

**RESULTS OF REDETERMINATION ON REMAND  
PURSUANT TO  
CHINA KINGDOM IMPORT & EXPORT CO., LTD. V. UNITED STATES  
Consol. Ct. No. 03-00302, Slip Op. 07-135 (CIT September 4, 2007)**

**I. SUMMARY**

The Department of Commerce (Commerce), pursuant to the remand order of the Court of International Trade (Court), in China Kingdom Import & Export Co., Ltd. v. United States, Consol. Ct. No. 03-00302, Slip Op. 07-135 (CIT September 4, 2007) (Remand Order), has prepared these results of redetermination on remand with respect to Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 68 FR 19504 (April 21, 2003) (Final Results).<sup>1</sup> In its opinion, the Court concluded that Commerce's determination in the Final Results to assign to China Kingdom an antidumping duty assessment rate based on total adverse facts available was not in accordance with the law and was not supported by substantial evidence. The Court ordered Commerce to recalculate China Kingdom's dumping margin.

In the Remand Order, the Court directed Commerce to calculate and assign China Kingdom a new antidumping duty assessment rate that is in full compliance with the Court's directives, and that Commerce support all its findings with substantial record evidence and include a reasoned explanation for its determination. Specifically, first, the Court ordered Commerce to make a determination as to the practicability that is required by 19 U.S.C. § 1677m(d), and, in doing so, to afford China Kingdom a reasonable opportunity to explain the

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<sup>1</sup> On November 9, 2007, Commerce issued a letter to China Kingdom Import & Export Co. Ltd. (China Kingdom) affording it the opportunity to explain the deficiencies it attempted to correct at verification. On November 16, 2007, China Kingdom submitted its response. On December 19, 2007, Commerce requested an extension of time to file its final remand redetermination. The Court granted Commerce's request on December 27, 2007, and extended the deadline to file its final remand redetermination until March 4, 2007.

deficiency affecting the information on Chaohu Daxin Foodstuff Co., Ltd.'s (Daxin) total production and the calculated data for eight of the eleven factors of production. Second, the Court specified that once China Kingdom has provided its explanation regarding the deficient information, Commerce must make the determinations required by 19 U.S.C. § 1677m(d)(1) or (2), or both, with respect to the substitute information. Third, the Court ordered that Commerce may use facts otherwise available solely to determine the total amount of Daxin's production of subject merchandise and to calculate and to determine the eight incorrectly reported factors of production during the period of review. Lastly, the Court instructed that Commerce may use adverse inferences only to a limited extent, and must demonstrate that the use of adverse inferences is not punitive, aberrational, or uncorroborated.

For these remand results, Commerce has recalculated China Kingdom's margin in accordance with the Court's instructions. As a result, China Kingdom's new dumping margin is 90.66 percent. On February 1, 2008, Commerce released its draft final results of redetermination for comment. No party submitted comments by the February 11, 2008, deadline.

## **II. BACKGROUND**

In the Final Results, Commerce invoked facts otherwise available and adverse inferences in assigning China Kingdom an antidumping duty assessment rate of 223.01 percent. See Final Results, 68 FR 19506. Commerce found that the use of facts otherwise available was warranted because the evidence gathered at verification established that China Kingdom failed to report its total tail meat production for the period of review and eight of its eleven factors of production for the period of review. See Final Results; see also 19 U.S.C. § 1677e(a)(2)(A) and (B). Further, Commerce determined that, in accordance with 19 CFR 351.301(b)(2), China

Kingdom's August 13, 2002, submission correcting Daxin production and factor input data was untimely submitted new factual information. See Memorandum to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, from Barbara E. Tillman Acting Deputy Assistant Secretary for Import Administration, Group III: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: September 1, 2000 through August 31, 2001, April 23, 2003 (Issues and Decision Memo) at Comment 7.

In addition, Commerce found that, because it was unaware of any deficiencies in China Kingdom's production and factors of production information, as China Kingdom, rather than Commerce, discovered the errors in its reported data, 19 U.S.C. § 1677m(d) did not apply. See Memorandum to Joseph A. Spetrini: Freshwater Crawfish Tail Meat from the People's Republic of China: Application of Total Adverse Facts Available for China Kingdom Import & Export Co., Ltd. in the Preliminary Results of the Administrative Review for the Period 9/1/00 - 8/31/01 (September 30, 2002) (China Kingdom AFA Memo). Commerce found that because the information was submitted during verification, instead of in a response to one of the several questionnaires issued to China Kingdom, Commerce did not have an opportunity to analyze the information in the context of this review. See Issues and Decision Memo at Comment 7.

Furthermore, Commerce concluded that China Kingdom failed to meet the requirements of 19 U.S.C. § 1677m(e)(1)-(5). First, the tail meat production and factors of production figures for the period of review were not submitted by the established deadline, as discussed above. See China Kingdom AFA Memo. Second, because this information was provided for the first time on the third day of verification, it could not be verified. See id. Third, lacking all production

data and almost all factors of production data, Commerce ruled that China Kingdom's information was incomplete and could not serve as a reliable basis for an antidumping determination. See id. Fourth, because China Kingdom had information regarding factors of production and total production, and China Kingdom failed to report this information to Commerce, China Kingdom failed to act to the best of its ability in providing the information in question, and failed to meet the requirements established by Commerce with respect to this information. See id.

Commerce afforded China Kingdom numerous opportunities to provide this information in its initial questionnaire, and in its three separate supplemental questionnaires. However, China Kingdom never provided correct and accurate production and factors of production information. See Memorandum to the File, from Maureen Flannery, Program Manager, Office of AD/CVD Enforcement VII, from Doug Campau, Analyst, Office of AD/CVD Enforcement VII: Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Verification Report for China Kingdom Import & Export Co. Ltd., September 16, 2002 at 10 (Verification Report). Finally, without correct and accurate production and factors of production information, the remaining information submitted by China Kingdom could not be used without undue difficulty. See China Kingdom AFA Memo. Commerce, therefore, adopted the reasons articulated in the China Kingdom AFA Memo and found that the use of facts otherwise available was appropriate with respect to China Kingdom in the Final Results. See Issues and Decision Memo at Comment 7.

Commerce further found that the use of an adverse inference was appropriate in this case. Under 19 U.S.C. § 1677e(b), Commerce is permitted to apply an adverse inference if it makes

the additional finding that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. 1 (1994) at 870 (SAA). In this case, Commerce determined that China Kingdom’s pattern of behavior indicated that it failed to cooperate by not acting to the best of its ability to comply with Commerce’s requests for information. See Issues and Decision Memo at Comment 7.

Specifically, China Kingdom was provided several opportunities to report the correct figures for total tail meat production and factors of production during the period of review in its response to Commerce’s initial section D questionnaire. See Commerce’s supplemental questionnaires issued to China Kingdom on May 8, 2002, June 18, 2002, and July 24, 2002. China Kingdom instead provided total tail meat production and factors of production for the wrong production period--a period prior to the period of review. Commerce found that the information China Kingdom submitted in response to Commerce’s numerous questionnaires was, on the whole, grossly incomplete. Given that China Kingdom and its previous supplier had earlier undergone review and verification for its new shipper review, Commerce found that China Kingdom should have been able to comply with Commerce’s requests for information in an accurate and timely manner. Therefore, Commerce determined that China Kingdom failed to cooperate to the best of its ability within the meaning of 19 U.S.C. § 1677e(b), and that the application of total adverse facts available for China Kingdom was warranted.

In applying total adverse facts available, Commerce chose to assign to China Kingdom the highest calculated rate from any segment of the proceeding as Commerce found that China Kingdom failed to cooperate to the best of its ability. See Final Results. Therefore, China

Kingdom was assigned a rate of 223.01 percent—the highest rate calculated in any previous segment of this proceeding. See id.

On February 1, 2008, Commerce released the draft remand redetermination for comment. No party submitted comments on the draft remand redetermination.

### **III. REMAND OPINION AND ORDER**

In its opinion, the Court concluded that Commerce's determination in the Final Results to assign to China Kingdom an antidumping duty assessment rate based on total adverse facts available was not in accordance with the law because: (1) Commerce failed to make a finding that any specific person withheld requested information for purposes of 19 U.S.C. § 1677e(a)(2)(A); (2) although Commerce did not err in treating the submission of the new information from China Kingdom as untimely under 19 U.S.C. § 1677e(a)(2)(B), Commerce erred in determining that 19 U.S.C. § 1677m(d) did not apply and therefore did not afford China Kingdom the opportunity to remedy or explain the deficiency as required by 19 U.S.C. § 1677m(d); (3) Commerce erred in relying on 19 C.F.R. 351.301(b)(2) when invoking authority to use facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B); (4) Commerce erred in failing to make any findings as required by 19 U.S.C. § 1677m(d) that acceptance of the substitute information would not be practicable; (5) Commerce erred in failing to make a finding under 19 U.S.C. § 1677m(d)(1) or (2); (6) Commerce erred in disregarding certain information submitted by China Kingdom that was not deficient under 19 U.S.C. § 1677e(a) and assigning to China Kingdom a rate of 223.01 percent. As noted, the Court held that Commerce correctly determined

China Kingdom's substitute information submitted after the questionnaire phase of the review was untimely for purposes of 19 U.S.C. § 1677e(a)(2)(B).

