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August 12, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

RE: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty New Shipper Review of Xanthan Gum from
the People's Republic of China

SUMMARY

The Department of Commerce (“Department”) analyzed the comments submitted by Petitioner¹ and Inner Mongolia Jianlong Biochemical Co., Ltd. (“IMJ”) in this new shipper review (“NSR”) of the antidumping duty (“AD”) order on xanthan gum from the People’s Republic of China (“PRC”). Based on the analysis of the comments received, we continue to find it appropriate to rescind the NSR of IMJ.² We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

BACKGROUND

On March 22, 2016, the Department published the *Preliminary Results* of this NSR for the period of review of July 1, 2014, through June 30, 2015.³ On May 5, 2016, the Department

¹ CP Kelco U.S., Inc. (“Petitioner”).

² See *Xanthan Gum From the People’s Republic of China: Preliminary Rescission of 2014--2015 Antidumping Duty NSR*, 81 FR 15240 (March 22, 2016) (“*Preliminary Results*”); see also Memorandum to Abdelali Elouaradia, Director, Office IV, AD/CVD Operations, from Cara Lofaro and Brandon Farlander, International Trade Analysts, entitled “2014-2015 Antidumping Duty NSR of Xanthan Gum From the People’s Republic of China: Preliminary *Bona Fide* Sales Analysis for Hengdian Group Inner Mongolia Jianlong Biochemical Co., Ltd.,” dated March 15, 2016 (“*Preliminary Bona Fide Memorandum*”).

³ See *Preliminary Results*; see also Preliminary Bona Fide Memorandum.



received a case brief from IMJ.⁴ On May 16, 2016, the Department received a rebuttal brief from Petitioner.⁵

SCOPE OF THE ORDER

The scope of the order covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in the order regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

Xanthan gum that has been blended with other product(s) is included in the scope when the resulting mix contains 15 percent or more of xanthan gum by dry weight. Other products with which xanthan gum may be blended include, but are not limited to, sugars, minerals, and salts.

Xanthan gum is a polysaccharide produced by aerobic fermentation of *Xanthomonas campestris*. The chemical structure of the repeating pentasaccharide monomer unit consists of a backbone of two P-1,4-D-Glucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)- P-DGlucuronic acid-(1,2) - a-D-Mannose monosaccharide units. The terminal mannose may be pyruvylated and the internal mannose unit may be acetylated.

Merchandise covered by the scope of this order is classified in the Harmonized Tariff Schedule (“HTS”) of the United States at subheading 3913.90.20. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.

DISCUSSION OF THE ISSUES

This memorandum discusses the following comments that the parties raised during this NSR.

- Comment 1: Whether IMJ Met the Regulatory Requirements for Requesting a New Shipper Review
- Comment 2: Whether or not IMJ’s sale was a *Bona Fide* Sale
- Comment 3: IMJ’s March 24, 2016 Submission

Comment 1: Whether IMJ Met the Regulatory Requirements for Requesting a New Shipper Review

In the *Preliminary Results*, the Department determined that IMJ did not meet the requirements for initiating a NSR because it did not identify in its NSR request shipments of subject merchandise to the United States in January 2014 and March 2014 which were before the entry of the subject merchandise that is the basis for this NSR, as required by 19 CFR 351.214(b)(2)(iv)(A). Further, the Department found that IMJ failed to meet the deadline for

⁴ See Letter from IMJ to the Secretary of Commerce, “Xanthan Gum From the People’s Republic of China: Case Brief,” dated May 5, 2016 (“IMJ’s Case Brief”).

⁵ See Letter from Petitioner to the Secretary of Commerce, “Xanthan Gum From the People’s Republic of China: Petitioner’s Rebuttal Brief,” dated May 16, 2016 (“Petitioner’s Rebuttal Brief”).

requesting a NSR given the existence of these unidentified shipments, as outlined in 19 CFR 351.214(c).⁶

IMJ's Comments:

- The sample shipments at issue could not have been the basis for a NSR request, because the Department treats sample sales for no value as non-reviewable sales and treats certifications of “shipments” or “no shipments” as applicable only to commercial quantity shipments for value.⁷
- In *Certain Polyester Staple Fiber*, the Department agreed that a respondent’s no shipment claim was not inconsistent with having had one entry during the POR of sample merchandise that did not involve consideration.⁸
- Unlike in *Wooden Bedroom Furniture – Marvin NSR*, there is no record evidence that the sample merchandise shipped to IMJ’s customer in January 2014 was “entered for consumption.”⁹ The Department cannot apply this practice inconsistently.¹⁰
- The Department should not strictly interpret its regulatory deadline to request a new shipper review within one year of the first entry or shipment when the first entry or shipment involves a non-reviewable sale that could not form the basis for a new shipper request. Such a strict interpretation eliminates the opportunity for any exporter that does not make a “reviewable” sale to request a NSR within one year of making any non-reviewable sample shipment. This is contrary to the congressional intent of section 751(a)(2) of the Tariff Act of 1930, as amended (“the Act”) and denies IMJ due process.¹¹
- Also, the small volumes of the sample shipments are inconsequential, and the inclusion of such shipments in dumping margin calculations would have no impact on the dumping margin. Unlike in *Wooden Bedroom Furniture – Marvin NSR*, no party, not even the Department, has claimed that the samples provided by IMJ to its customer constitute “relevant entries necessary to determine an accurate rate” and IMJ has consistently been forthcoming in its descriptions of the merchandise samples it provided to its U.S. customer.¹² Accordingly, the samples for no value and for examination purposes only should not have been subject to the Department’s review request.
- Additionally, the continuous bonding option was not available in this review, and therefore, because there was no actual difference at the border resulting from the initiation of the

⁶ See Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, from Cristian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, entitled “Decision Memorandum for the Preliminary Rescission of the 2014-2015 Antidumping Duty NSR of Xanthan Gum from the People’s Republic of China,” dated March 15, 2016 at 3-4 (“Preliminary Decision Memorandum”).

⁷ See IMJ’s Case Brief at 3.

⁸ See *Certain Polyester Staple Fiber from the People’s Republic of China: Preliminary Results of the Antidumping Duty Administrative Review*; 80 FR 43392 (“*Certain Polyester Staple Fiber*”) (July 22, 2015) and accompanying Preliminary Decision Memorandum at 4.

⁹ See *Marvin Furniture (Shanghai) Co. Ltd. v. United States*, 744 F.3d 1319, 1322-1325 (Fed. Cir. 2014) (“*Marvin*”); see also, *Wooden Bedroom Furniture From the People’s Republic of China: Final Rescission of Antidumping Duty New Shipper Review*, 77 FR 21536 (April 10, 2012) (“*Wooden Bedroom Furniture – Marvin NSR*”) and accompanying Issues and Decision Memorandum (“*Marvin IDM*”).

¹⁰ See IMJ’s Case Brief at 4, citing See IMJ’s NSR Request (July 31, 2015), at Exhibit 3.

¹¹ *Id.*, at 5.

¹² *Id.*, at 5-6, citing *Marvin*.

review, the Department's rationale for strictly enforcing its regulations, citing to *Wooden Bedroom Furniture – Marvin NSR*, lacks a sufficient basis.¹³

- Denying an exporter the right to engage in normal commercial practices (such as providing free samples) by imposing a time restriction that an export must make a “reviewable” sale to the United States within one year of any shipment of subject merchandise to the United States in order to be eligible to request a NSR is inconsistent with commercial considerations and represents a Constitutional violation of due process.¹⁴

No parties submitted rebuttal comments for this issue.

Department's Position:

We disagree with IMJ. As an initial matter, regardless of the Department's practice with respect to whether certifications of “no shipments” are applicable only to commercial quantity shipments for value (*i.e.*, “reviewable sales”) or also purported shipments of samples for no value, the issue here is not whether the sale was a reviewable transaction, but whether the requirements for requesting a NSR were met by IMJ when it neglected to report the shipments to Department in its request for a NSR. Also, the issues of whether or not the quantities of the sample shipments were small and whether or not there was an actual difference at the border are irrelevant because the question here is whether or not IMJ failed to meet the regulatory requirements for requesting a NSR.

Specifically, 19 CFR 351.214(b)(2)(iv)(A) requires that a request for a NSR contain documentation establishing “the date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States.” However, as explained in the Preliminary Decision Memorandum, IMJ did not identify in its NSR request¹⁵ the samples of subject merchandise for no value that it shipped to its first unaffiliated U.S. customer in January 2014 and March 2014.

IMJ attempts to distinguish the instant NSR from *Wooden Bedroom Furniture – Marvin NSR*, because it claims that the respondent in that case was not forthcoming concerning the nature of the samples provided to its customer when queried by the Department.¹⁶ However, in both the instant NSR and in *Wooden Bedroom Furniture – Marvin NSR*, the respondent failed to report its initial pre-POR shipments in its request for a NSR. Therefore, as was the case in *Wooden Bedroom Furniture – Marvin NSR*, the Department initiated the instant NSR based on erroneous information. In both cases, the entries in question involved shipments of samples for purportedly no consideration. Despite arguments in *Marvin* that these shipments did not involve a commercial sale, and therefore would not have been reviewable transactions; the Court of Appeals for the Federal Circuit and the Court of International Trade (“CIT”) agreed that the

¹³ See IMJ's Case Brief at 7-8, referencing *Wooden Bedroom Furniture*.

¹⁴ See IMJ's Submission at 8, referencing *Marvin*, 744 F.3d at 1325.

¹⁵ See Letter to the Secretary of Commerce “Re: Xanthan Gum from the People's Republic of China - Request for NSR,” dated July 31, 2015.

¹⁶ See *Marvin* at 1322 n.1.

respondent failed to meet the requirements for requesting a NSR. In both *Marvin* and the instant NSR, the parties were required under the Department's regulations to report the pre-POR entry(ies), but did not. IMJ asserts that here, unlike in *Marvin*, there is no evidence that IMJ's samples were entered for consumption. However, as was the case in *Marvin*,¹⁷ the evidence on the record indicates that the samples were entered into the United States and consumed in the United States, as there is no indication from the record that the samples were returned to IMJ.¹⁸

We disagree with IMJ's assertion that the Department's rationale for strictly enforcing its regulations lacks a sufficient basis because the continuous bonding option was not available in this review. It is important for parties to comply with the Department's regulations by providing all of the information required under the regulations when requesting a NSR. If the Department does not have all of the required information, it cannot be confident that it is making the proper decision as to whether or not to initiate a NSR. Thus, regardless of whether there was a bonding option available (this option was available to IMJ in this case),¹⁹ the Department properly applied its regulation in this NSR. The Department needs to apply the regulations to determine whether or not the respondent meets the requirements for obtaining a NSR.

Finally, with regard to IMJ's argument that denying an exporter the right to engage in normal commercial practices is inconsistent with commercial considerations and represents a Constitutional violation of due process, the Department disagrees. We are not denying the right of IMJ to engage in normal commercial practices, but rather, we are enforcing our regulations, applicable to all companies that apply for a NSR.

Therefore, we continue to find that IMJ's first sample shipment in January 2014 should have been reported in their request for a NSR, based on the plain language of the regulatory requirements under 19 CFR 351.214(b)(2)(iv)(A) for requesting a NSR. As such, the Department continues to find that IMJ did not satisfy the requirements for requesting a NSR.

Comment 2: Whether or not IMJ's Sale was a *Bona Fide* Sale

In the *Preliminary Results*, the Department determined that the sale under review was not a *bona fide* sale based on the price of the sale, the fact that the sale occurred towards the end of the POR, and the establishment of Jianlong USA, IMJ's U.S. affiliate, in the month before the last month of the POR.

¹⁷ See *Marvin* at 1322; see also, *Marvin IDM* at 3-4; see also Memorandum to the File from Patrick O'Connor through Howard Smith regarding: "Business Proprietary Information Regarding the Final Rescission of Marvin Furniture (Shanghai) Co., Ltd.," dated concurrently with *Marvin IDM*, at 1.

¹⁸ See IMJ's Section C&D Questionnaire response, dated October 15, 2015, at I-3; see also IMJ's 3rd Supplemental D Questionnaire response ("3rd Supplemental D Response"), dated February 4, 2016 at SuppD3-6.

¹⁹ See *Xanthan Gum From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 80 FR 52031, 52032 (August 27, 2015) stating "{t}he Department will instruct CBP to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for entries of subject merchandise from Inner Mongolia Jianlong in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e)."

IMJ's Comments:

Sale Price

- Record evidence does not support the Department's preliminary finding that the sales price was atypical.
- The price comparisons used by the Department to find the sales price atypical, (namely comparing the sales price to the price of sales made by the mandatory respondents²⁰ in the second administrative review ("AR2") in this proceeding) are not appropriate because they fail to consider differences in customer types; sales terms; timing, and dumping and cash deposit rates.²¹
- Other available information might show that IMJ's CEP selling price was a typical market price. The complete AR2 sales files for the mandatory respondents in that review are not on the record, and therefore, it is possible that the AR2 sales used for comparison purposes do not include all of the sales by the respondents of the same grade of xanthan gum with similar terms of sale as IMJ's POR sale.²² The Department should examine whether the record of the AR2 proceeding contains evidence of sales, purchases or orders of similar subject merchandise, with similar sales terms, by IMJ's POR customer but with another vender.²³

Timing of the Sale

- The Department never gave IMJ an opportunity to address concerns related to the timing of the sale.
- The Department considered the sale to have taken place four days before the end of the POR based on an incorrect date of sale. The Department has consistently found factory shipment date to be the date of sale, if it precedes invoice date, for CEP sales, which are sold back-to-back through U.S. affiliates or "direct CEP" sales that are made by a U.S. affiliate which never takes physical possession of the merchandise after shipment from the factory. Using the shipment date as the date of sale,²⁴ the sale took place almost a month before the end of the POR, rather than four days.²⁵

²⁰The mandatory respondents are Deosen Biochemical Ltd. ("Deosen") and Neimenggu Fufeng Biotechnologies Co., Ltd. ("Fufeng").

²¹ See Memorandum from Patrick O'Connor to the File, Re: "Proprietary Information for Final Results of the Antidumping Duty NSR of Xanthan Gum from the People's Republic of China," dated concurrently with this Memorandum, ("BPI Memorandum") at Note 1.

²² See IMJ's Case Brief at 14.

²³ *Id.*, at 17.

²⁴ See IMJ's Section A questionnaire response, dated September 30, 2015, at Exhibit A-5.

²⁵ See IMJ's Case Brief at 10-11, citing, e.g., *Certain Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value*, 81 FR 72 (January 4, 2016) and accompanying Preliminary Decision Memorandum (December 21, 2015) at 10 ("*CORE from Taiwan*"); *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 742 (January 7, 2016), and accompanying Preliminary Decision Memorandum (December 21, 2015) at 6-7 ("*Welded Pipe from Korea*"); *Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35244 (June 12, 2013), and accompanying Issues and Decision Memorandum (June 5, 2013) at Comment 2 ("*Copper Pipe from Mexico*").

- The Department should consider the careful, measured commercial relationship that was developed between IMJ and the U.S. customer over the course of a year and half prior to the sale as the exact opposite of a late-POR sale made in order to obtain a NSR.²⁶

U.S. Affiliate

- The establishment of a U.S. affiliate is not relevant to a *bona fide* sales analysis because the existence or non-existence of a U.S. sales branch is not a prerequisite for requesting, or being eligible to participate in, a NSR.
- The U.S. affiliate, Jianlong USA never took possession of the merchandise shipped by IMJ, and acted merely as a facilitator of the transaction.
- There is no record evidence that would support any notion that Jianlong USA might not operate as a legitimate commercial operation and the Department did not find evidence of unusual or extraordinary expenses for the transaction.²⁷

Petitioner's Rebuttal Comments:

Sale Price

- Nothing on the record indicates that the Department had any reason to take into consideration, or to not make a price comparison or change its price comparison methodology based on, the type of customers for, the sales terms (*e.g.*, quantities) of, or timing differences between, the compared sales.²⁸
- IMJ cites no precedent for its contention that the Department may *not* use potentially dumped sales as the measure of what is realistic in its price comparisons and what is indicative of future prices prior to the assessment of antidumping duties. The Department has an established practice of comparing the prices of sales in a NSR to the selling prices of other exporters operating under an existing antidumping order to determine whether the new shipper's sale is a *bona fide* commercial sale.²⁹ Moreover, because the comparison prices in the concurrent AR2 are being made under the discipline of an existing order, there is no reason for the Department to believe that those sales are being dumped in the U.S. market.³⁰
- Antidumping duty cash deposits have nothing to do with the seller building its sales price. Also, IMJ offers no precedent for adjusting prices used for comparison purposes for antidumping duty cash deposits and doing so would offer no value because cash deposits are not the same as final, assessed antidumping duties.³¹
- There is no reason for the Department to conduct a further examination of the record in AR2 to find possible sales that might indicate IMJ's sale was a *bona fide* commercial sale. It is

²⁶ See IMJ's Case Brief at 12.

²⁷ *Id.*, at 12-13.

²⁸ See Petitioner's Rebuttal Brief at 10-11; *also see* BPI Memorandum at Note 2.

²⁹ See Petitioner's Rebuttal Brief at 12 referencing Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty NSR, and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439 (January 10, 2003) and accompanying Issues and Decision Memorandum at Comment 1.

³⁰ See Petitioner's Rebuttal Brief at 12-13 *also see* BPI Memorandum at Note 3.

³¹ *Id.*, at 10-11.

the responsibility of IMJ to submit record evidence in this review to support the *bona fide* nature of its sale.³²

Timing of the Sale

- Record information regarding the sales process indicates the sale was timed in order to allow Jianlong USA to issue a commercial invoice within the POR.³³
- The Department’s regulations direct it to use invoice date as the date of sale unless there is evidence that another date better reflects the date when the material terms of sale are established. Communications between the U.S. customer and Jianlong USA indicate the material terms of sale were not settled prior to issuance of the invoice³⁴ and IMJ reported the “commercial invoice date as the date of sale . . . because the material terms of sale were established as of the date when the invoice was issued.”³⁵
- The decisions which IMJ cites do not support its position. Two of the decisions are preliminary findings, and, in both, the Department used the date of invoice not the date of shipment as the date of sale.³⁶ The facts of the final decision which IMJ relies upon are inapposite to this case, as the product had a “fixed price” where the material terms of sale were set at shipment.³⁷

U.S. Affiliate

- The fact that IMJ established a relationship with the U.S. customer over a year and a half before the sale calls into question why IMJ would, at the last minute, form a U.S. affiliate, Jianlong USA, just before making the sale. The most apparent reason for doing so is to turn IMJ’s sale to into a CEP sale rather than an EP sale, which could allow IMJ to manipulate prices for purposes of reducing AD cash deposits paid upon entry apart from establishing a different price for purposes of obtaining a low dumping margin in this NSR.
- Jianlong USA is uncharacteristically different from what would be expected for a company that had legitimate business operations. Those differences include certain aspects of its presence,³⁸ the fact that it made only one sale of any product during the POR, and has not made any other sales since its first sale, and the price that it was able to negotiate on the single business transaction undertaken during its existence.³⁹

³² See Petitioner’s Rebuttal Brief at 13-14.

³³ See BPI Memorandum at Note 4.

³⁴ See Petitioner’s Rebuttal Brief at 4-5.

³⁵ See Petitioner’s Rebuttal Brief at 2-3; *see also* Letter from IMJ, Re: Xanthan Gum from the People’s Republic of China: Section A Response (September 30, 2015) (“IMJ’s Section A Response”) at A-15– 16.

³⁶ *Id.*, at 6, referencing *CORE from Taiwan* and accompanying Issues and Decision Memorandum and *Welded Pipe from Korea* and accompanying Issues and Decision Memorandum.

³⁷ *Id.*, referencing *Copper Pipe from Mexico* and accompanying Issues and Decisions Memorandum at Comment 2.

³⁸ See BPI Memorandum at Note 5.

³⁹ See Petitioner’s Rebuttal Brief at 7-9; *also see* BPI Memorandum at Note 6.

Department's Position:

Sale Price

In the *Preliminary Results*, we determined that the price of IMJ's reported sale calls into question whether the sale was based on normal commercial considerations and whether it is representative of the prices at which IMJ/Jianlong USA will be able to sell xanthan gum in the United States in the future. We determined that the sales price was atypical based on comparisons to sales of similar subject merchandise, with similar sales terms, reported by the mandatory respondents in AR2 in this proceeding, which covers the same period of review as this NSR, and compared with the price of IMJ's sales of xanthan gum to other countries during the POR.⁴⁰ In these final results of review, we have compared the price of IMJ/Jianlong USA's U.S. sale of xanthan gum to the average export price and maximum export price of the same type of xanthan gum sold by Fufeng, the only mandatory respondent that received a separate calculated rate in the preliminary results of AR2, during the POR,⁴¹ and to the price of IMJ's sales of xanthan gum to other countries during the POR.⁴² As discussed in the Preliminary Bona Fide Memorandum, our comparisons demonstrate that the price of IMJ's sale is "atypical" in nature. Price information from multiple and varied sources indicated that IMJ's sale was not a *bona fide* sale.⁴³ Moreover, our price comparisons raise questions about IMJ's claim that its first unaffiliated U.S. customer chose to purchase from Jianlong USA in order to secure a competitive supply source. IMJ's sale price does not appear to be competitive when compared against Fufeng's average and highest export price of the same grade of xanthan gum. As explained below, we do not find any of IMJ's arguments as to why the price comparisons are inappropriate to be persuasive. In addition, IMJ's arguments concerning the comparison of its sales with the sales of Deosen's sales during the AR2 POR are moot because for these final results, the Department's analysis is based on a comparison of IMJ's sale with the relevant AR2 sales of Fufeng.

We disagree with IMJ's claim that the Department's price comparisons are deficient because the Department failed to consider the type of customers for, the sales terms (*e.g.*, quantities) of, and timing differences between, the compared sales. IMJ cited no record evidence regarding the effect of customer type on sale price and thus its argument that the Department's analysis was flawed because the Department did not consider customer type is not supported by the record.⁴⁴ With respect to differences in sales terms, the facts on the record do not support IMJ's line of reasoning.⁴⁵ Additionally, we disagree with IMJ's argument regarding timing differences between IMJ's sale and the comparison sales. The Department uses the best information

⁴⁰ Because the Harmonized Tariff Schedule of the U.S. category that covers xanthan gum is a basket category which includes imports of other products (not just xanthan gum), we are not using U.S. Census import statistic data to evaluate the price and quantity of IMJ's sale.

⁴¹ See *Xanthan Gum from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Preliminary Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, (issued August 5, 2016). In a change from the preliminary results, for these final results we are no longer also relying on a comparison of IMJ's sale with the sales of Deosen during AR2 in light of our preliminary decision in AR2 to apply total adverse facts available to Deosen.

⁴² See IMJ's Surrogate Value Questionnaire response, dated January 19, 2016 at SV-7.

⁴³ See *Preliminary Results*; see also Preliminary Decision Memorandum and Preliminary Bona Fide Memorandum and Fufeng's sales data in Attachment III.

⁴⁴ See generally section 751(a)(2)(B) of the Act and 19 CFR 351.214.

⁴⁵ See BPI Memorandum at Note 7.

available in making price comparisons in *bona fide* sales analyses. In this instance, the best available information with which to conduct the *bona fides* analysis with respect to IMJ's sale is the sales information from AR2.⁴⁶ IMJ has not proposed any other data which would be suitable for use in conducting this analysis. Moreover, one of our comparisons was between the average export price of Fufeng's sales, which was calculated using sales throughout the POR, and the price of IMJ's sale. Hence, we do not find the price comparisons inappropriate because of the timing of the sales. Further, the statute clearly enumerates a number of considerations which, depending on the circumstances of the sale, the Department shall consider when determining whether a sale is a *bona fide* sale. The issues regarding customer type and sales terms are not among those considerations.⁴⁷

We also disagree with IMJ's contention that the Department's comparisons should consider dumping and cash deposit rates. The Department does not adjust for cash deposit rates when calculating net prices in its price comparisons. We have long maintained, and continue to maintain, that antidumping duties, and cash deposits of antidumping duties, are not expenses that we should deduct from U.S. price.⁴⁸ To do so would involve a circular logic that could result in an unending spiral of deductions for an amount that is intended to represent the actual offset for the dumping. There is no reason for the Department to depart from its practice here and IMJ has cited no precedent as evidence of past Department practice in this regard.

Finally, we address IMJ's claims regarding evidence from AR2. We disagree with IMJ's claim that not having certain additional sales data from AR2 on the record of this NSR hinders the comparison of IMJ's sale with the sales in AR2. As an initial matter, we believe we have the complete relevant sales data from AR2 on the record. Xanthan gum is made in a number of different grades (*e.g.*, pharmaceutical, consumer, food, industrial, and oil). We placed on the record data from AR2 for all of the reported sales of xanthan gum of the same grade as the grade of xanthan gum sold by IMJ.⁴⁹ Given that we were able to compare sales of the same grade of xanthan gum, there was no need to place on the record, nor would it have been appropriate to compare IMJ's sale to, data from AR2 regarding respondents' sales of other grades of xanthan

⁴⁶ The Department's practice, when relying on reported sales for comparison purposes, is to use sales from the most recently completed segment in the proceeding to conduct its *bona fide* analysis. However in this instance, the final results for the first administrative review in this proceeding have not been issued (*see* Memorandum, Re "*Xanthan Gum from the People's Republic of China: Deferral of the Final Results of the First Antidumping Duty Administrative Review*," dated February 9, 2016) nor have the final results of the second administrative review in this proceeding been issued. Therefore, we used the most contemporaneous sales in our comparison (*i.e.*, Fufeng's sales data from AR2).

⁴⁷ *See* Section 751(a)(2)(B) (iv) of the Act. Stating the Department "shall consider, depending on the circumstances of the sale: (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 the administering authority 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." *See also* *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

⁴⁸ *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 FR 54043 (October 17, 1997) and accompanying Issues and Decision Memorandum at Comment 15.

⁴⁹ *See* Preliminary Bona Fide Memorandum at Exhibit II and III.

gum.⁵⁰ Also, we disagree with IMJ's assertion that the Department should examine whether the record of AR2 contains evidence of sales to, purchases by, or orders from IMJ's customer for similar subject merchandise with similar terms involving a supplier other than IMJ. It is incumbent upon the respondent to provide record evidence to support the *bona fides* of its sale. The Department provided IMJ several opportunities to submit relevant information regarding the sale, including the opportunity to rebut, clarify, or correct the information on the record.⁵¹ IMJ provided only the information discussed above, but as explained, the Department finds that this information supports a conclusion that the reported sale is a non-*bona fide* sale.

The CIT emphasized the importance of a commercially realistic price when determining whether a sale is a *bona fide* sale, when, in *TTPC*, it stated that in *bona fide* sales analyses, "the price factor has significant weight, and cannot necessarily be offset by ... other factors by which the sale could be considered typical The transaction must be 'normal' as a whole, and price must be a large part of what produces 'normal' sales in the context of an antidumping determination."⁵² As explained above, we find the price of IMJ's sale is not commercially realistic. This fact is particularly important because IMJ's sale is the sole basis upon which a calculated separate antidumping duty margin and cash deposit rate would be based.

Timing of the Sale

In the *Preliminary Results*, the Department noted that IMJ's sale occurred four days before the end of the POR. IMJ contends that this finding is incorrect because the Department used the wrong date of sale. While the Department's regulations state that the Department will normally rely on invoice date as the date of sale, IMJ is correct that the Department typically will not use a date of sale after shipment date (*i.e.*, will use the earlier of invoice date or shipment date as the date of sale).⁵³ However, regardless of the date the Department recognizes as the date of sale in this case, the shipment date or the invoice date, both are evidence that the transaction was completed towards the end of the POR,⁵⁴ which suggests that IMJ timed the sale to occur before the end of the POR for the purposing of obtaining a NSR. In other NSRs, we have found sales that were similarly made at the end of the POR to also be an indication that the sale was not a *bona fide* sale.⁵⁵ We find that to be the case here.

⁵⁰ *Id.*

⁵¹ See Memorandum to the File from Cara Lofaro through Howard Smith, Re: "Deadline for Submission of Comments on New Factual Information," dated March 17, 2016 ("March 17, 2016 Memo to File").

⁵² See *Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250, 1263 (CIT 2005) (*TTPC*).

⁵³ See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-1092 (CIT 2001); also see, e.g., *Seamless Refined Copper Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 33482 (June 12, 2015) and accompanying Issues and Decision Memorandum at Comment 1; *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10.

⁵⁴ See BPI Memorandum at Note 8.

⁵⁵ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Rescission of Antidumping Duty NSR; 2013-2014*, 80 FR 55090 ("Solar NSR Final") (September 14, 2015) and accompanying Issues and Decision Memorandum at 15 (finding that a sale shipped at the end of a POR in conjunction with other factors, raises questions as to whether the sale was indicative of normal commercial practices).

We disagree with IMJ's argument that its U.S. sale is not a late-POR sale because it developed a relationship with its customer over the course of a year and a half. Even if IMJ established contact with its U.S. customer a year and a half earlier, it was not until the last month of the POR that the sale under consideration was made through IMJ's recently incorporated CEP affiliate. Given the reported length of the relationship, this calls into question whether the sale was made and timed specifically for the purpose of obtaining a NSR. In light of the foregoing, we do not find IMJ's argument that it established a long-term relationship with its U.S. customer compelling.

We disagree with IMJ's assertion that the Department never gave IMJ the opportunity to address concerns related to the timing of the sale. IMJ had previously described the facts surrounding the sales process on the record, and therefore, IMJ had the opportunity to brief the Department on the sales process and concerns related to timing of the sale.

U.S. Affiliate

Contrary to IMJ's position, the establishment of the U.S. affiliate, Jianlong USA, is relevant to the *bona fide* sales analysis in this case because Jianlong USA was incorporated immediately before it entered negotiations with the same downstream customer but nearly a year and a half after IMJ had sent xanthan gum samples to the same downstream customer. The evidence on the record raises questions as to whether IMJ/Jianlong USA made the sale in order to obtain a NSR and whether the transaction is indicative of normal commercial practices. Petitioner points to record evidence supporting the notion that Jianlong USA was established for the sole purpose of IMJ's single sale for this NSR.⁵⁶ The Department agrees with Petitioner.

IMJ had an established relationship with its first unaffiliated customer over a year and a half before the sale⁵⁷ yet it formed Jianlong USA only shortly before the sale under review.⁵⁸ Further, Jianlong USA made no sales prior to the one that forms the basis of this NSR and has made no other sales since making the sale under review. In light of the lack of sales activity and the lack of evidence of ongoing U.S. commercial operations, we continue to find that the facts surrounding the establishment of Jianlong USA raise doubts as to whether Jianlong USA was established to be an ongoing commercial enterprise, or rather established for the purpose of obtaining a NSR. The establishment of and circumstances surrounding the U.S. affiliate further call into question whether the IMJ/Jianlong USA sale is representative of normal business practices, and therefore contributes to the Department's finding that the sale is not a *bona fide* sale.

Based on the analysis above, when viewed in a totality of the circumstances, we continue to find that the sale does not represent IMJ's future commercial behavior and is a non-*bona fide* sale.

⁵⁶ See IMJ's Section A Response at Exhibit A-5.

⁵⁷ See IMJ's Section C and D questionnaire response, dated October 15, 2015 ("Section C&D Response") at I-3 - I-4.

⁵⁸ See BPI Memorandum at Note 9.

Comment 3: IMJ's March 24, 2016 Submission⁵⁹

On March 17, 2016, in accordance with 19 CFR 351.301(c)(4), the Department gave interested parties the opportunity to submit factual information to rebut, clarify, or correct the new factual information placed on the record by the Department in its Preliminary Bona Fide Memorandum.⁶⁰ Subsequently, on March 24, 2016, IMJ submitted a document which it contended was a response to the new factual information,⁶¹ and on April 25, 2016, pursuant to 19 CFR 351.302(d)(1)(i), the Department rejected IMJ's March 24, 2016 Submission because it contained untimely filed and unsolicited factual information.⁶²

IMJ's Comments:

- The Department's rejection of factual information related to the *bona fide* sales analysis submitted by IMJ was incorrect and denied IMJ due process of law. IMJ incorporates in this brief by reference the comments included in its April 4, 2016, letter⁶³ to the Department, and urges the Department to allow all of the information provided in IMJ's March 24, 2016 submission to be reintroduced onto the record for the Department's consideration for the final results.⁶⁴

Petitioner's Rebuttal Comments:

- It is the responsibility of respondent IMJ to build the record evidence in this segment to support the *bona fide* nature of its sale. For this reason, the Department should adhere to its decision to reject the untimely new factual information in IMJ's March 24, 2016 submission.

Department's Position:

We already addressed the question of whether to accept IMJ's March 24, 2016 submission. On March 17, 2016, in accordance with 19 CFR 351.301(c)(4), the Department allowed interested parties one opportunity to submit factual information to rebut, clarify, or correct the *new* factual information included in the Preliminary Bona Fide Memorandum. However, much of the factual information in IMJ's March 24, 2016 submission served to rebut the Department's analysis, not to rebut, clarify or correct the new factual information in the Preliminary Bona Fide Memorandum. Further, although IMJ claimed that the information contained in certain Exhibits attached to its March 24, 2016 submission was submitted to confirm the accuracy of the data that the Department relied on for its *bona fide* sales analysis, which it first placed on the record in its Preliminary Bona Fide Memorandum, IMJ failed to explain how the information rebutted, clarified, or corrected the Department's new factual information and did not point to any inaccuracy in the data that the Department placed on the record. Thus, the Department rejected

⁵⁹ See Letter from IMJ to the Secretary of Commerce, "Re: Xanthan Gum from the People's Republic of China: Response to New Factual Information," dated March 24, 2016 ("March 24, 2016 Submission").

⁶⁰ See March 17, 2016 Memo to File.

⁶¹ See March 24, 2016 Submission.

⁶² See Letter from Howard Smith, Program Manager, Office IV, AD/CVD Operations, to IMJ, "New Shipper Review of Xanthan Gum from the People's Republic of China: Rejection and Removal from the Record of Response to New Factual Information," dated April 25, 2016 ("April 25, 2016 Rejection Letter").

⁶³ See Letter from IMJ to the Secretary of Commerce, "Re: Xanthan Gum from the People's Republic of China: Response to CP Kelco U.S. Inc.'s Request to Reject IMJ's March 24, 2016, Submission," dated April 4, 2016.

⁶⁴ IMJ's Submission at 18-19.

these parts of IMJ's March 24, 2016 submission. The Department's position remains unchanged and we adopt our response in the April 25, 2016 Rejection Letter for purposes of these final results.⁶⁵

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of this NSR in the *Federal Register*.

Agree Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

12 AUGUST 2016
Date

⁶⁵ See April 25, 2016 Rejection Letter.