Decisions of the United States Court of International Trade

Slip Op. 09–81

FUJIAN LIANFU FORESTRY CO., LTD., A.K.A. FUJIAN WONDER PACIFIC INC., FUZHOU HUAN MEI FURNITURE CO., LTD., AND JIANGSU DARE FURNITURE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 07–00306

[Commerce's final administrative review results remanded.]

Dated: August 10, 2009

Arent Fox (*Nancy A. Noonan*, *Matthew L. Kanna*) for Plaintiffs Fujian Lianfu Forestry Co., Ltd., a.k.a. Fujian Wonder Pacific Inc., Fuzhou Huan Mei Furniture Co., Ltd., and Jiangsu Dare Furniture Co., Ltd.

Steptoe & Johnson (*Thomas J. Trendl*, *Jamie B. Beaber*) for Plaintiffs Starcorp Furniture Co., Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co. Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Brian A. Mizoguchi*), Senior Trial Attorney; and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Rachel Wenthold*), of counsel, for Defendant United States.

King & Spalding LLP (*J. Michael Taylor*, *Elizabeth E. Duall*, *Jeffrey M. Telep*, *Joseph W. Dorn*, *Stephen A. Jones*) for Defendant-Intervenor American Furniture Manufacturers Committee for Legal Trade.

OPINION AND ORDER

Gordon, Judge:

I.
INTRODUCTION

This consolidated action arises from the first administrative review of the antidumping duty order ("Order") covering wooden bedroom furniture from the People's Republic of China ("PRC"). *See Amended Final Results of Antidumping Duty Administrative Review and New*

Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 Fed. Reg. 46,957 (Dep't Commerce Aug. 22, 2007), *as amended*, 72 Fed. Reg. 62,834 (Dep't Commerce Nov. 7, 2007) (amended final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for the 2004–2005 Administrative Review of Wooden Bedroom Furniture from the People's Republic of China, A–570–890 (Aug. 8, 2007), *available at* http://ia.ita.doc.gov/frn/summary/prc/E7-16584-1.pdf (last visited Aug. 10, 2009) ("Issues and Dec. Mem."); Memorandum from Wendy J. Frankel, Director, AD/CVD Enforcement, Office 8, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration (Aug. 8, 2007) (Application of Adverse Facts Available to Starcorp) ("Starcorp AFA Mem.").

Respondents, (1) Fujian Lianfu Forestry Co., Ltd., a.k.a. Fujian Wonder Pacific Inc., Fuzhou Huan Mei Furniture Co., Ltd., and Jiangsu Dare Furniture Co., Ltd., ("Dare Group"); and (2) Starcorp Furniture Co., Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co., Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd., ("Starcorp"); and Petitioners, American Furniture Manufacturers Committee For Legal Trade ("AFMC"), each move for judgment on the agency record pursuant to USCIT Rule 56.2, challenging the *Final Results*. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, the court remands this action to Commerce to reconsider (1) its decision regarding combination rates, and (2) its selection of a total adverse facts available rate of 216.01 percent for Starcorp. The court sustains Commerce's determinations regarding all other issues in this action.

II.
Standard of Review

When reviewing the U.S. Department of Commerce's ("Commerce") final results of an antidumping duty administrative review under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" 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)(i).

"Substantial evidence" is a word formula that connotes reasonableness review. When reviewing a party's substantial evidence challenge, the court assesses whether the agency "determination, finding, or conclusion" is reasonable given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006);

[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

3 Charles H. Koch, Jr., *Administrative Law and Practice*§ 10.3[1] (2d ed. 2008). When reviewing substantial evidence issues from non-market economy proceedings involving Commerce's selection of the "best available" pricing and cost data taken from "surrogate" economies/companies, 19 U.S.C. § 1677b(c), the court's role ."is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) ("*Goldlink*"); *see also Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1269–70 (2006) ("*Dorbest*") (providing comprehensive explanation of substantial evidence standard of review in non-market economy context).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under Chevron." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001).

III.
Discussion

A.
Combination Rates

AFMC challenges Commerce's decision not to assign combination rates[2] to exporters pursuant to 19 C.F.R. § 351.107(b) (2004).[3] Commerce concedes that it did not explain its decision regarding combination rates. Commerce therefore requests a remand to reexamine the record, provide a reasoned explanation, and take any appropriate action consistent with the remand analysis. Accordingly, the court will grant the remand request. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

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[2] When merchandise is exported to the United States by a company that is not a producer of the merchandise, Commerce may establish a "combination rate" for each combination of the exporter and its supplying producer(s). 19 C.F.R. § 351.107(b).

[3] Further citations to the C.F.R. are to the 2004 edition.

B.
Selection of Total Adverse Facts Available Rate for Starcorp[4]

In the *Final Results*, after concluding that Starcorp had not cooperated to the best of its ability (an issue the court addresses in Section C), Commerce assigned a total adverse facts available ("AFA") rate of 216.01 percent to Starcorp. *See* Issues and Dec. Mem., Pub. Doc. 1185 fr. 222.[5] In a total AFA scenario, Commerce is unable to calculate an antidumping rate for an uncooperative respondent because the information required for such a calculation (the respondent's sales and cost information for the subject merchandise during the period of review) is found to be unreliable. As a substitute, Commerce relies on the petition, the final determination from the investigation, prior administrative reviews, or other information placed on the record, 19 U.S.C. § 1677e(b), to select a proxy that should be a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*").

When applying a total AFA rate, Commerce shall, "to the extent practicable," corroborate that rate "from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). The statute does not prescribe any methodology for corroborating a total facts available rate, but the regulations state that corroborate "means that the Secretary will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d) (parroting Uruguay Round Agreements Act Statement of Administrative Action, H.R. Rep. No. 103–316, vol. 1 at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4199). A total facts available proxy rate should therefore have probative value of a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *De Cecco*, 216 F.3d at 1032. As a general matter, Commerce assesses the probative value of secondary information by examining its reliability and relevance. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore,*

[4] Defendant argues that Starcorp failed to contest the lawfulness of the total AFA rate at the administrative level. According to Defendant, the 216.01 percent rate was applied in the *Preliminary Results* to certain of Starcorp's sales, and was applied to other respondents, as adverse facts available, requiring Starcorp to contest the rate in its case brief. The court does not agree. Had Commerce applied the total AFA 216.01 percent rate to Starcorp in the *Preliminary Results*, then Starcorp would have had to have contested the rate at the administrative level. Commerce though did not apply the 216.01 percent rate as a total AFA rate until the *Final Results*. Also, Starcorp did respond to the propriety of the 216.01 percent rate as a total AFA proxy in its rebuttal brief to petitioners' case brief.

[5] Documents in the administrative record are identified as either "Pub. Doc." (for a public document) or "Confid. Doc." (for a confidential document), followed by the document and CD-ROM frame numbers.

and the United Kingdom, 70 Fed. Reg. 54,711, 54,712–13 (Sept. 16, 2005) (final results). For specific secondary information like a total facts available proxy, the corroboration analysis therefore depends on whether the proxy is a reliable and relevant indicator that satisfies the *De Cecco* standard.

What this means is that the total AFA rate should bear a "rational relationship to the respondent, not just the industry on the whole." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 31 CIT ___, ___, Slip Op. 07–131 at 35 (Aug. 28, 2007) (citing *Shandong Huarong Gen. Group Corp.*, 31 CIT ___, ___, Slip Op. 07–04 at 7 (Jan. 9, 2007) ("[T]he law 'requires that an assigned rate relate to the company to which it is assigned.") (internal citation omitted)). Courts "have affirmed Commerce's selection of adverse facts available margins where Commerce corroborated the margin with respect to a respondent's own transaction specific margins, either from the period of review at issue, . . . , or a previous period of review." *PAM, S.p.A. v. United States*, 31 CIT ___, ___ 495 F. Supp. 2d 1360, 1372 (2007) ("*PAM*") (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339–40 (Fed. Cir. 2002) and *Mittal Steel Galati S.A. v. United States*, 31 CIT ___, ___, 491 F. Supp. 2d 1273, 1276 (2007)). Similarly, this Court has found that "Commerce adequately corroborated where it compared the adverse facts available margin selected to the highest previously calculated margin for that respondent." *PAM*, 31 CIT at ___, 495 F. Supp. 2d at 1372 (citations omitted). Conversely, "the courts have remanded for lack of corroboration of adverse facts available rates where Commerce did not establish a link between the respondent and the rate selected." *Id.* at ___, 495 F. Supp. 2d at 1372 (citing, *e.g.*, *De Cecco*, 216 F.3d at 1032; *Gerber Food (Yunnan) Co. v. United States*, 31 CIT___, ___, 491 F. Supp. 2d 1326, 1352 (2007) ("*Gerber Food*"); *World Finer Foods, Inc. v. United States*, 24 CIT 541, 547–48 (2000); *Ferro Union, Inc. v. United States*, 23 CIT 178, 44 F. Supp. 2d 1310 (1999)).

During the administrative review Commerce provided the following rationale for its selection and attempted corroboration of the 216.01 percent rate:

> Generally, it is the Department's practice to select, as AFA, the highest rate in any segment of the proceeding. *See, e.g.*, *Certain Cased Pencils from the People's Republic of China*; Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 70 FR 76,755, 76,761 (December 28, 2005).
>
> The Court of International Trade ("CIT") and the Court of Appeals for the Federal Circuit ("Fed. Cir.") have consistently upheld the Department's practice. *See Rhone Poulenc, Inc. v.*

> *United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) ("Rhone Poulenc") (upholding the Department's presumption that the highest margin was the best information of current margins); . . . .
>
> Corroboration
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> . . .
>
> The AFA rate that [Commerce] is now using was determined in the recently published new shipper review. See Final New Shipper Review 71 FR 70741. In the new shipper review, [Commerce] calculated a company-specific rate, which was above the PRC-wide rate established in the LTFV investigation. Because this new rate is a company-specific calculated rate, we have determined this rate to be reliable.
>
> To assess the relevancy of the new rate used, [Commerce] examined the highest rate from the recently completed new shipper review. We find that the highest rate from the new shipper proceeding of 216.01 percent is relevant to this proceeding because: (1) it is a company-specific calculated rate; and (2) the new shipper review period overlaps this administrative review period by twelve months (i.e., June 24, 2004, through June 30, 2005). Therefore, we have determined the 216.01 percent rate to be relevant for use in this administrative review.
>
> As the adverse margin is both reliable and relevant, we determine that it has probative value. Accordingly, we determine that this rate, meets the corroboration criteria established in section 776(c) that secondary information have probative value. As a result, [Commerce] determines that the margin is corroborated for the purposes of this administrative review and may reasonably be applied to First Wood, Huanghouse, Starcorp, and the PRC-wide entity as AFA.

Preliminary Results, 72 Fed. Reg. at 6213–17; *see also Final Results*, 72 Fed. Reg. at 62,834.

The court cannot sustain this determination because Commerce's attempted corroboration never explains whether the selected proxy is a reliable and relevant indicator of a "reasonably accurate estimate of [Starcorp's] actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *De Cecco*, 216 F.3d at 1032. In short Commerce never ties the rate to Starcorp. In making its selection, Commerce relied on *Rhone Poulenc*, 899 F.2d at 1190, and chose the highest calculated rate from any segment of the proceeding. *Rhone Poulenc* involved Commerce's interpretation and application of the

antidumping law's "best information available" or "BIA" provision that was replaced in 1994 by the "facts available" provision at issue here. Under the old law, when Commerce applied total BIA to a respondent, Commerce applied the highest rate in any segment of the proceeding, presuming that "the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." *Id.* at 1190 (emphasis in original). The old law, however, did not have a corroboration requirement, a difference that the Court of Appeals for the Federal Circuit explained in *De Cecco*:

> It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

De Cecco, 216 F.3d at 1032. Commerce may, of course, begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding, but that selection must then be corroborated, to the extent practicable. To corroborate, Commerce needs to demonstrate how the selected proxy satisfies the *De Cecco* standard.

Commerce's corroboration attempt here did not explain how the selected total AFA rate bears a rational relationship to Starcorp. Commerce's conclusion that the total AFA rate is reliable because it is "a company-specific calculated rate," does not tie the rate to Starcorp. *Preliminary Results*, 72 Fed. Reg. at 6217. Commerce's other conclusion, that the total AFA rate is relevant because it was calculated during a new shipper review that overlapped with the administrative review, is similarly unhelpful in indentifying how the selected rate relates to Starcorp. *Id.* Commerce never ties its selected total AFA rate to Starcorp, and the court never learns whether the proxy meets the *De Cecco* standard.

Starcorp received a calculated rate of 15.78 percent in the investigation. *See Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Dep't Commerce Jan. 4, 2005) (final deter-

mination). Commerce's assignment of a 216.01 percent rate as a total AFA rate, based on some other respondent having received that same rate in a contemporaneous new shipper review, appears to be a potentially "unreasonably high rate[] with no relationship to the respondent's actual dumping margin." *De Cecco*, 216 F.3d at 1032. Therefore, the court must remand this issue to Commerce to reconsider its selection of a total AFA rate for Starcorp. Commerce needs to address the corroboration standards articulated by the Court of Appeals for the Federal Circuit in *De Cecco*. If it is not "practicable" under 19 U.S.C. § 1677e(c) to tie a total AFA proxy to Starcorp, then Commerce needs to explain why. The court is not rejecting the notion that the 216.01 percent rate may be an appropriate total AFA proxy for Starcorp, but to sustain such a rate the court needs a reasonable explanation from Commerce as to why that rate represents a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *De Cecco*, 216 F.3d at 1032.

C.
Application of Adverse Inference to Starcorp

If Commerce finds that a respondent's information is unreliable because the respondent has withheld information that Commerce requests, failed to provide requested information in a timely manner or in the form or manner requested, or significantly impeded the progress of the proceeding, Commerce is required to calculate that respondent's margin using the facts otherwise available. 19 U.S.C. § 1677e(a)(2). Commerce may draw an adverse inference against a respondent in selecting from among the facts otherwise available when it finds that a respondent "has failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b).

Prior to applying an adverse inference Commerce examines a respondent's actions and assesses the extent of the "respondent's abilities, efforts, and cooperation in responding to Commerce's information requests." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "Acting to the best of its ability" requires that a respondent do the maximum that it is able to do. *Id.* Although the standard does not require perfection and recognizes that mistakes occur, it does not condone inattentiveness, carelessness, or inadequate record-keeping. *Id.* Rather, it is the responsibility of a respondent to comply with Commerce's information requests.

Whether a respondent has done the maximum it was able to do to comply with Commerce's requests involves both objective and subjective inquiries. First, Commerce 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." *Id.* at 1382–83. Second, Commerce must make a subjective showing that the respondent not only has failed to promptly produce the 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." *Id.*

Commerce found that because Starcorp withheld and failed repeatedly to timely produce requested data, in the form and manner requested, the record lacked sufficient reliable data with which to analyze and calculate an antidumping duty for Starcorp. Specifically, Commerce determined, in accordance with § 1677e(a)(2), that the use of facts otherwise available was warranted because Starcorp: (1) misreported and withheld information regarding 56 percent of its U.S. sales; (2) failed to provide its factors of production databases in the form and manner requested and within Commerce's established deadlines; (3) withheld reliable financial statements; and (4) provided data that contained numerous other unexplained discrepancies.

Having determined that Starcorp's information was unreliable, Commerce then found that Starcorp failed to cooperate to the best of its ability. Specifically, Commerce found that Starcorp had not acted as a reasonable respondent because its repeated failure to comply with requests for information was unnecessary. In addition, Commerce found that Starcorp concealed its true reporting methodology and selectively reported information by "providing only that information that [Starcorp] deemed relevant and appropriate . . . and withholding, or providing in an untimely and confusing manner, information specifically requested by [Commerce]." Starcorp AFA Mem., Pub. Doc. 1184 fr. 43. As a result, pursuant to 19 U.S.C. § 1677e(b), Commerce concluded that, when selecting from the facts otherwise available for the calculation of Starcorp's margin, an adverse inference was warranted.

Starcorp challenges Commerce's application of an adverse inference to the facts otherwise available in the calculation of Starcorp's dumping margin. Starcorp argues that it went to "extraordinary lengths," and did "everything possible," or "the maximum it was able to do" to cooperate with Commerce, *i.e.*, to meet Commerce's requests for information. Starcorp Mem. in Support of Mot. J. Agency R. 17, 16, 20 ("Starcorp Br."). Starcorp further contends that Commerce caused any gaps in the record because it demanded information in a form and manner not consistent with how Starcorp keeps its books and records, so that an adverse inference should not apply. Starcorp is not challenging Commerce's reliability determination – that the use of facts otherwise available was warranted pursuant to

19 U.S.C. § 1677e(a)(2)(A), (B), and (C). However, to the extent that any findings under § 1677e(a)(2)(A), (B), and (C) also support Commerce's determination to apply an adverse inference, those findings are part of Starcorp's challenge. Starcorp requests a remand to Commerce to apply facts otherwise available without the application of an adverse inference. Starcorp Br. 16, 50.

As is evident from the record leading to Commerce's decision to apply facts otherwise available, Starcorp did not make timely or maximum efforts to comply with Commerce's requests for information, failed to disclose available facts and information, and was not cooperative. Accordingly, Commerce's finding that an adverse inference was warranted in the calculation of Starcorp's dumping margin, because Starcorp did not cooperate to the best of its ability, is supported by the record as a whole and is thus reasonable.

1.
Starcorp's Failures as to its U.S. Sales Data

Commerce determined that Starcorp's failure to report sold but not produced merchandise and its failure to disclose its reporting methodology with respect to such merchandise, until very late in the proceeding, significantly impeded Commerce's ability to comprehend and analyze Starcorp's reported data within the statutory time frame. As a result of this failure, Commerce lacked reliable information from which to calculate a margin, pursuant to 19 U.S.C. § 1677e(a)(2)(A), (B), and (C), for a sizable portion of Starcorp's U.S. sales. Starcorp AFA Mem. at 4–15; Issues and Dec. Mem. at 219–20. Starcorp's failure, in turn, lead Commerce to conclude that Starcorp did not act to the best of its ability to provide Commerce with the requested information. Starcorp AFA Mem. at 8.

Starcorp disagrees with Commerce's conclusions and version of the facts. Starcorp Br. 17. Starcorp maintains that it made its maximum effort to comply with Commerce's requests for data on its U.S. sales.

Commerce's initial questionnaire, issued in July 2006, inquired whether Starcorp had sold but not produced merchandise and instructed respondents to contact Commerce prior to preparing their response if they had such products. Starcorp AFA Mem. at 5. Starcorp responded that it had "produced *all* merchandise under consideration that it sold." Starcorp Section D Resp. at D–3 (Oct. 2, 2006), Pub. Doc. 553 fr. 10 (emphasis added). That statement was not true. After a later inquiry by Commerce about two items that had been described as "unfinished" — Starcorp acknowledged that those two items were sold but not produced during the period. Starcorp Supplemental Section C Questionnaire Resp. at 10 (Dec. 12, 2006), Confid. Doc. 283 fr. 17. This sold but not produced merchandise accounted for 56 percent

of Starcorp's U.S. sales. At that point, however, Starcorp still failed to disclose the full extent to which its reporting was affected by sold but not produced merchandise, including in particular its use of proxy data rather than actual data for the factors of production ("FOPs") for the sold merchandise. Starcorp AFA Mem. at 4, 14–15.

