SLIP OP. 03–135

BEFORE: RICHARD K. EATON, JUDGE

SHANDONG HUARONG GENERAL GROUP CORPORATION AND LIAONING MACHINERY IMPORT & EXPORT CORPORATION, PLAINTIFFS, V. UNITED STATES, DEFENDANT.

COURT NO. 01–00858
PUBLIC VERSION

[Antidumping determination remanded.]

Decided: October 22, 2003

Hume & Associates, PC (Robert T. Hume), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch; *Patricia M. McCarthy*, Assistant Director, International Trade Section, Civil Division, Commercial Litigation Branch (*Paul D. Kovac*); *Linda S. Chang*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION AND ORDER

EATON, Judge: This matter is before the court on the motion of plaintiffs Shandong Huarong General Group Corporation ("Huarong") and Liaoning Machinery Import and Export Corporation ("LMC") (collectively the "Companies") for judgment upon the agency record pursuant to USCIT R. 56.2. By their motion, the Companies contest certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") ninth administrative review of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"), *see* Heavy Forged Hand Tools From the P.R.C., 66 Fed. Reg. 48,026 (ITA Sept. 17, 2001) (final det.) ("Final Results"), covering the period of review ("POR") February 1, 1999, through January 31, 2000. *Id.* at 48,026. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19

U.S.C. § 1516a(a)(2)(A)(i)(I) (2000). For the reasons set forth below the court remands this matter for further action in conformity with this opinion.

BACKGROUND

On February 14, 2000, Commerce published a notice of opportunity to request administrative reviews of the antidumping order covering HFHTs from the PRC. *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 65 Fed. Reg. 7348, 7349 (ITA Feb. 14, 2000) (opportunity request admin. rev.). In response, several PRC entities—including the Companies—requested administrative reviews. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the P.R.C., 65 Fed. Reg. 66,691, 66,692 (ITA Nov. 7, 2000) (prelim. results and prelim. partial rescission of antidumping duty admin. revs.) ("Preliminary Results"). Specifically, Huarong "requested that the Department conduct an administrative review of its exports of HFHTs within the bars/wedges class or kind of merchandise," and LMC "requested that the Department conduct an administrative review of its exports of HFHTs within the bars/wedges class or kind of merchandise. . . ." *Id.* at 66,692.[1] Commerce then commenced its investigation and distributed standard nonmarket economy ("NME")[2] country antidumping questionnaires.

LMC timely filed its initial questionnaire response. *See* LMC Sections A & C Questionnaire Resp., Pub. R. Doc. 22, Conf. R. Doc. 2.[3] In doing so, LMC provided sales data and information about its sales process. As to sales, LMC claimed that it sold all of its bars/wedges to a single United States customer ("the Buyer"). *See* Conf. R. Doc. 2, Ex. 1 (sales quantity); *id.*, Ex. 14 (customer identity).[4] As to its sales process, LMC stated the following: "Customers provide purchase or-

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[1] During the POR Huarong also had sales of axes/adzes to the United States. *See* Prelim. Results, 66 Fed. Reg. at 66,692; Pls.' Conf. Mem. Supp. Mot. J. Agency R. ("Pls.' Mem.") at 5 n.2 ("Huarong reported in its June 12, 2000, questionnaire response that it did not have access to the required information to participate in the review with respect to axes/adzes, and in its September 18, 2000, [response] that its supplier factory refused to respond. In the Preliminary Results, Commerce found that Huarong's supplier failed to act to the best of its ability in responding to the questionnaires with respect to axes/adzes, and therefore assigned adverse facts available."). Because the Companies do not take issue with Commerce's determination as to these sales, the court does not address Commerce's determination in this respect.

[2] A "nonmarket economy" country is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(a). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(c)(i).

[3] In this response, LMC requested a company-specific antidumping duty margin and provided evidence of its independence from government control. *See* Pub. R. Doc. 22 at A2.

[4] LMC identified the Buyer as [[ ]]. *See* Conf. R. Doc. 2, Ex. 14.

ders and LMC confirms these orders," Pub. R. Doc. 22 at A–10; it "[did] not use resellers," *id.* at A–11; all of its sales "are based on purchase orders," *id.*; "no affiliate was involved in the sale of the subject merchandise to the U.S. during the POR," *id.*; and although its PRC supplier[5] ("the Supplier") of the subject merchandise "knew the ultimate destination [of the subject merchandise] because it arranged the shipments," *id.* at A–15, "[t]here was no understanding restricting, discouraging, or prohibiting sales in the home market or elsewhere. The supplier does not have the right to review LMC's sales records and the supplier does not provide after-sales service in the United States, participate in U.S. sales calls or activities. . . ." *Id.*[6] In support of these statements, LMC supplied representative samples of invoices, packing lists, and other documentation. *See, e.g., id.*, Ex. 6.

Commerce then directed LMC to complete Section D, the "Factors of Production Questionnaire," and to provide data about the factors of production for the subject merchandise LMC sold. *See* LMC Section D Questionnaire Resp., Pub. R. Doc. 29, Conf. R. Doc. 8. In its response, LMC stated that it "is a trading company and did not produce any subject merchandise." Pub. R. Doc. 29 at D–2. LMC further stated that "information relating to [the manufacturer of the subject merchandise] is on the record in this proceeding and is not being reproduced." *Id.* at D–2—D–3. LMC further stated that its Supplier of the subject merchandise "produced [all of the bars] shipped by LMC to the US market and entered during the POR." *Id.* at D–3.[7]

After reviewing LMC's Sections A, C, and D responses, Commerce asked LMC to provide additional information, which LMC did in a timely fashion. *See, e.g.*, LMC Supp. Questionnaire Resps. of: Aug. 23, 2000, Pub. R. Doc. 40, Conf. R. Doc. 12; Sept. 18, 2000, Pub. R. Doc. 57, Conf. R. Doc. 20; Sept. 29, 2000, Pub. R. Doc. 70, Conf. R. Doc. 32; Feb. 26, 2001, Pub. R. Doc. 88, Conf. R. Doc. 45; Apr. 9, 2001, Pub. R. Doc. 96, Conf. R. Doc. 52; May 11, 2001, Pub. R. Doc. 108, Conf. R. Doc. 62; and May 30, 2001, Pub. R. Doc. 116, Conf. R. Doc. 69. In general, these supplemental questionnaires focused on information relating to the various factors of production used in the manufacture of the subject merchandise. In addition to this material, in the questionnaire response submitted on September 18, 2000, LMC indicated that it had reported all of its U.S. sales. *See* Pub. R. Doc. 57 at 3 (Q: "Please confirm that you have reported all

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[5] LMC's supplier of the subject merchandise was [[ ]].

[6] In other words, it was clear from LMC's questionnaire responses that it was acknowledging itself to be the seller of this subject merchandise.

[7] The Supplier supplied LMC with [[ ]] of the subject merchandise that LMC claimed as sales to the Buyer. *See* Conf. R. Doc. 2, Ex. 12 (stating LMC sold a total of [[ ]] pieces of subject merchandise); *id.* at D–3 (stating [[ ]] shipped by LMC to the US market during the POR.").

sales to the United States entered during the period of review ('POR')." A: "LMC confirms that it has reported all sales of the subject merchandise that were exported by LMC and entered U.S. customs during the POR.").

For its part, Huarong also timely filed its initial questionnaire response. *See* Huarong Sections A & C Questionnaire Resp., Pub. R. Doc. 23, Conf. R. Doc. 3.[8] As with LMC, Huarong provided sales data and information dealing with its sales process. *See* Pub. R. Doc. 23. Huarong was instructed to "state the total quantity and value of merchandise under review that you sold during the period of review ('POR') in the United States" and to "[e]xclude your U.S. sales to affiliated resellers. Report instead the resales to the first unaffiliated customer." Pub. R. Doc. 23 at A–1. In response, Huarong stated that it "had no affiliated resellers" and submitted data as to its claimed U.S. sales. *See id.*; *id.*, Ex. 1 (quantity and value of sales).[9] As to its sales process, Huarong was instructed to provide information about how it structured certain sales to the United States. *See* Pub. R. Doc. 28 at A–10—A–12. In response, Huarong stated that "[f]or sales made through resellers during the POR, Huarong arranged the sale for export. Huarong does not restrict any reseller's volume or geographic area for distribution. Huarong neither provides customer lists to resellers nor makes joint sales calls with resellers." Pub. R. Doc. 28 at A–11. *See id.* at A–18; *id.*, Ex. 5 (contract). Included with Huarong's questionnaire response was a copy of what it identified in its questionnaire response as a "sales contract" between it and what it identified as a "reseller" (the "Export Agent").[10] Finally, the questionnaire stated that "[i]f you are aware that any of the merchandise that you sold to another company in your country was ultimately shipped to the United States, or was at the time [of] the sale intended to be shipped to the United States, please contact the official in charge within two weeks of receipt of this questionnaire." Pub. R. Doc. 23 at A–16. In response, Huarong stated that it "sold some subject merchandise" through the Export Agent.[11] Conf. R. Doc. 3 at A–16.

Commerce then directed Huarong to submit a response to Section D of the questionnaire. *See* Huarong Section D Questionnaire Resp., Pub. R. Doc. 28, Conf. R. Doc. 7. Section D requested information concerning the various factors of production used to manufacture the

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[8] In its questionnaire response, Huarong requested a company-specific antidumping duty margin and provided evidence of its independence from government control.

[9] As to theses sales, Huarong claimed that it sold [[ ]] of subject merchandise to several United States customers including [[ ]]. *See* Conf. R. Doc. 3, Ex. 1 (total quantity and value of sales); Ex. 10 (breaking out sales by customer code); Ex. 12 (identifying customer codes).

[10] The Export Agent was [[ ]]. *See* Conf. R. Doc. 3, Ex. 5.

[11] Huarong also stated that [[ ]]. Conf. R. Doc. 3 at A–16.

subject merchandise. In response, Huarong stated that it was not providing actual data for the factors of production but, rather, data based on "caps." *See* Pub. R. Doc. 28 at D–6. Huarong further stated that it was providing data based on "caps" for the factors of production of steel billet, paint, labor, electricity, and coal. *See* Pub. R. Doc. 28 at D–6—D13.

Thereafter, in order to clarify certain information, Commerce asked Huarong to submit answers to several supplemental questionnaires. *See, e.g.*, Huarong Supp. Questionnaire Resps. of: Sept. 18, 2000, Pub. R. Doc. 59, Conf. R. Doc. 22; Sept. 29, 2000, Pub. R. Doc. 68, Conf. R. Doc. 30; Apr. 9, 2001, Pub. R. Doc. 102, Conf. R. Doc. 50; and May 30, 2001, Pub. R. Doc. 117, Conf. R. Doc. 70. As with LMC's supplemental questionnaire responses, most of the information solicited by Commerce dealt with various factors of production. However, in the questionnaire response submitted on September 18, 2000, Huarong also stated that it had reported all of its U.S. sales. *See* Pub. R. Doc. 59 at 5 (Q: "Please confirm that you have reported all sales to the United States entered during the period of review ('POR')." A: "Huarong confirms that it has reported all sales of the subject merchandise that were exported by Huarong and entered Customs during the POR.").

Commerce then published the Preliminary Results. Based on information provided by the Companies in their original and supplemental questionnaire responses, Commerce determined that they were each preliminarily entitled to company-specific antidumping duty margins separate from the PRC-wide antidumping duty margin. *See* Prelim. Results, 65 Fed. Reg. at 66,693. Commerce calculated Huarong's preliminary company-specific antidumping duty margin for bars/wedges to be 0.44 percent, and calculated LMC's preliminary company-specific antidumping duty margin for bars/wedges to be 0.01 percent. *Id.* at 66,696. The PRC-wide antidumping duty margin for bars/wedges was preliminarily calculated to be 139.31 percent. *Id.*

Commerce then notified the Companies that it would conduct verification of their submitted sales and factors of production information. *See* Letter from Commerce to law firm of Hume & Assoc. of 4/9/01, Pub. R. Doc. 100 ("LMC Sales Agenda"); Letter from Commerce to law firm of Hume & Assoc. of 4/9/01, Pub. R. Doc. 98 ("Huarong Sales Agenda"). Included with this notification was an outline of the information Commerce intended to review at verification. *See generally* LMC Sales Agenda; Huarong Sales Agenda.

Commerce conducted verification of LMC's questionnaire responses from April 23 through April 26, 2001. *See* Verification in Dalian, Liaoning, the P.R.C, of the Questionnaire Resps. of LMC in the Antidumping Duty Admin. Rev. of HFHTs from the P.R.C., Conf. R. Doc. 73 ("LMC Verification Report"). In its verification report, Commerce noted that [[ ]]. *Id.* Com-

merce also made the following "significant findings": (1) "[u]pon arrival at verification [the Department] observed that LMC had prepared none of the documentation requested in the [verification] outline"; and (2) that the "overwhelming majority of sales activities of subject merchandise sales reported by LMC were actually performed by [[ ]]." *Id.* In other words, it was only at verification, and not before, that Commerce learned the actual nature of these transactions.

At sales verification, Commerce found that LMC was not the "seller" of the bars/wedges but, rather, that "[f]or bar sales LMC's role is largely one of processing documents for shipment and processing receipt of payment." LMC Verification Report at 5. After reviewing LMC's records, Commerce found that

> LMC used U.S. importer records to prepare its sales listings to the Department and thus did not have the database used as the source of its response. However, it did have sales invoices for each sale of subject merchandise reported to the Department and these reconciled closely to the amounts reported to the Department.

Id. at 7.