Therefore, the Court ordered that Commerce, to the extent possible now that the administrative review is completed, correct the error it made when it failed to provide China Kingdom the opportunity under 19 U.S.C. § 1677m(d) to remedy or explain the deficiency that occurred upon submission of the incorrect Daxin information. See Remand Order at 42.

Additionally, the Court instructed Commerce to make the determinations that are required by 19 U.S.C. § 1677m(d)(1) or (2), or both, and may reopen the record as necessary for this purpose.

See id. The Court further instructed that Commerce may use facts available for the limited purposes of determining a total amount of Daxin's production during the period of review and recalculating the eight affected factors of production. See id. On the subject of the application of adverse inferences, the Court ordered that Commerce must confine its limited drawing of any adverse inferences to the deficiency in information resulting from the error occurring upon submission of the Daxin production-related information for the incorrect time period. See id. at 45. Further, the Court ordered that Commerce may not fail to use, in calculating an antidumping duty assessment rate for China Kingdom, the information that China Kingdom submitted that was not affected by the error occurring upon submission of the Daxin production related information for the incorrect time period. See id.

#### **IV. REMAND ANALYSIS**

##### **A. Determinations Pursuant to 19 U.S.C. § 1677m(d)**

The Court affirmed Commerce's finding that China Kingdom failed to provide Daxin's total tail meat production and factors of production data in a timely manner, and therefore failed

to meet the requirements under 19 U.S.C. § 1677e(a)(2)(B) that information be provided to Commerce by the established deadlines. Remand Order at 21-23. Having found China Kingdom's questionnaire response untimely under 19 U.S.C. § 1677e(a)(2)(B), in accordance with the Court's opinion and order, Commerce is instructed to utilize facts otherwise available in place of the deficient Daxin production and factor input information, subject to 19 U.S.C. § 1677m(d). Section 1677m(d) states the following:

{i}f the administering authority . . . determines that a response to a request for information under this subtitle does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of . . . reviews under this subtitle.

Commerce respectfully disagrees that 1677m(d) is applicable in this case because the deficiency was not apparent to Commerce and was not brought to Commerce's attention until verification.<sup>2</sup> Nevertheless, in accordance with the Court's order and 19 U.S.C. § 1677m(d), Commerce explains why it is impracticable to provide China Kingdom with the opportunity to remedy or explain the deficiencies affecting the Daxin production and factor input information provided in China Kingdom's questionnaire responses because China Kingdom did not bring these deficiencies to Commerce's attention during the questionnaire portion of the review.

On February 27, 2002, China Kingdom submitted its response to Commerce's sections A, C, and D questionnaire. All antidumping questionnaires contain the same standard instructions to the parties. In its original questionnaire, in accordance with section 351.301(c)(2)(ii) of the Department's regulations, Commerce stated:

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<sup>2</sup> See Viraj Group Ltd. v. United States, 343 F.3d 1371, 1376 (Fed. Cir. 2003).



If you fail to provide accurately the information requested within the time provided, the Department may be required to base its findings on the facts available. If you fail to cooperate with the Department by not acting to the best of your ability to comply with a request for information, the Department may use information that is adverse to your interest in conducting its analysis.

See, e.g., the January 18, 2002, questionnaire to Qingdao Zhengri Seafood Co. Ltd., and the January 30, 2002, questionnaires to Yangzhou Lakebest Foods Co., Ltd, and Suqian Foreign Trade Corporation, all at page 6, under General Instructions.

Further, Commerce issued three supplemental questionnaires to China Kingdom. These supplemental questionnaires were issued on May 8, 2002, June 18, 2002, and July 24, 2002. In each of these supplemental questionnaires, in accordance with section 351.301(c)(2)(ii) of the Department's regulations, Commerce stated:

Any undue delays or lack of response may result in our proceeding with our determination based on the facts available. Upon receipt of a response that is incomplete or deficient to the extent the Department determines it to be non-responsive, the Department will not issue additional supplemental questionnaires but will use the facts available.