Starcorp thus reported sales quantities rather than actual production quantities, *id.* at 4–8, and devised a method of approximating production data for the items that it did not produce, *id.* at 8–13. It was only through follow-up questionnaires that Commerce discovered that Starcorp had devised its own reporting methodology to substitute proxy data for actual production data, without prior disclosure to or approval by Commerce. *See id.* at 4–13; *see also* Issues and Dec. Mem. at 186–87, 219–20.

Without first informing Commerce, in contravention of Commerce's instructions, Starcorp failed to disclose several other deviations from reporting actual production data. Starcorp AFA Mem. at 5 (listing additional failures to disclose). To illustrate, Starcorp assigned to its sold but not produced merchandise FOPs that were not actual production data. *Id.* Specifically, Starcorp assigned FOPs to that merchandise based upon products that Starcorp had deemed most resembled the items that it had not produced. *Id.*

Commerce concluded that Starcorp had "misled" the agency "by 1) stating that it had reported *production* quantities for all products when in fact it had not, and 2) by not providing any indication that it had merchandise that it had sold and not produced for which it was not reporting actual FOPs." *Id.* at 6 (emphasis in original).

Commerce reasoned that "if Starcorp's failure to disclose sold but not produced merchandise in its first questionnaire had been an oversight . . . [Commerce's] supplemental questionnaire . . . should have alerted Starcorp to the problem . . ." *Id.* at 8. Commerce concluded that Starcorp was "at best, careless or inattentive in preparing its questionnaire responses, and therefore, did not act to the best of its ability to comply with [Commerce's] requests." *Id.*

By withholding and not timely disclosing its sold but not produced items, or its reporting methodology for these items, Commerce found that Starcorp had deprived it of the opportunity to conduct a meaningful analysis of Starcorp's methodology and further precluded any opportunity for Commerce to consider what might have been the most appropriate method for calculating Starcorp's factors of production for merchandise for which actual production data was unavailable. *See* Issues and Dec. Mem. at 219–220.

Given that Starcorp, not Commerce, was the party in control of Starcorp's information, it was incumbent upon Starcorp to fully and clearly disclose to Commerce, on a timely basis, the merchandise that

it had not produced, and its reporting of proxy rather than actual production data. This is especially true given the large percentage of Starcorp's U.S. sales affected by the non-disclosure.

A respondent has "a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce." *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758 (2001). A respondent also is obligated to fully disclose all requested information, and cannot select which facts, from the range of information requested, it will report to Commerce. *See NTN Corp. v. United States*, 28 CIT 108, 117, 120, 306 F. Supp. 2d 1319, 1329, 1332 (2004). Here Commerce's initial and subsequent questionnaires were clear. Moreover, Commerce complied with its obligations under § 1677m(d) by requesting that Starcorp report all its factors of production, including those for merchandise it did not produce, and by continuing to request more detailed information in not just one, but several supplemental questionnaires. 19 U.S.C. § 1677m(d).

As detailed in its 44-page memorandum, Commerce expended considerable time and resources attempting to extract information from Starcorp through the issuance of numerous questionnaires. Starcorp was uncooperative and failed to timely comply with Commerce's requests. *See* Starcorp AFA Mem. at 43; Issues and Dec. Mem. at 180–83, 185–89, 219–21. Specifically, Commerce found that Starcorp failed to disclose the existence of sold but not produced merchandise and did not explain its true reporting methodology (*e.g.*, use of proxy FOP data and sales quantities instead of production quantities) until late in the proceeding, thereby withholding and selectively reporting information that specifically had been requested by Commerce. *See* Starcorp AFA Mem. at 41; Issues and Dec. Mem. at 173–190, 204–222; *Final Results*, 72 Fed. Reg. at 46, 962–63. Ultimately, Commerce concluded that the facts demonstrated that Starcorp had not acted as a reasonable respondent. Starcorp AFA Mem. at 15.

Commerce's determination that Starcorp failed to make maximum efforts necessary to provide Commerce with the requested information is therefore reasonable given the record as a whole. *See Tianjin Mach. Imp. & Exp. Corp.*, 31 CIT at ___, Slip Op. 07–131 (respondent's misrepresentation of true nature of agency relationship warranted application of adverse facts available); *see also Gerber Food*, 31 CIT at ___, 491 F. Supp. 2d at 1334–54 (misrepresenting the nature of 24 transactions warranted the application of adverse facts available).

2.
Starcorp's Failures as to its Factors of Production Databases

Commerce also found that Starcorp failed to cooperate to the best of its ability because it failed to submit reliable factors of production databases. *See* Starcorp AFA Mem. at 15–30; Issues and Dec. Mem. at 178–222. Starcorp appears to suggest that Commerce's finding that Starcorp had failed to timely disclose the actual facts regarding 56 percent of Starcorp's U.S. sales resulted "because Commerce chose to use the very FOP files which Starcorp informed Commerce were inconsistent with how it operated and kept its books and records in the normal course of business, and thus were of limited accuracy." Starcorp Br. 16. Starcorp also suggests that Commerce is to blame for Starcorp's reporting failures because Commerce insisted upon plant-specific data. Starcorp did not provide plant-specific information until near the end of the review process.

Starcorp argues that because it does not keep plant-specific information in the normal course, Commerce should not have required it to submit its data on a plant-specific basis, and that Commerce failed "to take into account [that] Starcorp went to extraordinary lengths to provide Commerce with the requested information. . . ." Starcorp Br. 17. The record, however, supports Commerce's conclusion that Starcorp repeatedly failed to comply with Commerce's requests for plant-specific information, and did not provide Commerce with an adequate explanation as to why Starcorp's combined database, which it claimed to use in the normal course of business, would provide more accurate factor usage information. The record does not support Starcorp's contention that supplying plant-specific databases for factors of production was unduly burdensome for Starcorp.

Commerce's difficulties in obtaining plant-specific FOP databases from Starcorp, and Starcorp's ability to provide such information, were recorded in detail by Commerce. *See* Starcorp AFA Mem. at 15-30; Issues and Dec. Mem. at 178–82. In short, Commerce explained to Starcorp that, in accordance with standard practice, to adequately capture its factor usage information, Commerce needed Starcorp to report its production data from each of its four operating plants. Commerce requested that Starcorp disclose factors of production on a plant-specific basis because plant-specific reporting more accurately captures the differences in production efficiencies at each plant. *See* Issues and Dec. Mem. at 178. Commerce twice sought this information from Starcorp.

Starcorp requested two extensions of time, which were granted in part, but Commerce found Starcorp did not produce the requested plant-specific data. Instead, Starcorp urged acceptance of combined FOP data and a combined financial statement. Starcorp Supplemen-

tal Section D Resp. (Nov. 29, 2006), Confid. Doc. 255 fr. 10. On January 8, 2007, several months after Commerce's initial request, and just 23 days before Commerce's statutory deadline for issuance of Commerce's preliminary results, Starcorp finally produced plant-specific databases. *See* Starcorp AFA Mem. at 19-20; Starcorp Supplemental Section D Questionnaire Resp. at 3–4 (Jan. 8, 2007), Confid. Doc. 347 frs. 11–12. However, the plant-specific databases that Starcorp finally produced contained several unreconciled discrepancies, and were submitted without adequate explanation that would permit Commerce to determine their reliability. *See* Starcorp AFA Mem. at 21–22; Issues and Dec. Mem. at 182, 220. Commerce found that Starcorp's delay in providing plant-specific information deprived Commerce of the opportunity to resolve the evident discrepancies in Starcorp's information. *See* Starcorp AFA Mem. at 21.[6]

Commerce's inability to solicit and consider additional information much past the issuance of its *Preliminary Results* was explained on the record, when Commerce similarly responded to another party's late requests for Commerce to consider new factual information. Issues and Dec. Mem. at 135.[7]

Because Starcorp's plant-specific data were submitted so late in the proceeding, Commerce was never able to attain a complete understanding of Starcorp's submitted information or its reporting meth-

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[6] "[H]ad Starcorp submitted and described these databases in October 2006, as originally requested by [Commerce], or even in November 2006, as subsequently requested . . . , there would have been an opportunity to analyze them and issue supplemental questionnaires soliciting information to clarify or rectify, as appropriate, these inconsistencies. . . . [Because Starcorp] . . . withheld these data until just before the *Preliminary Results*, [Commerce] was again deprived of the opportunity to seek . . . clarification or corrections. . . . ." Starcorp AFA Mem. at 21; *see also* Issues and Dec. Mem. at 182 ("Had Starcorp been more forthcoming in its earlier questionnaire responses and had it responded to [Commerce]'s requests for data in a timely fashion (*i.e.*, in response to the questionnaires soliciting that data), [Commerce] may have had the opportunity to review the information in detail prior to the verification and may have been able to resolve with Starcorp which database represented the most accurate reflection of its factor consumption ratios for its U.S. sales.").

[7] "[Commerce] must set a date certain to close the administrative record in order to meet its obligations for completing any segment of a proceeding. Such deadlines are established to allow [Commerce] sufficient time to analyze the information and facilitate [Commerce's] ability to administer the antidumping law. . . . Upon return from verification, the team had to write verification reports. Following the release of the verification reports, the team had literally hundreds of pages of case and rebuttal briefs to analyze and which to respond. Additionally, based on positions adopted by [Commerce] in response to the arguments in the briefs, the team had to make changes to its margin programs, research new surrogate value information, draft a final factors-of-production memorandum, company-specific analysis memorandums {sic} and the Final Results *Federal Register* notice, and accomplish many other tasks normally associated with finalizing an antidumping case. The ability to set a date certain to close the record is crucial to allow [Commerce] to perform these tasks. To allow respondents to provide any factual information they please at any time would make the administration of the case within the statutory deadlines literally impossible." Issues and Dec. Mem. at 135.

odologies. Commerce was, therefore, unable to determine based on the record evidence which if any of the databases Starcorp submitted were suitable for use in calculating Starcorp's margin. *See* Issues and Dec. Mem. at 182. On the one hand, Commerce found Starcorp's combined database not to be reliable because it does "not capture varying plant-specific production efficiencies . . . ." *Id.* at 181. Commerce also found that Starcorp's contention that its combined database was more accurate because Starcorp purportedly operates as a single facility, Starcorp Br. 18, was not supported by record evidence. Issues and Dec. Mem. at 180 ("[W]e have determined that Starcorp's contentions that the company-wide combined FOP data are necessarily more accurate than the plant-specific FOP data are not supported by record evidence. For example, there appears to be no direct correlation between which legal entity purchases the raw material and which factory actually consumes it, as Starcorp alleges. It is further unclear how this fact would impact the accuracy of the plant-specific but not the combined FOP databases."). On the other hand, with respect to Starcorp's plant-specific databases Commerce found that it was "not able to assess how accurately the variances are captured because Starcorp did not adequately reconcile its combined FOP database to its plant-specific FOP databases." Issues and Dec. Mem. at 182.

Starcorp does not appear to dispute Commerce's finding that there were discrepancies in Starcorp's plant-specific data, but instead blames their existence upon Commerce's requirement that Starcorp report information on a plant-specific basis. Starcorp Br. 19 ("This is particularly true where those consequences (*i.e.*, the potential for inaccuracies or inadvertent omissions in the data) eventually came to pass, at least in part."). Starcorp also reiterates its contentions before Commerce that reporting on a plant-specific basis was unduly burdensome and that Starcorp acted to the best of its ability to report factors of production data. Starcorp Br. 18–20.

Commerce examined below the arguments that Starcorp advances here in its brief, and found that the record did not support Starcorp's contentions. *See* Starcorp AFA Mem. at 23–28; Issues and Dec. Mem. at 180–81. To illustrate, Commerce found that, because Starcorp maintained its production and inventory data in Excel files that track data by plant, Starcorp simply needed to aggregate the data by plant, rather than company-wide and complete the calculations already completed for its combined FOP database on the plant-specific bases. Issues and Dec. Mem. at 181.[8] Commerce further considered that

[8] "First, with respect to the items that Starcorp already tracks on a model-specific basis, the reporting methodology should be the same regardless of whether Starcorp is reporting on a combined- or plant-specific basis. Second, with respect to the allocations involving net consumption, Starcorp itself stated that the total model-specific production quantities and

Starcorp's verification revealed that Starcorp had the ability to report FOP data on a plant-specific basis because it collected gross raw material consumption data on a plant-specific basis. *Id.* Commerce concluded, based upon these and other observations, including its examination of Starcorp's books and records, and discussions with Starcorp personnel, that Starcorp could have timely complied with Commerce's request for plant-specific data because, among other things, Starcorp recorded such data in the ordinary course of business. *Id.* (citing Starcorp Verification Report at 16); *see* Starcorp AFA Mem. at 27–28.

It was Starcorp's repeated and multiple failures to disclose, not Commerce's preference for plant-specific information, that caused Commerce only belatedly to discover Starcorp's use of other than actual production data for these sales. Commerce also found Starcorp similarly uncooperative with respect to other requests for information. With respect to its requests for plant-specific FOP data, Commerce found that Starcorp's data, when ultimately produced, was plagued by discrepancies and distortions. Starcorp AFA Mem. at 28-30. Commerce also found that Starcorp failed to cooperate to the best of its ability because it "failed to provide forthcoming responses in a timely manner, despite [Commerce's] numerous direct requests to do so, and this failure significantly impeded [Commerce's] ability to comprehend and analyze Starcorp's data adequately within the statutory timeframe." *Id.* at 29. When Starcorp eventually did provide some of the requested plant-specific FOP data, "it did so without adequate explanation," such that Commerce could not sufficiently comprehend that data submitted. Issues and Dec. Mem. at 220.

If a respondent requests a review, it should possess complete and accurate records of its factors of production. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1637, 353 F. Supp. 2d 1294, 1299 (2004). In this case, Starcorp requested that it be reviewed, and had participated in the previous segment (the underlying investigation). Starcorp does not have a credible basis to suggest that it was

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the respective BOMs {bill of materials} for each product served as the basis for this calculation. This was, in fact, how it derived the net BOM consumption values for total production. Starcorp also explained at verification that it maintained a production report identifying each piece of merchandise produced, by production plant. From these data, Starcorp compiled the quantities produced for purposes of its combined FOPs on a corporate-wide basis. However, since the production and inventory data are maintained in Excel files that track the data by plant, all Starcorp would have had to {have} done differently was to aggregate the data by plant, rather than company wide and complete the calculations already completed for its combined FOP database on the plant-specific bases. Especially since, as Starcorp stated, regardless of which plant produces the product, the BOM is the same. This does not appear to be so extraordinarily difficult given that the data is maintained in an Excel file, as is Starcorp [sic] own data.". Issues and Dec. Mem. at 181.

surprised by Commerce's requests for factors of production data. Commerce thus reasonably concluded that "because it is apparent from the facts on the record that Starcorp's failure to be responsive was unnecessary, we find that with respect to its reporting of these data, Starcorp failed to cooperate by not acting to the best of its ability."Starcorp AFA Mem. at 30.

3.
Starcorp's Failure as to its Financial Statements

In antidumping proceedings Commerce's ability to confirm the accuracy and completeness of a respondent's submitted data largely rests on the existence of reliable financial statements and record keeping systems that accurately reflect the experience of the entity under review. Starcorp AFA Mem. at 36. Commerce's methodology for calculating normal value in a non-market economy focuses upon the quantity of inputs consumed in the production process, and, thus, Commerce must be able to confirm such consumption rates from the company's financial statements or recording system that accurately reflects the activity under review. *Id.* If Commerce is able to so confirm consumption rates, it will then be able to gain confidence in the overall integrity and reliability of a respondent's data. *Id.* Conversely, a financial system that lacks integrity cannot serve as the basis for confirming the accuracy of a respondent's submitted information. *Id.*

Starcorp did not submit reliable financial statements, providing another basis for Commerce's decision that Starcorp failed to cooperate to the best of its ability and that an adverse inference was warranted in the calculation of Starcorp's dumping margin. *See* Starcorp AFA Mem. at 30–37; Issues and Dec. Mem. at 190, 221. Starcorp ultimately submitted some financial statements. Starcorp AFA Mem. at 30.

Starcorp argues that Commerce should have relied on its combined financial statement because, among other things, its individual statements were constructed solely for tax purposes, whereas the combined statement purportedly "reflect[s] the reality of how Starcorp operates." Starcorp Br. 20–21. Starcorp also argues that because its financial statements were audited, Commerce should have considered them to be in accordance with Chinese GAAP. Starcorp Br. 22–23.

Commerce considered and set forth in detail the record bases for its determination that, contrary to Starcorp's contentions, it had failed to submit reliable financial statements. *See* Starcorp AFA Mem. at 30–37. Commerce found that because Starcorp's submitted informa-

tion could not be tied to any reliable financial statements or a reliable record-keeping system, the data submitted by Starcorp was not reliable. *Id.* at 37.

Commerce also found that Starcorp's combined statement lacked the integrity normally acquired through an independent audit, and thus was not a reliable representation of Starcorp's normal operations. Starcorp AFA Mem. at 31. Commerce found, however, that the fact that the combined statement is only generated on an annual basis, not monthly or even quarterly, undercut any claim that it was of any use in daily operations. Starcorp AFA Mem. at 30–31 & n.70; *see* Starcorp Supplemental Section A Resp. at 30 (Oct. 27, 2006), Confid. Doc. 216 frs. 36–37. Finally, although the combined statement was audited, Commerce was troubled by other factors involving the reliability of the financial statements. Starcorp AFA Mem. at 31.[9]

Commerce had additional reasons to question the reliability of Starcorp's submitted financial statements. *See id.* at 33. Commerce found the inventory values reported in the combined financial statement to be suspect. *Id.*; *see* Starcorp Verification Report (June 11, 2007), Confid. Doc. 408 fr. 16. Commerce was anticipating Starcorp would demonstrate actual inventory values as required by Article 28 of Chinese GAAP. *Id.* Commerce, however, found Starcorp's financial statements to be inconsistent with these standards. *See* Starcorp AFA Mem. at 33 (Item II. Major accounting policies, assumptions and the methodology of preparing the combined financial statements, Sub item 4. Accounting Principles and Basis, states: "Valuation is based on the actual acquiring cost.").

Starcorp argues that Commerce erroneously interpreted Chinese GAAP, and that because Commerce is not an expert in Chinese GAAP, its findings should be discounted. Starcorp Br. 22–23. During verification, Commerce requested that Starcorp provide the relevant provisions of Chinese GAAP to demonstrate its compliance. Starcorp provided a translation of Article 28 of the Chinese GAAP to support its claim. *See* Starcorp Verification Report at 16. Commerce, however, found nothing in the text of GAAP Article 28 that would approve valuation other than "based on the actual acquiring cost" as specified by Article 28, Item II of the Chinese GAAP. *See* Starcorp AFA Mem. at 33.

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[9] The combined statement is "not required to meet any reporting requirements . . . and it does not represent the activities of Starcorp in any public domain as a consolidated financial statement. Furthermore, in this case, where the financial statement is only used for internal management purposes, as Starcorp claims, it is likely that it will not undergo any government oversight or scrutiny. As a result, [Commerce] finds that the combined financial statement lacks the integrity normally acquired through approval of an independent third party subject to jurisdictional oversight." Starcorp AFA Mem. at 31.

Although Starcorp does not appear to maintain that its individual financial statements should be accepted, Commerce, nevertheless, examined those statements and found that they too were unreliable because, among other things, they did not comply with Chinese GAAP. *See* Starcorp AFA Mem. at 34–36.

