



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-570-985
Investigation
Public Document
AD/CVD 04: BF/EK/RG/CR

May 28, 2013

MEMORANDUM TO: Ronald K. Lorentzen
Acting 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 Determination of
the Antidumping Duty Investigation of Xanthan Gum from the
People's Republic of China

SUMMARY:

We have analyzed the case briefs and rebuttal briefs submitted by interested parties in the antidumping investigation of xanthan gum from the PRC. As a result of our analysis, we have made changes to the *Preliminary Determination*.¹

We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum.

Background:

The Department published its *Preliminary Determination* on January 10, 2013. Between January 14 and January 29, 2013, the Department conducted verifications of mandatory respondents Fufeng, Deosen, and Deosen's affiliate, Deosen USA. On February 25 and February 26, 2013, at the Department's request, Fufeng and Deosen submitted supplemental questionnaire responses. On March 4, 2013, the Department released post-preliminary analysis memoranda for the

¹ See *Xanthan Gum From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 78 FR 2252 (January 10, 2013) ("*Preliminary Determination*").



mandatory respondents.² Petitioner, Fufeng, and Deosen submitted case briefs on March 12, 2013,³ and rebuttal briefs on March 19, 2013.⁴ Deosen resubmitted its rebuttal brief, at the Department's request, on March 29, 2013.⁵

List of Abbreviations and Acronyms Used In This Memorandum:

Act or Statute	Tariff Act of 1930, as amended
AD	Antidumping Duty
AFA	Adverse Facts Available
Ajinomoto	Ajinomoto (Thailand) Co., Ltd.
APA	Administrative Procedure Act
A-to-A	Average-to-Average
AUV	Average Unit Value
B&H	Brokerage and Handling
BEI	Bank Eksport Indonesia
BOT	Bank of Thailand
CFR	Code of Federal Regulations
CIT	United States Court of International Trade
CVD	Countervailing Duty
Deosen	Deosen Biochemical Ltd.
Deosen Ordos	Deosen Biochemical (Ordos) Ltd.
Deosen Power	Deosen Power Co., Ltd.
Deosen USA	Deosen USA Inc.
Department	Department of Commerce
EGAT	Electricity Generating Authority of Thailand
FA	Facts Available
FOP(s)	Factor(s) of Production

² See Memorandum to Paul Piquado, Assistant Secretary for Import Administration, from Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4, "Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.," dated March 4, 2013 ("Fufeng Post-Preliminary Analysis Memorandum"); *see also* Memorandum to Paul Piquado, Assistant Secretary for Import Administration, from Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4, "Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Deosen Biochemical Ltd.," dated March 4, 2013 ("Deosen Post-Preliminary Analysis Memorandum").

³ See Submission from Petitioner, "Xanthan Gum from the People's Republic of China: Petitioner's Case Brief," dated March 12, 2013 ("Petitioner Case Brief"); *see also* Submission from Fufeng, "Neimenggu Fufeng's Administrative Case Brief," dated March 12, 2013 ("Fufeng Case Brief"); Submission from Deosen, "Case Brief of Deosen Biochemical and Deosen USA: Xanthan Gum from China," dated March 13, 2013 ("Deosen Case Brief").

⁴ See Submission from Petitioner, "Xanthan Gum from the People's Republic of China: Petitioner's Rebuttal Case Brief," dated March 19, 2013 ("Petitioner Rebuttal Brief"); *see also* Submission from Fufeng, "Neimenggu Fufeng Biotechnologies Co., Ltd. Rebuttal Case Brief," dated March 20, 2013 ("Fufeng Rebuttal Brief").

⁵ See Submission from Deosen, "Rebuttal Brief of Deosen Biochemical and Deosen USA," dated March 29, 2013 ("Deosen Rebuttal Brief").

Fufeng	Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.
Glow Energy	Glow Energy Public Company Limited
GTA	Global Trade Atlas
HTS	Harmonized Tariff System
IDM	Issues and Decision Memorandum
ILO	International Labor Organization
IPA	Investment Promotion Act
ISIC	International Standard Industrial Classification of All Economic Activities
kWh	Kilowatt Hour
LABORSTA	International Labor Office Database on Labor Statistics
Leyte Agricorp	Leyte Agri Corporation
Lysine	L-Lysine
MERALCO	Manila Electric Company
ME	Market Economy
MSG	Monosodium Glutamate
Neimenggu Fufeng	Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.)
NESOI	Not Elsewhere Specified or Included
NME	Non-Market Economy
NPC	National Power Corporation of the Philippines
NSO	National Statistics Office
NTE	National Trade Estimates
Petitioner	CP Kelco U.S.
PIERS	Port Import Export Reporting Service
POI	Period of Investigation
PRC	People's Republic of China
SAA	Statement of Administrative Action
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Semirara	Semirara Mining Corporation
SG&A	Selling, General, and Administrative Expenses
Shandong Fufeng	Shandong Fufeng Fermentation Co., Ltd.
SV(s)	Surrogate Value(s)
Thai Churos	Thai Churos Company Limited
Thai Fermentation	Thai Fermentation Industry Ltd.
TPRM Report	Trade Policy Review Mechanism Report
USTR	Office of the United States Trade Representative
WIP	Work in Process
WTO	World Trade Organization

W/W	Water Weight
<i>X. Campestris</i>	<i>Xanthomonas Campestris</i>

Nonmarket Economy Country

The Department considers the PRC to be an NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. The Department continues to treat the PRC as an NME for purposes of this final determination.

Surrogate Country

In the *Preliminary Determination*, we stated that we had selected Thailand as the appropriate surrogate country to use in this investigation for the following reasons: (1) it is at a level of economic development comparable to that of the PRC; (2) it is a significant producer of comparable merchandise, pursuant to section 773(c)(4) of the Act; and (3) we have reliable data from Thailand that we can use to value the factors of production (“FOPs”).⁶ For the final determination, we analyzed the comments received on surrogate country selection and made no changes to our findings with respect to the selection of a surrogate country.⁷

Separate Rate Companies

In proceedings involving NME countries, the Department holds a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department’s policy to assign all exporters of the subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

In the *Preliminary Determination*, we found four companies and the two mandatory respondents (collectively, the “Separate Rate Applicants”) demonstrated their eligibility for separate rate status.⁸ The Department continues to find that the evidence placed on the record of this investigation by the Separate Rate Applicants that were granted separate rate status in the *Preliminary Determination* demonstrates both *de jure* and *de facto* absence of government control with respect to each company’s respective exports of the merchandise under investigation.

The separate rate is normally determined based on the weighted-average of the calculated weighted-average dumping margins established for exporters and producers individually investigated, excluding rates that are zero, *de minimis*, or based entirely on facts available.⁹ In this investigation, both Deosen and Fufeng have weighted-average dumping margins which are above the *de minimis* threshold and which are not based on total facts available. Because there are only two relevant weighted-average dumping margins for this final determination, using a

⁶ See *Preliminary Determination* and accompanying Decision Memorandum at 4-8.

⁷ See Comment 1, below.

⁸ See *Preliminary Determination* and accompanying Decision Memorandum at 8-11.

⁹ See section 735(c)(5)(A) of the Act.

weighted-average of these two rates risks disclosure of business proprietary information data. Therefore, the Department has calculated a simple average of the two final weighted-average dumping margins calculated for the mandatory respondents.¹⁰

Determination of the Comparison Method

As noted above, the Department preliminarily determined that application of an alternative calculation methodology was not appropriate for Fufeng or Deosen, and, accordingly, continued to apply the average-to-average method.¹¹ For this final determination, the Department has applied the differential pricing analysis described in its March 4, 2013, post-preliminary analysis memoranda to determine the appropriate comparison method.¹² Based on the results of the differential pricing analysis, the Department finds that while a pattern of export prices (or constructed export prices) exists for comparable merchandise that differs significantly among purchasers, regions, or time periods, the average-to-average method can appropriately account for such differences.¹³

Application of Facts Available and Adverse Facts Available

Section 776(a) of the Act provides that the Department shall apply FA 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.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying FA when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

¹⁰ See Memorandum to the File from Brandon Farlander, Case Analyst, Office 4, AD/CVD Operations, Import Administration, “Antidumping Investigation of Xanthan Gum from the People’s Republic of China: Calculation of the Final Margin for Separate Rate Recipients,” dated May 28, 2013. This memo contains the Department’s comparison of (A) a weighted-average of the dumping margins calculated for the mandatory respondents, weighted using U.S. export sales values as reported in their U.S. sales databases, with U.S. sales adjustments; (B) a simple average of the dumping margins calculated for the mandatory respondents; and (C) a weighted-average of the dumping margins calculated for the mandatory respondents using each company’s publicly ranged values for U.S. exports of subject merchandise.

¹¹ See Fufeng Post-Preliminary Analysis Memorandum; see also Deosen Post-Preliminary Analysis Memorandum.

¹² See *id.*

¹³ See Memorandum to the File from Brandon Farlander, International Trade Compliance Analyst, Office 4, AD/CVD Operations, “Final Determination Analysis Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.,” dated May 28, 2013 (“Fufeng Final Analysis Memorandum”); Memorandum to the File from Erin Kearney, International Trade Compliance Analyst, Office 4, AD/CVD Operations, “Final Determination Analysis Memorandum for Deosen Biochemical Ltd.,” dated May 28, 2013 (“Deosen Final Analysis Memorandum”).

PRC-Wide Entity

In the *Preliminary Determination*, the Department determined that, during the POI, in addition to Shandong Yi Lian Cosmetics Co., Ltd., Shanghai Echem Fine Chemicals Co., Ltd., Sinotrans Xiamen Logistics Co., Ltd., and Zibo Cargill HuangHelong Bioengineering Co., Ltd., there are other PRC exporters of the merchandise under consideration that failed to timely respond to the Department's requests for information and did not establish that they were separate from the PRC-wide entity. Thus, the Department has found that these PRC exporters are part of the PRC-wide entity and the PRC-wide entity has not responded to our requests for information. Because the PRC-wide entity did not provide the Department with requested information, pursuant to section 776(a)(2)(A) of the Act, the Department continues to find it appropriate to base the PRC-wide rate on FA.

The Department determines that, because the PRC-wide entity did not respond to our request for information, the PRC-wide entity has failed to cooperate to the best of its ability. Therefore, pursuant to section 776(b) of the Act, the Department finds that, in selecting from among the FA, an adverse inference is appropriate for the PRC-wide entity. Because the Department begins with the presumption that all companies within an NME country are subject to government control, and because only the Separate Rate Applicants have overcome that presumption, the Department is applying a single AFA rate as the weighted-average dumping margin to all other exporters of subject merchandise from the PRC. Such companies have not demonstrated entitlement to a separate rate.¹⁴

Selection of the Adverse Facts Available Rate for the PRC-Wide Entity

In determining a rate for AFA, the Department's practice is to select a rate that is sufficiently adverse "as to effectuate the purpose of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."¹⁵ Further, it is the Department's practice to select a rate that ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."¹⁶ Thus, the Department's practice is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated dumping margin of any respondent in the investigation.¹⁷ In this investigation, the highest petition AD margin is 154.07 percent.¹⁸ This rate is higher than any of the weighted-average dumping margins calculated for the companies individually examined.

¹⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Market Value: Synthetic Indigo From the People's Republic of China*, 65 FR 25706, 25707 (May 2, 2000).

¹⁵ 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).

¹⁶ See *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) (quoting the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994)).

¹⁷ See *Certain Stilbenic Optical Brightening Agents From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17436, 17438 (March 26, 2012).

¹⁸ See *Xanthan Gum From Austria and the People's Republic of China: Initiation of Antidumping Duty Investigations*, 77 FR 39210 (July 2, 2012).

Corroboration of Information

Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as facts available. 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.”¹⁹

The SAA clarifies that “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.²⁰ The SAA also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.²¹ To corroborate secondary information, the Department will, to the extent practicable, determine whether the information used has probative value by examining the reliability and relevance of the information.

In order to determine the probative value of the highest dumping margin in the petition for use as AFA for purposes of this final determination, we compared the highest petition margin to the dumping margins we calculated for the individually examined respondents. We determined that the petition margin of 154.07 percent is reliable and relevant because it is within the range of the control-number-specific dumping margins on the record for one of the individually examined exporters of subject merchandise.²² Thus, the highest petition margin has probative value. Accordingly, we have corroborated the highest petition margin to the extent practicable within the meaning of section 776(c) of the Act.²³

DISCUSSION OF THE ISSUES

Comment 1: Surrogate Country

Deosen Argument:

- The Philippines is the best choice for surrogate country for the final determination because (1) it is at a level of economic development comparable to the PRC, (2) it is a significant producer of comparable merchandise (*i.e.*, carrageenan and ethanol), and (3) it has better, more appropriate, and more robust data available than does Thailand.
- Carrageenan is a more comparable product to xanthan gum than MSG or lysine because it shares more similar physical characteristics and end uses with xanthan gum, and also shares some production processes, although it is not produced via fermentation. Ethanol

¹⁹ See SAA, H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994).

²⁰ See *id.*

²¹ See *id.*

²² See the Department’s Memorandum entitled, “Antidumping Duty Investigation of Xanthan Gum from the People’s Republic of China: Final Determination Analysis Memorandum for Deosen Biochemical Ltd.,” dated May 28, 2013, at Attachment 1, SAS Margin Output.

²³ See section 776(c) of the Act and 19 CFR 351.308(c) and (d); *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People’s Republic of China*, 73 FR 35652, 35653 (June 24, 2008), and accompanying Issues and Decision Memorandum at Comment 1.

is also a comparable product to xanthan gum because it is produced using fermentation during the production process.

- The Philippines has more appropriate data available to value FOPs for major inputs than does Thailand. Thailand's import statistics are unreliable because they do not reflect market transactions.

Petitioner Rebuttal:

- The only shared production processes between Philippine carrageenan and xanthan gum are drying and milling; the Department should continue to find that carrageenan is not comparable merchandise to xanthan gum.
- Ethanol should not be considered comparable to xanthan gum based solely on the fact that it is produced through a fermentation process because many other differences exist in production processes of xanthan gum and ethanol, and ethanol has different physical characteristics and end uses than xanthan gum.
- Evidence provided by Deosen to show that Thai import data are unreliable for use as SVs do not relate to any inputs in this investigation. Thai data should not be rejected based on this evidence.

Department's Position: For the final determination, we have continued to select Thailand as the surrogate country. We continue to find that: 1) Thailand is at a level of economic development comparable to that of the PRC; and 2) Thailand is a significant producer of comparable merchandise. Moreover, the record indicates that Thailand has readily available and sufficient data that are input-specific and which will allow the Department to use contemporaneous publicly available data to value the FOPs.²⁴

When the Department investigates imports from an NME country, section 773(c)(1) of the Act directs the Department to base normal value, in most circumstances, on the NME surrogate producer's FOPs valued in a surrogate ME country or countries considered appropriate by the Department. In accordance with section 773(c)(4) of the Act, the Department will value FOPs using "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." Further, pursuant to 19 CFR 351.408(c)(2), the Department will normally value all FOPs in a single country.

No parties in this investigation have argued against the Department's preliminary determination that Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand, and Ukraine all satisfy the first criterion of section 773(c)(4) of the Act, in that they are countries that are at a level of economic development comparable to that of the PRC.²⁵ Therefore, we continue to find that all seven of these potential surrogate countries are equally economically comparable to the PRC.

²⁴ See Department Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process, dated March 1, 2004 ("Policy Bulletin"), at 4.

²⁵ See Memorandum to the File through Abdelali Elouaradia, Director, AD/CVD Operations, Office 4, and Charles Riggle, Program Manager, AD/CVD Operations, Office 4, from Brandon Farlander and Erin Kearney, International Trade Analysts, AD/CVD Operations, Office 4, "Antidumping Duty Investigation of Xanthan Gum from the

Regarding the second criterion of section 773(c)(4) of the Act, selection of a surrogate country that is a significant producer of comparable merchandise, the Department's practice for identifying comparable merchandise, as reflected in the Policy Bulletin, is to follow the procedures described below:

{C}omparable merchandise is not defined in the statute or the regulations, since it is best determined on a case-by-case basis. Even so, there are some basic rules that every team should follow. In all cases, if identical merchandise is produced, the country qualifies as a producer of comparable merchandise. In cases where identical merchandise is not produced, the team must determine if other merchandise that is comparable is produced.²⁶

In examining the issue of comparable merchandise for the *Preliminary Determination*, we considered the physical characteristics, end uses, and production processes of the products suggested by the parties to be comparable to xanthan gum. Despite Petitioner's statement that we found xanthan gum and carrageenan to be non-comparable merchandise in the *Preliminary Determination*,²⁷ we did, in fact, find that xanthan gum and carrageenan have similar physical characteristics and end uses, and that xanthan gum, MSG, and lysine have similar production processes and end uses. We also found that the manufacture of xanthan gum is highly dependent on the machinery and energy utilized at the manufacturing facility, as well as the use of biotechnology. Because of the importance of these production steps, we concluded that it was appropriate to rely primarily upon similarity of production processes in determining comparable merchandise in this investigation.²⁸ Accordingly, we preliminarily concluded that MSG and lysine are comparable merchandise to xanthan gum for the purposes of surrogate country selection.²⁹

For the final determination, Deosen asserts that the Department should not focus exclusively on production process in determining merchandise comparability.³⁰ Deosen argues that the Department should follow its practice of considering physical characteristics, end uses, and production processes, and should not find that one of these considerations is more important than the others.³¹ We disagree with Deosen that we focused exclusively on production process to select merchandise comparable to xanthan gum in the *Preliminary Determination*. The Department's Policy Bulletin states that, “{i}n cases where identical merchandise is not produced, the team must determine if other merchandise that is comparable is produced. How

People's Republic of China: Selection of a Surrogate Country,” dated January 3, 2013 (“Preliminary Surrogate Country Memorandum”).

²⁶ See Policy Bulletin, at 1.

²⁷ See Petitioner Brief, at 4.

²⁸ See *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005), and accompanying IDM at Comment 1 (where the Department preferred the surrogate financial statements of a company manufacturing a comparable product with a similar production process over those of a company manufacturing an identical product with a dissimilar production process).

²⁹ See Preliminary Surrogate Country Memorandum.

³⁰ See Deosen Case Brief, at 10.

³¹ See *id.*, at 11-13.

the team does this depends on the subject merchandise.”³² The Policy Bulletin makes clear that the Department has the discretion to weigh some merchandise comparability considerations more heavily than others, depending on the nature of the subject merchandise. It states, for example, that “where there are major inputs, *i.e.*, inputs that are specialized or dedicated or used intensively, in the production of the subject merchandise, *e.g.*, processed agricultural, aquatic and mineral products, comparable merchandise should be identified narrowly, on the basis of a comparison of the major inputs, including energy, where appropriate.”³³ After considering comparability of physical characteristics, end uses, and production processes, we still find that production process should be weighted more heavily than physical characteristics and end uses in this case, due to the importance of biotechnology (*i.e.*, a specialized strain of bacteria), energy, and machinery usage in the production of xanthan gum.³⁴

Regarding Deosen’s contention that carrageenan has similar physical characteristics and end uses to those of xanthan gum, we agree. We found in the *Preliminary Determination* that carrageenan and xanthan gum share similar physical characteristics and end uses,³⁵ and no party has disputed these similarities for the final determination. Therefore, we continue to find that carrageenan and xanthan gum have comparable physical characteristics and end uses.

Deosen next alleges that neither MSG nor lysine has comparable physical characteristics or end uses to those of xanthan gum.³⁶ We agree with Deosen that MSG and lysine do not share physical characteristics with xanthan gum.³⁷ However, we disagree with Deosen’s argument that MSG and lysine are not comparable to xanthan gum in terms of end use based on the contention that they are used for different purposes within similar products. Although neither MSG nor lysine is interchangeable with xanthan gum in providing xanthan gum’s specific functions, we find that MSG, lysine, and xanthan gum have sufficiently similar end uses as additives to food, pharmaceutical, and consumer care products.³⁸ Additionally, Deosen references three exhibits on the record of this investigation to illustrate the lack of similarity between the end uses of

³² See Policy Bulletin.

³³ See *id.*

³⁴ See Preliminary Surrogate Country Memorandum.

³⁵ See *id.*

³⁶ See Deosen Case Brief, at 19-26.

³⁷ See Preliminary Surrogate Country Memorandum (stating that the Department found xanthan gum, MSG, and lysine to have similar production processes and end uses).

³⁸ See *Certain Stilbenic Optical Brightening Agents From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17436 (March 26, 2012) (“*Stilbenic Optical Brightening Agents*”), and accompanying IDM at Issue 2 (finding that certain stilbenic optical brightening agents are comparable to “downstream organic chemicals that are ready for direct use by foreign and domestic manufacturers in their finished products”); see also *Fresh Garlic from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 34082 (June 13, 2005), and accompanying IDM at Comment 5 (finding that Indian tea producers are comparable to and representative of garlic producers in the PRC).

xanthan gum and either MSG or lysine.³⁹ Deosen uses the fact that the words “xanthan gum” do not appear in any of these documents as evidence of the lack of similarity of end uses between MSG, lysine, and xanthan gum. However, because each of these articles only provides information about either MSG or lysine, and does not purport to provide a comparison to any other product, we do not find the absence of the words “xanthan gum” to be probative of the lack of comparability between xanthan gum and MSG or lysine.

Deosen asserts that although the manufacture of xanthan gum involves a fermentation stage, and the manufacture of carrageenan does not, the manufacturing processes for carrageenan and xanthan gum nonetheless share other similar production stages, such as precipitation with alcohol, alcohol recovery, drying, and milling.⁴⁰ Petitioner argues in rebuttal that although carrageenan may be produced with alcohol precipitation and recovery, no known producers in the Philippines use this process, and that, therefore, the only shared production processes between carrageenan and xanthan gum are drying and milling.⁴¹ Regardless of whether carrageenan producers in the Philippines actually use a production process involving alcohol precipitation and recovery, no evidence on the record suggests that carrageenan production involves the mutation, maintenance, and growth of a specialized strain of bacteria or the fermentation of specialized bacteria with a carbohydrate source, each of which are vital stages in the production of xanthan gum.⁴² Additionally, no evidence on the record suggests that the production of carrageenan requires similar amounts of energy or similar types of specialized equipment as does the production of xanthan gum. We continue to find that these essential requirements for the production of xanthan gum differ significantly from the production process of carrageenan and, thus, that carrageenan and xanthan gum are not comparable in terms of production processes.

According to Deosen, the Department is not required to find that a single product is the most comparable merchandise for purposes of surrogate country selection, and that the Department may determine that multiple products constitute comparable merchandise.⁴³ In addition to stating that carrageenan is more comparable to xanthan gum than MSG or lysine in terms of physical characteristics and end uses, Deosen suggests that ethanol is equally comparable to xanthan gum as is MSG or lysine in terms of production process, and that ethanol also has comparable end uses to xanthan gum.⁴⁴ We disagree with Deosen that the production process of ethanol is comparable to that of xanthan gum. Contrary to Deosen’s implications, the Department did not conclude in the *Preliminary Determination* that MSG and lysine were comparable merchandise to xanthan gum based solely on the presence of fermentation in their

³⁹ See Deosen Case Brief, at 24-25; see also Memorandum to the File through Charles Riggle, Program Manager, AD/CVD Operations, Office 4, from Brandon Farlander and Erin Kearney, International Trade Analysts, AD/CVD Operations, Office 4, “Preliminary Surrogate Value Memorandum,” dated January 3, 2013 (“Preliminary SV Memorandum”), at Attachment II-A, (containing the “History of Glutamate Production” from *The American Journal of Clinical Nutrition*); Preliminary SV Memorandum, at Attachment II-B, (containing “L-Lysine Fermentation” from *Recent Patents on Biotechnology 2007*); Submission from Petitioner, “Xanthan Gum from the People’s Republic of China; Rebuttal Comments Concerning Surrogate Country Selection,” dated October 24, 2012 (“Petitioner Prelim SC Rebuttal Comments”), at Exhibit 5.

⁴⁰ See Deosen Case Brief, at 26-27.

⁴¹ See Petitioner Rebuttal Brief, at 2-3.

⁴² See Preliminary Surrogate Country Memorandum.

⁴³ See Deosen Case Brief, at 13.

⁴⁴ See Deosen Case Brief, at 14-26 and 28-31.

production processes. Rather, the Department found that the production processes of MSG and lysine were comparable to the production process of xanthan gum based on the types of manufacturing facilities (*e.g.*, labs for mutating and maintaining bacteria and fermentation tanks), the types of materials (*e.g.*, a carbon or carbohydrate source and specialized bacterial microorganisms), and amounts of energy required for production.⁴⁵ Although we do not disagree that ethanol is produced through fermentation, and may be produced with some similar grain inputs, the evidence cited by Deosen does not indicate that any specialized bacteria or high amounts of energy are necessary for production. Furthermore, as Petitioner states, because ethanol is sold as a liquid rather than a dry powder, ethanol production does not involve stages of alcohol precipitation, drying, or grinding.⁴⁶ As a result, we do not find that ethanol is comparable to xanthan gum in terms of production process. To the extent that ethanol and xanthan gum have comparable end uses as a fuel additive and as an industrial and oilfield application additive, respectively, we find that any similarity does not outweigh the dissimilarities in production processes between ethanol and xanthan gum.

Concerning Deosen's claim that better data with which to value the respondents' inputs are available from the Philippines than from Thailand, we disagree that the evidence cited by Deosen illustrates that Thai import data are unreliable or inferior to Philippine import data. We agree with Petitioner that Deosen's evidence regarding the unreliability of Thai import data⁴⁷ does not address any of the raw material inputs specific to this investigation.⁴⁸ Additionally, while the report from the Office of the United States Trade Representative cited by Deosen indicates that the United States has expressed concern over the practices of Thailand's Customs Department officials, we cannot conclude from this report that the entirety of the Thai import data should, therefore, be rejected as unreliable.⁴⁹

We have addressed Deosen's arguments that the Philippines has better data than Thailand for valuing specific inputs (*i.e.*, cornstarch, corn, hydrochloric acid, electricity, coal, and labor) and calculating financial ratios in the comments addressing those inputs and calculations, below.

Based on the record of this investigation, we continue to find that Thailand represents the most appropriate choice of surrogate country because it is at a level of economic development comparable to that of the PRC, and it is a significant producer of comparable merchandise. Additionally, as we stated in the *Preliminary Determination*, and in the comments discussing surrogate values, below, the record of this investigation contains suitable Thai data with which to value the respondents' FOPs.⁵⁰

Comment 2: Surrogate Financial Statements

The record of this investigation includes three financial statements of Thai producers of MSG and/or lysine (*i.e.*, Ajinomoto, Thai Churos, and Thai Fermentation), six financial statements of

⁴⁵ See Preliminary Surrogate Country Memorandum.

⁴⁶ See Petitioner Rebuttal Brief, at 4-5.

⁴⁷ See Submission from Deosen, "Deosen Biochemical's Submission of Publicly Available Information for Surrogate Values," dated February 22, 2013 ("Deosen Post-Prelim SV Submission"), at Exhibit FSV-4.