See the May 8, 2002, June 18, 2002, and July 24, 2002, supplemental questionnaires to China Kingdom, at page 2.

On, August 8, 2002, the third day of the China Kingdom verification, the first day of the Daxin production verification, China Kingdom notified Commerce verifiers that its February 27, 2002, section D questionnaire response erroneously reported Daxin's production and factor input data for the 1999-2000 period of review,<sup>3</sup> rather than for the 2000-2001 period of review required by the questionnaire. At verification, Commerce was provided with confirmation from

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<sup>3</sup> This information had been submitted by China Kingdom in its new shipper review which covered the period September 1, 1999 to March 31, 2000. We relied on this information to calculate a rate for China Kingdom in the new shipper review. See Freshwater Crawfish Tail Meat From the People's Republic of China: Amended Final Results of Antidumping Duty New Shipper Reviews, 66 FR 49343 (September 27, 2001).

the company that its response, submitted 162 days beforehand, was not accurate. See Verification Report at 10.

The Federal Circuit has made clear that Commerce should correct respondent errors where such correction “would neither have required beginning anew nor have delayed making the final determination.” See Timken U.S. Corp. v. United States, 434 F.3d 1345 (Fed. Cir. 2006) (Timken) (citing NTN Bearing Corp. v. United States, 74 F. 3d 1204, 1208 (Fed. Cir. 1995)).” In ordering Commerce to consider the information submitted by the party in that case, the Federal Circuit noted that “a straightforward mathematical adjustment was all that was required.” See id. In this case, China Kingdom sought to replace its Daxin total production and factor input information with a new database at verification, after China Kingdom realized the information contained in the February 27, 2002, response could not be verified as accurate. In contrast to the facts in Timken, replacement of China Kingdom’s reported Daxin total production and factor input information would have required Commerce to “begin anew and would not have been a straightforward mathematical adjustment.” China Kingdom’s new Daxin total production and factor input data was not a minor correction to its existing data. Rather, it was an attempt to substitute data calculated based on total production and factor inputs from the 1999-2000 period with data calculated based on total production and factor inputs based on the 2000-2001 period. This is an important distinction.

At verification, China Kingdom did not present minor corrections to its factor input data which was on the record (from 1999-2000). We note that during the course of preparing for verification, it is typical for respondents to review the production, consumption and inventory records as well as the financial statements upon which its section D input response is based to

ensure that the information it has reported is correct and verifiable. It is not unusual for a respondent, during the course of reviewing the company records in preparation for verification, to find minor errors in its responses. For example, a respondent might have incorrectly calculated the total whole crawfish consumed in a particular month thus affecting the total whole crawfish consumed during the production period and the factor input reported for whole crawfish.

This scenario contrasts with that of China Kingdom. During its preparation for verification, China Kingdom discovered that it had submitted the total production data and factor input data for the incorrect period (1999-2000) rather than the relevant information for the 2000-2001 period. Thus at verification, China Kingdom was not making a minor corrections to its total production data and factor input data (from 1999-2000) based on a review of its production, consumption and inventory records and financial statements from 1999-2000. China Kingdom did not, for example, discover that it had incorrectly calculated the total whole crawfish consumed in the month of May 2000, thus affecting the total whole crawfish consumed during the 1999-2000 production period and the factor input reported for whole crawfish. Rather, China Kingdom created an entirely new section D response based on its review of the relevant production, consumption and inventory records and financial statements from 2000-2001.

Commerce's antidumping calculations are based on a comparison of U.S. prices from the period of review to the normal value from the relevant period. The accuracy of Commerce's antidumping calculations relies on accurate U.S. price data and normal value data. One basic measure of the accuracy of the U.S. price data and normal value data is that they be from the correct period. Reporting normal value information (or U.S. price data) from the incorrect

period has a detrimental effect on the accuracy of Commerce's antidumping duty calculations for the period of review. In its new section D response, China Kingdom submitted eight newly calculated raw material, labor and energy factors which make up the cost of manufacturing of the subject merchandise. If accepted, they would have changed the entire basis of normal value. Therefore, Commerce does not consider submitting a new section D response with eight newly calculated factor inputs to be a "minor correction," or a straightforward mathematical adjustment.

Moreover, Commerce issued three supplemental questionnaires to China Kingdom, each one seeking to clarify the information China Kingdom reported in its February 27, 2002, response. In not reporting the correct total production and factor input data until verification, China Kingdom denied Commerce the time necessary to fully examine the factors that were reported, and to ask any supplemental questions about this data prior to the verification. For example, Commerce would have had the opportunity to ask for supporting documentation and to explain how the new factor input data tied into China Kingdom's accounting and financial records. Since China Kingdom failed to alert Commerce of its error prior to verification, Commerce was unable to conduct a thorough and complete verification without time to examine the information that is to be verified in advance.