Commerce then conducted verification of Huarong's questionnaire responses from May 2 through May 9. *See* Verification in Dongping Town, Shandong Province, the P.R.C., of the Questionnaire Resps. of Shandong Huarong Gen. Group Corp. in the Admin. Rev. of HFHTs from the PRC, Conf. R. Doc. 74 ("Huarong Verification Report"). Again, as with LMC, Commerce made certain "significant findings," including that "[t]he overwhelming majority of sales activities for subject merchandise sales reported by [[ ]]."[12] *Id.* at 1. In-

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[12] At verification, Commerce learned from Huarong officials the nature of Huarong's actual sales process for bars/wedges to the Buyer through the Export Agent. Commerce found that

> for [these sales] [the Buyer] contacts Huarong directly through a purchase order. While this purchase order has [the Export Agent] named as the recipient, both [the Export Agent] and Huarong stated that Huarong is the only recipient of the purchase order. The prices for these sales to [the Buyer] are based on a price agreement between Huarong and [the Buyer]. Upon receipt of the order, Huarong will directly send an order confirmation to [the Buyer]. If [the Buyer] desires any changes in its order, be it quantity, price, terms of sale or shipment instructions, it will contact Huarong directly. Upon sending an order confirmation to [the Buyer], Huarong sends production orders to its factory. Upon completion of production, Huarong arranges shipment of the product to the port. Huarong and not [the Export Agent] enter[s] the sale in its accounts receivable ledger. Neither Huarong nor [the Export Agent] directly arrange [sic] international ocean freight, but rather a shipping forwarder arranges ocean shipment. However, Huarong and not [the Export Agent] pays for any ocean freight and insurance to the freight forwarder. It is at this point of shipment from Huarong to the freight forwarder that Huarong first notifies [the Export Agent] of the sale. Prior to this point [the Export Agent] has no knowledge of the sale. [The Export Agent] is made aware of the sale at this time as Huarong sends [the Export Agent] a preliminary packing list on which [the Ex-

deed, Commerce determined that the [[ ]] were actually Huarong's. *See* Application of Adverse Facts Available to Shandong Huarong General Group Corp., Conf. R. Doc. 84 at 3 ("[T]he information reviewed at verification clearly demonstrates that Huarong records these sales in its books and records [them] as sales to the U.S. customer in question."). Finally, Commerce determined that once the sales [[ ]], there were no significant discrepancies in total sales quantity and value of reconciliation data, or sales completeness, based on Huarong's sales database. *See id.* at 7–9.

Commerce also discussed with Huarong officials the various factors of production for the subject merchandise and its use of "caps." Commerce stated that

> [a]ccording to company officials, the consumption amounts reported for the factors of production were based on what company officials call "caps," which are the company's closest approximation of the inputs used based on years of production experience manufacturing the subject merchandise. Company officials stated that they no longer had the worksheets showing how they computed the "caps"; however, . . . the company supported their reported "caps" with actual production and work records from the POR.

Huarong Verification Report at 10–11. Although Commerce stated Huarong was unable to supply the worksheets it used to calculate all of the "caps," some data was available for the inputs of electricity, paint, and coal. Using these data as its starting point, Commerce tested the reasonableness of each reported "cap" for these factors of production. For the factor of production "paint," Commerce stated that "[t]he average consumption rates based on the worksheets were significantly different and much greater than the amounts reported to the Department." *Id.* at 13. For the factor of production "electricity," Commerce stated that the "consumption rates based on company records all exceeded the consumption rates reported by Huarong to the Department." *Id.* at 15. For the factor of production "coal," Commerce stated that the "consumption rates based on company records all exceeded the consumption rates reported by Huarong to the Department." *Id.* Finally, Commerce stated that it

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port Agent] creates an official packing list. Huarong stated that [the Export Agent]'s name should be on the packing list as it receives payment from [the Buyer], rather than Huarong. . . . Upon receipt of payment from [the Buyer], [the Export Agent] retains a . . . fee and sends Huarong the remaining amount. Huarong records the entire amount of the invoice in its accounts receivable and sales ledger and records the agent fee provided to [the Export Agent] in its agent fee expense ledger.

Huarong and not [the Export Agent] record [sic] [the Buyer's] sales in their [sic] sales ledgers, accounts receivable and inventory records.

Huarong Verification Report at 6 (internal citations omitted).

was unable to "reconcile certain factors of production to company cost records . . . due to time constraints. . . ." *Id*. at 16.

After review and analysis of the questionnaire responses and the information gathered at verification, Commerce determined that the use of facts available and adverse facts available was warranted to determine the antidumping duty margins for both LMC and Huarong. *See* Final Results, 66 Fed. Reg. at 48,028; *see also* Issues and Decision Mem. for the Admin. Revs. of HFHTs from the P.R.C. — February 1, 1999 through January 31, 2000, Pub. R. Doc. 144 ("Decision Memo"). As to LMC, Commerce explained:

> Pursuant to [19 U.S.C. §§ 1677e(a)(2)(A) and (C)], the Department has determined that it is appropriate to apply the facts available for purposes of determining the dumping margin for LMC in the instant review. Pursuant to [19 U.S.C. § 1677e(a)(2)(A)], we have determined that LMC has withheld significant information that was requested by the Department such that the Department is unable to calculate a dumping margin with respect to this company. Pursuant to [19 U.S.C. § 1677e(a)(2)(C)], we further determined that LMC has significantly impeded the Department's ability to accurately determine a margin of dumping for LMC in the instant administrative review. . . .
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> Pursuant to [19 U.S.C. § 1677m(i)], the Department conducted an on-site verification of the information submitted by LMC at its sales headquarters in the PRC. In analyzing LMC's record information pursuant to [19 U.S.C. § 1677m(e)], we have determined significant portions of LMC's reported data could not be verified in accordance with [19 U.S.C. § 1677m(e)(2)]. Upon arrival at verification, the Department discovered that LMC had prepared *none* of the documentation requested in the April 9, 2001 sales verification outline. Moreover, during verification, it became evident that LMC could not provide the information necessary to verify its own submissions. As a consequence of our findings at verification, pursuant to [19 U.S.C. § 1677m(e)(4)], we determined that LMC did not act to the best of its ability in responding to the Department's requests for information. . . .
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> For the reasons discussed above, the application of [19 U.S.C. § 1677m(e)] does not overcome [19 U.S.C. § 1677e(a)]'s direction to use facts otherwise available to determine a margin of dumping for LMC in this administrative review. Thus the use of facts available is warranted for LMC in this case. Moreover, we determine that, due to the nature of LMC's verification failures, and the inadequacy of its cooperation, the integrity of LMC's company reported data on the whole is compromised. Therefore, we determine that LMC has not adequately demon-

> strated its entitlement to rates separate from the government entity. As a consequence LMC will receive the PRC-wide entity rates. Moreover, . . . the Department has determined, pursuant to [19 U.S.C. § 1677e(b)], that LMC did not cooperate by acting to the best of its ability to comply with the Department's requests for information.

Final Results, 66 Fed. Reg. at 48,028 (emphasis in original). In support of its determination that LMC "withheld" information, Commerce explained that

> [t]he Department discovered at verification that LMC had reported U.S. sales of bars in its sales database which were in fact sales by another PRC company to the United States. . . . Because these misreported sales constituted the bulk of LMC's reported U.S. sales, we have determined that LMC's database is inadequate for purposes of calculating a dumping margin for this respondent.

Decision Memo at 6–7. In support of its determination that LMC "significantly impeded" the investigation, Commerce explained that

> LMC demonstrated at verification that it was fully aware of its lack of any meaningful involvement in these sales from the beginning of this review. Yet . . . LMC misreported the sales as its own in its initial questionnaire response and in the ensuing supplemental responses. As a consequence of LMC's failure to accurately describe the true nature of these sales in its questionnaire and supplemental responses, the Department was unable to determine that the sales were misreported until verification. As a direct result of LMC misreporting its sales, the Department: 1) issued a verification outline to LMC for purposes of reviewing the data relevant to these transactions; 2) did not anticipate the need to verify these transactions at another company's facilities in the PRC; and 3) incorrectly included these sales in the preliminary dumping margin analysis for LMC. Thus, LMC's mischaracterization of these sales significantly impeded the Department's ability to accurately determine a margin of dumping for LMC in the instant administrative review.

Id. at 10. As to Huarong, Commerce explained:

> Pursuant to [19 U.S.C. §§ 1677e(a)(2)(A) and (C)], the Department has determined that it is appropriate to apply the [f]acts available for purposes of determining the dumping margin for Huarong in the instant review. Specifically, Huarong failed to report the great majority of its U.S. market sales to the Department. Thus, pursuant to [19 U.S.C. § 1677e(a)(2)(A)], the Department has determined that Huarong has withheld informa-

> tion that was requested by the Department. . . . In addition, pursuant to [19 U.S.C. § 1677e(a)(2)(C)], we have determined that Huarong has significantly impeded this review.
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> We further determine that Huarong has failed to satisfy several of the requirements enunciated by [19 U.S.C. § 1677m(e)]. Pursuant to [19 U.S.C. § 1677m(i)], the Department conducted an on-site verification of Huarong's data at Huarong's headquarters in China. Upon arrival at verification, the Department found that Huarong had prepared almost no documents requested of it in the Department's verification outline. As a result of the verification team having to devote extensive amounts of time to examining issues pertaining to the unreported U.S. sales, and difficulties in verifying the accuracy of the reported factors of production input levels, there was insufficient time for the verifiers to conduct a full factors of production verification. As a consequence of our findings at verification, we determined that Huarong did not act to the best of its ability in responding to the Department's requests for information pursuant to [19 U.S.C. § 1677m(e)(4)].
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> For the reasons stated above, the application of [19 U.S.C. § 1677m(e)] does not overcome [19 U.S.C. § 1677e(a)]'s direction to use facts otherwise available for purposes of determining a dumping margin for Huarong. Thus, the use of facts available is warranted for Huarong in this case. Moreover, we determine that, due to the nature of Huarong's verification failures, and the inadequacy of its cooperation, the integrity of this company's reported data on the whole is compromised. Therefore, we determine that Huarong has not adequately demonstrated its entitlement to rates separate from the government entity. As a consequence Huarong will receive the PRC-wide entity rates.

Final Results, 66 Fed. Reg. at 48,028. In support of its determination that Huarong "withheld" information in its questionnaire responses, Commerce explained that

> the Department has determined that Huarong failed to report the great majority of its U.S. sales. Thus, Huarong has withheld information that was requested by the Department. By not including these sales in its U.S. sales database and misidentifying these transactions as sales to another Chinese company, for resale to the United States, Huarong failed to disclose the fact that it: 1) negotiated the sales prices and terms with the U.S. customer; 2) received the purchase order directly from the U.S. customer; 3) issued the order confirmation directly to the U.S. customer; 4) incurred brokerage and handling and marine insurance expenses for the transactions in question; and 5) never

> transferred ownership of these unreported sales to the named PRC reseller.

Decision Memo at 4. In support of its determination that Huarong "significantly impeded" the investigation, Commerce explained that

> [a]s a direct consequence of Huarong's mischaracterization of, and failure to report, the majority of its sales to the United States, the Department[:] 1) did not solicit further information from Huarong regarding these transactions in its supplemental questionnaires; 2) did not anticipate the need to address these sales at Huarong's verification and thus scheduled Huarong's verification without regard to these transactions; and 3) did not include these sales in the preliminary dumping margin analysis for Huarong. Thus, Huarong's mischaracterization of these sales significantly impeded the Department's ability to accurately determine a margin of dumping for Huarong in the instant administrative review. With respect to the verification, we note that Huarong's failure to report these sales in its database and its mischaracterization of them as sales to a PRC reseller resulted in the Department having to spend an inordinate amount of the scheduled verification at Huarong on sales issues, thus reducing the amount of time left and impeding the progress of the factors of production portion of the verification. . . . This, compounded by the failure of Huarong to adequately prepare for verification, led to the Department's inability to reconcile factors of production to the company's cost records.

Id. at 6.

Commerce then determined that the use of adverse facts available was warranted as the Companies did not cooperate by acting to the best of their abilities to comply with the Department's requests for information. *See* Final Results, 66 Fed. Reg. at 48,028 ("[A]s discussed in detail in the Decision Memorandum and the Huarong AFA Memorandum, pursuant to [19 U.S.C. § 1677e(b)], we have determined that Huarong did not cooperate by acting to the best of its ability to comply with the Department's requests for information."); *id*. ("[A]s discussed in detail in the Decision Memorandum and the LMC AFA Memorandum, the Department has determined, pursuant to [19 U.S.C. § 1677e(b)], that LMC did not cooperate by acting to the best of its ability to comply with the Department's requests for information."). In the Decision Memo, Commerce summarized its adverse facts available reasoning:

> Section [1677e(b) of Title 19] states that if the administering authority . . . 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 from the administering authority . . . , the

> administering authority . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully". . . . Such adverse inference may include reliance on information derived from[:] (1) the petition; (2) a final determination in the investigation under this title; (3) any previous review . . . [;] or (4) any other information on the record.
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> To examine whether the respondent "cooperated" by "acting to the best of its ability" under [19 U.S.C. § 1677e(b)], the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins.
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> [A]s discussed . . . the accuracy of Huarong's and LMC's responses could not be substantiated at verification and the Department determined that it is appropriate to use the facts available for these two respondents. Neither Huarong or LMC cooperated by acting to the best of their respective abilities to comply with the Department's requests for information. Huarong failed to report a substantial portion of its U.S. sales, despite its knowledge that these were U.S. sales subject to this review. In addition, at verification, Huarong was unable to substantiate numerous reported factor of production values. LMC misreported, as the predominant portion of its U.S. sales database, transactions for which it was not the seller . . . and at verification could not substantiate the reported data with respect to these sales.

Decision Memo at 11–12, 13 (citations omitted). As a result of these findings, the Companies' subject merchandise was assigned the PRC-wide antidumping duty margin of 47.88 percent. *See* Final Results, 66 Fed. Reg. at 48,029 n.1 ("Based on the results of this review the following companies are no longer eligible for separate rates . . . Huarong, and LMC.").

