

PUBLIC VERSION

FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND
WASHINGTON INTERNATIONAL INSURANCE COMPANY V. UNITED STATES
Court No. 08-00156, Slip Op. 09-78

Summary

The U.S. Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“Court”) in Washington International Insurance Company v. United States, Court No. 08-00156, Slip Op. 09-78 (July 29, 2009) (“WII”). This remand addresses two issues in the 2005-2006 administrative review of the antidumping duty order on freshwater crawfish tail meat from the People’s Republic of China (“crawfish tail meat”). See Freshwater Crawfish Tail Meat From the People’s Republic of China: Final Results and Partial Rescission of the 2005-2006 Antidumping Duty Administrative Review and Rescission of 2005-2006 New Shipper Reviews, 73 FR 20249 (April 15, 2008) (“Final Results”), and accompanying Issues and Decision Memorandum (“I&D Memorandum”).

In WII, the Court remanded two issues concerning the respondent Xuzhou Jinjiang Foodstuffs Co., Ltd. (“Xuzhou”). First, the Court held that the Department did not sufficiently explain why the failure to report a number of sales of subject merchandise during the period of review (“POR”) justifies the application of total adverse facts available (“AFA”) rather than partial AFA. On remand, the Court asked the Department to reconsider whether the circumstances warrant partial or total AFA. Second, the Court held that the Department did not adequately corroborate the 223.01 percent rate assigned to Xuzhou’s sales as total AFA. On remand, the Court directed the Department to determine an AFA rate “that more closely reflects Xuzhou’s then-current market practices during the POR, ‘albeit with some built-in increase intended as a deterrent to non-compliance’” See WII at 25.

In accordance with the Court’s remand instructions, the Department has made redeterminations with respect to these issues. In these remand results, the Department continues to find that the record is too incomplete to serve as a reliable basis for reaching a determination and, thus, total AFA is warranted. As explained below, significant data elements were not reported and the record does not contain all the information required to accurately calculate Xuzhou’s dumping margin. Second, because the Court found the 223.01 percent rate inappropriate, on remand, the Department has selected 188.52 percent as the AFA rate for Xuzhou.

Analysis

1. *Whether the circumstances warrant the use of partial or total adverse facts available*

In the Final Results, the Department found (1) that Xuzhou failed to report a significant volume of its U.S. sales of subject merchandise during the POR and (2) that such failure warranted the use of facts available, with adverse inferences, because information necessary to calculate a margin was not on the record and Xuzhou failed to act to the best of its ability to provide the

requested information. The Department reached this conclusion based on a totality of the evidence. This evidence included: (1) U.S. Customs and Border Protection (“CBP”) entry documentation for merchandise declared as non-subject merchandise that described the merchandise as crawfish tail meat; (2) entries declared as subject merchandise but described as [] without specifying whether the merchandise was subject or non-subject merchandise; (3) item counts (sizes) consistent with crawfish tail meat; (4) entries identified as whole crawfish that were reclassified by CBP as crawfish tail meat; and (5) U.S. Food and Drug Administration (“FDA”) records, including photographs of the merchandise, indicating certain unreported sales were shipments of crawfish tail meat. See I&D Memorandum at Comment 3.

Although the Court held that “{s}ubstantial evidence of record supports Commerce’s finding that ‘Xuzhou made a significant number of sales of subject merchandise that it failed to report’” and that it was necessary to resort to facts otherwise available, using an adverse inference, to fill this gap in information, the Court questioned whether this finding “justified rejection of *all* of Xuzhou’s information or whether {Commerce} had to consider the application of partial AFA.” See WII at 18 and 20 (emphasis in original). Thus, on remand, the Court ordered the Department to reconsider whether the information on the record justifies the application of total, rather than partial, AFA. As explained below, the Department has reconsidered the information on the record and continues to find that the application of total AFA is warranted.

Here, the record evidence shows that there were such extensive omissions, as opposed to partial gaps, in the submitted U.S. sales and FOP data that a reasonably accurate, reliable dumping margin could not be calculated using the limited information that Xuzhou reported, together with partial AFA for the missing information. Specifically, Xuzhou failed to submit complete and accurate U.S. sales and FOP data, both of which are required to accurately calculate Xuzhou’s dumping margin.

As noted by the Court, substantial evidence supports the Department’s finding that Xuzhou failed to report a significant number of its U.S. sales of subject merchandise during the POR. See WII at 20. Specifically, the Court found that FDA photographs supported this finding for [] entries. Additionally, the Court found that the arguments made by Washington International Insurance Company (“Washington International”) did not adequately clarify certain inconsistencies relating to another [] entries with [] identifying the merchandise as subject merchandise.

Thus, the Court concluded that the weight the Department accorded the inconsistencies was not unreasonable. See WII at 12. Another [] unreported entries were declared as subject merchandise in the entry summary form filed with CBP. Although Washington International argued that these entries were mistakenly declared to CBP as subject merchandise, the Court noted that they were “nonetheless, so declared, and a party claiming otherwise must provide sufficient proof of its position beyond asserting that the declarations were mistakes.” See WII at 11. While the Department continues to believe that other evidence questioned by the Court indicates that there were additional unreported entries of subject merchandise (e.g., unreported entries with multiple threads of evidence indicating subject merchandise such as CBP

reclassification of entries as subject merchandise, counts consistent with crawfish tail meat, and FDA reports indicating the merchandise was crawfish tail meat), even if these other “unreported” sales are disregarded, the [] entries discussed above constitute over [] percent, by quantity, of the reported sales. Thus, the record shows that Xuzhou reported only a very limited amount of U.S. sales data to the Department. Specifically, Xuzhou’s [] reported sales account only for [] percent of Xuzhou’s sales during the instant POR. A dumping margin calculated from this limited amount of information would not accurately reflect Xuzhou’s dumping margin.

Moreover, record evidence calls into question the credibility of the sales records that Xuzhou provided. Xuzhou submitted sales ledgers to substantiate the sales information relating to its reported sales. The sales ledgers contain Xuzhou’s sales of both subject and non-subject merchandise during the POR. However, Xuzhou mislabeled all of the unreported sales discussed in the prior paragraph as sales of whole crawfish in its sales ledgers rather than crawfish tail meat. See letter from Xuzhou Jinjiang Foodstuffs Co., Ltd. to Secretary of Commerce regarding “Freshwater Crawfish Tail Meat from the People’s Rep. of China; Response to the Department’s March 30, 2007, Entry Documents Letter,” dated April 12, 2007, at attachment 1. Such inconsistencies undercut the reliability of the records used to support Xuzhou’s reported sales and thus call the reported sales information into question.

Furthermore, the record indicates that Xuzhou only reported a fraction of the production data related to its sales of subject merchandise during the POR. Xuzhou’s reported total production quantity of crawfish tail meat for the POR was [] kilograms (kg). This quantity is far less than [] kg,¹ the total quantity of Xuzhou’s reported and [] unreported sales of crawfish tail meat during the same period. This omission is significant because the Department multiplies all surrogate or market values by the reported per-unit FOP consumption quantity in calculating normal value. Without an accurate quantity for the total production of crawfish tail meat during the POR, the per-unit FOP consumption quantities are rendered inaccurate and, thus, the Department cannot rely on these data in calculating a dumping margin.

Section 782(e) of the Tariff Act of 1930, as amended (the “Act”) provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements if the information satisfies the following criteria: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties. The Court has previously found it reasonable to apply the above provision to *all* of the information, in *toto*, needed to calculate an accurate dumping margin, rather than separately

¹The quantity of the [] sales to the United States reported by Xuzhou account for approximately [] kg of crawfish tail meat. See Xuzhou’s Section C and D Response at Exhibit C-1. Xuzhou also reported additional sales to [] during the POR which account for [] kg of crawfish tail meat. See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt to Secretary of Commerce, Xuzhou’s Case Brief, at Attachment 1 (December 18, 2007). Meanwhile, the quantity of the [] unreported sales was [] kg.

applying the provision to specific categories of information (e.g., U.S. sales, home market sales, cost of production, or constructed value information). See Steel Authority of India, Ltd. v. United States, 149 F. Supp. 2d 921, 928 (CIT 2001) (“Steel Authority of India”) (affirming the Department’s use of total AFA where “pervasive and persistent deficiencies” which cut across all aspects of respondent’s data rendered the information unreliable); aff’d on remand, 25 C.I.T. 1390 (2001). In cases involving non-market economy countries, respondents must supply the Department with complete and accurate U.S. sales and factors of production (“FOP”) data in order for the Department to accurately calculate the respondent’s dumping margin. Thus, where one, or both, of these data sets is so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, the Department may decline to consider a respondent’s information in its entirety. As the Court noted in Steel Authority of India:

... if the Department were forced to use the partial information submitted by respondents, interested parties would be able to manipulate the process by submitting only beneficial information. Respondents, not the Department, would have the ultimate control to determine what information would be used for the margin calculation. This is in direct contradiction to the policy behind the use of facts available.

See Steel Authority of India, 149 F. Supp. 2d at 928.

Moreover, partial facts available or partial AFA are generally used only to fill limited gaps in the record. See id. (noting that the Department has a “long standing practice of limiting the use of partial facts available” and “only uses partial facts available to ‘fill gaps’ in the record”). The Court has previously upheld the Department’s determination that pervasive deficiencies in portions of information submitted can undermine the reliability of a respondent’s submissions, and has recognized that the Department requires accurate information to make a reliable determination. See id.

Based on the foregoing, the Department finds that it cannot use any of the information Xuzhou submitted on the record, including Xuzhou’s reported sales, to calculate an accurate dumping margin. Since significant data elements were not reported and the record does not contain all of the information required to accurately calculate Xuzhou’s dumping margin, the Department finds the record too incomplete to serve as a reliable basis for reaching a determination pursuant to section 782(e)(3) of the Act. Thus, the Department finds that it is appropriate to base Xuzhou’s dumping margin on total AFA.

2. The appropriate adverse facts available rate

In the Final Results, the Department assigned Xuzhou the highest rate calculated for a respondent in any segment of the proceeding (i.e., 223.01 percent) as total AFA. See I&D Memorandum at comment 3. The Department corroborated this rate by comparing it to a dumping margin for Xuzhou (i.e., [] percent) that it calculated using entered values from CBP documents for a large quantity of unreported subject merchandise sales and the average normal value from Xuzhou’s 2004-2005 new shipper review. See I&D Memorandum at comment 3. The Department did not make any U.S. price adjustments or inflate the 2004-2005 normal value

to a 2005-2006 value in calculating the [] percent estimated dumping margin. See I&D Memorandum at comment 3.

The Court found that the [] percent estimated dumping margin that the Department calculated for Xuzhou undercut its corroboration of the 223.01 percent AFA rate stating that “{t}here is no basis on the record or in law for concluding that a [] percentage point differential, amounting to [] percent over the calculated estimate of Xuzhou’s “current market conditions” is “corroboration” of the contemporaneity, and therefore applicability, of the 1999-2000 AFA rate {the 223.01 percent rate}, even allowing for a “built-in increase intended as a deterrent to non-compliance.” See WII at 22. Further, the Court noted that the [] percent rate is based on the entered value of “unreported” sales for which there was insufficient evidence demonstrating these were sales of subject merchandise (namely only CBP reclassifications). See WII at 23. On remand, the Court ordered the Department to use an AFA rate “that more closely reflects Xuzhou’s then-current market practices during the POR, ’albeit with some built-in increase intended as a deterrent to non-compliance’.” See WII at 25.

While the Department respectfully disagrees with the Court’s finding that the 223.01 percent rate was uncorroborated, given that the Court rejected this rate, the Department has reexamined the record to determine an AFA rate consistent with the Court’s instructions. The record of this review contains the two verified normal values from Xuzhou’s 2004-2005 new shipper review, its calculated dumping margin from its 2004-2005 new shipper review, various prices for Xuzhou’s sales of subject merchandise during the instant POR, and a dumping margin calculated for the cooperative respondent in the instant review. It would be inappropriate to use Xuzhou’s own dumping margin from its 2004-2005 new shipper review or the dumping margin calculated for the cooperative respondent in the instant review as AFA because there are higher rates on the record. On the other hand, an AFA rate based on the lowest U.S. net price for unreported sales, and the higher of the two normal value from its 2004-2005 new shipper review, would reflect Xuzhou’s current market practices because it is based on current sales prices and a normal value from the immediately preceding POR. Specifically, the Department believes it is appropriate to base Xuzhou’s AFA rate on its unreported sales with a price of [] USD per kg. This is the price on CBP entry documents for a significant portion of Xuzhou’s unreported sales during the instant POR. The group of sales with this price primarily consists of the sales for which the Court did not disagree with the Department’s conclusion that they were subject merchandise sales (*i.e.*, entries for which there are FDA photographs, entries with documents indicating subject merchandise for which Xuzhou provided inconsistent explanations, unreported entries of merchandise declared as subject merchandise in the entry summary form). The Department deducted foreign movement expenses from the U.S. price of \$[] per kg for a net U.S. price of \$[] per kg. Further, the Department believes that it is appropriate to compare the above U.S. net price to the higher of Xuzhou’s two normal values from its 2004-2005 new shipper review (*i.e.*, [] USD per kg) to derive an AFA rate. This normal value is reliable and relevant because it comes from Xuzhou’s own information that was verified in its 2004-2005 new shipper review. See Memorandum to Stephen J. Claeys from Abdelali Elouaradia regarding Unreported Sales and the Use of Adverse Facts Available (October 9, 2007) at attachment VII.

In calculating an AFA rate for Xuzhou, the Department deducted foreign movement expenses from the above U.S. price, in accordance with section 772(c) of the Act, and inflated the 2004-2005 normal value to a 2005-2006 value. The Department valued foreign movement expenses using the surrogate values for foreign brokerage and handling and refrigerated truck freight that were used to calculate the dumping margin for the cooperative respondent in the Final Results. See Memorandum to the File, through Howard Smith, Program Manager, AD/CVD Operations, Office 4, from Melissa Blackledge, Case Analyst, AD/CVD Operations, Office 4, regarding 2005-2006 Administrative and New Shipper Reviews of Freshwater Crawfish Tail Meat from the People's Republic of China: Factor Valuation (dated October 1, 2007) ("Surrogate Value Memorandum"). The Department inflated normal value to the instant POR using price index data reported in International Financial Statistics from the International Monetary Fund. See Surrogate Value Memorandum. Comparing the adjusted U.S. price and normal value yields an estimated dumping margin for Xuzhou of 188.52 percent. See Memorandum to the File: Analysis Memorandum for the Redetermination Pursuant to Court Remand in the Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Xuzhou Jinjiang Foodstuffs Co., Ltd. ("Xuzhou") (September 18, 2009).

The Department believes that the 188.52 percent rate is consistent with the Court's instructions because it is derived from Xuzhou's own information on the instant record, namely the entered value, net of foreign movement expenses, of the majority of its unreported sales and its normal value from the 2004-2005 new shipper review. The United States Court of Appeals for the Federal Circuit has explained that it "is within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative" and that Commerce "is in the best position, based on its expert knowledge of the market and the individual respondent, to select AFA that will create the proper deterrent to the non-cooperation with its investigations" F. Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1034 (Fed. Cir. 2000). Because there are no other calculated rates on the record aside from the 223.01 percent rate to ensure proper deterrence from non-cooperation, on remand, the Department has selected 188.52 percent as the AFA rate for Xuzhou in this review. The Department finds that this rate is sufficiently adverse so as to effectuate the purpose of the facts available role to induce cooperation in providing the Department with complete and accurate information.

Comments

On September 21, 2009, we released the draft results of the Department's redetermination to Washington International for comments. See letter to Washington International Insurance Company regarding "Request for Comments on the Draft Results of Redetermination-2005-2006 Administrative Review of the Antidumping Duty Order on Freshwater Crawfish Tail Meat from the People's Republic of China," dated September 21, 2009 ("Draft Remand Results"). Washington International submitted comments on October 2, 2009. See letter from Washington International Insurance Company to Secretary of Commerce regarding "Freshwater Crawfish Tail Meat from China –Washington International Comments on Draft Remand Memo," dated

October 2, 2009 (“Washington International Comments”). The Department has addressed these comments below.

Comment 1

Washington International argues that the Draft Remand Results do not comply with the Court’s instructions because the Court clearly contemplated a much lower rate on remand than the 223.01 percent rate used in the Final Results, but the Department has continued to calculate a punitive AFA rate of 188.52 percent based on a faulty methodology. See Washington International Comments at 2-3 and 12-13. According to Washington International, the remand rate of 188.52 percent does nothing to address the Court’s concern over the extreme divergence between the AFA rate and Xuzhou’s calculated rate of zero percent from the immediately preceding review. See id. Moreover, Washington International considers the methodology used to derive the 188.52 percent AFA rate to be flawed for the following reasons. First, while the Department strenuously argues that the record evidence is too incomplete to calculate a reliable margin for Xuzhou, it uses that record to calculate an AFA rate for Xuzhou. Washington International asserts that this is a fatal flaw in the Department’s approach which dictates abandoning any further attempts to calculate an AFA rate. See Washington International Comments at 7-9. Second, Washington International contends that the U.S. price used in the AFA calculation undermines the calculation because it is essentially the same price which the Court found to be more consistent with the price of non-subject merchandise and the price is inexplicably 189 percent less than the U.S. price from Xuzhou’s 2004-2005 new shipper review. See Washington International Comments at 5-6.

Given the flaws in the Department’s AFA calculation and the extreme divergence between the 188.52 percent rate and Xuzhou’s zero percent rate in the prior administrative review, Washington International contends that the only reasonable approach is to base Xuzhou’s AFA rate on the rate calculated for the other respondent in the instant review. Washington International claims that this fully cooperative respondent’s rate of 13.61 percent is the only reasonably accurate estimate of Xuzhou’s actual margin and that this rate can be increased by anywhere from 1 percent to 20 percent to derive an AFA rate. See Washington International Comments at 10-12. Washington International notes that this range of percentages was identified by the Court as a range the Department has considered to be significant in other facets of antidumping duty proceedings. See Washington International Comments at 10-11. Nonetheless, even after increasing the 13.61 percent to include a built-in increase intended as a deterrent to non-compliance, Washington International argues that Xuzhou’s margin should be no more than a number in the low double digits. See Washington International Comments at 12. While the Department stated in the Draft Remand Results that it would be inappropriate to use the rates of a cooperative respondent as an AFA rate for Xuzhou, Washington International points out that this statement is inconsistent with Departmental practice. Therefore, Washington International urges the Department to abandon its efforts to calculate an AFA rate and instead use the calculated rate of the cooperative respondent in this review as AFA, after adjusting this rate to deter non-compliance. See Washington International Comments at 3-4.

Department Position

We disagree with Washington International's claims that the remand AFA rate does not comply with the Court's instructions and is based on a flawed methodology. On remand, the Court ordered the Department to use an AFA rate "that more closely reflects Xuzhou's then-current market practices during the POR, 'albeit with some built-in increase intended as a deterrent to non-compliance'." See WII at 25. Washington International's position is based on the assumption that Xuzhou's market practices in the prior review represent its current practices during the instant POR; therefore the selected AFA rate cannot diverge significantly from the dumping margin calculated for Xuzhou in the past. The record does not support this assumption.

The Department used a net U.S. price of \$[] per kg (based on the starting U.S. price of \$[] per kg) to calculate an AFA rate for Xuzhou. The Court agreed that "there is substantial evidence on the record – the FDA photographs – to support the inference that two {unreported} entries consisted of crawfish tail meat (entry numbers [])" These entries were priced at [] USD per kg, which is the same price that was listed on CBP documents for a significant portion of Xuzhou's unreported sales of subject merchandise during the instant POR. Given that this is a POR price, it is a much better indication of Xuzhou's current market practices during the POR than any prices from a past review of Xuzhou that were used to calculate Xuzhou's dumping margin. Thus, using this price to derive an AFA margin complies with the Court's instructions to determine an AFA rate "that more closely reflects Xuzhou's then-current market practices during the POR" See id. Further, this price is the lowest subject merchandise price on the record. Hence, using this price to derive an AFA rate provides the "built-in increase intended as a deterrent to non-compliance," that the Court instructed the Department to include. See id. Although Washington International notes that the price used by the Department to calculate the AFA rate is more consistent with that of non-subject merchandise and appears unreasonably low when compared to Xuzhou's subject merchandise prices from its 2004-2005 new shipper review, the record clearly shows that Xuzhou made unreported sales of subject merchandise at this price during the POR. Therefore, it is appropriate to base Xuzhou's AFA rate on this price, particularly in light of the Court's instructions to determine an AFA rate "that more closely reflects Xuzhou's then-current market practices during the POR" See id.

Washington International is also incorrect in believing that the Department's calculation methodology is flawed because it relies on record information that the Department found to be too incomplete to calculate a reliable margin for Xuzhou. Washington International's argument erroneously equates calculating an actual dumping margin with using available facts from the record to determine an appropriate AFA rate. In reaching an antidumping determination, the statute requires the Department to consider information that is timely submitted, verifiable, not so incomplete that it is not a reliable basis for the determination, and usable without undue difficulties. See section 782(e) of the Act. On the other hand, in selecting from among the facts otherwise available the Department may rely on "any other information placed on the record" as long as any secondary information used is corroborated. See sections 776(b)(4) and 776(c) of the Act. Hence there are different standards for determining whether information is adequate for

calculating a dumping margin versus whether the information can be used for purposes of determining an AFA rate. The Courts have recognized that “it is within Commerce’s discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative.” See F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F. 3d 1027, 1032 (Fed. Cir. 2000). For the reasons explained above, the record of this review is not reliable for calculating a dumping margin. However, given that an AFA rate need only be rationally related to a respondent, and not the precise margin that would have been calculated if complete information were available, the prices from CBP documents for Xuzhou’s unreported sales of subject merchandise are usable for AFA purposes.

In the Draft Remand Results, the Department stated that “{i}t would be inappropriate to use Xuzhou’s own dumping margin from its 2004-2005 new shipper review or the dumping margin calculated for the cooperative respondent in the instant review as AFA because both rates were calculated for fully cooperative respondents.” See Draft Remand at 5. What the Department meant, and has restated above for the final results, is that it would be inappropriate to use the rates from these cooperative respondents as AFA because there are higher rates in this case that are more appropriate as AFA. The Department’s practice in reviews, in selecting a rate as AFA, is to use the highest rate on the record of the proceeding which, to the extent practicable, can be corroborated (assuming the rate is based on secondary information). See Glycine from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15930, 15934 (April 8, 2009) unchanged in Glycine from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 41121 (August 14, 2009); see also Fujian Lianfu Forestry Co., Ltd., a.k.a. Fujian Wonder Pacific Inc., et al. v. United States, 2009 WL 2461012 (CIT) (August 10, 2009) (“Commerce may, of course, begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding, but that selection must then be corroborated, to the extent practicable.”). The Department does not find that selecting either the rate of the cooperative respondent from the 2005-2006 review, or Xuzhou’s own rate from its new shipper review, would be appropriate in this case because there is a higher rate on the record that is more probative of Xuzhou’s dumping margin.

Lastly, Washington International’s argument that Xuzhou’s AFA rate should be based on the cooperative respondent’s rate in this review is not persuasive. Washington International has not provided any evidence that the rate for the cooperative respondent in the Final Results would be more probative of Xuzhou’s margin of dumping than the AFA rate derived from Xuzhou’s own information. Washington International has provided no evidence to support its assertion that the cooperative respondent’s rate of 13.61 percent provides an accurate estimate of Xuzhou’s actual margin. Moreover, Washington International has not proposed a reasoned methodology by which to impute an additional increase to the cooperative respondent’s rate sufficient to deter noncompliance. Instead, Washington International points to a list of percentages used in other facets of antidumping methodology and decides that an additional increase to Xuzhou’s margin can be no greater than 20 percent. Washington International engages in further guesswork when it asserts that Xuzhou’s AFA rate should be no greater than the very low double digits. These are speculative assertions based on subjective reasoning rather than record evidence. Such an

approach to selecting an AFA rate does not comply with the Court's instructions to select an AFA rate that is a reasonably accurate estimate of "Xuzhou's then-current market practices during the POR, 'albeit with some built-in increase intended as a deterrent to non-compliance'." See WII at 25.

Comment 2

In the alternative, Washington International argues that the Department should apply partial AFA by calculating a dumping margin based on Xuzhou's reported sales and adding an additional amount to the calculated margin to deter future non-compliance. See Washington International Comments at 2. Washington International contends that this approach is appropriate because Xuzhou reported complete, accurate, and reliable U.S. sales information, and using this information to calculate the company's "actual" dumping margin would be in keeping with the statutory mandate to calculate dumping margins as accurately as possible. See Washington International Comments at 9-10. Moreover, Washington International notes that during the instant administrative review, the Department did not claim that the reported information was untimely submitted, unverifiable, or could not be used without difficulties. See id. Furthermore, Washington International notes that in Gerber Food (Yunnan) Co., Ltd. v. United States, 29 CIT 753, 772, 387 F. Supp. 2d 1270, 1287-88 (2005) ("Gerber"), the Court found that "{b}ecause Commerce is empowered to use adverse inferences in "selecting from among the facts otherwise available," it may not do so in disregard of information of record that is not missing or otherwise deficient" Therefore, Washington International submits that the Department should calculate a margin for Xuzhou based on its [] reported U.S. sales and increase this margin using a multiplier of no more than 20 percent, a percentage that it selected from among a series of percentages listed by the Court and relied upon by the Department in other facets of antidumping administrative reviews. See Washington International Comments at 10-11.

Department Position

We do not agree with Washington International's alternative suggestion of calculating a partial AFA rate using Xuzhou's reported sales. Nor do we agree with its unsupported assertions that Xuzhou's reported sales information is complete and reliable. Xuzhou's reported sales information cannot be considered complete or reliable given the record evidence of unreported sales representing over [] percent of the reported sales, by quantity. Moreover, as explained above, inconsistencies in the sales ledgers used to support the reported sales and a lack of accurate production quantities on the record call into question using any of the reported information to calculate Xuzhou's dumping margin. When there are extensive omissions from, and deficiencies in, the reported data, as is the case here, there is no statutory requirement to use such information because the information is too incomplete to serve as a reliable basis for the determination. See section 782(e)(3) of the Act. Moreover, as this Court has found in the past, there is no benefit to be gained in terms of accuracy in using partial information where the missing information is significant. See e.g., Heveafil SDN. BHD., and Filati Lstex SDN. BHD. V. United States, 25 C.I.T. 147, 151 (2001) ("it is clear to the Court that unverifiable product-

specific direct material costs would prevent any meaningful accurate cost calculation;” thus the Court upheld rejecting plaintiff’s costs *in toto* in favor of total AFA).

In addition, Washington International’s reliance on Gerber is misplaced. In Gerber, the Court indicated that before rejecting record information in favor of applying AFA, the Department must provide reasons for the rejection that are consistent with the statutory scheme, including the provisions of section 782(e) of the Act (which lists the conditions under which the Department shall not decline to consider submitted information). See Gerber 387 F. Supp. 2d at 1285. In Gerber, the Court found that the Department failed to meet its requirements under section 782(e) of the Act. See Gerber at 1284. In contrast, in this case the Department has explained that Xuzhou’s reported information need not be considered pursuant to section 782(e) of the Act because significant data elements were not reported and the record does not contain all of the information required to accurately calculate Xuzhou’s dumping margin. Therefore, the Department continues to find that the record evidence supports that the application of total AFA, rather than partial, AFA.

John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

Date