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December 11, 2019

**MEMORANDUM TO:** Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

**FROM:** James Maeder  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Results of the  
Administrative Review of the Antidumping Duty Order on Silicon  
Metal from the People's Republic of China; 2017-2018

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## I. SUMMARY

We have analyzed the case and rebuttal briefs submitted by interested parties and, consistent with the *Preliminary Results*,<sup>1</sup> continue to find it appropriate to rescind this review. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

- Comment:** Whether Fuyang’s Sole U.S. Sale During the Period of Review is *Bona Fide*
- i. Whether Sale Price Weighs in Favor of Finding Fuyang’s Sale Was Not *Bona Fide*
  - ii. Whether Sale Quantity Weighs in Favor of Finding Fuyang’s Sale Was Not *Bona Fide*
  - iii. Whether Sale Timing Weighs in Favor of Finding Fuyang’s Sale Was Not *Bona Fide*
  - iv. Whether the Goods were Resold at a Profit
  - v. Whether the Sale was Made on an Arm’s-Length Basis
  - vi. Other Relevant Factors

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<sup>1</sup> See *Silicon Metal From the People’s Republic of China: Preliminary Rescission of the Antidumping Duty Administrative Review; 2017-2018*, 84 FR 40395 (August 14, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum; and Commerce’s Letter, “2017-2018 Antidumping Duty Administrative Review of Silicon Metal from the People’s Republic of China: Preliminary *Bona Fide* Sales Analysis for Yunnan Fuyang Trade Co., Ltd.,” dated August 14, 2019 (Preliminary *Bona Fides* Memo).

## II. BACKGROUND

On August 14, 2019, the Department of Commerce (Commerce) published the preliminary results of the administrative review of the antidumping duty (AD) order on silicon metal from the People's Republic of China (China) for the period June 1, 2017 through May 31, 2018.<sup>2</sup> The review covers one producer/exporter of the subject merchandise: Yunnan Fuyang Trade Co., Ltd. (Fuyang).

On September 13, 2019, Fuyang and the petitioner<sup>3</sup> timely submitted case briefs commenting on the *Preliminary Results*.<sup>4</sup> Fuyang and the petitioner timely submitted rebuttal briefs on September 23, 2019.<sup>5</sup>

Based upon our analysis of the comments received, we continue to find that Fuyang had no *bona fide* U.S. sales during the POR. If our recommendation is approved, consistent with our finding that Fuyang had no *bona fide* U.S. sales during the POR, we will rescind the administrative review.

Commerce has conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

## III. SCOPE OF THE ORDER

The product covered by the order is silicon metal containing at least 96.00 but less than 99.99 percent of silicon by weight, and silicon metal with a higher aluminum content containing between 89 and 96 percent silicon by weight. The subject merchandise is currently classifiable under item numbers 2804.69.10 and 2804.69.50 of the Harmonized Tariff Schedule of the United States (HTSUS) as a chemical product, but is commonly referred to as a metal. Semiconductor-grade silicon (silicon metal containing by weight not less than 99.99 percent of silicon and provided for in subheading 2804.61.00 of the HTSUS) is not subject to this order. This order is not limited to silicon metal used only as an alloy agent or in the chemical industry. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

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<sup>2</sup> *Id.*

<sup>3</sup> The petitioner is U8 Globe Specialty Metals, Inc.

<sup>4</sup> See Fuyang's Letter, "Silicon Metal from the People's Republic of China: Case Brief of Yunnan Fuyang Trade Co., Ltd.," dated September 13, 2019 (Fuyang's Case Brief); and Petitioner's Letter, "Silicon Metal from the People's Republic of China; 2017-18 Administrative Review; Case Brief of Globe Specialty Metals, Inc.," dated September 13, 2019 (Petitioner's Case Brief). In its case brief, Fuyang requested that petitioner remove from the record sensitive information regarding its U.S. importer's company officials. See Fuyang's Case Brief at 14. Petitioner agreed to re-file its submission without this information and Commerce accordingly removed the original submission from the record of this proceeding. See Memorandum "Telephone Conversation Regarding the Removal of Certain Bracketed Information on the Record," dated November 5, 2019.

<sup>5</sup> See Fuyang's Letter, "Silicon Metal from China: Fuyang's Rebuttal Brief," dated September 23, 2019 (Fuyang's Rebuttal Brief); and Petitioner's Letter, "Silicon Metal from the People's Republic of China; 2017-18 Administrative Review; Rebuttal Brief of Globe Specialty Metals, Inc.," dated September 23, 2019 (Petitioner's Rebuttal Brief).

#### IV. DISCUSSION OF THE ISSUES

##### Comment: Whether Fuyang's POR U.S. Sale During the Period of Review is *Bona Fide*

###### *Fuyang's Comments:*

- Commerce's *Preliminary Results* are not based on substantial evidence or otherwise in accordance with law, and require reversal for the final results of administrative review.<sup>6</sup>

###### *Petitioner's Comments:*

- Commerce correctly determined that the evidence supports finding Fuyang's sale was not a *bona fide* sale. Because no reviewable sales were made, Commerce must rescind this administrative review.<sup>7</sup>

###### *Commerce's Position:*

We continue to find that the weight of evidence supports finding that Fuyang's sale was not *bona fide*. Commerce has a well-established practice of conducting *bona fides* sales analysis in administrative reviews (ARs), where warranted.<sup>8</sup> In evaluating whether a sale is *bona fide*, Commerce employs a totality of the circumstances test<sup>9</sup> to determine whether the transaction is "commercially reasonable" or "atypical."<sup>10</sup> Atypical or non-typical in this context means unrepresentative of a normal business practice.<sup>11</sup>

Specifically, in evaluating whether a sale is *bona fide*, Commerce considers: (a) the price of the sale; (b) whether the sale was made in commercial quantities; (c) the timing of the sale; (d) the expenses arising from the transaction; (e) whether the goods were resold at a profit; (f) whether the transaction was made on an arm's-length basis; and (g) any other factor that Commerce

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<sup>6</sup> *Id.* at 14.