The Companies then commenced this action arguing that Commerce's determination was improper. Specifically, the Companies contend that Commerce's determination to apply the PRC-wide antidumping duty margin to their subject merchandise is not supported by substantial evidence or otherwise in accordance with law.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the

record or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "In reviewing the Department's construction of a statute it administers, [the court defers] to the agency's reasonable interpretation of the antidumping statutes if not contrary to an unambiguous legislative intent as expressed in the words of the statute." *Id.* at 1374–75 (citing *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881–82 (Fed. Cir. 1998)). Furthermore, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 46–47 (1983)).

DISCUSSION

I. *Commerce's use of facts available and adverse facts available for LMC's sales data and Huarong's sales and factors of production data*

A. *Facts available*

It is Commerce's duty to implement "the basic purpose of the [antidumping] statute—determining current margins as accurately as possible," *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), and it is Commerce's "responsibility to prevent circumvention of the antidumping law." *Queen's Flowers de Colom. v. United States*, 21 CIT 968, 972, 981 F. Supp. 617, 622 (1997) (citing *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1046, 700 F. Supp. 538, 555 (1988)). In order that Commerce may comply with these mandates, interested parties that choose to participate in an investigation must cooperate by complying with Commerce's requests for information. *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT ___ , ___ , 206 F. Supp. 2d 1323, 1333 (2002) (citing *Sanyo Elec. Co. v. United States*, 22 CIT 304, 314, 9 F. Supp. 2d 688, 697 (1998); *RHP Bearings v. United States*, 19 CIT 133, 136, 875 F.

Supp. 854, 857 (1995)) ("It is the interested party's obligation to create an accurate record and provide Commerce with the information requested to ensure an accurate dumping margin.").[13] Nonetheless, Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements," if it meets five statutory criteria. *See* 19 U.S.C. § 1677m(e)[14]; *Borden*, 22 CIT at ___, 4 F. Supp. 2d at 1246 ("[U]nder subsection (e), even if the initial information submitted is 'deficient', and even if, after an opportunity to 'remedy or explain,' the Department finds the information 'not satisfactory,' it *still* must use the information, rather than facts available, so long as the criteria of subsection (e) have been met." (emphasis in original)); *see also NTN Bearing*, 26 CIT at ___, 104 F. Supp. 2d at 141 (citing *Borden*, 22 CIT at ___, 4 F. Supp. 2d at 1245); *Steel Auth. of India v. United States*, 25 CIT ___, ___, 149 F. Supp. 2d 921, 927 (2001); *Branco Peres Citrus, S.A. v. United States*, 25 CIT ___, ___ n.7, slip op. 01–121 at 22 n.7 (citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–826(I), at 865 (1994), *reprinted in* 1994 U.S.C.C.A.N 4040, 4195; *Borden*, 22 CIT at ___, 4 F. Supp. 2d at 1245–46) ("[S]ection 1677m(e) is, on its face, inapplicable in situations where . . . a party has failed to 'demonstrate[ ] that it acted to the

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[13] By statute, where an interested party attempts to comply with Commerce's requests for information but Commerce finds such information is deficient, Commerce must provide the interested party with an opportunity to remedy the deficiencies. *See* 19 U.S.C. § 1677m(d); *NTN Bearing Corp. of Am. v. United States*, 26 CIT ____, ____, 104 F. Supp. 2d 110, 141 (2000) (quoting *Borden, Inc. v. United States*, 22 CIT 233, 262, 4 F. Supp. 2d 1221, 1245 (1998), *aff'd sub nom. F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000), *aff'd in part and rev'd in part on other grounds by Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001)) ("Section 1677m, which was enacted as part of the URAA, is 'designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with [Commerce].' "). Here, no party argues that the provisions of subsection 1677m(d) apply to the instant action.

[14] Subsection 1677m(e) of title 19 provides:

> In reaching a determination under [19 U.S.C. § 1675] the administering authority . . . shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority . . . if—
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> (1) the information is submitted by the deadline established for its submission,
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> (2) the information can be verified,
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> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
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> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . with respect to the information, and
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> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). It is apparent from the inclusion of requirement (2) alone that this provision is intended for use prior to verification.

best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information.' "). Finally, if, after soliciting information from interested parties and allowing them an opportunity to remedy any deficiencies in such submissions, needed information is not on the record, Commerce may then use facts available in order to complete its investigation. *See* 19 U.S.C. § 1677e(a).[15] As recently stated by the Court of Appeals for the Federal Circuit: "Under subsection (a), if a respondent 'fails to provide [requested] information *by the deadlines for submission*,' Commerce shall fill in the gaps with 'facts otherwise available.' " *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("*Nippon Fed. Cir.*") (emphasis added).

In the instant investigation, Commerce determined that the use of facts available was warranted for LMC's sales data, and for Huarong's sales and factors of production data. As to the Companies' sales data Commerce determined that the use of facts available was warranted because they each failed to properly provide this requested information in either their initial or supplemental questionnaire responses. In support, Commerce determined that the Companies had "mischaracterized" certain sales data in their responses and, therefore, pursuant to 19 U.S.C. § 1677e(a), the Companies "withheld" information and "significantly impeded" the investigation. Furthermore, Commerce determined that the use of facts available was warranted as to Huarong's factors of production data because Commerce was unable to completely verify that information.

The Companies argue that Commerce's determination that the use of facts available was warranted as to their sales, and as to Huarong's factors of production data, was improper. The Companies contend that

> [t]he Department's decision . . . was based primarily upon its assertion that Plaintiffs withheld information that was requested by the Department. The information they purportedly withheld was that [[ ]]. Commerce decided that Plaintiffs failed to act to the best of their ability based on what occurred during their verifications. Commerce further

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[15] Pursuant to 19 U.S.C. § 1677e:

> If—
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> (1) necessary information is not available on the record, or
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> (2) an interested party or any other person—
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> (A) withholds information that has been requested by the . . . administering authority . . . under this subtitle, . . . [or]
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> (C) significantly impedes a proceeding under this subtitle, . . .
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> the administering authority . . . shall, subject to [19 U.S.C. § 1677m(d)], use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a).

> found that Plaintiffs impeded the investigation, again because Plaintiffs reported that certain bars/wedges sales were made by [[ ]].

Pls.' Mem. at 9–10 (citations omitted). The Companies contend that "the record demonstrates that Plaintiffs cooperated with the Department throughout the proceeding by answering all of Commerce's questionnaires and cooperating fully during the verification." *Id.* at 10. The Companies further argue that "regardless of who is deemed the seller, the Department had all the data it needed from Plaintiffs to calculate accurate dumping margins for both of them." *Id.*

1. *The Companies did not provide requested information in their questionnaire responses*

The court first examines whether the Companies, by their questionnaire responses, "create[d] an accurate record and provide[d] Commerce with the information requested to ensure an accurate dumping margin." *Reiner Brach*, 26 CIT at ____, 206 F. Supp. at 1333. In other words, the court must determine whether the Companies had, prior to verification, completely and accurately complied with Commerce's requests for information. The court examines each company in turn.

a. *LMC*

The record shows that Commerce solicited information about LMC's sales data and sales process. In response to questions about its sales process, LMC stated that

> [t]he supplier knew the ultimate destination [of the subject merchandise] because it arranged the shipments. There was no understanding restricting, discouraging, or prohibiting sales in the home market or elsewhere. The supplier does not have the right to review LMC's sales records and the supplier does not provide after-sales service in the United States, participate in U.S. sales calls or activities, or provide sales incentives to LMC's customers.

LMC Section A Questionnaire Resp., Pub. R. Doc. 22 at A–15. This explication of LMC's sales process is accurate as far as it goes, but it is not fully responsive to the question asked. For instance, the statement "the supplier knew the ultimate destination [of the subject merchandise] because it arranged the shipments" fails to mention that the Supplier arranged all the terms of the sale, including pricing, and that the Supplier ultimately received payment for the subject merchandise. The statement "[t]here was no understanding restricting, discouraging, or prohibiting sales in the home market or elsewhere" is misleading in that, while there is no evidence that the Supplier could generally control LMC's sales process, LMC had absolutely no control over the transactions here at issue. The statement

"[t]he supplier does not have the right to review LMC's sales records" may, again, be accurate as it relates to LMC's own sales, but for the transactions here at issue, LMC had no involvement with the sales process and did not, in fact, have the relevant records of the sales in its own sales database. Finally, the statement that the Supplier "[did] not participate in U.S. sales calls or activities" is simply false as the Supplier completely arranged the sales. In other words, although LMC identified the transactions at issue as its own sales in its questionnaire responses, they were, in fact, not its own sales.

b. *Huarong*

As to Huarong, the record is clear that it did not accurately provide information in its responses in several important respects. First, Huarong claimed that certain transactions were not "sales" to the Buyer because it "resold" some merchandise "through" the Export Agent; yet the Export Agent did not pay Huarong for the merchandise, and Huarong neither reported these "sales" to Commerce nor recorded them as sales to the Export Agent on its sales ledgers. Second, Huarong stated that it was uninvolved with the sales process of certain transactions; yet the record shows that not only was the Buyer a pre-existing customer of Huarong's, but the terms of the sales were agreed upon directly by the Buyer and Huarong. In other words, although Huarong did not identify certain transactions as its own sales to the Buyer, they were, in fact, its own sales.

2. *Commerce's determination that it need not consider data submitted by the Companies at verification to remedy missing information was proper*

The court finds proper Commerce's determination that it need not consider information relating to the Companies' sales data gathered during verification. Specifically, Commerce found that it need not consider this information because, pursuant to 19 U.S.C. § 1677m(e)(4), the Companies were unable to show that they had acted to the best of their abilities in providing the information prior to verification.

The Companies argue that they were acting to the best of their abilities to comply with Commerce's requests for information because: (1) pursuant to the statute, Commerce's regulations, and the antidumping questionnaire instructions they accurately identified who the "seller" was for the transactions here at issue and, in any event, the identity of the "seller" was inconsequential; (2) even assuming, *arguendo*, that it was relevant as to who the "seller" was in the transactions here at issue, Commerce eventually came into possession of all relevant information and was able to calculate an antidumping duty margin from that information; and (3) they otherwise "cooperated" with Commerce's requests for information. The court does not agree.

Where two entities each apply for company-specific treatment, the actual seller of the subject merchandise is relevant. With respect to the time at which Commerce came into possession of the relevant information, the court finds *Florex v. United States*, 13 CIT 28, 705 F. Supp. 582 (1989), instructive. In *Florex*,

> [t]he questionnaire response was replete with other errors. In such a situation [Commerce] is justified in finding a failure of verification. Such a finding is essentially the same as a finding of failure to respond at all. In fact, it may be worse because [Commerce] had to expend time at verification to discover the errors made in the response.

Florex, 13 CIT at 32, 705 F. Supp. at 588; *see Maui Pineapple Co. v. United States*, 25 CIT ___ , ___ , 264 F. Supp. 2d 1244, 1259 (2001) (discussing *Florex*, 13 CIT at 32, 705 F. Supp. at 588). In the instant investigation Commerce was placed in a similar position. Specifically, at verification—and not before—it became evident that the Companies, by their questionnaire responses, did not accurately provide information about their sales and sales processes. As a result, Commerce was compelled to expend a considerable amount of time discovering and correcting these critical errors. Indeed, because of the amount of time spent correcting errors Commerce was unable to complete the Companies' verification within the scheduled dates. Therefore, as the Companies misstated the seller for certain transactions of subject merchandise in their questionnaire responses, they cannot show that they were acting to the best of their abilities to supply requested information in those responses. 19 U.S.C. § 1677e(a)(4).

As to the Companies' argument that Commerce eventually came into possession of all the relevant documentation and should, therefore, have calculated individual margins based on such collected data, it is incumbent upon parties that choose to participate in an antidumping duty investigation to accurately provide information to Commerce in the first instance. *Reiner Brach*, 26 CIT at ___ , 206 F. Supp. 2d at 1333 ("It is the interested party's obligation to create an accurate record and provide Commerce with the information requested to ensure an accurate dumping margin."). Indeed, verification is not an opportunity to submit new answers to previously posed questions, but is more like an audit of information previously submitted. *See Bomont Indus. v. United States*, 14 CIT at 208, 209, 733 F. Supp. 1507, 1508 (1990) ("[V]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness."). Because the Companies did not accurately supply requested information about their sales and sales processes in their questionnaire responses, presentation of this data to Commerce at verification cannot serve as proof that they "acted to the

best of their abilities" to supply this information in their questionnaire responses.

Finally, the record does not support the Companies' argument that they "cooperated" with Commerce's requests for information. Specifically, the Companies make much of their alleged cooperation with Commerce during verification. *See* Pls.' Mem. at 14 ("The record reflects . . . that Plaintiffs fully cooperated during verification. . . ."). However, the Companies misstate Commerce's determination in this regard. The record shows that Commerce found the use of facts available was warranted because the Companies failed to provide requested information and impeded the investigation prior to verification, not that the Companies may or may not have "cooperated" with Commerce at verification. *See* Decision Memo at 7 (stating use of facts available was warranted as to LMC because "[t]he Department's questionnaire specifically asks respondents to '[s]tate the total quantity and value of the merchandise under review that you sold during the period of review in the United States. . . .' " (bracketing and emphasis in original)); *id*. at 4 (stating use of facts available was warranted as to Huarong because "[t]he Department's Section A questionnaire specifically asks respondents to provide '[t]he total quantity and value of the merchandise under review that *you sold* during the period of review in the United States. . . .' " (emphasis and second bracketing in original)).[16] Thus, that the Companies may have cooperated with Commerce at verification cannot be evidence

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[16] The Companies also take issue with the Government's position that they were not fully forthcoming about the role of the Export Agent in this matter. The Companies state

> [t]he Government asserts that the Plaintiffs appear to have tried to take advantage of [[ ]]'s lower rate from a prior review when paying cash deposits during the pendency of the current review, and relies on a statement given by an [[ ]] during verification that it believed the customer had the bars sold through [[ ]] in order to avoid dumping penalties. This is absurd for several reasons.
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> First of all, the company official's statement was only conjecture, and no one asked the customer why it had the shipments go through [[ ]]. Second, the official retracted his statement. And third, neither LMC nor Huarong attempted to avoid paying dumping duties. To the contrary, both of them requested reviews of the entries at issue, as the Government admits. If the Plaintiffs sought to avoid paying dumping duties, they certainly would not have requested these reviews, reported all their sales, and showed all their records to Commerce, as they clearly did here. The Government's claim is preposterous.