China Kingdom first presented its updated total production and factors of production figures to Commerce during verification on August 8, 2002. This date is clearly after the questionnaire response phase had ended, and long after Commerce's initial questionnaire was issued. Therefore, in accordance with 19 U.S.C. § 1677m(d), Commerce finds that it is not practicable (and would not have been practicable), even given that the review is now completed

and within the context of this redetermination, to allow China Kingdom the opportunity to remedy or explain its deficient information.

In its Remand Order, the Court found that Commerce did not adequately explain “why subjecting to verification the substitute Daxin information instead of the originally submitted Daxin information would have been so burdensome as to make use of the substitute information impracticable.” See Remand Order at 31. Accordingly, we explain in this remand redetermination why it would have been impracticable to verify the substitute Daxin information. Verifications are similar to audits in that the overarching objective of both is to verify the accuracy of the information submitted. During a verification, Commerce attempts to verify the accuracy of the subject material (as submitted) as well as to verify that relevant data was not omitted from the subject material that was previously submitted. Thus, verifications are not the proper time to submit important or significant changes to data subject to that verification. In fact, the need to submit important or significant changes at a verification necessarily means that information being replaced was incorrect and, thus, unverifiable.

During the administrative review process, Commerce builds the record of a proceeding by issuing initial questionnaires, and if necessary, supplemental questionnaires, to the company under review. Moreover, pursuant to section 351.301(c)(1) of Commerce’s regulations, interested parties have the opportunity to comment on a company’s questionnaire responses as well as place information on the record to rebut those responses. The same provision also gives interested parties an opportunity to provide pre-verification comments. Commerce must analyze all the record evidence and prepare a verification outline which is issued to the respondent company prior to verification. The verification outline serves as a guide to both the agency

verifiers and the company in that it details the verification procedure and the information that will be verified. Verification is a planned event prior to which both Commerce and the company must prepare. Thus, allowing China Kingdom to submit a new section D questionnaire response at verification would not have afforded Commerce the opportunity to conduct a meaningful analysis of this new response and would have made much of Commerce's pre-verification analysis and preparation meaningless. Likewise, interested parties would not have had the opportunity to submit comments and information prior to verification.

It is important to note that China Kingdom was the only party to this proceeding that possessed the information requested by Commerce. In preparing its responses to these questionnaires, China Kingdom had the opportunity and responsibility to review the accuracy and completeness of its responses early enough in the proceeding to allow Commerce to analyze the information. Given the magnitude of the errors, submission of the corrected data during verification deprived Commerce of the opportunity to first examine and then verify the information once that examination (analysis of the data, issuance of follow-up questions when necessary, preparation for verification) was completed.

In the Remand Order, the Court also states that “[b]ecause 53 days remained before the Preliminary Results were due and more than eight months remained before the Final Results were due, no reason is apparent why affording China Kingdom, at the least, the opportunity to explain the deficiency would have been impracticable.” See Remand Order at 29. While the 53 days with which Commerce had to complete all of the above tasks to meet its statutory deadline may seem more than adequate, in reality, it requires great efforts by Commerce to complete the work required to meet the statutory deadline. When returning from verification of a company,

Commerce's analysts must write a verification report, calculate a margin for that company, write the calculation memorandum, and write the preliminary results of the review for publication in the Federal Register. This frequently has to be done for multiple companies per analyst in each review. The methodological and policy decisions underlying the calculation of a margin, as well as the documents, go through a lengthy concurrence process involving the Import Administration's Office of Policy, the General Counsel's Office, the Deputy Assistant Secretary, and ultimately the Assistant Secretary for Import Administration. Further, the calculations themselves go through an extensive paneling process, in which the calculations are reviewed to ensure both the mathematical and methodological accuracy of the calculations.

The Court also states that Commerce had a full eight months after the Preliminary Results during which Commerce could have accepted China Kingdom's new information. See id. The Preliminary Results set forth Commerce's analyses, positions, and calculations based on the record information. The time between the preliminary results and the final results is dedicated to accepting and analyzing parties comments in case briefs and rebuttals briefs which address issues arising from the preliminary results. A hearing is frequently scheduled and conducted prior to the final results. Commerce writes an issues and decision memorandum, summarizing the arguments presented in the case and rebuttal briefs, and explaining its position. Any corrections or changes to the preliminary results margin calculation must be examined and implemented in the same manner as for the preliminary results, and the final calculations have to be similarly paneled. The final results of the review must be written and again go through the concurrence process for publication in the Federal Register.