Under the circumstances, Commerce's finding that Starcorp failed to cooperate to the best of its ability because its financial statements lacked reliability is reasonable given the record as a whole.

4.
Other Failures in Starcorp's Submissions

In addition to the other enumerated deficiencies, Commerce found significant discrepancies between the actual data Starcorp submitted, and the narrative descriptions Starcorp provided to explain its data. *Final Results*, 72 Fed. Reg. at 46,962; Starcorp AFA Mem. at 38–39. For example, although Starcorp stated repeatedly that it does not produce merchandise in sets, it reported quantities for sets. Starcorp AFA Mem. at 39. Starcorp also included the same products in the FOP buildups for more than one CONNUM, when the products included in each CONNUM's FOP buildup should be distinct. *Id.* at 38; *see Final Results*, 72 Fed. Reg. at 46,962. Finally, Commerce found inconsistencies in which products were reported using proxy data. *Id.* Commerce determined that these additional, unexplained incongruities further called the reliability of Starcorp's reported information into question, and supported Commerce's belief that Starcorp had not provided forthcoming and accurate responses to repeated requests for information, nor made a maximum effort to provide Commerce with the information that it had requested.

The record does not support Starcorp's claims that it was unable to produce information and that the discrepancies in information it belatedly produced are excusable because it did not keep such information in the ordinary course but made "extraordinary" efforts to comply with Commerce's requests. Starcorp Br. 17–20.

As noted above and in Commerce's memorandum detailing its reasons for applying an adverse inference, Commerce found Starcorp's claims that reporting information in the manner requested would have been outside the normal course or unduly burdensome to be unsubstantiated and at times contradicted by Starcorp's actions. *See* Starcorp AFA Mem. at 27–28.[10] Commerce found that Starcorp's

[10] "At verification, [Commerce] learned that Starcorp tracks its labor hours by production/function line, at each plant on a daily basis. *See*Starcorp's November 29, 2006 response at page 14 where it states that 'Starcorp does not track standard or actual labor hours required to manufacture each product, but tracks, actual labor hours incurred everyday.' While Starcorp tracks the hours manually, it had to compile these hours regard-

claims also were at odds with its submission of data in a prior proceeding, and its requests for two time extensions for the very purpose of providing such information (after which it still insisted upon submitting combined data). *Id.*at 17-18. Consequently, Commerce concluded that Starcorp's misstatements constituted the basis for Starcorp's failure to be forthcoming, and thus Commerce's finding that Starcorp did not cooperate to the best of its ability. Starcorp AFA Mem. at 40.

In sum, Commerce determined that Starcorp misreported and withheld information regarding a sizable portion of its U.S. sales that would have served as the basis for Commerce's analysis and impacted Commerce's ability to calculate Starcorp's dumping margin. Further, Commerce found that Starcorp failed to provide plant-specific information as Commerce requested, leading to a lack of reliable information regarding factor of production usage from Starcorp. Commerce also determined that Starcorp's information could not be tied to reliable financial statements or reliable record-keeping system, and that the data manifested other significant discrepancies. Based on these findings, Commerce concluded, objectively and subjectively, that Starcorp failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information. Consequently, Commerce's decision to apply an adverse inference in calculating Starcorp's dumping margin was supported by the record evidence and is therefore reasonable.

D.
Selection of India as the Primary Surrogate Country

During the review Commerce selected India as the primary surrogate country. Dare Group asserts a substantial evidence challenge to Commerce's selection of India, arguing it was unreasonable because the difference in per capita Gross National Income ("GNI") between India and China purportedly shows that India is not economically comparable to China. Dare Group Mem. in Support of Mot. J. Agency R. 4–19 ("Dare Group Br."). They also raise a substantial evidence challenge to the reliability of Indian data, arguing that Commerce's choice of India as the primary surrogate country is unreasonable because the data from India are not reliable, Dare Group Br. 14–18, and that better data are available from the Philippines, Dare Group Br. 19–21.

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less of whether it was doing so on a company-wide or plant-specific basis. Moreover, since it tracks the labor hours by production line at each plant, in compiling the combined data, it arguably would have had to first compile it by plant."*See* Starcorp AFA Mem. at 27–28.

In a non-market economy proceeding Commerce values the factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1). An "appropriate" market economy country is one "(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) [a] significant producer[] of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce employs a four-step process to select the primary surrogate country. First, Commerce compiles a list of countries that are at a level of economic development comparable to the country being investigated. *Department of Commerce, Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process*at 2 (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04-1.html. (last visited Aug. 10, 2009) ("*Policy Bulletin*"). Commerce then ascertains which, if any, of those cited countries produce comparable merchandise. *Id.* Next, from the resulting list of countries, Commerce determines, which, if any, of the countries are significant producers of comparable merchandise. Finally, Commerce evaluates the quality, *e.g.*, the reliability and availability, of the data from those countries. *Id.* at 3. "Upon review of these criteria, Commerce chooses the country most appropriate for use as a surrogate for the [review]." *Dorbest*, 30 CIT at 1678-79, 462 F. Supp. 2d at 1270–71.

1.
Economic Comparability

Early in the review Commerce selected what it believed to be five economically comparable countries for consideration as the surrogate country. *See* Surrogate Country Selection Mem. (Jan. 22, 2007), Pub. Doc. 983 frs. 1–11 (citing *Policy Bulletin*). To determine which countries were at comparable levels of economic development to China, Commerce evaluated per capita GNI pursuant to 19 C.F.R. § 351.408(b). Rather than simply selecting countries closest to China in GNI, however, Commerce also considered which countries were likely to offer adequate data sources for valuing the factors of production (anticipating the subsequent steps in its selection process):

> When selecting the list of comparable countries in this case, [Commerce] first ranked the per capita 2004 GNI figures as reported in the World Bank's World Development Report 2006 (the latest version available at that point in the proceeding), disregarding countries designated as NMEs .. . and non-countries since neither would constitute appropriate surrogate countries. From among the remaining group with similar levels of economic development to the PRC, [Commerce] selected five

> countries that have offered, in [Commerce]'s experience, the statistical sources and breadth of information that might make them suitable surrogate countries in the present proceeding. It is these countries that [Commerce] first examined to see if any produced comparable merchandise in significant quantities and offered adequate data upon which to base the review.

Surrogate Country Selection Mem. at 8.

Commerce determined that India, Sri Lanka, Indonesia, Philippines, and Egypt were economically comparable to China. *See* Memorandum from Ron Lorentzen, Director, Office of Policy, to Robert Bolling, Program Manager, AD/CVD Enforcement, Office 8 (Aug. 7, 2006) (listing Surrogate Countries), Pub. Doc. 501 fr. 2. In responding to parties' arguments that India's GNI (USD 620) was too disparate from China's (USD 1290) for India to be considered "economically comparable," Commerce explained:

> While the Department's regulations at 19 CFR 351.408 instruct the Department to consider per capita income when determining economic comparability, neither the statute nor the Department's regulations define the term "economic comparability." As such, the Department does not have a set range within which a country's GNI per capita could be considered economically comparable. In the context of the World Development Report, which contains approximately 180 countries and territories, the difference in GNI per capita between India and the PRC is minimal. As previously stated in the Surrogate Country Selection Memo, "while the difference between the PRC's USD1290 per capita GNI and India's USD620 per capita GNI in 2004 seems large in nominal terms, seen in the context of the spectrum of economic development across the world, the two countries are at a fairly similar stage of development." For example, in the World Development Report the four countries immediately higher than China in per capita GNI were Egypt (which was on the list of potential surrogate countries), Morocco, Columbia [sic], and Bosnia. Their per capita GNIs were higher than China's by USD20, USD230, USD710, and USD750, respectively. India's GNI per capita was only USD670 lower than China's. Therefore, the Department disagrees with the contention that India is no longer economically comparable to the PRC.
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> Using this understanding of economic comparability, the Department currently formulates a nonexhaustive list in each proceeding of about five countries economically comparable to the NME country that, in the Department's experience, are most likely to offer data necessary to conduct the proceeding. In selecting the list of potential surrogate countries, the Department

> does not consider NMEs and non-state territories such as "West Bank/Gaza." The Department also did not include on its list ten countries which the Department believes would not have as much available and reliable data as India (i.e., Syria, Angola, Ivory Coast). Nevertheless, if parties suggest the consideration of another economically comparable country that did not appear on this initial list, the Department will also consider the appropriateness of using that country in its analysis. In this case, the country argued for by Respondents, the Philippines, was already included on the list and was considered equally with the other countries on the list including Indonesia, Sri Lanka, Egypt, and the chosen surrogate country, India.

Issues and Dec. Mem. at 23–29. Although Commerce places primary emphasis on GNI when compiling its list of potential surrogate countries, it apparently does not set a fixed range into which a potential surrogate's per capita GNI must fall. *See id.* at 27. Commerce explained that GNI is a broad indicator spanning over 180 countries and territories, and that "[a]n excessive focus on the exact ranking of each country on the list would only provide an illusion of precision and distort the appropriate purpose of using per capita GNI as the primary indicator, which is to give a general sense of the level of economic development of the country in question." Surrogate Country Selection Mem. at 8.

Dare Group's substantial evidence challenge might be compelling if the standard for economic comparability (either by statute, regulation, administrative policy, or practice) depended on some fixed range of nominal GNI data, but as noted, it apparently does not. Reviewed against the more flexible GNI standard actually applied by Commerce, Commerce's finding (and its accompanying explanation) that India is economically comparable to China is reasonable, and therefore supported by substantial evidence.

One final note about Dare Group's challenge to Commerce's finding of economic comparability. During the administrative review Dare Group sought to utilize updated GNI information from a 2007 World Development Report that became available after Commerce had begun its surrogate country selection process, but before Commerce made its selection. Commerce opted not to consider that information, concluding that it was issued too late for consideration in the surrogate country selection process. In its briefs in this action, Dare Group again relies upon information contained in the 2007 World Development Report in arguing that Commerce's economic comparability findings were unreasonable. Dare Group makes a bare assertion (without citation to any applicable statutory or regulatory provisions

governing Commerce's treatment of record information) that: "the timing of the release of the World Development Report 2007 should not have been an issue . . . ," Dare Group Br. 11–12, and Commerce therefore should have considered that information.

Dare Group is asking the court to consider this information in its analysis of the issue when Commerce expressly declined to do so. Dare Group misunderstands the standard of review. When applying the substantial evidence standard of review, the court does not analyze or weigh evidence in the first instance; those actions reside within the agency's primary jurisdiction. Commerce specifically excluded the 2007 World Development Report from its economic comparability analysis. Given the current posture of the litigation, the court may, at most, review the more limited question of whether Commerce's refusal to consider the 2007 World Development Report data was reasonable (supported by substantial evidence) or in accordance with law. If not, then the appropriate remedy would be a remand to the agency to reconsider its comparability analysis with the benefit of the updated GNI data.

Dare Group, however, other than its bare assertion that Commerce had plenty of time to consider the 2007 World Development Report, makes no effort at identifying the standards governing Commerce's consideration of record information (e.g., statute, regulation, precedent, etc.) against which the court could review the reasonableness of Commerce's action. Dare Group did not therefore provide any developed argumentation why Commerce should have considered the 2007 World Development Report. Thus, the court is not in a position to discuss this issue further. *Cf. United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (internal citations omitted).

2.
Commerce's Selection of Indian, Rather Than Philippine, Data Sources

Commerce selected India over the Philippines as the primary surrogate country for this review because Commerce determined that India provided the best available data valuing the respondent's factors of production. Issues and Dec. Mem. at 34–37. Dare Group does not appear to contest Commerce's finding that Indian data provide greater coverage than Philippine data for valuing inputs specific to the production of wooden bedroom furniture. Instead, Dare Group

argues that Indian data are unreliable, citing reports alleging errors in the classifications and valuation of data from India. Dare Group Br. 14–18.

Data considerations may be a determining factor for surrogate country selection. *See Dorbest*, 30 CIT at 1683–84, 462 F. Supp. 2d at 1274–75. Commerce has relied upon country-wide, publicly-available Indian data in numerous reviews and investigations. *E.g.*, *id.*; *Goldlink*, 30 CIT at 618, 431 F. Supp. 2d at 1326. In this review, because both India and the Philippines proved to be economically comparable to China and significant producers of comparable merchandise, Commerce found data availability and reliability to be the determining factor in its surrogate country selection. *See* Surrogate Country Selection Mem. at 10.

Commerce needed to find factor values for several hundred inputs used in the production of wooden bedroom furniture. Issues and Dec. Mem. at 32 (for Dare Group, 161 factors were valued using India), 36 ("{n}ot including Starcorp, {Commerce} has valued approximately 400 FOPs for the remaining four respondents."). According to Commerce, Indian data provided more comprehensive coverage of, and were more specific to, the inputs used in the production of wooden bedroom furniture. *See* Surrogate Country Selection Mem. at 11.[11] Because more input-specific data were available from India, and because Philippine data were lacking for several inputs, such as electricity and truck freight, Commerce concluded that India provided the best public data for calculating an accurate normal value in this review. Issues and Dec. Mem. at 37. In sum, after comparing the data available from India and the Philippines, Commerce found that India should be selected because the public data available for India provided a greater number of values for inputs specific to the wooden bedroom furniture factors of production that it needed to value in this review. *See* Surrogate Country Selection Mem. at 11; Issues and Dec. Mem. at 34–37.

Dare Group does not contest Commerce's finding that Indian data provided more specific input values, but rather cite several studies in

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[11] Commerce found that Indian data provided twice as many categories from which it could value lumber inputs (which would be among the most significant inputs in a review of wooden furniture), provided a contemporaneous HS data specific to mahogany whereas no contemporaneous data was available from the Philippines, and covered "significant FOPs such as birch lumber and pine lumber" that "are not available in the Philippine HS data." Surrogate Country Selection Mem. at 10–11; Issues and Decision Mem. at 36 (.The HTS {Harmonized Tariff Schedule} numbers that Dare Group submitted {from the Philippines} were . . . general basket categories, not specific to the inputs at all: 4407.10.00 ('coniferous wood'), for pine, and 4407.99.00 ('other woods') for birch . . . of the five Philippine HTS categories for lumber that may be applicable to this review, three of them are broad basket categories. . . {where} there are five Indian HTS categories specific to a particular type of wood . . . {applicable} to this review . . . .).

an effort to impeach the reliability of the Indian data on a systemic level. Dare Group Br. 14–17.[12] Commerce examined these studies during the review, but found that they were not "sufficiently specific to the inputs in this case to qualify as evidence of inaccurate surrogate value data in this review." Issues and Dec. Mem. at 35. For example, Commerce found that the United States Trade Representative ("USTR") study references automotive parts and soybeans, inputs unrelated to furniture production. *Id.*; *see* Dare Group Surrogate Factor Data Submission Ex. 17 at 302-303 (Mar. 15, 2007), Pub. Doc. 1058 frs. 690–91. Similarly, Commerce found that the United Nations study only made general references to India in relation to misclassifications, unsupported by citation, and that the ARTNet study was not specific to any input in the administrative review. Issues and Dec. Mem. at 35; Dare Group Surrogate Factor Data Submission Ex. 13 at 20, Ex. 14 at 25, Ex. 15 at 56. These findings have support in the record.[13]

Commerce examined specific input classification where distortion was alleged by Dare Group. *See* Issues and Dec. Mem. at 35 ("{o}f the 14 Indian surrogate values that Dare Group alleges are distorted, {Commerce} finds that there is credible evidence only to determine that three surrogate values were inaccurate."). Commerce made adjustments to these specific input values where it found evidence of distortions (plywood) or relied upon an alternative source where distortion or unreliability were demonstrated (mirrors). *Id.* at 35–36.

Commerce concluded that isolated incidents of distorted values did not render unreliable the entire Indian Harmonized Tariff Schedule ("HTS"). *Id.* Considering that Commerce needed to value approximately 400 inputs in this review, *id.* at 36, Commerce reasonably concluded that Indian HTS values did not suffer from extensive or systematic errors.

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[12] Dare Group refers to studies alleging misclassification in various countries, including India, but did not specify any affected product category or the subject merchandise of wooden bedroom furniture.

[13] *See* note 6; *see also* Dare Group Factor Values Data Ex. 13 at 20 (discussion paper published by self-described "think tank" alleges problems with classification, supported by the following endnote: "Business Standard 25 August 2005"), Ex. 15 at 20 (references "private sector survey" of "problem areas" which include customs valuation, classification, documents, and technical and sanitary requirements), Ex. 14 at 25 (2006 working paper alleging "several under invoicing situations are *possible*", citing examples like apples, cameras and gum, i.e., not wooden bedroom furniture) (emphasis added), Ex. 17 at 302-303 (The USTR's annual report on international trade barriers notes that "U.S. exporters have reported that India's customs valuation methodologies do not reflect actual transaction values and effectively increase tariff rates," and discusses two products that are unrelated to this review: automotive parts and soybeans).

E.
Valuation of Market Economy Inputs

AFMC challenges Commerce's utilization of four market economy inputs pursuant to 19 C.F.R. § 351.408(c)(1). AFMC Mem. in Support of Mot. J. Agency R. 26–33 ("AFMC Br."). AFMC argues that Commerce failed to explain its methodology for ascertaining the valuation of these inputs and that Commerce did not examine whether the market economy inputs represented a "meaningful" percentage of the volume of factors being valued. AFMC Br. 26–33. AFMC, however, failed to raise these specific issues before Commerce, arguing instead that Commerce should simply apply retroactively a newly announced 33 percent threshold policy for market economy inputs. Petitioners' Case Brief at 30 (June 18, 2007), Non-Pub. R. 416 fr. 41. That argument, in turn, is what Commerce addressed and rejected in the *Final Results*. Issues and Dec. Mem. at 52.

When reviewing Commerce's antidumping determinations, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). By failing to raise the issues involving the four market economy inputs at the administrative level, AFMC deprived Commerce of the opportunity to make "findings, conclusions or determinations" for these issues. As a result, Commerce did not have the opportunity to "apply its expertise" or "compile a record adequate for judicial review." *Id.* AFMC therefore did not properly exhaust its administrative remedies for these issues.

F.
Jayabharatham's Financial Statements

Before the agency AFMC argued that Commerce should include Jayabharatham's financial statement in calculating surrogate financial ratios. Commerce did not agree:

> The Department has determined it is not appropriate to use Jayabharatham's 2005 - 2006 financial statement to calculate surrogate financial ratios for the final results. Although the website www.gnaol.com classifies Jayabharatham as a furniture manufacturer, other information on the record does not support this classification. First, a narrative description of the company

> taken from Jayabharatham's own website, http://www.jayabharathamfurniture.in/aboutus.htm, does not state that it is a manufacturer of any type of product and does not claim that it has any manufacturing facilities. Furthermore, Jayabharatham's profit and loss account lists purchases but does not specify whether it purchased material inputs that could be used in the manufacture of furniture or whether it purchased finished furniture. Moreover, the profit and loss account does not specify that any manufacturing expenses were incurred during the applicable period. Additionally, certain line item designations listed in the left column of Jayabharatham's fixed assets schedule, presumed to be titled "description of assets," are missing or are illegible. Thus, our analysis of Jayabharatham's business structure is impaired. Since the Department has determined that it will not rely on the 2005 – 2006 financial statement due to the concerns outlined above, Petitioners's argument that the Department should use the 2005 – 2006 financial statement to calculate surrogate ratios applicable to Jayabharatham's 2004 – 2005 fiscal year are not relevant. Therefore, we have not used Jayabharatham's financial statement in the calculation of our surrogate financial ratios.