Pls.' Reply Br. in Resp. Mem. Def. Opp'n Pls.' Mot. J. Agency R. Mem. ("Pls.' Reply") at 15 (footnotes omitted). The record contains evidence of a series of communications between Huarong and the Buyer. *See* [[ ]]. These communications, sent on both Huarong's and the Buyer's letterhead, dealt with, among other things, shipments of defective "Gorilla Bars." *See generally id*. By these communications the parties attempted to reach a settlement, and presented various reasons as to why the settlement should be adjusted higher or lower. After discussion, Huarong stated: [[ ]]

Id., [[ ]] (text as in original, emphasis added). In the immediately preceding segment [[ ]] while

that they acted to the best of their abilities to supply requested information in their questionnaire responses.

3. *Commerce's determination that use of facts available was warranted for LMC's missing sales data was proper*

Commerce determined that the use of facts available was warranted for LMC's sales data because LMC did not accurately provide that information in any of its questionnaire responses. In support of its determination, Commerce stated that it was using facts available because, pursuant to 19 U.S.C. §§ 1677e(a)(2) and (a)(4), LMC "withheld" information and "significantly impeded" the investigation. *See* Final Results, 66 Fed. Reg. at 48,028.

a. *LMC withheld information*

The record shows that LMC did not accurately supply requested information in its questionnaire responses. Specifically, LMC stated in its questionnaire responses that it sold bars/wedges to a U.S. customer. At verification, however, it became evident that LMC was not the actual seller. Indeed, at verification LMC at first continued to maintain that it was the seller but, eventually, admitted it was not. *See* Decision Memo at 9 ("LMC acknowledged that it had not purchased bars for resale to the United States; rather it acted more along the lines of a processing agent for the relevant sales to the U.S. customer."). Thus, because LMC did not accurately provide requested sales information, Commerce's determination that it "withheld" information is sustained.

b. *LMC significantly impeded the investigation*

As noted above, the record shows that LMC claimed to have certain sales when it had none and did not accurately describe [[ ]]. Based on this inaccurate information, Commerce scheduled LMC's verification with the expectation that LMC was the seller of subject merchandise to a U.S. customer. At verification Commerce reasonably expected LMC to be in possession of the relevant original sales documents as to these transactions. At verification, however, it became evident that LMC did not possess these documents, and did not record the relevant sales in its sales database. Thus, because LMC did not reveal its role in these sales until verification, and because it did not possess the requisite sales information, Commerce's determination that LMC "significantly impeded" the investigation is sustained.

Huarong's was 34.00 percent. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the P.R.C., 63 Fed. Reg. 16,758, 16,767 (ITA Apr. 6, 1998) (final results).

4. *Commerce's determination that the use of facts available was warranted for Huarong's missing sales data was proper*

Commerce determined that the use of facts available was warranted for establishing Huarong's sales data because (1) Huarong did not accurately provide that information in any of its questionnaire responses, and (2) because Commerce was required to spend nearly all of its scheduled verification time tracking down sales data, the verifiers were unable to address matters related to the factors of production data. In support of its determination, Commerce stated that it was using facts available because, pursuant to 19 U.S.C. §§ 1677e(a)(2) and (a)(4), Huarong both "withheld" information and "significantly impeded" the investigation. *See* Final Results, 66 Fed. Reg. at 48,028.

a. *Huarong withheld information*

The record shows that the questionnaires sent to Huarong specifically asked it to supply information about "your" sales to the United States. In its responses, however, Huarong never included information regarding the transactions here at issue even though Commerce specifically requested this information. Thus, since Huarong had the information in its possession and did not provide it, Commerce's determination that it "withheld" information is sustained.

b. *Huarong significantly impeded the investigation*

Commerce was likewise justified in its determination that the use of facts available was warranted as to Huarong's sales data based on its finding that Huarong "significantly impeded" the investigation. The record shows that Commerce, based on the information provided in Huarong's questionnaire responses, scheduled verification with the expectation that it would only be verifying a small quantity of bar sales and various factors of production. However, because of the inaccuracies in Huarong's submitted sales data, Commerce spent its verification time collecting this missing information. Therefore, because Commerce was unable to complete verification of Huarong's submitted data with respect to factors of production due to Huarong's actions, Commerce's determination that Huarong "significantly impeded" Commerce's investigation is sustained.

5. *Commerce's determination that the use of facts available was warranted for Huarong's factors of production data was proper*

Commerce was justified in its determination that the use of facts available was warranted as to Huarong's factors of production data based on its finding that Huarong "significantly impeded" the investigation. As noted above, the record shows that Commerce scheduled verification with the expectation that it would only be verifying a small quantity of bar sales and various factors of production. How-

ever, because of the inaccuracies in Huarong's submitted sales data, Commerce spent its verification time collecting this missing information, and was thus unable to verify completely Huarong's factors of production data. Final Results, 66 Fed. Reg. at 48,028 ("As a result of the verification team having to devote extensive amounts of time to examining issues pertaining to the unreported U.S. sales, and difficulties in verifying the accuracy of the reported factors of production input levels, there was insufficient time for the verifiers to conduct a full factors of production verification."). In addition, Commerce's preliminary review of Huarong's factors of production, based on "caps," found that there were significant discrepancies between Huarong's questionnaire responses and the data it provided at verification. *See* Huarong Verification Report at 13 (stating "[t]he average consumption rates [for paint] based on the worksheets were significantly different and much greater than the amounts reported to the Department."); *id*. at 15 ("These consumption rates [for electricity] based on company records all exceeded the consumption rates reported by Huarong to the Department. We asked company officials to explain the discrepancy and they stated that they had no explanation."); *id*. ("These consumption rates [for coal] based on company records all exceeded the consumption rates reported by Huarong to the Department."). Therefore, because Commerce was unable to complete verification of Huarong's submitted data with respect to factors of production due to Huarong's actions, Commerce's determination that the use of facts available was warranted as to Huarong's factors of production data because Huarong "significantly impeded" Commerce's investigation is sustained.

6. *Commerce's determination that the use of adverse facts available was warranted for the Companies' sales data, and Huarong's factors of production data was proper*

By statute, Commerce may find the use of adverse facts available is warranted where it first finds that a respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information. . . ." *See* 19 U.S.C. § 1677e(b)[17]; *Nippon Fed. Cir.*, 337 F.3d at 1381 ("[S]ubsection (b) permits Commerce to 'use an inference that is adverse to the interest of [a respondent] in selecting

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[17] Title 19 U.S.C. § 1677e(b) provides:

> If [Commerce] . . . 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 from [Commerce] . . . , [Commerce], in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
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> (1) the petition,
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> (2) a final determination in the investigation under this subtitle,

from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.' " (bracketing in original)). The Court of Appeals for the Federal Circuit stated that "[t]he focus of [1677e(b)] is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information." *Nippon Fed. Cir.*, 337 F.3d at 1381 (emphasis in original). The court further stated that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Id.* at 1382. The court continued:

> [t]o conclude that an importer has not cooperated to the best of its ability and draw an adverse inference under section 1677e(b), Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records. An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.

Id. at 1382–83 (citation omitted).[18]

Here, the Companies argue that Commerce's determination to use adverse facts available was improper because they

> fully cooperated [with Commerce's investigation] and that their responses in nearly all instances reconciled to their books and records. Plaintiffs never sought to mislead Commerce's verifiers but rather offered them upon arrival at Huarong's headquar-

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(3) any previous review under section 1675 of this title or determination under section 1675b of this title,

(4) any other information placed on the record.

19 U.S.C. § 1677e(b)(1)–(4).

[18] Although the subject of the Court of Appeals for the Federal Circuit's analysis of 19 U.S.C. § 1677e(b) in *Nippon Fed. Cir.* was a United States importer, there is nothing in its reasoning that would preclude its analysis from covering a PRC exporter.

> ters corrections to their prior submissions, explained the use of "caps" and otherwise tried to give the verifiers everything they requested. Where this was not possible, the company officials provided the verifiers with all the written records they had available. . . . Accordingly, there is no basis for Commerce's determination . . . for deriving an adverse inference in selecting which facts available to use in calculating their margins.

Pls.' Mem. at 20–21.

The court finds proper Commerce's determination that the use of adverse facts available was warranted as to the Companies' sales data, and as to Huarong's factors of production data, because they each failed to act to the best of their ability to comply with Commerce's requests for information. First, there can be no doubt that reasonable and responsible sellers that request an administrative review of an antidumping order will have accurate records of their sales. Indeed, the administrative record shows that Huarong had such records and eventually produced them. There can also be no doubt that a reasonable and responsible producer, seeking an administrative review, will have accurate records of its factors of production. Second, the record shows that LMC and Huarong did not make the maximum effort to produce the sales records in order to respond to Commerce's questionnaire requests. Rather, the information contained in the questionnaire responses was inaccurate. In addition, it cannot be said that Huarong did the maximum it could do to substantiate its use of "caps," as it did not retain the worksheets upon which the caps were based or make any effort to replicate them. As a result, Commerce has satisfied the statutory showings for the use of adverse facts available as articulated by the Court of Appeals for the Federal Circuit. *See Nippon Fed. Cir.*, 337 F.3d at 1382. Thus, the court sustains Commerce's determination that the use of adverse facts available was warranted as to the Companies' sales data and Huarong's factors of production data.

II. *Commerce's determination that the Companies should receive the PRC-wide antidumping duty margin based on their failure to provide evidence of their independence from state control*

Where an antidumping duty investigation involves an NME country, all exporters within that country are presumed to be subject to government control. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) ("[I]t was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. . . . Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control." (citing *Zenith Elecs.*

Corp. v. United States, 988 F.2d 1573, 1583 (Fed. Cir. 1993)); *see also Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT ___, ___, 178 F. Supp. 2d 1305, 1329 (2001) (citing Manganese Metal From the P.R.C., 63 Fed. Reg. 12,440, 12,441 (ITA Mar. 13, 1998) (final results and partial rescission of admin. rev.)). While all NME exporters are presumed to be subject to government control, an exporter may request and receive an antidumping duty margin separate from the NME-wide antidumping duty margin by providing evidence of its independence from government control. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002) (citing *Sigma*, 117 F.3d at 1405–06) ("Under the NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the countrywide rate, while a company that demonstrates its independence is entitled to an individual rate as in a market economy."); *see also* Huarong Section A Questionnaire Resp., Pub. R. Doc. 23 at A–1 ("The Department presumes that a single weighted-average dumping margin is appropriate for all exporters in a nonmarket economy country. The Department may, however, consider requests for separate rates from individual exporters."); LMC Section A Questionnaire Resp., Pub. R. Doc. 22 at A–1 (same). Where an NME exporter successfully rebuts the NME presumption by providing evidence of its independence from state control, Commerce may assign such NME exporter a company-specific antidumping duty margin. However, where an NME exporter fails to either: (1) rebut the nonmarket economy presumption of state control, or (2) otherwise cooperate with the investigation[19] by failing to "respond to Commerce's questionnaire for that review," Commerce may then apply the NME-wide antidumping duty margin to such exporter's merchandise. *See Sigma*, 117 F.3d at 1411 (citing *D&L Supply Co. v. United States*, 113 F.3d 1220, 1222 (Fed. Cir. 1997)) (stating Commerce has a "long-standing practice of assigning to respondents who fail to cooperate with Commerce's investigation the highest margin calculated for any party in the less-than-fair-value investigation or in any administrative review."). Thus, an NME exporter may qualify for a company-specific antidumping duty margin where it participates in the investigation, and: (1) requests a company specific antidumping margin; and (2) provides evidence of its independence from government control in both law and fact.

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[19] This failure to cooperate with the investigation is distinct from the kind of failure to cooperate by not acting to the best of one's abilities found in 19 U.S.C. § 1677e(b). For the failure to cooperate to serve as the basis for assignment of the country-wide rate it must be of the sort found in *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997), i.e., the failure to respond to Commerce's questionnaire. *Sigma*, 117 F.3d at 1411 ("Commerce stated that it was using the antidumping margin assigned to Guandong as the margin for all other Chinese exporters, *who did not respond to Commerce's questionnaire for that review*." (emphasis added)).

Here, the Companies participated in the administrative review and had, by their questionnaire responses: (1) requested company-specific antidumping duty margins; and (2) submitted evidence of their independence from government control with their questionnaire responses. Based on these factors, Commerce preliminarily determined that the Companies had provided sufficient evidence of their independence from government control and preliminarily assigned them company-specific antidumping duty margins based on the sales and factors of production data submitted in their questionnaire responses. *See* Prelim. Results, 65 Fed. Reg. at 66,696. After verification, however, Commerce determined that, using facts available and adverse facts available, the Companies were not entitled to separate rates and, thus, assigned them the PRC-wide antidumping duty margin.

The Companies argue that Commerce's determination to reject their evidence of independence from government control was improper:

> Commerce's decision to subject Plaintiffs to the all-PRC dumping margin was wholly punitive and was made despite its having found in the Preliminary Results that Plaintiffs fully responded to the portions of the questionnaires regarding separate rates and demonstrated the continued entitlement to separate rates. Commerce fully verified these responses and found nothing to contradict them.

Pls.' Mem. at 4. The Companies further contend that they

> provided all of the information that was necessary to establish their entitlement to separate rates. Commerce's claim that . . . the integrity of [their] reported data on the whole is compromised is belied by the fact that Commerce fully verified Plaintiffs' separate rates responses and . . . Commerce fully verified Plaintiffs' reported data.

Id. at 21.

The Government argues that Commerce's determination was proper. The Government contends that

> [g]iven the nature and extent of the misrepresentations contained in the responses, Commerce could no longer rely upon Plaintiffs' responses to establish the nature of their relationship with the local and national governments. Significantly, some of the misrepresentations were in the separate rates responses themselves. Thus, Commerce lawfully determined that Plaintiffs had not adequately demonstrated entitlement to separate rates and should therefore be considered part of the PRC-wide entity.

Def.'s Opp'n Pls.' Mot. J. Agency R. ("Def.'s Resp.") at 14–15 (citations omitted).[20] In support, the Government states that

> [e]ven though Huarong and LMC received separate rates in previous segments of these proceedings, it has long been Commerce's standard policy to conduct a separate rate inquiry each time an NME respondent is subject to review. In accordance with this policy, Huarong and LMC each submitted a facially adequate separate rates questionnaire response and Commerce preliminarily determined that these companies continued to be entitled to separate rates. *However, in the Final Results, Commerce denied Plaintiffs separate rates because the nature of their verification failures, including their lack of cooperation, cast doubt upon the reliability of their entire responses.*

Id. at 25 (citations and footnote omitted; emphasis added).

The Companies take issue with the Government's position:

> The separate rates issue is solely concerned with whether a company is independent in law and in fact from the government of China. Once a respondent establishes its independence from government control, it is entitled to have its margin calculated based on its reported sales and factors of production. . . .
>
> [T]here is no connection in this case between the Plaintiffs' independence from government control and the questions [[ ]].

Pls.' Reply at 15–16.

A. *Facts available*

The court does not find proper Commerce's determination to reject the Companies' separate rates evidence and, thus, assign them the PRC-wide antidumping duty margin based on the presumption of state control. In support of its determination that the Companies would receive the PRC-wide antidumping duty margin based on facts available, Commerce stated that "due to the nature of [the Companies'] verification failures, and the inadequacy of [their] cooperation, the integrity of [the Companies'] reported data on the whole

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[20] The Government finds it significant that "some of the misrepresentations were in the separate rates responses themselves." Def.'s Resp. at 15. Although the Government never specifically identifies what these "misrepresentations" were, presumably they were the Companies' assertions in their questionnaire responses that they were in possession of certain documents, providing evidence of their independence from state control, that they were unable to produce at verification. As is discussed *infra*, however, Commerce did not request—either at verification or otherwise—that the Companies remedy this "deficiency" by providing such information.

is compromised." *See* 66 Fed. Reg. at 48,028 (Huarong); *id.* (LMC) (same). This reasoning, however, cannot be the basis for assigning the Companies the PRC-wide antidumping duty margin based on facts available, as it is clear the Companies did provide evidence of their entitlement to separate rates and there is no indication that any necessary information was missing or incomplete. *See Nippon Fed. Cir.*, 337 F.3d at 1381 ("The focus of subsection (a) is respondent's *failure to provide information*." (emphasis in original)). In other words, the findings that justified the use of facts available and a resort to adverse facts available with respect to the Companies' sales data and factors of production, cannot be used to accord similar treatment to issues relating to the Companies' evidence of independence from state control. Specifically, the record shows that the Companies each submitted evidence of their entitlement to separate rates with their questionnaire responses, and at verification Commerce found such evidence was not "compromised." In addition, while the record shows that the Companies, by their questionnaire responses, represented that they were in possession of all of the relevant documentation but at verification were unable to produce all of the documents necessary to establish their entitlement to separate rates, Commerce neither pressed them to produce such evidence nor otherwise requested that the Companies rectify this "deficiency." *See* LMC Verification Report at 2; Huarong Verification Report at 2. Furthermore, the record also shows that Commerce seemingly determined that the lack of such documentation was not dispositive with respect to the separate rates determination. *See* LMC Verification Report at 2–3 ("LMC officials confirmed that [the Ministry of Foreign Trade and Economic Cooperation] allowed it to operate independent from the government. However, when asked, LMC officials were unable to produce the document that allowed it to operate independently. The Department notes, however, that this document has been cited in previous periods of review for this case."); Huarong Verification Report at 2–3 ("Huarong confirmed that the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) allowed it to operate independent from the government. However, when asked, Huarong was unable to produce the document that allowed it to do so. The Department notes, however, that this document has been cited in previous periods of review for this case."). Thus, because the Companies did provide evidence of their independence from government control and Commerce: (1) verified such information; (2) did not request the Companies to remedy any deficiencies in their separate rates information; and (3) did not find the lack of such information dispositive with respect to the separate rates determination, the court cannot sustain Commerce's determination that the Companies should be assigned the PRC-wide antidumping duty margin based on facts available.

B. *Adverse facts available*

For the Final Determination, Commerce determined that the use of adverse facts available was warranted as to the Companies' separate rates information and, therefore, they would receive the PRC-wide antidumping duty margin. In support of its determination, Commerce reasoned that because the integrity of the Companies' data was "compromised," they "[had] not adequately demonstrated [their] entitlement to a rate separate from the PRC-wide entity." Decision Memo at 11 (LMC); *id*. at 6 (Huarong). The court cannot sustain Commerce's determination in this regard. Specifically, the Court of Appeals for the Federal Circuit has stated that, pursuant to 19 U.S.C. § 1677e(b), Commerce must make certain showings before it may resort to adverse facts available. *See Nippon Fed. Cir.*, 337 F.3d at 1382. Here, the record shows that the Companies apparently kept records sufficient to satisfy Commerce of their independence from state control and supplied such records to Commerce in a timely fashion. Because findings with respect to data Commerce found to be "compromised"—i.e., the Companies' sales data and Huarong's factors of production data—are distinct from those related to state control, it is difficult to see how Commerce's determination with respect to the sales and factors of production data can form the basis for the use of adverse facts available with respect to independence from state control. Historically, Commerce has exercised its ability to parse respondents' questionnaire responses and apply adverse facts available only to a portion of a determination. *See Kao Hsing Chang Iron & Steel Corp. v. United States*, 26 CIT ___, ___, slip op. 02–142 (Dec. 6, 2002) (sustaining use of partial adverse facts available for "missing production quantity data for . . . [cost of production and constructed value] databases." (bracketing in original)); *Torrington Co. v. United States*, 25 CIT ___, ___, 146 F. Supp. 2d 845, 885 (2001) (remanding action where determination was based on partial adverse facts available as to the factor of production "packing expenses" and it was "unclear" what action Commerce took in arriving at that determination). Commerce has exercised this ability in the context of NME investigations. *See Pac. Giant, Inc. v. United States*, 26 CIT ___, ___, slip op. 02–140 at 4 (Dec. 2, 2002) (sustaining application of "partial adverse inference" to NME company's "labor" factor of production). Similar treatment would appear to be appropriate here. The Companies supplied the requested information and Commerce has not adequately demonstrated a sufficient reason to disregard the Companies' submissions of evidence of their entitlement to separate antidumping duty margins and resort to adverse facts available.

CONCLUSION

On remand, Commerce shall revisit, in a manner consistent with this opinion, its determination that the Companies were to receive the PRC-wide antidumping duty margin. Specifically, Commerce shall: (1) consider the separate rates evidence submitted by the Companies, (2) determine whether the assignment of separate rates for the Companies is warranted, i.e., that the Companies have demonstrated an absence of state control both in law and in fact, and (3) if Commerce finds that the assignment of separate rates is warranted, calculate separate antidumping duty margins for Huarong and LMC. In the event Commerce continues to find that the Companies should receive the PRC-wide antidumping duty margin, it shall make specific showings with explicit and complete references to the record with respect thereto. Such remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

Slip Op. 03–149

PAPER, ALLIED INDUSTRIAL, CHEMICAL AND ENERGY INTERNATIONAL UNION, LOCAL 5–689, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 03–00356

ORDER

STANCEU, Judge: Upon consideration of defendant's consent motion for voluntary remand, it is hereby

ORDERED that the defendant's consent motion is granted; and it is further

ORDERED that this action is remanded to the United States Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for worker adjustment assistance benefits; and it is further

ORDERED that remand results shall be filed no later than 90 days after the date of this order; and it is further

ORDERED that plaintiffs shall file comments with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court; and it is further

ORDERED that the deadline for the filing of the motion for judgment on the agency record shall be extended to 60 days after the

plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

SLIP OP. 03–150

BEFORE: RICHARD K. EATON, JUDGE

YANTAI ORIENTAL JUICE CO., ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND COLOMA FROZEN FOODS, INC., ET AL., DEF.-INTERVENORS.

COURT NO. 00–00309

[Commerce's second remand determination sustained.]

Decided: November 20, 2003

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell, Jeffrey S. Grimson* and *Mark E. Pardo*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director (*Ada E. Bosque*); *Scott D. McBride*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

The Law Firm of C. Michael Hathaway (*C. Michael Hathaway*), for Defendant-Intervenors.

MEMORANDUM OPINION

EATON, Judge: On March 21, 2003, the court, for the second time, remanded certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") determination in Certain Non-Frozen Apple Juice Concentrate from the P.R.C., 65 Fed. Reg. 19,873 (Dep't Commerce Apr.13, 2000) (final determination) ("Final Determination"), as amended in Certain Non-Frozen Apple Juice Concentrate From the P.R.C., 65 Fed. Reg. 35,606 (Dep't Commerce June 5, 2000) (am. final determination) ("Amended Final Determination"), covering the period of investigation ("POI") of October 1, 1998, through March 31, 1999. *See Yantai Oriental Juice Co. v. United States*, 27 CIT ___, slip op. 03–33 (Mar. 21, 2003) ("*Yantai II*"). The second remand order directed Commerce to revisit the issue of the proper calculation of the antidumping duty margin for Xianyang Fuan Juice Co., Ltd., Xian Asia Qin Fruit Co., Ltd., Changsha Industrial Products & Minerals Import & Export Corp.,

and Shandong Foodstuffs Import & Export Corp.,[1] and explain in clear and specific terms why its selected methodology "is based on the best available information and establishes antidumping margins as accurately as possible." *Yantai II*, 27 CIT at ____ , slip op. 03–33 at 18 (internal quotation omitted). On May 5, 2003, Commerce released the results of its second remand determination. *See* Second Redetermination Pursuant to Court Remand Order in *Yantai Oriental Juice Co. v. United States* (Mar. 21, 2003) (Dep't Commerce May 5, 2003), Second Remand R. Pub. Doc. 8 ("Second Remand Determination"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516(a)(2)(A)(i)(I). For the reasons set forth below, the court sustains Commerce's Second Remand Determination.

BACKGROUND

In the original investigation, the antidumping duty margin for the Cooperative Respondents was calculated to be 14.88%. *See* Am. Final Determination, 65 Fed. Reg. at 35,607. This antidumping duty margin was based on the weighted-average of antidumping duty margins for the Fully-Investigated Respondents. *See* Final Determination, 65 Fed. Reg. at 19,874. After the first remand, however, Commerce determined that, because the Fully-Investigated Respondents would receive antidumping duty margins of zero percent, a new methodology was needed to calculate the antidumping duty margin for the Cooperative Respondents. *See Yantai II*, 27 CIT ____ , slip op. 03–33 at 12 (citing Redetermination Pursuant to Court Remand Order in *Yantai Oriental Juice Co. v. United States* (Dep't Commerce Nov. 15, 2002), First Remand R. Pub. Doc. 53 ("First Remand Determination") at 14). Specifically, Commerce determined that it would calculate the Cooperative Respondents' margin following the "all-others" methodology of 19 U.S.C. § 1673d(c)(5). *See id.* However, because all of the margins in the investigation were either (1) zero percent (i.e., the Fully-Investigated Respondents' margins) or (2) based on facts available (i.e., the PRC-wide margin), Commerce did not follow the methodology of 19 U.S.C. § 1673d(c)(5)(A) but, instead, looked to 19 U.S.C. § 1673d(c)(5)(B). *See id.* at 13 (citing First Remand Determination at 14). Using this methodology, the Cooperative Respondents' calculated antidumping duty margin increased from 14.88% to 28.33%. *Id.* at 16.

After reviewing the remand results, the court determined that it

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[1] These companies fully responded to Commerce's antidumping questionnaire but were not selected for investigation. They shall be referred to collectively as the "Cooperative Respondents." Yantai Oriental Juice Co., Qingdao Nannan Foods Co., Sanmenxia Lakeside Fruit Juice Co., Ltd., Shaanxi Haisheng Fresh Fruit Juice Co., and Shandong Zhonglu Juice Group Co. were fully investigated and shall be referred to collectively as the "Fully-Investigated Respondents." The Cooperative Respondents and the Fully-Investigated Respondents are plaintiffs in this action ("Plaintiffs").

could not sustain Commerce's new methodology as proper. The court reasoned:

> First, the record shows that the Cooperative Respondents fully and completely complied with all of Commerce's requests for information. Indeed, the only apparent difference between the Fully-Investigated Respondents and the Cooperative Respondents is that Commerce did not select them for full investigations. Second, while it is not inconceivable that individual margins for each Cooperative Respondent could have increased had they been fully investigated, this outcome seems unlikely given that all of the Fully-Investigated Respondents' antidumping duty margins were reduced to zero percent—including that respondent originally assigned an antidumping duty margin of 27.57 percent. Given these facts it appears that Commerce strained to reach its result. This is particularly puzzling given that in reaching its result Commerce abandoned the methodology used in the *Final Determination* (i.e., weight-averaging the estimated dumping margins of the Fully-Investigated Respondents) even though that method is specifically provided for in the statutory subsection it purported to follow. More importantly, in doing so, Commerce failed to justify the use of its new methodology other than by reference to the SAA. The SAA, however, takes into account the possibility that, under certain facts, the "expected" method should not be used.

Yantai II, 27 CIT at ___ , slip op. 03–33 at 16–17 (citations omitted). As a result, the court remanded this matter a second time. In doing so, the court directed Commerce to

> revisit the issue of the proper calculation of the Cooperative Respondents' antidumping duty margin and . . . either: (1) use the methodology set forth in 19 U.S.C. § 1673d(c)(5)(B); or (2) set out another methodology. In either event, Commerce shall explain in clear and specific terms why its selected methodology "is based on the best available information and establishes antidumping margins as accurately as possible."

Id., 27 CIT at ___ , slip op. 03–33 at 18 (citing *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001)).

In its Second Remand Determination, Commerce calculated the antidumping duty margin for the Cooperative Respondents to be 3.83%. *See* Second Remand Determination at 9.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law. . . ." 19 U.S.C.

§ 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Commerce has considerable discretion in the evaluation of factors of production. *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1374–75, 985 F. Supp. 133, 136–37 (1997), *aff'd* 166 F.3d 1373 (Fed. Cir. 1999). "When examining Commerce's factual determinations, '[i]t is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.' " *Air Prods. & Chems., Inc. v. United States*, 22 CIT 433, 442, 14 F. Supp. 2d 737, 746 (1998) (quoting *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd* 894 F.2d 385 (Fed. Cir. 1990)). "In reviewing the Department's construction of a statute it administers, [the court defers] to the agency's reasonable interpretation of the antidumping statutes if not contrary to an unambiguous legislative intent as expressed in the words of the statute." *Huaiyin*, 322 F.3d at 1374–75 (citing *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881–82 (Fed. Cir. 1998)). Furthermore, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 46–47 (1983)).

DISCUSSION

In the Second Remand Determination, Commerce stated that

> [t]he Department agrees with the Court that the [Cooperative Respondents] were responsive and fully cooperated with the Department in the investigation. The [Cooperative Respondents] had originally requested to be fully examined during the investigation. . . .
>
> To comply with the Court's order, the Department has revised its methodology for calculating a separate rate for the [Cooperative Respondents]. In this regard, we have considered the

> calculated margins of zero percent for the [Fully-Investigated Respondents] as well as the information on the record of the investigation for the [Cooperative Respondents]. For this remand redetermination, and consistent with the [Statement of Administrative Action], the Department has determined the antidumping duty margin for the [Cooperative Respondents] by weight-averaging the zero margins for the [Fully-Investigated Respondents] with the estimated margins determined for the [Cooperative Respondents]. In calculating the estimated margins for the [Cooperative Respondents], we relied, in part, upon information provided by these companies in their Section A questionnaire responses to the Department in which they provided the gross volume and value of their sales to the United States during the period of investigation. We also relied upon corroborated information from the petition, as adjusted to reflect the surrogate values incorporated by the Department in its *Remand Determination*.

Second Remand Determination at 5.

Plaintiffs raise two objections to Commerce's methodology and its choice of record evidence used in calculating the Cooperative Respondents' antidumping duty margin. First, Plaintiffs argue that Commerce's determination was not proper because Commerce's calculations were not "based on the best available information." Pls.' Comments Regarding Commerce's Second Remand Determination ("Pls.' Comments") at 3. Second, Plaintiffs contend that Commerce's normal value calculation "is inflated through unexplained and inappropriate material inputs." *Id.* at 7. The court examines each in turn.

A. *Commerce's selection of "best available information"*

For the Second Remand Determination, Commerce revised its methodology for calculating the Cooperative Respondents' antidumping duty margins. Commerce explained its revised methodology:

> Under [19 U.S.C. § 1677f–1(c)], we establish dumping margins by comparing the normal value ("NV") and export price ("EP") of the subject merchandise sold during the period of investigation. To determine the margins for the [Cooperative Respondents], we first calculated a single NV for the [Cooperative Respondents] by relying upon the corroborated factors of production and values provided by the petitioners in the original petition. However, consistent with the *Remand Determination*, we adjusted certain values to reflect the Turkish values for juice apples, selling, general, and administrative expenses, overhead, and profit.
>
> In the petition, the corroborated EP was based on U.S. price obtained by the petitioners. However, since the [Cooperative Respondents] were requested to provide the volume and value of

> their United States sales of apple juice concentrate during the period of investigation, we were able to use this information as the basis for calculating an EP that more accurately reflected the actual U.S. selling prices of these companies. [Title 19 U.S.C. § 1677a(c)] requires the Department to make adjustments to the EP before it can be compared to the NV to establish a dumping margin. These adjustments typically include packing, movement charges, taxes, etc. Since the average gross unit prices reported by these companies were inclusive of movement and other selling expenses, it was necessary to restate these prices on a net unit price basis. This was accomplished by deducting from these gross unit prices, the weighted-average difference between the Section A gross unit prices of the [Fully-Investigated Respondents]. These adjustments and calculations using the actual data of the [Fully-Investigated Respondents] enabled us to establish the antidumping margins for the separate rate companies as accurately as possible.

Second Remand Determination at 5–6 (citation omitted).

Plaintiffs take issue with Commerce's revised methodology. Specifically, Plaintiffs argue that

> Commerce has calculated an average deduction for EP sales based on verified sales data reported by the [Fully-Investigated Respondents]. However, Commerce has chosen to ignore the verified data from these same respondents in its calculation of normal value. Instead, Commerce has resorted to the unverified assumptions about the factors of production contained in the petition. . . .
>
> On its face, it would appear that the best available source of information for *both* the net U.S. sales price calculation and the normal value calculation would be the information reported by the [Fully-Investigated Respondents] and verified by the Department in its original investigation.

Pls.' Comments at 3–4 (emphasis in original).

In response, the United States ("Government"), on behalf of Commerce, contends that

> [b]ecause Commerce did not possess information specific to the cooperating respondents necessary to adjust the fully-investigated respondents' data and as the record established that the experience of the fully-investigated respondents differed significantly from the experience of the cooperating respondents, Commerce reasonably developed a methodology from which it could better discern the appropriate margin rate.

Def.'s Reply to Pls.' Comments Upon the Second Remand Redetermination ("Def.'s Comments") at 7. In support of its position, the Gov-

ernment cites Commerce's reasoning set out in the Second Remand Determination. *Id.* (citing Second Remand Determination at 7). In the Second Remand Determination, Commerce specifically responded to Plaintiffs' concern that the petition data were not the "best available information" for calculating the Cooperative Respondents' margin:

> Since the record of investigation does not contain any company-specific factors of production data for the [Cooperative Respondents], as best available information, we relied upon the corroborated factors of production from the petition. We did not rely upon the factors of production for the fully-investigated companies because the record of the investigation shows that the factors of production vary significantly from company to company. Thus, there is no basis for assuming that the factors of production for the fully-investigated companies are any more representative of the factors of production of the [Cooperative Respondents] than the information from the petition.

Second Remand Determination at 7–8. The Government argues that Plaintiffs'

> proposed methodology . . . is premised upon speculation that is unsupported by the record. Specifically, [Plaintiffs] assume[] the experience of the fully-investigated respondents mirrors that of the cooperating respondents. The record, however, does not support that assumption. To the contrary, the section A questionnaire responses showed a large difference between the fully-investigated respondents' and the cooperating respondents' average selling price to the United States. Accounting for the same or similar sale terms, the cooperating respondents' average United States section A selling price was [significantly] *lower* than the fully-investigated respondents'.

Def.'s Comments at 7–8 (citing Second Remand Determination at 7) (emphasis in original).

It is worth noting that Plaintiffs do not take issue with either of the findings relied upon by Commerce in reaching its conclusions with respect to its selection of data. That is, Plaintiffs do not dispute (1) that "the factors of production for the fully-investigated companies . . . var[ied] significantly from company to company,"[2] Second Remand Determination at 7, and (2) that "the gross average U.S. selling price of the separate-rate companies is well below the

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[2] An examination of the Section D questionnaire responses for the Fully-Investigated Respondents confirms this finding.

gross average selling[3] price of the fully-investigated companies with the same reported terms of sale . . . ." *Id.* Rather, Plaintiffs rely on the notion that the Fully-Investigated Respondents and the Cooperative Respondents are necessarily indistinguishable.

The court finds that Commerce's determination with respect to "best available information" is proper. Specifically, Commerce has "articulate[d] a 'rational connection between the facts found and the choice made.' " *Rhodia, Inc. v. United States*, 25 CI ___ , ___ , 185 F. Supp. 2d 1343, 1348 (2001) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 168 (1962)). Commerce determined that the "best available information" was the corroborated data from the petition. It explained that the wide variation between the Fully-Investigated Respondents' and the Cooperative Respondents' production data and sales price data indicated that their experiences were not necessarily comparable. Therefore, Commerce further determined that "there is no basis for assuming that the factors of production for the fully-investigated companies are any more representative of the factors of production of the [Cooperative Respondents] than the information in the petition." Second Remand Determination at 7. As there is no dispute with respect to the evidence relied upon by Commerce in reaching its conclusion that the circumstances of the Fully-Investigated Respondents and the Cooperative Respondents were not necessarily the same, and as Plaintiffs make no showing that Commerce's normal value calculation would be more accurate based on the alternative information on the record, the court sustains Commerce's determination in this regard. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)) ("While § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines."). "Commerce's finding that there 'was no basis to add additional factors for [indirect labor]' was supported by substantial evidence. That Plaintiff 'can point to evidence . . . which detracts from . . . [Commerce's] decision and can hypothesize a . . . basis for a contrary determination is neither surprising nor persuasive.' " *Air Prods. & Chems., Inc.*, 22 CIT at 444, 14 F. Supp. 2d at 748 (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984)).

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[3] Specifically, Plaintiffs do not dispute that "[a]ccounting for the same or similar sale terms, the cooperating respondents' average United States Section A selling price was 21 percent *lower* than the fully-investigated respondents'." Def.'s Comments at 8 (citing Second Remand Determination at 7) (emphasis in original). An examination of the Section A questionnaire responses for the Fully-Investigated Respondents and the Cooperative Respondents confirms this finding.

B. *Commerce's normal value calculation*

Plaintiffs argue that "[n]otwithstanding [their first argument], if it is reasonable for Commerce to base its normal value calculation on information from the petition, the calculation must still be revised to remove inappropriate and unexplained material inputs." Pls.' Comments at 7. Plaintiffs point to two examples in support of this argument. First, Plaintiffs state that

> [t]he most arbitrary addition Commerce made to its normal value calculation is the addition of a material input that is merely described as "maintenance/supplies." On its face, it is apparent that an item defined as "maintenance/supplies" is *not* a material input. Instead, maintenance/supply items are properly designated as factory overhead. Thus, in light of the fact that Commerce is already adding a 17.64% factory overhead ratio to its normal value calculation, the inclusion of a factory overhead item in its material inputs is an unlawful double counting.

Pls.' Comments at 8 (citation omitted) (emphasis in original). Plaintiffs then state:

> Likewise, Commerce makes no attempt to explain what material inputs are accounted for in "miscellaneous costs" and "miscellaneous utilities." It is difficult to imagine what could be included in these "miscellaneous" baskets since Commerce has already listed every necessary input for [apple juice concentrate] (and the energy costs) individually.

Id. Plaintiffs conclude that

> it is wholly unreasonable for Commerce to include these extra expenses in its normal value calculation without even attempting to describe the material inputs they are supposed to represent. Their inclusion demonstrates that Commerce has failed to use the best available information in its normal value calculation, and that it has failed to recalculate the Section A margin as accurately as possible.

Id. at 9.

The Government argues:

> Suggesting that the Court delve into the minutia of antidumping rate calculations, [Plaintiffs] contend[ ] elements of the petition data are unexplained. The basis for each of the petition line-items, however, is evident from Commerce's various corroboration memoranda. The petition data is [sic] derived from the records of [an identifiable source]. Thus, the line-items for

> miscellaneous costs and maintenance/supplies, for example, originate from that [source].

Def.'s Comments at 9–10 (citations omitted).

While complaining of Commerce's behavior, Plaintiffs make no effort to prove their case. Rather, they rely on what they claim to be true "[o]n its face" and what "[i]s difficult to imagine." Pls.' Comments at 8. An examination of the record, though, reveals the following concerning the factors of production. First, there are no actual costs for the factors of production of the Cooperative Respondents since they were not asked to answer Section D of the questionnaire. Second, there was a lack of uniformity in the responses of the Fully-Investigated Respondents with respect not only to the value of the factors of production, but also as to the factors of production themselves. For instance, with respect to Apple Juice Concentrate, one respondent listed "pectolytic [enzyme]" as an individual factor while others did not. *See* Conf. R. Doc. 41, Ex. D–1. "Gelatin" was listed as an individual factor by three respondents but not by the others. *Compare* Conf. R. Docs. 42, 43, 45, Ex. D–1 *with* Conf. R. Docs. 40, 41, Ex. D–1. Further, there is no correlation between many of the factors listed in the Section D questionnaire responses of the Fully-Investigated Respondents and those found in the petition. For instance, "pectinex," "plastic liners," "aseptic," "steel drums," "labels," and "PakLab" (labor hours for packing) are all listed individually on the Fully-Investigated Respondents' Section D questionnaire responses but are not individually broken down in the petition. *Compare* Conf. R. Docs. 40, 41, 42, 43 and 45 *with* Pet. for the Imposition of Antidumping Duties: Certain Non-Frozen Apple Juice Concentrate from China, Conf. R. Doc. 1, Ex. 12, Attach. B. Thus, it may be presumed that they are covered by the categories "maintenance/supplies" and "miscellaneous costs." *See* Antidumping Investigation Initiation Checklist of 6/28/99, Conf. App. Def.'s Comments, Ex. 5 at 14. Third, with respect to "miscellaneous utilities," these are identified as being water and waste water treatment in Commerce's memorandum corroborating the petition data ("Corroboration Memorandum"). *See* Mem. from Susan H. Kuhbach to File of 4/6/00 (corroborating petition data), Conf. App. Def.'s Comments, Ex.6 at 3. In constructing normal value, Commerce is charged with the duty to use the "best available information" in the valuation of factors of production. *See* 19 U.S.C. § 1677b(c)(1)(B). In doing so, Commerce must capture all of the costs of production no matter how characterized. In their papers, Plaintiffs merely demonstrate that Commerce, using the petition, denominated the various factors of production differently than was done in the Section D questionnaire responses of the Fully-Investigated Respondents. They have not demonstrated, however, that though the factors of production were denominated differently, they did not capture all of the costs of production. As such, Plaintiffs have offered nothing but speculation to support their claim

that the normal value calculation was flawed. Given the Corroboration Memorandum and Commerce's duty to select from among "best available information," it has "articulate[d] a 'rational connection between the facts found and the choice made.' " *Rhodia, Inc.*, 25 CIT at ___ , 185 F. Supp. 2d at 1348 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Perhaps most importantly, however, had Plaintiffs wished to dispute the items about which it complains, they should have done so in the context of Commerce's proceedings on remand. Having failed to do so, Plaintiffs cannot now dispute these items. *See* Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP to Commerce of 4/23/03 (comments on draft remand and recalculation of Section A rate), Conf. App. Def.'s Comments, Ex. 3. The record shows that Plaintiffs raised other issues as to various factors at the administrative level and that Commerce did respond to them. However, Plaintiffs did not raise the questions they are now asking the court to decide. *See, e.g.*, Second Remand Determination at 8 (agreeing with Plaintiffs that the EP calculation incorrectly relied upon "CEP sales information"); *id.* (agreeing with Plaintiffs that the EP calculation "incorrectly deducts ocean freight from all [Cooperative Respondents'] sales."). By raising these matters for the first time before this court, Plaintiffs are simply too late. "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT ___ , ___ , 155 F. Supp. 2d 801, 805 (2001) (citing *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)); *Unemployment Comp. Comm'n of Alaska*, 329 U.S. at 155 ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792, slip op. 99–112 at 36 (Oct. 20, 1999) ("The court generally takes a strict view of the need to exhaust remedies by raising all arguments."); *see also Fabrique de Fer de Charleroi S.A.*, 25 CIT at ___ n.1, 155 F. Supp. 2d at 805 n.1 (noting court's discretion in application of the exhaustion requirement and listing examples of exceptions fashioned thereto).