Commerce does not find it practicable to afford companies the opportunity to explain or remedy significant deficiencies that are not brought to light until after the questionnaire phase of the review, or during the verification of the companies' information. Commerce must meet statutory deadlines, and has a great deal of work to do for each and every company that is reviewed. As such, Commerce cannot allow respondent companies or petitioning firms endless opportunities to submit information.

However, in the Remand Order, the Court specifically directed Commerce to afford China Kingdom the opportunity to explain the deficiencies to its reported Daxin total production and input factors of production. See Remand Order at 42, 56. The Court also held that "because China Kingdom submitted the substitute Daxin information for the specific purpose of remedying the deficiency resulting from the original submission of incorrect Daxin information, Commerce, on remand, must make the determinations that are required by 19 U.S.C. § 1677m(d)(1) or (2), or both, and may reopen the record as necessary for this purpose." Remand Order at 42. Therefore, in accordance with the Court's instructions, on November 9, 2007, Commerce issued a letter allowing China Kingdom the opportunity to remedy or explain these deficiencies. See Commerce's November 9, 2007, letter to China Kingdom. On November 16, 2007, China Kingdom submitted its response, explaining that in its February 27, 2002, section D questionnaire response, it erroneously reported Daxin's production and input data for the 1999-2000 period of review, rather than the 2000-2001 period of review. Further, China Kingdom also provided revised Daxin production and usage factors for seven<sup>4</sup> of the eleven factors of

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<sup>4</sup> Commerce has noted that China Kingdom's water usage rate was not included as a correction in the September 17, 2007, submission. Therefore, Commerce will be using the water factor reported in China Kingdom's February 27, 2002, response for calculating the margin.



production (whole crawfish, labor, indirect labor, electricity, coal, crawfish shell by-product, and packing labor) for the 2000-2001 period of review.

Having provided China Kingdom with an opportunity to explain the deficiencies affecting the Daxin production and factor input information, in accordance with the Court's order, Commerce must now examine: 1) whether Commerce finds China Kingdom's response to be satisfactory, or 2) whether this response was submitted within the applicable time limits. See 19 U.S.C. § 1677m(d)(1) and (2). With respect to (1), the Court stated “{h}aving refused to subject this information to the verification process, Commerce had no basis on which to make this determination.” See Remand Order at 35. The Court found that “{h}aving never made a determination whether allowing China Kingdom the opportunity to remedy the deficiency would or would not be practicable, Commerce never made a determination as to when such a remedy must be accomplished.” See id. As explained above, Commerce does not believe that the timing of China Kingdom's submission of substitute information allowed for sufficient time to subject the data to the normal checks and verification, and thus we find that the information cannot be relied upon as satisfactory. Nevertheless, to the extent the Court has found that Commerce had “no basis to make this determination,” we also continue to find the substitute information to be untimely.

Commerce notes that the final due date for responses from China Kingdom to Commerce's questionnaires was July, 31, 2002. China Kingdom failed to notify Commerce that its February 27, 2002, section D questionnaire response was deficient until August 13, 2002, the third day of China Kingdom's verification, and the first day of the Daxin production verification. Further, Commerce specifically asked China Kingdom supplemental questions about its section

D response in its May 8, 2002, questionnaire. China Kingdom, in answering these supplemental questions, had a statutory obligation to meet Commerce's request that China Kingdom's reported information be complete and accurate. China Kingdom did not do so. Given this, Commerce finds that China Kingdom's November 16, 2007, and August 13, 2002, submissions of substitute Daxin information are untimely for purposes of 19 U.S.C. § 1677m(d)(2), because these submissions were not made during the questionnaire response portion of the review, *i.e.*, by the due dates set by Commerce in the final supplemental questionnaire. Further, Commerce finds that even if this submission had been accepted in its original form on August 13, 2002, rather than rejected, it would still have been untimely, because July 31, 2002 marked the end of the questionnaire phase of the review.

B. Use of Facts Available

The Court held that “[i]f it is necessary to do so, Commerce on remand may use facts otherwise available for the limited purpose of determining a total amount of Daxin's production during the period of review and calculating the eight affected factors of production.” Remand Order at 42. The Court indicated that Commerce could use the originally submitted Daxin information or some or all of the substitute information. See id. at 42-43. Having found China Kingdom's substitute Daxin information untimely, 19 U.S.C. § 1677m(d) instructs Commerce to examine this information in accordance with 19 U.S.C. § 1677m(e). Section 1677m(e) states that Commerce must not decline to consider information that is submitted by an interested party and that is necessary to the determination if all of the following requirements are met: 1) the information is submitted by the established deadline; 2) the information can be verified; 3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the

applicable determination; 4) the interested party has demonstrated that it acted to the best of its ability; and 5) the information can be used without undue difficulties.

As Commerce established under 19 U.S.C. § 1677m(d)(2), China Kingdom's substitute Daxin information was submitted after the questionnaire phase of the administrative review, and was therefore not submitted by the established deadline. See 19 U.S.C. § 1677m(e)(1). Further, Commerce finds that China Kingdom should have been able to comply with the Department's requests for information in an accurate and timely manner. In light of China Kingdom's failure to provide accurate figures for Daxin's total production and eight of the eleven factors of production, and considering the ease with which the failure likely could have been detected, Commerce finds that China Kingdom paid insufficient attention to its statutory duty to comply with Commerce's requests for information. As such, Commerce finds that China Kingdom did not act to the best of its ability in responding to Commerce's questionnaires. See 19 U.S.C. § 1677m(e)(4). The Court also stated that "{w}ere 19 U.S.C. § 1677e(b) properly applied in the Final Results, the court would sustain under that standard set forth in Nippon Steel Corp. the Department's finding that China Kingdom did not act to the best of its ability in responding to the Department's request for total production and factor-of-production data pertaining to its producer." See Remand Order at 38. Therefore, Commerce finds that because China Kingdom's substitute Daxin information fails to meet the requirements of 19 U.S.C § 1677m(e)(1) and (4), we must resort to the use of facts available in determining Daxin's eight incorrectly reported factors of production.

Commerce is not resorting to the use of facts available for China Kingdom's reported

total production information, as this information is not necessary under the circumstances before us in this remand. In calculating normal value in non-market economy cases, Commerce multiplies the producer's per-unit usage factor for each factor of production with a surrogate value for that factor of production, which Commerce selects from a market economy at a similar level of economic development as the non-market economy. Commerce then adds to this value an amount for general expenses and profit plus the cost of containers, coverings, and other expenses to arrive at normal value. The total production information is only useful to Commerce if the respondent includes its actual factor usage quantities in its submissions. As China Kingdom provided its per-unit factors of production as opposed to its actual total factor usage quantities in the original administrative review proceeding, a facts available determination of the total production quantity is not required.

### C. The Use of Adverse Inferences

Commerce is instructed in 19 U.S.C. § 1677e(b) that it may use an inference that is adverse to the interests of a party, if that party has failed to cooperate to the best of its ability to comply with Commerce's request for information. See also SAA at 870. As noted in Nippon Steel Corp. v. U.S., 118 F. Supp. 2d 1366, 1378 (Oct. 26, 2000) (Nippon Steel), such a finding is supported by substantial evidence, in accordance with 19 U.S.C. § 1516a(b)(1)(B)(I), if Commerce "(1) articulates its reasons for concluding a party failed to act to the best of its ability; and (2) explains why the missing information is significant to the review." In determining whether a party has cooperated to the best of its ability, "Commerce must necessarily draw some inferences from a pattern of behavior." See Borden, Inc. v. United States, 22 C.I.T. 1153, 1154 (1998). Furthermore, to determine whether the respondent "cooperated" by "acting to the best of

its ability” Commerce also considers the accuracy and completeness of submitted information, and whether the respondent has hindered the calculation of accurate dumping margins. See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-20 (October 16, 1997).

In this case, China Kingdom’s pattern of behavior indicates that it failed to cooperate by not acting to the best of its ability to comply with Commerce’s requests for information. In indicating that it would sustain Commerce’s finding “that China Kingdom did not act to the best of its ability in responding to the Department’s request for total production and factor-of-production data pertaining to its producer,” the Court specifically noted that “Commerce reasonably could expect China Kingdom to review information provided to it by its producer to discover a facially-apparent deficiency before submitting it during the questionnaire phase of the review.” Remand Order at 38. China Kingdom’s failure to provide essential information in an accurate and timely manner precluded Commerce from accurately calculating a dumping margin for this company. We therefore determine that China Kingdom did not cooperate to the best of its ability within the meaning of 19 U.S.C. § 1677e(b), and that the application of adverse inferences is warranted.