⁴⁸ We note that the only specific products identified in the WTO articles cited by Deosen are alcoholic beverages and cigarettes.

⁴⁹ See Deosen Post-Prelim SV Submission, at Exhibit FSV-4.

⁵⁰ See Policy Bulletin, at 4.

Philippine producers of carrageenan, and one financial statement of a Philippine producer of ethanol (*i.e.*, Leyte Agricornp).

Deosen Argument:

- The Department must reject the financial statements of Ajinomoto because Ajinomoto received subsidies that have been found to be countervailable by the Department in other proceedings⁵¹ and the vast majority of its sales of MSG and lysine are to affiliated parties.
- The Department cannot use the financial statements of Thai Churos because they are missing several notes, which renders them incomplete and inaccurate.⁵²
- The Department cannot use the financial statements of Thai Fermentation because they are not completely translated into English and contain certain inaccuracies.⁵³
- As there are no suitable Thai financial statements on the record, the Department should use the multiple financial statements available on the record for Philippine carrageenan producers.
- Even if the Department were to conclude that the Thai financial statements were useable, the Philippine financial statements are preferable because carrageenan is more comparable to xanthan gum than MSG or lysine, and the Thai financial statements are significantly less detailed because they do not break out energy from overhead expenses.
- The Department has consistently found in prior cases that if the only useable financial statements on the record do not include a separate line item for energy, the Department may conclude that energy is recorded as part of the surrogate producers' factory overhead.⁵⁴ In both *Stilbenic Optical Brightening Agents* and *Citric Acid*, the Department correctly excluded energy from the respondents' normal value calculations as including them would have resulted in double-counting.

Fufeng Argument:

- Ajinomoto's financial statements are distorted by countervailable subsidies while those of Thai Fermentation and Thai Churos are untainted by subsidy benefits.
- Leyte Agricornp's financial statement is unsuitable because it is from outside the primary surrogate country and it produces a range of dissimilar products.

⁵¹ See Submission from Petitioner, "Xanthan Gum from the People's Republic of China: Supplemental Surrogate Value Submission," dated November 6, 2012 ("Petitioner Supplemental SV Submission"), at Exhibit 1, notes 20, 24 and 25.

⁵² See Submission from Fufeng, "Fufeng's Post-Preliminary Surrogate Value Submission in Antidumping Duty Investigation on Xanthan Gum from the People's Republic of China (A-570-985)," dated February 22, 2013 ("Fufeng Post-Prelim SV Submission"), at Exhibit 5b.

⁵³ See *id.*, at Exhibit 5a.

⁵⁴ See *Stilbenic Optical Brightening Agents*, 77 FR 17436, and accompanying IDM at Comment 2; see also *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009) ("*Citric Acid*"), and accompanying IDM at Comment 2. Deosen notes that in *Citric Acid* the Department found at the final determination that it had double-counted the respondent's energy costs at the preliminary determination because the overhead ratio included the surrogate company's energy costs, and the Department also included the energy cost for each respondent. Deosen asserts that the Department has made the same error in this case.

Petitioner Rebuttal:

- The Department should continue to use Ajinomoto’s financial statements as all other financial statements that have been placed on the record are either incomplete, not fully translated, or come from companies that are not producers of comparable merchandise.
- Even if Ajinomoto did receive subsidies, the impact is negligible and cannot distort Ajinomoto’s financial ratios in a meaningful way.
- The Department cannot use the financial statements of Thai Fermentation because they are incomplete and not representative of a producer of comparable merchandise.
- Because Thai Fermentation is primarily a trading company,⁵⁵ its financial statements do not accurately reflect the cost of production of a manufacturing enterprise.
- The translated version of Thai Fermentation’s financial statements is missing two full paragraphs related to property, plant and equipment and is therefore incomplete. The Department’s practice is to not use financial statements that are poorly or not fully translated for deriving surrogate financial ratios.⁵⁶
- The financial statement of Thai Churos is unusable because it is missing footnotes and is therefore incomplete. The Department has routinely rejected incomplete financial statements in past proceedings.⁵⁷
- If the Department uses any of the financial statements advocated by the respondents, it must continue to value the respondents’ energy FOPs at the final determination consistent with past practice and the Department’s preference of determining normal value using the respondent’s own FOPs.⁵⁸

Department’s Position: In this final determination, we have calculated the financial ratios using Ajinomoto’s unconsolidated financial statements because we find that Ajinomoto’s financial statements represent the best available information within the meaning of the statute.

In selecting SVs for FOPs, section 773(c)(1) of the Act instructs the Department to use “the best available information” from the appropriate market economy country. The Department’s criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent’s experience, and publicly available information.⁵⁹ Moreover,

⁵⁵ Petitioner refers to Fufeng Post-Prelim SV Submission, at Exhibit 5a, and notes that the amount listed for purchases of finished goods exceeds the combined total materials, labor and energy.

⁵⁶ See, e.g., *High Pressure Cylinders from the People’s Republic of China: Final Determination of Sales at Less than Fair Value*, 77 FR 26739 (May 7, 2012), and accompanying IDM at Comment 2; *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 14499 (March 12, 2012) (“*Ironing Tables*”), and accompanying IDM at Comment 2; *Third Administrative Review of Frozen Warmwater Shrimp From the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46565 (September 10, 2009), and accompanying IDM at Comment 1.

⁵⁷ See, e.g., *Administrative Review of Certain Frozen Warmwater Shrimp From the People’s Republic of China: Final Results, Partial Rescission of Sixth Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 77 FR 53856 (September 4, 2012) (“*Frozen Shrimp 6th Review*”), and accompanying IDM at Comment 12.

⁵⁸ See *Sodium Hexametaphosphate From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 59375 (September 27, 2012) (“*Sodium Hexametaphosphate 2010-2011*”), and accompanying IDM at Comment 1.

⁵⁹ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People’s Republic of China*, 70 FR 24502 (May 10, 2005), and accompanying IDM at Comment 3.

for valuing overhead, SG&A and profit, the Department uses non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.⁶⁰ While the statute does not define “comparable merchandise,” in selecting surrogate financial statements, the Department has considered whether the products have similar production processes, end uses, and physical characteristics. Further, it is the Department’s well established practice to rely upon the primary surrogate country for all SVs, whenever possible, and to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.⁶¹ The Court of International Trade has held this preference for valuing FOPs with information from a single surrogate country reasonable because deriving surrogate data from one surrogate country limits the amount of distortion introduced into the calculations because a domestic producer would be more likely to purchase a product available in the domestic market.⁶²

In choosing surrogate financial ratios, the Department’s practice does not set forth a discrete hierarchy when evaluating the Department’s established criteria. In determining the suitability of SVs, the Department carefully considers the available evidence with respect to the particular facts of each case and evaluates the suitability of each source on a case-by-case basis. Furthermore, the courts have recognized the Department’s discretion when choosing appropriate financial statements with which to calculate surrogate financial ratios.⁶³

There are three financial statements on the record for companies in Thailand that produce MSG and/or lysine (*i.e.*, Ajinomoto, Thai Fermentation and Thai Churos), which we consider to be comparable merchandise to xanthan gum. As noted at Comment 1 above, we find that MSG and xanthan gum have sufficiently similar end uses as additives to food, pharmaceutical and consumer care products. Further, the production processes for MSG and xanthan gum are comparable based on the type of manufacturing facilities, the types of materials and the amounts of energy required for production.⁶⁴

With regard to the Philippine financial statements on the record for producers of carrageenan, although carrageenan may be similar in physical characteristics and end use to xanthan gum, we noted in Comment 1 that the production experience of a producer of carrageenan is very different from that of a xanthan gum producer. No evidence on the record suggests that carrageenan production involves the maintenance or fermentation of specialized strains of bacteria or consumes similar amounts of energy as does the production of xanthan gum.⁶⁵ With regards to the financial statements of Leyte Agricorp, a Philippine producer of ethanol,⁶⁶ we find, as

⁶⁰ See section 773(c)(4) of the Act; 19 CFR 351.408(c)(4).

⁶¹ See, e.g., *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 FR 15039 (March 14, 2012), and accompanying IDM at Comment 2A; see also *Sodium Hexametaphosphate 2010-2011*, and accompanying IDM at Comment 1.

⁶² See *Clearon Corporation and Occidental Chemical Corp. v. United States*, Slip Op. 13-22, at 12-14 (CIT 2013).

⁶³ See, e.g., *FMC Corp. v. United States*, 27 CIT 240, 251 (2003) (holding that the Department can exercise discretion in choosing between reasonable alternatives), *affirmed FMC Corp. v. United States*, 87 Fed. Appx. 753 (Fed. Cir. 2004); *Crawfish Processors Alliance v. United States*, 343 F. Supp.2d 1242, 1251 (CIT 2004) (“If Commerce’s determination of what constitutes the best available information is reasonable, then the Court must defer to Commerce.”).

⁶⁴ See Comment 1, above, referencing the Preliminary Surrogate Country Memorandum.

⁶⁵ *Id.*

⁶⁶ See Deosen Post-Prelim SV Submission, at Exhibit FSV-5.

discussed in Comment 1, above, that ethanol is not comparable merchandise to xanthan gum in terms of production process. No record evidence indicates that ethanol production uses specialized bacteria or high amounts of energy as does xanthan gum. Further, ethanol, unlike xanthan gum, is sold as a liquid and is not dried or ground.⁶⁷ When available, the Department prefers financial statements of surrogate producers from the primary surrogate country whose production process is comparable to the respondent's production process.⁶⁸ Consequently, we have not considered the statements of the Philippine carrageenan producers or the financial statements of Leyte Agricornp for use in the final determination.

Regarding the financial statements of Thai Fermentation and Thai Churos, we agree with Deosen that we cannot use the financial statements of either company to calculate the surrogate financial ratios because they are both incomplete. Specifically, the financial statements of Thai Churos are missing several footnotes that may be material to determining the usability of its financial statements,⁶⁹ and Thai Fermentation's financial statements lack complete English translations.⁷⁰ The absence of entire footnotes or complete translations precludes the Department from fully evaluating the financial information set forth in these financial statements. For these reasons, the Department's practice has been to exclude incomplete financial statements from consideration in the calculation of the financial ratios.⁷¹ In contrast, Ajinomoto's financial statements are complete and fully translated.

As an initial matter, we agree with Deosen that Ajinomoto's financial statements show evidence of the receipt of countervailable subsidies.⁷² While our general practice is to disregard financial statements that show that a company has received countervailable subsidies, we note that this practice presupposes that there are other sufficiently reliable and representative data on the record to calculate the financial ratios.⁷³ In past cases the Department has relied on statements that included countervailable subsidies when there were no other usable statements on the record

⁶⁷ See Comment 1 above, referencing Petitioner Rebuttal Brief, at 4-5.

⁶⁸ See, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China*, 66 FR 22183, 22193 (May 3, 2001) (where the Department rejected the surrogate financial statements of a producer because "its financial information would be less comparable to that of the respondents, as the respondents operate integrated steel production facilities"), unchanged in *Notice of Final Determination of Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products from China*, 66 FR 49632 (September 28, 2001) ("*Hot-Rolled Carbon Steel Flat Products*"), and accompanying IDM at Comment 4.

⁶⁹ Thai Churos' financial statements are missing notes 1 through 3 in both the Thai and English language versions. See Fufeng Post-Prelim SV Submission, at Exhibit 5b.

⁷⁰ Two complete paragraphs that are included in the Thai version of Thai Fermentation's financial statements have been left un-translated. See Fufeng Post-Prelim SV Submission, at Exhibit 5a.

⁷¹ See, e.g., *Ironing Tables*, and accompanying IDM at Comment 2.

⁷² See Petitioner Supplemental SV Submission, at Exhibit 1, note 24.

⁷³ See, e.g., *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2009-2010*, 78 FR 11143 (February 15, 2013) ("*Diamond Sawblades 2009-2010*"), and accompanying IDM at Comment 14.

from a producer of comparable merchandise in the primary surrogate country.⁷⁴ Accordingly, because Ajinomoto's financial statements represent the only complete and fully translated financial statements on the record of this proceeding of a producer of comparable merchandise in the primary surrogate country, we determine that they constitute the best available information on the record for the purposes of calculating the surrogate financial ratios. Therefore, we have continued to base the financial ratios on Ajinomoto's statements for the final determination.

We disagree with Deosen's argument that we cannot value the respondents' energy FOPs if we use any of the Thai financial statements to calculate the surrogate financial ratios. While we acknowledge that Ajinomoto's financial statements do not contain the full level of detail that the Department may prefer, we note that by including only depreciation in the calculation of Ajinomoto's overhead, we explicitly exclude energy costs from the surrogate financial ratios. In this way, the respondents' own energy FOPs may be included in normal value in accordance with section 773(c)(3) of the Act, which states that normal value for non-market economies shall be determined on the basis of the FOPs utilized in producing the merchandise, including the amounts of energy and other utilities consumed. Consequently, consistent with *Sodium Hexametaphosphate 2010-2011*,⁷⁵ each respondent's energy FOPs may be included in the normal value because there is no double-counting of energy costs. Further, the production of xanthan gum is an energy-intensive process, and the Department's stated preference when faced with an energy-intensive process is to use the respondent's own energy FOPs in the calculation of normal value.⁷⁶ Accordingly, for the final determination, we have continued to use Fufeng's and Deosen's own energy FOPs in the calculation of normal value.

Comment 3: Comparison Methodology

Deosen Argument:

- The Department's conclusion in the post-preliminary analysis that Deosen engaged in differential pricing is premised on an unlawful and unreasonable analysis.
- The Department's 2008 withdrawal of the targeted dumping regulation, 19 CFR 351.414(f)(1)(ii) and (2) (2007), violated the requirements of the APA. The Department withdrew the targeted dumping regulation without notice and comment as required. Additionally, the Department did not satisfy the proscribed exception under the APA for the withdrawal of a regulation by showing that "good cause" existed to withdraw the regulation without a notice and comment period. The Department's explanation that

⁷⁴ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 77 FR 63,791 (October 17, 2012), and accompanying IDM at Comment 2 ("While all four of these surrogate financial statements exhibit evidence of having received countervailable subsidies, all usable financial statements on the record were for companies that received countervailable subsidies . . . therefore . . . we find that the financial statements of Team Precision, Hana, KCE, and Styromatic provide the best available information on the record for purposes of calculating financial ratios.").

⁷⁵ See also *Citric Acid*, and accompanying IDM at Comment 1 (where the Department found that including water as an FOP did not double-count water costs because there was no evidence that water was captured in overhead); *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 4386 (January 22, 2013) ("*Chlorinated Isos 2010-2011*"), and accompanying IDM at Comment 13 (where the Department specifically excluded certain overhead costs from the calculation of the surrogate financial ratios in order to avoid the double-counting of electricity costs).

⁷⁶ See, e.g., *Chlorinated Isos 2010-2011*, at Comment 13.

good cause existed because notice and comment “is impracticable and contrary to the public interest” was unsubstantiated.

- Federal Circuit precedent supports Deosen’s claim that the Department did not properly withdraw the targeted dumping regulation. The notice and comment procedures also apply when the Department is “repealing a rule.”⁷⁷ The good cause exception to the notice and comment requirement should be “narrowly construed and only reluctantly countenanced.”⁷⁸ The good cause exception is rarely accepted by the Federal Circuit and is usually used in the case of a national emergency.⁷⁹ The good cause exception is “narrowly construed” and “policy-based time pressures” are an insufficient reason to invoke the good cause exception.⁸⁰
- *National Customs Brokers* and *Riverbend Farms* are unpersuasive because the facts there are distinguishable.⁸¹ In *National Customs Brokers*, the Federal Circuit upheld Customs reliance on the good cause exception because a change in the statute required Customs to bring its regulations into compliance immediately. No such exigency existed in the instant proceeding. *Riverbend Farms* was a fact-specific case whose findings do not apply here.
- “Public interest” under the APA refers to the threat of anticipatory evasion by the regulated parties once they know they will soon face new restrictions, and no such threat was present here. As such, the Department violated APA requirements, rendering its withdrawal of the targeted dumping regulation in violation of law. Deosen is entitled to application of the withdrawn regulation and, as such, the Department should only apply the alternative methodology to those sales that are targeted.
- The first flaw in the Department’s post-preliminary analysis is that the Department incorrectly considers the “Cohen’s *d* test” to be a generally recognized statistical measure, whereas the “t-test” is actually the recognized measure of “statistical significance.” The Cohen’s *d* test does not measure statistical significance and only measures and standardizes the size of a difference between two mean values. Thus, the Cohen’s *d* test only measures the extent of a difference, *i.e.* the “effect size” between the mean of a test group and the mean of a comparison group. Whether the Department finds the size of the difference to be “small” or “large” is insignificant, because it is not measured in relation to anything but the standard deviation of the population being studied. Such a measurement is arbitrary because to find that a difference is “large” does not necessarily mean that the difference is “statistically significant.”
- The Department’s cannot necessarily apply the Cohen’s *d* test whenever it has “at least two observations.” Having at least two observations in each of two groups does not necessarily allow for a statistically meaningful conclusion about the difference between those two means.
- The t-test is the more traditional and widely recognized test for determining whether the difference between two mean values is statistically significant. In contrast to the Cohen’s

⁷⁷ Deosen cites *Tunik v. Merit Sys. Protection Bd.*, 407 F.3d 1326, 1342 (Fed. Cir. 2005) (“*Tunik*”).

⁷⁸ Deosen cites *Tunik*, 407 F.3d at 1342.

⁷⁹ Deosen cites *Reeves v. Simon*, 507 F.2d 455, 459 (Temp. Emer. Ct. App. 1974) and *Shimek v. Dep’t of Energy*, 685 F.2d 1372, 1375 (Temp. Emer. Ct. App. 1981).

⁸⁰ Deosen cites *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983).

⁸¹ *National Customs Brokers v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 2005) (“*National Customs Brokers*”) and *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992) (“*Riverbend Farms*”).

d test, which serves a narrower purpose to standardize a measure of the size difference, the t-test is the basic way to measure whether the difference between two means is actually meaningful. Because Cohen's *d* and the t-test measure different issues, the Department should apply both tests and find targeting dumping (differential pricing) only when both standards are satisfied, allowing the Department to ensure that a measured difference is both statistically significant and economically meaningful.

- The second flaw in the Department's post-preliminary analysis is that it incorrectly considers the absolute value of the difference rather than only positive differences that may suggest targeting. The Department's analysis inappropriately allows higher priced U.S. sales transactions to allegedly targeted groups to provide evidence suggesting possible targeted dumping through lower priced U.S. sales. The Department should consider only the positive values of the Cohen's *d* test to avoid overstating the quantity of sales allegedly targeted.
- The third flaw in the Department's analysis is that it determines variance based on a simple average rather than a weighted average. By using a simple average the results are distorted because too much weight is given to the variance from the allegedly targeted groups. In contrast, a weighted average approach would adjust for differences in the sizes of the groups being compared.
- If the Department applies the alternative methodology in the final determination, (1) it should only apply the methodology to targeted sales, rather than all sales, and (2) it may not employ the zeroing methodology. Pursuant to the statutory language, the Department should apply the average-to-transaction ("A-T") methodology to only targeted sales. In order to use the excepted A-T methodology, the Department must explain both that there is a "pattern" of transactions and that they "differ significantly." In past analyses the Department has failed to explain why any differences cannot be taken into account.
- The Department has never provided an explanation as to why it is reasonable to apply the alternative methodology to all sales. The new approach of applying the A-T methodology to all sales where 66 percent of the value of all sales passes the Cohen's *d* test is arbitrary.
- The Department may not use its zeroing practice when applying the alternative methodology. The Federal Circuit held that the Department's zeroing methodology is unlawful in *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011). The Department unlawfully adopted a different statutory interpretation in investigations than in administrative reviews.

No other parties commented on this issue.

Department's Position: For the final determination, consistent with the post-preliminary determination,⁸² the Department has continued to use the A-to-A method in making comparisons of export price (or constructed export price) and normal value. For additional explanation, see Fufeng Final Analysis Memorandum and Deosen Final Analysis Memorandum.

⁸² See Fufeng Post-Preliminary Analysis Memorandum; see also Deosen Post-Preliminary Analysis Memorandum.

The Department's Withdrawal of the Targeted Dumping Regulation

The Department disagrees with Deosen that the withdrawal of the targeted dumping regulation violated the APA such that Deosen is entitled to its application. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation by posting a notice in the *Federal Register* seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under 19 USC 1677f-1(d)(1)(B).⁸³ As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments.⁸⁴ Various parties submitted comments in response to the Department's request.⁸⁵

After considering those comments, the Department published a proposed new methodology in May of 2008 and again requested public comment.⁸⁶ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."⁸⁷ Several of the submissions received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.⁸⁸ Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.⁸⁹

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."⁹⁰ For this reason, the Department determined that the regulation had to be withdrawn.⁹¹ And although this withdrawal was effective immediately, the Department again invited parties to submit

⁸³ See *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).

⁸⁴ *Id.*

⁸⁵ See *Public Comments Received December 10, 2007*, DEP'T OF COMMERCE, <http://ia.ita.doc.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (Dec. 10, 2007) (listing the entities that commented).

⁸⁶ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008).

⁸⁷ *Id.*

⁸⁸ See, e.g., Comments of Kelley, Drye and Warren on Behalf of Various Domestic Producers, <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/kdw-td-cmt-20080623.pdf> at 2; <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/csustl-td-cmt-20080623.pdf>.

⁸⁹ See, e.g., <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/csustl-td-cmt-20080623.pdf> at 25; <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/kdw-td-cmt-20080623.pdf> at 29.

⁹⁰ See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930, 74931 (Dec. 10, 2008) ("Withdrawal Notice").

⁹¹ *Id.*

comments, and gave them a full 30 days to do so.⁹² The comment period ended on January 9, 2009, with several parties submitting comments.⁹³

The course of the Department's decision-making demonstrates that it sought to actively engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.⁹⁴ Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.⁹⁵ Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency has, as a whole, acted in a way that is consistent with the statute's purpose.⁹⁶ Here, similar to the agency in *Mineta*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in *Mineta*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Mineta* found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.⁹⁷ Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."⁹⁸ The Federal Circuit has recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.⁹⁹ In *National Customs Brokers*, the Federal Circuit rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a

⁹² *Id.*

⁹³ See *Public Comments Received January 23, 2009*, DEP'T OF COMMERCE, (Jan. 23, 2009).

⁹⁴ See, e.g., *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (holding that the EPA's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

⁹⁵ See *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) ("*Mineta*") (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

⁹⁶ *Id.*

⁹⁷ See, e.g., *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁹⁸ 5 USC 553(b)(B).

⁹⁹ See, e.g., *National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995).

prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it “would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience” administering those regulations.¹⁰⁰ The U.S. Customs Service explained that “good cause” existed not to comply with the APA’s usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should “become effective as soon as possible” so that the public could benefit from “the relief that Congress intended.”¹⁰¹ The Court recognized that this explanation was a proper invocation of the “good cause” exception and explained that soliciting and considering comments was *both* unnecessary (because Congress had passed a statute that superseded the regulation) “*and* contrary to the public interest because the public would benefit from the amended regulations.”¹⁰² For this reason, the Court affirmed the regulation against the plaintiff’s challenge.¹⁰³

The Department disagrees with Deosen that *National Customs Brokers* is not informative in this case. The Department’s basis for invoking the “public interest” exception here is almost identical to the one that the Federal Circuit sustained in *National Customs Brokers*. The regulations that the Department withdrew were designed to implement the provision that Congress codified at 19 USC 1677f-1(d)(1)(B). However, these regulations were originally promulgated before the Department had ever performed any such analysis in an actual proceeding.¹⁰⁴ Perhaps reflecting this dearth of practical experience, the regulations imposed several requirements that were not part of the statute. *Compare* 19 USC 1677f-1(d)(1)(B) *with* 19 CFR 351.414(f), (g).¹⁰⁵ After receiving comments on various proposals to amend its methodology under this regulation and deliberating on the issue, the Department determined that the regulations “may have established thresholds or other criteria that ha {d} prevented the use of this {alternative} comparison methodology to unmask dumping.”¹⁰⁶ These criteria, the Department noted, were inadvertently denying “relief to domestic industries suffering material injury from unfairly traded imports”—relief that Congress intended to grant by passing the statutory provision in the first instance.¹⁰⁷ Immediate withdrawal of the regulation was therefore necessary to allow parties to take advantage of the statutory remedy. *See* section 777A(d)(1)(B) of the Act. This interest in granting congressionally-mandated relief without undue delay is exactly the basis upon which the Federal Circuit sustained the agency’s invocation of the “public interest” exception to notice and comment procedures in *National Customs Brokers*.

¹⁰⁰ *Id.*, at 1220–21.

¹⁰¹ *Id.*, at 1223.

¹⁰² *Id.*, at 1224 (emphasis).

¹⁰³ *Id.*

¹⁰⁴ *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27374–76 (May 19, 1997) (final rule); 19 CFR 351.414(f), (g) and 351.301(d)(5) (1997).

¹⁰⁵ For example, 19 CFR 351.414(f)(2) provided that the Department would normally limit the application of the transaction-to-average methodology to those sales that constituted targeted dumping, while the statutory provision does not contain this limitation. Similarly, the regulations and the regulations provided that an allegation of targeted dumping is due no later than thirty days before the scheduled date of the preliminary determination—a both requirements that is are not present in the statute. *See* 19 CFR 351.414(f)(3) and 351.301(d)(5).

¹⁰⁶ *Withdrawal Notice*, 73 FR at 74931.

¹⁰⁷ *Id.*

In fact, the only difference between this case and *National Customs Brokers* is that in the latter Congress passed a statute that affirmatively abrogated the prior regulation. But this distinction is insignificant. When an administering agency finds that the effect of a regulation is to curtail statutorily mandated relief, the agency may act to remedy that situation, regardless of whether the statutory mandate is new or old. Nor does the fact that the Department was not aware of this potential effect for a period of time justify additional delay. Rather, it was appropriate for the Department to revoke the regulation as soon as it became apparent that there may be an effect “contrary to {the Department’s} intention in promulgating the provisions and inconsistent with {the Department’s} statutory mandate. . . .”¹⁰⁸ Immediate revocation was all the more appropriate given that the Department had *already* conducted two rounds of notice and comment and received suggestions that the regulation may have been improper.

Moreover, *National Customs Brokers* defeats Deosen’s assertion that the public interest exception applies only to situations of emergency or possible crisis. In fact, courts have at various times suggested that a multitude of different factors can form grounds for a determination that the public interest supports a shortened comment period and an immediate effective date for a regulation.¹⁰⁹ To be sure, we agree with Deosen to the extent it argues that courts have suggested that these factors do not include generalized interests in fiscal savings or other efficiencies.¹¹⁰ But an agency’s concern that a regulation may have an effect that is contrary to the Department’s statutory mandate and congressional intent is not this kind of generalized interest. Moreover, as explained above, the Department’s withdrawal of the targeted dumping regulation came after *two full rounds* of notice and comment, and provided for additional comment opportunities after the regulation’s withdrawal went into effect.