CONCLUSION

For the foregoing reasons, Commerce's Second Remand Determination is sustained. Judgment shall enter accordingly.

Slip-Op. 03–152

HYNIX SEMICONDUCTOR, INC., HYNIX SEMICONDUCTOR AMERICA, INC., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR.

Court No. 01–00988

[The Department of Commerce's Final Results of Redetermination Pursuant to Court Remand is remanded for reconsideration in part and sustained in part.]

Dated: November 24, 2003

Willkie Farr & Gallagher LLP (*Carrie L. Owens, James P. Durling, Daniel L. Porter, Robert E. DeFrancesco, Julia K. Eppard*), Washington, D.C., for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Ada E. Bosque*, Trial Attorney, Commercial Litigations Branch, Civil Division, U.S. Department of Justice; *Patrick V. Gallagher, Jr.*, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Hale & Dorr LLP (*Gilbert B. Kaplan, Michael D. Esch, Cris R. Revaz*), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, Judge: The Court reviews the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand (June 6, 2003) (Def. Conf. App. Ex. 1) ("*Remand Results*"), filed with the Court in response to its opinion and order in *Hynix Semiconductor, Inc. v. United States*, 248 F. Supp. 2d 1297 (Ct. Int'l Trade 2003), pursuant to 28 U.S.C. § 1581(c) (2000). The Court directed Commerce to reconsider and further explain its decision to recalculate Plaintiffs' reported research and development ("R&D") costs and its decision to reject Plaintiffs' accounting adjustments for the average useful lives ("AULs") of Plaintiffs' semiconductor equipment in *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 52,097 (Oct. 12, 2001) ("*Final Results*"). *See Hynix Semiconductor, Inc. v. United States*, 248 F. Supp. 2d 1297 ("*Hynix*").[1] Specifically, the Court ordered Commerce to:

1. Reconsider and further explain why the use of Plaintiffs' amortized R&D costs would not reasonably reflect Plaintiffs' actual R&D expenses for *this* period of review, and to identify what dis-

[1] Familiarity with the Court's earlier opinion is presumed.

tortions, if any, would arise in the COP calculation if amortized R&D costs were used; and to reconsider and address Plaintiffs' assertion that all 1996 R&D costs that should have been carried forward into this period of review, if amortized, were fully taken into account prior to or within the Fifth Administrative Review, when Commerce used expensed R&D costs in the cost of production calculation. *Id*. at 1312–1313.

2. Reconsider and further explain why Plaintiffs' deferral of certain R&D costs does not reasonably reflect the R&D costs related to the subject merchandise. *Id*. at 1313.

3. Further explain whether the subject merchandise has benefitted from R&D activities for non-memory products and identify substantial evidence in the record to justify this conclusion. *Id*. at 1317.

4. Explain how the revised average useful lives reported by Plaintiffs are not standard industry practice; how and where in the record Plaintiffs' reported AULs were overstated; and whether the use of Plaintiffs' reported AULs would not reasonably reflect the cost of production. *Id*. at 1319.

Commerce filed the *Remand Results* on June 6, 2003. Plaintiffs filed comments on the Remand Results, and Defendant and Defendant-Intervenor subsequently submitted responses to Plaintiffs' comments.

STANDARD OF REVIEW

The Court will sustain the *Remand Results*, unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). While substantial evidence "is something less than the weight of the evidence," *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted), it consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620 (citations omitted). In fact, "[the] court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984) (alteration in original) (quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 2223 (1st Cir. 1983) (citation omitted)); *see also, Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986),

aff'd, 810 F.2d 1137 (Fed. Cir. 1987) ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.").

DISCUSSION

I. Commerce's Decision to Reject Plaintiffs' Method of Accounting for Research and Development Expenses On Remand is Remanded in Part and Sustained in Part.

The Court ordered Commerce to reconsider its treatment of Plaintiffs' R&D costs in two respects. First, the Court ordered Commerce to reconsider and further explain why the use of Plaintiffs' amortized R&D costs would not reasonably reflect Plaintiffs' actual R&D expenses for *this* period of review, and to identify what distortions, if any, would arise in the cost of production ("COP") calculation if amortized R&D costs were used. *Hynix*, 248 F. Supp. 2d at 1312–1313. The Court ordered Commerce to address in its explanation Plaintiffs' assertion that all R&D costs incurred prior to and including 1996 that should have been carried forward into this period of review through amortization accounting, were fully taken into account prior to or within the Fifth Administrative Review, when Commerce used expensed R&D costs in the cost of production calculation. *Id.* at 1312. The Court also ordered Commerce to reconsider and further explain why Plaintiffs' deferral of certain R&D costs does not reasonably reflect the R&D costs related to the subject merchandise. *Id.* at 1313. Second, the Court ordered Commerce to further explain whether the subject merchandise has benefitted from R&D activities for non-memory products and identify substantial evidence in the record to justify this conclusion. *Id.* at 1317. The two issues will be addressed separately in the discussion below.

1. Commerce's Rejection of Plaintiffs' Amortized R&D Costs and Plaintiffs' Deferral of Certain R&D Costs

A. Rejecting Plaintiffs' Amortized R&D Costs

Commerce offers two hypotheticals in response to the Court's order requesting an explanation for rejecting Plaintiffs' amortized R&D costs. The first hypothetical assumes that Plaintiffs amortized their R&D costs over a three-year period consecutively for seven years, holding the annual R&D expenses constant at $150,000. *Remand Results* at 6. In the second hypothetical, Commerce presents a situation in which Plaintiffs changed accounting methodologies annually from expensing to amortization and back over a six-year period. *Id.* at 7. Commerce asserts that these hypotheticals demonstrate that "switching of methodologies can lead to distortions for

antidumping purposes because the fluctuating costs tend to overstate per unit amounts in one period and understate these amounts in other periods." *Id.*

Commerce also submits possible explanations for why a company may decide to amortize costs in one period of review while deciding to expense in another period of review. *Id* at 3–5. Commerce states that the possible reason for amortization "is that R&D will benefit future years and the sum of each previous year's amortized price forms a whole. [T]he theory behind expensing the full amount of R&D in the year incurred is that there is no certainty that the R&D performed in the current year will benefit future years; thus, being conservative, a company expenses the full amount of its R&D costs in the year incurred." *Id.* at 4.

The Court finds that Commerce's use of hypotheticals, generalizations as to why companies may choose one accounting method over another, and conditional language suggesting possible distortions in antidumping calculations offer conjecture rather than a reasoned explanation founded on substantial evidence for its decision to reject Plaintiffs' amortized costs in this case.

While Commerce is fixated on the undisputed fact that Plaintiffs have changed accounting methods, the Court is concerned with how this change results in distortions to the antidumping calculations, given the particular characteristics of the two accounting methods at issue. Commerce has failed to establish through a reasoned explanation founded on substantial evidence on the record that a change from one permissible accounting method to another necessarily creates a distortion in the cost of production calculation in this period of review for these Plaintiffs under these facts.

Commerce presents the second hypothetical as evidence of the distortions that it claims occurred in this period of review when Plaintiffs changed their accounting methodologies in 1996 from expensing to amortizing. *Remand Results* at 7. However, Commerce's second hypothetical is significantly distinguishable from the facts of this case and, as such, is not helpful. Specifically, Plaintiffs have not changed accounting methodologies annually over the course of the administrative review. *Hynix*, 248 F. Supp. 2d at 1312. Prior to the initiation of administrative reviews, while Plaintiffs operated as Hyundai[2], they historically amortized R&D costs. *Id.* at 1306; *see also, Micron Tech., Inc. v. United States*, 893 F. Supp. 21, 28–29 (Ct. Int'l Trade 1995) ("*Micron I*") (ordering Commerce to use Plaintiffs' reported amortized R&D costs in its calculations of sales at less than

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[2] As noted in the remand, Plaintiffs configuration as a company has changed over the course of the administrative review of the subject merchandise. *Id.* In 1999, Hyundai, the precursor to Plaintiffs, acquired LG Semicon. *Id.* at 1298. During this administrative review, Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America ("Hyundai") became Hynix. *Id.*

fair value of the subject merchandise). Hyundai expensed R&D costs during the First to the Fourth Administrative Reviews. *Remand Results* at 3. LG Semicon, the company that Plaintiffs acquired in 1999, expensed its R&D costs from 1993 to 1997. *Hynix*, 248 F. Supp. 2d at 1306; *Micron Tech., Inc. v. United States*, 23 Ct. Int'l Trade 55, 58–60 (1999). In 1997, during the Fifth Administrative Review, Hyundai returned to amortization, citing business reasons. *Hynix*, 248 F. Supp. 2d at 1306. Plaintiffs have since amortized their R&D costs. *Id.* Given these facts, Commerce's second hypothetical seems to present an exaggerated and unrealistic situation, and does not assist in explaining Commerce's determination in this case. *See Micron Tech., Inc. v. United States*, 23 Ct. Int'l Trade 380, 382 (1999) ("*Micron II*") ("It makes little, if any, business sense to switch accounting systems on an annual basis.").

In the *Remand Results*, Commerce, relying on *Micron II*, repeats its argument that changing accounting methods resulted in an understatement of R&D costs. *Remand Results* at 5. Commerce is concerned with using what it calls the "full amount of R&D" costs in the COP calculations. *Id.* at 4–5. Commerce defines "full amount of R&D" costs to be either the expensed amount for a given year (i.e. 1999) or amortized R&D costs compiled from fractional amounts of R&D amounts carried forward from preceding years in a fractional relationship equaling one (i.e. three-thirds, five-fifths). *Id.* at 3–5. Commerce asserts that the "full amount of R&D" costs can only be achieved through the consistent use of one accounting method, and that a change from expensing to amortizing necessarily results in an understatement of R&D costs. *Id.* at 5, 7.

Commerce has failed to establish through evidence on the record that an understatement of R&D costs has occurred in this period of review by the change of accounting methods, such that Plaintiffs' reported and verified amortized R&D costs do not "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). This is the factual premise that the Court ordered Commerce to establish, if it could, on remand. Furthermore, contrary to Commerce's assertions, this Court is not persuaded that *Micron II* stands for the position that "actual production costs for a period of review" means that COP calculations require either the use of expensed R&D costs or the use of a fractional relationship equaling one if R&D costs are amortized. *Micron II*, 23 Ct. Int'l Trade at 382. Continued reliance on *Micron II*, which the Court has distinguished from the facts of this case, *Hynix*, 248 F. Supp. 2d at 1312, the use of hypotheticals, and general suggestions as to why parties may select one accounting method over another do not establish that Plaintiffs' reported R&D costs would result in distortions to cost of production calculations and do not "reasonably reflect" the costs of production.

Commerce did not address the Court's order to consider and explain whether all R&D costs that should have been carried forward into this period of review from 1996 and before, if amortized, were fully taken into account prior to or within the Fifth Administrative Review, when Commerce used Plaintiffs' expensed R&D costs in its cost of production calculation. *See Hynix*, 248 F. Supp. 2d at 1312. This Court asked Commerce to consider the facts of *these* Plaintiffs for *this* period of review. This Court understands that Commerce is seeking a "whole" (i.e., three-thirds or five-fifths) R&D amount and that its argument emphasizes Plaintiffs' change in accounting methods. However, this Court directs Commerce to provide a reasoned explanation, supported by substantial evidence, if it is able, that distortions in the cost of production calculations for this period of review necessarily arise, where Plaintiffs' R&D costs which were previously accounted for through expensing, are now accounted for through amortization. This Court again orders Commerce to consider and explain whether Plaintiffs' R&D costs prior to the Fifth Administrative Review were accounted for through the expensing of these costs, and if this expensing of R&D costs would leave nothing to carry forward to subsequent review periods. If Plaintiffs' R&D costs were accounted for prior to the Fifth Administrative Review, then the Court orders Commerce to explain why Plaintiff's reported amortized R&D costs in this period of review are not fully inclusive of Plaintiffs' R&D costs.