Issues and Dec. Mem. at 95–96. AFMC raises a substantial evidence challenge to this decision, attacking its reasonableness.

When valuing the factors of production in a non-market economy context, Commerce employs financial statements from one or more surrogate companies to calculate comparable ratios for factory overhead, SG&A expenses and profit, so that Commerce can capture indirect expenses and profits not traceable to a specific product or input. 19 U.S.C. § 1677b(c)(1), (3), (4); *see Dorbest*, 30 CIT at 1713–16, 462 F. Supp. 2d at 1300–01. To serve as an adequate proxy for the respondent companies being reviewed, the surrogate companies selected ideally should produce comparable merchandise. *See* 19 C.F.R. § 351.408(c)(4) ("For manufacturing overhead, general expenses, and profit, [Commerce] normally will use . . . information gathered from producers of identical or comparable merchandise."); *see also* 19 U.S.C. § 1677b(c)(1), (4). When an administrative review involves several viable surrogate companies, Commerce averages the financial ratios for factory overhead, SG&A, and profit from the financial statements. Those averages then serve as surrogate values that are applied to the respondents being reviewed in the non-market economy proceeding. Issues and Dec. Mem. at 86.

When averaging multiple financial ratios from several statements, Commerce generally finds that the greatest number of financial

statements yields the most representative data from the relevant manufacturing sector, and thus provides the most accurate portrayal of the economic spectrum. *Id.* at 86 (citing *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 Fed. Reg. 72,139 (Dep't Commerce Dec. 4, 2002) (final results new shipper review) and accompanying issues and decisions memorandum).

In the *Final Results* Commerce used 10 of the 19 statements submitted to calculate the surrogate financial ratios. Issues and Dec. Mem. at 86. Given that Commerce had 10 viable financial statements from which to derive the financial ratios, Commerce was understandably reluctant to also include a suspect Jayabharatham financial statement for a manufacturer that arguably did not manufacture comparable merchandise. *See Dorbest*, 30 CIT at 1720, 462 F. Supp. 2d at 1304 ("Particularly problematic is the fact that other financial statements, without such problems, exist. Under such circumstances, Commerce must justify its decision to include statements which it admits are of questionable reliability and thereby unlikely to constitute the best available information.").

Commerce excluded Jayabharatham because Commerce found that its profit and loss statement, its fixed assets schedule, and the narrative on the company's website indicated that Jayabharatham did not manufacture comparable merchandise. Jayabharatham's profit and loss statement did not provide Commerce with confidence that Jayabharatham is a manufacturer or producer because it "does not specify that any manufacturing expenses were incurred during the applicable period." Issues and Dec. Mem. at 95; AFMC Post-Preliminary Factor Submission Ex. 13 (Mar. 15, 2007), Pub. Doc. 1057 fr. 205. Rather, the expenses listed in Jayabharatham's profit and loss statement (i.e., under "Expenditures"), appeared to Commerce to be administrative costs, rather than manufacturing costs. Although Jayabharatham's profit and loss statement contains line items for "purchases," "administrative expenses," "selling & distribution," and "depreciation," there are no labor costs listed, nor is there a line item for "raw materials consumed" to indicate that Jayabharatham is consuming goods in manufacture. *See id.* Ex. 13 at 205. Further, because its profit and loss statement only lists "purchases," Commerce could not determine whether Jayabharatham's expenses were "used in the manufacture of furniture or whether it purchased [and resold] finished furniture." Issues and Dec. Mem. at 95.

The lack of line items indicative of manufacturing in Jayabharatham's profit and loss statement contrasts with the companies that Commerce did select as surrogates, for which financial statements

and website data indicated furniture manufacturing. *Id.* at 87 (Ahuja), 93-95 (Imperial Furniture). This contrast further justified Commerce's concern about Jayabharatham's status as a manufacturer of wooden furniture.

AFMC argues that because Jayabharatham's balance sheet refers to a loan "on all equipments, Plant & Machinery and other assets acquired by utilsing [sic] the loan," Commerce should have found Jayabharatham to be a producer. *See* AFMC Post-Preliminary Factor Submission at 206; AFMC Br. 35. Defendant persuasively counters that such a reference to machinery, without more, does not demonstrate that Jayabharatham produces furniture, "particularly when the totality of Jayabharatham's financial statements does not indicate furniture manufacturing to have occurred during the period." Def's. Resp. to Pls.' Mots. J. Agency R. 32. Moreover, contrary to AFMC's argument, Commerce's acceptance of Ahuja and Imperial Furniture as surrogates is not inconsistent with Jayabharatham's exclusion. Although both Ahuja's and Imperial's fixed asset schedules describe some assets other than those related to manufacturing, the fixed assets schedules for both companies also include at least some item descriptions consistent with the production of furniture. *See* AFMC Preliminary Factor Submission (Oct. 24, 2006), Pub. Doc. 610 fr. 122 (Ahuja), fr. 199 (Imperial Furniture). Additionally, both Ahuja's and Imperial's profit and loss statements demonstrate they were engaged in manufacturing. *See id.* at 124 (Ahuja), 204–05 (Imperial Furniture).

Finally, Commerce reasonably found that Jayabharatham's company website does not support a finding that it manufactures merchandise. Issues and Dec. Mem. at 95; AFMC Post-Preliminary Factor Submission Ex. 13 at 216–18; AFMC Br. 34 ("The history of Jayabharatham Furniture began in 1937. It was in this year that Thiru. Elumalai commenced designing and manufacturing of {sic} cane furniture . . . ."). The quote relied upon by AFMC only demonstrates that the founder of Jayabharatham began manufacturing cane furniture in 1937, it does not claim that Jayabharatham during the review period manufactured wooden furniture (*i.e.*, comparable merchandise). AFMC's other quotations from Jayabharatham's website also do not provide definitive support that Jayabharatham actually manufactures furniture:

> A dramatic change occurred in this period. Wood became the most preferred material in the making for furniture. It was a welcome change. With wood the whole process became advantageous. Manufacture of furniture's {sic} could now be mechanized. Mechanized production increased productivity.

> A relatively easier manufacturing process could now be put to use to mass produce furniture's {sic} that would cater to the needs and demands of Chennai's Population {sic} exquisitely {sic} designed furniture's {sic} were no longer out of the reach of the city's populace.

AFMC Post-Preliminary Factor Submission at 216–17; AFMC Br. 34. These quotes only suggest that furniture is manufactured from wood not that Jayabharatham manufactured subject merchandise during the review period. Accordingly, Commerce's finding that Jayabharatham's website "does not state that it is a manufacturer of any type of product and does not claim that it has any manufacturing facilities," is supported by record evidence. Issues and Dec. Mem. at 95. For all of the foregoing reasons, Commerce's decision not to use financial statements from Jayabharatham was reasonable.

G.
Calculation of Dare Group's Entered Value

Dare Group challenges Commerce's calculation of Dare Group's assessment rate by not accepting its reported invoice prices for certain sales. Dare Group Br. 27. Additionally, for other sales, Dare Group argues that Commerce erred by refusing to accept its reported values, which Dare Group claims are more accurate than Commerce's calculation of entered value using its standard margin calculation program. Dare Group Br. 27–28.

As is prescribed by Commerce's regulation, Commerce "normally will calculate an assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs purposes . . . ." 19 C.F.R. § 351.212(b)(1). Commerce's practice pursuant to this regulation is to use a respondent's reported entered value to calculate an *ad valorem* assessment rate for sales associated with a particular importer, where a respondent reports the actual entered value for all sales associated with that importer. Issues and Dec. Mem. at 133; *see Polyethylene Retail Carrier Bags from the People's Republic of China*, 72 Fed. Reg. 51,588, 51,954 (Dep't Commerce Sept. 10, 2007) (prelim. results); *Certain Steel Concrete Reinforcing Bars from Turkey*, 73 Fed. Reg. 24,535, 24,540 (Dep't Commerce May 5, 2008) (prelim. results). However, where the respondent does not report the actual entered value for all sales associated with an importer and/or the entered value is unknown, Commerce uses its standard margin calculation program to calculate a per-unit assessment rate for all sales associated with that importer. *Id.*

Commerce found that Dare Group did not report the actual entered value for "all" of its sales and had instead reported commercial

invoice or calculated estimates. *Id.* Commerce did not accept reported invoice or estimated values because they were not the actual entered values submitted on customs forms. Issues and Dec. Mem. at 133. Because Dare Group did not report the actual entered values for any of its sales, Commerce, consistent with its regulation and practice, utilized its standard margin calculation program. *Id.*

Invoice values represent the reported purchase price of the subject merchandise or the fair market value, whereas, in contrast, the entered value is the invoice or commercial value less freight, insurance premium costs, and other applicable non-dutiable charges. *Koyo Seiko Co. v. United States*, 24 CIT 364, 372, 110 F. Supp. 2d 934, 941 (2000), *aff'd* 258 F.3d 1340 (Fed. Cir. 2001). In other words, the two values are not equal; the entered value is the adjusted commercial price. Given that Commerce's regulation, 19 C.F.R. § 351.212(b), requires Commerce to use actual entered values for purposes of its assessment calculations, Commerce acted in accordance with the regulation by not accepting commercial invoice values in place of actual entered values.

Dare Group's claim that its method is more accurate is not the issue upon which Commerce's decision turned, rather it was the absence of actual entered value data. In any event, Dare Group's claim does not appear to be supported by the record. Dare Group stated that it could not report within the time allotted because it did not maintain the requested information in a computerized database. *See* Dare Group's Supplemental Resp. (Jan. 22, 2007), Confid. Doc. 362 fr. 18. Dare Group's argument that Commerce should have accepted Dare Group's estimate would in effect hold Commerce to undertake the task that Dare Group itself declined to perform. It was Dare Group's burden in the first instance to comply with Commerce's request for information. Dare Group knew or should have known that, pursuant to 19 C.F.R. § 351.212(b), it would have to produce actual entered value data or Commerce would utilize its margin calculation program in the absence of such data.

Commerce's regulation and its practice require that it employ the actual entered value in order to calculate accurate assessment rates. 19 C.F.R. § 351.212(b). Commerce acted in accordance with its regulation when it did not accept either invoice values or other values derived by Dare Group, in place of actual entered values that Dare Group reported to U.S. Customs and Border Protection. *NSK Ltd. v. United States*, 27 CIT 56, 107–78, 245 F. Supp. 2d 1335, 1377 (2003) (citing *Koyo Seiko*, 24 CIT at 372–73, 110 F. Supp. 2d at 941–42 (2000) (finding that neither 19 U.S.C. § 1675(a) nor its legislative history

provides an "unambiguously express intent" regarding the issue of whether Commerce could use entered value rather than sales value in its calculation of the assessment rate)).

H.
Zeroing

Starcorp and Dare Group challenge Commerce's practice of "zeroing" negative dumping margins when computing antidumping duties during an administrative review. Starcorp Br. 36-46. The issue of zeroing has been frequently litigated in this Court and the Federal Circuit; in each instance the courts have sustained the practice as a reasonable application of the antidumping statute under the second step of *Chevron*. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) ("*Corus Staal I*"), *cert. denied*, 546 U.S. 1089 (2006); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 976 (2004); *Dorbest*, 30 CIT at 1734–36, 462 F. Supp. 2d at 1315–17.

Commerce has ended the practice of zeroing for investigations, but continues the practice for administrative reviews. The antidumping statute defines the term "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). After *Timken*, for both investigations and reviews, Commerce interpreted the word "exceeds" to mean that only positive values fall within the definition of "dumping margin," and that only positive values are to be included in the computation of the "weighted average dumping margin" defined by 19 U.S.C. § 1677(35)(B). *Timken*, 354 F.3d at 1341. Commerce, however, ended the practice of zeroing negative margins in antidumping investigations effective February 22, 2007. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dept. Commerce Dec. 27, 2006) (final modification) ("*Final Modification*") (implementing *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (WTO App. Body Apr. 18, 2006)).

Commerce though continues to zero negative margins for administrative reviews. In the *Final Results* and in response to Dare Group's and Starcorp's arguments that investigations and administrative reviews must be treated uniformly, Commerce explained that "outside the context of antidumping investigations involving average-to-average comparisons, [Commerce] interprets this statutory definition [§ 1677(35)(A)] to mean that a dumping margin exists only when

normal value is greater than export or constructed export price." Issues and Dec. Mem. at 54. Commerce's justification for the disparate treatment now depends on the difference between investigations, in which Commerce calculates margins using average-to-average comparisons, 19 U.S.C. § 1677f-1(d)(1)(A), and administrative reviews, in which Commerce calculates margins on an entry-by-entry basis, 19 U.S.C. § 1675(a)(2)(A).

Dare Group and Starcorp argue that Commerce's new gap-filling position on zeroing violates the Federal Circuit's decision in *Corus Staal I*, which they believe requires § 1677(35) to be applied uniformly in both investigations and administrative reviews. Starcorp Br. 40. The court does not agree. In *Corus Staal I* the Federal Circuit upheld as a permissible construction of the statute Commerce's practice of zeroing in both investigations and reviews, notwithstanding arguments that investigations involve average-to-average comparisons and reviews involve entry-by-entry comparisons. *Corus Staal I*, 395 F.3d at 1347. The Federal Circuit upheld Commerce's uniform treatment of § 1677(35) for investigations and reviews not because the statute required such treatment (*Chevron* step 1), but because it represented a permissible construction of the statute (*Chevron* step 2). Although there is some irony in Commerce now adopting an interpretation of the statute that it previously rejected in the administrative proceedings underlying *Corus Staal I*, such irony alone does not make Commerce's new approach unlawful. *Chevron* contemplates administrative flexibility in the interpretation of silent or ambiguous statutes; *Chevron* acknowledges that a statute like the antidumping law may contain more than one permissible construction on a particular issue. Here, Commerce has not arbitrarily shifted its interpretation of the statute without reason. It has, instead, exercised its gap-filling authority to conform the administration of the dumping laws with U.S. international obligations. *Final Modification*, 71 Fed. Reg. 77,722. That exercise has resulted in a permissible construction of the statute that does not violate *Corus Staal I*. Accordingly, Commerce's practice of zeroing negative margins in the *Final Results* is sustained.

IV.
Conclusion

Commerce's request for a voluntary remand regarding the treatment of combination rates is granted. The court also remands to Commerce for reconsideration the issue of Commerce's selection of Starcorp's total AFA proxy. The court sustains Commerce's determinations for all remaining issues contested in the motions for judgment on the agency record. Accordingly, it is hereby

ORDERED that Defendant's request to remand this action to Commerce to reconsider its decision regarding combination rates is granted; it is further

ORDERED that this action is remanded to Commerce to reconsider its selection of a total AFA rate of 216.01 percent for Starcorp; it is further

ORDERED that the Motions for Judgment on the Agency Record are denied with respect to all other issues and that Commerce's determinations as to those other issues are sustained; it is further

ORDERED that Commerce is to file the remand results on or before October 7, 2009; and it is further

ORDERED that the parties file a proposed scheduling order with page limits for comments on the remand results, if applicable, not later than 14 days after Commerce files the remand results with the court.

Dated: August 10, 2009
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 09–82

NMB SINGAPORE LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and the TIMKEN COMPANY, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 06–00182

ORDER AND JUDGMENT

Upon consideration of the Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), filed pursuant to this court's Order, dated April 20, 2009, remanding-in-part this case to Commerce for further proceedings consistent with the opinion of the Court of Appeals for the Federal Circuit ("CAFC") in *NMB Singapore Ltd. v. United States*, 557 F.3d 1316 (Fed. Cir. 2009), and the corresponding mandate issued on April 13, 2009; Plaintiffs having notified the court via letter that they do not intend to file any comments with respect to the Remand Results, the court having reviewed the Remand Results and all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED ADJUDGED AND DECREED that the Remand Results are consistent with the opinion and corresponding mandate issued by the CAFC; and it is further

ORDERED that the Remand Results are AFFIRMED.

Dated: August 10, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 09–83

QINGDAO TAIFA GROUP CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and GLEASON INDUSTRIAL PRODUCTS, INC. and PRECISION PRODUCTS, INC., Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 08-00245
Public Version

[Plaintiff's motion for judgment on the agency record granted in part; remanded to Department of Commerce regarding government control of plaintiff.]

Dated: August 11, 2009

Adduci, Mastriani & Schaumberg, LLP (*Louis S. Mastriani* and *William C. Sjoberg*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Irene H. Chen*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Crowell & Moring LLP (*Matthew P. Jaffe* and *Alexander H. Schaefer*) for the defendant-intervenors.

OPINION

Restani, Chief Judge:

INTRODUCTION

This matter is before the court on plaintiff Qingdao Taifa Group Co., Ltd.'s ("Taifa") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Taifa, a Chinese manufacturer of hand trucks and parts thereof, challenges the final determination of the United States Department of Commerce ("Commerce") in the administrative review of the antidumping duty order on hand trucks and certain parts thereof from the People's Republic of China ("PRC"), which assigned Taifa the PRC-wide dumping margin based on total adverse facts available ("AFA"). *See Hand Trucks and Certain Parts Thereof from the People's Republic of China; Final Results of 2005–2006 Administrative Review*, 73 Fed. Reg. 43,684 (Dep't Com-

merce July 28, 2008) ("*Final Results*"). For the reasons stated below, the court sustains Commerce's final determination in part and rejects it in part, and this matter will be remanded to the Department of Commerce to consider the appropriate AFA margin.

BACKGROUND

In 2004, Commerce issued an antidumping duty order on hand trucks and certain parts thereof from the PRC. *See Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China*, 69 Fed. Reg. 70,122 (Dep't Commerce Dec. 2, 2004) ("*AD Order*"). The *AD Order* applies to "assembled or unassembled" hand trucks and defines a "complete or fully assembled hand truck" as having "at least two wheels" but excludes "wheels and tires used in the manufacture of hand trucks." *Id.* at 70,122. Commerce determined that Taifa's individual weighted-average dumping margin was 26.49%, as opposed to the PRC-wide rate of 383.60%. *Id.* at 70,123. Commerce received requests for administrative reviews of the *AD Order* for Taifa and other exporters for the period December 1, 2005, through November 30, 2006, and Commerce initiated a review in February 2007. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 Fed. Reg. 5005 (Dep't Commerce Feb. 2, 2007).

Taifa, the sole mandatory respondent, *Hand Trucks and Certain Parts Thereof from the People's Republic of China; Preliminary Results, Partial Intent to Rescind and Partial Rescission of the 2005–06 Administrative Review*, 73 Fed. Reg. 2214, 2214 (Dep't Commerce Jan. 14, 2008) ("*Preliminary Results*"), submitted a separate rate certification and responses to Commerce's questionnaires stating that the government did not control or own any interest in Taifa during the period of review ("POR") (*see* App. of Docs. in Supp. of Pl.'s Mem. of P. & A. in Supp. of Pl.'s Mot. for J. on the Agency R. ("Pl.'s App.") Tab 1; Def.'s App. 13, 64; Def.-Intervenors' App. to Mem. of P. & A. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def.-Intervenors' App.") Tab 3, at 2–3). Domestic producers Gleason Industrial Products, Inc. ("Gleason") and Precision Products, Inc. ("Precision"), defendant-intervenors here, submitted documents indicating that the Yinzhu Town Government owned a majority interest in Taifa. (*See* Def.-Intervenors' App. Tab 6.) Taifa also stated in its questionnaire responses that it did not sell wheels with its hand trucks and therefore did not report any factors of production ("FOP") data for wheels. (*See* Def.'s App. 41, 56.) Commerce's *Preliminary Results*, issued in January 2008, applied an individual weighted-average dumping margin of

3.82% for Taifa, while the PRC-wide rate was 383.60%. *Preliminary Results*, 73 Fed. Reg. at 2222.