In short, the regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such effect would have been contrary to congressional intent. The Department’s revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the “public interest” exception. Accordingly, there was no basis for the Department to base its analysis in the instant proceeding upon the withdrawn regulation.

The Department’s Differential Pricing Analysis

The Department disagrees with Deosen that the differential pricing analysis is unreasonable or arbitrary. To the contrary, and as explained in the post-preliminary analysis, the Department continues to develop its approach pursuant to its authority to address potential masked dumping.¹¹¹ In carrying out the statutory objective, the Department determines whether “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods”¹¹² With the statutory language in

¹⁰⁸ *Withdrawal Notice*, 73 FR at 74931.

¹⁰⁹ *See, e.g., Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996) (crediting the agency’s explanation that a shortened comment period was necessary because the usual comment procedures “would undermine the public interest by delaying additional competition in the wireless marketplace”).

¹¹⁰ *See, e.g., Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983).

¹¹¹ *See Fufeng Post-Preliminary Analysis Memorandum*, at 3; *see also Deosen Post-Preliminary Analysis Memorandum*, at 3.

¹¹² 19 USC 1677f-1(d)(1)(B) (emphasis added).

mind, the Department has relied on the differential pricing analysis to determine whether the criteria are satisfied such that application of the alternative methodology is appropriate.

Deosen presents several arguments regarding the Department's post-preliminary memoranda and differential pricing analysis. As an initial matter, we note that Deosen's arguments have no grounding in the language of the statute. Deosen does not argue that the Department's reliance on the Cohen's *d* test violates the statutory language, nor can it. Rather, Deosen advocates for an alternative approach and puts forth several reasons why it believes the Department should modify its approach from the post-preliminary analysis. There is nothing, however, in the statute that mandates *how* the Department measure whether there is a pattern of export prices that differs significantly. To the contrary, carrying out the purpose of the statute here is a gap filling exercise by the Department. As explained in the post-preliminary analysis and below, the Department's differential pricing analysis is reasonable, and the use of Cohen's *d* test as a component in this analysis is in no way contrary to the law.

According to Deosen, it is insufficient for the Department to determine that a "significant difference" exists, despite the fact that this is the precise statutory language. Deosen claims that the difference must also be shown to have "statistical significance" before the Department may consider use of the alternative methodology. Deosen claims that the Department must employ the t-test to determine statistical significance in order for the Department's analysis to be lawful. Deosen's claim has no basis in the statutory language, which only requires a finding of a pattern of prices that differ "significantly." The statute does not require that the difference be "statistically" significant, only that it be significant. Deosen fails to demonstrate that the Department's reliance on Cohen's *d*, which is a generally recognized statistical measure of effect size, is unreasonable and that some higher threshold, not enumerated in the statutory language, must be satisfied.

Nothing in Deosen's submitted articles undermines the Department's reliance on the Cohen's *d* test. Deosen's reliance on the article "It's the Effect Size, Stupid" does not undermine the validity of the Cohen's *d* test or the Department's reliance on it to satisfy the statutory language.¹¹³ Interestingly, the first sentence in the abstract of the article states: Effect size is a simple way of quantifying the difference between two groups *and has many advantages over the use of tests of statistical significance alone.*¹¹⁴ Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference.*"¹¹⁵ The article points out the precise purpose for which the Department relies on Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant. To the extent Deosen cites to page 5 of Coe's article to argue that "significance" is often meant to imply "statistical significance," the author's comment relates to the use of the term "significance" in the context of the field of statistics, not in the context of

¹¹³ See Deosen Case Brief, at 146, 148-49.

¹¹⁴ See Coe, "It's the Effects Size, Stupid: What effect size is and why it is important," Paper presented at the Annual Conference of British Educational Research Association (Sept. 2002), <http://www.leeds.ac.uk/educol/documents/00002182.htm>.

¹¹⁵ *Id.*, at 5 (emphasis added).

statutes written by Congress. We note that this paper was presented at an Education Research Conference, where the goals and objectives for statistical analysis are distinct from the Department's purposes of measuring a pattern of prices that differ significantly. If Congress had intended to require a particular result be obtained with a t-test to ensure the "statistical significance" of price differences that mask dumping as a condition for applying an alternative comparison method, Congress presumably would have used language more precise than "differ significantly." The Department, tasked with implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, reasonably does not agree with Deosen's extraordinary elaboration of the statute such that "significantly" can mean only "statistically significant", which in turn can only be determined by application of a t-test. The law includes no such directive. The analysis employed by the Department, including the use of the Cohen's *d* test, reasonably fills the statutory gap as to how to determine whether a pattern of prices "differ significantly."

We disagree with Deosen that information contained in the Wikiversity webpage is persuasive authority that undermines the Department's determination to use the Cohen's *d* test. Deosen cites to the Wikiversity webpage on "Effect Size" to conclude that "the Cohen's *d* test serves as a compliment for, but not a replacement for traditional tests of statistical significance."¹¹⁶ Here again, Deosen's argument assumes that the statutory term "significantly" can only refer to "statistical significance." On the contrary, the Department has chosen to make use of a generally recognized measure of effect size in a practical analysis of exporter's pricing data to make a determination the statute calls upon the Department to make.

Deosen's claim that the Cohen's *d* test's thresholds of "small," "medium," and "large" are arbitrary is misplaced.¹¹⁷ In "Difference Between Two Means," the author states that "there is no objective answer" to the question of what constitutes a large effect.¹¹⁸ Although Deosen focuses on this excerpt for the proposition that the "guidelines are somewhat arbitrary," the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size "have been widely adopted."¹¹⁹ The author further explains that Cohen's *d* is a "commonly used measure{" to "consider the difference between means in standardized units."¹²⁰ At best, the article may indicate that although the Cohen's *d* test is not perfect, it has been widely adopted. And certainly, the article does not support a finding, as Deosen contends, that the Cohen's *d* test is not a reasonable tool for use as part of an analysis to determine whether a pattern of prices differ significantly.

Deosen relies on excerpts from the above mentioned articles to argue that characterization of a difference as, for example, "large" is dependent on the standard deviation to which it is compared. Such concern, however, is alleviated in a situation where sampling is not used and the universe of data is known. For that reason, Deosen's claim that a "measured difference might be completely unreliable and completely a construct of the *small sample size* and random noise in the data" is not of concern when using Cohen's *d* in the context of the differential

¹¹⁶ Deosen Case Brief, at 150.

¹¹⁷ See Deosen Case Brief, at 147.

¹¹⁸ See David Lane et al., Chapter 19 "Effect Size," Section 2 "Difference Between Two Means."

¹¹⁹ *Id.*

¹²⁰ *Id.*

pricing analysis.¹²¹ When using the Cohen’s *d* test, the Department will always have before it all reported sales from a company, rather than a sample of those sales. For example, Coe notes that “{i}deally, in calculating effect-size one should use the standard deviation of the full population, in order to make comparisons fair.”¹²² The Cohen’s *d* test is run on a company’s entire set of sales, thereby eliminating all uncertainty that may result from relying on a subset of data. For example, in a typical case an exporter reports all of its sales made to the United States of the subject merchandise. Given that the Department has the entire population of data in each case, concerns about sampling errors are simply misplaced.

Contrary to Deosen’s claim, the statute does not require that the Department consider only lower priced sales in the differential pricing analysis. The Department has the discretion to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to Deosen’s claim, it is reasonable for the Department to consider both lower priced and higher priced sales in the Cohen’s *d* analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly. Further, higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, that can mask dumping. The statute states that the Department may apply the average-to-transaction comparison method if “there is a *pattern of export prices* . . . for comparable merchandise that *differ* significantly among purchasers, regions, or periods of time,” and the Department “explains why *such differences* cannot be taken into account” using the average-to-average comparison method.¹²³ The statute directs the Department to consider whether a pattern of prices differ significantly. The statutory language references prices that “differ” and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department considers only higher priced sales or only lower priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department has explained that higher priced sales and lower priced sales do not operate independently; all sales are relevant to the analysis. Higher or lower priced sales could be dumped or could be masking other dumped sales—this is immaterial in the Cohen’s *d* test and the question of whether there is a pattern of export prices that differ significantly because this analysis includes no comparisons with normal values. By considering all sales, higher priced sales and lower priced sales, the Department is able to analyze an exporter’s pricing practice and to identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differ significantly among purchasers, regions, or periods of time, signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter is engaged in a discriminating pricing behavior, there is cause to continue with the analysis to determine whether masked dumping is occurring. Accordingly, both higher and lower priced sales are relevant to the Department’s analysis of the exporter’s pricing behavior.

Deosen argues that the Department should use a weighted average rather than a simple average of the variances for the test and comparison groups when calculating the pooled standard

¹²¹ *Id.*, at 149 (emphasis added).

¹²² Coe, at 7.

¹²³ See Section 777A(d)(1)(B) of the Act (emphasis added).

deviation of the Cohen's *d* coefficient.¹²⁴ Deosen claims that the correct approach is a weighted average, based on the frequency of observations, to adjust for differences in sizes between the test and comparison groups, and that a simple average gives too much weight to the variance from the test groups.¹²⁵ As explained above with respect to other issues, there is no statutory directive with respect to how the Department should determine whether a pattern of export prices that differ significantly exists, let alone how to calculate the pooled standard deviation of the Cohen's *d* coefficient. The Department's intent is to rely on a reasonable approach that affords predictability. The Department finds here that the best way to accomplish this goal is to use a simple average (*i.e.*, giving equal weight to the test and comparison groups) when determining the pooled standard deviation. By using a simple average, the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome (although we note that within both the test group and comparison group, the Department uses weight averaging when calculating the variance for each group). Deosen provides an example that it claims demonstrates that the Department is "over weighing" the test group.¹²⁶ Deosen's example attempts to demonstrate that the simple average approach leads to distorted results.¹²⁷ This example, however, is results oriented and actually provides further support for the Department's use of a simple average. If, in Deosen's hypothetical, the standard deviations are reversed between the test and comparison groups, the exact opposite result is derived. The Department is not persuaded that the results yielded by this example based on hypothetical data demonstrate that the Department's proposed approach is unreasonable. Therefore, we disagree with Deosen's claim that the proper approach is to account for differences in the size of each group. Rather, the Department finds it reasonable to use a simple average, in which the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome.

In sum, Deosen has presented a suggested alternative methodology for the Department to employ. Deosen's arguments, however, fall short of demonstrating that the Department's methodology and use of the Cohen's *d* test does not comply with the statute, fails to address the requirements of section 777A(d)(1)(B)(i) of the Act, or is unreasonable.

Application of the Alternative Methodology

Deosen claims that the Department has failed to articulate a reasonable explanation as to why it can apply the alternative methodology to all sales. Deosen claims that the alternative methodology should be applied only to targeted sales.

When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction method to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. Although the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that

¹²⁴ Deosen Case Brief, at 152-54.

¹²⁵ *Id.*

¹²⁶ Deosen Case Brief, at 154.

¹²⁷ *Id.*

this interpretation is a reasonable one and is more consistent with the Department's approach to the selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

In the post-preliminary analysis, the Department explained that the differential pricing analysis relied on a tiered approach to applying an alternative methodology. Depending on the percentage of total sales by value that pass the Cohen's *d* test, the Department applied the average-to-transaction method to either all sales, a subset of sales, or no sales:

If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of export prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the identified pattern of export prices that differ significantly support consideration of the application of an average-to-transaction method to those sales identified by the Cohen's *d* test as part of the pattern of significant price differences as an alternative to the average-to-average method. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method.¹²⁸

The Department finds that this approach is reasonable because whether, as an alternative methodology, the average-to-transaction method is applied to all U.S. sales, a subset of U.S. sales, or no U.S. sales depends on what percentage of U.S. sales pass the Cohen's *d* test. Thus, there is a direct correlation between the U.S. sales that establish a pattern of export prices that differ significantly and to what portion of the U.S. sales the average-to-transaction method is applied.

Deosen's argument that the average-to-transaction method should only be applied to the U.S. sales which are found to have passed, even when 66 percent or more of the value of total sales pass the Cohen's *d* test, would undermine the determination that a pattern of significant price differences exists under section 777A(d)(1)(B)(i) of the Act. The Department employs the differential pricing analysis to determine whether a pattern of export prices that differ significantly by purchasers, regions or time periods exists. Then, under section 777A(d)(1)(B)(ii) of the Act, the Department explains whether such price differences can be taken into account by the average-to-average method,¹²⁹ and if not, then the Department may apply the average-to-transaction method. When the Department finds that 66 percent or more of the value of the sales pass the Cohen's *d* test, the Department considers that the pattern of prices

¹²⁸ See *Post-Preliminary Analysis*, at 4.

¹²⁹ Assuming that the rarely-satisfied conditions for application of the transaction-to-transaction method are not satisfied. See 19 CFR 351.414(c).

that differ significantly is so pervasive in the reported prices that application of the average-to-transaction method to all sales is appropriate to address all masked dumping that may result from such differences. The Department finds that the thresholds employed in the Cohen's *d* test are a reasonable way of determining whether and how to apply the average-to-transaction method as an alternative comparison methodology.

If Congress had intended for the Department to apply the average-to-transaction method only to a subset of transactions and use a different comparison method for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not. Instead, Congress expressed its intent with the language of section 777A(d)(1)(B), which imposes a general preclusion from using average-to-transaction comparisons and withdraws that preclusion entirely if the two criteria are satisfied. In the absence of such a preclusion, the Department has the discretion to apply the average-to-transaction method to all transactions or to a subset of transactions.¹³⁰ The Department may choose any method that is appropriate. The statute does not preclude the Department's application of the average-to-transaction method to either all of the respondent's transactions or to a subset of those transactions, and the Department has explained its reasons for doing so.

To the extent Deosen raises claims regarding the Department's use of the transaction-to-transaction methodology, we note that that, pursuant to the regulations, the transaction-to-transaction methodology is used only in limited circumstances. Pursuant to 19 CFR 351.414(c)(1), quoting the SAA at 842, the Department will use the "transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom made." Use of the transaction-to-transaction methodology is only used in unusual circumstances and was not intended to have broad application.¹³¹ Because this case does not present any unusual circumstances that warrant use of the transaction-to-transaction methodology, we decline to apply it here.

Zeroing

Deosen raises several claims regarding the Department's use of the zeroing methodology when applying the average-to-transaction methodology. The Federal Circuit's recent decision in *Union Steel v. United States*, Ct. No 2012-1248, -1315 (Fed. Cir. Apr. 16, 2013), resolved the outstanding question of whether the Department's statutory interpretation is reasonable. The Federal Circuit affirmed the Department's explanation that it may interpret the statute to permit zeroing with respect to the average-to-transaction method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the

¹³⁰ See SAA, H.R. Doc. No. 103-316 at 843 (placing no limitation on application of the average-to-transaction method once the Department satisfies the statutory criteria).

¹³¹ *Final Determination of Sales at Less than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 FR 60630 (Oct. 25, 2007), and accompanying IDM at Comments 5, 6; see also *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27374 (May 19, 1997) ("Preamble"); *Notice of Determination Under Section 129; Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 FR 22636, 22639 (May 2, 2005) (explaining that use of the transaction-to-transaction methodology is appropriate because, among other things, the prices of subject merchandise was volatile).

average-to-average method in investigations.¹³² The Federal Circuit also affirmed the Department’s explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews.¹³³ Indeed, the Court noted that although the Department recently modified its use of zeroing “to allow for offsets when making average-to-average comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns.”¹³⁴

Likewise, in *United States Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010), the Federal Circuit sustained the Department’s decision to no longer apply zeroing when employing the average-to-average method in investigations while recognizing the Department’s intent to continue to apply zeroing in other circumstances.¹³⁵ Specifically, the Court recognized that the Department may use zeroing when applying the average-to-transaction method where patterns of significant price differences are found.¹³⁶

As the Court affirmed, the Department may reasonably interpret section 771(35) of the Act in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce the sum of the positive comparison results when calculating “aggregate dumping margins” within the meaning of section 771(35)(B) of the Act. In contrast, when applying an average-to-transaction method under 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction method, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison method yields results specific to each individual export transaction. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – i.e., the amount of dumping found for each individual U.S. sale – to calculate the weighted-average dumping margin. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific comparison results.¹³⁷ Thus, when the Department focuses on transaction-specific comparison results, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only positive comparison results in the aggregate dumping margin. Consequently, when using the average-to-transaction method, the Department reasonably does not permit negative comparison

¹³² *Id.*, at *13.

¹³³ *Id.*, at *15-16.

¹³⁴ *Id.*, at *10 n.5 (internal citations omitted).

¹³⁵ *Id.*, at 1355 n.2, 1362-63.

¹³⁶ *Id.*, at 1363 (“{T}he exception contained in 1677f-1(d)(1)(B) indicates that Congress gave {the Department} a tool for combating targeted or masked dumping by allowing {the Department} to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time.”).

¹³⁷ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of all non-dumped sales is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, all non-dumped transactions result in a lower weighted-average dumping margin.

results to offset or reduce the sum of the positive comparison results when determining the aggregate dumping margin within the meaning of section 771(35)(B) of the Act.

Comment 4: Use of Indonesian Export Data

Deosen Argument:

- The USTR's National Trade Estimates reports support the conclusion that Indonesia provides no generally available export subsidies. According to the USTR, Indonesia's export subsidy programs ended in 2004.
- Evidence from the WTO confirms that Indonesia was required to eliminate all export subsidies by January 1, 2003, according to its obligations under the WTO SCM Agreement, and the WTO Secretariat's 2007 Trade Policy Review Mechanism Report of Indonesia confirmed no export subsidies.
- Since 2000, there have been only four CVD investigations of imports from Indonesia by the Department, and export subsidies were only alleged in the 2001 investigation but found not utilized.¹³⁸ In the other three CVD investigations for Indonesia, there were no allegations of export subsidies and no evidence that any were discovered in these investigations.¹³⁹ Based on the above evidence, for the final determination, the Department must use Indonesian import data to value direct and packing materials.

There were no rebuttal comments.

Department's Position: In the *Preliminary Determination* the Department followed its practice when valuing FOPs using import statistics for the surrogate country of excluding imports from Indonesia, South Korea, Thailand, and India because those countries maintain broadly available, non-industry specific export subsidies. As such, the Department has found that it is reasonable to infer that all exporters from Indonesia, South Korea, Thailand, and India may have benefitted from these subsidies. This practice has been upheld by the Court.¹⁴⁰

Deosen argues that the Department did not have a sufficient basis for reaching this conclusion with respect to imports from Indonesia in the *Preliminary Determination*, and that record evidence now demonstrates that there is no reasonable basis to suspect that Indonesian exporters benefit from broadly available, non-industry specific export subsidies.

As Deosen correctly states, the Department does not use as the basis for SVs data which it has reason to believe or suspect may be dumped or subsidized prices. Guided by the legislative history, the Department's practice is not to conduct a formal investigation to ensure that such

¹³⁸ Deosen cites *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Indonesia*, 66 FR 49637, 49639 (September 28, 2001).

¹³⁹ See *Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia*, 71 FR 47174 (August 16, 2006) ("*Certain Lined Paper Products from Indonesia*"); *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007) ("*Coated Free Sheet Paper from Indonesia*"); and *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 FR 59209 (September 27, 2010) ("*Coated Paper from Indonesia*").

¹⁴⁰ See, e.g., *China National Machinery Import & Export Corp. v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003) (aff'd, 104 Fed. Appx. 183 (Fed. Cir. 2004)) ("*China National Machinery*").

values are not dumped or subsidized.¹⁴¹ Instead, the Department bases its decision on information that is available to it at the time it makes its determination.¹⁴² That said, we agree with Deosen that the Department must find specific and objective evidence to support its reason to believe or suspect the existence of subsidies. However, we disagree with Deosen's assertion that in the instant investigation the Department has not found sufficient evidence to demonstrate that it is reasonable to believe or suspect that Indonesia maintains broadly available export subsidies.

Deosen objects to the Department's reliance on the 2005 sunset review of the CVD order on certain cut-to-length carbon quality steel plate from Indonesia as a reasonable basis to exclude imports from Indonesia from the information used to value Deosen's FOPs. Deosen suggests that the sunset review is not close enough to the POI in the instant proceeding, which must undercut the reasonableness of relying on such a finding. Deosen also maintains that because in the sunset review the Department received no response from the Government of Indonesia or other respondent interested parties, the sunset review reflects the absence of positive information regarding the presence of generally available export subsidies in Indonesia. However, the Department determined that the lack of any response, instead of reflecting an absence of positive information regarding the presence of generally available export subsidies, as suggested by Deosen, demonstrates just the opposite. In other words, having already found countervailable subsidies that resulted in the issuance of the order, the Department explained that it "did not receive a response from the foreign government or from any other respondent interested party," and "{a}bsent argument or evidence to the contrary, we find that countervailable programs continue to exist and be used."¹⁴³

Deosen also remarks that from the final determination in the original investigation that led to the Indonesian Plate CVD order to completion of the expedited sunset review in 2005, the Department conducted no administrative reviews of the CVD order in question. Deosen claims that this supports its argument that there is no positive evidence of the existence of generally available export subsidies in Indonesia. Once again, the Department finds that this supports the opposite conclusion. The Department explained that because there had been no administrative reviews, there had been "no evidence submitted to the Department that any programs found to be countervailable in the investigation have been terminated," and "that countervailable programs continue to exist and be used."¹⁴⁴ Thus, in spite of Deosen's argument that as a result of the absence of any administrative reviews, and the lack of a response from the Government of

¹⁴¹ See Omnibus Trade and Competitiveness Act of 1988, Conference Report to accompany H.R. Rep. 100-576 at 590 (1988) reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24; see also *Preliminary Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 30758 (June 4, 2007) unchanged in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 60632 (October 25, 2007).

¹⁴² See *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 73 FR 24552, 24559 (May 5, 2008), unchanged in *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039 (September 24, 2008) ("PET Film").

¹⁴³ See *Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia: Final Results of Expedited Sunset Review*, 70 FR 45692 (August 8, 2005) ("CTL Plate"), and accompanying IDM at Issue 1.

¹⁴⁴ See *id.*, and accompanying IDM at Issue 1; see also *Certain Cut-to-Length Carbon-Quality Steel Plate From India, Indonesia, Italy, and the Republic of Korea: Final Results of Expedited Sunset Review*, 76 FR 12702 (March 8, 2011).

Indonesia or any respondent in the sunset review, there is no information on the existence of generally available export subsidies and, thus, no substantial, specific, and objective evidence to support a reason to believe or suspect the existence of such subsidies, the Department finds otherwise. Not only did the Department find that countervailable programs exist and are used, it also explained the nature of the subsidy. Specifically, the Department described the Rediscount Loan Program: “The sale of the letters of credit and export drafts provides companies with working capital at lower interest rates than they would otherwise pay on short-term commercial loans. This program constitutes an export subsidy.”¹⁴⁵

Desosen also argues that the USTR’s NTE reports support the conclusion that Indonesia does not provide generally available export subsidies. According to Deosen, a review of the annual NTE reports for the period since the entry into force of the WTO SCM Agreement confirms that Indonesia no longer grants export subsidies. According to Deosen, the USTR’s annual reports indicate that it is questionable whether the Indonesian export subsidies have been generally available for exporters since 1996 at least, but that it is clear that these export subsidies are no longer available and have not been available at least since 2004. Contrary to Deosen’s claims, we find that the USTR NTE reports do not support such a conclusive finding. The 2005-2007 NTE reports found that in 2004 the Indonesian government ended “several programs that offered subsidized loans to agriculture and small and medium businesses to support exports.” This specific finding does not lead to the conclusion that all export subsidies ended, especially those for large companies and other industries that are not mentioned. More recently, in 2005, the Department still found that active export subsidies exist. Lastly, and as Deosen similarly argues on other issues, the Department does not agree that the absence of any discussion regarding Indonesia’s export subsidy programs since 2007 in the USTR reports necessarily means that no export subsidies exist. Rather, the Department finds that the absence of affirmative evidence does not allow for such a conclusion.

Deosen also states that in addition to the NTE reports, the Department has also looked to evidence contained in various WTO materials to support its belief or suspicion that countries provided generally available, non-industry-specific export subsidies. However, Deosen maintains that reliance on such materials in the instant investigation confirms that Indonesia does not provide generally available, non-industry-specific export subsidies. As support for its argument, Deosen uses the same flawed logic that it made in arguing that because neither the Government of Indonesia nor any respondent filed a response in the sunset review discussed above, the record of the sunset review reflected the absence of positive information regarding the presence of generally available export subsidies in Indonesia. Similarly, Deosen states that pursuant to the WTO SCM Agreement concluded during the Uruguay Round of multilateral trade negotiations which established the World Trade Organization, the time period for Indonesia to meet the requirements of the agreement and eliminate all export subsidies was January 1, 2003 and, according to Deosen, no WTO Member has alleged either in the Committee on Subsidies and Countervailing Measures or under the WTO Dispute Settlement Understanding that Indonesia currently maintains export subsidies. However, we do not agree that this affirmatively demonstrates that Indonesia has eliminated all export subsidies, any more than the absence of positive information regarding the presence of generally available export subsidies in the sunset review means that countervailable subsidies ceased to exist.

¹⁴⁵ See *CTL Plate*, and accompanying IDM at Issue 3.

Deosen argues that the absence of current export subsidies in Indonesia is further confirmed by the 2007 TPRM Report of Indonesia conducted by the WTO Secretariat. Deosen states that the TPRM Report is something that the Department has found probative as evidence to believe or suspect that a country maintains generally available, non-industry specific export subsidies, citing *Fuyao II*, 29 C.I.T. at 117. According to Deosen, the TPRM Report, issued on November 6, 2007, stated that in 2004, the Indonesian Government ended several credit programs that offered subsidized loans for agriculture and small- and medium-sized businesses to support exports. While Deosen notes that the report describes other assistance for exports, Deosen argues that these are either not in the form of countervailable subsidies or not generally available to exporters, or both. However, notwithstanding Deosen's claims, we find that the TPRM Report does contain evidence of generally available, non-industry-specific export subsidies in Indonesia. Specifically, the report explains

The state-owned Bank Eksport Indonesia (BEI), which opened in September 1999, provides pre-shipment and post-shipment financing facilities for exporters, which was formerly provided by Bank Indonesia. BEI guarantees letters of credit and issues guarantees for domestic exporters who need loans from local banks. In August 2005, BEI announced that it would serve as a financier for export credits rather than as a guarantor, since capital markets have increasingly filled the latter role.¹⁴⁶

Finally, Deosen asserts that the Department's investigations of CVD in Indonesia support the conclusion that there are no generally available, non-industry-specific export subsidies provided by the Government of Indonesia. Deosen claims that since 2000 there have been only four CVD investigations of imports from Indonesia, and in three investigations involving paper products from 2006-2010, there were no allegations of export subsidies and no evidence that any export subsidies were discovered during the course of the investigations.¹⁴⁷ Deosen argues that this is compelling evidence of the absence of any generally available export subsidies during this period. The Department does not agree. The fact that there were no allegations of export subsidies in a specific proceeding involving the paper sector is not indicative of the absence of generally available, non-industry-specific export subsidies. On the contrary, the Department continues to find that, as a result of the final results of the 2005 *CTL Plate* sunset review discussed above, where the Department found unequivocally that countervailable programs continue to exist and to be used, as well as the information from the TPRM Report showing that the state-owned BEI serves as financier of export credits, there is reason to continue to believe or suspect that exports from Indonesia may be subsidized.