D. Determining Appropriate Facts Available with Adverse Inferences

In its Remand Order, the Court determined that, should Commerce resort to the use of facts available, Commerce should utilize facts available solely to determine the total amount of Daxin’s production of subject merchandise and to calculate and to determine the eight incorrectly reported factors of production. Further, the Court instructed that, should Commerce find use of adverse inferences necessary, it must demonstrate that its use of adverse inferences is

not punitive, aberrational, or uncorroborated.

While Commerce respectfully disagrees that application of total facts available is not appropriate where, as here, the magnitude of the errors made the remaining data unreliable,<sup>5</sup> Commerce has complied with the Court's order and has utilized China Kingdom's U.S. sales and the three correctly reported factors: tape, boxes, and plastic bags. Commerce has limited, in accordance with the Court's order, its application of adverse facts available to the remaining factors of production.

As the Court has ordered Commerce to use the three correctly reported factors from China Kingdom's response, Commerce must determine the remaining factors using facts otherwise available with adverse inferences. To do so, Commerce has determined that it is appropriate to examine the two sets of reported factors currently on the record (from China Kingdom's February 27, 2002, section D questionnaire response and from its November 16, 2007, response) and for each of the remaining eight factors, select for each factor the usage rate that is adverse to China Kingdom (i.e., the usage rate which will result in the highest calculated normal value for China Kingdom). As the Court specified, "China Kingdom should not benefit from the use, as facts otherwise available, of information that is more beneficial to it than would have been the use of the actual, albeit unverified, Daxin production-related information." See Remand Order at 45. Because some of the data that Commerce is using for selected usage factors is from a previous review, it is secondary information, and therefore requires corroboration under 19 U.S.C. § 1677e(c).

Section 1677e(c) provides that, when Commerce relies on secondary information rather

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<sup>5</sup> See Viraj Group Ltd. v. United States, 343 F.3d 1376 (Fed. Cir. 2003).

than on information obtained in the review as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described in the SAA as “information derived from the petition that gave rise to the investigation, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise.” See SAA at 870. The SAA provides that to “corroborate” means simply that Commerce will satisfy itself that the secondary information to be used has probative value. See id. The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See id. As explained in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 57391, 57392 (November 6, 1996), to corroborate secondary information, Commerce will, to the extent practicable, examine the reliability and relevance of the information used.

China Kingdom’s new shipper review margin was calculated by Commerce by utilizing the same factors of production that will serve as adverse facts available in the remand redetermination. See Freshwater Crawfish Tail Meat From the People’s Republic of China: Amended Final Results of Antidumping Duty New Shipper Reviews, 66 FR 49,343 (September 27, 2001). Because Commerce relied upon these company-specific factors of production in China Kingdom’s new shipper review, we have determined this rate to be reliable.

With respect to the relevance aspect of corroboration, Commerce will consider

information reasonably at its disposal to determine whether information continues to have relevance. With regard to the factors of production in question, Commerce notes that these factors were used in China Kingdom's only other crawfish tail meat proceeding before Commerce, covering the period September 1, 1999 through March 31, 2000. Commerce finds that these factors of production continue to be relevant, as this period is only six months prior to the instant period of review. Therefore, as the adverse facts available Commerce is utilizing are both relevant and reliable, Commerce finds that it has probative value.

Further, as this information is China Kingdom's own reported data, covering the periods from September 1, 1999 through March 31, 2000 and September 2000 through August 31, 2001, Commerce finds that the use of this data as adverse facts otherwise available is in no way punitive, or aberrational to China Kingdom's experience.

E. Remand Redetermination Calculations

Commerce calculated a dumping margin for China Kingdom, utilizing the factor for each of the eight erroneously reported factor values (choosing between the February 27, 2002, section D questionnaire response and the November 16, 2007, response) that is adverse to China Kingdom. Commerce then compared U.S. sales price to normal value, and calculated a dumping margin for China Kingdom utilizing information on the record. See China Kingdom Draft Remand Calculation Memorandum from Scott Lindsay, Case Analyst, AD/CVD Operations, Office 6 through Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6, through Barbara E. Tillman, Office Director, AD/CVD Operations, Office 6, to the File, February 1, 2008.



## **V. RESULTS PURSUANT TO REMAND**

For these remand results, pursuant to the Court remand, the weighted-average margin for China Kingdom is now 90.66 percent.

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Ronald K. Lorentzen  
Acting Deputy Assistant Secretary  
for Import Administration

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Date