Commerce conducted verification of Taifa from April 15 to April 18, 2008, and issued its verification report on June 12, 2008. (Def.'s App. 81.) According to the report, Commerce found production notices for subject merchandise that referenced wheels, and a Taifa manager admitted that Taifa sold hand trucks and wheels together but did not attach the wheels to avoid duties under the *AD Order*. (*Id.* at 93.) The report also stated that although Taifa officials said that they had destroyed Taifa's production notices and factory-out slips, Commerce found the documents, and that Taifa employees attempted to remove and hide pages from the current production subledger. (*Id.* at 91–93.) Finally, the report stated that some documents indicated that a collective called Qingdao Taifa Group Co. owned a majority of Taifa's shares, but other documents indicated that the Yinzhu Town Government owned those shares, and that documents reflecting a 2003 transfer of the majority interest to other individuals were not registered. (*Id.* at 83–87.) Commerce found no other evidence of government control. (*Id.* at 88.)

In two memoranda issued on July 14, 2008, Commerce concluded that it would apply total AFA based on the information in the verification report. *See Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Hand Trucks and Certain Parts Thereof from the People's Republic of China*, A–570–891, POR 12/01/2005–11/30/2006, at 6 (July 14, 2008) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–17252–1.pdf; *Application of Adverse Facts Available for Qingdao Taifa Group Import and Export Co., Ltd. and Qingdao Taifa Group Co., Ltd. in the Review of Hand Trucks and Certain Parts Thereof From the People's Republic of China*, A–570–891, POR 12/01/05–11/30/06, at 11 (July 14, 2008) ("*AFA Memorandum*"), *available at* Pl.'s App. Tab 6. In its July 28, 2008, *Final Results*, Commerce determined that Taifa failed to cooperate with the review, applied total AFA, denied Taifa a separate rate, and assigned Taifa the PRC-wide margin of 383.60%. *Final Results*, 73 Fed. Reg. at 43,686–88. Taifa now challenges the *Final Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

II.
Exhaustion of administrative remedies

Preliminarily, the Government argues that the court should not consider Taifa's claims because Taifa failed to exhaust its administrative remedies. (Def.'s Resp. to Taifa's Mot. for J. Upon the Administrative R. 10–12.) The Government contends that Taifa should have addressed the application of AFA and the PRC-wide rate before Commerce by filing a case brief, explaining its actions during verification, commenting on the verification report, or responding to Gleason's case brief, which argued that Commerce should apply total AFA based on Taifa's actions during verification. (*Id.*) The Government's argument is unavailing.

The court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). To exhaust its administrative remedies, a party usually must submit a case brief "present-[ing] all arguments that continue in [its] view to be relevant to [Commerce's] final determination or final results." 19 C.F.R. § 351.309(c)(2); *see Nakornthai Strip Mill Pub. Co. v. United States*, 558 F. Supp. 2d 1319, 1329 (CIT 2008). A party, however, may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level. *LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (CIT 1997).

Here, the January 2008 *Preliminary Results* applied a low, separate rate of 3.82% for Taifa and did not rely on AFA. *See Preliminary Results*, 73 Fed. Reg. at 2219–22. Case briefs were due June 20, 2008, and rebuttal briefs were due June 25, 2008. *See Final Results*, 73 Fed. Reg. at 43,685. Taifa did not file a case brief or rebuttal brief. *See id.* Commerce first indicated that it would apply total AFA in the *Issues and Decision Memorandum* and *AFA Memorandum* issued on July 14, 2008, and then applied total AFA and assigned Taifa the PRC-wide rate of 383.60% in the *Final Results* issued later that month.[1] *See id.* at 43,688; *Issues and Decision Memorandum* at 6; *AFA Memorandum* at 11. Because the *Preliminary Results* were favorable to Taifa, and Commerce did not address the AFA issue until after the deadline for case briefs or the PRC-wide rate issue until the *Final Results*, Taifa did not have a fair opportunity to challenge these issues

[1] Although Commerce's verification report was issued before the deadline for case briefs, the report did not conclude that Commerce would apply AFA, deny Taifa's separate rate status, or assign Taifa the PRC-wide rate.

at the administrative level. *See Saha Thai Steel Pipe Co. v. United States*, 828 F. Supp. 57, 59–60 (CIT 1993) (holding that a respondent was not required to file a case brief or rebuttal brief to exhaust its administrative remedies where it had "received all the remedy it sought from the preliminary determination, *i.e.*, it received a very low company-specific duty assessment," but Commerce assigned a higher country-wide rate in the final determination). Taifa is not required to predict that Commerce would accept other parties' arguments and change its decision. The exhaustion doctrine therefore does not preclude the court's review of Taifa's claims.

III.
Application of AFA

Taifa claims that Commerce's application of AFA based on Taifa's decision not to report FOP or sales data for wheels and Taifa's conduct at verification was not supported by substantial evidence. (Mem. of P. & A. in Supp. of Pl.'s Mot. for J. on the Agency R. ("Pl.'s Br.") 12–18.) This claim lacks merit.

Commerce uses "facts otherwise available" in its determination if:

> (1) necessary information is not available on the record, or
>
> (2) an interested party . . .
>
> (A) withholds information that [Commerce has requested],
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, . . .
>
> (C) significantly impedes a proceeding . . . , or
>
> (D) provides such information but the information cannot be verified.

19 U.S.C. § 1677e(a). 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," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" in its determination, *id.* § 1677e(b), and disregard information that the party submitted,[2] *see id.*§ 1677m(d), (e)(4). Commerce may draw an adverse inference if it makes

[2] If Commerce "determines that a response to a request for information . . . does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits" for the review before disregarding the party's responses and relying on AFA. *Id.* § 1677m(d). Taifa does not argue that Commerce gave insufficient notice about the deficiencies in Taifa's responses or an inadequate opportunity to remedy or explain the deficiencies.

> [(1)] 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[and (2)] a subjective showing that the respondent under investigation not only has failed to promptly produce the 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.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003).

A.
Application of AFA based on Taifa's failure to report information about wheels

Taifa argues that because the *AD Order* explicitly excludes "wheels and tires used in the manufacture of hand trucks," *AD Order*, 69 Fed. Reg. at 70,122, Commerce's decision to apply AFA because Taifa did not report information about hand truck wheels essentially punishes Taifa for failing to provide information about non-subject merchandise (Pl.'s Br. 12–13). This argument fails because the *AD Order* encompasses "assembled or unassembled" hand trucks and defines a "complete . . . hand truck" as having wheels. *AD Order*, 69 Fed. Reg. at 70,122. Hand trucks that Taifa shipped with wheels to be attached later would constitute unassembled hand trucks, which are subject merchandise under the *AD Order*. Wheels that need only be attached to an otherwise complete hand truck shipped with the wheels are not separate wheels used in the manufacturing process for hand trucks. Accordingly, Taifa was required to report information about such wheels.

Although Taifa stated in its questionnaire responses that it did not sell wheels with hand trucks and did not report any FOP data for wheels, Commerce found evidence that Taifa sold and shipped unattached wheels with hand trucks. *See AFA Memorandum* at 7–9. At verification, Commerce "collected production notices that were identifiable as being for models that were subject to the [*AD Order*], and made reference to wheels." (Def.'s App. 93.) A Taifa manager admitted that "Taifa did not attach the wheels to the hand trucks sold to the United States in order to avoid having to pay U.S. dumping duties on the wheels under the [*AD Order*]." (*Id.*) Another Taifa manager stated that when customers order hand trucks with wheels, they purchase

"wheels from another supplier or from Taifa and that the wheels were not attached to the hand trucks but were loaded in the shipping container with the hand trucks." (*Id.* at 94.)

Accordingly, Commerce properly relied upon "facts otherwise available" because FOP information for wheels necessary to calculate normal value, U.S. price, and an accurate dumping margin was not available on the record, and Taifa withheld requested information about shipments of wheels with hand trucks.[3] *See* 19 U.S.C. § 1677e(a)(1), (2)(A). Although by itself, this conduct might not be sufficient to draw an adverse inference in selecting a final rate, it is part of a course of conduct as discussed *infra*.[4]

B.
Application of AFA based on Taifa's conduct at verification

Taifa also challenges Commerce's decision to apply AFA based on Taifa's conduct during verification. (Pl.'s Br. 13–15.) This challenge similarly fails.

According to the verification report, Commerce requested copies of the factory-out slips for the POR, but Taifa's production manager stated that Taifa immediately destroys the slips after creating monthly summary sheets, and that Taifa had destroyed the summary sheets and "any remaining documentation." (Def.'s App. 91–92.) Commerce, however, "found several stacks of old factory-out slips" and "pointed out to Taifa officials that the existence of these slips contradicted" the manager's statements. (*Id.* at 92.) Thirty minutes after Commerce's initial request, a Taifa senior accountant "finally said that they did maintain copies of the factory-out slips, and he departed to get them." (*Id.*) After Commerce officials asked to accompany the senior accountant, however, "he stopped and reverted to his prior position that they do not have any of the slips" for twenty

[3] Although Taifa provided information regarding U.S. wheels sales prior to verification in its December 2007 response to Commerce's fifth supplemental questionnaire, the information did not link shipments of wheels with shipments of hand trucks and did not provide FOP data necessary to calculate an accurate antidumping margin. (*See* Pl.'s App. Tab 3.)

[4] Taifa asserts that Commerce applied AFA on an "exceedingly narrow factual basis," as Taifa sold [[ ]] hand trucks without wheels to U.S. customers and sold [[ ]] wheels to its U.S. hand truck customers during the POR, and therefore only [[ ]] percent of Taifa's U.S. hand truck customers were wheel customers. (Confidential Reply Br. of Taifa 12.) Facts relating to a small percentage of actual sales, however, may be used as the basis for an adverse inference where the foreign producer admits it made such sales or it is otherwise established that such sales were made. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (affirming Commerce's 30.95% dumping margin where the respondent admitted making a sale with that margin but claimed the sale represented only 0.04% of its sales during the POR). Because Taifa admitted that at least a small percentage of its sales involved hand trucks shipped with wheels, and Taifa did not report the FOP data for those wheels, Commerce could rely on those facts as some evidence to support an adverse inference.

minutes before agreeing to get the slips and to allow Commerce officials to accompany him. (*Id.*)

Commerce also requested copies of the factory production notices for the POR, but Taifa's production manager stated that Taifa immediately destroys production notices. (*Id.* at 91.) A Commerce official, however, "found numerous production notices with dates extending back to and beyond the POR" in a Taifa office. (*Id.* at 93.) Taifa officials did not answer the Commerce officials' questions about the production notices. (*Id.*)

Additionally, Taifa officials did not immediately provide Taifa's current, 2008 production subledger upon Commerce's request. (*Id.* at 92.) Nonetheless, a Commerce official saw the senior accountant attempt to put the 2008 production subledger in his pocket. (*Id.* at 92–93.) The Commerce official obtained the sublegder but discovered that pages had been ripped out. (*Id.* at 93.) The Commerce official later retrieved the missing pages from a woman who had attempted to leave the warehouse when the official arrived. (*Id.*)

A reasonable and responsible foreign producer would have known that it must keep and maintain documents such as factory-out slips, production notices, and production subledgers, and Taifa officials' efforts to avoid producing the requested documents demonstrates that Taifa failed to put forth maximum efforts to investigate and obtain the documents. *See Nippon Steel*, 337 F.3d at 1382–83. Although Commerce recovered the documents, Taifa's false statements and attempts to avoid producing the information significantly impeded Commerce's investigation. *See Gerber Food (Yunnan) Co. v. United States*, 491 F. Supp. 2d 1326, 1337 (CIT 2007) ("[A] party's unresponsiveness and failure to cooperate prior to providing the needed and verifiable information might significantly and unnecessarily impede the proceeding and waste the Department's resources."). Taifa thus failed to cooperate with Commerce's verification to the best of its ability, and substantial evidence supported Commerce's decision to apply adverse inferences.

Taifa's conduct at verification also supports Commerce's decision to apply AFA to all the facts relevant to calculating Taifa's dumping margin, rather than merely to any facts missing from the record.[5]

[5] Commerce often uses the term "total AFA" to refer to application of AFA "to the facts respecting all of respondents' sales encompassed by the relevant antidumping duty order," rather than the specific facts "for which information was not provided." *Shandong Huarong Mach. Co. v. United States*, 435 F. Supp. 2d 1261, 1265 n.2 (CIT 2006). Here, however, Commerce's application of total AFA also encompassed Taifa's ownership status. *Issues and Decision Memorandum* at 6. Because the court rejects Commerce's AFA analysis regarding Taifa's ownership in the discussion of the PRC-wide rate *infra*, the court will not use the term "total AFA" in this discussion.

Because Taifa attempted to withhold or alter sales and production documents that Commerce requested, Commerce properly concluded that the information that Taifa provided was "incomplete and unreliable" and that no information on the record could be used to calculate an accurate dumping margin for Taifa. *Issues and Decision Memorandum* at 6. Commerce therefore could disregard all of the information Taifa provided, apply AFA to all of the facts relevant to calculating Taifa's dumping margin, and apply a substitute rate. *See Shanghai Taoen Int'l Trading Co. v. United States*, 360 F. Supp. 2d 1339, 1348 n.13 (CIT 2005) (affirming Commerce's decision to apply AFA to all of the facts relevant to calculating the respondent's margin where "core" information that it provided was not reliable).

IV.
Application of the PRC-wide rate as the AFA rate

Taifa also claims that Commerce's selection of the PRC-wide rate as the AFA rate was not supported by substantial evidence or in accordance with law. (Pl.'s Br. 8–11, 18–20.) This claim has merit.

In determining the AFA rate, Commerce may rely on information from "(1) the petition, (2) a final determination in the investigation . . . , (3) any previous review . . . or determination . . . , or (4) any other information placed on the record." 19 U.S.C. § 1677e(b). When relying on secondary information not obtained during the review, Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.* § 1677e(c). The AFA rate should "be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance," not a punitive or unreasonably high rate "with no relationship to the respondent's actual dumping margin." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Because an AFA rate must bear some relationship to the respondent's actual dumping margin, Commerce's ability to apply the PRC-wide rate as a respondent's AFA rate is limited. *See Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1287–88 (CIT 2005).

At present, Commerce applies a presumption of state control for a respondent in a nonmarket economy ("NME") country such as the PRC. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1404–05 (Fed. Cir. 1997); *Shandong Huanri (Group) Gen. Co. v. United States*, 493 F. Supp. 2d 1353, 1357 (CIT 2007).[6] Under this presumption, a respondent receives the NME country-wide rate unless it affirmatively

[6] The court need not address the strength or effect of this presumption at this stage. As China is evolving, however, it may be appropriate for Commerce to reevaluate its methodology in this regard at some point. Presumptions cannot become an excuse for inadequate investigation or assessment.

demonstrates an absence of de jure and de facto government control with respect to exports and is therefore entitled to a separate, company-specific rate. *See Sigma*, 117 F.3d at 1405. Because the PRC-wide rate thus presumes government control, Commerce may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and FOP data, but the respondent has established independence from government control. *Gerber*, 387 F. Supp. 2d at 1287 (citing *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568 (2003)). In such a situation, there is no connection between the PRC-wide rate and an estimate of the respondent's actual rate. *See id.*

Accordingly, Commerce could not apply the PRC-wide rate to Taifa based on Taifa's failures to report FOP data for wheels or attempts to avoid producing requested documents regarding sales and production at verification alone. Commerce could apply the PRC-wide rate only if Taifa did not establish its de jure and de facto independence from government control.

Here, Commerce's *Preliminary Results* found an absence of de jure and de facto government control,[7] *Preliminary Results*, 73 Fed. Reg. at 2219, and Commerce's verification report "noted no indication of government control" (Def.'s App. 88). Nevertheless, Commerce's *Final Results* applied the PRC-wide rate because Commerce could not verify documents regarding Taifa's ownership structure. *See Final Results*, 73 Fed. Reg. at 43,686; *Issues and Decision Memorandum* at 4. Specifically, Commerce found that some documents listed the Yinzhu Town Government as the holder of 51.42% of Taifa's shares, but all other documents identified a collective called Qingdao Taifa Group

[7] Evidence of absence of de jure government control "includes: (1) [a]n absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies." *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) ("*Sparklers*"); *see also Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229, 242 (CIT 1999) ("*Brake Drum I*"). Evidence of absence of de facto government control includes whether: (1) "each exporter sets its own export prices independently of the government and other exporters;" (2) "each exporter can keep the proceeds from its sales;" (3) "the Respondent has authority to negotiate and sign contracts and other agreements;" and (4) "the Respondent has autonomy from the government in making decisions regarding the selection of management." Brake Drum I, 44 F. Supp. 2d at 243 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Dep't Commerce May 2, 1994) ("*Silicon Carbide*")). Commerce preliminarily found that Taifa had presented statements and documentation satisfying each form of evidence of absence of de jure and de facto government control. *Preliminary Results*, 73 Fed. Reg. at 2219.

Co. as the owner of those shares.[8] (*See* Def.'s App. 83–87.) The documents that Taifa offered to show that the shares were divested in 2003 were unregistered.[9] (*Id.* at 85–86.) Determining that Taifa failed to keep and maintain full and complete records documenting its ownership information, which a reasonable importer should anticipate having to produce, Commerce applied AFA to the facts of Taifa's control, denied Taifa a separate rate, and applied the PRC-wide rate. *Final Results*, 73 Fed. Reg. at 43,686–88; *Issues and Decision Memorandum* at 6.

Mere evidence that a town government may own shares in Taifa, however, is insufficient to support Commerce's application of the PRC-wide rate. Although local government ownership is of some limited relevance to the analysis, government ownership is not tantamount to government control.

The Federal Circuit has recognized that Commerce may apply an NME country-wide rate, as opposed to a separate, company-specific rate, where a respondent is subject to *central* government control. *See Transcom, Inc. v. United States*, 182 F.3d 876, 883 (Fed. Cir. 1999); *Sigma*, 117 F.3d at 1405. Nevertheless, the Federal Circuit has not addressed whether an NME country-wide rate is appropriate where the respondent is subject to *local* or *town* government control.

Two cases before this Court, however, have recognized that town government control may be relevant. *See Shandong Huanri*, 493 F. Supp. 2d at 1360–64; *Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 318 F. Supp. 2d 1305, 1312–14 (CIT 2004) ("*Brake Drum II*"). The first, *Brake Drum II*, stated that Commerce's "separate-rate test should not be limited to proving absence of national-government ownership but should be applied to whatever level of governmental control is implicated." 318 F. Supp. 2d at 1312. In that case, Commerce had granted a separate rate to Shandong Laizhou Huanri Group General Co. ("Huanri"), which was controlled by a village committee related to the town government. *Id.*

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[8] According to Taifa, the collective, not the government, owned the interest in Taifa, and the references to the Yinzhu Town Government were due to drafting errors in some of the documents and in others, because the government acted on behalf of the collective. (Def.'s App. 83–84.)

[9] A 2003 Shares Transfer Agreement states that the 51.42% interest was transferred from "Yingzhu People's Government" to nine named individuals. (*Id.* at 70.) Taifa contends that this agreement is unregistered because of the Qingdao Administration for Industry and Commerce's ("AIC") bureaucratic delay in processing it. (Pl.'s Br. 19.) The other record supporting the transfer is Taifa's 2003 Articles of Association. (*See* Def.'s App. 85.) Although Taifa acknowledged that the 2003 Articles of Association "should be registered with the AIC" under the Regulations of the People's Republic of China on Administration of Registration of Companies, Taifa asserts it neglected to register the document because the person responsible resigned. (*Id.* at 63, 85.)

at 1306, 1313. *Brake Drum II* remanded for reconsideration based on the PRC's Organic Law of the Village Committee ("Village Committee Law") that was not in the record, "which may or may not be a promulgation of the central government and which may or may not provide that government or a subordinate, even grass-roots village, government with ultimate, nonmarket control." *Id.* at 1314. The second case, *Shandong Huanri*, summarily found that substantial evidence of de facto government control supported Commerce's decision to apply the PRC-wide rate to Huanri in a subsequent administrative review. 493 F. Supp. 2d at 1360–62, 1364.

These cases, however, must not be construed too broadly. They merely recognize that Commerce may apply the PRC-wide rate where it finds that a town or other local government exercises nonmarket control over a respondent's business activities, and where a promulgation of the PRC's central government such as the Village Committee Law authorizes the local government to exercise that type of control over the respondent. *See id.* at 1360–64; *Brake Drum II*, 318 F. Supp. 2d at 1312, 1314. They do not hold that local government ownership by itself is sufficient to support the application of a PRC-wide rate.

Indeed, as Commerce stated in the *Preliminary Results*, "government ownership by itself is not dispositive in determining government control." *Preliminary Results*, 73 Fed. Reg. at 2219; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results and Partial Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 6173, 6175 (Dep't Commerce Feb. 11, 1997) (*"Tapered Roller Bearings"*) (noting that Commerce has "rejected [its prior] position that state ownership per se eliminates the possibility of a company gaining a separate rate"). Commerce previously has applied separate rates, rather than PRC-wide rates, in instances where a government entity has an ownership interest in the respondent but does not exercise de facto control over the respondent's prices or export activities. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From The People's Republic of China*, 66 Fed. Reg. 67,197, 67,199 (Dep't Commerce Dec. 28, 2001) (applying a separate rate to a company that was sixty-three percent owned by a holding company wholly owned by a provincial government because there was no evidence of de facto control); *Silicon Carbide*, 59 Fed. Reg. at 22,588 (applying separate rates to companies allegedly owned by provincial governments because there was no evidence of government manipulation of export prices or interference with their export busi-

ness); *see also Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, A-570-912, POR 10/1/2006–3/31/2007, at 187–88 (July 7, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf (stating that "the mere existence of government-owned shares in the producer is not a basis for denying separate rate status," and that Commerce "looks beyond ownership in considering whether there is *de facto* government control"). Commerce also has applied separate rates in instances where a government entity owns shares of the respondent's stock but does not vote the shares or otherwise exercise operational control over the respondent's business. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters From the People's Republic of China*, 60 Fed. Reg. 22,359, 22,360–61 (Dep't Commerce May 5, 1995) ("*Disposable Pocket Lighters*"); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625, 55,626–29 (Dep't Commerce Nov. 8, 1994).

Reliance on evidence of de facto government control beyond a mere local government ownership interest is consistent with the purposes of the antidumping statute, which "recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources." *Sigma*, 117 F.3d at 1405–06. The statute applies special rules to NME countries because prices and costs are not reliable in valuing goods from NME countries "in view of the level of intervention by the government in setting relative prices." *ICC Indus., Inc. v. United States*, 812 F.2d 694, 697 (Fed. Cir. 1987); *see* 19 U.S.C. § 1677(18)(A) (defining an NME country as a country which "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"); *see also id.* § 1677b(c). Thus, a government's de facto interference with a respondent's export activities or prices or operational control over the respondent may render the respondent's prices and costs unreliable. *See Tapered Roller Bearings*, 62 Fed. Reg. at 6175; *Disposable Pocket Lighters*, 60 Fed. Reg. at 22,363. But a town or local government's ownership interest in a respondent, without more, does not render the respondent's prices and costs inherently unreliable or sufficiently linked to a China-wide rate. As this Court has recognized, "[t]he essence of a separate rates analysis is to determine whether the exporter is an autonomous market participant, or whether instead it is so closely tied to the communist government as to be shielded from the vagaries of the free market." *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp. 2d 1305, 1331 (CIT 2001). The court

concludes, therefore, that Commerce may not apply an NME country-wide rate where there is evidence that a town government had an ownership interest in the respondent, but there is no evidence that the government exercised de facto control over the respondent's prices, export activities, or operations.

Here, Commerce's decision to apply AFA to the facts of Taifa's control because Taifa's ownership documents could not be verified was apparently based on the flawed assumption that town government ownership alone establishes government control sufficient to trigger application of a China entity rate. Here Commerce applied the China entity rate without making a final determination about the presence or absence of de facto Chinese government control over Taifa's operations. Although Commerce has not cited any indications that the Yinzhu Town Government, or any other government entity, controlled Taifa's prices or export activities or exercised any operational control over Taifa, or any indications of a connection between the central government and Taifa's control, the court remands the matter to Commerce for a proper analysis of de facto control.

CONCLUSION

For the foregoing reasons, Taifa's motion for judgment on the agency record is granted in part and denied in part. The court hereby remands this matter to Commerce to determine whether a government entity exercised de facto nonmarket control over Taifa sufficient to link the China entity rate to Taifa. If Commerce concludes based on substantive evidence that such government entity control over Taifa exists, Commerce may apply the PRC-wide rate of 383.60% to Taifa.[10] If Commerce concludes otherwise, Commerce must calculate a separate, substitute AFA rate for Taifa.

Commerce shall file its remand determination with the court within sixty days of this date. Taifa, Gleason, and Precision have eleven days thereafter to file objections, and Commerce will have seven days thereafter to file its response.

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[10] Taifa did not challenge Commerce's calculation of the 383.60% PRC-wide rate before the court. Accordingly, although that rate was a minimally corroborated petition rate based on AFA, *see Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980, 60,982, 60,984 (Dep't Commerce Oct. 14, 2004), *amended by* 69 Fed. Reg. 65,410 (Dep't Commerce Nov. 12, 2004), Taifa has waived any challenge to the calculation of the rate, *see AL Tech Specialty Steel Corp. v. United States*, 366 F. Supp. 2d 1236, 1245 (CIT 2005) ("Arguments that are not properly preserved are waived.").

Dated: This 11th day of August, 2009.
New York, New York.

/s/ *Jane A. Restani*
JANE A. RESTANI
Chief Judge

Slip Op. 09–84

JENNIFER DEPERSIA, Plaintiff, v. UNITED STATES, Defendant.

Before: Nicholas Tsoucalas, Senior Judge
Court No. 08–00115

Held: Plaintiff's Motion for Judgment on the Agency Record is denied. The determination by the Assistant Secretary, Department of Homeland Security is affirmed.

Dated: August 11, 2009

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*David M. Murphy*; *Frances P. Hadfield*; *Michael J. Khorsandi*) for Jennifer Depersia, Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office; Saul Davis, Civil Division, Commercial Litigation Branch, United States Department of Justice; Of Counsel, *Christopher Chen*, Office of the Chief Counsel, United States Customs and Border Protection, for the United States, Defendant.

OPINION

Tsoucalas, Senior Judge:

INTRODUCTION

Plaintiff moves for judgment upon the agency record, pursuant to Rule 56.1 of the Rules of the United States Court of International Trade ("USCIT"), seeking review of the denial of her application for a customs broker's license, which was based on her failure to achieve a passing score of 75% on the requisite examination. Specifically, Plaintiff petitions this Court for reversal of a decision by the Assistant Secretary of Homeland Security ("the Secretary" or "DHS") affirming the denial of credit for her answer to one examination question. Defendant has filed a response in opposition, seeking that the Court uphold the Secretary's decision. For the reasons stated below, Plaintiff's Motion for Judgment on the Agency Record is denied.

BACKGROUND

Plaintiff sat for the April 2, 2007, administration of the Customs Broker License examination. In a letter dated June 22, 2007, the

United States Customs and Border Protection[1] ("Customs" or "CBP") advised Plaintiff of her score of 71.25% (57 correct answers) on the examination, whereas a minimum passing grade of 75% (60 correct answers) or higher was required.[2] On July 24, 2007, Plaintiff wrote a letter to the Broker Management Branch of Customs challenging CBP's grading of four test questions. Customs notified Plaintiff on November 9, 2007, that her appeal as to all challenged questions was denied. In its letter, Customs included an explanation of the single correct answer and several incorrect answers for every question that Plaintiff challenged.

By letter of December 26, 2007, Plaintiff next sought to have the matter reviewed by DHS. The Director of Cargo, Maritime and Trade Policy informed Plaintiff of its determination to affirm the denial of credit for the four contested questions in a letter dated February 19, 2008. Suit in this Court subsequently followed when Plaintiff filed her summons and complaint on April 9, 2008, followed by an amended complaint on April 14, 2008. Plaintiff challenges the Secretary's denial of her score on the April 2, 2007 examination, specifically question 9.[3] Plaintiff further moves for relief under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), for attorney's fees and expenses.

JURISDICTION AND STANDARD OF REVIEW

The Court has exclusive jurisdiction over this matter pursuant to 28 U.S.C. § 1581(g)(1) (2006). Regarding the appropriate standard of review, the statute provides that "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive."

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[1] Customs was transferred to DHS effective March 1, 2003, as a result of the reorganization of various federal agencies under the Homeland Security Act of 2002. *See Homeland Security Act of 2002*, Pub. L. No. 107–296, 116 Stat. 2178 (2002).

[2] The examination is administered by Customs on the first Mondays in April and October pursuant to its statutory authority under 19 U.S.C. § 1641(b)(2), and is "designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters." 19 C.F.R. § 111.13(a)–(b).

[3] As originally commenced, this action included two other plaintiffs besides Ms. Depersia. The original complaint challenged questions 9, 17, and 19. *See* Complaint p. 9. However, on January 16, 2009, the parties agreed to settle as to questions 17 and 19 in favor of plaintiffs. While this settlement resulted in passing grades for two of the plaintiffs, Ms. Depersia's score on the examination changed from 57 correct answers or 71.25% to 59 correct answers or 73.75%, still short of the requisite 75%. The Court takes this opportunity to note that both parties state Plaintiff's refigured score at 71.25%. *See* Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. ("Def.'s Mem.") at 3; Mem. Supp. Pl.'s Mot. Summ. J. ("Pl.'s Mem.") at 2. This is in part due to the fact that the stipulation agreement reflects this incorrect calculation. However, as the Defendant acknowledges, the test consists of 80 multiple choice questions worth 1.25 points each. *See* Def.'s Mem. at 2. Therefore, Plaintiff's revised score of 59 correct answers is more accurately calculated at 73.75%.

19 U.S.C. § 1641(e)(3). Substantial evidence includes "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). This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *See Boynton v. United States*, 517 F. Supp. 2d 1349, 1351 (internal citations omitted).

While the factual findings of the Secretary must be based on substantial evidence, both 19 U.S.C. § 1641 and 28 U.S.C. § 2640 are silent as to the standard of review the Court should apply to legal questions in a customs broker's license denial case. Therefore, in reviewing legal questions, the Court is guided by the Administrative Procedure Act ("APA") "which gives general guidance regarding the scope and standard of review to be applied in various circumstances." *United States v. Ricci*, 21 CIT 1145, 1146, 985 F. Supp. 125, 126 (1997); *see also O'Quinn v. United States*, 24 CIT 324, 325, 100 F. Supp. 2d 1136, 1137 (2000). Under the standard laid out in the APA, the Court will uphold the final administrative determination of the Secretary, unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006). "When applied to agency action independent of review of findings of fact, the arbitrary and capricious test requires that the agency engage in reasoned decision-making in grading the exam." *O'Quinn*, 24 CIT at 325, 100 F. Supp. 2d 1136, 1138 (internal citations omitted).

DISCUSSION

Consistent with the broad powers vested in the Secretary for licensing customs brokers under the statute, is the authority to deny an application for a license based on the failure to pass the licensing examination. *See Kenny v. Snow*, 401 F.3d 1359, 1361 (Fed. Cir. 2005) ("Among the lawful grounds for denying a license is the failure to pass the licensing examination."). 19 U.S.C. § 1641(b)(2) provides that:

> Before granting the license, the Secretary may require an applicant to show any facts deemed necessary to establish that the applicant is of good moral character and qualified to render valuable service to others in the conduct of customs business. In assessing the qualifications of an applicant, the Secretary may conduct an examination to determine the applicant's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters.

In its administration of this statutory provision Customs has promulgated regulations governing the conduct of the customs broker's license exam. *See* 19 C.F.R. § 111.11(a)(4) ("to obtain a broker's license, an individual must . . . attain[] a passing (75 percent or higher) grade on a written examination"); 19 C.F.R. § 111.16(b)(2) ("grounds sufficient to justify denial of an application for a license include . . . [t]he failure to meet any requirement set forth in [19 C.F.R.] § 111.11.").[4]

In reviewing the Secretary's decision to deny Plaintiff's application for a license, the Court "must necessarily conduct some inquiry into plaintiff's arguments and defendant's responses" concerning the question at issue. *Di Iorio v. United States*, 14 CIT 746, 747 (1990). Although the Court reviews the exam question being challenged, the "[p]arties should not conclude from the court's detailed examination of the test answers that the court is some kind of final reviewer of the [exam]." *Id.* at 752. With this in mind, the Court turns to Plaintiff's challenge of question 9.

The exam instructs applicants to choose the best answer from among the five alternatives presented. *See* Def.'s Mem. at 2. Question 9 requires the examinee to assess the type of ruling an importer is entitled to given a specific factual situation. The question reads as follows:

Question 9

In the following scenario, what type of ruling is the importer entitled to?

- CBP has rejected the importer's claim as to the tariff classification of green olives grown in Spain.
- Entries filed for these ongoing shipments have **NOT** been liquidated.
- Proposed rate advances (CBP Form 29) will result in substantial duty increases.
- A ruling has **NOT** been requested or issued on these import transactions.

(A) Ruling request submitted to the National Commodity Specialist Division

[4] The relevant regulations also provide:

If an examinee fails to attain a passing grade on the examination taken under this section, the examinee may challenge that result by filing a written appeal with [Customs] . . . . CBP will provide to the examinee written notice of the decision on the appeal. If the CBP decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by writing to the Secretary of Homeland Security . . . . 19 C.F.R. § 111.13(f).

(B) A NAFTA Advance Ruling request forwarded to CBP Headquarters

(C) A protest application for further review filed at the CBP port of entry

(D) An Internal Advice request submitted through the CBP port of entry

(E) The importer is not entitled to request a ruling from CBP on this transaction

The official answer to question 9 is (D). Plaintiff in turn selected (A), and claims that she was improperly denied credit for her answer in large part because of how the word "entitled" was construed by Customs. According to Plaintiff, this term, as used in question 9, speaks to an action that the agency must take. Therefore, if Customs' proposed answer (D) is deemed correct, the action that CBP must afford the requesting importer is Internal Advice.[5] *See* Pl.'s Mem. at 5. Plaintiff points to § 177.11(b)(5) which describes the conditions under which Customs may refuse to issue Internal Advice to a requesting importer.[6] See Pl.'s Mem. at 5. Therefore, Plaintiff argues, an importer is never entitled to such advice, but rather "an internal advice ruling may be requested." *Id.*

On the other hand, because the question's hypothetical facts indicate that the shipments at issue were "ongoing," it is Plaintiff's contention that the importer would be entitled to submit a tariff classification ruling request to the National Commodity Specialist Division, as described in answer choice (A). *Id.* at 4; *see also*

[5] The Internal Advice provision reads in part:

(b) Certain current transactions —

(2) When no ruling has been issued. Internal advice will be sought by a Customs Service field office with respect to a current transaction for which no ruling was requested or issued under the provisions of this part whenever a difference of opinion exists as to the interpretation or proper application of the Customs and related laws to the transaction, and the field office is requested to seek such advice by an importer or other person who would have been entitled, under § 177.1(c), to request a ruling with respect to the transaction, while prospective. The request must be submitted to the field office in writing and in accordance with the provisions of paragraph (b)(3) of this section. 19 C.F.R. § 177.11(b)(2).

[6] 19 C.F.R. § 177.11(b)(5) provides:

(5) Refusal by Headquarters Office to furnish advice. The Headquarters Office may refuse to consider the questions presented to it in the form of a request for internal advice whenever (i) the Headquarters Office determines that the period of time necessary to give adequate consideration to the questions presented would result in a withholding of action with respect to the transaction, or in any other situation, that is inconsistent with the sound administration of the Customs and related laws, and (ii) the questions presented can subsequently be raised by the importer or other interested party in the form of a protest filed in accordance with the provisions of part 174 of this chapter.

19 C.F.R. § 177.2(a) ("Requests for tariff classification rulings should be addressed to the Director, National Commodity Specialist Division . . ."); § 177.2(b)(2)(B) ("Rulings issued by the Director, National Commodity Specialist Division . . . are limited to prospective transactions."). In focusing on the stem of question 9 which asks, "what type of ruling is the importer entitled to?" the Plaintiff alleges that the word "entitled" operates to describe the importer's right to receive a classification ruling, as opposed to the discretionary authority of Customs in providing Internal Advice. *See* Pl.'s Mem. at 8. Plaintiff further notes that even if the official answer is deemed correct, her answer was also an appropriate response to question 9. *See id.*

Defendant explains that answer choice (D) is correct "because an examination of the question as a whole clearly shows that the olives at issue in the question had already been entered, though not liquidated, and that the importer's current claim was rejected." Def.'s Mem. at 8. Thus, while there were continuing importations of subject merchandise, the importer was "entitled" to seek a request for Internal Advice because "the importer furnished CBP with proper grounds for seeking a ruling through the internal advice procedure." *Id.* at 10. According to Customs, Plaintiff failed to glean from the information provided, the essential facts relevant to existing transactions, and instead chose to focus on the abstracts of future imports. *See id.* at 13. Moreover, Defendant argues, Plaintiff's theory is flawed for exactly the same reason she opposes Customs' proposed answer choice. *See id.* at 11. The regulations clearly state that where a request for a prospective ruling is made to the Director, National Commodity Specialists Division, under 19 C.F.R. § 177.2(b)(2)(ii), there are instances where Customs may refuse to issue a ruling of this kind. Specifically, § 177.7(a) and (b) describe the circumstances under which Customs may refuse to consider such a request.[7] Therefore, Defendant asserts, Plaintiff's answer (A) suffers from the same inadequacies Plaintiff ascribes to CBP's answer (D). *See id.*

Plaintiff's position on this issue is internally inconsistent. For instance, Plaintiff insists that the lexicographic authorities compel an

[7] The relevant portions of 19 C.F.R. § 177.7 read as follows:

Situations in which no ruling will be issued.

(a) Generally. No ruling letter will be issued in response to a request for a ruling which fails to comply with the provisions of this part. Moreover, no ruling letter will be issued . . . in any instance in which it appears contrary to the sound administration of the Customs and related laws to do so.

(b) Pending litigation in the United States Court of International Trade. No ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom.

interpretation of the word "entitled" as one that gives "a right or legal title to: qualify one for something: furnish with proper grounds for seeking or claiming something." Pl.'s Mem. at 5. As used in question 9, Plaintiff maintains, the word "entitled" compels issuance of a ruling to a requesting importer. *See id.* In this way, the discretionary authority granted the Secretary, under § 177.11(b)(5), to decline an importer's request for Internal Advice is inconsistent with this interpretation, and therefore the importer is only entitled to make a request for, not actually receive the Internal Advice. Yet, when it comes to her advocacy of answer choice (A), Plaintiff ignores the distinction she draws between the type of ruling an importer is entitled to request and the type of ruling an importer is entitled to receive. Instead, Plaintiff avers, the hypothetical importer is entitled to submit a request for a binding ruling to the National Import Specialist Division because the question indicates that there are "ongoing" shipments of subject merchandise. *See* Pl.'s Mem. at 6. As support for her position, Plaintiff points to Customs' own summary of the District Ruling program which observes that "'the program bestows a right upon the importing public' to submit requests for classification rulings." *Id.* at 7 (quoting 54 Fed. Reg. 8,209 (Feb. 27, 1989)). Plaintiff's claim that an importer is entitled to make a tariff classification request to the National Commodity Specialist Division, however, suffers from the same faulty logic she imputes to Customs. If, as Plaintiff asserts, the word "entitled" can only be construed as bestowing a right to *receive* a ruling, her charge that answer (A) is more accurate because it provides the importer a right to submit a *request* for a ruling makes no sense.

One need only examine Customs' regulations to observe that a tariff classification ruling may be withheld if certain conditions are met. *See* 19 C.F.R. § 177.7(a) ("Moreover, no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature or in any instance in which it appears contrary to the sound administration of the Customs and related laws to do so."). This decision is left up to the discretion of the agency in much the same way as it is under § 177.11(b)(5) (the Internal Advice provision).

Equally unpersuasive is Plaintiff's attempt at distinguishing the discretionary components of the Internal Advice and tariff classification procedures by arguing that "Customs may refuse to furnish internal advice on discretionary grounds, whereas a refusal to furnish a binding ruling must be based upon the actions of a party other than Customs." Pl.'s Reply in Supp. Mot. J. Agency R. ("Pl.'s Reply") at 7. This oversimplification of the regulations ignores the fact that both § 177.11(b)(5) and § 177.7 (binding ruling procedure) contain identical language permitting Customs to refuse to consider an importer's request in any situation in which such a request would appear con-

trary to "the sound administration of the Customs and related laws." 19 C.F.R. §§ 177.11(b)(5), 177.7. Clearly, both provisions afford CBP a degree of latitude in making determinations based upon certain criteria. The failure to recognize, in her own answer choice, the deficiencies which form the basis of her challenge to Defendant's proposed answer undermines the premise of Plaintiff's complaint.

The Court therefore agrees with Defendant that this aspect of Plaintiff's reasoning is unsound in that "under Ms. Depersia's theory, her proposed answer "A" would be incorrect for the same reasons she contends "D"is incorrect." Def.'s Mem. at 11.

Perhaps anticipating the incongruity of her position, Plaintiff argues in the alternative that a "review of the two disputed answer choices ("A" and "D") illustrates that neither selection properly answers the question." Pl.'s Reply at 4. Restating her earlier position, Plaintiff claims that question 9, in its present form, can only be understood as asking: What type of ruling is the importer entitled to *receive*? Not, as the agency contends: What type of ruling is the importer entitled to *request*? Since both answers (A) and (D) cite to the latter and not the former, neither response is entirely correct. According to Plaintiff, Customs' flawed drafting of question 9 causes it to suffer from a lack of critical decision-making information necessary for an examinee to make a proper selection. *See id.* at 5 n.4. Therefore, the question is ambiguous on its face and the Court should grant Plaintiff credit for this question.[8] *See id.*

Defendant alleges that Plaintiff's strained interpretation of question 9 runs contrary to one of the accepted principles of statutory construction that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *See* Def.'s Sur-reply at 2 (quoting *King v. St.Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Defendant insists that question 9 is more accurately understood when examined against the background of all the possible answer choices. *See id.* Hence, an examinee can observe that all five of the answers provided contemplate or relate to "requests" made by the hypothetical importer. It is within this context, says Defendant, that question 9 can only be understood as seeking "to ascertain the type of ruling an importer should request based upon the facts enunciated." *Id.* at 3. In sum, Defendant concludes, question 9 is not ambiguous and clearly requires an answer based on the type of

[8] Plaintiff makes the ancillary argument that question 9 is misleading for a second reason, namely, that an importer is not the party that seeks or receives Internal Advice. *See* Pl.'s Reply at 5. The Court rejects this argument outright. In point of fact, the regulations are unmistakable as to which party initiates the Internal Advice request. *See* 19 C.F.R. § 177.11(a) ("Advice as to the proper application of the Customs and related laws to a current transaction will be sought by a Customs Service field office whenever that office is requested to do so . . . by an importer or other person having an interest in the transaction.")

procedure on which the importer must rely to request a ruling. *See id*. at 4.

At the core of the parties' disagreement is whether question 9 requires an examinee to identify the type of ruling the importer is entitled to "receive" or entitled to "request." Examination of the question stem isolated from the accompanying facts and answer choices suggests an understanding consistent with Plaintiff's hypothesis. Without further qualification of the operative language "entitled to" and "ruling," the question can be understood as asking the examinee to identify the appropriate course of action for an importer to follow in order to receive a ruling. However, as Customs correctly notes, the common meaning of a word or phrase may be colored by the context in which it is used. Closer inspection of question 9 as a whole makes clear that the question seeks to ascertain the type of ruling an importer should request. Indeed, four of the five possible answer choices, including Plaintiff's proposed answer (A), reference a "request" made by the hypothetical importer. As the Court has already noted supra, there is no procedure whereby an importer possesses an unqualified right to be issued an administrative ruling by Customs. Thus, the Court rejects the gravamen of Plaintiff's argument that question 9 is more appropriately understood as asking what ruling the importer is entitled to receive from the agency. *See* Pl.'s Reply at 4.

Plaintiff's alternative assumptions are similarly flawed. For example, she focuses on the presence of the term "ongoing" in the second of the four facts provided in question 9. This, according to Plaintiff, is indicative of the prospective nature of the shipments being described in the fact pattern. Therefore, Plaintiff asserts, her answer properly recognizes that a ruling may be obtained to provide a binding tariff classification on future entries. Plaintiff's reading of this single term, however, disregards the existence of facts that focus primarily on current transactions. Moreover, Plaintiff's interpretation would render this statement superfluous. Prospective transactions may never be liquidated. The Court finds implausible the notion that this statement was intended to negative a condition that would never present itself. Rather, its intended purpose was to emphasize that the current entries had yet to be liquidated. Upon examination of the four additional facts as a whole, the inference to be drawn should be readily apparent to a reader who is being tested on their "knowledge of Customs and related laws, regulations and procedures." 19 C.F.R. 111.13(a). As the last of the four factual elements states: "A ruling has NOT been requested or issued on *these* import transactions." Clearly, reference is being made to the transactions described in the previous elements; i.e., unliquidated entries of green olives where a difference of opinion exists as to the appropriate tariff classification. In other words, those transactions currently before

Customs. Each of the factors discussed in the fact pattern are components of the Internal Advice procedure which in turn leads to the one "best answer," that is to say answer choice (D).

The rest of Plaintiff's argument focuses on the proposition that even if the agency's answer is deemed correct, so too is Plaintiff's. The Court disagrees. It is incumbent upon the test-taker to synthesize the fact pattern provided while referencing the universe of information on which he or she is to base a decision. With this in mind, Plaintiff's proposed answer (A) possesses limited applicability. Because a tariff classification ruling may only be requested with respect to "prospective transactions" answer (A) does nothing for the current transactions emphasized in question 9. 19 C.F.R. § 177.1(a). Conversely, the Internal Advice procedure contemplates "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws . . . at any time, whether the transaction is prospective, current, or completed." 19 C.F.R. § 177.11(a). Therefore, answer (D) can properly be regarded as the "best answer" because it considers both the current transactions which form the core of question 9's hypothetical, as well as the "ongoing" shipments identified by Plaintiff. In this way, answer (D) is consistent with one of the express objectives of the license examination procedure which is to test an examinee's fitness "to render valuable service to importers and exporters." 19 C.F.R. § 111.13(a). Under the circumstances of question 9, the most valuable service an importer might receive is one which allows the importer to seek redress on both its current and ongoing transactions.

While Customs could perhaps have used more precise language in its drafting of question 9, susceptibility of different meanings does not in and of itself render a term ambiguous. The overall meaning is unmistakable: the question seeks to identify the course of action most appropriate for the hypothetical importer with regard to the current transactions described therein. This is answer (D).

CONCLUSION

Based on the foregoing, the Secretary's determination denying Plaintiff's appeal of the scoring of her customs broker license examination was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and therefore must be sustained. Accordingly, Plaintiff's request for relief under the EAJA cannot lie. Plaintiff's Motion for Judgment on the Agency Record is denied.

Dated: August 11, 2009
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 09–85

AD HOC SHRIMP TRADE AACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, -and- GROBEST & I-MEI INDUSTRIAL (VIETNAM) CO., LTD., Intervenor-Defendant

Court No. 07–00380

[Plaintiff's motion for judgment upon the agency record denied; action dismissed.]

Decided: August 12, 2009

Dewey & LeBoeuf LLP (*Bradford L. Ward*, *Rory F. Quirk* and *David A. Bentley*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Jonathan Zielinski* and *Aaron Kleiner*), of counsel, for the defendant.

Thompson Hine LLP (*Matthew R. Nicely* and *Christopher M. Rassi*) for the intervenor-defendant.

Heller Ehrman LLP (*William H. Barringer*) for Minh Phu Seafood Corporation, Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd., amici curiae.

MEMORANDUM & ORDER

AQUILINO, Senior Judge:

The Ad Hoc Shrimp Trade Action Committee, an association of U.S. producers and processors of warmwater shrimp, having successfully petitioned the International Trade Administration, U.S. Department of Commerce ("ITA"), for imposition of the antidumping-duty order published at 70 Fed.Reg. 5,152 (Feb. 1, 2005), thereafter requested a first administrative review thereof pursuant to 19 U.S.C. §1675, which resulted in ITA's *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 Fed. Reg. 52,052 (Sept. 12, 2007), that are now at issue in this action brought in accordance with 19 U.S.C. §1516a(a)(2)(A) and 28 U.S.C. §§ 1581(c) and 2631(c).[1]

[1] The petitioner's request for ITA review initially implicated some 84 enterprises, only one of which, Vietnam Fish One Co., Ltd., fully participated as a respondent in the agency's proceedings that resulted in that company's assignment of a zero dumping margin for the period July 16, 2004 to January 31, 2006. Margins ranging from 4.57 to 25.76 percent were assigned for that period of review to 15 other firms. *See* 72 Fed.Reg. at 52,054, col. 2 and n. 9.

Vietnam Fish One Co. has not sought to intervene in this action, but Grobest & I-Mei Industrial (Vietnam) Co., Ltd., one of the many companies dropped from the ITA's review,

I

The precise focus of plaintiff's complaint, as reflected in the preliminary injunction it applied for and had entered, is the zero margin assigned to Vietnam Fish One Co., Ltd. It now moves for judgment on the underlying ITA record pursuant to USCIT Rule 56.2.

A

As indicated, the country of origin of the merchandise that is subject to the antidumping-duty order is the Socialist Republic of Vietnam, which the ITA considers to be a "nonmarket economy country" [2] ("NME") within the meaning of the Trade Agreements Act of 1979, as amended, 19 U.S.C. §1677(18).

To determine whether subject merchandise is being, or is likely to be, sold in the United States at less than fair value, the agency must make "a fair comparison . . . between the export price or constructed export price and normal value." 19 U.S.C. §1677b(a). When that merchandise emanates from an NME, however, the actual export price is often not a valid source of comparison due to the nature of such a country. Whereupon the ITA, in general, is to

> determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he valuation of the factors of production shall be based on the best available information

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then requested and was afforded agency review as a new shipper. While it too was ultimately assigned a dumping margin of zero [*see id.*], it has sought and obtained leave to intervene herein as a party defendant.

Come now Minh Phu Seafood Corporation, Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd. alleging, among other things, that they are large Vietnamese exporters of frozen warmwater shrimp to the United States, that they were not involved in the ITA administrative review *sub judice* herein but that they have been mandatory respondents in the second and the third such reviews. *Cf. Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed.Reg. 52,273 (Sept. 9, 2008); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Request for Revocation, In Part, of the Third Administrative Review*, 74 Fed.Reg. 10,009 (March 9, 2009). Whereupon they move in the absence of any appearance herein by Vietnam Fish One Co. for leave to file a brief as *amici curiae*, which motion can be, and it hereby is, granted.

[2] The statute defines this term, in general, to mean any foreign country that the ITA 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. *See* 19 U.S.C. §1677(18)(A).

> regarding the values of such factors in a market economy country or countries considered to be appropriate by [it].

19 U.S.C. §1677b(c)(1).

In this instance, the agency found

> Bangladesh to be a reliable source for surrogate values because Bangladesh is at a similar level of economic development pursuant to 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has publicly available and reliable data. . . . Furthermore, we note that Bangladesh has been the primary surrogate country in past segments and both the Petitioner and Respondents submitted surrogate values based on Bangladeshi data that are contemporaneous to the [period of review], which gives further credence to the use of Bangladesh as a surrogate country.

72 Fed.Reg. at 10,695 (citation omitted). Furthermore, it

> determined that data contained in a study of the Bangladeshi shrimp industry published by the Network of Aquaculture Centres in Asia-Pacific ("NACA"), an intergovernmental organization affiliated with the UN's Food and Agriculture Organization, is a suitable surrogate value for shrimp from the surrogate country, namely, Bangladesh.

Id. at 10,697.

The petitioner cum plaintiff continues to attempt to impeach that study, which is entitled *Evaluation of the impact of the Indian Ocean tsunami and U.S. anti-dumping duties on the shrimp farming sector of South and South-East Asia: Case studies in Vietnam, Indonesia and Bangladesh* (Oct. 2006) and apparently publicly available on NACA's website. According to ITA's Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review (Sept. 5, 2007)[3], which is at the core of the agency's *Final Results* herein[4], the petitioner argued, among other things, that the NACA study is unreliable because it was based on voluntary questionnaire responses that were not audited, that its coverage of the industry was limited, and that its data are incomplete because they do not contain two of the shrimp count sizes used in the margin calculation for Vietnam Fish One Co.,

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[3] This document, which will be cited hereinafter as "DecMemo", is on the ITA record and publicly available on the ITA's website.

[4] *See* 72 Fed.Reg. at 52,053, col. 2.

Ltd. *See* DecMemo, p. 3. Now, the plaintiff pinpoints the study's alleged flaws as follows:

- The data obtained by the NACA Survey were based on voluntary information obtained through questionnaires from a limited number of Bangladeshi shrimp processors. . . . In fact, the NACA Survey consists of just eight Bangladeshi shrimp processors. . . .
- Further, the survey's coverage of Bangladeshi shrimp processors is scattershot — Apex, one of the largest shrimp processors in Bangladesh, was not even included in the NACA Survey. . . .
- Moreover, the NACA data not only were not audited, they are admittedly imprecise. In fact, the NACA Survey concedes that "*general* price information" was collected from Department of Fisheries officers "with the aim of validating the *general* accuracy" of the survey. NACA Survey at 56 (emphasis added).
- In addition, the NACA data are incomplete, as they do not include two of the shrimp count sizes used in the margin calculation, a flaw which required Commerce to fill in these data "holes" with extrapolated prices. . . . In contrast, the Apex prices cover *all* count sizes used in Commerce's margin calculation, and do not require any extrapolation of missing information. . . .

Plaintiff's Memorandum of Law, pp. 8–9 (citations omitted; emphasis in original).

B

Whereupon the plaintiff postulates the issues it presents viz.:

a. Whether Commerce erred when it valued raw shrimp based on the surrogate value from . . . the . . . NACA Survey . . . rather than on publicly available, audited, count-specific raw shrimp purchase prices from the Bangladeshi shrimp processor Apex Foods Ltd. . . . , which were on the record.

b. Whether Commerce erred in the calculation of the surrogate financial ratios by excluding the financial statements of the Bangladeshi shrimp processor Bionic Seafood Exports Limited . . . because Bionic failed to show a profit.

Id. at 1–2 (citation omitted).

Seemingly, counsel's crafting of this action reduces it to an anomaly, even a paradox. That is, courts always contemplate *ab initio* the relief a party prays for. In the matter at bar, if this court understands plaintiff's position correctly, all that it seeks before liquidation of any Vietnam Fish One Co., Ltd. entries during the period of review is a

dumping margin for that company greater than zero. Its memorandum of law and proposed order filed in conjunction with its motion for judgment on the agency record request remand to the ITA with "instructions" to correct defendant's errors. According to the foregoing issues presented, those "errors" boil down to agency disregard of data from two particular Bangladeshi shrimp processors. The plaintiff would have this court order the ITA to rely solely on information for Apex Foods Ltd. — to the exclusion of data for other such processors in the surrogate state, either reflected in the NACA study or otherwise. And even if, as the plaintiff argues, the Apex data are the "gold standard" [5], at least with regard to the seemingly-sole object of its complaint, Vietnam Fish One Co., Ltd.[6], there is no showing what impact that standard would have (or could have had) on the margins derived for the other 15 enterprises subject to the ITA's *Final Results*, *supra*. In other words, the plaintiff would apparently allow those numbers to stand, albeit based upon the NACA data and agency record it otherwise seeks, for one company, to order the defendant to disregard.

C

As revealed in footnote 1, *supra*, the *Final Results* herein are but the first from an ITA review of the underlying antidumping-duty order, and, with the passage of time, other such reviews have been undertaken. Indeed, the second review has been completed and the final results thereof published at 73 Fed.Reg. 52,273 (Sept. 9, 2008), and the agency has published preliminary results for its third review, 74 Fed.Reg. 10,009 (March 9, 2009). Numerous parties have filed and/or joined in complaints over the final results of the second review per CIT Nos. 08–00301, –00325 and –00347, which matters have been ordered consolidated and which are now on the Court calendar for oral argument on September 16, 2009. While the plaintiff herein, Ad Hoc Trade Action Committee, has been granted leave to appear therein as an intervenor-defendant, this court notes that it continued its complaint in the second review over the ITA's reliance on the NACA data. *See, e.g.*, Issues and Decision Memorandum for the Second Administrative Review, p. 7 (Sept. 2, 2008). Hence, it seems safe

[5] Plaintiff's Memorandum of Law, pp. 4, 8.

[6] Experienced counsel claim this is a rare instance in an NME proceeding where both the petitioner and a mandatory respondent agree on best surrogate information on the record for valuing the primary production input. *Id.* at 4.

to assume that that issue will entail multipartite litigation in the consolidated case in contrast with its paradoxical lie herein.[7]

II

In view of the foregoing, plaintiff's motion for judgment upon the agency record can be denied (without prejudice) and its anomalous action dismissed.

So ordered.

Dated: August 12, 2009
New York, New York

/s/ Thomas J. Aquilino, Jr.
Senior Judge

Slip Op. 09–86

PEERLESS CLOTHING INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No: 03–00537

[Defendant's Motion for Rehearing or Reconsideration is DENIED.]

Dated: August 13, 2009

Sandler, Travis & Rosenberg, P.A. (*Arthur K. Purcell*) for Plaintiff Peerless Clothing International, Inc.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny*); and *Chi S. Choy*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION AND ORDER

Wallach, Judge:

I.
INTRODUCTION

Plaintiff Peerless Clothing International, Inc. ("Peerless USA") commenced this action contesting the appraisement and assessment of certain duties by the United States Customs and Border Protection

[7] The court notes in passing that the ITA has continued to attribute a zero margin of dumping to Vietnam One Fish Co., Ltd. [*see* 73 Fed.Reg. at 52,276] but that it has, to date, denied that company's request for revocation of the antidumping-duty order as against it on the grounds of three consecutive years of no dumping. *See* 74 Fed.Reg. at 10,011, col. 3.

("Customs") on garments imported into the United States. This court granted in part and denied in part both Peerless USA's Motion for Summary Judgment and Defendant United States' ("Defendant") Cross-Motion for Summary Judgment. *Peerless Clothing Int'l, Inc. v. United States*, 602 F. Supp. 2d 1309 (CIT 2009) (*"Peerless I"*). Accordingly, this court remanded to Customs with instructions to reallocate specific expense categories that Customs had found dutiable. Defendant subsequently filed a Motion For Rehearing or Reconsideration ("Defendant's Reconsideration Motion") requesting reconsideration of *Peerless I* such that the underlying appraisement and assessment of Customs be affirmed in its entirety. Oral argument on Defendant's Reconsideration Motion took place on May 28, 2009. While the court has carefully considered Defendant's Reconsideration Motion and this Opinion represents a reconsideration of *Peerless I*, to the extent it seeks to change the result of *Peerless I*, the Motion is denied because the requisite standard is not satisfied.

II.
BACKGROUND

Peerless Clothing, Inc. ("Peerless Canada") is the largest manufacturer of men's wool suits in North America. *Peerless I*, 602 F. Supp. 2d at 1313 (citation omitted). In the 1980s, Peerless Canada created Peerless USA, a separate legal entity sharing common senior management and corporate officers, to import merchandise into the United States (Peerless Canada and Peerless USA are collectively referred to as "Peerless"). *Id.* (citations omitted). The subject garments were purchased by Peerless USA from Peerless Canada through related party transactions. *Id.* (citations omitted). For appraisement by Customs, Peerless calculated intercompany price using two types of invoices that Peerless Canada issued to Peerless USA: the cost of manufacturing known as "cut, make & trim" ("CMT"); and the cost of fabric known as material purchase recovery ("MPR"). *Id.* (citations omitted). During an audit initiated in 1997, Customs examined CMT, MPR and a third type of invoice that Peerless Canada issued to Peerless USA but was not declared to Customs consisting of eleven categories of warehousing, general and administrative expenses known as Warehousing and Expense Allocation ("WEA"). *Id.* (citations omitted). Peerless USA claimed that these expenses were either not dutiable or had already been allocated and captured in CMT. *Id.* at 1314 (citations omitted).

Customs in March 2000 determined that Peerless USA owed additional dutiable value on certain WEA categories. Customs Headquarters Ruling Letter Number 547108 (March 28, 2000) ("HQ 547108"). Customs agreed with Peerless that the following three WEA categories were "not included in the price" and therefore not dutiable:

"expenses for shipping truck rental, selling expenses, and travelling and selling expenses." HQ 547108 at 3. Customs further accepted Peerless' 50 percent allocation of the WEA category for shipping salaries. *Id.* at 6. In contrast to Peerless, Customs found that the entire WEA category for warehousing was dutiable. *Id.* at 6. For the six remaining WEA categories, Customs found that "92.2 percent of the management salaries, data entry salaries, office salaries and supplies, computer supplies, telephone and buying salaries were to be included in the price of the imported clothing." *Id*. at 9. Customs in September 2002 denied the protest of HQ 547108. Customs Headquarters Ruling Letter Number 548065 (September 6, 2002) ("HQ 548065").

Peerless USA commenced this action in August 2003 contesting the imposition of duties on the WEA categories by Customs. Specifically, Peerless USA argued that Customs violated: (1) 19 U.S.C. § 1625(c) by modifying "treatment" of the imported garments without the statutorily required review and comment period, and (2) 19 U.S.C. § 1401a by replacing Peerless' expense methodology that complied with generally accepted accounting principles ("GAAP"). *Peerless I*, 602 F. Supp. 2d at 1312. This court in January 2009 held that Customs had not violated 19 U.S.C. § 1625(c). *Id.* at 1318–24. This court further held that Customs properly found the WEA warehousing category fully dutiable but improperly replaced Peerless' allocation of six WEA categories. *Id*. at 1327–30. *Peerless I* determined that Peerless' intercompany expense allocation complied with both GAAP and the computed value method pursuant to 19 U.S.C. § 1401a(e). *Id.* at 1326–27.

Defendant now moves for reconsideration of *Peerless I*, requesting the affirmation of HQ 547108 and HQ 548065. Defendant's Reconsideration Motion at 1. Defendant claims that pursuant to the statutory scheme of 19 U.S.C. § 1401a valuation methods are hierarchical and contends that the court misapplied 19 U.S.C. § 1401a by failing to either apply the transaction value method pursuant to 19 U.S.C. § 1401a(b) or find the transaction value method to be inapplicable. *Id.* at 8–11. Defendant further claims that *Peerless I* erroneously relied upon the KPMG Transfer Pricing Study Update 1997 Report ("KPMG Study") to support its computed value conclusion. *Id.* at 12–14. Peerless USA opposes Defendant's Reconsideration Motion. See Plaintiff's Brief in Opposition to Defendant's Motion for Rehearing or Reconsideration ("Plaintiff's Reconsideration Opposition").

III.
STANDARD OF REVIEW

USCIT Rule 59 provides that rehearing may be granted "on all or some of the issues — and to any party — . . . after a nonjury trial, for

any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." USCIT R.59(a)(1)(B). This court has articulated the grounds for granting motions pursuant to USCIT Rule 59 as follows:

> A rehearing may be appropriate [for cases in which] there was: (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case. In any event, in ruling on a petition for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous."

United States v. Gold Mountain Coffee, Ltd., 8 CIT 336, 336–37, 601 F. Supp. 212 (1984) citing *W.J. Byrnes & Co. v. United States*, 68 Cust. Ct. 358 (1972), and *Quigley & Manard, Inc. v. United States*, 61 CCPA 65, 496 F.2d 1214 (1974). *See also Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006) ("The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice.").

Motions for reconsideration are granted to correct instances in which there was a "significant flaw" in the original proceedings, not to allow a losing party the chance to repeat arguments or to relitigate issues previously before the court. *Ont. Forest Indus. Assoc. v. United States*, 30 CIT 1624, 1625, 462 F. Supp. 2d 1261 (2006); *see also Starkey Lab. v. United States*, 24 CIT 504, 510, 110 F. Supp. 2d 945 (2000) ("rehearing is a means to correct a miscarriage of justice") (quoting *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 585, 623 F. Supp. 1262 (1985) *rev'd and remanded on other grounds*, 840 F.2d 1547 (Fed. Cir. 1988)); *Gold Mountain*, 8 CIT at 337. "[T]he purpose of a petition for rehearing under the [USCIT] Rules . . . is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *Retamal v. United States*, 29 CIT 132, 136 (2005) (citations omitted), *vacated in part, rev'd in part, and remanded on other grounds*, 439 F.3d 1327 (Fed. Cir. 2006).

IV.
DISCUSSION

Defendant's Reconsideration Motion is denied because use of the transaction value method that Defendant advocates would not have

brought about a different result from *Peerless I*. *See Retamal*, 29 CIT at 136. Defendant is certainly correct that 19 U.S.C. § 1401a creates a hierarchy of valuation methods for appraisement with transaction value being the primary method. *See* Defendant's Reconsideration Motion at 8–11 citing 19 U.S.C. § 1401a; *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1330–31 (Fed. Cir. 1999); *E.I. Dupont De Nemours & Co. v. United States*, 24 CIT 1301, 1307, 123 F. Supp. 2d 637 (2000); 19 C.F.R. § 152.101(b). *See also* H.R. Rep. No. 96-317, at 80 (1979), *as reprinted in* 3 Legislative History of the Trade Agreements Act of 1979. The statute permits use of transaction value between related parties but sets out a prerequisite before that value can be used between a related buyer and seller. 19 U.S.C. § 1401a(b)(2)(B).[1] Because the court is convinced that Defendant is correct about the hierarchical nature of the statute, it has used the transaction value method for appraisement between Peerless USA and Peerless Canada in deciding Defendant's Reconsideration Motion.[2] Thus, the amount determined to be dutiable in *Peerless I*, as revised herein, is comprised of CMT, MPR and the WEA warehousing category which is the transaction value pursuant to 19 U.S.C. § 1401a(b).

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[1] As set forth in 19 U.S.C. § 1401a(b)(2)(B):

> The transaction value between a related buyer and seller is acceptable for the purposes of this subsection if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or if the transaction value of the imported merchandise closely approximates—
>
> > (i) The transaction of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States; or
> > (ii) The deductive value or computed value for identical merchandise or similar merchandise;
>
> but only if each value referred to in clause (i) or (ii) that is used for comparison relates to merchandise that was exported to the United States at or about the same time as the imported merchandise.

The legislative history for this provision explains as follows:

> Since the two methods are alternatives, a finding under either one that the related parties' transaction value is acceptable for customs purposes is sufficient. . . . [T]he fact that the buyer and seller are related will not automatically preclude the availability of transaction value; rather, the U.S. Customs Service will use the alternative methods of determining the applicability of the transaction value. While it is understood that previous examinations by the U.S. Customs Service of a particular relationship may obviate the need to fully examine that relationship in each transaction, the criteria of one of the two alternative methods must always be met to stay in the transaction value.

H.R. Rep. No. 96–317, at 82 (1979), *as reprinted in* 3 Legislative History of the Trade Agreements Act of 1979.

[2] At oral argument, Plaintiff Peerless Clothing International, Inc. ("*Peerless USA*") stated that the transaction value method is appropriate in this case.

Transaction value is defined in relevant part as "the price actually paid or payable for the merchandise when sold for exportation to the United States. . . ." 19 U.S.C. § 1401a(b)(1). The term " price actually paid or payable" is further defined as the "total payment . . . made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4)(A). Customs found that Peerless USA owed additional dutiable value on the entire WEA warehousing category and 92.2 percent of six specified WEA categories. HQ 547108 at 6, 9. Defendant claims that the transaction value includes these amounts because "the invoices which comprised the intercompany allocation payments were properly considered part of the 'price actually paid or payable' and Customs was correct in factoring the majority of such costs back into the price following its appraisal." Defendant's Reconsideration Motion at 11–12.

Defendant relies upon *Generra Sportswear Co. v. United States*, 905 F.2d 377 (Fed. Cir. 1990). Defendant's Reconsideration Motion at 11. There, Customs included separately invoiced quota charges in the transaction value and the importer challenged after "Customs denied the protest, concluding that all monies paid to the seller are includable in transaction value." *Generra*, 905 F.2d at 378. The Federal Circuit held that "Customs' construction of section 1401a(b), that transaction value may include quota charges, is permissible." *Id.* at 379. *Generra* provides the following discussion of the statutory requirement for transaction value:

> As long as the quota payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in the transaction value, even if the payment represents something other than the per se value of the goods. The focus of transaction value is the actual transaction between the buyer and seller; if quota payments were transferred by the buyer to the seller, they are part of the transaction value. That transaction value may encompass items other than the pure cost of the imported merchandise is reflected in section 1401a(b)(3), governing exclusions from transaction value. If excludable costs or charges are not identified separately from the price actually paid or payable, they are included in transaction value.

Id. at 380.[3]

[3] In their briefs, both Defendant and Peerless USA refer to "the *Generra* presumption." Defendant's Reply in Support of its Motion For Rehearing or Reconsideration at 2–4; Plaintiff's Brief in Opposition to Defendant's Motion for Rehearing or Reconsideration at 4 n.2. A "presumption" is "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." BLACK'S LAW DICTIONARY (8th Ed. 2004). At oral argument, neither Defendant nor Peerless USA could identify

Generra does not render all payments by Peerless USA to Peerless Canada part of the transaction value. Although *Generra* held that Customs permissibly determined the transaction value under 19 U.S.C. § 1401a(b) to include all payments between the buyer and seller in that case, *Generra*, 905 F.2d at 379–81, it does not follow that the same result is reached here. Peerless USA effectively distinguishes *Generra* based on

> what Customs itself did in this case: Customs determined that not all payments from plaintiff [Peerless USA] to Peerless Canada were dutiable; it accepted the concept of inter-company overhead expense allocations as permissible; and even fully agreed with some of plaintiff's allocations, while disagreeing with the majority of others only as to the allocation percentage.

See Plaintiff's Reconsideration Opposition at 4 (emphasis removed). By accepting Peerless' allocation of the non-warehousing WEA categories either in their entirety or as to a particular percentage, HQ 547108 at 3, 6, 9, Customs conceded that the transaction value does not necessarily include all payments by Peerless USA to Peerless Canada.

Peerless was found to have appropriately allocated the non-warehousing WEA categories using methodology that complied with Canadian GAAP. *Peerless I*, 602 F. Supp. 2d at 1328–30, 1326. Therefore, CMT, MPR and the WEA warehousing category comprise the "total payment . . . made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." *See* 19 U.S.C. § 1401a(b)(4)(A). This amount is, in fact, the transaction value pursuant to 19 U.S.C. § 1401a(b) and also the computed value pursuant to 19 U.S.C. § 1401a(e), which the court used in *Peerless I*. Accordingly, application of transaction value does not change the result in this case.

Defendant additionally seeks reconsideration of the computed value conclusion in *Peerless I*. Defendant contends that "the Court erred in relying upon the KPMG Study to establish that plaintiff [Peerless USA] showed due diligence in concluding that Peerless Canada (the manufacturing company) had no competitors in Canada." Defendant's Reconsideration Motion at 12 (emphasis removed). As previously recognized, the requirement in

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language in the opinion making all payments between a buyer and a seller presumed to be part of the transaction value (the presumption that the precedent is claimed to establish). Because the court also cannot identify any language to this effect, it does not find that such a presumption is created by *Generra Sportswear Co. v. United States*, 905 F.2d 377 (Fed. Cir. 1990).

19 U.S.C.§ 1401a(e)(1)(B)[4] "that computed value be consistent with other producers in the country of export is not absolute. When an exporting manufacturer makes a diligent effort to find a comparable manufacturer in the country of export but cannot do so, it can use . . . actual profits in making its computed value determination." *Peerless I*, 602 F. Supp. 2d at 1327 citing *Meadows Wye & Co., Inc. v. United States*, 58 Cust. Ct. 746, 750–51 (1967), and *Meadows Wye & Co., Inc. v. United States*, 64 Cust. Ct. 713, 717–18, 314 F. Supp. 54 (1970). *See also La Perla Fashions, Inc. v. United States*, 22 CIT 393, 401, 9 F. Supp. 2d 698 (1998), aff'd, 185 F.3d 885 (Fed. Cir. 1999) ("Customs wishfully reads into the statute a condition for comparison to unrelated party sales from exporter to importer where there is none.").[5]

The computed value conclusion in *Peerless I* was reached without the KPMG Study. Peerless USA accurately explains that disregarding the KPMG Study "would not change the result of this case because it was permissible for the Court, under the language of the statute, to look only to Peerless Canada's ('the producer's') actual profits and general expenses, which were reasonable under the circumstances of the related party sale and consistent during the relevant period. . . . [T]he record otherwise supports the Court's conclusion that Peerless had no real competitors in Canada, and that plaintiff [Peerless USA] was otherwise diligent in setting a price that was reasonable and ensured recovery of all costs and expenses plus a profit." *See* Plaintiff's Reconsideration Opposition at 8 citing Plaintiff's Motion for Summary Judgment Exhibit 3: Deposition of Carmen Lamonica at 76–77, Exhibit 8: Deposition of Robert L. Roy at 23, 25, 33, and *Coats & Clark, Inc. v. United States*, 74 Cust. Ct. 13, 16 (1975). Peerless USA provides ample record support for the computed value conclusion in Peerless I being reached without the KPMG Study, see Plaintiff's Reconsideration Opposition at 8–10, including testimony that

[4] As set forth in 19 U.S.C. § 1401a(e)(1):
The computed value of imported merchandise is the sum of—
. . .
(B) an amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States; . . . .

[5] "[T]he Court finds that there is no support in the statute for Customs' contention that computed . . . value calculations must be derived from an unrelated manufacturer or exporter. The Court can envisage scenarios where a manufacturer sells unique merchandise to a single related importer in the U.S. In this situation there would be no comparable unrelated third party transfer with which to compare cost information." *La Perla Fashions, Inc. v. United States*, 22 CIT 393, 401, 9 F. Supp. 2d 698 (1998). Although this explanation of the statutory requirement for computed value is directly applicable here, the upholding of Customs having rejected the importer's computed value calculations is not because, unlike *La Perla*, the calculations at issue do not suffer from a "lack of reliability." *See id.*; *Peerless Clothing Int'l, Inc. v. United States*, 602 F. Supp. 2d 1309, 1329 (CIT 2009) (finding an absence of "fraud, falsehood, or inaccuracy" as to the subject intercompany allocation).

Peerless Canada lacked a comparable manufacturer in Canada, *id.*, Plaintiff's Rehearing Exhibit A: Deposition of Joel Segal at 119–122.[6]

Peerless I held that the amount dutiable was CMT, MPR and the WEA warehousing category. This sum constitutes the computed value pursuant to 19 U.S.C. § 1401a(e) without the KPMG Study, as well as "the price actually paid or payable" transaction value pursuant to 19 U.S.C. § 1401a(b). The non-warehousing WEA categories are not included in the transaction value and need not be, as Customs acknowledged by accepting Peerless' allocation for these categories either in their entirety or as to a particular percentage. *See* HQ 547108 at 3, 6, 9. Because the arguments set forth in Defendant's Reconsideration Motion do not affect the outcome of *Peerless I*, any change in results due to reconsideration is not "need[ed] to prevent manifest injustice." *See Ford Motor*, 30 CIT at 1588. *Peerless I* is neither "manifestly erroneous," *see Gold Coffee*, 8 CIT at 337 (citation omitted), nor "a miscarriage of justice," *see Starkey Lab.*, 24 CIT at 510 (citation omitted), warranting reconsideration pursuant to USCIT Rule 59.

V
CONCLUSION

For the above stated reasons, Defendants' Motion for Rehearing or Reconsideration of *Peerless Clothing Int'l, Inc. v. United States*, 602 F. Supp. 2d 1309 (CIT 2009), is DENIED.

SO ORDERED.

Dated: August 13, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

[6] Additional record support includes testimony that Peerless Clothing, Inc. endeavored to verify the reasonableness of its intercompany pricing. *See* Plaintiff's Motion for Summary Judgment Exhibit 4: Deposition of Michael Frankel at 42–43, 67–68, 90–91, 96–97, Exhibit 8: Deposition of Robert L. Roy at 23, 25, 33:23–25 ("[w]e always checked with our Customs counsel to make sure that we were within the realm of what was reasonable.").