<sup>7</sup> See Petitioner's Case Brief at 18.

<sup>8</sup> See, e.g., *Glycine From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind, In Part; 2013-2014*, 80 FR 18814 (April 8, 2015) (unchanged in *Glycine From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 62027 (October 15, 2015)); see also *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of the 2008-2009 Administrative Review of the Antidumping Duty Order*, 75 FR 41148 (July 15, 2010) (evaluating the *bona fides* of the single POR sale from a voluntary respondent; unchanged in *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)); and *Administrative Review of Honey from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review, In Part*, 75 FR 24880 (May 6, 2010).

<sup>9</sup> See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1249-1250; see also *Glycine from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd.*, 69 FR 47405, 47406 (August 5, 2004) (*New Donghua*).

<sup>10</sup> See, e.g., *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439, 1440 (January 10, 2003) (*Crawfish Final*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1.

<sup>11</sup> See *American Silicon Technologies v. United States*, 110 F. Supp. 2d 992, 996-98 (Ct. Int'l Trade 2000) (*Silicon Techs*).

considers to be relevant to whether the sale at issue is “likely to be typical of those the exporter or producer will make after the completion of the review.”<sup>12</sup>

The Court of International Trade (CIT) recognized that the aim of Commerce’s *bona fide* sales analysis is “to ensure that a producer does not unfairly benefit from an atypical sale to obtain a lower dumping margin than the producer’s usual commercial practice would dictate.”<sup>13</sup> In *Hebei New Donghua v. United States*, the CIT noted that Commerce’s practice makes clear it “is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an AD Order.”<sup>14</sup> Further, regarding single sale reviews, it is well-established that Commerce carefully scrutinizes single sales because there is only one transaction with which to calculate a dumping margin and establish a cash deposit rate.<sup>15</sup>

Lastly, it is also well-established that when no *bona-fide* sales were made during the POR, there is no basis to calculate an accurate dumping margin, and it is within Commerce’s authority to rescind the review.<sup>16</sup> As such, a non-*bona fide* finding must necessarily end a single sale review.<sup>17</sup>

For the reasons explained below, we find there was no *bona fide* sale during the POR and therefore we are rescinding this review.

**i. Whether Sale Price Weighs in Favor of Finding Fuyang’s Sale Was Not *Bona Fide***

*Fuyang’s Comments:*

- Commerce failed to provide details regarding the “price range” it used to find the POR sale price unusual and determined without explanation that a small percentage difference

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<sup>12</sup> See section 751(a)(2)(B)(iv) of the Act (setting out the factors that Commerce considers to determine whether a sale is *bona fide* in the context of a new shipper review); see also *Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1249 (CIT 2005) (*Tianjin Tiancheng*) (citing *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 995 (CIT 2000)); see also *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (*Hebei New Donghua*) (“Commerce’s practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices.”).

<sup>13</sup> See *Inner Mongolia Jianlong Biochemical Co. v. United States*, 337 F. Supp. 3d 1329, 1338 (CIT 2018) (citing *Huzhou Muyun Wood Co., Ltd. v. United States*, 324 F. Supp. 3d 1364, 1376 (CIT 2018) (*Huzhou Muyun II*)).

<sup>14</sup> See *Hebei New Donghua*, 374 F. Supp. 2d at 1339; see also *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review*, 80 FR 55333 (September 15, 2015), and accompanying IDM at Comment 1 (citing *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250; and *Hebei New Donghua*, 374 F. Supp. 2d at 1339).

<sup>15</sup> See, e.g., *Silicomanganese From India: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 75660 (December 3, 2015), and accompanying IDM at Comment 1; see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1249; and *Hebei New Donghua*, 374 F. Supp. 2d at 1344.

<sup>16</sup> See, e.g., *Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation v. United States*, 253 F. Supp. 3d 1364, 1370 (Fed. Cir. 2018); and *Titanium Sponge from the Russian Federation; Notice of Final Results of Antidumping Duty Administrative Review*, 62 FR 48601 (September 16, 1997), and accompanying IDM at Comment 3.

<sup>17</sup> See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1249.

between the 2016 comparison prices and the POR price<sup>18</sup> means Fuyang's POR price was "not based on normal commercial considerations." This small price difference is normal in light of differences in the markets, timing, and expenses of the transactions being compared.<sup>19</sup> The Court of International Trade (CIT) recognized that "changes in price over time are inevitable in any industry," and that such changes impact an analysis of whether a sale price is typical.<sup>20</sup>

- A meaningful examination of the 2016 comparison and POR prices relative to contemporaneous index prices for silicon metal show the prices were based on normal commercial considerations, weighing in favor of a *bona fide* sale determination.<sup>21</sup>
- Fuyang also took into consideration pricing trends noting that it believed there was an upward trajectory of silicon metal prices.<sup>22</sup>
- Commerce should not have based its price analysis, in part, on a comparison of the POR sales price with a April 2016 price quoted by Fuyang because no sale was ever made based on that April 2016 price quote.<sup>23</sup> Negotiating positions over a year prior to the POR sale do not undermine Fuyang's explanation of how it relied on certain commercial considerations to price its POR sale.

*Petitioner's Comments:*

- Commerce specifically identified the prices it compared to Fuyang's U.S. sale price (and thereby defined the price range),<sup>24</sup> correctly concluded that the POR price falls outside the price range and relied on more than just the "small" price difference noted by Fuyang; these comparisons demonstrate the POR sale is non-*bona fide*.<sup>25</sup>
- Fuyang failed to provide any explanation of a specific methodology used to determine the POR sales price to support its claim that it based the price on commercial considerations.
- Fuyang's claim regarding differences in markets, timing, and related transaction expenses fails to explain the difference between the POR price and the comparison prices.<sup>26</sup>
- Contemporaneous index prices for silicon metal do not support Fuyang's explanation as to why the 2016 comparison prices and the POR price differ.<sup>27</sup>
- Evidence calls into question Fuyang's claim that no sale was ever made based on the April 2016 price quote.<sup>28</sup>

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<sup>18</sup> See Memorandum, "Proprietary Information for the Final Results of the Administrative Review of the Antidumping Duty Order on Silicon Metal from the People's Republic of China; 2017-2018," dated concurrently with this memorandum (BPI Memorandum), at Note 1. Throughout this memorandum any reference to a 2017 price refers to the POR sale.

<sup>19</sup> See Fuyang's Case Brief at 3-4 (citing *Huzhou Muyun Wood Co., Ltd. v. United States*, 279 F. Supp. 3d 1215, 1229 (CIT 2017) (*Huzhou Muyun I*)).

<sup>20</sup> *Id.* at 4 (citing *Huzhou Muyun I*), 279 F. Supp. 3d at 1229).

<sup>21</sup> See BPI Memorandum at Note 2.

<sup>22</sup> See Fuyang's Case Brief at 6; see also BPI Memorandum at Note 3.

<sup>23</sup> See Fuyang's Case Brief at 5; see also BPI Memorandum at Note 4.

<sup>24</sup> See Petitioner's Rebuttal Brief at 5.

<sup>25</sup> See Petitioner's Case Brief at 3-4; see also BPI Memorandum at Note 5.

<sup>26</sup> See Petitioner's Case Brief at 5; see also BPI Memorandum at Note 6.

<sup>27</sup> See BPI Memorandum at Note 7.

<sup>28</sup> *Id.* at Note 8.

*Commerce's Position:*

We disagree with Fuyang that the price of its POR sale supports finding that the sale is representative of Fuyang's future sales of silicon metal to the United States. The price of the POR sale is higher than any previous price that Fuyang charged for silicon metal.<sup>29</sup> Contrary to Fuyang's claim, we identified this price range in the Preliminary *Bona Fides* Memo to determine whether Fuyang's POR price was based on normal commercial considerations.<sup>30</sup>

Per Commerce practice, we based our price analysis on the best information available in this review with which to compare the price and quantity of Fuyang's sole U.S. sale, Fuyang's prior third country sales of subject merchandise. Those sales are: (1) export sales of silicon metal; and (2) made through the same sales channel (*i.e.*, from Fuyang to the importer) as the POR sale.<sup>31</sup> No party disputes our determination to base our price analysis on a comparison of Fuyang's POR sale to Fuyang's prior third country sales of subject merchandise.

However, Fuyang's attempts to explain that the difference in price between Fuyang's POR sale and its prior third country sales is due to differences in markets, timing, and related expenses is not consistent with certain record evidence. Fuyang claimed that it based the price of its prior and POR sales of silicon metal on an index, which reports the price of silicon metal on a near daily basis.<sup>32</sup> If this is true, the fact that Fuyang sold the silicon metal to different markets would not explain the price differences because the referenced index is not specific to a particular export market. Further evidence indicates that differing markets would not have impacted the price differences between Fuyang's POR sale and prior sales.<sup>33</sup> Thus, price fluctuations based on market differences cannot explain the differences in price between Fuyang's POR sale and its prior export sales.

With respect to explaining the price differences based on timing, Fuyang reported that "volume and price differences between the merchandise at issue and silicon metal purchased in previous years were attributable to... index price fluctuations at that time."<sup>34</sup> However, it is not clear that the increase in the contemporaneous index price between the time that Fuyang made its third-country sales and the time that it made the POR sale explains the difference in price between these sales. First, it is not clear that Fuyang sets prices based on the index. In response to Commerce's specific questions regarding how, exactly, Fuyang determined the price of its POR sale, Fuyang failed to provide any explanation of a specific methodology or steps that were used to arrive at the price based on the referenced index. Additionally, in price negotiation documents dated August 1, 2017, Fuyang made reference to raw material costs to explain price fluctuations but made no reference to the index.<sup>35</sup> Moreover, Fuyang quoted similar prices for silicon metal to the same U.S. customer prior to the POR and during the POR, even though over this time period

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<sup>29</sup> *Id.* at Note 9.

<sup>30</sup> See Commerce's Letter, "Silicon Metal from the People's Republic of China: Fourth Supplemental Questionnaire," dated May 23, 2019 (Fourth SQR), at 6; *see also* BPI Memorandum at Note 10.

<sup>31</sup> See Preliminary *Bona Fides* Memo at 4.

<sup>32</sup> See Fuyang's Letter, "Silicon Metal from the People's Republic of China: Response to the Initial Supplemental Questionnaire," dated April 29, 2019 (First SQR), at Appendix 1.

<sup>33</sup> See Fourth SQR at 6; *see also* BPI Memorandum at Note 11.

<sup>34</sup> See First SQR at Appendix 1.

<sup>35</sup> *Id.* at A-16.

the index price rose significantly.<sup>36</sup> It is not clear why Fuyang quoted similar prices over this span of time if it set prices based on an index price which increased during this time period.

Fuyang also argues that its prices changed over time in a manner that is consistent with the changes in the referenced index price.<sup>37</sup> However, this comparison is not particularly informative because the terms of the POR sale differ from the terms of Fuyang's prior third-country sales.<sup>38</sup> Accordingly, the similarity in these percentages is overstated.<sup>39</sup> Thus, Fuyang's assertion that the percentage differences between its third-country sales prices and the contemporaneous index are "astonishingly close" to the percentage difference between the price of the POR sale and the contemporaneous index price at the time of the POR sale is misleading.<sup>40</sup>

Lastly, Fuyang's argument that the prices of the POR sale and its prior third-country sales differ because of related expenses is at odds with the record.<sup>41</sup> As explained above, Fuyang made the comparison third-country sales on shipping terms different than the POR sale. Neither freight costs nor duties explain why the POR sale is different than Fuyang's comparison third-market sales.<sup>42</sup> Therefore, Fuyang's explanation with respect to why the POR sale price and the third country sales prices differ is contradicted by record evidence.

Given the record evidence calling into question Fuyang's explanation of why the price of its POR sale is outside the range of its prior prices and given that the price of the POR sale is higher than any of Fuyang's prior prices for silicon metal, we continue to find that the price of Fuyang's POR sale weighs in favor of finding the sale *non-bona fide*.

## **ii. Whether Sale Quantity Weighs in Favor of Finding Fuyang's Sale Was Not *Bona Fide***

### *Petitioner's Comments:*

- The record of this review clearly supports finding that the POR sales quantity is not likely to be typical of the quantities Fuyang would sell to the United States after completion of the review.<sup>43</sup>
- Fuyang's POR sale quantity could not have satisfied the requirements of the ultimate customer<sup>44</sup> and is not consistent with the quantities of silicon metal imported into the United States.<sup>45</sup>

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<sup>36</sup> See Fuyang's Letter, "Silicon Metal from the People's Republic of China: Response to the Third Supplemental Questionnaire," dated May 21, 2019 (Third SQR), at Exhibit O; see also BPI Memorandum at Note 12.

<sup>37</sup> See First SQR at Exhibit C; see also Fuyang's Letter, "Silicon Metal from the People's Republic of China: Response to the Second Supplemental Questionnaire," dated May 14, 2019 (Second SQR), at Exhibit H; see also BPI Memorandum at Note 13.

<sup>38</sup> See First SQR at 3 and Exhibit A-12; see also BPI Memorandum at Note 14.

<sup>39</sup> See Petitioner Rebuttal Brief at 7; see also First SQR at Appendix I; Fourth SQR at 7; and BPI Memorandum at Note 15.

<sup>40</sup> See Fuyang's Case Brief at 4; see also BPI Memorandum at Note 16.

<sup>41</sup> See Fourth SQR at 7; see also BPI Memorandum at Note 16.

<sup>42</sup> See First SQR at Appendix 1.

<sup>43</sup> See BPI Memorandum at Note 17 and Note 19.

<sup>44</sup> See Fuyang's Rebuttal Brief at 5; see also BPI Memorandum at Note 18.

<sup>45</sup> See Petitioner's Case Brief at 7; see also BPI Memorandum at Note 19.

- Commerce’s comparison understates the extent to which the POR sales quantity is below Fuyang’s sales quantities sold prior to the POR.<sup>46</sup>

*Fuyang’s Comments:*

- Although it is not clear that Commerce found the POR sale quantity atypical, if it did so, it should note that the quantity reflects the commercial needs of the customer, is consistent with Fuyang’s other sales, and is not commercially insignificant or exceptional, whether considered individually or collectively.<sup>47</sup>
- Any differences in the comparison and POR sales quantities is not surprising given that different customers require different quantities.<sup>48</sup>
- The petitioner’s suggestion that the POR sale quantity could not have satisfied the requirements of the ultimate customer is speculative and unreasonable.<sup>49</sup>

*Commerce’s Position:*

In a *bona fide* sales analysis, Commerce examines the quantity of the sale to determine if it is commercially reasonable and not atypical of normal business practices. As an initial matter, the petitioner cites to U.S. port arrival records but failed to provide record evidence of such records.<sup>50</sup> To analyze this criterion, we compared the quantity of Fuyang’s POR sale to the quantities of its prior third-country sales of silicon metal, finding that the quantity of Fuyang’s POR sale was less than the quantities of its prior third-market sales.<sup>51</sup>

Fuyang argues that the quantity of its POR sale reflects the needs of its ultimate U.S. customer, and is consistent with the quantities of its sales to other customers, for which Fuyang “provided the specific quantities of silicon metal required by the ultimate customer.”<sup>52</sup> Given that the customer’s volume of purchases from the importer in 2016 significantly differed from the volume of its purchase from Fuyang during the POR,<sup>53</sup> and the quantity of the POR sale is below the quantities of Fuyang’s prior sales of silicon metal, record evidence calls into question whether the POR sales quantity is representative of Fuyang’s future sales of silicon metal to the United States.

Because the remainder of our analysis under this category involves a considerable amount of business proprietary (BPI) information, it is set forth in the BPI Memorandum.<sup>54</sup>

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<sup>46</sup> See BPI Memorandum at Note 20.

<sup>47</sup> See Fuyang’s Case Brief at 7 (citing *Shijiazhuang Goodman Trading Co. v. United States*, 172 F. Supp. 3d 1363, 1377 (Ct. Int’l Trade, March 22, 2016)).

<sup>48</sup> See Fuyang’s Rebuttal Brief at 5.

<sup>49</sup> *Id.*

<sup>50</sup> See Petitioner’s Case Brief at 7; see also Petitioner’s Letter, “Silicon Metal from the People’s Republic of China; Antidumping Administrative Review; Request That the Department Perform a *Bona Fide* Sales Analysis,” dated October 1, 2018, at 5.

<sup>51</sup> See Preliminary *Bona Fides* Memo at 6.

<sup>52</sup> See Fuyang’s Case Brief at 7.

<sup>53</sup> See Fourth SQR at 7-8.

<sup>54</sup> See BPI Memorandum at Note 21.

The weight of the evidence does not demonstrate that the POR sales quantity is a typical commercial quantity for Fuyang, nor does it indicate that this quantity is representative of future commercial sales quantities.

**iii. Whether Sale Timing Weighs in Favor of Finding Fuyang’s Sale Was Not *Bona Fide***

*Petitioner’s Comments:*

- Evidence calls into question whether the date of sale reported for the POR sale is in fact the date of that sale (and, therefore, whether the timing of the sale indicates that it is *bona fide*).<sup>55</sup>

*Fuyang’s Comments:*

- Commerce correctly determined that the timing of the POR sale does not weigh against finding the sale to be *bona fide*.<sup>56</sup>
- The petitioner’s evidence relating to a prior period that allegedly calls into question the date of sale does not relate to any price agreement or specific purchase order.<sup>57</sup> Other evidence regarding the date of sale relied upon by the petitioner simply relates to preparations for a likely order.<sup>58</sup>

*Commerce’s Position:*

One factor which could weigh in favor of finding that a sale is not *bona fide* is if the sale of subject merchandise was made towards the end of a POR. A sale made toward the end of a POR could indicate that the sale was constructed solely for purposes of obtaining a dumping rate and thus the merchandise was shipped solely to ensure that it entered the United States before the end of the POR.<sup>59</sup> Commerce has previously found that a sale made at the end of a POR may indicate the sale is not *bona fide*.<sup>60</sup> Here Fuyang made its POR sale nine months before the end of the POR. This does not weigh against finding the sale to be *bona fide*.

The petitioner’s argument involves date of sale. However, in an administrative review, respondents report sales based on entry date, if known.<sup>61</sup> Fuyang knows the entry date of the POR sale and therefore it properly reported the transaction as within the POR.

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<sup>55</sup> See Petitioner’s Case Brief at 9; see also BPI Memorandum at Note 22.

<sup>56</sup> See Fuyang’s Case Brief at 8.

<sup>57</sup> See Fuyang’s Rebuttal Brief at 7.

<sup>58</sup> See BPI Memorandum at Note 23.

<sup>59</sup> See *Brake Rotors From the People’s Republic of China: Preliminary Results and Partial Rescission of the Fourth New Shipper Review and Rescission of the Third Antidumping Duty Administrative*, 66 FR 1303, 1307 (January 8, 2001) (unchanged in *Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of Fourth New Shipper Review and Rescission of Third Antidumping Duty Administrative Review*, 66 FR 27063 (May 16, 2001); see also *Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review*, 64 FR 6305, 6317 (February 9, 1999) (“there is no indication that the merchandise was shipped ... solely to ensure that it entered the United States before the end of the POR.”).

<sup>60</sup> See, e.g., *Windmill Int’l Pte v. United States*, 193 F. Supp. 2d 1303, 1312 (CIT 2002) (*Windmill Int’l Pte*).

<sup>61</sup> See Commerce’s Letter, “United States Department of Commerce, Enforcement and Compliance, Antidumping and Countervailing Duty Operations, Office IV; request for Information, Antidumping Duty Administrative Review,” dated August 22, 2018 (Sections A, C, D, and E Questionnaire).

#### iv. Whether the Goods were Resold at a Profit

##### *Petitioner's Comments:*

- The reported resale profit is not commercially reasonable<sup>62</sup> and is called into question if unreported operating expenses had been considered. This, and other information regarding the U.S. customer's operations<sup>63</sup> call into question the motivation for making the purchase.
- Record evidence demonstrates that the U.S. customer incurred operating expenses.<sup>64</sup> Given the nature of these expenses, and the U.S. customer's sales information, it is appropriate to consider the impact of operating costs on the reported profitability even in the absence of the actual amount of the operating expenses.
- A comparison with operating expenses for certain U.S. wholesalers also calls into question the resale profitability.<sup>65</sup>

##### *Fuyang's Comments:*

- The pertinent statutory criterion – whether profit was realized on the resale of the merchandise at issue – was satisfied because the resale was profitable. The statute does not impose any restrictions with respect to how much profit was realized on resale.<sup>66</sup>
- Commerce never requested that Fuyang report its U.S. customer's operating expenses and thus it cannot now speculate on their impact on resale profit.<sup>67</sup>
- U.S. Census Bureau data on operating expenses and profit for U.S. wholesalers are irrelevant to the question of whether the merchandise was resold at a profit. The statute does not require that resale profit reflect industry averages.<sup>68</sup>
- The petitioner failed to demonstrate how achieving a profit on resale, which is in the U.S. customer's self-interest, undermines the *bona fide* nature of the sale.
- The petitioner's analysis of other aspects of the U.S. customer's operations has no bearing on whether or not the resale was profitable.<sup>69</sup>
- As noted in *Silicon Metal from Brazil*, “a purchaser's failure to obtain prices that may be favorable does not necessarily mean the transaction is not at arm's-length.”<sup>70</sup>
- In sum, the resale was profitable which weighs in favor of finding the sale *bona fide*.<sup>71</sup>

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<sup>62</sup> See BPI Memorandum at Note 24.

<sup>63</sup> *Id.* at Note 25.

<sup>64</sup> *Id.* at Note 26.

<sup>65</sup> *Id.* at Note 27.

<sup>66</sup> See Fuyang's Rebuttal Brief at 7.

<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.* at 7-8.

<sup>69</sup> *Id.* at 12.

<sup>70</sup> *Id.* (citing *Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review*, 64 FR 6305 (February 9, 1999) (*Silicon Metal from Brazil*) and accompanying IDM at Comment 1).

<sup>71</sup> *Id.*

*Commerce's Position:*

Fuyang argues that it submitted evidence demonstrating that its U.S. customer resold the silicon metal for a profit,<sup>72</sup> and that a profit of any amount meets the statutory criterion that Commerce must consider in making a *bona fide* sales determination. In the *Preliminary Results*, we questioned whether the reported profit, which Fuyang calculated by subtracting the cost of purchasing the silicon metal and other direct transaction expenses from the sales revenue, would remain after considering overhead operating expenses. Fuyang counters that “Commerce may not openly engage in speculation about information it never requested and is therefore not present on the proceeding record.”<sup>73</sup>

While we did not request that the U.S. customer report its operating expenses, we found based on record evidence that that the customer did incur such expenses. The record shows that the importer had expenses typical of a business,<sup>74</sup> and must have incurred routine expenses, none of which were taken into consideration in calculating the reported profit. Hence, it is not speculation to conclude that the nominal reported profit is not accurate, but is overstated, if there is any profit at all after allocating a portion of these additional expenses to the POR sale.

Therefore, although Commerce is unable to precisely ascertain the importer’s net profit, the sales documents do not indicate that the sale of subject merchandise was resold at a profit. When this fact is analyzed together with the totality of the circumstances of the sale, we find it calls into question whether Fuyang’s single sale is *bona fide*.

**v. Whether Commerce Should Find the Sale was Not Made on an Arm’s-Length Basis**

*Fuyang’s Comments:*

- It is perplexing why Commerce questions the *bona fide* nature of a sale between unaffiliated parties.<sup>75</sup>
- Simply because parties knew Fuyang intended to apply for a new shipper rate does not demonstrate that the POR sale is not arm’s-length.
- As Commerce stated, “[t]he initiation of a sale by an exporter for the purpose of obtaining a separate rate by way of a new shipper review... does not, by itself, indicate the sale is not a *bona fide* sale where the U.S. customer is simply purchasing subject merchandise to meet its needs and is not engaged in a collaborative effort with the exporter to affect the dumping rate.”<sup>76</sup>
- Commerce cannot rely on the petitioner’s evidence supposedly showing the parties were aware the POR sale was for obtaining a dumping rate. This evidence is suspect because the source of the information has no association with the parties involved in the sale and because of the source’s relationship with the petitioner.<sup>77</sup>

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<sup>72</sup> See First SQR at 14-15.

<sup>73</sup> See Fuyang’s Rebuttal Brief at 8.

<sup>74</sup> See BPI Memorandum at Note 28.

<sup>75</sup> See Fuyang’s Case Brief at 1.

<sup>76</sup> See Fuyang’s Rebuttal Brief at 9.

<sup>77</sup> See Fuyang’s Case Brief at 10.

- Other evidence that the petitioner relies upon to allege coordination between the parties on the price of the POR sale prior to price negotiations fails because there is no mention of the price in this evidence.<sup>78</sup>

*Petitioner's Comments:*

- Non-arm's length transactions can occur between unaffiliated parties where there is evidence the parties did not act solely in their own independent interests but engaged in a collaborative effort to achieve a common goal.
- Extensive record evidence supports Commerce's conclusion that because "{a}ll parties knew this sale was for the purpose of obtaining a separate rate or a lower antidumping rate," the sale is "atypical of Fuyang's likely future sales."<sup>79</sup>
- Fuyang suggests that certain of this evidence that was supplied by the petitioner is "self-serving" or otherwise factually inaccurate. However, the petitioner and its counsel certified to the accuracy of the information and Fuyang did not submit any rebuttal facts or deny the substance of the information.<sup>80</sup> Also the petitioner's evidence is consistent with other information supplied by Fuyang.<sup>81</sup>
- Fuyang questions other evidence supporting Commerce's conclusion because the evidence contains no mention of the price of the POR sale. However, this is to be expected given the nature of the evidence.<sup>82</sup> Moreover, Fuyang's description of this evidence provides further support for Commerce's conclusion.<sup>83</sup>

*Commerce's Position:*

We continue to find that record evidence calls into question the arm's-length basis of the POR sale. We examined whether record evidence indicates that the U.S. customer was "simply purchasing subject merchandise to meet its needs independent of Fuyang's review and was not engaged in a collaborative effort with the exporter to affect the dumping rate."<sup>84</sup> An email correspondence from the importer to a freight forwarder dated prior to the POR sale demonstrates that the importer knew the impending shipment was for the purpose of establishing a separate rate.<sup>85</sup> This is consistent with the history of this proceeding because on December 29, 2017, Fuyang requested a new shipper review (which Commerce declined to initiate) of the POR sale currently under examination in this administrative review.<sup>86</sup> Hence, *before* price negotiations even began, Fuyang's U.S. customer knew it was engaging in this transaction for the purposes of establishing a new shipper dumping duty rate.

<sup>78</sup> See BPI Memorandum at Note 29.

<sup>79</sup> See Petitioner's Rebuttal Brief at 20; *see also* BPI Memorandum at Note 30.

<sup>80</sup> See Petitioner's Rebuttal Brief at 21.

<sup>81</sup> See BPI Memorandum at Note 31.

<sup>82</sup> *Id.* at Note 32.

<sup>83</sup> *Id.* at Note 31.

<sup>84</sup> See Preliminary *Bona Fides* Analysis Memorandum at 9.

<sup>85</sup> See Petitioner's Letter, "Silicon Metal from the People's Republic of China; Antidumping Administrative Review; Deficiency Comments on Yunnan Fuyang Section A Questionnaire Response," dated September 24, 2018, at Exhibit 1; *see also* BPI Memorandum at Note 32.

<sup>86</sup> See Fuyang's Letter, "Silicon Metal from the People's Republic of China: New Shipper Review," dated December 29, 2017; *see also* Commerce's Letter, "New Shipper Review for Silicon Metal from the People's Republic of China," dated January 31, 2018.

Additionally, the petitioner placed on the record a 2018 certified declaration from a person familiar with the silicon metal industry in China noting that Fuyang and the manufacturer had been collaborating in an attempt to procure a separate rate.<sup>87</sup> Fuyang contends that it is inappropriate for Commerce to rely on the declaration of an individual who has no association with the manufacturer for details regarding verbal communications made by the manufacturer's officials.<sup>88</sup> However, Fuyang provided evidence consistent with information in the petitioner's declaration.<sup>89</sup> Thus, entirely consistent with the declaration, all parties involved in the POR sale were in contact and discussions which eventually led to the sale under review.<sup>90</sup>

Fuyang contends that the email between the importer and a U.S. freight forwarder was for the purpose of assessing shipping options and cost for quantity likely to be ordered by its customer which issued its purchase order to the importer just several days later regarding its silicon metal requirements.<sup>91</sup> Nevertheless, the email between the importer and a U.S. freight forwarder demonstrates that the importer knew that the impending POR sale was for the purpose of obtaining a separate rate.

Fuyang correctly points out that the initiation of a sale by an exporter for the purpose of obtaining a separate rate by way of a new shipper review or an administrative review does not, by itself, indicate the sale is not a *bona fide*. However, here, not only were the exporter and producer involved in an effort to establish a dumping rate, but evidence demonstrates that the U.S. importer was also engaged in the effort to establish a separate rate.<sup>92</sup> The culmination of all the parties' efforts resulted in a sale priced above any of Fuyang's prior sales of silicon metal, at the lowest quantity of any of Fuyang's prior sales of silicon metal and the U.S. customer was only able to resell the silicon metal at a nominal profit which, as noted above, is overstated. Even though the importer may have earned a minute profit, the above facts indicate that the amount of the profit is inconsistent with reasonable practices and leads to the conclusion that transactions at these prices could not continue.

The above evidence indicates that the POR sale not made on an arm's-length basis, was not reflective of normal business and commercial prices, and thus is not likely representative of Fuyang's future sales. We do not find it appropriate to calculate a dumping margin on such sales.

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<sup>87</sup> See Petitioner's Letter, "Silicon Metal from the People's Republic of China; Antidumping Administrative Review; Request That the Department Perform a Bona Fide Sales Analysis," dated October 1, 2018 at Exhibit 6; *see also* BPI Memorandum at Note 33.

<sup>88</sup> See Fuyang's Rebuttal Brief at 10.

<sup>89</sup> See Third SQR at 5; *see also* Second SQR at Exhibit G; and BPI Memorandum at Note 34.

<sup>90</sup> See Petitioner's Letter, "Silicon Metal from the People's Republic of China; Antidumping Administrative Review; Deficiency Comments on Yunnan Fuyang Section A Questionnaire Response," dated September 24, 2018, at Exhibit 1; *see also* BPI Memorandum at Note 35.

<sup>91</sup> See Petitioner's Rebuttal Brief at 23.

<sup>92</sup> See BPI Memorandum at Note 35.

## vi. Other Relevant Factors

### *Fuyang's Comments:*

- Commerce's reliance on lack of experience in making its non-*bona fides* sales determination is unlawful because it imposes certain legal requirements – absent from the statute – that a respondent (a) possess high levels of experience selling the subject merchandise and (b) make more than one sale during the POR.<sup>93</sup>
- The statute is silent with respect to the level of experience selling subject merchandise that is required on the part of exporters/producers and importers in the context of a *bona fides* sales analysis. Commerce's imposition of such requirements is unlawful and reflects arbitrary and capricious agency conduct.<sup>94</sup>
- Commerce's heightened legal standard for a single sale is untethered from the statute.<sup>95</sup>
- Although Commerce acknowledges that “reliance on a single sale need not be fatal,” Commerce's analysis suggests otherwise, reflecting the position that a single sale during the POR provides insufficient “transactions from which to draw inferences on ... future selling practices.”
- However, Commerce found single sales within a review to be *bona fide* on several occasions.<sup>96</sup> In *Certain Welded Carbon Steel Pipe and Tube from Turkey*, Commerce found that “single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties normal selling practices.”<sup>97</sup>

### *Petitioner's Comments:*

- The statutory provision for conducting a *bona fide* sales analysis expressly provides that Commerce may consider “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 the completion of the review.”<sup>98</sup>
- Commerce was relying on this statutory provision when it considered lack of experience in its *bona fide* sales analysis.
- Thus, Commerce properly considered lack of experience in its analysis, and, based on this factor, properly expressed concerns over whether a dumping rate calculated using the sale under review would be based on reliable data and whether this sale is representative of Fuyang's future selling practices.<sup>99</sup>
- Fuyang's claims regarding a single sale are incorrect. Again, the statute allows Commerce to consider any other relevant factor in its *bona fides* sales analysis.

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<sup>93</sup> See Fuyang's Case Brief at 11-12.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 11 (citing *Huzhou Muyun II*, 324 F. Supp. 3d at 1375) (“{t}he ‘singular nature’ of the transaction under evaluation...is not one of the statutory factors enumerated...for determining whether a sale is *bona fide*.”).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 12-13 (citing *Notice of Final Results of Antidumping Duty New Shipper Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 71 FR 43444 (August 1, 2006)).

<sup>98</sup> *Id.* at 24.

<sup>99</sup> *Id.* at 15-16; see also BPI Memorandum at Note 36.

- Commerce’s declaration that a single sale during the POR may provide insufficient “transactions from which to draw inferences on ... future selling practices” is simply a restatement of applicable case law.
- In *Windmill Int’l Pte. Ltd. v. United States*, the CIT noted that “[i]n one sale reviews, there is ... little data from which to infer what the shipper’s future selling practices would look like.”
- In *Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States (Tianjin Tiancheng)*, the CIT noted that single sales must be “carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales.”
- In *Inner Mongolia Jianlong Biochemical Co. v. United States*, the CIT noted that “[e]vidence of only a single sale during the POR may raise certain suspicions; as such, ‘[w]hile a single sale is not inherently commercially unreasonable, it will be carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales.’”<sup>100</sup>

*Commerce’s Position:*

We address Fuyang’s arguments regarding a single sale and the lack of experience on the part of an importer and/or exporter in turn below.

Fuyang argues that Commerce’s position contradicts the position articulated by the CIT in *Tianjin Tiancheng Pharm. Co. v. United State* that reliance on a single sale need not be fatal in the context of a one-sale review.<sup>101</sup> Fuyang, however, takes the CIT’s statement out of context, omitting from the CIT’s statement that while a single sale need not be fatal with respect to one-sale reviews, the small amount of data upon which Commerce relies in such cases “leaves the door wide to the possibility that the sale may not, in fact, be typical, and that any resulting antidumping duty calculation would be based on unreliable data.”<sup>102</sup> Thus, single POR sales “will be carefully scrutinized to ensure” companies do not “unfairly benefit from unrepresentative sales.”<sup>103</sup> This is what we have done in the instant review. Accordingly, contrary to Fuyang’s reliance on *Huzhou Muyun Wood* for the proposition that Commerce unlawfully employed a heightened legal standard for a single sale review compared with reviews involving two or more sales,<sup>104</sup> Commerce has not “treat[ed] the single sale the same as the enumerated statutory factors,” nor has Commerce “indicat[ed] that the single sale itself is a reason for finding Fuyang’s sale commercially atypical.”<sup>105</sup>

Fuyang also argues that Commerce’s reliance on the importer and exporter’s lack of experience is unlawful because it “imposes certain legal requirements” unmentioned in the statute.<sup>106</sup>

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<sup>100</sup> See Petitioner’s Rebuttal Brief at 25.

<sup>101</sup> See Fuyang’s Rebuttal Brief at 10.

<sup>102</sup> See *Windmill Int’l Pte.*, 193 F. Supp. 2d at 1313 (evaluating the *bona fides* of a single sale in the context of a new shipper review).

<sup>103</sup> See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1263.

<sup>104</sup> See Fuyang’s Rebuttal Brief at 11 (citing *Huzhou Muyun II*, 324 F. Supp. 3d at 1375) (“[t]he ‘singular nature’ of the transaction under evaluation...is not one of the statutory factors enumerated...for determining whether a sale is *bona fide*.”).

<sup>105</sup> See *Huzhou Muyun II*, 324 F. Supp. 3d at 1375.

<sup>106</sup> See Fuyang’s Case Brief at 11-12.

However, section 751(a)(2)(B)(iv)(VII) of the Act instructs Commerce to consider any factors it determines to be relevant as to whether the sale under review is “likely to be typical of those the exporter or producer will make after the completion of the review.”<sup>107</sup> Commerce finds that consideration of Fuyang and the importer’s experience is relevant and informs its decision as to whether the sale is commercially reasonable or atypical. This type of analysis is consistent with Commerce’s practice. For example, in *Hebei New Donghua Amino Acid Co. v. United States*, the Court supported Commerce’s decision to rescind a new shipper review based, in part, on the importer’s lack of experience and behavior inconsistent with good business practices.<sup>108</sup>

In this review, Commerce found ample evidence demonstrating a lack of experience on the part of Fuyang and the importer.<sup>109</sup> This lack of experience raises questions as to whether the POR sale is “likely to be typical of those the exporter or producer will make after the completion of the review.”<sup>110</sup> In light of the apparent financial nonviability of the transaction for a sale parties knew would serve the basis of a establishing a separate rate, we find that the lack of experience on the part of the importer and exporter is relevant and weighs against finding the sale *bona fide* for antidumping purposes.

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<sup>107</sup> See section 751(a)(2)(B)(iv) of the Act (setting out the factors that the Commerce considers to determine whether a sale is *bona fide* in the context of a new shipper review); see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (citing *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 995 (CIT 2000)); see also *Hebei New Donghua*, 374 F. Supp. 2d at 1342 (“Commerce’s practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices.”).

<sup>108</sup> See *Hebei New Donghua*, 374 F. Supp. 2d at 1344, 1345.

<sup>109</sup> See Petitioner’s Case Brief at 15; see also Petitioner’s Letter, “Silicon Metal from the People’s Republic of China; Antidumping Administrative Review; Request That the Department Perform a *Bona Fide* Sales Analysis,” dated October 1, 2018; and BPI Memorandum at Note 35.

<sup>110</sup> See section 751(a)(2)(B)(iv) of the Act (setting out the factors that the Commerce considers to determine whether a sale is *bona fide* in the context of a new shipper review); see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (citing *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 995 (CIT 2000)); see also *Hebei New Donghua*, 374 F. Supp. 2d at 1342 (“Commerce’s practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices.”).

**V. RECOMMENDATION**

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

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

\_\_\_\_\_  


Signed by: JEFFREY KESSLER  
Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance