U.S. Customs and Border Protection

Slip Op. 09–127

SIDENOR INDUSTRIAL SL, Plaintiff, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORP., ET AL., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 07–00307

[Plaintiff's Motion for Judgment on the Agency Record is DENIED and the Agency's Determination is AFFIRMED.]

Dated: October 30, 2009

Riggle & Craven (*David J. Craven* and *David A. Riggle*) for Plaintiff Sidenor Industrial SL.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*L. Misha Preheim*); and *Deborah King*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Kelley Drye & Warren LLP (*Mary T. Staley* and *Grace W. Kim*) for Defendant-Intervenors Carpenter Technology Corporation, Electralloy Corporation, a Division of G.O. Carlson, Inc., and Valbruna Slater Stainless, Inc.

PUBLIC VERSION

Wallach, Judge:

I.
Introduction

This action arises out of the administrative review of an antidumping duty order conducted by the United States Department of Commerce ("Commerce"). Plaintiff Sidenor Industrial SL ("Sidenor") challenges Commerce's decision to apply adverse facts available ("AFA") to calculate Sidenor's dumping margin. Alternatively, Sidenor challenges the AFA dumping margin selected by Commerce. In addition, Sidenor argues that Commerce's denial of its request to report its cost data on a fiscal year basis, rather than for the period of review, was an abuse of discretion.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because Commerce's decisions are supported by substantial evidence and oth-

erwise in accordance with law, Commerce's determination in *Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 42,395 (August 2, 2007) ("*Final Results*") is affirmed.

II.
Background

Commerce imposed an antidumping duty order on stainless steel bar from Spain in 1995. *Amended Final Determination and Antidumping Duty Order: Stainless Steel Bar from Spain*, 60 Fed. Reg. 11,656 (March 2, 1995) ("*AD Order*"). In March 2006, Commerce published notice of the opportunity to request an administrative review of the *AD Order* for the period of review beginning March 1, 2005 and ending February 28, 2006. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 71 Fed. Reg. 10,642 (March 2, 2006). In response to this notice, Sidenor requested that Commerce conduct an administrative review of its U.S. sales of stainless steel bar. Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce (March 28, 2006), Public Record ("P.R.") 1. Commerce thereafter initiated an administrative review of Sidenor's sales of stainless steel bar for the period of review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 71 Fed. Reg. 25,145 (April 28, 2006), P.R. 2.

Commerce sent Sections A, B, and C of its antidumping duty questionnaire to Sidenor on May 5, 2006.[1] Sidenor responded with a letter dated May 19, 2006; in the letter, Sidenor requested that Commerce clarify certain aspects of the questionnaire. Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce (May 19, 2006), P.R. 8. Sidenor also requested authorization from Commerce to report its cost of production and constructed value data for its 2005 fiscal year rather than for the period of review

[1]The antidumping questionnaire is designed to elicit all information necessary to determine whether a respondent is dumping and, if so, to calculate the dumping margin. *See* Department of Commerce, Antidumping Manual (February 10, 1998) ("AD Manual"), Chap. 6 at 11. The antidumping questionnaire normally consists of five sections (A through E) and several appendices. *Id.*, Chap. 4 at 2–8. Section A is designed to elicit general information about a respondent's corporate structure and business practices as well as information concerning the allegedly dumped goods. *Id.*, Chap. 4 at 2. Section B is designed to assist Commerce in determining the normal value of the goods; it requires respondents to list sales transactions of the subject goods in the home country market (or a third-country market, where appropriate). *Id.*, Chap. 4 at 3. Section C is designed to assist Commerce in determining the U.S. price against which normal value is compared. *Id.*, Chap. 4 at 5. Section D inquires about the costs of producing the goods. *Id.* Section E inquires about the value added in the U.S. to the goods prior to delivery to unaffiliated U.S. customers, if any. *Id.*, Chap. 4 at 6.

(March 1, 2005 through February 28, 2006). *Id.* In responding to Sidenor's requests, Commerce expressed its willingness to consider authorizing Sidenor to report its cost data on the basis of the 2005 fiscal year, provided that Sidenor demonstrate that such a shift in the cost reporting would not distort costs for the period of review. Letter from Laurie Parkhill, Office Director, Department of Commerce, to David J. Craven, Riggle & Craven (May 30, 2006), P.R. 12. Commerce requested that Sidenor answer four specific questions, the answers to which would assist Commerce in determining whether a shift in the cost reporting period would lead to distortion in the data. *Id.* Sidenor "did not provide the specific information" that Commerce requested. Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Stainless Steel Bar from Spain for the Period of Review March 1, 2005, through February 28, 2006 (July 26, 2007), P.R. 84 ("*Final Decision Memo*"), 2.

Subsequently, Commerce published the preliminary results of this administrative review. *Stainless Steel Bar from Spain: Preliminary Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 14,522 (March 28, 2007) ("*Preliminary Results*"). In the *Preliminary Results*, Commerce found that the statutory criteria for application of an AFA rate to Sidenor were met. *Id.* at 14,522–24. Commerce selected an AFA rate of 62.85%, the highest rate established by Commerce in the initial less-than-fair-value ("LTFV") investigation. Commerce determined that this rate remained both reliable and relevant. *Id.* at 14,524.

Sidenor filed a case brief challenging Commerce's conclusions with respect to its questionnaire responses and Commerce's application of total adverse facts available. Commerce rejected Sidenor's arguments. *See Final Decision Memo*. Sidenor was assigned a final AFA rate of 62.85%. *Final Results* at 42,395.

III.
Standard of Review

The court will hold unlawful a determination by Commerce resulting from an administrative review of an antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

A determination is supported by substantial evidence if the record contains "evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291,

1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Id.* (citing *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1375–76 (Fed. Cir. 2001); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1356–57 (Fed. Cir. 1996).

To determine whether Commerce's interpretation and application of the antidumping statute at issue is otherwise "in accordance with law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842—43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the first step of the *Chevron* analysis, the court must ascertain "'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (quoting *Chevron*, 467 U.S. at 842–43).

The court reaches the second step of the *Chevron* analysis only "'if the statute is silent or ambiguous with respect to the specific issue.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). Under this second step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978) (citations omitted). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation had the question first arisen in a judicial proceeding. *Id.* (citations omitted).

IV.
Discussion

Sidenor challenges three decisions made by Commerce during the course of the administrative review. First, Sidenor argues that Commerce's denial of its request to report its cost data on a fiscal year basis, rather than for the period of review, was an abuse of discretion. Second, Sidenor contests Commerce's decision to apply adverse facts available to calculate its dumping margin. Third, Sidenor argues that even if Commerce's decision to calculate its dumping margin on the

basis of adverse facts available is affirmed, the margin selected by Commerce should be lower. Each of Commerce's determinations survives these challenges. Commerce reasonably exercised its discretion to deny Sidenor's request to submit information in a form different than that originally requested. Commerce's decision to calculate Sidenor's dumping margin on the basis of adverse facts available is supported by substantial evidence and in accordance with law. The AFA rate selected by Commerce is supported by substantial evidence and in accordance with law.

A
Commerce Reasonably Exercised its Discretion to Deny Sidenor's Request to Submit Information In a Form Different Than That Originally Requested

Sidenor argues that Commerce's denial of its request to report its cost data on a fiscal year basis, rather than for the period of review, was an abuse of discretion. *See* Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("Plaintiff's Motion") at 13. Commerce generally allows a respondent to shift its cost-reporting period if the respondent shows that such a shift will not distort the costs for the period of review. *Final Decision Memo* at 2. Sidenor did not make that showing. *Id.* at 3.

After receiving Sidenor's request for authorization to shift the cost-reporting period from the period of review to the fiscal year, Commerce responded that it "may agree to Sidenor's request . . . only if [Commerce] can establish that the shifted costs will not distort the costs for the period of review." Letter from Laurie Parkhill, Office Director, Department of Commerce, to Sidenor Industrial Ltd. c/o Donald J. Craven (May 20, 2006), P.R. 12. To that end, Commerce asked that Sidenor respond to four specific questions. *Id.* Sidenor did not respond to these questions. *Final Decision Memo* at 2. Two months later, Commerce followed up with a second letter reiterating its request. *Id.* Although Sidenor responded, it failed to provide the information that Commerce requested. *Id.* Commerce thereafter concluded that "without Sidenor's response . . . , we could not determine whether a shift in the reporting period was reasonable." *Id.*

Accordingly, Commerce did not abuse its discretion in denying Sidenor's request.

B
Commerce's Decision to Calculate Sidenor's Dumping Margin on the Basis of Adverse Facts Available is Supported by Substantial Evidence and in Accordance With Law

When Commerce uses the phrase "adverse facts available," it is referring to a two-step procedure: (1) resort to "facts otherwise available" when information it has requested is unavailable or deficient, 19 U.S.C. § 1677e(a); and (2) use of "adverse inferences" in selecting from the "facts otherwise available" when "an interested party has failed to cooperate by not acting to the best of its ability," 19 U.S.C. § 1677e(b). *See Ad Hoc Shrimp Trade Action Committee v. United States*, 616 F. Supp. 2d 1354, 1368–69 (CIT 2009) (citing *Jinan Yipin Corp v. United States*, 526 F. Supp. 2d 1347, 1353 n.7 (CIT 2008)). Sidenor argues that Commerce erred with respect to both steps.

First, Sidenor contends that the requisite statutory criteria for determinations on the basis of "facts otherwise available" have not been met. Second, Sidenor contends that the application of adverse inferences is inappropriate because it acted to the best of its ability in responding to Commerce's requests for information. Lastly, Sidenor argues that Commerce is not authorized to calculate a respondent's dumping margin on the basis of adverse facts available unless it has conducted a verification of the information submitted during the course of the administrative review.

1
Commerce's Resort to "Facts Otherwise Available" Was Appropriate Because Sidenor Did Not Provide the Requested Information

Sidenor contends that the requisite statutory criteria for determinations on the basis of "facts otherwise available" have not been met. Plaintiff's Motion at 15. The relevant statute directs Commerce to use the facts otherwise available in making determinations in antidumping proceedings when any one of the following conditions is met:

> (1) necessary information is not available on the record; or (2) an interested party . . . (A) withholds information that has been requested by [Commerce] . . . , (B) fails to provide such information by the deadlines for submission 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). Before using the facts otherwise available, however, Commerce is required to notify the responding party of the deficiency and, to the extent practicable, permit that party to remedy

or explain the deficiency. *Id.* § 1677m(d). Commerce must consider information submitted by an interested party if the following five criteria are met:

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] . . . with respect to the information, and

(5) the information can be used without undue difficulties.

Id. § 1677m(e). If, however, Commerce finds the party's explanation of the deficiency either untimely or insufficient, and one of the five criteria in 19 U.S.C. § 1677m(e) is not met, Commerce can disregard all or part of the original and subsequent responses. *Id.* § 1677m(d).

Here, Commerce determined that four of the conditions enumerated in 19 U.S.C. § 1677e were present; the existence of only one condition is sufficient for Commerce to make a determination on the basis of facts otherwise available. According to Commerce, "necessary information was not available on the record and Sidenor withheld critical information requested by Commerce, failed to provide information in the form and manner requested, and significantly impeded the proceeding." Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Defendant's Response") at 14. These findings are supported by substantial evidence.

When determining normal value, Commerce normally calculates costs "based on the records of the exporter . . . , if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). In order to determine whether the cost data provided by an exporter is reasonably allocated to the subject merchandise, Commerce first "ensure[s] that the aggregate amount of the reported costs captures all costs incurred by the respondent in producing the merchandise under consideration." Memorandum from Mark Todd, Senior Accountant, Department of Commerce, to the file (March 22,

2007), Confidential Record ("C.R.") 29 ("*AFA Memo*"), 2. Commerce does so by reconciling the cost data submitted by the respondent to the respondent's audited financial statements. *Id.* This court has recognized that "Commerce must ensure that [a respondent's] reported costs capture all of the costs incurred by the respondent in producing the subject merchandise" before it can appropriately use that respondent's cost allocation methodology. *Myland Indus., Ltd. v. United States*, 2007 WL 3120293, *6 (CIT 2007). Sidenor's failure to furnish to Commerce (1) actual documentation from its normal books and records to support its reported direct materials cost and (2) a reconciliation between its sales and production figures made it impossible for Commerce to do so.

Sidenor claimed that it calculated its direct material costs by subtracting the nonmaterial costs from the total production costs for the final products. Section D Antidumping Questionnaire, Response of Sidenor Industrial SL (September 19, 2006), C.R. 12, D–24 to D–25. Sidenor did not, however, provide Commerce with appropriate documentation to support this assertion.

Commerce provided Sidenor with the opportunity to remedy or explain the deficiencies in its response, as required by 19 U.S.C § 1677m(d), by issuing three supplemental questionnaires requesting a proper cost reconciliation and supporting information for the direct materials cost for the merchandise under consideration. *Final Decision Memo* at 10. Commerce explained that the purpose of its request "was to obtain support from Sidenor's normal books and records for the information included in [certain of Sidenor's] exhibits." *Id.* at 5. Yet, Sidenor "failed to provide . . . supporting documentation linking its reported direct material costs to its financial accounting records maintained in the normal course of business." *AFA Memo* at 2; *see also Final Decision Memo* at 7. Commerce found this failure particularly problematic because Sidenor's direct material costs account for [[a large]] percent of the merchandise under consideration and only [[a small]] percent of Sidenor's stainless steel bar was reported as merchandise under consideration (with [[a large]] percent reported as sold outside of the United States and the home market). *AFA Memo* at 6.

Sidenor maintains that it "is of no moment" that it did not reconcile its sales directly to the costs because, "[s]ince both [sales and costs] were reconciled to the audited financial statement, they necessarily reconcile to each other." Plaintiff's Motion at 15. This misses the point; the fact remains that Sidenor did not provide to Commerce the information necessary "to gain an understanding of Sidenor's report-

ing methodology." *AFA Memo* at 3; *see also Final Decision Memo* at 7. Commerce found that Sidenor's failure to provide the requested reconciliations left it "with no support or assurance that the quantity of [stainless steel bar] reported as merchandise under consideration is complete and accurate." *AFA Memo* at 6.

As a result of Sidenor's failure to furnish the requested documentation, necessary information was neither on the record (19 U.S.C. § 1677e(a)(1)) nor provided in the form and manner requested by Commerce (19 U.S.C. § 1677e(a)(2)(B)). Further, by failing to furnish the information, Sidenor withheld information (19 U.S.C. § 1677e(a)(2)(A)) and significantly impeded the conduct of the administrative review (19 U.S.C. § 1677e(a)(2)(C)). Accordingly, Commerce's decision to rely on facts otherwise available to calculate Sidenor's dumping margin was supported by substantial evidence and otherwise in accordance with law.

2
Commerce Properly Applied Adverse Inferences When Selecting Amongst the Facts Otherwise Available Because Sidenor Did Not Act to the Best of its Ability

Commerce is authorized to employ adverse inferences when selecting from the facts otherwise available if it finds that an interested party "has failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 ("SAA")[2] at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199. The Federal Circuit has interpreted this language to mean that a party must "do the maximum it is able to do" to comply with Commerce's request. *Nippon Steel Corporation v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

"Whether a respondent has done the maximum it was able to do to comply with Commerce's requests involves both objective and subjective inquiries." *Fujian Lianfu Forestry Co. v. United States*, 2009 Ct. Int'l Trade LEXIS 92, *17 (CIT 2009). Under the objective inquiry, Commerce must demonstrate "'that a reasonable and responsible

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[2]The Uruguay Round Agreements Act was signed into law on December 8, 1994. The Act approved the new WTO Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C. § 3511(a)(1). The Statement of Administrative Action approved by Congress to implement the Agreements is regarded as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations.'" *Id.* (quoting *Nippon Steel*, 337 F.3d at 1382–83). Under the subjective inquiry, Commerce must demonstrate that a respondent's failure to promptly produce the requested information "'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.* at *17–18 (quoting *Nippon Steel*, 337 F.3d at 1382–83).