B. Rejecting Plaintiffs' Indefinite Deferral of Certain R&D expenses

Commerce has provided a reasoned explanation for rejecting Plaintiffs' indefinite deferral of certain R&D expenses. *Remand Results* at 7–9. Despite the fact that Korean GAAP permits the indefinite deferral of certain expenses, and this provision of the Korean GAAP is consistent with the International Accounting Standards No. 9 and the matching principle of accounting, Commerce may select an other methodology if it determines that the accounting method at issue does not accurately reflect the cost of producing the subject merchandise for this period of review. *See Ad Hoc Comm. v. United States*, 25 F. Supp. 2d 352, 363 (Ct. Int'l Trade 1998). In its earlier opinion, the Court noted that the theory of conservativism in accounting "does not supersede the matching principle, but is incorporated into it as a general quality found in all information used in financial statements." *Hynix*, 248 F. Supp. 2d at 1313 (citation omitted). In the *Remand Results*, Commerce provided a reasoned explanation, supported by evidence on the record, demonstrating that its determination did not result in the matching principle being superseded by conservativism. *Remand Results* at 9. Commerce explained that the lack of evidence on the record of Plaintiffs objectively obtaining future revenues from the deferred R&D expenses

made the application of the matching principle in this case inappropriate. *Id.* Commerce could not find evidence in the record that Plaintiffs' deferred R&D costs would produce future revenue within an appreciable amount of time. *Remand Results* at 8. Plaintiffs argue that evidence of future revenue production exists on the record. (Pls.' Cmts. on the Dep't of Commerce's Final Results of Redetermination ("Pls.' Cmts.") at 12 (referring to Resp. of Hyundai Elec. Indus. Co., Ltd., and Hyundai Elec. Am. to the Dep't's Supp. Req. for Information, vol. 2 (Pls.' Conf. App. Ex. 4 at 2–7).) While there is a reference as to when products would produce revenue in terms of the generation of a given product, the Court could not find the timing in terms of months, years, etc., of expected revenue from the R&D cost. (See Resp. of Hyundai Elec. Indus. Co., Ltd., and Hyundai Elec. Am. to the Dep't's Supp. Req. for Information, vol. 2 (Pls.' Conf. App. Ex. 4 at 2–7).)

While Plaintiffs present an alternative explanation to support their indefinite deferral of certain costs, this Court must sustain Commerce's decision to reallocate those costs, noting that Commerce has sufficiently complied with the remand order. *See American Spring Wire*, 590 F. Supp. at 1276. The Court holds that Commerce's explanation for rejecting Plaintiffs' indefinite deferral of certain R&D expenses is supported by substantial evidence and is otherwise in accordance with law. Recalculation of these deferred R&D expenses may be required pursuant to resolution of the issue of Commerce's rejection of Plaintiffs' amortized R&D costs.

2. Commerce's Decision to Reject Product-Specific R&D Costs (Cross-fertilization of R&D) is Remanded

The Court ordered Commerce to explain its conclusion that R&D for the subject merchandise benefitted from R&D activities for non-subject merchandise products ("cross-fertilization") is established through substantial evidence on the record. *Hynix*, 248 F. Supp. 2d at 1317. In the *Remand Results*, Commerce reiterated its theory of the existence of cross-fertilization of R&D in the semiconductor industry and its application of this theory in the administrative reviews of the subject merchandise in this proceeding and in other semiconductor proceedings. *Remand Results* at 10. Commerce again cites to the memorandum of Dr. Jhabvala in support of the cross-fertilization theory. *Id.* Commerce then discusses Plaintiffs' failure to establish on the record that the subject merchandise does not benefit from R&D activities for non-subject merchandise. *Id.* at 10–11. In support of the application of the cross-fertilization theory to the subject merchandise in this case, Commerce points to six projects in Plaintiffs' non-memory R&D lab. *Id.* at 11. Commerce argues that "[o]n its face, it appears that the R&D at Hynix's non-memory lab could provide benefits to the production of Hynix's memory products, as these titles appear to reference memory products." *Id.*

Commerce has not complied with the Court's remand order. Commerce was ordered to point to substantial evidence on the record to establish the existence of cross-fertilization of R&D in this case to justify its decision to reject Plaintiffs' R&D costs reported on a project-basis. *Hynix*, 248 F. Supp. 2d at 1317. In response, Commerce provided the Court with a repetition of its theory based on Dr. Jhabvala's memorandum and speculation that cross-fertilization exists in this case because of the names of six R&D projects in Plaintiffs' non-memory lab. This is not substantial evidence. This Court held that Dr. Jhabvala's memorandum does not provide substantial evidence establishing the existence of cross-fertilization of R&D in this case. *Id.* at 1316. The simple recitation of the titles of Plaintiffs' six projects does not provide substantial evidence to establish the existence of cross-fertilization either. Commerce is concerned that Plaintiffs have "not demonstrated that the R&D for its subject merchandise and non-subject merchandise do not enjoy a mutually beneficial relationship." *Remand Results* at 11. This concern is misplaced. Commerce should instead have focused on finding substantial evidence on the record to support its application of the cross-fertilization theory in this case. *See Micron I*, 893 F. Supp. at 27 ("[T]he factual premise upon which Commerce bases its choice of methodology must be supported by substantial evidence on the record."). The *Remand Results* before the Court do not establish through substantial evidence Commerce's conclusion that the subject merchandise derives benefits from R&D activities involving non-subject merchandise.

This issue is remanded again to Commerce to establish, if it can, through substantial evidence on the record that the six non-subject merchandise projects Commerce mentions or other non-subject merchandise projects provide benefits to the R&D activities of the subject merchandise. In the alternative, Commerce is ordered to recalculate Plaintiffs' R&D costs, excluding R&D costs for non-subject merchandise.

II. Commerce's Decision to Reject the Average Useful Lives ("AULs") for Hynix's Fixed Assets is Remanded.

The Court ordered Commerce to explain the following: (1) how the revised recommendations for Plaintiffs' AUL's provided by an independent appraiser are not standard industry practice; (2) how and where in the record the AULs were overstated; (3) how the use of the revised AULs would not reasonably reflect Plaintiffs' cost of production. *See Hynix*, 248 F. Supp. 2d at 1319. In the *Remand Results*, Commerce repeats its assertion contained in the *Final Results* that Plaintiffs' revised AULs do not reasonably reflect the cost of producing the subject merchandise and the revised AULs were not historically used. *Remand Results* at 13. Commerce also offers

hypotheticals to illustrate "its concerns that Hynix's accounting revisions distort[ ] its production costs during the [period of review] in question." *Id.* at 14–15. Commerce notes that Plaintiffs revised their AULs in 1996 and Commerce accepted this revision. *Id.* at 13. Commerce, however, rejected the revision of AULs for this period of review because the adjustment was "based solely upon the information contained in contained in the appraisers' report," and Plaintiffs only supplied Commerce with a portion of a partially translated report and failed to provide information "to establish the authority or expertise of the independent appraisers."*Id.*

In its earlier opinion, the Court held that Commerce failed to provide reasoned analysis for its decision to reject Plaintiffs revised AULs. *Hynix*, 248 F. Supp. at 1319. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n. v. State Farm*, 463 U.S. 29, 50 (1983). The explanation provided in the *Remand Results*, dependant on hypotheticals and challenges to the qualifications of Plaintiffs' appraisers and the submitted appraisers report falls short of being a reasoned explanation.

First, Commerce does not clearly articulate why it accepted Plaintiffs' 1996 AUL revisions, yet rejected AUL revisions for this period of review. It would appear disingenuous for Commerce to reject the new revisions based on an argument that Plaintiffs are "continually" revising AULs, without articulating a reasoned explanation for distinguishing its acceptance of Plaintiffs' previous revision, particularly when there appears to be nothing in the record to support an inference that Plaintiffs have changed their AULs more often than the documented 1996 revision. Furthermore, Plaintiffs raise an interesting assertion in their comments to the *Remand Results*. Plaintiffs assert that Commerce characterized Plaintiffs' 1996 AUL revision as "represent[ing] only a change in an accounting estimate. It does not constitute a change in depreciation methodology." (Pls. Cmts. at 26 (citing *Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review and Notice of Determination Not to Revoke Order*, 63 Fed. Reg. 50,867, 50,871 (Sept. 23, 1998)).) The Court is unclear whether Commerce characterized the two AUL revisions differently, as Plaintiffs contend, or whether Commerce considered the AUL revisions characteristically the same, and accepted one but not the other.

Defendant argues that Commerce substantively "considered the information that [Plaintiffs] submitted to demonstrate that broader AULs are claimed by other producers, but found such information unconvincing." (Def.'s Resp. to Pls.' Cmts. at 22 (referring to "Hyundai's Resp. to Second Supp. Questionnaire," Ex. SS–14 (Mar. 6,

2001) (Pls.' Conf. App. Ex. 5) (Conf. Corrected App. to Def.'s Resp. To Pls.' Cmts. to the Remand Determination Ex. 5).) Commerce, however, makes no mention of considering the information Plaintiffs introduced to support the appraisers' recommended revision of the AULs. *See Remand Results* at 11–15, 24. It is well settled that "counsel's post hoc rationalization" cannot be used to provide a rationalization for Commerce's determination. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Commerce also challenges the quality of Plaintiffs' appraisers and the adequacy of the report submitted by Plaintiffs as related to the AULs for the first time in the *Remand Results*. *Remand Results* at 13. The Court finds it unusual that the form of the report and the qualification of the appraisers are raised for the first time in the *Remand Results*. *See id.* at 24. This new challenge seems arbitrary, given the fact that Commerce used "a portion of the [same] appraisers' findings in the *Final Results*, [but] it was only with respect to revaluation of assets, which [were] discussed in a separate portion of the appraisers' report." *Id.* at 24 (citing *Final Decision Memorandum* at 15–18 (Def.'s Pub. App. Ex. 7)). Commerce adds that the appraisers' report with respect to the revaluation of assets was "appropriate, given the widely-known economic circumstances that affected the [period of review]." *Id.*

Commerce claims that it was unable to evaluate Plaintiffs' report because only portions of the report were translated, thus Plaintiffs did not comply with 19 C.F.R. § 351.303(e)'s requirement for supplying a fully translate document or obtaining permission from Commerce before submitting a partially translated document. *Id.* at 24; 19 C.F.R. § 351.303(e). However, in the General Instructions accompanying Commerce's letter soliciting information from Plaintiffs for this administrative review, Plaintiffs were instructed to "[p]repare [their] responses in typed form and in English [and to] [i]nclude an original and translated version of all pertinent *portions* of non-English language documents that accompany [the] response, including the financial statements." (Letter from Ronald Trentham, Acting Program Manager, Dep't of Commerce, Int'l Trade Admin., to Lawrence R. Walders, Esq. of 7/18/00 ("Commerce July 18, 2000 Letter") (Pls.' Supp. App. Ex. 8 at 8.) (emphasis added).) Based on these instructions, it is far from obvious, as Commerce contends, that Plaintiffs "must have been fully aware of [the requirement to provide fully translated documents,] as [they were] informed of this requirement in the Department's standard questionnaire." *Remand Results* at 24 (citing General Instructions, attached to Commerce July 18, 2000 Letter (Pls.' Supp. App. Ex. 8 at 8)). At the very least, Commerce's instructions to submit "pertinent portions of non-English language documents" might lead Plaintiffs to believe that their submission would be sufficient. (General Instructions, attached to Com-

merce July 18, 2000 Letter (Pls.' Supp. App. Ex. 8 at 8).) Additionally, Commerce has, in the past, notified respondents that their submissions did not meet 19 C.F.R. § 351.303(e)'s requirement and offered respondents an opportunity to correct their submissions before Commerce would rely on adverse facts available. *See Ocean Harvest Wholesale, Inc. v. United States*, No. 00–05–00231, 2002 Ct. Intl. Trade LEXIS 31, at *15–*16 (Ct. Int'l Trade Mar. 20, 2002). The Court finds that Commerce's attempt to distinguish the use of the portions of the appraisers' report referring to asset valuation based on the "widely-known economic circumstances" of the Korean won fluctuations does not fully provide an explanation as to why the "authority or expertise of the independent appraisers" was established for the asset valuation portion of the report, but not for the revision of the AULs.

Commerce's new challenge of Plaintiffs' appraisers and the appraisal report raises a significantly different issue before the Court. The Court has been under the impression that Commerce based its decision to reject the revisions of the AULs on substantive grounds, through an evaluation of the information contained in the appraisers' report and verified by Commerce. *See Final Decision Memorandum* at 17–18 (Pub. Doc. No. 72) (Def.'s Pub. App. Ex. 7); *Remand Results* at 13–15. However, Commerce has now introduced what appears to be a reason for rejecting Plaintiffs AULs based on form, not substance. As a result, the Court is unable to determine what evidence on the record Commerce evaluated to reach its decision to reject Plaintiffs' AUL revision.

The Court again remands this issue to Commerce to provide a reasoned explanation for rejecting Plaintiffs' revised AULs. This explanation must include: (1) a discussion of why Commerce accepted Plaintiffs' 1996 AUL revision, and whether Commerce characterized the 1996 AUL revision and this period of review's AUL revisions differently; (2) a clarification of what information Commerce evaluated in reaching its determination to reject Plaintiffs' revised AULs; (3) a clarification of whether Commerce did, in fact, consider Plaintiffs' information demonstrating industry-wide AUL ranges, and if not, to do so now; (4) an explanation addressing why Commerce accepted Plaintiffs' appraisers' report for asset revaluation, while rejecting the same report for AUL revision; this explanation should compare the quality of the two sections of the report, including whether all pages of the asset revaluation section were translated and why the qualifications of the appraisers were acceptable for the asset revaluation and not for the AUL section. Should Commerce find it necessary to make recalculations, it is ordered to so do.

CONCLUSION

Upon consideration of the *Remand Results*, Plaintiffs' and Defendant-Intervenor's Comments and Defendant's Response, the

Remand Results are affirmed in part and remanded in part. The Court remands to Commerce for reconsideration and further explanation its decision to reject Plaintiffs' reported R&D costs and Plaintiffs' revised AULs.