¹⁴⁶ See TPRM section III.3.iii.(d)89 at 58, contained in Deosen Post-Prelim SV Submission, at Exhibit FSV-11.

¹⁴⁷ Deosen cites *Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia*, 71 FR 47174 (August 16, 2006); *Coated Free Sheet Paper from Indonesia*; and *Coated Paper from Indonesia*.

Comment 5: Valuation of Bacteria

Petitioner Argument:

- The Department should value the respondents' *x. campestris* bacteria because it is a reportable FOP, and xanthan gum production would not be possible without the bacteria input.
- The value of the *x. campestris* bacteria is not captured in the surrogate financial ratios used in *Preliminary Determination*. Ajinomoto does not have research and development expenses, amortization expenses, or licensing fees related to its production bacteria in its financial statements.
- Biotechnology licensing agreements are the best way to value *x. campestris* because the respondents license the use of the bacteria, but do not have outright ownership of it. The Department should multiply a net-sales royalty rate by the AUV of xanthan gum imported into the surrogate country, and then apply it to the respondents' materials, labor, and energy, prior to application of financial ratios.

Fufeng Rebuttal:

- *X. campestris* bacteria is not a reportable FOP. Fufeng continuously produces or replenishes its strain of bacteria in its factory, incurring nominal costs. These costs are accounted for as general administrative expenses.
- Fufeng purchased its strain of *x. campestris* bacteria in 2002 as part of the acquisition of materials and technology for production of xanthan gum. Fufeng is not required to pay any additional fees, such as royalties or leases, for its use of the bacteria after purchase. Fufeng owns the right to exploit the strain of bacteria and the technology used to produce xanthan gum.
- Petitioner's method of calculating a fee for the bacteria is unreasonable because it would add a charge to reflect an expense not incurred by Fufeng.

Deosen Rebuttal:

- The Department should continue not valuing the *x. campestris* bacteria as an FOP.
- Deosen acquired its strain of *x. campestris* bacteria in a transaction that provided Deosen with the right to use the bacteria in perpetuity to produce xanthan gum. Deosen made a one-time payment to the party in possession of the bacteria's intellectual property rights. Deosen incurs no further costs for bacteria for future production.
- Petitioner's analogy of licensing agreements with continuous payments and amortization is not consistent with the facts of this investigation or with generally accepted accounting principles. There is no evidence that Petitioner's proposed valuation of bacteria is consistent with Deosen's purchase rights to use bacteria or principles for valuing intangible assets established by the Financial Accounting Board.

Department's Position: We agree with Fufeng and Deosen that we should not value the respondents' *x. campestris* bacteria as an FOP for the final determination. We found in the *Preliminary Determination* that the respondents' costs associated with maintenance and use of the *x. campestris* bacteria are similar to those of the MSG and lysine producer whose financial statements were used to calculate surrogate financial ratios, because MSG and lysine production also rely on the use of specialized strains of bacteria. Thus, these costs are included within the surrogate financial ratios. Because we have continued to rely on the financial statements of

Ajinomoto, a company that produces MSG and lysine, as discussed in Comment 2, above, we continue to find that we have accounted for the value of the *x. campestris* bacteria in the financial ratios, and that we should not separately value it as a raw material input.

Regarding Petitioner's argument that the *x. campestris* bacteria is a reportable FOP,¹⁴⁸ we agree with Deosen and Fufeng that the bacteria used in the respondents' production of subject merchandise should not be valued as an FOP. In *Copper Pipe and Tube*, cited by Petitioner, the Department valued a solvent used by a respondent as a direct material, rather than as an overhead item.¹⁴⁹ However, we find that the instant case is distinguished because the respondent's use of solvent in *Copper Pipe and Tube* would necessitate ongoing purchases of the solvent to replenish the respondent's supply, whereas the *x. campestris* bacteria is self-replicating. We find that the evidence on the record of the present investigation shows that both Deosen and Fufeng purchased their strains of *x. campestris* bacteria long before the POI, and that they continually regenerate the bacteria for use in their xanthan gum production.¹⁵⁰ Although Petitioner argues that the *x. campestris* bacteria meets all of the criteria considered by the Department in determining whether to value FOPs,¹⁵¹ we find that the respondents' ownership and regenerative use of the bacteria makes it more similar to an asset than a direct material input. Further, we agree with Deosen and Fufeng that the perpetual regeneration of bacteria makes the lifespan of the bacteria indefinite, and that there is no evidence the respondents depreciate or amortize the value of the bacteria based on its useful life. Therefore, we continue to find that valuing the bacteria as a direct material would be inappropriate.

We also agree with Deosen and Fufeng that the application of a surrogate biotechnology licensing fee, as suggested by Petitioner, does not accurately reflect the respondents' production experience. We find that the record of this investigation does not contain evidence that Deosen and Fufeng pay any type of ongoing royalty or licensing fee for the use of their *x. campestris* bacteria. Concerning Petitioner's assertion that the company that transferred the bacteria strains and associated technology to Deosen and Fufeng still maintains ultimate ownership rights over the intellectual property, we find that the record of this investigation supports a finding that each of the respondents acquired its *x. campestris* strain for payment-in-full long before the POI, and that the acquisitions included the right to further grow and exploit the resulting bacteria for the production of xanthan gum.¹⁵² While Petitioner showed that other biotechnology firms use

¹⁴⁸ See Petitioner Case Brief, at 39-41 (citing *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 60725 (October 1, 2010) ("*Copper Pipe and Tube*"), and accompanying IDM at Comment 7).

¹⁴⁹ See *Copper Pipe and Tube*, and accompanying IDM at Comment 7.

¹⁵⁰ See Submission from Fufeng, "Supplemental Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd.," dated November 27, 2012 ("Fufeng November 27 Supplemental Questionnaire Response") at 2-3; see also "Deosen Biochemical's 2nd Supplemental Section A, C, and D Response," dated November 27, 2012 ("Deosen November 27 Supplemental Questionnaire Response"), at 16-17.

¹⁵¹ See *Copper Pipe and Tube*, and accompanying IDM at Comment 7 ("...the Department will typically value a material as a direct material input if it is: 1) consumed continuously with each unit of production, 2) required for a particular segment of the production process, 3) essential for production, 4) not used for "incidental purposes," or 5) otherwise a 'significant input into the manufacturing process rather than miscellaneous or occasionally used material.'").

¹⁵² See Submission from Deosen, "Deosen Biochemical's Additional Comments for Preliminary Determination," dated December 13, 2012 ("Deosen Additional Pre-Prelim Comments") at attachment A; see also Submission from

ongoing licensing agreements for intellectual property, there is no evidence on the record that either of the respondents is subject to such an agreement. Thus, we have not applied the “surrogate royalty rates” proposed by Petitioner for the final determination.

Regarding Petitioner’s argument that the financial statements of Ajinomoto do not contain research and development or amortization expenses, we disagree with Petitioner that this is a valid reason to value the *x. campestris* bacteria in the manner suggested by Petitioner. Because the record contains evidence that both respondents own and maintain their production strains of *x. campestris*, and the bacteria’s indefinite lifespan precludes amortization, we find that any lack of research and development or amortization expenses in the financial statements of Thai producers of MSG and/or lysine do not make those producers substantially dissimilar from the production experience of the respondents.

Comment 6: General Surrogate Values

Comment 6-A: Truck Freight

Petitioner Argument:

- Figures from the 2005 Express Transportation Organization of Thailand (ETO) are unreliable and the ETO was shut down in 2006. *Doing Business 2013: Thailand* compiled by the World Bank is more reliable and contemporaneous.
- In *Sodium Hexametaphosphate*, the Department decided that for truck freight, 2013 *Doing Business* was the best information available when compared to the 2005 ETO.
- In *Certain Polyester Staple Fiber*,¹⁵³ the Department ruled that the best measurement for inland freight was *Doing Business* compared to a database based on a single company’s information (Indonesia in that review).

Fufeng Argument:

- 2005 ETO data is unreliable and figures from 2010 from the Thai transport website Dxplace.com (“Dxplace”) should instead be used.
- Dxplace is a comprehensive database of logistics in Thailand with detailed truck freight charges from Bangkok to 76 cities across Thailand. It also provides information for three types of trucks, yielding 228 price points.

Fufeng Rebuttal:

- Petitioner’s argument that Dxplace takes figures from only one freight provider is inaccurate as demonstrated by multiple transport companies listed in Dxplace’s database.
- *Doing Business 2013: Thailand* is based on one truck route and is therefore less reliable than Dxplace, even though Dxplace is one year less contemporaneous than *Doing Business 2013: Thailand*.
- The reference to *Certain Polyester Staple Fiber* is invalid because unlike in that review, Dxplace has information from more than one company and is more contemporaneous to the instant POI.

Fufeng, “Second Supplemental Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd.,” dated December 18, 2012, (“Fufeng December 18 Supplemental Questionnaire Response”), at Exhibit 2A.

¹⁵³ See *Certain Polyester Staple Fiber From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 FR 2366 (January 11, 2013) (“*Certain Polyester Staple Fiber*”), and accompanying IDM at Comment 3.

Deosen Rebuttal:

- The Department should value all FOPs based on the Philippines.

Petitioner Rebuttal:

- The Department should use *Doing Business 2013: Thailand*, which is contemporaneous to the POI and is a broad market average, unlike Dxplace, which is based on one freight provider.
- If the Department does use Dxplace, it needs to correct inaccurate calculations submitted by Fufeng.

Department's Position: We have determined that the World Bank *Doing Business 2013: Thailand* data for truck freight are the best available information on the record to calculate the truck freight cost in the final determination because the *Doing Business 2013: Thailand* data are the most reliable on the record, are contemporaneous with the POI, and were used in the recent administrative reviews of *Certain Polyester Staple Fiber* and *Sodium Hexametaphosphate 2010-2011*.¹⁵⁴

At the *Preliminary Determination*, the Department selected a truck freight rate based on a 2005 Thai Board of Investment report, *Costs of Doing Business in Thailand*.¹⁵⁵ The ultimate source of the information contained within this report was the ETO which, according to information placed on the record by Petitioner, was shut down by the Thai government in 2006 for inefficient operation.¹⁵⁶ After the *Preliminary Determination*, Fufeng placed on the record extensive truck freight costs from the Thai transport website Dxplace, while Petitioner suggested using the World Bank's *Doing Business 2013: Thailand* report.¹⁵⁷ Deosen continued to argue that the Department should use the Philippines as the source for all SVs.¹⁵⁸

In selecting SVs for inputs, section 773(c)(1) of the Act directs the Department to use the "best available information." In determining the "best available information," it is the Department's practice to consider five factors: (1) broad market average; (2) public availability; (3) product specificity; (4) tax and duty exclusivity; and (5) contemporaneity of the data.¹⁵⁹ Both the 2010 Dxplace and *Doing Business 2013: Thailand* data satisfy the criteria of public availability, broad market average and tax and duty exclusivity.¹⁶⁰

First, as the information placed on the record by Petitioner demonstrates, the *Doing Business 2013: Thailand* report provides information for the inland freight cost of shipping a container on

¹⁵⁴ See *Sodium Hexametaphosphate 2010-2011*, and accompanying IDM at Comment IV.B.

¹⁵⁵ See Preliminary SV Memorandum.

¹⁵⁶ See Submission from Petitioner, "Xanthan Gum from the People's Republic of China; Post-Preliminary Surrogate Value Submission," dated February 22, 2013 ("Petitioner Post-Prelim SV Submission"), at Exhibit 4.

¹⁵⁷ See Fufeng Post-Prelim SV Submission, at Exhibit 2; see also Petitioner Post-Prelim SV Submission, at Exhibits 5-6.

¹⁵⁸ See Deosen Rebuttal Brief.

¹⁵⁹ See *Fresh Garlic from the People's Republic of China: Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order*, 77 FR 34346, (June 11, 2012), and accompanying IDM at Comment 4.

¹⁶⁰ See Fufeng Post-Prelim SV Submission, at Exhibit 2; see also Petitioner Post-Prelim SV Submission, at Exhibits 5-6.

a route from Bangkok to the port 133 kilometers away.¹⁶¹ On the other hand, the 2010 Dxplace data provide price points for three types of trucks from multiple companies and include the cost to ship from Bangkok to 76 different cities throughout the country, yielding a total of 228 price points.¹⁶² However, the Dxplace data come from a single date in June 2010 and it is unclear if these prices are six-month averages or a snapshot in time. Additionally, it appears that the Dxplace website is still currently used for shipping rates, but no other historical data are provided. In two recent cases, *Sodium Hexametaphosphate 2010-2011* and *Certain Polyester Staple Fiber*, the Department chose the *Doing Business 2013: Thailand* survey because of the reliability of the World Bank data. Additionally, as stated in *Certain Polyester Staple Fiber*, the Department prefers *Doing Business 2013: Thailand* despite the fact that it provides freight costs solely from the main city to the port because it reflects freight costs for multiple vendors and users (*i.e.*, shipping lines, customs brokers and banks).¹⁶³

Second, the Department will not be considering truck freight information from the Philippines to use as an SV. It is the Department's stated preference to use a single surrogate country for SVs¹⁶⁴ and we have selected Thailand as the surrogate country in this investigation.¹⁶⁵

Third, the data from the *Doing Business 2013: Thailand* survey is contemporaneous with the POI. The POI is from October 1, 2011 through March 31, 2012. The Dxplace data reflect prices from June 3, 2010,¹⁶⁶ while the World Bank's *Doing Business 2013: Thailand* survey collected data inclusive of June 1, 2011, to May 31, 2012.¹⁶⁷

Comment 6-B: Brokerage and Handling

Fufeng Argument:

- The Department should use the updated *Doing Business 2013: Thailand* report that was placed on the record after the *Preliminary Determination*, as this report covers a time period from June 1, 2011 through May 31, 2012, making it contemporaneous with the POI.
- The Department should value B&H at 28.2 metric tons of cargo per 20-foot container as opposed to 10 metric tons, which was used in the *Preliminary Determination*. The value of 28.2 metric tons is substantiated by information on the record and has been used previously by the Department.¹⁶⁸

¹⁶¹ See Petitioner Post-Prelim SV Submission, at Exhibits 5-6.

¹⁶² See Fufeng Post-Prelim SV Submission, at Exhibit 2.

¹⁶³ See *Certain Polyester Staple Fiber*, and accompanying IDM at Comment 3.

¹⁶⁴ See 19 CFR 351.408(c)(2); see also *Clearon Corp. v. United States*, No. 08-00364, 2013 WL 646390, at *6 (CIT Feb. 20, 2013) (acknowledging that the Department's preference is reasonable because "deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations"); see also *Peer Bearing Co. Changshan v. United States*, 804 F.Supp.2d 1337, 1353 (CIT 2011) (citation omitted) ("the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data 'upon a fair comparison, are otherwise seen to be fairly equal.'"); *Bristol Metals L.P. v. United States*, 703 F.Supp.2d 1370, 1374 (CIT 2010).

¹⁶⁵ See Preliminary Surrogate Country Memorandum.

¹⁶⁶ See Fufeng Post-Prelim SV Submission, at Exhibit 2.

¹⁶⁷ See Petitioner Post-Prelim SV Submission, at Exhibit 6.

¹⁶⁸ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent To Revoke Order in Part*, 77 FR 56180 (September 12, 2012).

- Should the Department decide to not value B&H at 28.2 metric tons, it should value it with an average of the weights submitted in the bills of lading provided by Fufeng.¹⁶⁹

Petitioner Rebuttal:

- The *Doing Business 2013: Thailand* report clearly states that the B&H rates are calculated on 10 metric tons per container. Furthermore, the Department has stated this fact in prior decisions.¹⁷⁰ Therefore, the Department should continue to use 10 metric tons to calculate B&H charges.

Department’s Position: The Department agrees with Fufeng in part and has determined to use the *Doing Business 2013: Thailand* report, as it is contemporaneous with the POI. However, after close examination, the Department agrees with Petitioner that the *Doing Business 2013: Thailand* report calculates B&H rates based upon 10 metric tons per container.¹⁷¹ Furthermore, the Department notes that the value of 10 metric tons was used in the final results of the 8th administrative review of frozen fish fillets from Vietnam.¹⁷² Therefore, the Department has used the *Doing Business 2013: Thailand* report to calculate B&H, applying 10 metric tons as the value for container weight.

Comment 6-C: Labor

Fufeng Argument:

- 2005 Thai ILO data are aberrational and contradicted by 2007 Thai NSO Industrial Census report for ISIC code 15: “Manufacture of food products and beverages” and ISIC code 24: “Manufacture of chemicals and chemical products,” and by the BOT manufacturing sector average for the POI.
- The ILO stated that the 2005 Thai manufacturing labor cost data are wrong and have been removed from the labor statistics database, LABORSTA. Therefore, no Thai ILO labor data are available after 2000.
- The SV for labor for the final determination should be based on the 2007 Thai NSO Industrial Census Report – after suitably adjusting for inflation – because it provides industry-specific, comprehensive, broad market average, and more contemporaneous labor data. Code 15 is the correct industry category, covering manufacture of food products & beverages, but the report also includes Code 24 (manufacture of chemicals), which was used in the *Preliminary Determination*.

¹⁶⁹ See Submission from Fufeng, “Section A Response for Neimenggu Fufeng Biotechnologies Co., Ltd. In Antidumping Duty Investigation on Xanthan Gum from the People’s Republic of China (A-570-985),” dated September 6, 2012 (“Fufeng Section A Questionnaire Response”), at Exhibits 14-A and 14-B (proprietary rights waived in Fufeng Case Brief, at 49).

¹⁷⁰ See *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Results of Antidumping Administrative Review: 2010-2011*, 77 FR 74644 (December 17, 2012), and accompanying IDM at Comment 3; see also *Stilbenic Optical Brightening Agents*, and accompanying IDM at Comment 5.

¹⁷¹ See Petitioner Post-Prelim SV Submission, at page 3 of Exhibit 6 (containing *Doing Business 2013* survey instructions stating the assumption that the product “is imported or exported in a dry cargo 20-ft full container load (FCL), weighs 10 tons and is valued at U.S. \$20,000.”).

¹⁷² See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2010-2011*, 78 FR 17350 (March 21, 2013).

Deosen Argument:

- Use 2008 Philippine ILO labor data, rather than 2005 Thai ILO data or 2007 Thai NSO data because it is industry-specific, representative of the entire market (there is no evidence that Thai NSO data are countrywide), and more contemporaneous.
- If continuing to use Thailand, the 2007 Thai NSO data are a better source than the 2005 Thai ILO data.

Petitioner Rebuttal:

- The correct ISIC category for xanthan gum is 24 and the correct four-digit class is 2413, not category 15, as proposed by Fufeng.

Fufeng Rebuttal:

- Despite Deosen’s claim that there is no evidence that 2007 Thai NSO data represent the entire country, the source states that the NSO data are for manufacturing establishments located in the whole kingdom. *Drawn Stainless Steel Sinks* concluded that the 2007 Thai NSO labor data provided a broad market average.
- Despite Deosen’s claim that 2008 Philippine ILO data and 2007 Thai NSO data are equally specific, 2007 Thai NSO data are broken down into four-digit levels, rather than two-digit categories, making it more industry specific.

Department’s Position: In the *Preliminary Determination*, we determined that “Manufacture of Chemicals and Chemical Products” (ISIC Rev.3 Code: 24) is the most appropriate for the manufacturing of xanthan gum.¹⁷³ We have analyzed the additional surrogate labor data placed on the record since the *Preliminary Determination*. For the reasons explained below, we have determined that the 2007 Thai NSO data for labor cost of “Manufacture of plastics in primary forms and of synthetic rubber” (ISIC Rev.3 Code: 2413) is the best available information on the record to calculate the labor cost for the final determination.

In selecting SVs for inputs, section 773(c)(1) of the Act directs the Department to use the “best available information.” In determining the “best available information,” it is the Department’s practice to consider five factors: (1) broad market average; (2) public availability; (3) product specificity; (4) tax and duty exclusivity; and (5) contemporaneity of the data. Both the 2007 Thai NSO and 2008 Philippine ILO data satisfy the criteria of broad market average, public availability and tax and duty exclusivity. Neither of the data at issue is contemporaneous with the POI, though the 2008 Philippine ILO data is closer by one year. However, we find that the 2007 Thai NSO data are superior in terms of product specificity.

To elaborate, record evidence shows that the 2007 Thai NSO data are more product specific than the 2008 Philippine ILO Chapter 6A data. The NSO, a Thai government agency, is responsible for collecting and compiling economic and social data for various fields and conducts the Industrial Census to this end.¹⁷⁴ In conducting the 2007 Industrial Census, manufacturing industry activities were classified according to the International Standard Industrial Classification of All Economic Activities¹⁷⁵ (ISIC Rev.3) category D: Manufacturing,¹⁷⁶ the

¹⁷³ See Preliminary SV Memorandum.

¹⁷⁴ See Fufeng Post-Prelim SV Submission, at Exhibit 1A.

¹⁷⁵ See *id.*

same classification used by ILO Chapter 6A¹⁷⁷ that was used by the Department in the preliminary determination. However, as the 2007 Thai NSO data go to four-digits, the most appropriate code to use is “Manufacture of plastics in primary forms and of synthetic rubber” (ISIC Rev.3 Code: 2413). As information placed on the record by Petitioner demonstrates, xanthan gum can be traced from its description as a polysaccharide to plastics in primary forms, which corresponds to “Manufacture of plastics in primary forms and of synthetic rubber” (ISIC Rev.3 Code: 2413).¹⁷⁸ According to the 2007 Thai NSO data, the hourly labor cost for “Manufacturing of plastics in primary forms and of synthetic rubber” (including “xanthan gum”) in the reporting year was an uninflated 62.69 Thai Baht per hour.¹⁷⁹ In contrast, the 2008 Philippine ILO Chapter 6A data do not report the labor cost for manufacturing at a four-digit level of specificity; rather, they only report the total labor cost of “Manufacture of Chemicals and Chemical Products” (ISIC Rev.3 Code: 24).¹⁸⁰

Second, the record shows that both datasets represent broad market averages. Despite Deosen’s claim that it is not clear whether the 2007 Thai NSO data reflects all of Thailand, the record shows that the NSO data are broken down by region and reflect a country-wide sample under the Whole Kingdom category.¹⁸¹

While we find the 2007 Thai NSO data to be the best information with which to value labor on its own merits, it is also preferable to the 2008 Philippine ILO data because Thailand is the surrogate country for this investigation. Pursuant to 19 CFR 351.408(c)(2), the Department “normally will value all factors in a single surrogate country. The CIT has upheld this practice, stating that “the court must treat seriously the Department’s preference for a single surrogate country.”¹⁸² In its opinion, the CIT explained that the preference for using a single surrogate country is reasonable because it “limits the amount of distortion introduced into the calculation.”¹⁸³

Comment 6-D: Electricity

Fufeng Argument:

- The Department should apply the electricity charges published in the actual report from EGAT to value electricity at 2.57 Baht per kWh, rather than the report from EGAT as published in the Glow Energy 2011 annual report, which was used to value electricity charges in the *Preliminary Determination*.
- Further information placed on the record shows that the source data used in the *Preliminary Determination* was calculated from charges imposed by a single company, Glow Energy, as opposed to those charged by EGAT.
- EGAT is the largest producer and supplier of electricity in Thailand, possesses a large customer base, is a wholesale purchaser of electricity from several sources, and conducts

¹⁷⁶ See *id.*, at Exhibit 1D.

¹⁷⁷ See *id.*

¹⁷⁸ See Petitioner Post-Prelim SV Submission, at Exhibit 1A.

¹⁷⁹ See *id.*

¹⁸⁰ See Deosen Post-Prelim SV Submission, at Exhibit FSV-6, 1F.

¹⁸¹ See *id.*

¹⁸² See, e.g., *Clearon Corp. v. United States*, 2013 CIT LEXIS 27, Slip Op. 13-22, Ct. No. 08-00364 (February 20, 2013), at 12.

¹⁸³ See *id.*, at *13, *20.

transactions countrywide. Therefore, EGAT's sale prices are more representative of a broad market average than that of a single company.

- Glow Energy, unlike EGAT, has a small customer base that is dependent upon petrochemical sector customers located in a specific area. Furthermore, the company states that its prices are not reflective of its costs. Thus, Glow Energy's prices do not present an accurate sampling of broad market average electricity prices.
- EGAT is contemporaneous, publicly available, and has previously been used by the Department.¹⁸⁴

Deosen Argument:

- The Department should value electricity using data from the Philippines, specifically sourcing from the prices reported by the NPC of the Philippines or data reported by MERALCO.
- The data reported by the NPC are contemporaneous, cover three power grids located in Luzon, Mindano and Visaya, represent national rates published by the government. Additionally, they are publicly available, tax exclusive, and have previously been used by the Department.¹⁸⁵
- The data provided by MERALCO is country-wide, contemporaneous, and tax exclusive, and is specific to the quantity of electricity consumed.
- The data used by the Department in the *Preliminary Determination* are based upon prices charged by Glow Energy, a single company; are not market-wide average prices; incorporate only 32 percent of the electricity sold by Glow Energy in two regions of Thailand, and do not show evidence of being tax exclusive.
- The EGAT data placed on the record after the *Preliminary Determination* are inaccurate, as the actual average prices for various customers do not seem to tie to the Overall Average Sales Price reported in the financial statement. Nor do the data present a broad market average, as it is a price charged by a single company and includes sales to other countries. Finally, there is no evidence that it is tax exclusive.

Petitioner Rebuttal:

- The Department should continue to use Glow Energy's financial statement to value electricity.
- The majority of EGAT's sales are to distributing authorities, not industrial consumers. Furthermore, EGAT's sale price to direct customers, 2.71 baht per kWh, is comparable to Glow Energy's price of 2.69 baht per kWh.
- The NPC is mandated to provide electricity to areas that are not connected to the grid, sells to distributing authorities as opposed to industrial customers, and is heavily subsidized.
- There is no evidence that shows that the MERALCO data is country-wide. Furthermore, there are many charges to industrial users that are calculated on a kilowatt basis, as opposed to a kilowatt per hour basis, and have not been included by Deosen in its SV

¹⁸⁴ Fufeng cites *Diamond Sawblades and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review: 2010-2011*, 77 FR 73417 (December 10, 2012), and accompanying Decision Memorandum at 18.

¹⁸⁵ See *Certain Activated Carbon From the People's Republic of China Final Results of Antidumping Duty Administrative Review: 2010-2011*, 77 FR 67337 (November 9, 2012), and accompanying IDM at Comment III.

calculation based on MERALCO's data. Because of this discrepancy, the Department has previously determined that MERALCO's data is unusable.¹⁸⁶

Department's Position: To value electricity, we have used the pricing information published by EGAT in its 2011 Annual Report as provided by Fufeng in its post-preliminary SV submission.¹⁸⁷ These electricity rates represent contemporaneous, country-wide, publicly available information on tax-exclusive electricity rates charged to small, medium, and large industries in Thailand, thereby representing a broad market average in the primary surrogate country. At the *Preliminary Determination*, the Department used an annual report published by Glow Energy, believing that this report provided data from EGAT. However, it has come to the Department's attention that the rate of 2.69 baht per kWh calculated in the *Preliminary Determination* is based upon the price that Glow Energy charges its customers, and is derived from EGAT, but is not the actual price that EGAT charges. Therefore, the Department finds that the Glow Energy electricity rate is not representative of a broad market average.¹⁸⁸

Regarding Deosen's argument to use data provided by NPC or MERALCO, it is the Department's preference to use data reported by the primary surrogate country which, in this case, is Thailand. Furthermore, the Department has previously determined that because the MERALCO data include rates calculated on a kilowatt basis and does not represent as broad of a market, it is not superior.¹⁸⁹

Regarding Petitioner's comments, we note that Glow Energy's primary customer is EGAT.¹⁹⁰ Although Glow Energy does have industrial consumers, they do not account for the majority of electricity sales, are highly concentrated in a smaller geographical area, and operate in a single industry sector.¹⁹¹ Therefore, the Department determines that this is not as representative of a broad market average as the data reported by EGAT.

Comment 6-E: Sodium Hypochlorite

Petitioner Argument:

- Remove the percent solution adjustments to the respondents' sodium hypochlorite SVs because the Department's practice is to not adjust respondents' FOPs when the concentration level in the data source is unknown.

Deosen Rebuttal:

- Deosen consumes sodium hypochlorite in a five percent solution, and it would be inappropriate to value it as if it was a full concentration.

Department's Position: We agree with Deosen that it is appropriate in this instance to apply the solution percentages used by respondents to the SV for sodium hypochlorite. Deosen reported its input as "bleach," which it stated was a solution containing five percent sodium

¹⁸⁶ See *Chlorinated Isocyanurates 2010-2011*, and accompanying IDM at Comment 10.

¹⁸⁷ See Fufeng Post-Prelim SV Submission, at Exhibit 3.

¹⁸⁸ See Submission from Petitioner, "Xanthan Gum from the People's Republic of China; Surrogate Value Submission," dated October 26, 2012 ("Petitioner SV Submission"), at Exhibit 24.

¹⁸⁹ See *Chlorinated Isocyanurates 2010-2011*, and accompanying IDM at Comment 10.

¹⁹⁰ See Petitioner SV Submission, at Exhibit 24.

¹⁹¹ See *id.*

hypochlorite.¹⁹² Because bleach is an aqueous solution whose active ingredient is commonly sodium hypochlorite,¹⁹³ we find it appropriate to continue valuing Deosen’s bleach input using its percentage solution adjustment to the Thai HTS category for sodium hypochlorite. Likewise, Fufeng also reported that it consumed a solution containing sodium hypochlorite (but in a different percentage than Deosen),¹⁹⁴ so we find it appropriate to continue applying Fufeng’s reported percentage solution to the Thai HTS category to value Fufeng’s input.

We find that the instant case is distinguished from *Chlorinated Isos*,¹⁹⁵ cited by Petitioner. In *Chlorinated Isos*, the HTS category covered the precise chemical that was reported by the respondent as an input, and the Department declined to adjust the SV based on the concentration level of the respondent’s input. In the present case, the HTS category covers only the active ingredient (*i.e.*, sodium hypochlorite) of the input reported (*i.e.*, bleach). Therefore, for the final determination, we have continued to apply the percentage solution of the respondents’ sodium hypochlorite to the SV, in order to more accurately reflect the respondents’ actual consumption of a sodium hypochlorite bleach solution.

Comment 6-F: Hydrochloric Acid

Deosen Argument:

- Thai import data for hydrochloric acid, classified under HTS heading 2806.10 (“Hydrogen Chloride (Hydrochloric Acid)”), are unusable because Japanese and U.S. export data do not reconcile with Thai import data for HTS heading 2806.10. The Department should instead use Philippine import data for HTS heading 2806.10.
- The type and grade of Thai imports under HTS heading 2806.10 are different than the hydrochloric acid consumed by Deosen. Deosen consumes bulk hydrochloric acid of 31 percent strength. Thai imports under HTS heading 2806.10 include medical grade, small packaged grades, and other grades besides the bulk hydrochloric acid consumed by Deosen.
- Even if Department continues to value hydrochloric acid with Thai import data, it should use Thai HTS category 2806.10.00103 (“Hydrochloric Acid More Than 36% W/W”), because it is more specific to the input that Deosen consumes.

No other parties commented on this issue.

Department’s Position: We disagree with Deosen that the Thai import data for hydrochloric acid are unusable, but we agree that we should value Deosen’s hydrochloric acid with an HTS category that is more specific to its input.

As we stated in the *Preliminary Determination*, the Department’s practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is

¹⁹² See “Deosen Biochemical’s Section D Response,” dated September 27, 2012 (“Deosen Section D Questionnaire Response”), at Exhibit D-3; *see also* Deosen November 27 Supplemental Questionnaire Response, at 18.

¹⁹³ See U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, Fact Sheet for Calcium Hypochlorite and Sodium Hypochlorite, dated April 2002, available at <<http://www.atsdr.cdc.gov/toxfaqs/tfacts184.pdf>>.

¹⁹⁴ See Fufeng December 18 Supplemental Questionnaire Response, at 6.

¹⁹⁵ *Chlorinated Isocyanurates 2010-2011*, 78 FR 4386, and accompanying IDM at Comment 18.

to select, to the extent practicable, SVs which are product-specific, representative of a broad market average, publicly available and contemporaneous with the POI.¹⁹⁶ We continue to find that SVs derived from Thai import data meet these requirements.

Deosen argues that Japanese and U.S. export data do not reconcile with Thai import data from GTA for HTS heading 2806.10, and that the Thai data is, therefore, unusable. The Thai import data that Deosen placed on the record for HTS heading 2806.10 shows 54 kilograms imported from the United States in December 2011.¹⁹⁷ The U.S. export data for the same HTS heading shows a quantity of 53,000¹⁹⁸ kilograms exported to Thailand from the United States during the first quarter of 2012.¹⁹⁹ Deosen contends that these numbers must refer to the same shipment and that the Thai import data was misreported. The Department has previously stated that it “does not expect one country's export quantities to be a one to one ratio to another country's import data,”²⁰⁰ and we do not agree that the evidence to which Deosen points supports Deosen's conclusion that the Thai import data for HTS heading 2806.10 is unusable. For the same reason, we do not agree with Deosen's argument that a difference in AUV between Thai import data from Japan and Japanese export data to Thailand for HTS heading 2806.10 undermines the reliability of the Thai import data.²⁰¹

Although we mistakenly did not consider the strength of the hydrochloric acid consumed by Deosen for the *Preliminary Determination*, we agree that the record of this investigation contains evidence that Deosen consumes hydrochloric acid with a strength of 31 percent.²⁰² Therefore, for the final determination, we have valued Deosen's hydrochloric acid with the Thai import data within Thai HTS category 2806.10.00103, which corresponds to hydrochloric acid with more than 36 percent water weight, and which Deosen has identified as being specific to its input.

Although no parties commented on the SV used to value Fufeng's hydrochloric acid, we find that the record now contains evidence that Fufeng also consumes hydrochloric acid with a strength that matches the description for Thai HTS category 2806.10.00103 (“Hydrochloric Acid More Than 36% W/W”).²⁰³ Therefore, we have valued Fufeng's hydrochloric acid with the Thai import data within Thai HTS category 2806.10.00103.

¹⁹⁶ See *Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) (“*Certain Artist Canvas*”), and accompanying IDM at Comment 2; see also Preliminary SV Memorandum.

¹⁹⁷ See Deosen Post-Prelim SV Submission, at Exhibit FSV-1.

¹⁹⁸ We note that Deosen argued that the U.S. export data showed 54,000 kilograms exported from the United States to Thailand, rather than 53,000 kilograms.

¹⁹⁹ See Deosen Post-Prelim SV Submission, at Exhibit FSV-1.

²⁰⁰ See *First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009) (“*Certain Activated Carbon 1st Review*”), and accompanying IDM at Comment 3-f.

²⁰¹ See *Certain Activated Carbon 1st Review*, and accompanying IDM at Comment 3-f (finding that a party simply arguing that the export quantities versus import quantities predictably differ, the party did not establish that the export data are more reliable than the import data).

²⁰² See Deosen Section D Questionnaire Response, at Exhibit D-5.

²⁰³ See Memorandum to the File, “Verification of the Sales and Factors Responses of Neimenggu Fufeng Biotechnologies Co., Ltd. (“Neimenggu Fufeng”) and its affiliate Shandong Fufeng Fermentation Co., Ltd. (“Shandong Fufeng”) in the investigation of xanthan gum from the People's Republic of China,” dated February 20, 2013 (“Fufeng Verification Report”), at VE-24, page 120.

Comment 7: Discrepancy in Respondents' Preliminary Weighted-Average Dumping Margins

Deosen Argument:

- When comparing Deosen's and Fufeng's U.S. prices, products, and raw materials used in each respondent's manufacturing processes, there should not be such a large difference in the calculated weighted-average dumping margins for each respondent.
- The difference in the weighted-average dumping margins is due to: 1) the SVs applied to Deosen's cornstarch FOPs and Fufeng's corn FOPs; and 2) intermediate input methodology applied to Deosen's energy consumption.

No other parties commented on this issue.

Department's Position: We determine that the SVs and methodology used to calculate each respondent's weighted-average dumping margins accurately reflect the inputs and production processes used by each respondent. For additional details on these inputs and production processes for each respondent, *see* Comment 16-A (Deosen's cornstarch SV); Comment 11-A (Fufeng's corn SV); and Comment 13 (Deosen's energy intermediate input).

Comment 8: Cornstarch Intermediate Input

Petitioner Argument:

- The Department should value Fufeng's consumption of cornstarch instead of the reported FOPs used by Fufeng to produce cornstarch.
- Valuing the FOPs to make cornstarch understates Fufeng's normal value because it excludes the significant capital costs from the wet-milling facility, where the cornstarch is produced, as these capital costs do not appear in Ajinomoto's financial statements.
- Fufeng's energy consumption for its wet-milling/starch-making facility is unreliable and underreported when compared to the energy used in other wet-milling facilities, according to the Energy Star report.²⁰⁴
- Fufeng did not state that steam was used in the production of xanthan gum in its wet-milling facility.

Fufeng Rebuttal:

- The Energy Star report, published in 2003, relies primarily upon data collected in the 1990s through 2001. This information is now antiquated and not representative of energy consumption during the POI. Also, the energy analysis in the Energy Star report considers operations that are significantly different than Fufeng's because Fufeng produces cornstarch milk while the energy consumption reported in the Energy Star report is for a wet milling operation that produces dry cornstarch.
- Cornstarch milk is a wet product with a high volume of water which is never dried and powdered like cornstarch and, thus, takes less energy to produce than dry cornstarch.

²⁰⁴ *See* Submission from Petitioner, "Comments on Deficiencies in Neimenggu Fufeng Biotechnologies Co., Ltd.'s Section A, C, and D Questionnaire Responses," dated October 15, 2012, at Exhibit 4 (containing "Energy Efficiency Improvement and Cost Savings Opportunities for the Corn Wet Milling Industry," by Christina Galitsky, Ernst Worrell and Michael Ruth, Ernest Orlando Lawrence Berkeley National Laboratory, Berkeley, CA, dated July 2003 ("Energy Star report")).

- The Department’s intermediate input methodology is a limited exception to the general rule of using the respondent’s actual FOPs, and this exception should only be applied if: 1) the intermediate input takes the place of an insignificant self-produced input, or 2) the FOPs may yield a less accurate result because a significant element of cost would not be captured, citing *WBF 2004*.²⁰⁵

Department’s Position: We disagree with Petitioner that it is more accurate to value Fufeng’s intermediate input (*i.e.*, cornstarch milk), using the cornstarch SV, rather than to value Fufeng’s reported FOPs in its starch-making facility, which is one stage of the production process for making xanthan gum.

Our policy, consistent with section 773(c)(1)(B) of the Act, is to value the FOPs that a respondent uses to produce the subject merchandise. Accordingly, our standard NME questionnaire asks respondents to report the FOPs used in the various stages of production.

There are, however, two limited exceptions to this general rule.²⁰⁶ First, in some cases a respondent may report FOPs used to produce an intermediate input that accounts for a small or insignificant share of total output. The Department recognizes that, in those cases, the increased accuracy in our overall calculations that would result from valuing (separately) each of those FOPs may be so small so as to not justify the burden of doing so. Therefore, in those situations, the Department would value the intermediate input directly.²⁰⁷

Second, in certain situations, it is clear that attempting to value the FOPs used in a production process yielding an intermediate product would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in the overall buildup when SVs are applied to the FOPs.²⁰⁸ For example, the Department addressed whether to value a respondent’s FOPs used in extracting iron ore – an input to its wire rod – in *Steel Wire Rod from Ukraine*.²⁰⁹ The Department determined that, if it were to use those FOPs, it would not sufficiently account for the capital costs associated with the iron ore mining operation given that the surrogate financial ratios used for valuing production overhead did not have mining operations. Therefore, because ignoring this important cost element would distort the calculation, the Department declined to value the FOPs used in mining iron ore and instead valued the intermediate input, which was iron ore.²¹⁰

²⁰⁵ See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture From the People’s Republic of China*, 69 FR 35312, 3525-26 (June 24, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People’s Republic of China*, 69 FR 67313 (November 17, 2004) (“*WBF 2004*”).

²⁰⁶ See *Drill Pipe from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 76 FR 1966 (January 11, 2011), and accompanying IDM at Comment 12.

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Ukraine*, 67 FR 55785 (August 30, 2002) (“*Steel Wire Rod from Ukraine*”).

²¹⁰ See *Steel Wire Rod from Ukraine*; see also *Hot-Rolled Carbon Steel Flat Products*, 66 FR 49632; *Final Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon Steel Plate From the People’s Republic of China*, 62 FR 61964 (November 20, 1997); *Notice of Final Determination of Sales at Less Than Fair Value; Furfuryl Alcohol From the People’s Republic of China*, 60 FR 22544 (May 8, 1995).

In this investigation, the Department has determined that the exceptions described above do not apply for the following reasons. First, Fufeng produces the intermediate input, cornstarch milk, in liquid form, from corn and other inputs in its starch-making facility.²¹¹ Cornstarch milk is then piped, in liquid form, to the xanthan-gum-making facility.²¹² Cornstarch milk, which is a liquid, is a different product from cornstarch, which is a dry powder. Therefore, we do not agree with Petitioner that applying the SV for a different product, cornstarch, to Fufeng's cornstarch milk, would result in a more accurate weighted-average dumping margin.

We also disagree with Petitioner that using the Ajinomoto financial statements would result in a significant underreporting of Fufeng's overhead costs because Ajinomoto begins its production process for MSG and lysine with tapioca starch – a product which has already been processed from a raw agricultural commodity. Although we agree with Petitioner that Ajinomoto begins its production process with tapioca starch, we disagree that this results in a distortion to Fufeng's financial overhead ratio. We have examined Fufeng's production process for its starch-making facility and determine that the factory equipment costs are not significant enough to justify using the intermediate input methodology rather than Fufeng's actual FOPs. In *Steel Wire Rod from Ukraine, WBF 2004*, and *Frozen Fish Fillets from Vietnam 2003*,²¹³ where the Department valued intermediate inputs, we stated that the reported FOPs would not sufficiently account for the capital costs for certain production steps because the surrogate producer's overhead did not include these production steps. In these cases the Department determined that the respondent incurred significant capital costs for a production step and those costs were not reflected in the financial overhead ratio for the surrogate producer. In this case, we determine that Fufeng's capital costs for its starch-making facility, which processes corn into cornstarch milk, are not at the same level of significance as in cases where the Department used an intermediate input.²¹⁴ In addition, Fufeng's starch-making facility requires less capital equipment and less electricity²¹⁵ to operate than does the rest of the xanthan gum production process. Therefore, the starch-making facility is not a significant contributor to the overhead costs in comparison to the other production steps required to make xanthan gum because energy is a significant input in making xanthan gum. Also, while Ajinomoto does not have a starch-making facility, it also has other facilities which Fufeng does not have, such as retail packing of MSG seasoning products.²¹⁶ The Department's practice does not require an exact match between the production experience of the respondent and the surrogate producer, in order for a surrogate financial statement to be

²¹¹ See Fufeng Verification Report, at 14; see also Fufeng November 27 Supplemental Questionnaire Response, at 9-10.

²¹² See *id.*

²¹³ *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003) (“*Frozen Fish Fillets from Vietnam 2003*”), and accompanying IDM at Comment 3.

²¹⁴ See Fufeng Verification Report, at page 6 of VE-14, which details the production steps for the starch-making facility.

²¹⁵ See Submission from Fufeng, “Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in Antidumping Duty Investigation on Xanthan Gum from the People's Republic of China (A-570-985),” dated September 27, 2012 (“Fufeng Section D Questionnaire Response”), at 16 and Exhibits D-6 and D-7.

²¹⁶ See Submission from Deosen, “Deosen Biochemical's Rebuttal Factual Information,” dated November 2, 2012, at Exhibit SVR-1.

usable.²¹⁷ In this instance, we are relying on the best available financial statement on the record, as previously discussed above in Comment 2.

Next, we determine that the Energy Star report is not instructive on how much energy Fufeng should be consuming in its starch-making facility. The Energy Star report is based on a corn wet-milling facility which produces ethanol, sweeteners, and dry cornstarch,²¹⁸ whereas Fufeng produces cornstarch milk in wet form. The production process and, therefore, energy usage, in Fufeng's starch-making facility are significantly different from the processes used in the wet-milling facility described in the Energy Star report. As a result, we would not expect the energy consumption numbers to match.

Further, we disagree with Petitioner that Fufeng did not state that steam was used in the production of xanthan gum. In Fufeng's November 27, 2012 Section D supplemental questionnaire response, Fufeng responded to the Department's question regarding how Fufeng tracks its consumption of electricity and steam by workshop in its normal course of business. Also, Fufeng provided information regarding its steam consumption in a schematic of its production process.²¹⁹ Based on this information, we disagree with Petitioner's allegation that Fufeng reported incorrect percentages of steam consumed in the production of subject and non-subject merchandise. In addition, while at verification, Fufeng clarified that steam was used for certain functions in the production process.²²⁰

Finally, we disagree with Petitioner that valuing Fufeng's FOPs in the starch-making facility, including its by-product offsets in the *Preliminary Determination* has created aberrational results. Petitioner calculated Fufeng's cost of manufacture for its starch-making facility (less its by-product offsets) and claims that the cost obviously is distorted when compared to Petitioner's proposed valuation of the intermediate input, cornstarch milk. However, we note that Petitioner did not include in its calculation the surrogate financial ratios when it compared its cornstarch SV to its cost of manufacture figure for Fufeng's starch-making facility.²²¹ Hence, we determine that Petitioner's cost build-up is not an accurate portrayal of how the Department would calculate normal value and therefore does not support Petitioner's argument that the *Preliminary Determination* was aberrational.

Comment 9: FOP Allocation Methodology and Steam By-Product Offset

Deosen Argument:

- Fufeng has not properly reported certain FOPs, such as electricity and steam.
- Fufeng's cost reconciliation of its FOPs does not agree with the cost of xanthan gum in Fufeng's 2011 financial statements.

²¹⁷ See *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008), and accompanying IDM at Comment 20-D.

²¹⁸ See Energy Star report, at 7.

²¹⁹ See Fufeng November 27 Supplemental Questionnaire Response, at Exhibit SD-23.

²²⁰ See Fufeng Verification Report, at 13.

²²¹ See Petitioner Case Brief, at 9-10 and Exhibits 3-4.

Petitioner Argument:

- The Department discovered at verification that steam was used in the production of xanthan gum. As partial adverse facts available for Fufeng's unreported steam consumption, the Department should deny Fufeng's steam by-product offset and allocate a percentage of the steam produced at the electricity-generating workshops to subject merchandise.
- Fufeng should not have claimed a steam by-product offset because Fufeng's inputs consumed at the electricity-generating workshops, such as coal, were fully and correctly allocated to subject and non-subject merchandise through the use of electricity consumption as the allocation factor.

Fufeng Rebuttal (to Deosen):

- At verification, the Department reconciled Fufeng's reported costs to its accounting records for each stage of production, as well as to its financial statements.
- Fufeng properly reported its electricity consumption for both Neimenggu Fufeng and Shandong Fufeng and the ratios, which Deosen cites as distorting the electricity FOP, are the proportion of purchased electricity from Shandong Fufeng and self-generated electricity produced at Neimenggu Fufeng.

Fufeng Rebuttal (to Petitioner):

- Fufeng properly reported its steam by-product offset because the Department's current practice for by-product offsets is to allow such offsets based on the amount of by-product generated once the by-product has been shown to have commercial value. At verification, the Department confirmed: (1) Fufeng's electricity production; (2) the amount of steam consumed in making xanthan gum; (3) that the excess steam by-product from the xanthan gum plant was re-used in the production of non-subject merchandise; and (4) that Fufeng maintained supporting accounting records.

Department's Position: For the final determination, the Department has revised Fufeng's allocation methodology and adjusted Fufeng's energy FOPs. Based on these adjustments, Fufeng's steam by-product offset is no longer necessary.

Allocation methodology and steam by-product offset

We disagree with Fufeng that the inputs consumed at the energy-generating workshops²²² are correctly allocated to both subject and non-subject merchandise based on electricity consumption alone. In its responses, Fufeng allocated its energy usage based only on electricity consumption, rather than electricity and steam. Because both electricity and steam are main products of the energy generating process, the inputs consumed in their production should be allocated based on total energy consumption (both steam and electricity).²²³ Accordingly, we have re-allocated the inputs consumed at the energy-generating workshops to xanthan gum and non-subject merchandise based on the total energy consumed at each production workshop, expressed in equivalent units. For details of this analysis and calculations, *see* Fufeng Final Analysis Memorandum.²²⁴

²²² Fufeng has reported these workshops as electricity-generating workshops.

²²³ Both electricity and steam are produced via a joint production process using the same inputs.

²²⁴ *See* Fufeng Final Analysis Memorandum.

Further, we agree with Petitioner that an offset for the steam consumed at non-xanthan gum workshops is not warranted. By allocating the total raw material inputs consumed at the energy-generating workshops to the total steam and electricity output to all workshops (subject merchandise and non-subject merchandise), and then allocating a proportionate share of these inputs to xanthan gum based on the specific consumption of steam and electricity at the xanthan gum workshops, we have captured only the inputs attributable to the production of xanthan gum in the revised energy FOP. Thus, it is not necessary to include an offset for energy consumed at other workshops which produce non-subject merchandise (*i.e.*, Fufeng’s reported offset for steam consumed at non-subject merchandise production workshops).

We agree with Deosen and Petitioner that certain FOPs, such as electricity and steam, were not properly reported based on Fufeng’s allocation methodology because Fufeng only allocated its energy based on electricity instead of electricity and steam. As noted above, we have modified Fufeng’s allocation methodology for its energy FOP to now be based on total energy consumption (both steam and electricity). However, we disagree with Deosen’s concerns about Fufeng’s work-in-process (“WIP”) impacting Fufeng’s reported FOPs. Fufeng’s production process, which differs significantly from Deosen’s, uses a continuous production system which uses corn (and other inputs) to make cornstarch milk, which is then pumped to the xanthan gum making workshops without entering inventory.²²⁵ While we have adjusted Fufeng’s energy FOP as noted above, at verification we tied Fufeng’s reported FOPs to its accounting records, which include total POI quantities for the FOPs.²²⁶ Hence, although we confirmed at verification that Fufeng’s reported quantities used to calculate its FOPs were properly reported, we have determined that Fufeng’s reported allocation methodology does not reasonably account for its energy consumption, which was based only on electricity, and not steam.

Further, we disagree with Deosen that valuing Fufeng’s intermediate input, cornstarch milk, rather than Fufeng’s reported FOPs from its starch-making workshop (such as corn), is necessary to correct Fufeng’s energy consumption. *See* Comment 8.

We also disagree with Petitioner that the Department was not aware that Fufeng consumed steam in the production of xanthan gum prior to verification.²²⁷ In Fufeng’s November 27, 2012 Section D supplemental questionnaire response, Fufeng fully responded to the Department’s question regarding how Fufeng tracks its consumption of electricity and steam by workshop in its normal course of business. Also, Fufeng provided additional information regarding its steam consumption in a schematic of its production process.²²⁸ In addition, while at verification, Fufeng clarified, in response to questions by the Department, that steam was used for certain functions in the production process.²²⁹ Therefore, we find that an adverse inference is not warranted because Fufeng has complied with the Department’s requests to the best of its ability.

²²⁵ *See* Fufeng Verification Report, at 14.

²²⁶ *See* Fufeng Verification Report, at 28-41.

²²⁷ For Neimenggu Fufeng, Fufeng reported its inputs, such as coal and water, to make the steam and electricity used in making xanthan gum.

²²⁸ *See* Fufeng November 27 Supplemental Questionnaire Response, at Exhibit SD-23.

²²⁹ *See* Fufeng Verification Report, at 13.

Finally, we disagree with Deosen that Fufeng's allocation of its self-produced and purchased electricity results in Fufeng underreporting its electricity FOP. Fufeng reported its electricity consumption for both Neimenggu Fufeng and Shandong Fufeng. The ratios, which Deosen claims are distortive, are the proportion of purchased electricity from Shandong Fufeng and self-generated electricity produced at Neimenggu Fufeng. Fufeng reported its electricity consumed at Neimenggu Fufeng and Shandong Fufeng when it calculated its total electricity consumed.²³⁰ We confirmed these figures at verification.²³¹

Cost reconciliation to Fufeng's financial statements

We disagree with Deosen's contention that Fufeng's cost reconciliation of its FOPs does not correlate with its cost for xanthan gum in Fufeng's 2011 financial statements and, therefore, Fufeng's reported FOPs must be inaccurate. When we addressed this issue at verification, Fufeng explained that its total reported cost figure includes the cost for xanthan gum workshops as well as the cost for non-xanthan gum workshops which also consume the same inputs as the xanthan gum workshops.²³² In addition, at verification, we tied Fufeng's total reported costs to its accounting records for each stage of production and to Fufeng's financial statements.²³³

Comment 10: Packing FOP for Raw Xanthan Gum

Petitioner Argument:

- Adjust Fufeng's packing materials and packing labor to account for not reporting the packing costs of shipping raw xanthan gum from Neimenggu Fufeng to Shandong Fufeng by applying an adjustment factor calculated by dividing the production output of Shandong Fufeng by Fufeng's consolidated production output.

Fufeng Rebuttal:

- The bags used to transport raw xanthan gum from Neimenggu Fufeng to Shandong Fufeng are not packing material for a finished product (xanthan gum). Department practice is to not value temporary packing material for a semi-finished product, such as raw xanthan gum, as these packing materials are an overhead item rather than a separately reported packing cost, citing *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review*, 72 FR 13242 (March 21, 2007) and accompanying IDM at Comment 3.E. ("*Fish Fillets from Vietnam 2004-2005*").

Department's Position: We agree with Fufeng that the bags used to transport raw xanthan gum from Neimenggu Fufeng to Shandong Fufeng are not packing material for a finished product ready for exportation to the United States. The Department has broad discretion in valuing indirect materials included in factory overhead. The Federal Circuit has stated that "{n}othing in the statute requires the Department to value each individual element in a non-market economy," nor is the Department "required to do an item-by-item analysis in calculating factory overhead."²³⁴ In *Fish Fillets from Vietnam 2004-2005*, the Department declined to value bags

²³⁰ See Fufeng Section D Questionnaire Response, at Exhibit D-7.

²³¹ See Fufeng Verification Report, at 33-35.

²³² See Fufeng Verification Report, at 30.

²³³ See Fufeng Verification Report, at 25-27.

²³⁴ See *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

that were used to pack semi-finished fish fillets that were then transported to another location for final processing. The Department explained that the bags would be included in factory overhead rather than as an FOP. Like in *Fish Fillets from Vietnam 2004-2005*, the bags used by Fufeng are for temporary and intermediate packing purposes, and not to pack the subject merchandise for exportation to the United States. Consistent with past Department practice, we decline to value these bags.

Comment 11: Fufeng Surrogate Values

Comment 11-A: Corn

Petitioner Argument:

- Use the weighted average value of the AUVs of Thai imports of corn under Thai HTS numbers 1005.90.90001, 1005.90.90002, and 1005.90.90090, based on the volume of corn purchased during the POI by Fufeng. Also, add an additional amount to the SV as a fine in accordance with Thailand's Agricultural Standards Act.²³⁵
- The Thai corn standard demonstrates, in conjunction with Fufeng's corn data, that the corn SVs on the record from the other potential surrogate countries are not as specific as the Thai HTS numbers, and an apples-to-apples comparison cannot be made between the Thai import values and the import values of other surrogate countries.
- Differences in the Thai import values are based on the differences in the quality of the corn rather than the existence of import quotas, as suggested by Deosen.

Deosen Argument:

- The Thai import value used as an SV for corn in the preliminary determination is aberrationally low, and the Thai domestic prices are not broad market averages or specific to the type and grade of corn consumed by Fufeng.
- The domestic Philippine corn prices are free of subsidies, contemporaneous, publicly available, specific, tax exclusive and corroborated by data on the record. However, if the Department uses Thai corn prices, the domestic Thai corn prices on the record are more reliable than Thai import data because these prices are within the range of the other data on the record for feed grade corn.

Fufeng Argument:

- Fufeng's corn purchases are measured against Chinese corn standard GB 1353-2009 and there is no evidence that standards GB 1353-2009,²³⁶ GB 2715-2005,²³⁷ and the Thailand Agricultural Standard for Maize ("Thai corn standard")²³⁸ placed on the record by Petitioner are intended to apply to products that are further processed from corn, such as xanthan gum.

²³⁵ See Petitioner Post-Prelim SV Submission, at Exhibit 12.

²³⁶ See Petitioner Post-Prelim SV Submission, at Exhibit 8, (the GB 1353-2009 standard (Chinese corn standard) specifies the terms and definitions, classification, quality and hygienic requirements for corn as well as the standard for the purchase, storage, transport, processing and sale of commercial corn).

²³⁷ See Petitioner Post-Prelim SV Submission, at Exhibit 9, (the GB 2715-2005 standard (Chinese hygienic grain standard) is for the hygienic treatment and maintenance of grains and the scope covers raw grain and products of grain, including cereals, beans and potato, which are for human consumption).

²³⁸ See Petitioner Post-Prelim SV Submission, at Exhibit 10.

- There is a separate standard which covers food grade xanthan gum,²³⁹ and Fufeng's food grade xanthan gum complies with all standards and requirements.
- If the Department decides to base the SV for corn on all three Thai HTS numbers as the basis for the corn SV, the Department should weight-average these SVs based on the import quantities and values rather than on the basis of Fufeng's corn purchases.
- Philippine price data for yellow grade corn are not more specific to the type of corn used by Fufeng to produce xanthan gum. Deosen's suggestion to use domestic Thai corn prices as a better alternative than Thai GTA import data contradicts Deosen's own contention that domestic Thai price data are distorted due to corn subsidies.

Department's Position: Petitioner contends that the Department should use a new methodology to value Fufeng's corn by weight-averaging the AUVs of the Thai HTS numbers based on the volume of Fufeng's corn purchased during the POI. However, Thai HTS number 1005.90.90001 is corn fit for human consumption, and the description for the Thai "other" category (HTS number 1005.90.90090) is for corn which is not otherwise included in the categories containing corn fit for human consumption or corn fit for animal feed. Because the Department has determined that, based on the description of Fufeng's corn input, Thai HTS number 1005.90.90002, which was used in the preliminary determination, remains the best available information with which to value Fufeng's corn, it is unnecessary, and would be distortive, if we were to average the values for all three Thai HTS numbers.

Furthermore, with respect to Deosen's proposal that we use a Philippine SV to value Fufeng's corn, the Department has a preference, pursuant to 19 CFR 351.408(c)(2), to value the FOPs in a single surrogate country, when possible.²⁴⁰ In *Clearon*, the CIT found this preference reasonable because deriving surrogate data from one surrogate country limits the amount of distortion introduced into calculations because a domestic producer would be more likely to purchase a product available in the domestic market.²⁴¹ Accordingly, we have determined that the best available information regarding the appropriate and reliable SV data is from Thailand, the primary surrogate country selected for this investigation; therefore, there is no need to use an SV from a different surrogate country.

Due to the proprietary nature of this issue, for a complete discussion of the issue see Fufeng's proprietary analysis memo.

²³⁹ See Fufeng December 18 Supplemental Questionnaire Response, at Exhibit 3, (the GB 13886-2007 standard (Chinese food grade xanthan gum standard) establishes testing methods as well as physic-chemical, such as lead (Pb) and pyruvic acid, and microbiological standards, such as total plate count (to determine bacteria count), E. coli, salmonella, yeast and molds). This standard was implemented on June 1, 2008, and was published on October 20, 2007, by the China National Administration for Quality Supervision, Inspection and Quarantine and China National Standardization Management Committee.

²⁴⁰ See *Frozen Shrimp 6th Review*, and accompanying IDM at Comment 10.

²⁴¹ See *Clearon Corp. and Occidental Chemical Corp. v. United States*, Slip Op. 13-22 (CIT 2013) at 13.

Comment 11-B: Decoking Agent

Fufeng Argument:

- The Department should value Fufeng’s decoking agent with a weighted average of the Thai import data used in the *Preliminary Determination*, which was for Thai HTS category 2825.90.0009 (“other metal oxides”), and Thai HTS category 2811.29 (“inorganic oxygen compounds of non-metals, not elsewhere specified”), because information placed on the record after the *Preliminary Determination* indicates that decoking agents are also classified under HTS category 2811.29.
- If a metal oxide could act as a decoking agent by oxidizing the carbon particles, then the same function could be performed by non-metal oxides.
- Record evidence demonstrates that hydrogen peroxide, which is a non-metallic oxide, can be used to remove carbonaceous resinous or gummy deposits.

Petitioner Rebuttal:

- Prior to the *Preliminary Determination*, Fufeng suggested using import data for Philippine HTS number 2825.90.0009, and Fufeng provided no other information about its decoking agent. Therefore, there is no basis for the Department to adopt or consider Fufeng’s argument.

Department’s Position: We disagree with Fufeng that the Department should weight average two different SVs to value Fufeng’s decoking agent. Section 773(c)(1) of the Act directs the Department to use the “best available information” from the appropriate market-economy country to value FOPs. In selecting the best available information from among the SVs on the record, the Department’s preference is to use, where possible, a range of publicly available, non-export, tax-exclusive, and product-specific prices for the POI. Each of these criteria is applied non-hierarchically to the particular case-specific facts and with preference to data from a single surrogate country.²⁴² As Fufeng is not arguing the merits of our use of Thai import data to value its decoking agent, the issue before the Department is whether to use a single HTS category, as was done in the *Preliminary Determination*, or to average two different categories as the best available “product-specific prices” with which to value Fufeng’s decoking agent.

In exhibit D-2 of its September 27, 2012 section D response, Fufeng listed its inputs, one of which it reported as “decoking agent.” In exhibit D-5 of the same response it provided an FOP spreadsheet, again listing the input as decoking agent. On October 26, 2012, Fufeng submitted “surrogate values that should be used to value the factors of production reported” for the preliminary determination,²⁴³ and stated that the Philippine HTS number 2825.90.0009 is the

²⁴² See *Clearon Corp. v. United States*, Slip Op. 13-22 (CIT 2013) at *12; see also *Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 159 (January 2, 2008); *Carbazole Violet Pigment 23 from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 26589 (May 10, 2007); *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 11349 (March 17, 2009), and accompanying IDM at Comment 2.

²⁴³ See Submission from Fufeng, “Neimenggu Fufeng First Surrogate Value Submission in Antidumping Duty Investigation on Xanthan Gum from the People’s Republic of China (A-570-985),” dated October 26, 2012 (“Fufeng SV Submission”), at Exhibit 1 (We note that the second page of the cover letter refers to FOPs reported by CS Wind, an apparent reference to a different proceeding. Nevertheless, the submission contains Fufeng’s certification of accuracy regarding the FOPs and the appropriate SVs with which to value its reported FOPs.).

appropriate category with which to value its decoking agent.²⁴⁴ HTS subchapter 2825 covers “Hydrazine and hydroxylamine and their inorganic salts; other inorganic bases; other metal oxides, hydroxides and peroxides.”

Although Fufeng now argues that the Department should average the import data for HTS heading 2811.29, “Inorganic oxygen compounds of nonmetals, not elsewhere specified,” and the Thai HTS number 2825.90.0009 (“other metal oxides”), which was used in the *Preliminary Determination*, Fufeng does not support this argument with any evidence with respect to its own decoking agent. In fact, Fufeng has made no further attempt to describe its own decoking agent input since certifying that the HTS number describing other metal oxides was the appropriate category with which to value its input. Fufeng placed on the record information indicating that non-metal oxides, *i.e.*, HTS heading 2811.29, may perform the same decoking function as the metal oxides that it certified as the appropriate SV for its own decoking agent. Fufeng claims that non-metal oxides may also remove carbon particles, just like metal oxides; however, Fufeng is silent regarding whether non-metal oxides are in any way relevant to its own decoking agent input.

Furthermore, the evidence provided by Fufeng for including non-metal oxides in the calculation of the SV for Fufeng’s decoking agent is based on hydrogen peroxide, a non-metallic oxide, derived from a U.S. patent, dated July 18, 1989.²⁴⁵ However, the record is not clear whether hydrogen peroxide is included in HTS heading 2811.29, nor does that seem relevant in any event, as Fufeng makes no claim that hydrogen peroxide is similar to Fufeng’s FOP for its decoking agent. Thus, we find that the analysis of hydrogen peroxide as a representative of non-metallic oxides is irrelevant to the facts of this case and has no bearing on our choice of the appropriate SV for Fufeng’s decoking agent.

Finally, Fufeng argues that it is the Department’s ordinary practice to weight average data whenever an input is classified under multiple HTS categories. We disagree. Fufeng’s support for its proposal is the Department’s treatment of certain FOPs in the *Preliminary Determination*, where the Department valued several FOPs by weight averaging different HTS categories. However, as explained in the Preliminary SV Memorandum, the Department valued a single FOP using different HTS categories for different portions of the POI – one for the last quarter of 2011 and a different one for the first quarter of 2012 – because Thailand reported through GTA that it had revised certain HTS numbers and descriptions for 2012. Therefore, it was more accurate to value certain FOPs using the single HTS category under which the product was classified for one part of the POI, and a different, single HTS category under which the same product was classified for another part of the POI. This is much different than averaging multiple data points which cover the same time period for the same FOP. Although the HTS categories differed because they had been revised, the product was the same. Fufeng’s suggestion that we weight average the values for two different products in order to value a single FOP is not supported by our *Preliminary Determination*, nor could Fufeng cite any case where

²⁴⁴ For the *Preliminary Determination*, the Department valued Fufeng’s decoking agent with the Thai HTS category with the description that best matched the description of the Philippine HTS category suggested by Fufeng.

²⁴⁵ See Submission from Fufeng, “Fufeng’s Post-Preliminary Surrogate Value Rebuttal Submission in Antidumping Duty Investigation on Xanthan Gum from the People’s Republic of China (A-570-985),” dated March 4, 2013 (“Fufeng Post-Prelim SV Rebuttal”), at Exhibit 10C.

we have done so in the past. Further, the record contains no information which demonstrates that Fufeng's FOP for a decoking agent is in fact two separate, distinct products, for if it is two distinct products, then Fufeng should have reported two separate FOPs. Therefore, we find that Thai HTS number 2825.90.0009 used in the *Preliminary Determination* continues to represent the best available information to value Fufeng's decoking agent input for the final determination.

Comment 11-C: Caustic Soda

Fufeng Argument:

- Fufeng argues that it erred in translating the caustic soda input as potassium hydroxide, where it should have been translated as sodium hydroxide. For the final determination, the Department should value Fufeng's caustic soda input using Thai import data for Thai HTS number 2815.12.00102 ("sodium hydroxide more than 20% W/W").

No other party commented on this issue.

Department's Position: We agree with Fufeng that caustic soda is most appropriately valued for the final determination using Thai import data for Thai HTS number 2815.12.00102 ("Sodium Hydroxide More Than 20% W/W"). For the *Preliminary Determination* we valued Fufeng's caustic soda input using Thai import data for Thai HTS number 2815.20.00102 ("Potassium Hydroxide More Than 20% W/W"). Fufeng recommended this HTS category because it stated that the caustic soda it consumed was potassium hydroxide with a weight concentration in excess of 20 percent.²⁴⁶

First, in Exhibit D-2 of its September 27, 2012 section D response, Fufeng reported its input as caustic soda. Further, during verification, the raw material in question was translated as caustic soda throughout the source documentation examined by the Department.²⁴⁷

Since the *Preliminary Determination*, Fufeng has clarified the record both in terms of its FOP, as well as the proper SV with which to value the input. For instance, Fufeng claims that as a result of a translation error, Fufeng's November 26, 2012 pre-preliminary comments mistakenly referred to caustic soda as potassium hydroxide, whereas the record now shows that caustic soda is synonymous with sodium hydroxide, and does not refer to potassium hydroxide.

Fufeng points out that exhibit 7 of its February 22, 2013, Post-Preliminary SV Submission contains five separate articles and definitions confirming that "caustic soda" and "sodium hydroxide" are synonymous, and that potassium hydroxide is synonymous instead with "caustic potash," an entirely different chemical compound. Fufeng adds that record evidence also shows that sodium hydroxide and potassium hydroxide have different molecular structures, and HTS heading 2815.12 of the Thai import statistics plainly states that it covers "Sodium Hydroxide (Caustic Soda)."

²⁴⁶ See Submission from Fufeng, "Neimenggu Fufeng Pre-Preliminary Comments in Antidumping Duty Investigation on Xanthan Gum from the People's Republic of China (A-570-985)," dated November 26, 2012 ("Fufeng Pre-Prelim Comments"), at 48.

²⁴⁷ See, e.g., Fufeng Verification Report, at VE-15, (Cost Reconciliation), pages 25-28, which contain inventory-out summary sheets showing raw material inventory movement including caustic soda.

The record is clear that the input used by Fufeng is caustic soda. The record further shows that caustic soda is synonymous with sodium hydroxide. Specifically, Exhibit 7 of Fufeng's February 22, 2013 post-preliminary SV submission includes information from chemicalland21.com that states: "Sodium Hydroxide, commonly known as caustic soda, lye, or sodium hydrate, is a caustic compound which attacks organic matter. (Caustic soda is sodium hydroxide, caustic potash is potassium hydroxide and silver nitrate is lunar caustic.)" Based on record evidence,²⁴⁸ for the final determination, we have valued Fufeng's caustic soda input using Thai import data for Thai HTS number 2815.12.00102, which covers sodium hydroxide (caustic soda) with more than 20% water weight.²⁴⁹

Comment 12: Fufeng By-Products

Comment 12-A: Corn Protein Powder

Petitioner Argument:

- Fufeng stated that it did not further process its corn protein powder by-product into products that are saleable for use in animal feed. Therefore, Petitioner contends that the Department should use as an SV Thai import data for HTS heading 2303.30 (brewing or distilling dregs and waste), rather than the SV used in the *Preliminary Determination*, which was based on Thai import data for HTS heading 2309.90 (animal feed preparations).

Fufeng Rebuttal:

- Fufeng cites to the Department's Preliminary SV Memorandum and contends that the Department selected HTS heading 2309.90 based on record information provided by Fufeng on the chemical composition and protein levels for its corn protein powder. Fufeng argues that no new information has been placed on the record since the *Preliminary Determination* such that the Department should reconsider this SV classification.

Department's Position: After a review of the record and based on the description of the HTS heading and Fufeng's description of its by-product, we determine that the most specific SV is one based on imports under Thai HTS subheading 2303.10.90.²⁵⁰ The description of the HTS categories is informative in determining the appropriate value of a by-product. The description for HTS heading 2303.10 is for "Residues Of Starch Manufacture And Similar Residues, Whether Or Not In The Form Of Pellets," while HTS heading 2309.90 is for "Animal Feed Preparations (Mixed Feeds, Etc.), Other Than Dog Or Cat Food Put Up For Retail Sale." Since the corn protein powder is a by-product of corn consumed during Fufeng's starch-making process, we determine that using an HTS category for residues of starch manufacture is a more

²⁴⁸ See Fufeng Pre-Prelim Comments, at 48.

²⁴⁹ See Petitioner SV Submission, at Exhibit 25.

²⁵⁰ Petitioner provided Thai import values and quantities for Thai HTS subheading 2303.10.90 and HTS heading 2303.10, which were in U.S. dollars. See Petitioner SV Submission, at Exhibit 25, pages 1685 and 1697. These data were the same, which means that all imports into Thailand entered under Thai HTS subheading 2303.10.90. Although the Department prefers import statistics based on the currency in which the country reported its Customs data (Thai baht in this case) because this HTS category is more specific to the by-product we are valuing, we determine that using the Thai import statistics for Thai HTS subheading 2303.10.90, in U.S. dollars, is the best SV on the record.

specific description of Fufeng's by-product than the HTS category used in the *Preliminary Determination*, i.e., HTS heading 2309.90 (animal feed preparations).

While we agree with Fufeng that no additional information has been placed on the record since the *Preliminary Determination*, there is no record information indicating the chemical composition and protein levels of the Thai import statistics for HTS heading 2309.90. Hence, the Department is unable to compare Fufeng's corn protein powder's chemical composition and protein levels with these same data from Thai import statistics for HTS heading 2309.90. Therefore, as noted above, a plain reading of the descriptions of the two HTS categories leads us to select Thai HTS subheading 2303.10.90 as the best SV for Fufeng's corn protein powder by-product.

In addition, we disagree with Petitioner's argument to value Fufeng's corn protein powder by-product using Thai import statistics for HTS heading 2303.30 ("Brewing or Distilling Dregs and Waste, Whether or Not in the Form of Pellets.") Based on Fufeng's by-product's chemical composition and protein levels, we determine that Fufeng's by-product is not a product that should be classified and valued using an SV described as a waste or brewed/distilled dreg product because of the different chemical composition and protein levels. Rather, as described above, the Department determines that Thai HTS subheading 2303.10.90, residues of starch manufacturer, is the more specific description and is therefore more appropriate.

Comment 12-B: Corn Embryo

Petitioner Argument:

- Indonesian import data under HTS heading 1104.30 is a more appropriate and accurate tariff classification than the Thai import data under HTS subchapter 1104 classification used in the *Preliminary Determination*. The Department should value corn embryo using Indonesian imports under HTS heading 1104.30 because there were no Thai imports during the POI for this HTS category.

Fufeng Rebuttal:

- Petitioner provided no reason for the Department to reconsider its initial decision to not use Indonesian import data under HTS heading 1104.30 for the corn embryo SV.

Department's Position: We agree with Petitioner that HTS heading 1104.30 ("germ of cereals, whole, rolled, flaked or ground") more closely matches the description of Fufeng's corn embryo by-product than HTS subchapter 1104 ("cereal grains, otherwise worked (hulled, rolled, etc.), except rice (heading 106); germ of cereals, whole, rolled, flaked or ground"). We also agree with Petitioner that there are no Thai imports for the POI under HTS heading 1104.30, only Thai imports under HTS subchapter 1104.²⁵¹ We also agree that the quantity of imports in 2011 for Thailand under HTS heading 1104.30 is too small (one kilogram) to be considered for use as an SV.²⁵² Although the Department's preference is to value all FOPs within a single surrogate country,²⁵³ there are no usable Thai import data on the record of this investigation within HTS category 1104.30. Therefore, for the final determination, we are valuing Fufeng's corn embryo

²⁵¹ See Petitioner Pre-Prelim Comments, at Exhibit 12.

²⁵² See *id.*

²⁵³ See 19 CFR 351.408(c)(2).

by-product with Indonesian import data classified under HTS number 1104.30, rather than Thai import data for HTS subchapter 1104.

Comment 12-C: Corn Rejects, Coal Ash, and Clinker

Deosen Argument:

- Fufeng over-reported its corn rejects, coal ash, and clinker by-product offsets.
- Based on Fufeng's verification report, Fufeng did not demonstrate an ability to document the production quantity for corn rejects so the Department should deny this by-product offset.
- The Department should adjust Fufeng's coal ash by-product offset to deny an offset to the portion of Fufeng's coal ash reused in the production of non-subject merchandise.
- The Department should deny Fufeng's clinker by-product offset because it did not sell clinker or reintroduce it into production during the POI.

Petitioner Argument:

- Adjust Fufeng's coal ash by-product offset to deny an offset to the portion of Fufeng's coal ash reused in the production of non-subject merchandise.
- Deny Fufeng's clinker by-product offset for the same reasons cited by Deosen.

Fufeng Rebuttal:

- Record evidence and the verification report indicate that Fufeng did not over-report its corn reject, coal ash, and clinker by-product offsets.
- Fufeng reported actual POI production quantities of corn rejects and coal ash. Also, it reported the amount of coal ash reintroduced into production.
- Clinker was not sold but it has value and a by-product offset should be granted.

Department's Position: We are not granting Fufeng a by-product credit for corn rejects, but for reasons other than Deosen's arguments. This rejected corn was not used in making cornstarch milk (nor was it a by-product of producing cornstarch milk) during the starch-making process. In addition, Fufeng was only acting as a reseller of these rejected corn kernels rather than a producer of corn kernels.²⁵⁴ Therefore, because these corn rejects did not result from the production of subject merchandise, Fufeng is not eligible for a by-product credit for corn rejects. Since the Department is not granting a by-product credit for corn rejects, Deosen's argument that Fufeng did not demonstrate an ability to document the production quantity is a moot issue.

For coal ash, we agree with Fufeng and are continuing to grant Fufeng a full by-product credit based on its quantity of coal ash produced during the POI. The Department recently explained its practice as follows: "the by-product offset is limited to the total production quantity of the byproduct ... produced during the POR, so long as it is shown that the by-product has

²⁵⁴ See Notice of Final Determination of Sales at Less Than Fair Value: *Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 FR 60980 (October 14, 2004), and accompanying IDM at Comment 4 (where the Department did not use an ME price for purchased steel plate because this steel plate was resold in the domestic market and not used to make hand trucks).

commercial value.”²⁵⁵ To demonstrate that the by-product offset has commercial value, the respondent must show that it resulted from production of subject merchandise and was sold for revenue or reintroduced into production.²⁵⁶ The antidumping questionnaire asked Fufeng to report its POI production quantity and supporting records as well as other records, such as sales invoices, to demonstrate that the by-product has commercial value.²⁵⁷ Fufeng reported the amount of coal ash recovered at its electricity-generating workshops, and stated that this coal ash is either sold or reintroduced into the production of non-subject merchandise.²⁵⁸ During verification, the Department reviewed Neimenggu Fufeng’s December 2011 cash receipt vouchers, transfer vouchers, and VAT invoices, which demonstrated that it sold coal ash, and that coal ash was used as an input into the production of non-subject merchandise (construction materials).²⁵⁹ We also tied Fufeng’s reported coal ash quantities to its FOP database.²⁶⁰ Therefore, Fufeng has demonstrated that its coal ash has commercial value and we confirmed Fufeng’s reported POI production quantity.

Deosen has presented no record evidence to support its allegation that Fufeng is intentionally producing coal ash so that the coal ash can be used to make non-subject merchandise. Hence, we do not agree with Deosen on this matter. As noted above, at verification, the Department confirmed Fufeng’s quantity of coal ash produced at its electricity-generating workshops.

We disagree with Deosen’s contention that the Department’s practice is to deny a by-product credit if the by-product is reused in the production of non-subject merchandise. In *Chlorinated Isos 2007-2008*, the Department granted a by-product credit for ammonia gas, which was then used by the respondent to produce ammonium sulfate (non-subject merchandise).²⁶¹ As noted above, the Department would recognize that a by-product offset has commercial value if the by-product results from production of subject merchandise and is either sold for revenue or reused in production (either subject merchandise or non-subject merchandise).

Also, we are not persuaded by Deosen’s and Petitioner’s request that we limit the coal ash by-product offset. As requested, Fufeng has demonstrated that by selling its coal ash, its coal ash has value, and that it has reported the amount of coal ash produced. Based on the Department’s practice, Fufeng does not need to demonstrate whether it reuses the remaining portion of its coal

²⁵⁵ See *Frontseating Service Valves From the People’s Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 70706 (November 15, 2011) (“*Frontseating Service Valves*”), and accompanying IDM at Comment 18.

²⁵⁶ See *Silicon Metal from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 54563 (September 5, 2012), and accompanying IDM at Comment 3.

²⁵⁷ See Letter from Charles Riggle, Program Manager, AD/CVD Operations, Office 4, to Neimenggu Fufeng Biotechnologies Co., Ltd., regarding, “Antidumping Investigation of Xanthan Gum from the People’s Republic of China: Antidumping Questionnaire,” dated August 7, 2012, at D-9 to D-10.

²⁵⁸ See Fufeng November 27 Supplemental Questionnaire Response, at Exhibit 21a; see also Fufeng Verification Report, at 41.

²⁵⁹ See Fufeng Verification Report, at VE-23, pages 34-42.

²⁶⁰ See *id.*, at VE-23, page 41.

²⁶¹ See *Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 52645 (September 10, 2008) (“*Chlorinated Isos 2007-2008*”), and accompanying IDM at Comment 6.

ash production to get a full by-product credit for the amount of coal ash it produced during the POI.²⁶²

For clinker, we agree with Deosen and Petitioner and are denying Fufeng's clinker by-product offset. Although Fufeng produced a clinker by-product at the electricity-generating workshop, it has not demonstrated that it sold or re-introduced the by-product into production of subject or non-subject merchandise.²⁶³ Hence, based on the Department's practice, Fufeng has not met the conditions for a by-product credit.

Comment 12-D: Soybean Dregs

Petitioner Argument:

- Adjust Fufeng's soybean dregs FOP by a factor which accounts for the difference in moisture content based on an alleged discrepancy in this moisture content.

Fufeng Rebuttal:

- Fufeng demonstrated that its practice is to record production based on a "wet" weight of the soybean and Petitioner has provided no contrary evidence that Fufeng does not sell the soybean dregs on a "wet" weight basis.

Department's Position: We agree with Fufeng and have continued to grant it a by-product credit for soybean dregs. As instructed in the Department's questionnaire, Fufeng has reported the production quantity of its soybean dregs by-product.²⁶⁴ Fufeng has demonstrated that the soybean dregs have value because Fufeng sold the soybean dregs.²⁶⁵ At verification, the Department tied Fufeng's reported soybean dregs weight to source documents for December 2011 and confirmed that Fufeng sold this product.²⁶⁶ There is no record evidence to support Petitioner's argument there is a discrepancy and that Fufeng has misreported its soybean dregs weight. Therefore, consistent with Department practice, we are continuing to grant Fufeng a by-product credit for soybean dregs.

²⁶² See *Frontseating Service Valves*, and accompanying IDM at Comment 18.

²⁶³ See Fufeng Verification Report, at 41.

²⁶⁴ See Fufeng November 27 Supplemental Questionnaire Response, at Exhibit SD-21a.

²⁶⁵ See Fufeng Verification Report, at 41 and VE-23 (by-products), pages 17-31.

²⁶⁶ See *id.*

Comment 13: Energy Intermediate Input

Deosen Argument:

- The Department must calculate Deosen’s weighted-average dumping margin using the FOPs of its affiliated energy supplier Deosen Power rather than valuing the consumption of steam and compressed air.
- The Department has a long-standing practice of valuing the FOPs of affiliated suppliers including instances where the affiliated supplier does not produce the subject merchandise.²⁶⁷
- The key consideration in determining whether to use the FOPs of an affiliated supplier is whether the respondent and the affiliated supplier operated as a single entity.
- The evidentiary record confirms that Deosen controls Deosen Power as a single entity. Given the possibility of manipulation of prices and costs, the U.S. antidumping law and long-standing Department practice require that the Department treat Deosen and Deosen Power as a single entity and, therefore, find that Deosen self produces steam and compressed air.
- The verification report contains factual mistakes and inaccurate legal conclusions regarding Deosen’s reporting of the FOPs for self-produced inputs at Deosen Power. Deosen has accounted for the consumption of all raw materials and has properly reported offsets to normal value as by-products.

Petitioner Argument:

- The Department properly declined to use Deosen Power’s FOPs at the *Preliminary Determination*.
- The Department found in the *Preliminary Determination* that a requirement for treating two companies as a single entity, (*i.e.*, that the companies produce identical or similar products and not require substantial retooling of their facilities in order to restructure manufacturing priorities), had not been met regarding Deosen and Deosen Power.²⁶⁸ Deosen Power produces electricity, steam, and compressed air, and produces nothing close to xanthan gum.
- The Department should also decline to use Deosen Power’s FOPs because Deosen did not report accurate FOPs for Deosen Power. The Department was correct in its statement

²⁶⁷ See *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 54361 (September 14, 2005) (“*Mushrooms*”), and accompanying IDM at Comment 9. Deosen also cites *Certain Oil Country Tubular Goods from the People's Republic of China; Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010); *Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Critical Circumstances*, in Part, 75 FR 57449 (September 21, 2010); and *Coated Paper 2009*. However, we note that there was no discussion of this issue in either the preliminary or final determinations in any of these cases, nor did Deosen place on the record of this investigation any information from these proceedings. Further, with regard to *Coated Paper 2009*, we note that although the issue of valuing inputs was not discussed, the affiliated supplier that was not also a producer was in fact found to be an exporter of the subject merchandise produced by the respondent. See *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Notice of Preliminary Determination of Sales at less than Fair Value and Postponement of Final Determination*, 75 FR 24892 (May 6, 2010) (“*Coated Paper 2009 Prelim*”).

²⁶⁸ See Memorandum from Erin Kearney to Abdelali Elouaradia entitled “Affiliation and Single Entity Status” dated January 3, 2013.

that Deosen's "methodology does not attribute all of the inputs consumed by Deosen Power to xanthan gum production."²⁶⁹

- Deosen has reported steam as both a by-product and a co-product. If the Department grants a by-product offset for steam, then it should attribute 100 percent of Deosen Power's FOPs to xanthan gum production.
- Deosen's approach to weight-averaging further understates Deosen Power's FOPs.²⁷⁰ This error provides another reason why the Department should not use Deosen Power's FOPs.

Department's Position: For the final determination, the Department has continued to value Deosen's steam and electricity consumption for purposes of the margin calculation, rather than valuing the FOPs of its affiliated energy supplier, Deosen Power, for producing steam and electricity.²⁷¹

Where inputs are produced by an affiliated company, the Department will typically not treat the inputs as being self-produced by the respondent unless it determines that the two entities should be collapsed and treated as a single entity pursuant to section 351.401(f) of the Department's regulations.²⁷² Section 351.401(f)(1) of the Department's regulations provides that two affiliated companies may be treated as a single entity if the following two criteria are met: (1) the affiliated producers "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities;" and (2) "there is a significant potential for manipulation of price or production."²⁷³ In determining whether a significant potential for manipulation exists, 19 CFR 351.401(f)(2) states that the Department may consider various factors, including: (1) the level of common ownership; (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (3) whether the operations of the affiliated firms are intertwined through the sharing of sales information, involvement in production and pricing

²⁶⁹ See Memorandum to the File through Charles Riggle, Program Manager, Office 4, AD/CVD Operations, from Erin Kearney, International Trade Analyst, Office 4, and Robert Greger, Senior Accountant, Office of Accounting, "Verification of the Questionnaire Responses of Deosen Biochemical Ltd.," dated February 20, 2013 ("Deosen Verification Report"), at page 30.

²⁷⁰ Petitioner provides proprietary calculations to illustrate this assertion. See Petitioner Rebuttal Brief, at 40-41.

²⁷¹ As noted at Comment 14, below, the Department has been unable to find a suitable surrogate value for compressed air purchased from Deosen Power and has not valued compressed air at the final determination.

²⁷² See, e.g., *First Administrative Review of Sodium Hexametaphosphate From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 75 FR 64695 (October 20, 2010) ("Sodium Hexametaphosphate 2007-2009"), and accompanying IDM at Comment 1 (where the Department declined to use the FOPs of the respondent's affiliated energy supplier because the Department's collapsing criteria were not met); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 FR 12726 (March 17, 2010) ("Fish Fillets from Vietnam 2007-2008"), and accompanying IDM at Comment 4a (where the Department declined to collapse the respondent with its affiliated supplier and use the supplier's FOPs because substantial retooling would be required to produce similar or identical products); *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 Order*, 75 FR 8301 (February 24, 2010) (where the Department declined to collapse two affiliates because one did not produce or export similar or identical merchandise); *Lightweight Thermal Paper from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008) ("Thermal Paper"), and accompanying IDM at Comment 8 (where the Department declined to collapse the respondent with an affiliated supplier).

²⁷³ See 19 CFR 351.401(f)(1).

decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.²⁷⁴ Where an affiliated company is not a producer but is involved in the exportation of subject merchandise, we have found that the regulatory requirements for single entity treatment are met due to the significant potential for the manipulation of price and/or export decisions.²⁷⁵ The CIT upheld the Department's decision to include export decisions in its analysis of whether there is a significant potential for manipulation.²⁷⁶

In this case, the record evidence shows that the regulatory criteria of 19 CFR 351.401(f)(1) have not been met. Deosen Power is not a producer of products similar or identical to those produced by Deosen (*i.e.*, xanthan gum), and also could not produce such products without substantial retooling. Further, Deosen Power is not involved in the export or sale of subject merchandise. Although common ownership and shared managerial employees or board members exist between Deosen and Deosen Power, in such instances where it is clear that an affiliated party is neither a producer nor an exporter of subject merchandise, we find that there is no basis to conclude that a significant potential for the manipulation of price or production exists.²⁷⁷ Thus, we find that the regulatory criteria for treating affiliated companies as a single entity are not met and we have not collapsed Deosen Power with Deosen in accordance with section 351.401(f).

We disagree with Deosen's argument that it "exercises complete legal and operational control" over Deosen Power, and that we should, therefore, consider the two companies as a single entity within the meaning of the Department's regulations.²⁷⁸ As stated above, the Department may consider factors such as common ownership, shared board members or managerial employees, and intertwined operations between two affiliated companies in determining whether a significant potential for manipulation exists,²⁷⁹ but in order for the Department to consider treating the companies as a single entity, they must also meet the other criterion within 19 CFR 351.401(f)(1) (*i.e.*, having production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities). As Deosen Power produces only energy, rather than products similar or identical to the subject merchandise, we do not agree with Deosen that the control that it contends it exercises over Deosen Power, is, on its own, sufficient to treat Deosen and Deosen Power as a single entity for purposes of determining the margin of dumping.²⁸⁰ Absent a finding that Deosen and Deosen Power are a single entity, we find it inappropriate to value upstream inputs that were not used by the actual producer of subject merchandise (*i.e.*, Deosen) because such valuation would not reflect the producer's own production experience.²⁸¹

²⁷⁴ See *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails From Taiwan*, 62 FR 51427, 51436 (October 1, 1997).

²⁷⁵ See, *e.g.*, *Coated Paper Prelim*, 75 FR 24892 (unchanged in *Coated Paper 2009*); *Mushrooms*.

²⁷⁶ See *Hontex Enterprises v. United States*, 248 F. Supp. 2d 1323, 1343 (CIT 2003).

²⁷⁷ See, *e.g.*, *Thermal Paper*, and accompanying IDM at Comment 8.

²⁷⁸ See *Deosen Case Brief*, at 106.

²⁷⁹ 19 CFR 351.401(f)(2).

²⁸⁰ See, *e.g.*, *Thermal Paper*, and accompanying IDM at Comment 8.

²⁸¹ See, *id.*; see also *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission*, 73 FR 15479 (March 24, 2008) ("*Fish Fillets from Vietnam 2005-2006*"), and accompanying IDM at Comment 5C.

We disagree with Deosen’s assertion that the Department has a “long-standing practice” of valuing the FOPs of affiliated suppliers. While we acknowledge that in *Mushrooms* the Department treated the respondent and its affiliated supplier as a single entity and used the supplier’s FOPs in the margin calculation, we note that this was an isolated instance. In this investigation, as described above, as well as in numerous proceedings subsequent to *Mushrooms*, the Department has followed its established practice of treating affiliated companies as a single entity only when the collapsing criteria in section 351.401(f) are met.²⁸² Moreover, no party to this proceeding has been able to cite a single case other than *Mushrooms* where the Department has accorded single entity status to a supplier that was not also a producer or exporter.

Accordingly, for the final determination, we have continued to value Deosen’s inputs of steam and electricity rather than the FOPs consumed by Deosen Power.

Because we have continued to rely on Deosen’s own consumption factors for the valuation of steam and electricity, we note that the issue as to whether or not Deosen Power’s FOPs are correctly reported is moot. Nonetheless, we will briefly address these arguments herein.

First, we disagree with Deosen’s arguments regarding the Department’s verification findings. Contrary to Deosen’s assertions, the passage in the verification report to which Deosen refers²⁸³ does not contain “factual mistakes” but rather simply notified the parties to this proceeding of certain possible errors in Deosen’s allocation methodology based on the actual data reported in Deosen’s own FOP database. Further, the verification report drew no conclusions based on these data but, rather, only suggested a possible course of action that may need to be taken at the final determination.²⁸⁴

With regard to Deosen Power’s FOP allocation methodology itself, we note that there are both mistaken assumptions and mathematical errors therein that make the resulting power plant FOPs unreliable without adjustment. First, we note that Deosen’s methodology treats the steam sold by Deosen Power as both a main product and a by-product. Specifically, after allocating the inputs consumed at the power plant between steam consumed in xanthan gum production and steam sold, Deosen attempts to also claim a by-product credit for those same sales of steam. Second, Deosen’s methodology treats electricity as a by-product of steam production, while the record evidence indicates that electricity is a co-product with steam.²⁸⁵ Third, even if the Department were to accept the theoretical premise of Deosen Power’s allocation methodology, it could not accept the reported FOPs for Deosen Power’s inputs due to mathematical errors in Deosen’s calculations.

²⁸² See, e.g., *Sodium Hexametaphosphate 2007-2009*, and accompanying IDM at Comment 1; *Fish Fillets from Vietnam 2007-2008*, and accompanying IDM at Comment 4a; *Thermal Paper*, and accompanying IDM at Comment 8; *Fish Fillets from Vietnam 2005-2006*, and accompanying IDM at Comment 5C.

²⁸³ See Deosen Case Brief, at 108.

²⁸⁴ See Deosen Verification Report, at 30.

²⁸⁵ Deosen Power officials explained that both electricity and steam are intentionally produced via a joint production process through the burning of coal. Neither steam nor electricity is an unavoidable consequence of the energy production process. If the company chose to do so, it could produce no electricity. Accordingly, management intentionally controls the production of electricity. See Deosen Verification Report, at 12.

Specifically, in weight-averaging the FOPs for the inputs consumed at Deosen Power with the production quantities at Deosen Ordos (for which no corresponding consumption quantities are reported), Deosen factors in the zero consumption quantities at Deosen Ordos at two separate stages of the calculation and then multiplies the results of those two stages to derive a final FOP (e.g., Deosen calculates a weighted-average FOP for Deosen Power's coal (reported as field "COALPOW") consumed in the production of steam, calculates a weighted-average FOP for steam consumed in the production of xanthan gum, and then multiplies the two weighted averages together to calculate COALPOW consumed in the production of xanthan gum). By multiplying a weighted average by a weighted average (rather than first calculating FOPs for each plant and then weight averaging them at the end), the company-wide weighted average of each Deosen Power input FOP is incorrectly diluted a second time by the zero consumption quantities at Deosen Ordos. Consequently, the actual consumption quantity of each power plant input is understated by Deosen Ordos' POI production as a percentage of the total company-wide POI production. For this, and the reasons noted above, Deosen Power's reported FOP allocation methodology would require significant corrections in order to derive reliable power plant FOPs.

Comment 14: Compressed Air

Petitioner Argument:

- The Department did not value compressed air in the *Preliminary Determination*. Compressed air is a major expense for Deosen, and the Department must therefore include an FOP for compressed air in its calculation of Deosen's normal value for the final determination.

Deosen Rebuttal:

- The Department must reject Petitioner's suggestion to value compressed air.
- Rather than value the steam and compressed air consumed by Deosen, the Department should value the FOPs used in their production by its affiliate Deosen Power.
- Compressed air is not a cost item in the traditional sense as it can be considered a by-product of the production of steam.
- If the Department did attempt to value compressed air, there is no valid information on the record for the type of compressed air consumed by Deosen in the production of subject merchandise.

Department's Position: In the *Preliminary Determination*, we stated that “{b}ecause we were unable to find a reliable SV for compressed air, we have not valued compressed air for the preliminary determination. We intend to look at the valuation of compressed air further for the final determination.”²⁸⁶ Subsequent to the *Preliminary Determination*, we note that no party has placed on the record additional SVs for compressed air. Further, the Department itself has been unable to locate a reliable SV. Accordingly, we continue to be unable to value Deosen's consumption of compressed air for the final determination.

²⁸⁶ See Memorandum from Erin Kearney and Robert Greger to the File entitled “Preliminary Determination Analysis Memorandum for Deosen Biochemical Ltd.” dated January 3, 2013, at 7.

Comment 15: Deosen Ordos Water Consumption

Petitioner Argument:

- Deosen has not reported water consumption for Deosen Ordos despite the fact that Deosen Ordos uses water to produce both energy (*i.e.*, steam and electricity) and xanthan gum. As facts available, the Department should use the water FOPs for both the xanthan gum plant and the power plant at Deosen Zibo that Deosen reported in its original section D database.²⁸⁷

Deosen Rebuttal:

- The Department has no grounds to apply facts available to Deosen's water consumption.
- Petitioner points to no evidence that the Department has ever questioned the proper reporting of Deosen Ordos' data.
- None of the water consumed at Deosen Ordos is tracked in its accounting records and it is neither a cost of production nor an overhead item.
- If the Department incorrectly decides to disregard the costs actually experienced by Deosen, it must only apply facts available to the models that were produced at Deosen Ordos.

Department's Position: We agree with Petitioner that the Department should value Deosen Ordos' water consumption for the final determination. In *Pacific Giant, Inc. v. United States*, 223 Supp. 2d 1336 (CIT 2002) ("*Pacific Giant*"), the CIT stated:

First, the statute plainly focuses on the quantity of inputs for factors of production rather than the costs associated with them. It states that "the factor of production utilized in producing merchandise include, but are not limited to - (A) hours of labor required, (B) *quantities* of raw materials employed (C) *amounts* of energy and other utilities consumed, and (D) representative capital cost including depreciation." 19 U.S.C. Part 1677b(c)(3). Second, water constitutes a factor of production in this case because of its use for more than incidental purposes. *See* Decision Memorandum at 22 (emphasis in original).

As the CIT stated in *Pacific Giant*, the statute specifies clearly that, for the purpose of constructing normal value in a non-market economy proceeding, the Department constructs the FOPs based on the quantities of the inputs, not the costs associated with those inputs. Thus, regardless of whether the respondent purchased or collected water, the Department still uses the quantity of water employed in its calculation of constructed value.²⁸⁸ Moreover, water is an important FOP at Deosen Ordos, as it is used both directly in the production of xanthan gum and indirectly in the form of self-produced steam.²⁸⁹ Deosen stated in its questionnaire responses to the Department that Deosen Ordos consumes large quantities of steam in the production of xanthan gum, and that "Deosen Ordos does not purchase steam or pressured air, instead it self-

²⁸⁷ See Deosen Section D Questionnaire Response, at Exhibit D-1.

²⁸⁸ See *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 69 FR 58392 (September 30, 2004), and accompanying IDM at Comment 1.

²⁸⁹ See Deosen Section D Questionnaire Response, at 6-8.

produces steam and pressured air from COAL and WATER... {a}ccordingly, for Deosen Ordos, we have not reported any consumption of steam or pressured air and have instead reported consumption of COAL and WATER.”²⁹⁰ Although Deosen stated that it reported coal and water consumption for Deosen Ordos, it did not, in fact, report the water consumption for Deosen Ordos.

However, we disagree with Petitioner as to how we should value Deosen Ordos’ water consumption. Because Deosen did not report the quantities of water that it stated were consumed at Deosen Ordos, it is necessary to use other information available on the record to value Deosen Ordos’ water consumption. However, as this issue arose at a later stage in the proceeding and the Department did not fully pursue it through additional questionnaires or verification, we find that an adverse inference is not warranted in this instance.²⁹¹ Therefore, as non-adverse, gap-filling, facts available, we are using only the water consumption reported for xanthan gum production at Deosen Zibo, rather than the total combined water consumption reported for both xanthan gum and energy production advocated by Petitioner.

Comment 16: Deosen Surrogate Values

Comment 16-A: Cornstarch

Deosen Argument:

- The Philippines has better data for valuing cornstarch, and the type and grade of Philippine cornstarch imports are the same type and grade consumed by Deosen. Thai import data are unreliable, and the type and grade of Thai cornstarch imports are not the type and grade consumed by Deosen.
- The Department should value cornstarch with either Philippine import data under HTS heading 1108.12, (including Indonesian exports to the Philippines), or the Philippine value of corn plus the processing cost for making cornstarch from corn. Alternatively, it should value cornstarch with either the Thai value for corn plus processing cost for cornstarch, or the price quotes from two Thai producers of bulk food grade cornstarch.
- For Thai import statistics for HTS heading 1108.12, exports from Japan, the United States, France, and Italy comprised nearly 67 percent of total import quantity. Japanese, Italian, and French data on the record show that Thai import data are inconsistent with the export data, and that the type/grade of cornstarch from Japan is not what Deosen uses. The Japanese, Italian, and French data corroborate Philippine data.
- The Thai import value for cornstarch is aberrational, incorrect, and not representative of market prices in the surrogate country, compared to other data on the record.

Petitioner Rebuttal:

- The Department should continue using the Thai import value for cornstarch. The Department has selected Thailand in other recent proceedings and found Thai import data to be reliable.

²⁹⁰ See *id.*, at 25-26.

²⁹¹ When necessary information is missing from the record, the Department must use the facts otherwise available, in accordance with section 776 of the Act. Section 776(b) of the Act permits an adverse inference when a respondent has failed to cooperate to the best of its ability. In this case, however, even though the necessary information is not on the record, the respondent fully cooperated with the investigation by responding to all of the Department’s requests for information.

- Whether the Thai HTS category contained other types of cornstarch than that consumed by Deosen is irrelevant because Deosen did not show that there is any resulting actual price distortion in the SV.
- The Department has previously found that country-specific export data are not a suitable comparative price benchmark to test the validity of selected SVs. Deosen did not follow the Department's standard test to determine aberrational values. Instead of comparing the SV to equivalent SVs from the other potential surrogate countries, Deosen compared other import values, export values, U.S. prices, Thai price quotes, cost differentials between corn and cornstarch, and then used a Cohen's *d* test to determine that the Thai value was aberrational.

Department Position: We disagree with Deosen that Thai import data are unreliable and that the Thai HTS category for cornstarch is not representative of Deosen's input. For the final determination, we have continued to value cornstarch using Thai import data classified under HTS heading 1108.12 ("Starch, Corn (Maize)").

As we stated in our *Preliminary Determination*, the Department's practice when selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act is to select, to the extent practicable, SVs which are publicly available, product-specific, representative of a broad market average, tax-exclusive, and contemporaneous with the POI.²⁹² The Department also normally values all FOPs in a single country pursuant to 19 CFR 351.408(c)(2). For the final determination, we continue to find that the Thai import data reported under HTS heading 1108.12 satisfy the Department's requirements for SVs.

Regarding Deosen's argument that the cornstarch SV relied upon in the *Preliminary Determination* is unusable for the final determination, we note that the Department has previously found that "{w}hen a party claims that a particular SV is not appropriate to value a certain FOP, the burden is on that party to provide evidence demonstrating the inadequacy of the SV."²⁹³ Here, the Department finds that Deosen failed to demonstrate that the Thai import data reported under HTS heading 1108.12 are unreliable. The Department notes that Deosen does not argue that HTS heading 1108.12 is the incorrect category with which to value cornstarch, and Deosen itself suggested the use of the same HTS heading for Philippine import data. Rather, Deosen contends that additional evidence on the record illustrates that the type and grade of cornstarch reported in the Thai import data under HTS heading 1108.12 does not match the type and grade of cornstarch consumed by Deosen, and that the SV for the Thai import data for HTS heading 1108.12 is aberrationally high, compared to other data on the record, as discussed below.

Deosen states that it uses bulk food-grade cornstarch packaged in 500 kilogram bags, but alleges that the HTS heading 1108.12 for Thailand is a basket category, containing food, pharmaceutical, and other grades, in both bulk and retail-sized packages. Additionally, Deosen

²⁹² See *Certain Artist Canvas*, and accompanying IDM at Comment 2; see also *Preliminary SV Memorandum*.

²⁹³ See *Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011) ("*Multilayered Wood Flooring*"), and accompanying IDM at Comment 15; see also *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987 (January 22, 2009), and accompanying IDM at Comment 6.

argues that imports of cornstarch into Thailand from the United States and Japan are not the same type and grade used by Deosen for the manufacture of xanthan gum. Deosen contends that the data it placed on the record from Indian Infodrive show that Indian imports from these countries which are classified under HTS heading 1108.12 commonly include merchandise other than bulk food-grade cornstarch.²⁹⁴ However, we note that the Infodrive data relate only to imports into India from various countries, rather than imports into Thailand (or any of the other countries identified in the *Preliminary Determination* as potential surrogate countries).²⁹⁵ Without supporting evidence, we cannot assume that the types of cornstarch imported into India from any specific country would necessarily be the same types of cornstarch imported into Thailand from the same country. Deosen next argues that the PIERS report it placed on the record for U.S. exports to Thailand under HTS heading 1108.12 shows that the majority of these exports should have been properly classified under HTS heading 3505.10 (“Dextrins and Other Modified Starches”), rather than HTS heading 1108.12 (“Starch, Corn (Maize)”).²⁹⁶ However, because the Department does not expect one country's export data to exactly match another country's import data,²⁹⁷ we do not find that the information in the PIERS report demonstrates that the Thai import data is unreliable.

Additionally, Deosen argues that Japan was exporting pharmaceutical-grade cornstarch packaged in small sizes to Thailand during the POI, as evidenced by Internet advertisements by Japanese suppliers for high priced, low quantity cornstarch shipments, and by the commodity code assigned to exports by Japanese customs officials.²⁹⁸ We cannot conclude that Thai imports of cornstarch from Japan consisted of a certain type of cornstarch simply because certain Japanese suppliers advertised that type of cornstarch on the Internet. We also disagree with Deosen's contention that the “Principle Commodity Code” applied to Japanese exports by Japanese Customs officials illustrates that the Thai imports of cornstarch from Japan are not the same type and grade used by Deosen. Although HTS subchapter 1108 appears to be classified by Japanese Customs under a commodity code for chemicals, we note that there does not appear to be a category within the Japanese commodity code system for cornstarch, under which it might be more appropriately classified. Furthermore, there is no evidence that the Japanese system for classifying its exports has any bearing on the HTS classifications of Thai imports. Therefore, we find that neither the advertisements, nor the commodity codes constitute sufficient evidence that the Thai import data classified under HTS heading 1108.12 does not contain a similar type and grade of cornstarch as that used by Deosen.

Deosen next points to the following data on the record to show that the Thai import data for cornstarch under HTS heading 1108.12 are unreliable: 1) Philippine import data for cornstarch; 2) export data for cornstarch from Japan, France, Italy, the United States, and Indonesia; 3)

²⁹⁴ See Deosen Post-Prelim SV Submission, at Exhibit FSV-4.

²⁹⁵ See *Prestressed Concrete Steel Wire Strand From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 28560 (May 21, 2010), and accompanying IDM at Comment 1-B (“The Department will use Infodrive either as a corroborative tool or price benchmark when there is the following: (1) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive India data; (2) direct and substantial evidence from Infodrive reflecting the imports from a particular country; and (3) distortions of the AUV in question can be demonstrated by the Infodrive data.”).

²⁹⁶ See Deosen Post-Prelim SV Submission, at Exhibit FSV-4.

²⁹⁷ See *Certain Activated Carbon 1st Review*, and accompanying IDM at Comment 3-f.

²⁹⁸ See Deosen Case Brief, at 42-43.

cornstarch price quotes from two Thai manufacturers; 4) Philippine and Thai prices and import data for corn, plus a markup for making cornstarch from corn.²⁹⁹ The Department's policy regarding the use of additional data for benchmarking purposes is that:

...the existence of lower price points on the record alone, while illustrative, is not sufficient to cause the Department to disregard the surrogate value information in question. Rather, the party must provide evidence to show why said surrogate value is inadequate aside from simply citing to lower price points or, alternatively, demonstrate that another value is preferable.³⁰⁰

The Department has further stated that "...country-specific export data, and import values from countries at different levels of economic development from the PRC are not suitable comparative price benchmarks to test the validity of selected SVs."³⁰¹ We examined each of the data sources submitted by Deosen to determine whether any of these sources substantiated Deosen's argument that the Thai import statistics for HTS heading 1108.12 are aberrational and unreliable, or if the alternate sources provide better information than the Thai import data used by the Department in the *Preliminary Determination*.

Regarding the data placed on the record by Deosen to show that the Thai import data for cornstarch are unreliable, we first considered the Philippine import data for HTS heading 1108.12. As stated in prior proceedings cited by both Petitioner and Deosen, the Department's practice for determining whether an SV is aberrational is to compare it with the data for the input at issue from the other countries found by the Department to be equally economically comparable to the PRC.³⁰² Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand, and Ukraine were found to be at a level of economic development comparable to the PRC in the *Preliminary Determination*.³⁰³ The only import data for cornstarch placed on the record of this investigation are from Thailand and the Philippines, and we cannot reasonably determine that Thai import data are aberrational based on only two data points.³⁰⁴ As the Department stated in *Multilayered Wood Flooring*, having only two values to compare could result in finding either the higher value aberrational in comparison to the lower value or the lower value aberrational in comparison to the higher value.³⁰⁵ Therefore, the Department finds that Deosen's benchmarking comparison to Philippine import data does not adequately demonstrate that the Thai import data are unreliable.

²⁹⁹ See *id.*, at 35-48; see also Deosen's SV submission, dated February 22, 2013, at Exhibit FSV-4.

³⁰⁰ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 3086 (January 19, 2011) ("TRBs 2008-2009"), and accompanying IDM at Comment 14-B.

³⁰¹ See *id.*

³⁰² See *Chlorinated Isos 2010-2011*, and accompanying IDM at Comment 7; see also *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 64100 (October 18, 2012) ("Glycine"), and accompanying IDM at Comment 1 (both citing *Trust Chem Co., Ltd. v. United States*, 791 F. Supp. 2d 1257, 1264 (CIT 2011)).

³⁰³ See Preliminary Surrogate Country Memorandum.

³⁰⁴ See *Multilayered Wood Flooring*, and accompanying IDM at Comment 14 ("In order to demonstrate that any value is unreliable because it significantly deviates from the norm, it is necessary to have multiple points of comparison.").

³⁰⁵ See *id.*

We next considered the export data from Japan, France, Italy, the United States, and Indonesia, which Deosen placed on the record.³⁰⁶ As an initial matter, as stated above, the Department considers country-specific export data to be an unsuitable point of comparison to determine the validity of the Thai SV selected in the *Preliminary Determination*.³⁰⁷ Nevertheless, Deosen suggests that the Thai import data are unreliable because the Thai imports from Japan do not match the export volume to Thailand reported in the Japanese export data and the Japanese Ministry of Finance export data.³⁰⁸ Deosen similarly placed on the record export data from France, Italy, the United States, and Indonesia, arguing that Thai import data from certain countries do not match the volume of exports to Thailand in the export data of those countries.³⁰⁹ The Department has previously stated that it “does not expect one country’s export quantities to be a one to one ratio to another country’s import data”³¹⁰ and, therefore, we do not agree that the export data from France, Indonesia, Italy, Japan, or the United States support Deosen’s conclusion that the Thai import data within HTS heading 1108.12 are unreliable.

We next examined the cornstarch price quotes submitted by Deosen from two Thai manufacturers, Friendship Cornstarch and King Milling. We found that neither price was a suitable benchmark for determining the reliability of the Thai import data. Both price quotes are non-contemporaneous with the POI,³¹¹ and each applies to a single producer of cornstarch, given in response to a request for price quotes, rather than an industry-wide price from a country-wide source of information based on actual sales.³¹² Thus, we find that these price quotes do not satisfy the Department’s preference for prices which are representative of a broad market average and contemporaneous with the POI. Additionally, it is unclear whether the prices are tax-exclusive, and there is no evidence on the record to indicate that the price quotes represent actual prices paid in the surrogate country. The Department has rejected price quotes in other proceedings, due to insufficient information to determine whether the prices were self-selected or were representative enough of the industry to demonstrate the unreliability of the import data.³¹³ Therefore, we find that they provide an unsuitable benchmark for determining the reliability of the Thai import data.

Finally, we considered Deosen’s suggestion of applying a markup to Philippine prices for corn, Philippine import values for corn, and Thai prices for corn, to account for the cost differential between corn and cornstarch.³¹⁴ Deosen applied this United States derived cost differential for

³⁰⁶ See Deosen Post-Prelim SV Submission, at Exhibit FSV-4.

³⁰⁷ See *TRBs 2008-2009*, and accompanying IDM at Comment 14-B.

³⁰⁸ See Deosen Case Brief at 37-38; see also Deosen Post-Prelim SV Submission, at Exhibit FSV-4.

³⁰⁹ See Deosen Case Brief at 38; see also Deosen Post-Prelim SV Submission, at Exhibit FSV-4.

³¹⁰ See *Certain Activated Carbon 1st Review*, and accompanying IDM at Comment 3-f.

³¹¹ See Deosen Post-Prelim SV Submission, at Exhibit FSV-4. The Friendship Cornstarch price quote is dated February 1, 2013, and the King Milling price quote is dated February 15, 2013.

³¹² See *Diamond Sawblades 2009-2010*, and accompanying IDM at Comment 11 (finding that the Department “prefer[s] country-wide information such as government import statistics to information from a single source,” and “industry-wide values to values of a single producer, because industry-wide values better represent prices of all producers in the surrogate country.”)

³¹³ See, e.g., *PET Film*, and accompanying IDM at Comment 2; *Polyvinyl Alcohol From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 27991 (May 15, 2006), and accompanying IDM at Comment 2.

³¹⁴ See Deosen Case Brief at 45-47.

converting corn into cornstarch to its selection of Thai and Philippine prices and import data, and then argued that these values show that the Thai import data for cornstarch are unreliable. We find that it would be inappropriate to value Deosen's cornstarch with an SV derived from a corn value (when a cornstarch value is available) because it is not product specific, as required by the Department's practice for valuing FOPs in accordance with section 773(c)(1) of the Act. We also find that attempting to compare these contrived AUVs with Thai import data for cornstarch does not provide a reliable benchmark, and that Deosen has not provided adequate justification for suggesting that we disregard our normal practice for determining whether SVs are aberrational.³¹⁵

We find that Deosen has failed to provide sufficient evidence demonstrating that the data classified under Thai HTS heading 1108.12 is inadequate or that another SV is more appropriate. In addition, because we have usable product specific data from Thailand on the record, we decline to depart from the preference stated in the regulation to value all FOPs using a single surrogate country.³¹⁶ Therefore, we have continued to value cornstarch with Thai import data classified under HTS heading 1108.12 for the final determination.

Comment 16-B: Soy Powder

Deosen Argument:

- The Department should use HTS heading 2304.00 ("soybean oilcake and other solid residues resulting from the extraction of soybean oil, whether or not ground or in the form of pellets"), instead of HTS heading 1208.10 ("flours and meals of soybeans") to value Deosen's soy powder (SOYPOWD) input because a verification exhibit contained documentation relating to the SOYPOWD input, which Deosen translated as "soybean oil-cake."

Petitioner Rebuttal:

- The Department should continue to value Deosen's soy powder FOP with HTS heading 1208.10.
- In its section D response, Deosen described its SOYPOWD input as "soy powder." In its section D production process diagram, Deosen listed "soybean powder" as input. In its original SV submission, Deosen again described SOYPOWD as "soy powder" and suggested HTS heading 1208.10 as the appropriate SV.

³¹⁵ See *Chlorinated Isos 2010-2011*, and accompanying IDM at Comment 7; see also *Glycine*, and accompanying IDM at Comment 1 (both citing *Trust Chem Co., Ltd. v. United States*, 791 F. Supp. 2d 1257, 1264 (CIT 2011)).

³¹⁶ See 19 CFR 351.408(c); see also *Clearon Corp. v. United States*, No. 08-00364, 2013 WL 646390, at *6 (CIT Feb. 20, 2013) (acknowledging that the Department's preference is reasonable because "deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations"); see also *Peer Bearing Co.-Changshan v. United States*, 804 F.Supp.2d 1337, 1353 (CIT 2011) (citation omitted) ("the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data 'upon a fair comparison, are otherwise seen to be fairly equal.'"); *Bristol Metals L.P. v. United States*, 703 F.Supp.2d 1370, 1374 (CIT 2010).

Department's Position: We agree with Petitioner. Throughout its questionnaire responses, Deosen repeatedly described its SOYPOWD input as soy or soybean powder,³¹⁷ and Deosen suggested in its original SV submission that the Department value its SOYPOWD input with Philippine HTS heading 1208.10.³¹⁸ Deosen bases its argument that the Department should value Deosen's SOYPOWD input with HTS heading 2304.00 on Deosen's translation of the input name in one of Deosen's verification exhibits. We note that the exhibit referenced by Deosen involves verification of the distances between Deosen's suppliers of raw materials and its factory, and that the same exhibit also includes a chart identifying the SOYPOWD input name as "soy powder."³¹⁹

Furthermore, additional verification exhibits concerning Deosen's production process and cost reconciliation describe the SOYPOWD input as "soy powder."³²⁰ We find that the record of this investigation contains more evidence that the description of the SOYPOWD input is "soy powder," rather than "soybean oil-cake," and that the description of HTS heading 1208.10 ("flours and meals of soybeans") best matches this description of Deosen's input. Therefore, we have continued to value Deosen's SOYPOWD input with Thai import data under HTS heading 1208.10 for the final determination.

Comment 16-C: Metal Buckle

Deosen Argument:

- The Department verified that Deosen's buckles are small folded pieces of metal, rather than buckles with moving parts, so the most appropriate SV is the HTS category covering "flat rolled steel products with width less than 300 mm and under 4.75 mm thick" instead of the HTS category covering "articles of iron or steel, nesoi: other."

No other parties commented on this issue.

Department's Position: We agree with Deosen that the proper HTS category for valuing its metal buckle input is Philippine HTS number 7211.19.1900 ("flat rolled steel products with width less than 300 mm and under 4.75 mm thick: other"). After seeing during Deosen's verification that the metal buckles used by Deosen are flat pieces of steel which are folded over a packing strap, we agree that the description for Philippine HTS number 7211.19.1900 best matches the input used by Deosen. Although the Department's preference is to value all FOPs within a single surrogate country,³²¹ there are no Thai import data on the record of this investigation within this HTS category. Therefore, we are valuing Deosen's metal buckle input with Philippine import data classified under Philippine HTS number 7211.19.1900 for the final determination.

³¹⁷ See Deosen Section D Questionnaire Response, at Exhibit D-3; see also Submission from Deosen, "Supplemental Section D Response: Deosen Biochemical's Response to Question 3: Xanthan Gum from China," dated October 30, 2012, at Exhibits SD 1-1 and SD 1-2.

³¹⁸ See Submission from Deosen, "Deosen Biochemical's Submission of Surrogate Values: Xanthan Gum from China," dated October 26, 2012 ("Deosen SV Submission"), at Exhibits SV-1 and SV-3.

³¹⁹ See Deosen Verification Report, at VE-24.

³²⁰ See *id.*, at VE-6 and VE-13.

³²¹ See 19 CFR 351.408(c)(2).

Comment 16-D: Coal

Deosen Argument:

- The Philippines has better data for valuing Deosen’s coal, and the Department should use Philippine financial statement of Semirara to value coal, rather than HTS heading 2701.19 (“coal, other than anthracite or bituminous, whether or not pulverized, but not agglomerated”) for either Thailand or Philippines.
- Semirara coal is more specific to the type of coal used by Deosen because it is steam coal for use in power plants, with similar moisture content and heat value, rather than the basket HTS category that includes “coal, other than anthracite or bituminous, whether or not pulverized, but not agglomerated.” Deosen provided a certificate for steam coal purchases, showing useful heat value of 3993 kilocalories per kilogram. HTS heading 2701.19 does not specify heat value.
- Semirara coal SV is contemporaneous, market-wide (representing over 95 percent of coal production in Philippines), publicly available, and tax-exclusive.

Petitioner Rebuttal:

- The Department should continue using Thai import data under HTS heading 2701.19 because it is consistent with respondents’ description of the steam coal used. Deosen does not provide adequate evidence of its steam coal type, moisture content, or heat value.
- Fufeng has stated that HTS heading 2701.19 is the proper classification for its steam coal. Deosen states that HTS heading 2701.19 is a basket category, but does not state that it is not the proper HTS classification for its steam coal. The Department has said that HTS heading 2701.19 is not a basket category, and that it is the HTS classification that best matches steam coal.
- Thai import data is better than the Semirara financial statements because the Semirara SV is less contemporaneous, is derived from a single company, and has not been shown to be tax-exclusive.

Department’s Position: For the final determination, we have continued valuing the coal input for both Deosen and Fufeng using import data from Thailand classified under HTS heading 2701.19 (“Coal, Other Than Anthracite Or Bituminous, Whether Or Not Pulverized, But Not Agglomerated”) because it is the best available information on the record.

We disagree with Deosen that the Philippine financial statements of Semirara provide a superior SV over the Thai import data classified under HTS heading 2701.19. As explained above, the Department’s practice when selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act is to select, to the extent practicable, SVs which are publicly available, product-specific, representative of a broad market average, tax-exclusive, and contemporaneous with the POI.³²² Additionally, the Department’s regulatory preference is to value all factors from a single surrogate country when that country has usable and reliable data.³²³

³²² See *Certain Artist Canvas*, and accompanying IDM at Comment 2; see also Preliminary SV Memorandum.

³²³ See 19 CFR 351.408(c)(2); see also *Clearon Corp. v. United States*, No. 08-00364, 2013 WL 646390, at *6 (CIT Feb. 20, 2013) (acknowledging that the Department’s preference is reasonable because “deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations”); see also *Peer Bearing*

Deosen argues that the Thai import data used in the preliminary determination to value the respondents' steam coal inputs (*i.e.* HTS heading 2701.19) is not specific to the type and grade of steam coal used by Deosen because it is a basket category.³²⁴ However, Deosen does not argue that HTS heading 2701.19 is the incorrect HTS category under which steam coal would properly be classified. Deosen states that it uses steam coal with a specific "useful heat value," and that HTS heading 2701.19 does not distinguish between different useful heat values.³²⁵ While we acknowledge that HTS heading 2701.19 does not include specific useful heat values within its description, the Department has previously found that the description for this HTS category best matches steam coal, and that HTS heading 2701.19 is, therefore, specific to the input of steam coal.³²⁶ Furthermore, we disagree with Deosen that the Semirara coal SV is more specific to Deosen's type and grade of coal than import data within HTS heading 2701.19. In order to show that Semirara's type of coal is more specific to Deosen's coal, Deosen relies on the statement within Semirara's annual report that the majority of Semirara's domestic sales of coal were to power plants.³²⁷ While we do not disagree that Semirara appears to make sales to power plants, its annual report also states that it sells coal domestically to cement plants and other industrial plants as well.³²⁸ Moreover, the corporate information in Note One to Semirara's financial statements says that Semirara's primary business purpose relates to "...ship coal, coke, and other coal products of all grades, kinds, forms, descriptions and combinations..." rather than specifically steam coal with certain useful heat values.³²⁹ As a result, we find that record evidence does not support Deosen's claim that the SV for coal obtained from the financial statements of Semirara is necessarily more specific to the type and grade of coal used by Deosen.

We agree with Deosen that the Semirara financial statements are publicly available, and that they are contemporaneous, because they cover the fiscal year ending December 31, 2011, which overlaps three months with the POI in the present investigation.³³⁰ However, we find that there is not enough information on the record to determine whether the SV derived from Semirara is tax-exclusive. Additionally, while Deosen argues that the Semirara SV represents over 95 percent of Philippine coal production, we find that it nevertheless reflects the price of a single coal producer, rather than an average of market prices, and thus, is not reflective of a broad market average.

We found in the *Preliminary Determination* that the Thai import data is publicly available, contemporaneous with the full six months of the POI, representative of a broad market average, product-specific, and tax-exclusive.³³¹ As stated above, we find that Thai import data classified

Co.-Changshan v. United States, 804 F.Supp.2d 1337, 1353 (CIT 2011) (citation omitted) ("the preference for use of data from a single surrogate country could support a choice of data as the best available information where the other available data 'upon a fair comparison, are otherwise seen to be fairly equal.'").

³²⁴ See Deosen Case Brief, at 63-64.

³²⁵ See *id.*

³²⁶ See *Chlorinated Isos 2010-2011*, 78 FR 4386, and accompanying IDM at Comment 9 (finding that it was evident from the sub-heading descriptions within the HTS category for coal (*i.e.*, HTS 2701) that HTS category 2701.19 was the sub-heading that best matched steam coal).

³²⁷ See Deosen Case Brief, at 64.

³²⁸ See Deosen SV Submission, at Exhibit SV-4.

³²⁹ See *id.*

³³⁰ See *id.*

³³¹ See Preliminary SV Memorandum.

under HTS heading 2701.19 is more specific to the input of steam coal than the SV derived from the Semirara financial statements. Finally, because the import data is from Thailand, and the Semirara financial statements are from the Philippines, we find that the Thai import data is a more appropriate source of a steam coal SV based on the Department's preference to value all FOPs from a single surrogate country.³³² Therefore, we have continued to value the steam coal of both Deosen and Fufeng using the Thai import data classified under HTS heading 2701.19.

Comment 17: Power Plant By-Products

Deosen Argument:

- The Department should value Deosen's affiliated power plant's inputs into producing steam and compressed air, and grant by-product offsets for the quantities of steam, electricity, and coal ash sold during the POI.

Petitioner Rebuttal:

- Department should deny Deosen's by-product offset for coal ash. Coal ash was generated by Deosen's affiliated power plant, and the offset claimed by Deosen is based on coal ash received by Deosen from the power plant, rather than on coal ash produced.
- Department's practice is to cap the by-product offset by the amount of the by-product produced during the POI, but Deosen did not provide the power plant's production of coal ash, only Deosen's receipts of coal ash.

Department's Position: As we stated in Comment 13, above, we have continued to value Deosen's consumption of steam and electricity, rather than the inputs consumed by Deosen's affiliated power plant.³³³ Because the offsets reported by Deosen (*i.e.*, steam, electricity, and coal ash) relate to by-products generated by the affiliated power plant rather than by Deosen itself, we continue to find that it is not appropriate to grant these offsets to Deosen in the final determination.

As a consequence, we find that Petitioner's rebuttal argument concerning Deosen's claimed coal ash by-product offset is moot. Because we have declined to value Deosen's affiliated power plant inputs, we have also declined to grant the power plant's by-product offsets.

Comment 18: U.S. Expenses

Petitioner Argument:

- Deosen reported market economy international freight (INTNFRU_ME), U.S. customs duty (USDUTYU), U.S. B&H (USBROKU), and inland freight from warehouse to customer (INLFWCU) using gross weight in the denominator, rather than net weight. This understates Deosen's expenses and overstates the net price.
- Department should multiply these expenses by the ratio of gross weight to net weight (*i.e.*, PACKWGT/QTYU) to correct the error.

³³² See 19 CFR 351.408(c)(2).

³³³ See Memorandum to the File through Charles Riggle, Program Manager, Office 4, AD/CVD Operations, from Erin Kearney, International Trade Compliance Analyst, Office 4, AD/CVD Operations, "Preliminary Determination Analysis Memorandum for Deosen Biochemical Ltd.," dated January 3, 2013, at 6-9.

Deosen Rebuttal:

- Freight expenses are incurred and billed on the total quantity shipped, which is gross weight. The correct calculation of movement expenses is total expense divided by the total gross kilogram quantity shipped.
- The Department should not arbitrarily adjust the expenses to a net weight basis when they are incurred and billed on a gross weight basis.

Department Position: We agree with Petitioner that Deosen understated its U.S. expenses by calculating the expenses based on gross weight, rather than net weight.³³⁴ Although the Department's questionnaire does not state a preference for the calculations to be based on gross or net weight, the Department has stated in prior ME and NME proceedings that sales and expenses should be reported on a similar basis to ensure fair comparisons in the Department's analysis.³³⁵ Furthermore, in cases where respondents calculated expenses on a gross weight basis, rather than on a net weight basis, the Department has recalculated international freight expenses and other U.S. transportation expenses by applying to them the ratio between gross weight and net weight.³³⁶ Therefore, for the final determination, we have multiplied Deosen's reported market economy international freight (INTNFRU_ME), U.S. customs duty (USDUTYU), U.S. B&H (USBROKU), and inland freight from warehouse to customer (INLFWCU) by the ratio of gross weight to net weight (PACKWGT/QTYU).

Comment 19: U.S. Indirect Selling Expenses

Petitioner Argument:

- The Department should include bad debt expense and damaged goods expense in Deosen USA's indirect selling expense ratio.

Deosen Rebuttal:

- Deosen has properly excluded bad debt expense from its indirect selling expense ratio. The bad debt expenses are tied to pre-POI invoices and are not an indirect selling expense for the POI.
- Deosen has also properly excluded damaged goods expense as these expenses are related to cost of goods sold rather than to indirect selling expenses.

Department's Position: We agree with Petitioner that we should include the POI bad debt expense in Deosen USA's indirect selling expense ratio. Absent a provision for bad debts

³³⁴ See Submission from Deosen, "Section C Response for Deosen Biochemical," dated September 20, 2012, at Exhibits C-4, C-6, and C-8.

³³⁵ See, e.g., *Frontseating Service Valves*, and accompanying IDM at Comment 11 (adjusting expenses to account for the difference between reported gross weight and net weight); *Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From the United Kingdom*, 64 FR 30688 (June 8, 1999), and accompanying IDM at Comment 10 (adjusting reported expenses to arrive at an approximation of expenses on a net weight basis).

³³⁶ See *Certain Magnesia Carbon Bricks from Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 75 FR 45097 (August 2, 2010), and accompanying IDM at Comment 5 (adjusting inland freight expenses to be on the basis of net weight of the merchandise rather than gross weight); see also *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Thailand*, 68 FR 68348 (December 8, 2003), and accompanying IDM at Comment 4(2) (recalculating international freight expenses and other U.S. transportation expenses to arrive at net weight).

recorded by a company,³³⁷ it is the Department's practice to include the full amount of any bad debt write-offs in our calculations during the period in which the write-offs were recorded in the company's accounting system.³³⁸ At verification, the Department's verifiers expressly noted that Deosen USA does not maintain a provision for bad debts, but rather directly writes off its bad debts as an expense when they are deemed uncollectible.³³⁹ Thus, in accordance with our practice, we have included the entire amount of Deosen USA's bad debt expense written off during the POI as captured in the company's accounting records in indirect selling expenses for the final determination.

We disagree with Deosen that Deosen USA's damaged goods expense is more closely related to cost of goods sold rather than indirect selling expenses. We note that this amount consists of write-downs related to sales of downgraded or expired products.³⁴⁰ We do not consider write-downs of finished goods related to the cost of production, as they are more closely associated with the sales of the merchandise.³⁴¹ Further, it is our practice to base U.S. indirect selling expenses on all the expenses incurred in the U.S. market that the respondents have not reported as direct expenses.³⁴² At no time during this proceeding did Deosen request that this expense be treated as a direct selling expense. Accordingly, we have included the POI damaged goods expense in indirect selling expenses for the final determination.

Comment 20: Ministerial and Other Claimed Errors

Deosen Argument:

- The Department should revise the margin program to properly apply the *Sigma* capped distance for Deosen's raw material and packing inputs.
- The Department's verification report for Deosen USA should be corrected because it falsely states that there is an unreconciled quantity in Deosen's CEP database.

No other parties commented on this issue.

³³⁷ In cases where a company records a provision for bad debts, the Department's practice is to recognize the amount of the bad debt expense when the corresponding provision is recorded rather than when the actual write-off occurs. See, e.g., *Small Diameter Circular Seamless Carbon and Alloy Steel Pipe from Brazil: Final Results of Antidumping Administrative Review*, 70 FR 7243 (Feb. 11, 2005), and accompanying IDM at Comment 6; *Stainless Steel Bar from India: Final Results of the Administrative Review*, FR 68 FR 47543 (Aug. 4, 2003), and accompanying IDM at Comment 7.

³³⁸ See, e.g., *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part*, 75 FR 41813 (Monday, July 19, 2010), and accompanying IDM at Comment 5; *Notice of Final Determination of Sales at Less Than Fair Value: Saccharin from the People's Republic of China*, 68 FR 27530 (May 20, 2003), and accompanying IDM at Comment 10.

³³⁹ See Memorandum to the File through Charles Riggle, Program Manager, Office 4, AD/CVD Operations, from Erin Kearney, International Trade Analyst, Office 4, and Robert Greger, Senior Accountant, Office of Accounting, "Verification of the Questionnaire Responses of Deosen USA Inc.," dated February 20, 2013 ("Deosen USA Verification Report"), at 12.

³⁴⁰ See *id.*

³⁴¹ See, e.g., *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 19153 (Monday, April 12, 2004), and accompanying IDM at Comment 7.

³⁴² See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 76 FR 9753 (February 22, 2011), and accompanying IDM at Comment 9.

Department's Position: Concerning the *Sigma* capped distance, we agree with Deosen that we should correct the ministerial error made in the *Preliminary Determination*. We stated in our Preliminary Ministerial Error Memorandum that we inadvertently made a ministerial error, as defined in 19 CFR 351.224(1), by not applying the *Sigma* capped distance to the freight calculation for 24 of Deosen's inputs.³⁴³ Therefore, we have corrected this ministerial error for the final determination.

We disagree with Deosen that the verification report for Deosen USA falsely states that there is an unreconciled quantity. We note that the statement to which Deosen refers (regarding an insignificant difference in the sales reconciliation being related to conversion adjustments from pounds to kilograms) was based on our understanding of the explanation provided by company officials during verification.³⁴⁴ Thus, it is reasonable to accept this explanation as the reason for the reconciling difference in the CEP sales database. Furthermore, due to the insignificant nature of this difference, we have not made an adjustment for the final determination.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final determination of this investigation and the final weighted-average dumping margins in the *Federal Register*.

AGREE DISAGREE

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

May 28, 2013

Date

³⁴³ See "Preliminary Determination of the Antidumping Duty Investigation of Xanthan Gum from the People's Republic of China: Allegation of Ministerial Errors," dated February 8, 2013 ("Preliminary Ministerial Error Memorandum").

³⁴⁴ See Deosen USA Verification Report, at 8-9.