With respect to the objective component of the inquiry, "[p]arties and attorneys filing documents with the Department of Commerce have an obligation to provide complete and correct information." *PAM, S.p.A. v. United States*, 2009 U.S. App. LEXIS 21118, *6 (Fed. Cir. 2009). Moreover, a respondent has "'a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce.'" *Fujian*, 2009 Ct. Int'l Trade LEXIS 92 at *24–25 (citing *Tung Mung Dev. v. United States*, 25 CIT 752, 758 (CIT 2001)). Here, Commerce did not request that Sidenor keep its books and records a certain way; it asked that Sidenor provide information that would assist Commerce in understanding how certain financial data related to the information contained in its normal books and records. Sidenor did not provide this information.

With respect to the subjective component of the inquiry, Commerce afforded Sidenor several opportunities to provide the requested reconciliations and documentation.[3] Because the requested information was within Sidenor's control, Commerce found that Sidenor's failure to furnish the requested information was effectively a failure to act to the best of its ability. *Final Decision Memo* at 12.

Sidenor disputes this finding and claims that it did act to the best of its ability. Plaintiff's Motion at 19. In support of this claim, Sidenor focuses on "reporting methodologies, conversion costs, cost variances, and the overall cost reconciliation." *Final Decision Memo* at 4; *see* Plaintiff's Motion at 19–30. Sidenor ignores what Commerce characterizes as "the primary reason for [its] finding that Sidenor did not cooperate to the best of its ability, [namely] Sidenor's failure to provide adequate explanations and requested documentation linking its reported direct-materials cost to cost-accounting records it maintains in the normal course of business." *Final Decision Memo* at 4; *see also AFA Memo* at 2–5 (discussing Sidenor's failure to provide proper data for an overall cost reconciliation and for a quantity reconciliation between reported sales and production quantities).

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[3] For a more detailed discussion of these opportunities, *see* Section IV.B.1.

Thus, Commerce's decision to apply adverse inferences when selecting from the facts otherwise available is supported by substantial evidence.

3
Commerce's Authority to Calculate a Respondent's Dumping Margin on the Basis of Adverse Facts Available Does Not Depend on Whether it has Conducted a Verification

Sidenor argues that Commerce cannot calculate its dumping margin on the basis of adverse facts available because it "was not subject to, and did not fail, a verification." Plaintiff's Motion at 10. Sidenor does not cite to any authority for this proposition.[4] *See id.* at 8–11.

The antidumping statute establishes the criteria that must be met in order to justify the use of adverse facts available to calculate a respondent's dumping margin; verification is not among the criteria listed. *See* 19 U.S.C. § 1677e(a) (use of "facts otherwise available") and 19 U.S.C. § 1677e(b) (use of adverse inferences in selecting from the facts otherwise available). The applicable statute requires verification in the context of an antidumping administrative review only if a domestic party makes a timely request for verification and either no verification has been performed in the prior two administrative reviews or good cause is shown. 19 U.S.C. § 1677m(i). The applicable regulation requires verification only if a domestic party makes a timely request for verification and no verification has been performed in the prior two administrative reviews or if good cause is shown. 19 C.F.R. § 351.307(b). These conditions are absent in the challenged review: Sidenor has not demonstrated that a domestic party requested verification of its information, and this is the first adminis-

[4]When asked at oral argument to provide citation to authority in support of this argument, Sidenor responded that "this case is a difficult case to cite specific legal authority [for]." In fact, