UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
OFFICE OF THE CHIEF COUNSEL FOR IMPORT ADMINISTRATION
Washington, DC 20230

ORIGINAL

December 1, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Leo M Gordon
Clerk of the Court
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Re Redetermination Pursuant to Court Remand, issued pursuant to Gerber Food (Yunnan) Co., Ltd and Green Fresh (Zhangzhou) Co., Ltd v United States, Slip Op. 05-84 (July 18, 2005)

Dear Mr. Gordon:

Enclosed please find enclosed both the Business Proprietary and Public versions of the United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand in the above-referenced case The Business Proprietary version is marked as such, and filed under seal

Please note that the record for this remand determination will be filed under separate cover If you have any questions regarding this matter, please contact me at (202) 482-6292.

Respectfully Submitted,

Scott D McBride
Attorney-Advisor
Office of Chief Counsel
for Import Administration

Enclosure

Public Version

REDETERMINATION
PURSUANT TO COURT REMAND
GERBER FOOD (YUNNAN) CO . LTD AND
GREEN FRESH (ZHANGZHOU) CO., LTD.
v.
UNITED STATES
Slip Op. 05-84 (July 18, 2005)

SUMMARY

The Department of Commerce ("the Department") has prepared this redetermination of the Final Results[1] ("Remand Redetermination") pursuant to the remand order from the U.S Court of International Trade ("the Court") in Gerber Food (Yunnan) Co., Ltd and Green Fresh (Zhangzhou) Co . Ltd. v United States, Slip Op 05-84 (July 18, 2005) ("Gerber v United States")

The Department issued its draft Remand Redetermination to all interested parties on October 14, 2005 On November 4, 2005, the Department received comments on the draft Remand Redetermination from the respondents Gerber Food (Yunnan) Co , Ltd ("Gerber") and Green Fresh (Zhangzhou) Co , Ltd ("Green Fresh") The Department received rebuttal comments from the petitioner[2] on November 9, 2005 These comments are addressed below in Section VI

The Department has determined that the application of adverse facts available ("AFA")

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[1] See Notice of Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of Third Antidumping Duty Administrative Review for Certain Preserved Mushrooms from the People's Republic of China (68 FR 41304, July 11, 2003)

[2] The petitioner is the Coalition for Fair Preserved Mushroom Trade which includes the following domestic companies L K. Bowman, Inc . Monterey Mushrooms, Inc , Mushrooms Canning Company, and Sunny Dell Foods, Inc

to Gerber and Green Fresh is warranted Consistent with the direction of the Court, the Department has explained that the reason for the application of AFA to Gerber and Green Fresh is appropriate in light of the substantial evidence on the record Furthermore, consistent with the Court's opinion, the Department has applied AFA only with respect to the transactions arising out of Gerber and Green Fresh's agreement that resulted in the evasion of the payment of the correct cash deposits to the Government of the United States Finally, the Department has clarified for the Court that in applying AFA in both its Final Results and in this Remand Redetermination, the Department has not made a finding that Gerber and Green Fresh do not warrant "separate rate" treatment, but that the application of the highest rate on the record of any segment of this proceeding, which is also the rate applicable to the PRC-wide entity, as AFA, is warranted given the facts on the record As we explain below, the use of the highest rate on the record, derived from the petition as AFA, while still determining that a company warrants "separate rate" treatment, is consistent with Section 776(b) of the Tariff Act of 1930, as amended ("the Act"), and court precedent

BACKGROUND

In the Final Results, the Department found that Gerber and Green Fresh had entered into an agreement during the period of review ("POR") by which Green Fresh, who had a previously calculated cash deposit rate (i e , 29 87 percent), would sell invoices to Gerber, who had a previously calculated cash deposit rate (i e , 121 33 percent), such that Gerber, using Green Fresh invoices, would report to U S Customs and Border Protection ("CBP") that Green Fresh was the "exporter" of the merchandise Although the agreement provided that Green Fresh would be more active in these sales, the Department discovered that, in fact, Green Fresh was not the

exporter of this merchandise, and at most performed minimal paperwork for only two of Gerber's transactions. The result of this relationship is the undisputed fact that Gerber paid significantly less in cash deposits to the Government of the United States during the POR, than was required by the Department's instructions

The Department concluded in the Final Results that both Gerber and Green Fresh had misrepresented, or failed to adequately explain in their questionnaire responses, the nature of their relationship during the POR, and it was not until verification of the companies that the Department learned many of the facts behind the companies' arrangement Despite the revelations regarding the true nature of the agreement uncovered at verification, the Department preliminarily calculated dumping margins for both companies based on their reported data However, recognizing the inappropriate nature and effect of this arrangement on the antidumping duty process and the potential for recurrence, the Department preliminarily applied the higher of the two calculated rates to both companies' cash deposit rates See Notice of Preliminary Results and Partial Rescission of Fourth New Shipper Review and Preliminary Results of Third Antidumping Duty Administrative Review for Certain Preserved Mushrooms from the People's Republic of China (68 FR 10694, March 6, 2003) ("Preliminary Results").

After assessing the information uncovered at verification and its significance, for the Final Results, the Department determined that the application of total AFA to both Gerber and Green Fresh was appropriate for two reasons (1) despite repeated questioning, Gerber and Green Fresh had continuously misrepresented or inadequately explained the nature of the relationship throughout the seven-month questionnaire issuance and response analysis process of this review; and (2) because the apparent purpose of the agreement itself was to evade the

payment of correct antidumping duties, the Department, pursuant to its inherent authority to prevent circumvention of the antidumping duty order, found it inappropriate to calculate dumping margins for Geiber and Green Fresh using data derived, in part, from this arrangement. The Department stated, in the Final Results, that the pattern of misrepresentations and inadequate responses, coupled with Gerber's circumvention of the applicable cash deposits, with Green Fresh's assistance, warranted the rejection of the proffered Gerber and Green Fresh data and the application of total AFA.

The Court disagreed with certain Department findings The Department found that, even under the terms of the agreement, Green Fresh would not have been considered the "exporter" of Gerber's merchandise The Court, however, described the arrangement as one in which, at least on its face, "Green Fresh would perform services in the role of exporter " Gerber v. United States at 7. The Department found that Gerber and Green Fresh's misrepresentations existed for the entirety of the administrative review and spoke to the veracity of all of the information on the record, while the Court stated that Gerber and Green Fresh only "initially" failed to disclose the nature of their relationship and that the nature of the misrepresented information could not be applied to unrelated transactions on the record. Gerber v United States at 20 Furthermore, the Department indicated that it believed that it had the authority to apply total AFA to both respondents, in light of facts on the record clearly showing the circumvention by Gerber, with Green Fresh's assistance, of the antidumping duty law On the other hand, the Court indicated that the cases cited by the Department in its Final Results did not establish that the Department possesses such inherent authority to address the circumvention found by the Department, holding that the Department can only apply total AFA when the gaps of information on the record are so

large that the Department has no recourse but to use total AFA Gerber v United States at 33-34 and 22-23 [3]

The Court ordered the Department on remand to, if the Department relies on its authority under 19 USC § 1677e to apply facts available and adverse facts available to individual assessment rates, "identify what information (is) needed to calculate those assessment rates," and what information is "unavailable or is deficient according to the statutory requirements for submitted information, including in particular the requirements of 19 USC §1677m." Gerber v. United States at 36. The Court also stated that if the Department "determines that any information that was submitted by either plaintiff and is necessary to the calculation of the individual assessment rates is unverifiable, then it must identify that specific information and provide a reasoned and supported analysis of any decision to deem that specific information unverifiable." Id. Furthermore, the Court held that "if Commerce relies on its authority under 19 USC § 1677e(a) in calculating an individual assessment rate for either plaintiff, and also, pursuant to 19 USC § 1677e(b), uses any inferences adverse to either plaintiff in selecting from facts otherwise available, Commerce must explain its conclusion, based on substantial evidence on the record, that the party in question failed to cooperate to the best of its ability in providing information that was needed to calculate the individual assessment rate." Id Finally, the Court held that "in that event, Commerce must include in the remand determination its findings of fact

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[3] The Department believes that the Court misunderstood that in applying total AFA to Gerber and Green Fresh, the Department was determining that Gerber and Green Fresh were under "government control " Gerber v United States at 29 In fact, the Department has applied as AFA the highest rate in any segment of a proceeding to numerous respondents in nonmarket-economy cases, while still finding that companies in the nonmarket economy warranted "separate rate" treatment As explained in Section IV below, the CIT has recognized in past cases that the statute permits such an application of the PRC-wide rate

and a reasoned analysis supporting its conclusion " Id

Pursuant to the Court's order, the Department has, in this Remand Redetermination, analyzed the facts of the record and further explained Gerber and Green Fresh's consistent failure throughout the entire POR to provide the Department with information relevant and necessary to its calculations of dumping margins in this administrative review, with respect to the transactions covered by the invoice sales scheme Furthermore, the Department has further explained the nature of its inherent authority to prevent circumvention of the antidumping duty law, and its belief that it is appropriate to exercise this authority in this case. The Department therefore has again concluded that application of AFA in this case is warranted Nonetheless, consistent with the Court's opinion, the Department has determined to apply partial AFA, not total AFA, in its margin calculations for both Gerber and Green Fresh Specifically, the Department has applied AFA only to those transactions in which Gerber exported merchandise to the United States and claimed Green Fresh as its exporter to CBP

The revised margins as a result of the remand are as follows

Manufacturer/Producer/Exporter	Final Results Weighted-Average Margin Percentage	Remand Redetermination Weighted-Average Margin Percentage
Gerber Food (Yunnan) Co , Ltd	198.63	150 79
Green Fresh (Zhangzhou) Co , Ltd	198.63	84 26

REDETERMINATION

Throughout the course of this administrative review, both Gerber and Green Fresh either failed to provide information requested by the Department or, when they did provide information, misrepresented the nature of their business relationship during the POR In the

beginning of the administrative review, Gerber and Green Fresh were reluctant to reveal anything about an important commercial relationship, and it was only after the Department issued numerous questionnaires that both companies revealed certain facts pertaining to their relationship However, even then, they failed to provide the Department with an accurate picture of the nature of their relationship and, more importantly, the true purpose or effect of that relationship It was not until verification, after significant further probing by the Department, that Gerber and Green Fresh revealed the salient details of their relationship with respect to a significant portion of their sales under review

Verification is supposed to be a "spot check," confirming the accuracy and completeness of information that is already on the record, by reviewing relevant portions of a company's books and records Allied Tube & Conduit Corp. v United States, 898 F 2d 780, 786 (Fed Cir. 1990) ("{T}he function of verification is to corroborate information provided in questionnaire responses . ."), Tianjin Machinery Import & Export Corp. v. United States, 353 F Supp 2d 1294, 1304 (CIT 2004); Chia Far Industrial Factory Co. Ltd v United States, 343 F Supp. 2d 1344 (CIT 2004), Acciai Speciali Terni S P A v. United States, 142 F Supp 2d 969, 986 (CIT 2001) Verification is not the forum in which the Department may be presented significant new information. Gerber and Green Fresh understood this, in the "verification outline" sent to Gerber and Green Fresh before verification, the Department advised them that it would not accept new information at verification [4] Nonetheless, it was only at verification that Gerber and Green Fresh, for the first time, provided the Department with numerous details about their relationship during

[4] See page 2 of the Department's January 4, 2003, verification outline cover letter issued to Green Fresh and page 2 of the January 4, 2003, verification outline cover letter issued to Gerber.

the POR The Department was unable to "verify" this new information (e.g., the reasoning behind the invoice scheme, the extent of Gerber's use of Green Fresh invoices, the identity of the true exporter, Green Fresh's recording of some of the sales at issue in its accounting records and its inability to provide source documentation for those sales, and the extent of Green Fresh's knowledge of the number of total sales affected by the invoice scheme as discussed below) given the limited duration and scope of verifications and because the parties admitted that they did not have information on the record to support some of their claims.

In light of the Court's instructions as noted above, below is (1) an identification of each company's salient deficiencies with respect to the sales at issue, (2) the Department's justification for resorting to partial AFA pursuant to Section 776 of the Act based on these deficiencies and its inherent authority to enforce the antidumping duty law, and (3) the consideration of Section 782 of the Act in the Department's facts available determination

I. Gerber And Green Fresh Consistently Failed To Provide Relevant Data On The Record Throughout The Entire Administrative Review, Or Misrepresented The Facts To The Department When That Information Was Requested

Below is a list of each critical misrepresentation made by Gerber and Green Fresh in response to Sections A and C of the Department's original and supplemental questionnaires[5] with respect to the sales at issue. Specifically, these misrepresentations relate to three critical questions for purposes of the dumping margin calculation (a) who was the exporter; (b) which company, Gerber or Green Fresh, made the sales in question, and (c) whether Gerber used Green

[5] Section A requests, among other things, information about a company's organization and general information regarding sales of the merchandise under review Section C requests information about the United States market, including a sales list and other data necessary to calculate the price in or to the United States market.

Fresh to evade payment of antidumping duty cash deposits

(A) Who Was The Exporter?

(1) Confusing Questionnaire Responses

With respect to who in fact was the exporter, or, for that matter, what roles Green Fresh and Gerber played with respect to 24 of 34 sales of Gerber-produced subject merchandise during the POR, the Department asked the following questions and the companies provided the following responses (emphasis added)

- Question: **Department's April 16, 2002, Section A Questionnaire (Page A-2):** *Explain "your company's relationship with other producers or exporters of the subject merchandise." (Question 2 a(iv))*

- Response **Gerber's May 23, 2002, Section A Response (Page A-2):** "Gerber has no relationship with other producers or exporters of subject merchandise . ." (Emphasis added)

- Response: **Green Fresh's May 23, 2002, Section A Response (Page 2)** "Neither Green Fresh nor Lubao has any relationship with other producers or exporters of the subject merchandise "

- Question: **Department's April 16, 2002, Questionnaire (Page A-7)** *"If you are aware that any of the merchandise that you sold to another company in your country was ultimately shipped to the United States, please contact the official in charge within two weeks of receipt of this questionnaire "*

- Response **Gerber's May 23, 2002, Section A Response (Pages A-11 and A-12):** "Gerber transacted some sales during the period of review through an agent Green Fresh, who was paid a commission for its services. For those sales transacted through Green Fresh, Gerber negotiated the price with the U S customer and at all times was aware that the product was destined for the United States Green Fresh acted as the exporter of record, however " (Emphasis added)

While both Gerber and Green Fresh originally reported they had no relationship with other producers or exporters of subject merchandise, they subsequently contradicted themselves by claiming Green Fresh as the exporter of record for certain transactions In fact, Green Fresh

provided confusing and contradictory information in the same questionnaire response (i e , May 23, 2002, response) concerning its relationship with other exporters (i e , Gerber) (see response excerpts above and below)

- Question. **Department's April 16, 2002, Section A Questionnaire (Page A-8):** *"Provide the names, addresses and facsimile numbers of those companies that supplied you with the merchandise under review that your company or an affiliate sold to the United States " (Question 9(a))*

- Response **Green Fresh's May 23, 2002, Section A Response (Page 11)** "During the period of review, we acted as a agent for sales by Gerber Food (Yunnan) Co , Ltd , an unaffiliated produce{r}, who supplied Green Fresh with merchandise to be exported to the United States. Gerber paid Green Fresh a commission for services rendered (Emphasis added) Gerber had full knowledge at all times that this merchandise was destined for the United States as Gerber negotiated the sale with its customer in the United States."

- Question **Department's July 23, 2002, 1st Supplemental Questionnaire to Green Fresh (Page 1)** *"Please define and discuss the role Green Fresh played when it acted as an agent in the sale of Gerber merchandise When did Green Fresh begin acting as an agent in the sale of Gerber merchandise? How was Green Fresh's commission calculated? Was the subject merchandise made by Gerber transported to either Green Fresh's or Lubao's premises before being transported to the United States? If so, how did Green Fresh ensure that the subject merchandise produced by Lubao was not intermingled with the merchandise produced by Gerber? "*

- Response· **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 1)** "Green Fresh acted as the exporter for sales in which Gerber was the manufacturer Green Fresh began acting as the exporter in September 2001 . Green Fresh received a commission from Gerber based on the contractual agreement between the two parties. The commission was paid to compensate Green Fresh for its role in the transaction . (Emphasis added) The subject merchandise produced by Gerber was not transported to either Green Fresh's or Lubao's premises before being transported to United States. The merchandise could never be intermingled because Gerber product was sent separately from Green Fresh's product and the codes on the can lids of Lubao and Gerber are different "

- Question **Department's July 23, 2002, 1st Supplemental Questionnaire to Green Fresh (Page 1):** *"Please submit the customs entry summary (CF 7501) for each of these transactions "*

- Response **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 2):** ". . . A copy of the CF 7501 for each of these shipments is attached as Exhibit AS-1 "

Having provided the customs entry summaries (i e , CF 7501) for 24 sales for which it now claimed it acted as the exporter on behalf of Gerber, the Department had a basis to request Green Fresh to further explain its exporter role in a supplemental questionnaire (see discussion below)

Even though Green Fresh initially described itself as a sales agent for Gerber, who supplied it with merchandise to be exported to the United States, it later responded, as evidenced below, that Gerber arranged for the shipments Meanwhile, Gerber explained that Green Fresh acted as a sales agent for the sales at issue but later stated that it acted as a shipping agent with no role at all in the sales process

- Question. **Department's July 23, 2002, 1st Supplemental Questionnaire to Green Fresh (Page 7):**
  "Provide the name of each agent Green Fresh used in making its POR shipments to the United States What role did the agents play in making these shipments? Did Green Fresh use the same agent(s) for arranging the sale of subject merchandise made by Gerber and Lubao?"

- Response. **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 11):** "We are not sure what the Department means by "agent" in this context. Green Fresh did not use any agents to arrange shipments, but arranged shipments itself Gerber was the importer of record for the merchandise produced by Gerber and Gerber arranged for the shipments " (Emphasis added).

- Question **Department's August 13, 2002, 2nd Supplemental Questionnaire to Gerber (Page 2):**
  "Please define and discuss the role Green Fresh played when it acted as an agent in the sale of Gerber merchandise When did Green Fresh begin acting as an agent in the sale of Gerber merchandise? How was Green Fresh's commission calculated? Why is {it} not appropriate to report this commission in Field Number 32 0 in Exhibit C-1 of your June 6, 2002 Section C response ("Section C response")?"

- Response **Gerber's September 11, 2002, 2nd Supplemental Response (Page 6)**
  "Green Fresh acted as an agent for the sale of Gerber merchandise from Sept 2001 to May 2002. Green Fresh's commission was calculated on a container basis (Emphasis added.) We did not report the commission in Field Number 32 of Exhibit C-1 of our Section C response because the questionnaire instructions for Fields 31 through 40 state that such fields are applicable "FOR CEP TRANSACTIONS ONLY " As Gerber's sales were not made on a CEP basis, Field 32 was not applicable. Moreover, the Department does not normally consider transaction expenses between two non-market economy entities, but rather assumes that such costs are included in the surrogate values "

- Question: **Department's November 22, 2002, 2nd Supplemental Questionnaire to Green Fresh (Page 2)**
  "Please provide a detailed description of the roles that Gerber Food (Yunnan) Co , Ltd ("Gerber") and Green Fresh played with regard to the sales of subject merchandise manufactured by Gerber but sold by Green Fresh ("sales in question") Also indicate whether Gerber or Green Fresh received payment from its customers for the sales in question If so, indicate whether Green Fresh deposited the funds remitted by its customers for the sales in question. If not, explain how Gerber received payment for the sales in question Also, specify the importer of record for the sales in question Explain the relationship between Gerber and Green Fresh that gave rise to the transactions in which Green Fresh became the exporter for sales manufactured by Gerber "

- Response **Green Fresh's December 23, 2002, 2nd Supplemental Response (Page 1).**
  "Green Fresh acted as Gerber's shipping agent by providing Gerber with certain export documents (an invoice, Customs and Quarantine inspection form, packing list, VAT refund form, Chinese customs declaration) Gerber was the manufacturer and seller for all these sales, meaning that Gerber sold to its own customers, not Green Fresh's customers, and Gerber negotiated the price Green Fresh had no role at all in choosing customers or establishing price Gerber's customers remitted payment to Gerber, not to Green Fresh All merchandise was shipped directly from Gerber to the U S. customer and never entered Green Fresh's inventory. The importer of record for these transactions is unknown to Green Fresh (Emphasis added) Under the contract between Gerber and Green Fresh, Gerber was supposed to transfer the foreign currency paid by its customer to Green Fresh, along with the sales invoice so that Green Fresh could receive the VAT refund. From these proceeds, Green Fresh was supposed to deduct a commission of [ ]. There is and was no relationship between Green Fresh and Gerber except that they were introduced by a mutual acquaintance."

The description of Green Fresh's role with respect to the transactions at issue varied from one response to another. Originally claiming that it was a sales agent for these sales, Green Fresh subsequently stated that it was an exporter or a shipping agent (even though Green Fresh reported

that Gerber arranged for shipping). Moreover, in one response, Green Fresh acknowledged Gerber was the importer of record and submitted the customs entry summaries, but, in another response submitted prior to verification, it claimed the importer of record was "unknown." Then, to make matters even more confusing, Gerber called Green Fresh's responses into question, while modifying its previous answers yet again in the same response as to who in fact the exporter was (see below):

- Question **Department's November 22, 2002, 3rd Supplemental Questionnaire to Gerber (Pages 1 and 2)**
  "Please provide a detailed description of the roles that Gerber and Green Fresh played with regard to the sales that were manufactured by Gerber but sold by Green Fresh ("sales in question") Indicate which company handled the order for the sales in question Indicate whether Gerber or Green Fresh received payment from its customers for the sales in question If so, indicate whether Gerber or Green Fresh deposited the funds remitted by its customers for the sales in question If Green Fresh received direct payment from the customer, explain how Gerber received payment for the sales in question Explain the relationship between Gerber and Green Fresh that gave rise to the transactions in which Green Fresh became the exporter for sales manufactured by Gerber Confirm that the sales made through Green Fresh were shipped directly to the U S customer and that such merchandise did not enter the inventory of Green Fresh

  In addition, on page 7 of your second supplemental response, you indicated that all sales made through Green Fresh are identified by the prefix "LX" in the reported sales invoice number Based on our review of your revised U S sales listing, 24 of the 34 sales transactions began with the prefix "LX" However, Green Fresh's most recent U S sales listing indicates that only 11 sales were made through Green Fresh Please explain this discrepancy and confirm the number of sales that Gerber made through Green Fresh during this review period If the number of sales made through Green Fresh that were reported in your U S sales listing differ from the number of sales transactions (24) reported in your second supplemental response, modify the sales invoice field (the field you used as the identifier) and resubmit your U S sales listing

  Please provide a translated copy of the commission agreement between Gerber and Green Fresh When did Gerber cease its business with Green Fresh?"

- Response **Gerber's December 23, 2002, 3rd Supplemental Response (Pages 2 and 3)**
  "We have correctly reported the numbers of sales that were made through Green Fresh. To reiterate, 24 of the 34 sales transactions made by Gerber during the period of

investigation were made through Green Fresh. We have conferred with Green Fresh and learned that they mistakenly did not report all of the sales made by it on our behalf (Emphasis added.) Green Fresh is currently amending its sales listing to reflect a total of 24 sales made on behalf of Gerber in response to their latest questionnaire

A translated copy of the commission agreement between Gerber and Green Fresh was provided as Exhibit 3 to our supplemental response of September 11, 2002. The agreement sets forth in some detail the role that Gerber and Green Fresh played in the 24 transactions We acknowledge that certain terms are not clear from the translation, however and we hereby explain in greater detail how the contract was actually implemented

Under the contract, Green Fresh acted as Gerber's shipping agent by preparing Gerber's export documents and coordinating its shipments of subject merchandise to the United States. Gerber was the manufacturer and seller for all these sales, meaning that Gerber sold to its own customers, not Green Fresh's customers, and Gerber negotiated the price. Green Fresh had no role at all in choosing customers or establishing price. (Emphasis added.)

The parties agreed that the U.S customer would pay directly to Gerber's parent company, Alexander International Development, Ltd , in Hong Kong Alexander would then remit the foreign proceeds to Green Fresh within 45 days of the issuance of the bill of lading The purpose of this would be to allow Green Fresh to collect the VAT refund available to the exporter under Chinese law - [ ] Under the contract, Green Fresh would then have responsibility of exchanging the foreign currency, and remitting all proceeds, including the VAT refund, to Gerber immediately Gerber would then be responsible for paying Green Fresh a commission of [ ] [6] (Emphasis added.)

As the parties carried out the agreement, however, it became increasingly clear that certain provisions were not workable A dispute arose and a breakdown in relations ensued. The issues of contention were as follows

a. According to Gerber, Green Fresh did not remit the foreign currency quickly enough to instill confidence for future transactions; Alexander subsequently stopped remitting the foreign proceeds to Green Fresh and paid Gerber directly

b According to Green Fresh, Gerber was not paying the [ ] commission for all shipments as the contract stated. Although Green Fresh continued to export Gerber's product, relations broke down and ceased as of May 2002 There is an ongoing dispute as

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[6] This explanation only created more confusion as to the purpose of the agreement. For further discussion, see section below entitled "(C) Whether Gerber Used Green Fresh To Evade Payment Of Antidumping Duty Cash Deposits?"

to whether Green Fresh was paid for all of the exports it made on behalf of Gerber

In sum, the role that Gerber and Green Fresh played with respect to these sales is as follows:

a. Gerber was the manufacturer and marketer for all of these sales Green Fresh acted as Gerber's shipping agent by preparing Gerber's export documents and coordinating its shipments of subject merchandise to the United States.

b. Gerber handled all price negotiations and identified the U S customer;

c. Gerber received all payments from the U S customer and paid Green Fresh a commission

d All merchandise was shipped directly from Gerber to the U S. customer and never entered Green Fresh's inventory "

Thus, by the time Department officials left the United States to verify Gerber's and Green Fresh's questionnaire responses, they were unsure if Green Fresh was the exporter, shipping agent, sales agent, or something different for the sales at issue

(2) New Factual Information at Verification

Heading into verification, the parties had portrayed to the Department a *bona fide*, although confusing, relationship whereby Gerber paid Green Fresh a commission to export sales to the United States on Gerber's behalf Green Fresh first portrayed itself as a sales agent for Gerber during the POR for 24 sales of Gerber-produced merchandise, only to later change its position by stating that it acted as an exporter or shipping agent, rather than a sales agent, for only 11 sales With regard to those 11 sales, it furnished complete sales data for these transactions in an August 22, 2002, addendum to its August 20, 2002, 1st Supplemental Response [7] However, verification revealed that Green Fresh could not provide the supporting

[7] See Exhibit CS-1 of the Green Fresh's August 22, 2002, submission

documentation for these 11 sales which it reported in its August 22, 2002, addendum to its 1st Supplemental Response (see page 7 of the Green Fresh verification report) On the other hand, Gerber maintained that Green Fresh was the exporter or shipping agent for all 24 sales at issue.

Over the course of seven months (i e , May through December 2002), the Department provided both parties with ample opportunity to clarify each entity's role with respect to the sales at issue because it was unclear which entity was the exporter and how many sales were at issue. Notwithstanding this opportunity, it was only through the examination of documentation at verification that the Department discovered that Gerber, rather than Green Fresh, arranged the exportation of all but arguably two of the 24 sales at issue (from which the Department sampled at verification), using Green Fresh invoices for all 24 sales for that purpose Although both companies claimed that Green Fresh was the exporter of record for these sales, the Department found no evidence that Green Fresh provided any export services with respect to the sales at issue (except possibly two of them) even though the agreement between the two parties specified that Green Fresh was responsible for preparing all documentation necessary for exporting the Gerber-produced merchandise from the PRC (see page 7 and VE-6P of the Green Fresh verification report).

Moreover, what had been portrayed in the narrative questionnaire responses as a *bona fide* arrangement between Gerber and Green Fresh turned out to be a scheme whereby Gerber used Green Fresh's invoices to export its product to the United States to benefit from Green Fresh's lower antidumping duty cash deposit rate and to avoid the payment of the required antidumping duty cash deposits (see page 7 of the Gerber verification report) Thus, had verification not taken place, the actual facts surrounding this arrangement would not have been

known

(B) Which Company, Gerber Or Green Fresh, Made The Sales In Question?

(1) Confusing Questionnaire Responses

With respect to who should report the 24 sales at issue for dumping margin calculation purposes, the Department asked the following questions and the companies provided the following responses (emphasis added).

- Question: **Department's April 16, 2002, Questionnaire (Page A-1)**:
  "State the total quantity and value of the merchandise under review sold during the period of review ("POR") in the United States. A chart for reporting the sales quantity and value can be found at the end of this section Complete a chart for all subject merchandise produced and sold by your company "

- Response: **Green Fresh's May 23, 2002, Section A Response (Exhibit 1)**:
  Green Fresh indicated on the requested chart that its total quantity was "[ ] (of this amount, [ ] was shipped as sales agent for Gerber" and the terms of sale were "CNF (However, sales made on behalf of Gerber were made on FOB basis)." In addition, Green Fresh indicated that its total value was "[ ] (Of this amount, [ ] was shipped as sales agent for Gerber) "

- Response. **Gerber's May 23, 2002, Section A Response (Page A-1)**:
  Gerber simply reported in the requested chart its total quantity and value for all sales of subject merchandise which it produced, including the sales for which it claimed Green Fresh was the exporter (which it subsequently submitted in its Section C Response)

- Question: **Department's April 16, 2002, Questionnaire (Page C-24)**:
  "Describe the terms under which commissions were paid and how commission rates were determined Explain whether the amount of the commission varies depending on the party to whom it is paid and whether that party is affiliated to you Include samples of each type of commission agreement used "

- Response **Gerber's June 6, 2002. Section C Response (Page C-28)**
  "There were no commissions paid."

Despite indicating that it paid no commissions during the POR, Gerber later revealed that it paid Green Fresh a commission for the sales for which Green Fresh acted as its agent (see page

6 of Gerber's September 11, 2002, 2nd Supplemental Response) However, the Department found no evidence at verification that Gerber paid Green Fresh the full commission for the sales at issue as specified under the agreement (see page 7 of the Green Fresh verification report)

- Question **Department's April 16, 2002, Section C Questionnaire (Page C-31):** *"If you are not the manufacturer, report the manufacturer of the merchandise in your narrative response and provide a key to the code "*

- Response **Green Fresh's June 7, 2002, Section C Response (Page C-26):** "The subject merchandise sold by Green Fresh was produced by Lubao, our affiliated manufacturer, and Gerber, an unaffiliated manufacturer We have reported in our sales listing all sales of Lubao's merchandise The sales of Gerber merchandise are listed in the sales listing submitted as part of Gerber's response and are indicated by all invoices that begin with the prefix LX." (Emphasis added)

Gerber's December 23, 2002, 3rd Supplemental Response, suggesting that Green Fresh would report the sales (see excerpt above), was inconsistent with Green Fresh's June 7, 2002, statement above Indeed, subsequently, Green Fresh stated that it believed Gerber would report the sales

- Question· **Department's July 23, 2002, 1st Supplemental Questionnaire to Green Fresh (Page 8)** *"All of the transactions you listed in Exhibit C-2 were for sales by Green Fresh (i e CNF) Please explain why you did not list any sales of Gerber merchandise in Exhibit C-2?"*

- Response **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 13)** "Since Gerber is also a respondent in this investigation, we believed that Gerber would report those sales (Emphasis added.) We have now revised Exhibit C-2 so as to include all the Gerber merchandise as well "

Thus, even though Green Fresh claimed it was the exporter, it assumed that Gerber reported the "agent" sales However, notwithstanding this claim, Green Fresh did provide in an August 22, 2002, addendum to its August 20, 2002, 1st Supplemental Response data for the 11 sales which it claimed it exported on behalf of Gerber

- Question **Department's November 22, 2002, 2nd Supplemental Questionnaire to Green Fresh (Page 3)**
  "On page 13 of Green Fresh's supplemental response, Green Fresh stated that "{w}e have now revised Exhibit C-2 so as to include all the Gerber merchandise " In its revised sales database submission, Green Fresh included one Excel file that contained two worksheets One of those worksheets reflected the reported 134 sales transactions ("revised sales database"), whereas the other worksheet contained 11 sales transactions which Green Fresh claims to represent sales supplied by Gerber that were sold through Green Fresh to the United States ("Gerber sales") Specify whether the revised sales database includes any Gerber sales Also, specify the total number of Gerber sales that were made through Green Fresh to the United States during the POR Were there more than 11 sales transactions? . In order to identify the Gerber sales, please add an additional variable to your sales database to reflect those sales transactions for which Gerber was the manufacturer "

- Response: **Green Fresh's December 23, 2002, 2nd Supplemental Response (Page 3)**
  "We reported the 11 sales transactions for which we had the data Since our role was limited to providing export documents, we were not aware of the details of all of the transactions . We have reported the sales of which we are aware in Exhibit Supp 2-3."

However, Exhibit Supp. 2-3 neither contained the sales Green Fresh referred to nor any additional data for those sales submitted in an August 22, 2002, addendum to its August 20, 2002, 1st Supplemental Response Thus, while Gerber's responses reflected 24 "agent" sales, Green Fresh indicated it was aware of only 11, notwithstanding a prior submission of the customs entry summaries for all 24

In response to the questions the Department asked on the invoicing system used for the sales at issue, the respondents submitted the following information:

- Question **Department's April 16, 2002, Section C Questionnaire (Page C-12):**
  "Describe the invoice numbering system used by each sales entity that originated a sale reported in this data file "

- Response. **Gerber's June 6, 2002, Section C Response (Page C-12)**
  "Shipments exported through Green Fresh are noted with the prefix "LX "

- Question: **Department's July 23, 1st Supplemental Questionnaire to Green Fresh (Page 8)**
  "You stated that the sales invoice numbers in this field were listed consecutively However, there are gaps in the sales invoice numbers listed in Exhibit C-2 (for example, the gap between invoice numbers LX2001-22 and LX2001-26) Explain why these gaps are present "

- Response: **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 13).**
  "The invoice number LX2001-22 and LX2001-26 were for Gerber and these followed a different numbering system "

- Question **Department's August 13, 2002, 2nd Supplemental Questionnaire to Gerber (Page 3)**
  "On page A-11 of the Section A response, you indicate that Green Fresh was the exporter of record for certain sales made by Gerber during the POR Please update Exhibit C-1 of your Section C response to include those sales in which Green Fresh acted as the exporter of record. Who was the importer of record for those sales in which Green Fresh was the exporter of record?"

- Response: **Gerber's September 11, 2002, 2nd Supplemental Response (Page 7).**
  "Gerber reported all of these sales in its original C-1 All sales for which Green Fresh acted as the exporter of record are indicated by the prefix LX Gerber Food was the importer of record for those transactions "

- Question: **Department's August 13, 2002, 2nd Supplemental Questionnaire (Page 3):**
  "Please explain what the letter "I" stands for after the prefix "GY" Also, please explain what the prefixes "LX2" and "LX-GB" represent."

- Response: **Gerber's September 11, 2002, 2nd Supplemental Response (Page 7):**
  "I" stands for invoice, LX stands for Luxian which is the Chinese pronunciation of Green Fresh 2 is for 2002 and GB is Gerber."

- Question **Department's November 22, 2002, 2nd Supplemental Questionnaire to Green Fresh (Page 6):**
  "In our supplemental questionnaire, we asked that you explain the gaps between sales invoice numbers and listed invoice numbers LX2001-22 and LX2001-26 as examples While you responded that these specific invoices pertained to transactions with Gerber, you limited your response to only this one gap in your invoice numbering systems as reported in your U S sales database Please specifically address the following gaps that are also in your U S sales database

  LX2001-03 and LX2001-05
  LX2001-28 and LX2001-30

LX2001-35 and LX2001-39
LX2001-52 and LX2001-55
LX2002-025 and LX2002-031

For instance, indicate whether the missing invoice numbers also pertain to transactions with Gerber For all transactions between Green Fresh and Gerber, specify the invoice numbers that you assigned to such sales "

- Response: **Green Fresh's December 23, 2002, 2nd Supplemental Response (Page 7)** "Invoices LX2001-04 and LX2001-29 were cancelled, because the invoices were wrongly prepared LX2002-026 and X2002-030 were invoiced outside of the current POR. Our new U S. sales listing contains all of the sales made on behalf of Gerber. We assigned the following invoice numbers to Gerber· 023, 024, 025, 036, 037, 038, 048, 050, 051, 053, 054. The other invoices are in our U S sales listing"

In response to the questions the Department asked on the terms of delivery used for the sales at issue, the respondents submitted the following information

- Question: **Department's April 16, 2002, Section C Questionnaire (Page C-13)** *"Describe the terms of delivery offered and indicate the code used for each . . . "*

- Response **Gerber's June 6, 2002, Section C Response (Page C-13)** "All shipments are delivered directly to the customer "

- Response: **Green Fresh's June 7, 2002, Section C Response (Page C-10)** "The terms of delivery were CNF for sales by Green Fresh and FOB for sales made of Gerber merchandise"

- Question. **Department's November 22, 2002, 2nd Supplemental Questionnaire to Green Fresh (Page 6):** *"On page C-10 of your June 7. 2002, questionnaire response. you state that the terms of delivery were CNF for sales by Green Fresh and assigned those sales with code "2," whereas you reported FOB terms of delivery for the Gerber sales and assigned those sales with code "3 " However, based on our review of your sales database, you reported only code "3" for all sales Please revise the codes reported in this field to reflect the proper sales delivery terms specific to Gerber and resubmit your sales database Please also explain why, for the 11 sales transactions in which Green Fresh acted as the sales agent for the Gerber merchandise, you entered the number 1 in the SALETERU field "*

- Response: **Green Fresh's December 23, 2002. 2nd Supplemental Response (Page 7)** "It is correct that all of Green Fresh's sales were made on a CNF basis Sales made by Gerber were made on a duty delivered paid basis The sales listing has been revised to reflect these terms of delivery, all of which are indicated by the number "3"."

As indicated above, Green Fresh stated in its Section C response that the terms of delivery were free-on-board ("FOB") for its sales of Gerber-produced merchandise and that its own invoices (which contained the prefix "LX") were used for those sales This information seemed to indicate that Green Fresh sold Gerber-produced merchandise during the POR and arranged shipment for those sales However, as discussed further below, the verification findings indicated otherwise.

(2) New Factual Information at Verification

After three supplemental questionnaires issued to Gerber and two supplemental questionnaires issued to Green Fresh, Green Fresh claimed that it only knew of 11 sales of Gerber-produced merchandise and that it provided all of the information in its possession with respect to these sales Gerber provided sales information for all of the 24 sales at issue, claiming that it negotiated the price with the U.S customer and at all times was aware that the product was destined for the United States but that Green Fresh acted as the exporter of record for these sales. Over the course of seven months (i.e., May through December 2002), the Department provided both parties with ample opportunity to submit all information with respect to these sales prior to verification because it was unclear which entity should be reporting them for antidumping duty purposes.

For example, Green Fresh indicated in its Section A response that its total quantity and value included 11 shipments which it claimed it exported on behalf of Gerber. However, an

examination of its original U S. sales listing did not contain any sales data for the sales for which it claimed to have acted as Gerber's sales agent (Page 9 of the May 23, 2002, Section A Response) Further, although Green Fresh denied knowledge of the remaining 13 sales, in response to the Department's July 23, 2002, 1st Supplemental Questionnaire, Green Fresh provided the customs entry summaries for 24 sales (not just 11 sales) made by Gerber All of the submitted customs entry summaries showed Green Fresh as the exporter of record for the 24 sales reported by Gerber.

On the other hand, Gerber stated in its December 23, 2002, 3rd Supplemental Response that Green Fresh mistakenly did not report all of the 24 sales it made on Gerber's behalf and that Green Fresh would amend its sales listing to reflect a total of 24 sales made on behalf of Gerber in response to its latest questionnaire In other words, given that Green Fresh was the exporter, Gerber maintained the sales should and would be reported by Green Fresh, rather than Gerber. Meanwhile, Green Fresh had provided the sales information for only 11 of these 24 sales in an August 22, 2002, addendum to its August 20, 2002, 1st Supplemental Response In summary, as is evident from the companies' responses, it was unclear who should be reporting these sales and how many sales should be reported.

Only through verification was it discovered that Green Fresh was unable to provide support documentation with respect to 11 of the sales at issue even though it recorded these transactions as sales in its accounting records as discussed below (see VE 6P of the Green Fresh verification report) Even more confusing was the fact that the invoices associated with the first two of the 11 sales that Green Fresh claimed to be aware of indicated that Green Fresh shipped its own product to Gerber, whereas other invoices sampled at verification with respect to the

remaining 22 sales that Gerber reported indicated that the product shipped by Green Fresh to Gerber was actually packed by Gerber (see VE 6P of the Green Fresh verification report and VEs 4C, and 4G through 4L of the Gerber verification report) In other words, although the documentation examined at verification for the sales at issue depicted an arrangement whereby Green Fresh sold its own product to Gerber, in fact no *bona fide* sales transaction occurred between the two parties. In addition, the same documentation contradicted both companies' claims that Green Fresh acted as Gerber's export agent with respect to these sales because the relevant invoices showed that Green Fresh supplied Gerber with the merchandise rather than *vice-versa*.

Nevertheless, with respect to the purported agent sales, Green Fresh provided the sales invoice and packing list for just two of the 11 sales for which it claimed knowledge (see page 7 and VE-6P of the Green Fresh verification report) Thus, despite recording 11 transactions as sales in its accounting records, as reflected in both its income statement and general ledger (see VE-6B of the Green Fresh verification report), it possessed virtually no source documentation for these sales. Also, Green Fresh's claim that it had no knowledge of the other 13 sales was inconsistent with its previous submission of the customs entry summaries for all 24 (not just 11) sales at issue. The various ambiguities and inconsistencies in its questionnaire responses raised serious questions as to the accuracy of its sales reporting Nor was the Department able to verify that its agreement with Gerber was terminated after the first 11 sales took place, as Green Fresh claimed at verification (see pages 6-7 of the Green Fresh verification report and page 2 and Exhibit AS-1 of the August 20, 2002, 1st Supplemental Response)

Furthermore, verification revealed that Gerber used Green Fresh's invoices during the POR for the 24 sales at issue, including 13 which Gerber claimed were made with Green Fresh's knowledge and for which Green Fresh had also submitted the customs entry summaries (see VEs 1A, 4A, and 4C of the Gerber verification report) All 24 sales were included in Gerber's accounting records and incorporated in its 2001 and 2002 income statements (see also VEs 1A, 4A, and 4C of the Gerber verification report) Thus, at least 11 of the sales were reflected in both Gerber's and Green Fresh's books and records.

Having failed to inform the Department of the existence and magnitude of this invoice scheme, as it affected who should be reporting which sales and how many sales should be reported prior to verification, the Department's ability to conduct verification was undermined, as it could not, for example, ascertain whether this invoice scheme was limited to just 24 sales as reported by Gerber in its questionnaire responses Nevertheless, based on the data which Gerber provided, the 24 sales at issue represented approximately [ ] percent of Gerber's total reported POR U S sales in terms of both quantity and value. For Green Fresh, the sales at issue represented approximately [ ] percent, in terms of quantity, and [ ] percent, in terms of value, of its total reported POR U S sales.

(C) Whether Gerber Used Green Fresh To Evade Payment Of Antidumping Duty Cash Deposits?

(1) Confusing Questionnaire Responses

With respect to whether Gerber used Green Fresh, and whether Green Fresh assisted Gerber, in evading payment of antidumping duty cash deposits, the Department asked the following questions and the companies provided the following responses

Although Gerber later claimed its business arrangement with Green Fresh was created on account of Chinese export restrictions, it initially reported the following

- Question: **Department's April 16, 2002, Section A Questionnaire (Page A-3).** *"are there any restrictions on the use of your company's export revenues? If so, explain when export earnings are deposited into a bank account " (Question 2 m))*

- Response: **Gerber's May 23, 2002, Section A Response (Page A-5)**: "there are no restrictions on the use of Gerber's export revenues " (Emphasis added.)

- Question **Department's August 13, 2002, 2nd Supplemental Questionnaire to Gerber (Page 1)**: *"Please explain why Gerber has two bank accounts Why is one of those accounts held in Alexander's name?"*

- Response **Gerber's September 11, 2002, 2nd Supplemental Response (Page 3)** "Gerber has two bank accounts because of the rules in China governing foreign exchange control. The Chinese authorities have not permitted us to exchange Chinese currency for dollars for the purpose of paying estimated antidumping duties, despite our detailed explanations to them In order to have access to funds, therefore, we remit the proceeds from our invoices to Alexander and then arrange remittance to U S Treasury via Alexander "

- Question **Department's June 28, 2002, 1st Supplemental Questionnaire to Gerber (Page 2)**: *"Please provide a copy of the commission agreement between Gerber and Green Fresh which was applicable during the period of review ("POR") What services did Green Fresh provide? Why was Green Fresh the exporter of record?"*

- Response: **Gerber's August 2, 2002, 1st Supplemental Response (Pages 3 and 4)**: "Attached as Exhibit 7 is the commission agreement between Gerber and Green Fresh Green Fresh exported the product to the United States. Gerber and Green Fresh have had several preliminary discussions towards possibly entering into a joint venture to export to the United States The reason for this is that Gerber is able to produce mushrooms year round in Yunnan Province because of the favorable climate, while Green Fresh's growing season is limited to only several months because of the climate there Green Fresh thus wished to increase its ability to ship to the United States by obtaining supply from Gerber. To test how well the companies could work together, Green Fresh made several shipments of Gerber's product from Xiamen during POR2 as an experiment (Gerber also continued to ship under its own name from Yunnan) In the end, the negotiations fell apart, and the companies have decided not to work together." (Emphasis added)

The purpose of the arrangement between Gerber and Green Fresh varied from one response to another. Gerber originally maintained that the purpose of this arrangement was to allow Green Fresh to increase its ability to ship to the United States by obtaining supply from Gerber because Gerber could grow mushrooms all year while Green Fresh could not (see page 4 of Gerber's August 2, 2002, 1st Supplemental Response). However, as indicated in its December 23, 2002, Supplemental Questionnaire Response reproduced in section (a)(1) above, Gerber later reported that the purpose was for Green Fresh to obtain the VAT refund on its behalf for sales made under this arrangement and then to remit it back to Gerber While Gerber claimed to have reported all such sales, it also maintained that after "conferring" with Green Fresh, Green Fresh would report the sales As discussed below, the Department discovered at verification that the true purpose of this arrangement was to disguise an invoice scheme between the two companies that had the effect of circumventing the proper payment of cash deposits pursuant to the antidumping duty order

Thus, the explanation of the genesis of the arrangement ranged from a trial joint venture, to export restrictions, to a VAT refund In the end, however, it became evident that the effect was that Gerber benefitted from Green Fresh's lower cash deposit rate applicable at that time From their responses, it was clear that the companies understood their arrangement would circumvent the applicable cash deposit rate, despite claims to the contrary (see below)

- Question **Department's July 23, 2002, 1st Supplemental Questionnaire to Green Fresh (Page 1)**
  " *Was Green Fresh designated as the seller or exporter in these transactions? How was Green Fresh's commission calculated? Did Green Fresh allow Gerber to use its lower cash deposit rate in return for the commission payments?* "

- Response **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 1)**
  " Green Fresh was identified to the U S Customs Service as the exporter, Gerber was identified to the U.S Customs Service as the manufacturer . . . Green Fresh does not have the power or authority to "allow" anyone to use its cash deposit rate by payment, by contract or by any other means The liquidation instruction issued by the Department of Commerce to the U S. Customs Service direct which cash deposit rate applies when the manufacturer and the exporter are not the same party The liquidation instructions specify that where the manufacturer and the exporter both have cash deposit rates, the U S Customs Service should collect the cash deposit applicable to the exporter rather than the rate applicable to the exporter . . ."

Thus, Green Fresh portrayed itself as the exporter of Gerber-produced merchandise which entitled the merchandise at issue to receive Green Fresh's lower cash deposit rate at the time of U.S. entry However, verification revealed that other than providing Gerber with its own invoices, Green Fresh did not provide any export services for the sales of Gerber-produced merchandise at issue (except arguably two of them) This invoice scheme effectively allowed Gerber, as the importer of record, to apply Green Fresh's cash deposit rate to the sales at issue upon U S. entry, as indicated below.

- Question **Department's July 23, 2002, 1st Supplemental Questionnaire to Green Fresh (Page 1)**:
  "What was the cash deposit rate applied to the entries of the Gerber subject merchandise that Green Fresh served as the sales agent on? "

- Response **Green Fresh's August 20, 2002, 1st Supplemental Response (Page 2)**:
  "For the reasons stated above, the cash deposit rate that applied to the entries of Gerber merchandise was the cash deposit rate applicable to Green Fresh . . "

- Question. **Department's August 13, 2002, 2nd Supplemental Questionnaire to Gerber (Page 2)**
  "Did Gerber use Green Fresh's cash deposit rate in these transactions?"

- Response **Gerber's September 11, 2002, 2nd Supplemental Response (Page 6)**
  "The U S. Customs Service did apply Green Fresh's rate based on the documents showing that Gerber was the producer and Green Fresh was the exporter "

(2) New Factual Information at Verification

In response to supplemental questionnaires issued to both companies on this matter, the parties presented what appeared initially to be a *bona fide* relationship whereby Gerber, the importer of record, posted Green Fresh's cash deposit rate for 24 entries of Gerber-produced merchandise for which Green Fresh was the exporter of record. Green Fresh provided customs entry summaries for all 24 of these sales at issue which seemed to indicate that Green Fresh was involved in export services associated with all of these sales. Over the course of seven months (i e , May through December 2002) and as noted above, the Department requested both parties to define their roles and identify the services each provided pursuant to their agreement in effect during the POR in order to ascertain whether the arrangement was legitimate and *bona fide*, rather than designed to evade payment of antidumping duties

At verification, the Department sampled the 24 sales at issue by examining the documentation for some of those sales. The 14 sales selected for sampling from the "24-sale pool" all showed that the invoice presented to CBP was a Green Fresh invoice and there was no Gerber invoice to Green Fresh.[8] Despite Gerber's claim that it entered into an agreement with Green Fresh so that Green Fresh could increase its shipments to the United States by obtaining the subject merchandise from Gerber, verification showed that none of the products included in these sales at issue were purchased by Green Fresh from Gerber (see page 6 of the Green Fresh verification report)

Moreover, Green Fresh was unable to provide documentation to support its claim that it

[8] See exhibits 4C and 4G through 4L of the Gerber verification report and exhibit 6P of the Green Fresh verification report

performed export services for all but arguably two of the 11 sales of which it claimed it had knowledge (see pages 5-7 of the Green Fresh verification report) Instead, the additional documentation examined at verification (e g , ocean bill of lading, packing list) clearly indicated that Green Fresh was not the exporter.

That Green Fresh provided virtually no services for the sales at issue was confirmed by the Department's review of Gerber's documentation, which showed that Gerber arranged the exportation of the product simply by using Green Fresh's invoices. Thus, Green Fresh's sole role was providing invoices and granting permission to report Green Fresh's name on the PRC Customs Declaration Form (see pages 5-6 of the Gerber verification report)

While Gerber claimed the arrangement was established due to export restrictions, Gerber was unable to provide at verification any evidence that the Chinese authorities did not permit it to exchange Chinese currency for dollars for the purpose of paying estimated antidumping duties Nor could Gerber show that, if the purported restriction had been lifted. it would not have entered into an arrangement with Green Fresh to export its product to the United States during the POR (see page 6 of the Gerber verification report)

The result of these verification findings revealed for the first time on the record, despite numerous questionnaire responses to the contrary, the true nature of this relationship between the two parties - an arrangement under which Gerber exported its product to the United States using Green Fresh invoices - and its ultimate purpose - to post Green Fresh's lower cash deposit rate at the time of U S entry, thereby circumventing the antidumping duty order (see pages 5-7 of the Gerber verification report)

II. In Light Of Gerber's And Green Fresh's Consistent Omissions And Misrepresentations On The Record, The Department's Decision To Apply AFA Is Warranted

As a result of the numerous inconsistencies, omissions and incorrect statements described above, and the Department's inability to verify new information presented at verification, the Department continues to find that, as to the transactions at issue, it is appropriate to resort to facts available pursuant to Section 776(a) of the Act Furthermore, the Department continues to find that neither Gerber nor Green Fresh acted to the best of its abilities in providing responses that were accurate, truthful, and complete, warranting an adverse inference in accordance with Section 776(b) of the Act As described in detail below, after analyzing the record in accordance with the Court's instructions, the Department continues to believe that application of AFA is warranted

A. Facts Available

The statute provides for multiple bases for the application of facts available Each basis is applicable here Section 776(a)(2)(A) of the Act provides that the Department will use facts otherwise available if a party withholds information that was requested, and Section 776(a)(2)(B) of the Act states that the Department will use facts available if a company fails to provide information by the deadline requested, subject to a notice and opportunity to cure As demonstrated above, the Department repeatedly requested information pertaining to Gerber and Green Fresh's relationship and reported sales, and both companies' responses were misleading and inconsistent The provision of misleading, inconsistent, and inaccurate responses constitutes withholding of requested information, warranting the application of facts available pursuant to Section 776(a)(2)(A) of the Act Here, Gerber and Green Fresh withheld information pertaining

to the nature of their relationship early in the proceeding, and the description provided later in the proceeding was undermined by new information discovered at verification The nature of their relationship was directly relevant to two fundamental aspects of calculating a dumping margin, i.e., who is the exporter and, thus, should report the sales, and how many sales should be reported.

In addition, Section 776(a)(2)(B) of the Act applies to the information that was provided for the first time at verification All of the information that was provided at verification was initially requested by the Department in questionnaires. Thus, pursuant to both Sections 776(a)(2)(A) and (a)(2)(B) of the Act, we believe that the application of facts available is warranted in this case given the fact that new information was furnished at verification concerning the arrangement between to the two parties as discussed above. As discussed below, this failure to report requested information impeded the Department's review of subject merchandise sales made by Green Fresh and Gerber, and its ability to calculate accurate dumping margins for Gerber and Green Fresh.

Section 776(a)(2)(C) of the Act, which provides that the Department shall apply facts available when a party's misstatements or omissions significantly impede an antidumping proceeding, is also applicable Gerber's and Green Fresh's explanations of the nature and purpose of their relationship changed throughout the proceeding and was, ultimately, undermined by verification. The companies efforts to obfuscate the arrangement and its effect significantly impeded the Department's ability to analyze the questionnaire responses and conduct verification of the same, and to conduct an effective administrative review. The Department clearly satisfied the requirements of Section 782(d) of the Act by alerting the companies to the deficiencies and

issuing numerous supplemental questionnaires in an effort to resolve those deficiencies The companies' responses generally only raised more questions, until (given the statutory deadline) the Department attempted to conduct verification It is entirely reasonable to find that providing confusing, misleading, and often false responses to questions such that the agency is unable to discern who is the exporter that should be reporting the sales and how many sales are affected significantly impedes a review, as defined by Section 776(a)(2)(C) of the Act

Section 776(a)(2)(D) of the Act, as noted by the Court, was also cited by the Department in the Final Results as a basis upon which to apply facts available, given its inability to verify the reported information In response to the Court's request for the Department to explain why it believes that it did not verify all of Gerber's and Green Fresh's information, as established above, the Department was unable to verify all of the untimely new information provided by Gerber and Green Fresh at verification and the timely record information provided by the companies prior to verification proved inaccurate The companies could not show that the agreement was motivated by Gerber's production capacity (as claimed prior to verification) or PRC export restraints (as claimed during verification) The companies also could not demonstrate that Gerber and Green Fresh had severed business ties beyond the first 11 sales as claimed by Green Fresh at verification. The companies never substantiated the pre-verification claim that Green Fresh possessed Gerber's merchandise, and the data reviewed at verification seemed to counter this claim

The information that the Department was unable to verify was directly relevant to its ability to calculate proper dumping margins While some of Green Fresh's books and records seemed to reflect 11 sales by Green Fresh of Gerber-produced merchandise, Gerber and Green

Fresh both claimed at verification that these sales were in actuality Gerber's transactions. Even through litigation, Green Fresh claimed that it did more than just sell invoices to Gerber for these 11 sales, but, at verification, Green Fresh could only provide the sales invoice and packing list for 2 of the 11 transactions If, indeed, Green Fresh had participated in the sale, as a sales, export, or shipping agent, its records would reflect such participation

In the end, despite the admonition that new information would not be accepted at verification, the Department attempted to verify both the reported information and the new information presented at verification but could not. At verification, the Department checks the accuracy and completeness of information already on the record As this Court has understood, the presentation of new facts and new explanations undermines the Department's ability to conduct verification For this reason, the Department normally will not accept new information at verification. Nonetheless, it is noteworthy that, when the Department officials attempted to verify some of the new information, neither Gerber nor Green Fresh could substantiate its claims

In addition, Gerber's and Green Fresh's very participation in this "agent" sales scheme further impeded our ability to conduct this administrative review and "impose" antidumping duties pursuant to Section 731 of the Act Contrary to its questionnaire responses, Green Fresh was not "exporting" Gerber's merchandise during the POR, nor was Green Fresh acting as a sales or shipping agent for Gerber Furthermore, it remains unclear whether Green Fresh exported and, therefore, should have reported, 24, 11, none, or more of these transactions, as opposed to Gerber. In any case, these two companies were not participants in a *bona fide* "agent" or "exporter" relationship, and the end result of this relationship was that Gerber was able to pay a

significantly lower cash deposit rate than its lawful obligation By Gerber representing to CBP that Green Fresh sold or exported the merchandise, CBP could not effectuate its ministerial role of "imposing" the correct antidumping duties as directed by the Department Such an arrangement is unacceptable because it impedes the Department's ability to conduct a review and enforce that review consistent with the mandates of Sections 731 and 751 of the Act The integrity of the proceeding is undermined because the entirety of the Department's review and calculations are rendered meaningless. If Gerber can simply use Green Fresh's invoices, it will never pay the cash deposit or assessment rates calculated by the Department Contrary to the companies' arguments before this Court, the companies' arrangement is not akin to other arrangements whereby one entity assumes the responsibility for another's liability Under the terms of the Gerber/Green Fresh arrangement, neither company would ever pay the entirety of the duties due

Section 782(e) of the Act provides that, even if the Department determines that certain information cannot be used pursuant to Section 776(a) of the Act, the Department "shall not decline to consider" imperfect information on the record if it meets all five of the criteria set forth therein. As explained below, in light of the Court's opinion, the Department is limiting its application of facts available to the sales subject to the Gerber/Green Fresh arrangement In response to the Court's query with regard to the applicability of the listed criteria, the Department finds that at least three of these criteria do not apply in this case

With respect to Sections 782(e)(1) and 782(e)(2) of the Act, the information pertaining to the Gerber/Green Fresh transactions was not "submitted by the deadline established for its submission" and could not be verified Indeed, as explained above, significant information

pertaining to Gerber's and Green Fresh's sales was not revealed until verification - long after the record had closed See 19 C F R 351 301(b)(2) (providing the regulatory deadline for submission of new factual information). Notwithstanding the untimely submission, the Department attempted but was unable to verify the new information, given the duration and scope of the verification and the magnitude of the ambiguities It is noteworthy that the new information the Department attempted to verify also could not be verified because Gerber and Green Fresh admitted that they did not have information to support many of their claims

Section 782(e)(4) of the Act is also applicable because Gerber and Green Fresh did not act to the best of their abilities in providing the Department with the details and effect of their arrangement. It is certainly true that Green Fresh and Gerber provided the Department with some sales information that the Department attempted to verify through a spot check of the records provided by the companies However, as described in greater detail below, Gerber and Green Fresh appear to have consistently misrepresented or omitted explanations in their questionnaire responses about the exact nature of their business arrangement and its actual implementation

As the Department explained in the Final Results, it must rely entirely on the data provided by respondents. Thus, when Gerber and Green Fresh in this case provided the Department with false or incorrect data, this review was undermined As such, the Department has reason to doubt the veracity and reliability of the data provided by Gerber and Green Fresh pertaining to these transactions Given the misleading and incorrect questionnaire responses, the Department is not confident that other data provided on the record pertaining to these particular transactions is accurate The Department is furthermore concerned that the data might contain errors that were undetected during the spot check conducted at verification. Gerber and Green

Fresh worked in tandem to circumvent the Department's administration of the antidumping duty law during the POR, then apparently worked in tandem to evade answering clearly and completely the Department's questionnaires during the review proceeding As we have illustrated in Section I above, the very reason for the arrangement provided to the Department completely changed from the initial questionnaire responses to the explanation given at verification

B. Adverse Facts Available

The Department has also determined that Gerber and Green Fresh did not act to the best of their individual abilities in providing correct and complete information to the agency during the administrative review Consequently, the Department has determined that an adverse inference is warranted in selecting from facts otherwise available, pursuant to Section 776(b) of the Act Gerber and Green Fresh did not act to the best of their ability in providing requested information; to the contrary, their pattern of providing inconsistent, misleading, and incorrect data in successive questionnaire responses, and the presentation of significant new information at verification (some of which remained unverifiable) evinces a failure to cooperate to the best of their ability. To apply AFA, the Department must only find that "under the circumstances it was reasonable to conclude that less than full cooperation" was given Nippon Steel Corp v United States, 337 F 3d, 1373, 1380 (Fed Cir 2003) ("Nippon").

As the Department has shown above, from the first questionnaire response through verification, Geiber and Green Fresh, apparently working in tandem, repeatedly modified the story surrounding their invoice-exchanging scheme In the beginning, neither was willing to provide much information about their relationship, and the information that they did provide

proved false Gerber reported that 24 shipments were "exported through Green Fresh," that Green Fresh was the sales or shipping agent for these transactions, and that for these sales a "commission for services rendered" (or upon a container basis) was paid to Green Fresh The facts ultimately discovered were that Green Fresh played virtually no role in the exportation or sale of the merchandise and Gerber arranged for shipment of the merchandise The only "service" for which a commission was paid was, therefore, the provision of blank sales invoices.

Likewise, Green Fresh initially stated that Gerber "supplied Green Fresh with merchandise to be exported to the United States" and that some of "Green Fresh's U.S. sales" were of merchandise "produced by" Gerber By its own admission in later submissions and at verification, Green Fresh acknowledged that it never was "supplied" with Gerber's merchandise even though it included these transactions as "sales" in its own books and records Indeed, according to Green Fresh, it was not even aware of 13 of the 24 sales at issue

Such misrepresentations and/or omissions continued through to the supplemental questionnaires By verification, the Department had many unanswered questions· Gerber had reported 24 sales, while Green Fresh alleged only 11 Gerber claimed that Green Fresh "mistakenly did not report all of the sales" and stated that "Green Fresh" would "amend its sales listing," but Green Fresh only provided complete data for 11 of them. Thus, the Department did not know who was responsible for reporting the sales and whether all the sales were fully and accurately reported Furthermore, it was still unclear if Green Fresh really "sold" Gerber's merchandise as an agent, if it "shipped" Gerber's merchandise as Gerber's alleged "shipping agent," if it "exported" Gerber's merchandise as Gerber's alleged "exporter," and why Green Fresh considered the Gerber sales to be Green Fresh's own sales in its books and records In

other words, despite dozens of questions in a total of five questionnaires, the record was still unclear and inconsistent, with regard to Gerber's and Green Fresh's relationship at the time of verification

It is not the Department's responsibility to piece together vague, confusing, and inconsistent information before verification. The verification, itself, is not intended to be a vehicle for respondents to submit significant new information, but an opportunity for the Department to verify the accuracy of the data already submitted In this case, however, at verification the Department discovered, for example, that the "exporting" arrangement was not an "experiment" to see "how well the companies could work together" because "Green Fresh wished to increase its ability to ship to the United States by obtaining supply from Gerber" as reported by Gerber See August 2, 2002, Supplemental Response at 4 [9] Even during verification, the companies continued to change their story Gerber had claimed in an earlier response that there were "no restrictions on the use of Gerber's export revenues " See Section A Response at A-5 Yet Gerber's general manager alleged for the first time at verification that the purpose of the agreement was to circumvent PRC foreign exchange restrictions [10] It appears that Green Fresh received a commission in exchange for Gerber benefitting from Green Fresh's lower cash deposits, totally unrelated to Gerber's year-long mushroom growing capacity.

Indeed, at verification, the Department learned that much of what it had been told earlier

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[9] Gerber stated that the underlying purpose of the agreement was a result of climate and agricultural benefits enjoyed by Gerber and not by Green Fresh Later, the Department discovered this answer was completely false, apparently created only to respond to the Department's questionnaire (see page 6 of the Gerber verification report)

[10] It should be noted that this claim was described by Gerber orally, but could not be substantiated at verification (see page 6 of the Gerber verification report)

in the questionnaire responses was untrue Green Fresh only received a portion of the total commission amount specified in the agreement (not all of the commission amount as claimed) and, despite the contents of the agreement and the companies' responses, there was no evidence that Green Fresh did anything more than sell its invoices to Gerber Furthermore, Green Fresh was unable to demonstrate that it prepared or completed any export-related paperwork for nine out of the 11 transactions it claimed it had knowledge of, even though, under the agreement, it was responsible for preparing all such documentation Thus, although the Department had very clearly indicated to Gerber and to Green Fresh that new factual information would not be accepted at verification in its verification outline,[11] both Gerber and Green Fresh took advantage of the Department's verification in an attempt to provide a significant amount of important new information for the record (e g , the existence of an invoice scheme and the reasoning behind it, the use of Green Fresh invoices by Gerber, the identity of the true exporter, Green Fresh's recording of some of the sales at issue in its accounting records and its inability to provide source documentation for those sales, and the extent of Green Fresh's knowledge of the number of total sales affected by the invoice scheme).

Gerber and Green Fresh both consistently provided misinformation or confusing responses with respect to the identity of the party actually exporting the merchandise in question, the relationship of the two parties, the existence of Chinese foreign exchange restrictions, and the motivation behind the agreement Such inadequate or misleading responses evince a clear failure of Gerber and Green Fresh to cooperate fully with the Department. Thus, the Department finds

[11] See page 2 of the Department's January 4, 2003, verification outline cover letter issued to Green Fresh and page 2 of the January 4, 2003, verification outline cover letter issued to Gerber

that Gerber and Green Fresh did not act to the best of their individual abilities in responding to the Department's questionnaires and that the application of AFA is appropriate in this case.

III. The Department Has The Inherent Authority To Administer Its Law In A Manner That Protects The Integrity Of Its Proceedings And Does Not Allow Exporters To Render The Department's Instructions To CBP Meaningless

The application of AFA is also appropriate under the unique circumstances of this case based on the Department's inherent authority to protect the integrity of its proceedings. Accepting Gerber's and Green Fresh's arrangement, whereby Gerber avoids paying the appropriate duties, would amount to condoning the circumvention of the antidumping duty law in this administrative proceeding

The importance of preserving the integrity of the cash deposit system cannot be overemphasized The United States antidumping law provides for retrospective assessment of antidumping duties In other words, the assessment of antidumping duties must wait at least a year, and often more, after merchandise subject to an order is imported. Under our system, then, the required deposit of estimated antidumping duties is a critical element in ensuring that imports subject to an order do not continue to injure a domestic industry pending final determinations as to the actual amount of antidumping duties to be assessed Thus, any attempt to undermine the system of duty deposits is, in the Department's view, no different from an attempt to misrepresent the facts upon which actual assessments will be based The improper use of another company's low deposit rate is likely to be as injurious to the domestic industry as an improperly low assessment rate As previously noted by the Court, when enacting the requirement for the payment of cash deposits, Congress was concerned with securing timely payment of duties and deterring continued dumping Badger Powhatan v United States, 633 F Supp , 1364,1372 (CIT

1986). Thus, the Department is concerned that the subversion of such deposits is likely to undermine the purpose and effect of the law Cf. Blaw Knox v. United States, 596 F. Supp 476, 479 (CIT 1984) (statute intended to protect against trading at less than fair market value) Accordingly, if the Department were unable to administer its law fully with respect to its application of cash deposits, but only with respect to assessments, then exporters would be able to take advantage of the United States' system, to the detriment of injured U S industries There is no statutory provision or legislative history which supports such an interpretation of U S antidumping law

Consequently, the Department believes that it is justified in applying AFA to Gerber's and Green Fresh's transactions pursuant to its inherent authority (1) to protect the integrity of its proceedings, (2) to effectively enforce the antidumping law, and (3) to prevent the circumvention of the law through contractual arrangements between respondents The Court disagreed that the Department has a statutory basis upon which to prevent such circumvention The Department strongly disagrees with this interpretation of the statute and of the past cases in which the CIT has affirmed the Department's authority in this manner Otherwise, the Department's calculations could be rendered meaningless by a simple agreement between private parties.

As the Department explained in the Final Results, Congress granted only one agency, CBP, the authority to prevent fraud. See 19 U S C. § 1592. However, it granted the Department the authority to calculate dumping margins and to direct CBP to collect the appropriate cash deposits and assess the appropriate final duties CBP's role in collecting deposits and assessing duties is ministerial in nature, implementing the instructions provided to it by the Department Mitsubishi Elects Am , Inc. v. United States, 44 F 3d 973, 977 (Fed Cir 1994) It cannot be

that Congress intended for the Department to ignore facts on the record of a proceeding that suggest that all of its efforts - the conduct of a review, the issuance of questionnaires, the verification of data, the calculation of margins, and the issuance of assessment and cash deposit instructions - could be rendered meaningless by a simple contract arrangement between two respondents Such an understanding of the law undermines the integrity of the antidumping law

The "inherent power of an administrative agency to protect the integrity of its own proceedings" is without question and has been affirmed by federal courts in various situations Alberta Gas Chemicals Ltd v. United States, 650 F. 2d 9 (2nd Cir 1981) ("Alberta Gas") For example, in Alberta Gas, a case involving the dumping of Canadian methanol, the International Trade Commission ("ITC") relied, in part, on oral and written testimony in making its injury decision A respondent argued that some of this testimony was untruthful The U S. Court of Appeals for the Second Circuit found that if the ITC later determined that the testimony at issue was the equivalent of perjury, it had the authority to revisit its injury decision The Court explained that there is clearly a public interest in applying the law in a meaningful, correct manner to future imports affected by an agency's determinations, and to find otherwise would undermine the integrity of the administrative process Id at 13 Similarly, the Department possesses the inherent authority in this case to address the misrepresentation of who exported, and thus should report, certain sales, so as to prevent evasion of the payment of the applicable deposit rate and final duties to CBP

In assessing the significance of the Gerber/Green Fresh arrangement to the Department's obligation under the statute to calculate a cash deposit and assessment rate, the framework of the statute is important. Pursuant to Section 751(a)(2) of the Act, the Department calculates a

dumping margin for reviewed exporters, and that margin is used for both assessment purposes and "for deposits of estimated duties." See also Section 735(c)(1)(B)(i) and (ii) of the Act (describing in detail that in investigations a margin is calculated for "each exporter and producer individually investigated" and that "the administering authority shall order the posting of a cash deposit . as the administering authority deems appropriate" based upon such margin) (emphasis added). Accordingly, the regulations refer to antidumping investigation and administrative review calculations as respondent-specific. See 19 CFR § 351 213(b)(1) (administrative reviews cover "specified individual exporters or producers") (emphasis added), and 19 CFR § 351 214(a) (indicating that new shippers "can obtain their own individual dumping margin"). Thus, the identity of the party exporting the merchandise is integral to the statute Accordingly, in previous reviews, the Department calculated an estimated duty rate for Green Fresh of 29.87 percent and for Gerber of 121 33 percent, specific to exports of subject merchandise by these respondents

The Department acknowledges that, until recently, neither the Department nor this Court has been squarely presented with schemes, like the Gerber/Green Fresh scheme, aimed at evading the calculated margins Accepting such schemes as legitimate, however, would risk making it a more prevalent practice. Although the scheme is novel and, thus, the Department's response is without directly analogous precedent, the Department and this Court have faced other attempts to circumvent the antidumping duty law, and this Court has affirmed the agency's authority to react to such attempts

The statute does not specifically address, for example, middleman dumping. That is, the sale of merchandise through a third party at less than fair market value. When faced with

dumping by middlemen, however, the Department developed a methodology, which this Court sustained, to address such dumping Tung Mung Development v United States, 219 F Supp 2d 1333, 1343 (CIT 2002), aff'd Tung Mung.et al v United States, 354 F 3d 1371 (Fed Cir 2004) ("Tung Mung"). As the Court articulated in Tung Mung, " {t}he ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent To this end, the ITA has {a} certain amount of discretion {to act} . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law " Tung Mung, 219 F Supp 2d at 1343 (quoting Mitsubishi Elec Corp v. United States, 700 F. Supp. 538, 555 (1988), aff'd 898 F. 2d 1577 (Fed. Cir 1990) ("Mitsubishi") In Mitsubishi, this Court sustained the agency finding that certain sub-assemblies fell within the scope of an antidumping duty order because, to exclude the subassemblies, could result in circumvention of the antidumping duty order

Without the authority to prevent the evasion or circumvention of the antidumping duty law, the Department, despite being responsible for administering the antidumping law, would be forced to accept information that it knew to be false or inappropriate and review sales that it knew were the result of potentially illegal or inappropriate arrangements. The concern of circumvention of antidumping and countervailing duties was the genesis for the concept of "collapsing" companies. Although the statute defines affiliates, it does not address the treatment of affiliates that are so intertwined that, analogous to the Gerber/Green Fresh case, one affiliate could circumvent its rate by entering merchandise through another affiliate. In response, the Department developed a "collapsing" methodology, which in Queen's Flowers De Colombia v United States, 981 F Supp 617, 621 (CIT 1997), this Court found consistent with the agency's

"responsibility to prevent circumvention of the antidumping law " That practice is now codified in the Department's regulations, and was recently expanded to encompass non-market economy entities Kaiyuan Group Corp v United States, Slip Op 05-103 (Aug. 23, 2005), Hontex Enterprises, Inc , et. al v. United States, 248 F. Supp 1323, 1343 (CIT 2003) (finding that the Department's decision to increase the scope of its analysis to include NME exporters was reasonable in light of its "responsibility to prevent circumvention of the antidumping law").

In analogous circumstances, the Court has sustained the ITC's ability to apply total AFA under Section 776(b) of the Act when it determined that three domestic companies, which had participated in a price-fixing agreement, were not forthcoming regarding the existence, and extent, of the agreement Elkem Metals Co v United States, 276 F Supp. 2d 1296 (CIT 2003) ("Elkem") The ITC found that the producer's conduct, both in participating in the scheme and in not reporting it, "significantly impeded, undermined, and compromised the integrity of the Commission's investigations " Id at 1303 (citing a remand issued by the ITC pursuant to an earlier Court order) The Court agreed and found that the use of "best information available," the precursor to AFA, was warranted. Id. at 1305.

More recently, in Shanghai Taoen Int'l Trading Co . Ltd. v United States, 360 F. Supp 2d 1339 (CIT 2005) ("Shanghai Taoen"), this Court faced an analogous case in which the respondents' representations to CBP differed from their representations to the Department. In sustaining the agency's decision to apply AFA, the Court recognized that the Department relies upon respondents' representations concerning the actual producer and seller of the subject merchandise: "Commerce made extensive efforts to request complete responses regarding all of {the companies'} producer and business relationships . . Commerce relied on {the companies'}

responses to calculate an antidumping margin based on factors of production for the only disclosed producer of {companies'} exports " Id. at 1344 Likewise, in this case, the respondents never fully disclosed their actual business relationship, and thereby thwarted the administrative process, warranting application of AFA to protect the integrity of the proceeding

The Supreme Court has also recognized that certain administrative responsibilities carry with them the inherent authority to prevent evasion In Interstate Commerce Commission v. Amer. Trucking Assoc., Inc , 467 U S. 354 (1984), for example, the Supreme Court considered a ruling of the Interstate Commerce Commission ("ICC") whereby it sought to retroactively reject certain tariffs. The Court considered whether the ICC possessed the discretion to fashion remedies in furtherance of its statutory obligations. Noting that the Congress could not have anticipated "every evil sought to be corrected," the Supreme Court found that the agency could not "sit idly by and wink at practices that lead to violations" of that act Accordingly, it concluded that even though the ICC lacked "explicit authority," it could address a "dilemma posited by the pipeline owners." Although the Supreme Court was assessing the ICC's authority under its ratemaking statute, the antidumping duty statute likewise grants the agency certain discretion in the administration of the antidumping duty law That discretion, like the ICC's, must be interpreted to allow the agency to respond to new methods concocted to evade the Department's calculations

There are other statutory provisions which can also be interpreted to support the existence of this authority as well For example, under Section 751(a)(2)(C) of the Act, the Department's determination in an administrative review "shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of

estimated duties " The Gerber/Green Fresh scheme would render meaningless the Department's review proceedings that are intended to result in the accurate assessment of duties and collection of cash deposits Consequently, the Department's application of AFA, under Sections 776(a) and (b) of the Act, protects the integrity of the Department's proceedings and serves to prevent evasion of the antidumping duty law

In conclusion, if the Department were required to accept the Gerber/Green Fresh scheme as a permissible contractual arrangement, it would have to place its head in the sand and eviscerate its obligation to ensure the integrity of its proceedings and further the purpose of the law. In short, when an agency is aware, based on record evidence, that a respondent failed to pay the proper estimated duties (and repeatedly withheld information regarding this arrangement from the Department), it is consistent with the findings of various federal courts that the agency is obligated to address that failure to protect the integrity of its proceeding, as contemplated by Section 776(b) of the Act

As the Court notes, and Gerber and Green Fresh argued in their briefs, the Federal Appellate Courts have held that the Department may not impose "punitive" antidumping rates that go beyond the facts of a given case This interpretation of the law dates back to C.J Towers & Sons v United States, 71 F. 2d 438 (1934) ("C J. Towers") We do not believe the finding of the Court in C J Towers undermines the Department's ability to apply AFA in this case, pursuant to its authority to protect the integrity of its proceedings First, it is noteworthy that, since 1934, the statute has been amended, most recently, to provide for the application of AFA when a party has "impeded" a proceeding and failed to act to the best of its ability in complying with an agency request. See Section 776(a) and (b) of the Act Second, in C J Towers, plaintiffs

questioned the constitutionality of imposing antidumping duties, alleging such duties were penalties. The court upheld the constitutionality of that version of the antidumping duty statute, finding its purpose to be remedial The Department's application of AFA in the face of activities, like those of the respondents, aimed at evading the antidumping duty statute, are entirely consistent with the remedial purposes addressed in C J Towers Under these circumstances, application of AFA is not "punitive," in the sense considered by C J Towers, but a carefully tailored remedy to prevent further circumvention of estimated duties, as required by Section 751(a)(2)(C) of the Act, and effectuate the remedial purpose of the statute by "equaliz{ing} competitive conditions between the exporter and American industries affected " Id. at 448.

IV. In Accordance With The Court's Instructions, The Department Has Applied Partial Adverse Facts Available To The Gerber and Green Fresh Transactions At Issue

As discussed above, both Gerber and Green Fresh failed to act to the best of their abilities to comply with the Department's requests for information throughout this administrative review for a significant portion of their total U S. sales during the POR Moreover, the nature of the misrepresentations made by the companies throughout this review with respect to their business relationship, which had the effect of evading the antidumping duty order and the proper collection of cash deposits, if not addressed by the Department, would effectively encourage parties to engage in such evasion activities in the future and deny domestic industry relief from unfairly traded imports. Therefore, pursuant to its inherent authority to uphold the integrity of its administrative proceedings, the Department continues to believe that the application of total AFA in the calculation of both Gerber's and Green Fresh's cash deposit and assessment rates is

warranted

However, the Department recognizes that this Court has disagreed with this interpretation of the facts and the law Accordingly, in this Remand Redetermination, the Department has reconsidered its Final Results decision in light of the Court's opinion The Department has therefore applied AFA only to the transactions ("Gerber/Green Fresh transactions") in which Gerber reported in the sales database it submitted to the Department that Green Fresh was the exporter With respect to Green Fresh, as partial AFA, the Department has applied the 24 Gerber/Green Fresh transactions from Gerber's database to the database provided by Green Fresh The 22 customs entry summaries Green Fresh provided in its August 20, 2002, 1st Supplemental Response[12] for these 24 transactions (of which Gerber reported all 24 but Green Fresh only reported 11 to the Department) contain a Green Fresh manufacturer identification code (for 12 of them) or a Gerber manufacturer identification code (for the remaining 10) [13] In either case, all 22 customs entry summaries indicate that Green Fresh's cash deposit rate, rather than Gerber's, was used to post the antidumping duties for these sales at issue Although the Department believes such reporting was untruthful, the fact remains that such designations confused the record and undermined the Department's and CBP's ability to enforce the antidumping law Thus, applying these transactions to Green Fresh's database, wherein Green Fresh is identified as the "exporter" of merchandise, as partial AFA, is appropriate in this case. This approach also limits the application of AFA to those transactions which the Department

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[12] See Exhibit AS-1

[13] The manufacturer identification code can indicate either the exporter or the manufacturer

affirmatively found were suspect in response to the concerns expressed by the Court The Department then applied an AFA rate of 198 63 percent to these transactions in its cash deposit and assessment calculations for both Gerber and Green Fresh.

The Department believes that, at a minimum, Gerber and Green Fresh misrepresented numerous facts with respect to these particular transactions throughout the entirety of the administrative review Furthermore, these transactions are a result of an agreement that serves to undermine the integrity and enforcement of the antidumping duty law We note that Green Fresh had argued during the review proceeding that if the Department decides to apply AFA to all of the Gerber/Green Fresh sales, Green Fresh should not be "penalized" for any sales beyond the original 11, because it did not know of those transactions However, the veracity of Green Fresh's claim is questionable· Green Fresh submitted the customs entry summaries for all 24 sales. Moreover, Gerber was only able to use Green Fresh's invoices because Green Fresh provided Gerber the invoices It is unrefuted that Gerber circumvented the payment of cash deposits for 24 transactions as a result of its arrangement with Green Fresh, which allowed Gerber to use Green Fresh's invoices. Accordingly, the application of AFA to these transactions for both Gerber and Green Fresh is supported by substantial evidence and is otherwise in accordance with law.

Section 776(b) of the Act provides that if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available (See also "Statement of Administrative Action" accompanying the Uruguay Round Agreements Act, H Rep No. 103-316, 870 (1994).)

Section 776(b) of the Act further provides that such adverse inference may include reliance on information from the petition, a final determination in the investigation, any previous review under Section 751 or determination under Section 753 of the Act, or any other information placed on the record As this Court recognized most recently in NSK Ltd v. United States, 356 F.Supp 2d 1313 (CIT 2004) ("NSK"), based upon its expertise, the Department is in the best position to select adverse facts that will create a proper determent NSK, 356 F.Supp. 2d at 1334 (quoting F Lli De Cecco do Filippo Fara S. Martino S p A v United States, 216 F 3d 1027, 1032 (Fed Cir 2000)) Section 776(b) of the Act does not preclude the selection of the highest rate in any segment of the proceeding as the AFA rate, and "{b}oth this court and the Federal Circuit have determined that in cases in which the respondent fails to provide Commerce with information necessary to calculate an accurate antidumping margin, 'it is within Commerce's discretion to presume that the highest prior margin reflects the current margins '" Shanghai Taoen, 360 F Supp 2d at 1346 (citing Ta Chen Stainless Steel Pipe, Inc v. United States, 298 F 3d 1330, 1339 (Fed. Cir 2002)).

In this case, the highest margin from any segment of the proceeding is 198 63 percent, which is the rate currently applicable to the PRC-wide entity The Department assumes that if respondents had received a rate lower than the highest prior margin, they would not have cooperated, and the Court of Appeals for the Federal Circuit has long recognized that assumption to be reasonable. Rhone Poulenc, Inc v United States, 899 F 2d 1185, 1190-91 (Fed Cir 1990), see also Shanghai Taoen, 360 F.Supp. 2d at 1346 (within discretion to presume highest margin reflects current margin), Kompass Food Trading Int'l v United States, 24 at 678 (CIT 2000) ("common sense inference that the highest margins are the most probative"); and Peer

Bearing Co , v United States, 12 F Supp 2d, 445, 451-52 (CIT 1998). Accordingly, the Department has applied the highest margin, which was derived from the petition, one of the rates specified in the statute as a possible source for AFA, but which also happens to be the PRC-wide rate, to the Gerber/Green Fresh transactions Applying the highest rate is consistent with the Department's practice, and ensures that the margin is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce a respondent to provide the Department with complete and accurate information in a timely manner " See Final Determination of Sales at Less than Fair Value Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8932 (February 23, 1998)

As the Court noted, this rate is also the PRC-wide rate Under the Department's "separate rate" practice, the Department will calculate a rate for all companies that warrant a separate rate from the PRC government entity. In many PRC cases, this means that a company might receive a separate rate (and therefore not receive the PRC-wide rate *per se*), but, as a result of a failure to act to the best of its ability in complying with a Department request, receive the PRC-wide rate, which is also the highest rate in the proceeding Here, however, the Department applied the PRC-wide rate to Gerber and Green Fresh with respect to the sales at issue, not because they were not eligible for separate rates, but because the PRC-wide rate was the highest rate in the proceeding Fujian Machinery and Shandong Machinery v United States, 276 F Supp 2d 1371 (CIT 2003) (recognizing it is not uncommon for the Department to assign uncooperative respondents the highest margin assigned to any respondent), and Cf Shandong Huarong General Group Corp v United States, Slip Op 2004-117 (CIT October 22, 2003) (remanding for explanation of corroboration of highest rate in the proceeding which, in that case,

exceeded the PRC-wide rate)

Thus, the Court's concerns about Gerber's and Green Fresh's rights to a separate rate are not at issue and the Department has determined that Gerber and Green Fresh warrant separate-rate treatment in this case See Preliminary Results at 68 FR 10698 (as affirmed in the Final Results) However, for the reasons previously discussed, the Department has found that an AFA rate based on the highest rate in the proceeding, which happens to be the PRC-wide rate, should be applied to the Gerber/Green Fresh transactions made pursuant to the invoice sales scheme. Thus, the Department appropriately has applied the highest rate in any segment of this proceeding to those transactions as partial AFA in this Remand Redetermination

V. Calculation Modifications As A Result of the Remand Order

Pursuant to the Court's opinion, the Department has applied AFA only to the specified Gerber/Green Fresh transactions. Such a change in its calculations has required the Department to incorporate the surrogate value changes noted in the Final Results,[14] as appropriate, and to now

[14] The Department made the following surrogate value changes in the Final Results (which have also been incorporated in this Remand Redetermination): (1) we calculated average surrogate percentages for factory overhead, SG&A expenses, and profit using the 2001-2002 financial reports of Agro Dutch Foods Ltd ("Agro Dutch") and Flex Foods Ltd. ("Flex Foods"); (2) we used freight rates published in the February 2002-June 2002 issues of Chemical Weekly and obtained distances between cities from the following websites: http://www infreight.com and http //www sitaindia com/Packages/CityDistance php . (3) we treated water as a separate factor of production and valued it using 1995-1996 and 1996-1997 data from the Second Water Utilities Data Book, (4) we used data in the 2001-2002 financial report of Flex Foods and February 2001-January 2002 data in Chemical Weekly to value urea (carbamide), (5) we used price data contained in the 2001-2002 financial report of Flex Foods to value super phosphate and grain, (6) we used price data contained in the 2001-2002 financial reports of Flex Foods and Agro Dutch to value spawn, cow manure and straw, (7) we used the 2001-2002 financial report of Flex Foods and April 2001-December 2001 data from Monthly Statistics of the Foreign Trade of India ("Monthly Statistics") to value gypsum; (8) to value tin can sets (i e., the can with the lid) for the respondents which both purchased and produced their cans during the POR (i e., Green Fresh), we used 2001-2002 actual can-size-specific price data submitted by Agro Dutch in

address, for the first time, certain other Gerber/Green Fresh-related issues raised in this review for which we received comments following the Preliminary Results, in anticipation of the Final Results. These issues are (1) Gerber's labor factor for spawn production; and (2) whether to value laterite The Department has incorporated its decisions on these two issues in this Remand Redetermination as discussed below.

A. Gerber's Labor Factor for Spawn Production

The petitioner claims that the last digit in Gerber's reported labor factor for spawn production is incorrectly truncated Having used this truncated factor in the Preliminary Results, the petitioner requests that the Department correct this incorrect truncation in the Final Results. Gerber did not comment on this issue

We agree with the petitioner and have corrected this error in the Remand Redetermination Specifically, the labor factor used in Gerber's Preliminary Results SAS program only extended to four decimal places For the Remand Redetermination, we have used Gerber's labor factor as reported. This labor factor extends to five decimal places (see Exhibit Supp 3-3 of Gerber's December 23, 2002, supplemental questionnaire response)

B. Whether to Value Laterite

In the Preliminary Results, the Department did not assign a surrogate value to laterite but did value the freight costs incurred by Green Fresh's producer, Lu Bao, to have the laterite

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the 3rd antidumping duty administrative review of certain preserved mushrooms from India, and (9) for the respondents which only purchased their cans during the POR (i e , Gerber), we continued to use 2000-2001 price data from the May 21, 2001, public version response submitted by Agro Dutch in the 2nd antidumping duty administrative review of certain preserved mushrooms from India, and relied on the petitioners' methodology contained in its September 6, 2002, publicly available information submission for purposes of deriving per-unit, can-size-specific prices

shipped to it from its supplier. As explained at page 18 of the Department's February 12, 2003, verification report for Green Fresh, laterite is a material that is widely available in the PRC at no cost to the user because of its abundance No other respondent in this review reported using laterite

The petitioner contends that the Department's decision not to value laterite is unwarranted, as there is no record evidence to support Green Fresh's contention that it did not incur costs for laterite other than freight. Moreover, the petitioner contends that there is no statutory exception that allows the Department not to assign a surrogate value to factors obtained at no cost. Green Fresh did not comment on this issue

We agree with the petitioner in that there is no statutory exception for not valuing factors obtained at no cost. See, Pacific Giant, Inc v United States, 223 F Supp 2d 1336 (August 6, 1998) Therefore, whether Green Fresh's producer purchased or collected the laterite is irrelevant

However, although we agree with the petitioner that laterite should be valued for purposes of the Remand Redetermination, we disagree with the value it proposes we use for this input because it is not specific to laterite (i e , it relates to aluminum powder) Moreover, the data we placed on the record for consideration on May 26, 2003, for purposes of valuing laterite is also inappropriate because that data appears to pertain to components contained in laterite rather than to be specific to laterite Therefore, because we do not have an appropriate value on this record to value this input, we have continued not to value this input in the Remand Redetermination However, we have continued to value the freight associated with bringing the laterite to the factory

VI. Comments From the Parties

The Department issued its draft Remand Redetermination to all interested parties on October 14, 2005. On November 4, 2005, the Department received comments on the draft Remand Redetermination from Gerber and Green Fresh The Department received rebuttal comments from the petitioner on November 9, 2005

A. The Respondents

In their November 4, 2005 comments, Gerber and Green Fresh contend that the Department's draft Remand Redetermination fails to provide a rational explanation of how their agreement and the circumstances surrounding their reporting of that agreement affected the information needed to calculate an antidumping duty rate Moreover, the respondents claim that the Department has failed to identify any specific information absent from the record and/or not verifiable for purposes of calculating each of their individual assessment rates Additionally, the respondents maintain that the Department has failed to identify a single piece of evidence that neither of them cooperated in providing the information needed to calculate each of their individual assessment rates Finally, the respondents argue that. (1) the Department's reliance on Tung Mung, Mitsubishi, and Elkem in support of its position that it has the inherent authority to prevent evasion has already been rejected by the Court, and (2) the Department's reliance on Shanghai Toaen is unpersuasive because in Shanghai Toaen, unlike in this case, the respondents' representations to CBP differed from their representations to the Department such that the respondents were unable to credibly explain the reasons for the differences.

B. The Petitioner

In its November 9, 2005, rebuttal comments, the petitioner notes that the respondents' comments contain no substantive analysis in support of their arguments summarized above. As a result of the respondents' decision to use their comments to "harangue" the Department rather than to provide thoughtful, substantive analysis that might assist in the development of the Department's practice, the petitioner states that its ability to respond substantively to the respondents' comments is limited The petitioner also states that the Department's draft Remand Redetermination is supported by substantial evidence and is in accordance with law.

C. Department's Position

As explained and thoroughly discussed in Sections II and III above, Gerber and Green Fresh misrepresented or failed to identify information pertaining to their relationship during the POR throughout the entire review. In this case, Gerber and Green Fresh attempted to manipulate the information that was given to the Department throughout the proceeding Neither company cooperated fully throughout the review, and the Department ended the review doubting the veracity of various claims made throughout the proceeding by Gerber and Green Fresh because of this manipulation. Accordingly, we have determined that Gerber and Green Fresh failed to act to the best of their abilities in responding to the Department's questionnaires and in assisting the Department in the conduct of the antidumping administrative review. We note that Congress stated in the Statement of Administrative Action ("SAA") that one factor the Department must consider in applying AFA is "the extent to which a party might benefit from its own lack of cooperation " SAA, URAA, H R. Doc 316, Vol 1, 103d Cong (1994) at 870 In cases in which a party failed to provide necessary information or selectively provided information to the

Department, the Court has affirmed an application of AFA to the entire record, so that a party might not benefit from its lack of cooperation For example, in Steel Authority of India, Ltd v United States, 149 F Supp 2d 921, 928 (CIT 2001), as affirmed by Steel Authority, 25 CIT 1390 (CIT 2001), the Court recognized the problems with manipulation of the record by a respondent

> {I}f 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 Rhone Poulenc, Inc v. United States, 710 F Supp. 341, 347 (1989), aff'd Rhone Poulenc, 899 F 2d 1185 (holding that the BIA rule, the forerunner to facts available, is designed to "prevent a respondent from controlling the results of the administrative review by providing partial information") As a result, the Department's interpretation of the statute is consistent with the purposes of the anti-dumping provisions, demonstrating the reasonableness of its interpretation

Steel Authority at 928 Furthermore, the Court of Appeals for the Federal Circuit has interpreted Sections 776(a) and (b) of the Act to allow the Department to prevent a party from "obtaining a more favorable result by failing to cooperate than if it had cooperated fully" and recognized that "the discretion granted by the statute .. to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences " See Timken Co v United States, 354 F. 3d 1334, 1345-46 (Fed Cir 2004) and Heveafil SDN BHD. v United States, 58 Fed Appx 843, 849-50 (Fed Cir 2003) (quoting Ta Chen Stainless Steel Pipe, Inc v United States, 298 F. 3d 1330, 1338-39 (Fed. Cir. 2003)). See also Chia Far Indus Factory Co v United States, 343 F. Supp 2d 1344 (CIT 2004), National Candle Association v United States, 366 F. Supp 2d 1318 (CIT 2004), NSK Ltd. v United States, 170 F Supp 2d 1280, 1312 (CIT 2001) (affirming the Department's application of AFA in a manner that would guarantee that the respondent "would not benefit from its lack of cooperation" and would "have

an incentive to cooperate in future reviews")

However, we also believe that the application of AFA is warranted in this case to prevent Gerber and Green Fresh from benefitting from their participation in an agreement to circumvent the antidumping law, pursuant to the Department's inherent authority to enforce the application of the antidumping law Gerber and Green Fresh argue that the agency lacks any inherent authority, but we do not believe that the Court rejected the agency's ability to prevent circumvention of the order The Court, instead, indicated that it did not believe the cited cases (i e , Tung Mung, Mitsubishi, and Elkem) were directly on point and that the Department did not point to any statutory source in invoking its authority in this case We agree with the Court that the facts of this case are ones of first impression, which is the reason we have explained in much greater detail in this Remand Redetermination why we believe the cited cases are instructive, cited statutory provisions which reinforce the agency's authority, and explained why it is critical that the Department's inherent authority to prevent circumvention of the order be upheld. A rejection of this authority is tantamount to an invitation for all exporters to contract around the antidumping law and the payment of cash deposits Such evasion of the law could not possibly have been Congress' intent when it enacted Sections 751(a)(2) and 735(c)(B)(i) and (ii) of the Act See Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy . Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will"), and United States v Morton, 467 U.S 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation, we read statutes as a whole") For these provisions to be enforceable, and for the Department's

assessment instructions and cash deposit instructions to provide any meaningful relief for the domestic industry injured by an exporter's dumping behavior, the agency must be permitted to address circumstances in which the facts on the record demonstrate that parties have acted in order to avoid the application of the antidumping duty law to them

When the Department is faced with evidence on the record, as in this case, where there is affirmative proof that a company has successfully circumvented the payment of statutorily required cash deposits, the agency believes that it has the authority to address that circumvention through the application of AFA in its calculations.[15]

Finally, with respect to Gerber and Green Fresh's claims that the facts of Shanghai Toaen are completely different from the facts in this case, we disagree. The respondent in that case made different representations to CBP and to the Department Gerber and Green Fresh also made different representations to CBP and to the Department, as explained thoroughly in Sections I, II, and IV above In both cases the Department faced inconsistencies and discrepancies that undermined the reliability of the reported data Therefore, for the reasons stated above, the Department believes that application of AFA is warranted in this case.

[15] As we explained in the Final Results and above in this Remand Redetermination, this is not the same as the ability to combat fraudulent activity - which is the sole authority of CBP

CONCLUSION

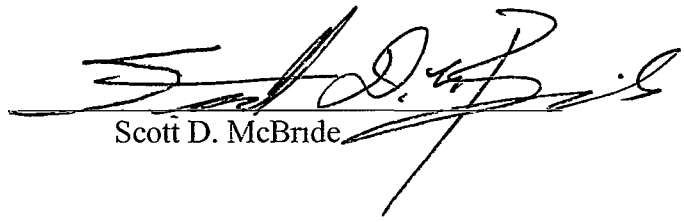
For the reasons stated above, the Department requests that the Court affirm its Remand Redetermination in full as supported by substantial evidence and otherwise in accordance with law

Stephen J. Claeys
Acting Assistant Secretary
for Import Administration

11/30/05
(Date)

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2005, I served by Federal Express the public version of the Redetermination Pursuant to Court Remand, issued pursuant to Gerber Food (Yunnan) Co , Ltd and Green Fresh (Zhangzhou) Co , Ltd v. United States, Slip Op 05-84 (July 18, 2005) to the listed version The proprietary version is available for pick-up by those covered by the administrative protective order at room 1875 of the United States Department of Commerce headquarters, located at 14th Street and Constitution Avenue, Washington, DC, 20230



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