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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Multilayered Wood Flooring from the People's Republic of China:
Issues and Decision Memorandum for the Final Rescission of the
2013-2014 New Shipper Review

SUMMARY

We analyzed the case brief submitted by Qingdao Barry Flooring Co., Ltd. ("Qingdao Barry") in the 2013-2014 new shipper review ("NSR") of the antidumping duty order on multilayered wood flooring ("MLWF") from the People's Republic of China ("PRC"). As a result of our analysis, we made no changes from the *Preliminary Rescission*¹ for these final results. The issues for which we received comments are discussed below.

LIST OF ISSUES

General Issues

- Comment 1: **Whether the Department Used the Correct Time Period for Data Comparison Purposes**
- Comment 2: **Whether the Department Properly Evaluated the Price Differential**
- Comment 3: **Whether the Department Properly Considered Whether the Sale was Resold at a Profit and the Arms-Length Nature of the Sale**
- Comment 4: **Whether the Department Properly Analyzed Other Factors in Its Bona Fide Analysis**

¹ See *Multilayered Wood Flooring From the People's Republic of China: Preliminary Rescission of 2013-2014 Antidumping Duty New Shipper Review*, 81 FR 35306 (June 2, 2016) ("*Preliminary Rescission*").

BACKGROUND

On June 2, 2016, the Department of Commerce (the “Department”) published the *Preliminary Rescission* for the 2013-2014 NSR of the antidumping duty order on MLWF from the PRC.² The period of review (“POR”) for this NSR is December 1, 2013, through November 30, 2014. In the *Preliminary Rescission*, the Department preliminarily rescinded the NSR after finding Qingdao Barry’s sole U.S. sale during the POR was not *bona fide*.³

On June 16, 2016, Qingdao Barry submitted its case brief.⁴ No other party submitted case or rebuttal briefs. On July 5, 2016, Qingdao Barry submitted a hearing request.⁵ However, a hearing was not held in this NSR.⁶

SCOPE OF THE ORDER

The product covered by the order is multilayered wood flooring, which is composed of an assembly of two or more layers or plies of wood veneer(s)⁷ in combination with a core. The several layers, along with the core, are glued or otherwise bonded together to form a final assembled product. Multilayered wood flooring is often referred to by other terms, *e.g.*, “engineered wood flooring” or “plywood flooring.” Regardless of the particular terminology, all products that meet the description set forth herein are intended for inclusion within the definition of subject merchandise.

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

² *Id.*

³ *Id.*

⁴ See Letter from Qingdao Barry to the Department, regarding “Multilayered Wood Flooring from China; Qingdao Barry’s Case Brief for the 2013-2014 New Shipper Review,” dated June 16, 2016 (“Case Brief”).

⁵ See Letter from Qingdao Barry to the Department, regarding “Multilayered Wood Flooring from China; Qingdao Barry; Hearing Request,” dated July 5, 2016.

⁶ For further details regarding the Department’s disposition of Qingdao Barry’s hearing request, see Memorandum To The File, from Abdelali Elouaradia, Office Director, IV, Regarding “Multilayered Wood Flooring from the PRC: Hearing Request,” dated July 12, 2016.

⁷ A “veneer” is a thin slice of wood, rotary cut, sliced or sawed from a log, bolt or flitch. Veneer is referred to as a ply when assembled.

included within the definition of subject merchandise regardless of whether or not it is manufactured with any interlocking or connecting mechanism (for example, tongue-and-groove construction or locking joints). All multilayered wood flooring is included within the definition of the subject merchandise regardless of whether the product meets a particular industry or similar standard.

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

Multilayered wood flooring products generally, but not exclusively, may be in the form of a strip, plank, or other geometrical patterns (*e.g.*, circular, hexagonal). All multilayered wood flooring products are included within this definition regardless of the actual or nominal dimensions or form of the product.

Specifically excluded from the scope are cork flooring and bamboo flooring, regardless of whether any of the sub-surface layers of either flooring are made from wood. Also excluded is laminate flooring. Laminate flooring consists of a top wear layer sheet not made of wood, a decorative paper layer, a core-layer of HDF, and a stabilizing bottom layer.

Imports of the subject merchandise are provided for under the following subheadings of the HTSUS: 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.2510; 4412.31.2520; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4070; 4412.31.4075; 4412.31.4080; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0560; 4412.32.0565; 4412.32.0570; 4412.32.2510; 4412.32.2520; 4412.32.2525; 4412.32.2530; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.5600; 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3171; 4412.94.4100; 4412.94.5100; 4412.94.6000; 4412.94.7000; 4412.94.8000; 4412.94.9000; 4412.94.9500; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5100; 4412.99.5105; 4412.99.5115; 4412.99.5710; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.99.9500; 4418.71.2000; 4418.71.9000; 4418.72.2000; 4418.72.9500; and 9801.00.2500.

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

DISCUSSION OF THE ISSUES

Comment 1: Whether the Department Used the Correct Time Period for Data Comparison Purposes

- Record evidence demonstrates that the sale price of Qingdao Barry's U.S. sale was within the minimum and maximum range of the sale prices of the most similar merchandise sold by mandatory respondents during the contemporaneous third administrative review ("AR 3") of this proceeding.
- The Department should not have compared Qingdao Barry's U.S. sale to sales from the second AR ("AR2") of this proceeding because AR2 is not contemporaneous with the instant NSR.
- The Department justified its use of AR2 data over AR3 data by stating that AR3 was not complete. However, by the time the Department issues these final results, the final results of AR3 will have already been issued or they will be issued concurrently with the final results of this NSR. Therefore, the Department should use AR3 data.
- The Department stated that it also could not use the AR3 data placed on the record by Qingdao Barry because the data were incomplete and did not contain the entire U.S. sales listings. However, the Department did not use the additional data it claimed were necessary for its analysis of AR2 data, as the Department limited the comparison to sales prices, quantities and control number ("CONNUM").

Department's Position: We disagree with Qingdao Barry's assertion that the Department should use price information from AR3 as comparison data for an analysis of Qingdao Barry's single U.S. sale. On April 12, 2016, the Department placed the complete sales databases of the two mandatory respondents in AR2 on the record of this review.⁸ These sale databases contained all the information related to the sales made during AR2, *e.g.*, delivery terms, type of sale, existence of any billing adjustments, etc. On April 14, 2016, Qingdao Barry submitted data from AR3. The data placed on the record by Qingdao Barry only contained the product code, CONNUM, quantity, quantity unit of measure and the gross unit price for sales of two CONNUMs sold by the mandatory respondents in that proceeding.

Qingdao Barry argues that it was not necessary to provide additional information because the Department did not use additional information in its analysis of Qingdao Barry's U.S. sale. However, this statement is not accurate. The Department's specific price comparison in the *bona fide* memorandum related only to price, quantity, and CONNUM, but that does not mean that the Department failed to analyze other aspects of the sale. To ensure that the correct comparisons were being made, the Department did, in fact, examine all CONNUMs and all aspects of the sale (including movement expenses and billing adjustments). Further, the Department placed the complete databases from AR2 on the record to enable other interested parties to comment on all aspects of the database. In contrast, by providing limited sales information for only two CONNUMs, Qingdao Barry has self-selected the data, which prevented both interested parties and the Department from evaluating whether the CONNUMs placed on the record were the most similar to Qingdao Barry's single sale and whether the gross unit price upon which Qingdao Barry's price comparison hinged was inclusive or exclusive of movement expenses, billing adjustments, *etc.* Therefore, Qingdao Barry is incorrect in its assertion that the Department did not use additional data in this analysis.

⁸ See Memorandum to the File, Through Robert Bolling, From Maisha Cryor, Regarding "New Shipper Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China – US Sales Data from the Second Administrative Review, dated April 12, 2016 ("AR2 Data Memo").

Further, the data provided by Qingdao Barry were derived from a segment of the proceeding (AR3) that was still in a preliminary stage. The Department has not rendered a final decision in that segment of the proceeding, meaning that the Department's treatment of that price information from AR3 could be subject to change.⁹ While each proceeding generally stands on its own, where the Department relies on information from other segments, it generally relies only upon data and information from finalized proceedings to ensure that it is using accurate and fully-vetted data.¹⁰

Qingdao Barry argues that the Department could use data from AR3 in its NSR analysis if the final results from AR3 are issued before or concurrently with the final results of this NSR. The Department disagrees. When this NSR was initiated, the Department noted that "the same merchandise covered by this review is concurrently subject to the ongoing administrative review covering the period 12/1/2013 through 11/30/2014. As a result, the Department intends to issue a final disposition in this new shipper review on or before the date on which the final is issued in the administrative review."¹¹ This is consistent with the Department's practice, which is to only rescind a company from an administrative review following a final determination with respect to that entry in the concurrent new shipper review.¹² Therefore, to determine the appropriate treatment of Qingdao Barry in AR3, Commerce must necessarily have first made a final determination in the NSR.

Therefore, for the final results, given that the data submitted by Qingdao Barry from AR3 was incomplete and not final, the Department will continue to use data from AR2 as the comparison basis for Qingdao Barry's U.S. sale given that the data is final, complete and the best information on the record.

Comment 2: Whether the Department Properly Evaluated the Price Differential

- Even if the Department continues to limit its pricing analysis to data from AR2, certain corrections must be made.
- The Department improperly compared Qingdao Barry's U.S. sale price to the lower-priced AR2 sales made by Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Jiangsu Senmao") in AR2, while arbitrarily excluding certain higher priced AR2 sales from its analysis.

⁹ See, e.g., *Changshan Peer Bearing Co., Ltd. v. United States*, 953 F. Supp. 2d 1354, 1363 (CIT 2014) (explaining that "Preliminary Rescission are just that—preliminary," and parties may "not presume that Commerce would not adopt a different approach in determining the Final Results").

¹⁰ See *Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review: 2013-2014*, 81 FR 39893, June 20, 2016 and accompanying Issues and Decision Memorandum at Comment 2 (an example of where the Department cites to several final proceedings).

¹¹ See Memorandum from Robert Bolling, Program Manager, AD/CVD Operations, Office IV, Enforcement and Compliance, To The File, Regarding "Deadline Extensions – Multilayered Wood Flooring, From the People's Republic of China – New Shipper Review for Qingdao Barry Flooring Co., Ltd.," dated October 20, 2015.

¹² See, e.g., *Fresh Garlic from the People's Republic of China: Final Results and Final Rescission of the 20th Antidumping Duty Administrative Review: 2013-2014*, 81 FR 39897 (June 20, 2016) (rescinding AR with respect to a company, where the Department had already found the new shipper's sale to be non-*bona fide* in final determination).

- Furthermore, the Department incorrectly compared the low end of the Jiangsu Senmao AR2 sales price range to the Qingdao Barry price. Instead, the Department should have based its measurement of the extent to which Qingdao Barry's price is higher than the range of Jiangsu Senmao's prices on a comparison only with the high range price.
- The Department failed to take into account record information that suggested that the price differential between Qingdao Barry's U.S. sale and Jiangsu Senmao's high range price was not significant and "could" be explained by the sales periods being non-contemporaneous and the differences in physical characteristics between Qingdao Barry's and Jiangsu Senmao's merchandise. The Department did not take into account any adjustment to reflect price increases or inflationary effects from the preceding POR.
- The price differential between Qingdao Barry and Jiangsu Senmao is of insufficient magnitude to conclude that the sales prices are not comparable and that such a difference constitutes evidence that Qingdao Barry's sales price was aberrationally high. Under other provisions of antidumping duty law, products with cost differentials of less than 20 percent may be considered similar merchandise for sales comparison purposes.

Department's Position: We disagree with Qingdao Barry that the Department's price analysis of its single sale was incorrect. The Department did, in fact, compare Qingdao Barry's sale to the high range of Jiangsu Senmao's sales and we noted in our preliminary analysis that Qingdao Barry's sale was still higher than the high range of Jiangsu Senmao's sales.¹³ However, it was also appropriate to analyze the full range of prices associated with the CONNUM sold by Jiangsu Senmao that was most similar to Qingdao Barry's U.S. sale, including the low-end of such range.¹⁴ Qingdao Barry argues that the Department should simply have focused on the price difference between Qingdao Barry's U.S. sale and Jiangsu Senmao's highest-priced comparable sale and ignored the remaining price information on the record. However, the Department considers all evidence on the record to determine whether a single sale is *bona fide*. Moreover, we disagree that a narrow focus on only Jiangsu Senmao's highest prices for a particular CONNUM provides a complete picture of typical pricing for that CONNUM. Companies may price certain sales differently for a variety of reasons, and considering the complete universe of sales is needed to fully evaluate pricing for a CONNUM. Further, a *bona fide* sale analysis employs a totality of the circumstances analysis that requires a broad examination of the pricing information on the record..

We also disagree that the price differential between Qingdao Barry's U.S. single sale and Jiangsu Senmao's sales can definitively be explained by differences in physical characteristics and a difference in time periods. Qingdao Barry has pointed to no information on the record to either determine or adjust for the difference in of physical characteristics and time periods on the price. While the Department notes that Qingdao Barry submitted the consumer price index (CPI) to inflate labor values as a part of its surrogate value submission, there is no evidence to suggest

¹³ See "Antidumping Duty New Shipper Review of Multilayered Wood Flooring from the People's Republic of China: Preliminary *Bona Fide* Sale Analysis for Qingdao Barry Flooring Co., Ltd.," from Maisha Cryor to Abdelali Elouaradia, dated May 24, 2016 at 4 ("Prelim Bona Fide Memo").

¹⁴ *Id.*

that the CPI should be used to inflate sale prices.¹⁵ Therefore, absent record evidence (*i.e.*, any data) with which to assess the impact of these factors, the Department solely compared the prices on the record at face value as it was the best information available.¹⁶

Qingdao Barry also argues that the price differential is insignificant. Again, the Department disagrees with Qingdao Barry. There is no bright-line test to judge the comparability of prices for the purposes of a *bona fide* sales analysis. Qingdao Barry notes that there are other aspects of antidumping law where a price differential of less than 20 percent may be considered similar merchandise. However, such a comparison is incongruous. For example, the Differences in Merchandise (DIFMER) test is a regulatory directive under which the Department considers differences in variable costs associated with the physical differences in the merchandise but, where appropriate, considers differences in market value. Because observed differences in cost are often the most practical way the Department has to identify and quantify price differences attributable to physical differences, the Department generally bases DIFMER adjustments on observed differences in cost. This analysis has nothing to do with whether a sale is *bona fide*. In fact, the Department's criteria for determining whether a sale is *bona fide* necessarily are case and fact specific because pricing differences are industry and transaction specific; *i.e.*, where an analysis entails examining a single sale, it would be disingenuous to apply a one size fits all criterion.

Moreover, in this instant NSR, there is a statutory requirement that Commerce base any margins calculated in NSRs on only *bona fide* sales.¹⁷ To determine whether a sale is *bona fide*, the statute directs Commerce to consider all relevant factors, including the price of a sale.¹⁸ Consistent with the statute, Commerce evaluated all relevant factors and concluded, based on the totality of the circumstances, that it could not determine that Qingdao Barry's single sale was *bona fide*. The price of Qingdao Barry's merchandise was not the only factor in Commerce's analysis, and although Qingdao Barry argues that the price differential is insignificant, the fact remains that there is a price differential.

This is especially relevant because in a one-sale review, "there is, as a result of the seller's choice to make only one shipment, little data from which to infer what the shipper's future selling practices look like."¹⁹ Therefore, the Department will "carefully scrutinize{}" that sale.²⁰ This careful scrutiny is consistent with the intent of section 751(a)(2)(B)(iv) of the Act, which was enacted to curb what Congress viewed as abuse of the new shipper review provision of the statute. In particular, in enacting section 751(a)(2)(B)(iv) of the Act, Congress expressed concern that new shipper reviews were being abused to secure low cash deposit rates that are not reflective of the new shipper's future commercial behavior.²¹

¹⁵ See "Multilayered Wood Flooring from the People's Republic of China: Submission of Surrogate Value Information," dated February 23, 2016, at Exhibit 2.; the Department notes that Qingdao Barry also did not argue for the Department to use the CPI from its labor calculation to inflate sale prices.

¹⁶ *Id.*

¹⁷ See section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended ("the Act").

¹⁸ See *id.*

¹⁹ See *Tianjin Tiancheng Pharm. Co. v. United States*, 366 F. Supp. 2d 1246, 1263 (CIT 2005) ("*TTPC*").

²⁰ *Id.*

²¹ See H. Rpt. No. 114-114 (2015), at 89.

Therefore, for the final results, we continue to find that the price differential, along with other factors, is significant when evaluating the totality of the circumstances surrounding Qingdao Barry's sale.

Comment 3: Whether the Department Properly Considered Whether the Sale was Resold at a Profit and the Arms-Length Nature of the Sale

- Qingdao Barry's inability to establish that its sale was sold by its U.S. customer at a profit should not alone be determinative of the *bona fide* status of its U.S. sale.
- The Department incorrectly determined that Qingdao Barry's acceptance of a late payment from its customer with no penalty was a sign that the sale was not made at arms-length. Qingdao Barry did not impose a penalty for late payment because the sales contract did not authorize such an action.
- The administrative record indicates that Qingdao Barry's relationship with its U.S. customer was at arms-length and based on normal commercial considerations.
- The fact that Qingdao Barry's U.S. customer refused to respond to the importer's questionnaire is further evidence that the sale was made at arms-length.

Department's Position: As noted, pursuant to section 751(a)(2)(B)(iv) of the Act, any weighted average dumping margin determined in a NSR *must* be based solely on *bona fide* sales during the POR. This requires an affirmative determination, supported by substantial evidence, that a sale is *bona fide* before it can be reviewed. To determine whether a sale in a NSR is *bona fide*, the Department is instructed to consider, depending on the circumstances surrounding such sales: "(I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor {it} determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review."

Thus, one factor in this analysis is whether the subject merchandise was resold at a profit. Contrary to Qingdao Barry's assertion, the Department never stated that Qingdao Barry's inability to establish whether its U.S. customer resold the merchandise at a profit was enough alone to preclude finding that the sale is non-*bona fide*. But it is nonetheless a factor in the Department's analysis, and the absence of evidence with respect to that factor (including the absence of evidence that the merchandise was resold *at all*) is relevant because it limits the Department's ability to fully evaluate the circumstances surrounding the single sale to assess whether it is actually reflective of Qingdao Barry's future commercial behavior in the U.S. market.²² When "analyzed together with the totality of the circumstances of the sale," we continue to find that this calls into question the *bona fide* nature of Qingdao Barry's sale.²³

²² See *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) ("*New Donghua*") (noting that the *bona fides* analysis is intended "to assess whether the sale(s) under review are indicative of future commercial behavior").

²³ See Prelim Bona Fide Memo at 6.

Another factor in the Department's analysis is whether the sale reflects an arms-length transaction. Qingdao Barry asserts that record evidence indicates that its relationship with its customer was arms-length because they met and transacted business in a normal manner, *e.g.*, trade show introduction, oral business negotiations, sales documentation, *etc.*²⁴ While Qingdao Barry's narrative of its relationship with its U.S. customer is on the administrative record, there are other significant aspects of the sale which continue to raise questions about the commercial reasonableness and arms-length nature of the sale. Specifically, we find it relevant that Qingdao Barry's U.S. customer paid for the merchandise significantly later than it was originally due under the terms of the contract.

In analyzing the *bona fide* nature of a sale, the Department examines the totality of the circumstances and examines whether the transaction is "atypical of normal business practices."²⁵ In this instant NSR, the Department finds that a significantly late payment, when analyzed together with the totality of the circumstances of the sale, raises questions about whether the transaction is indicative of normal arm's-length commercial sales.²⁶ Qingdao Barry asserts that it did not seek a late payment fee because the contract did not authorize such a fee. However, the absence of such a provision is not dispositive (indeed, if anything, it raises questions given that a seller in a truly arms-length transaction would generally be expected to protect its financial interests by imposing a penalty for non-compliance). The fact remains that the sales contract between Qingdao Barry and its U.S. customer stated very specific payment terms.²⁷ By paying late, Qingdao Barry's U.S. customer failed to comply with these contractual obligations with no apparent repercussions for failing to do so or even evidence of attempts by Qingdao Barry to collect payment.

This behavior is particularly important because, as stated above, in reviews involving one sale, there is "little data from which to infer what the shipper's future selling practices look like."²⁸ In analyzing Qingdao Barry's commercial practices, it is important for the Department to examine factors such as terms of sale for some indication of what its selling practices may look like. Allowing for late payments, when analyzed together with the totality of the circumstances of the sale, indicates that the sale in question may not be an arms-length commercial transaction.

Qingdao Barry also states that its U.S. customer's refusal to respond to the importer's questionnaire is evidence that the sale was made at arms-length. However, Qingdao Barry provides no explanation or record evidence for why its customer's refusal is evidence of an arms-length relationship. Therefore, the Department is not persuaded that the U.S. customer's refusal to respond is supportive evidence that the sale was made at arms-length

²⁴ See Qingdao Barry's Case Brief at 11.

²⁵ See *New Donghua*, 374 F. Supp. 2d at 1339, citing *Windmill Int'l Pte., Ltd. v. United States*, 193 F. Supp. 2d 1303, 1313 (CIT 2002) (*Windmill*); see also *TTPC*, 366 F. Supp. 2d at 1249-50.

²⁶ See *TTPC*, 366 F. Supp. 2d at 1259-60 (finding that, though not dispositive, late payment is relevant to totality of the circumstances analysis).

²⁷ See "Multilayered Wood Flooring from China; Submission of Qingdao Barry Section A Response," dated November 17, 2015 at Exhibit A-8.

²⁸ See *TTPC*, 366 F. Supp. 2d at 1263.

Therefore, for the final results, we continue to find that there is no evidence that the sale was resold at a profit (or resold at all), and we continue to find that the U.S. customer's late payment raises questions about the arm's length nature of the sale.

Comment 4: Whether the Department Properly Analyzed Other Factors in Its Bona Fide Analysis

- Qingdao Barry states that the Department noted a number of other factors in support of its finding that Qingdao Barry's sale was not *bona fide*.
- Qingdao Barry argues that these factors are not persuasive or supported by record evidence to determine that its sales was non-*bona fide*.
- Specifically, Qingdao Barry asserts that having solely verbal negotiations with its U.S. customer is a common type of negotiation; the termination of the relationship with its U.S. customer has no bearing on the *bona fide* nature of the sale; and the fact that it was just one sale is not persuasive as the Department has found one sale to be *bona fide* in numerous past cases.

Department's Position: As discussed above, pursuant to section 751(a)(2)(B)(iv) of the Act, any weighted average dumping margin determined in a NSR *must* be based solely on *bona fide* sales during the POR. To determine whether a sale in a NSR is *bona fide*, the Department is instructed to consider, depending on the circumstances surrounding such sales: "(I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor {it} determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review."

In light of this statutory language, Commerce is entitled (and indeed statutorily obligated) to consider *any* factors that are relevant to assessing whether a sale is likely to be typical of a new shipper's future sales. We reasonably attributed significance to the fact that the importer response from Qingdao Barry's customer regarding their current business relationship with Qingdao Barry suggests that they are unlikely to transact in the future. Qingdao Barry argues that it is not required to only sell to one customer, and we do not disagree. But the fact remains that this is the *sole* sale on the record of this NSR, this particular sales pattern is unlikely to recur, and we have no evidence or detail regarding *why* this particular sales pattern is unlikely to recur. This lack of information significantly limits the Department's ability to evaluate the commercial reasonableness of the transaction and calls into question whether the sale was reflective of Qingdao Barry's commercial behavior.

Further, in this NSR, Qingdao Barry stated that all sales negotiations were conducted orally, and the importer of Qingdao Barry's merchandise refused to respond to the Department's importer questionnaire or otherwise participate in the NSR. As a result, the record contained no evidence about critical elements of the transaction, and the Department was unable to conclude whether the circumstances surrounding the negotiation of the sale "were—or were not—indicative of

normal commercial practices.”²⁹ The absence of this information is not wholly irrelevant, as Qingdao Barry suggests. Again, the purpose of a *bona fides* analysis is to evaluate the commercial reasonableness of the sale, and whether any margin assigned is likely to reflect that company’s future commercial behavior. The Department never found that verbal negotiations were *per se* atypical, but the absence of evidence regarding the sales negotiations nonetheless means that the Department has less evidence with which to evaluate the *bona fides* of the sale. This is especially true where, as here, the request is based on a single transaction.

Qingdao Barry contends that it was improper for the Department to consider the fact that Qingdao Barry only had one sale. We disagree. Just because the Department has found one sale to be *bona fide* in the past does not mean that this fact is irrelevant. In a one-sale review, “there is, as a result of the seller’s choice to make only one shipment, little data from which to infer what the shipper’s future selling practices look like.”³⁰ Therefore, the Department must “carefully scrutinize{ }” that sale.³¹ In this instance, we find one sale to be germane to our *bona fide* analysis as it, in light of the other factors analyzed, provides a limited basis for understanding a seller’s commercial behavior.

Therefore, for the final results, the Department continues to find that the factors upon which it relied in its preliminary rescission are relevant to its analysis, and continues to find from the totality of the circumstances that the sale is not *bona fide*.

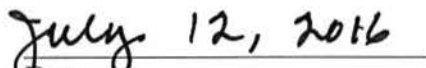
RECOMMENDATION:

Based on our analysis of the comments received and the factors described above, we recommend continuing to find the sale under review not a *bona fide* sale and we recommend rescinding this NSR. If accepted, we will publish the rescission of this review in the *Federal Register*.

AGREE ☒ DISAGREE ☐



Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance


Date

²⁹ See Prelim Bona Fides Memo at 5.

³⁰ See *TTPC*, 366 F. Supp. 2d at 1263.

³¹ *Id.*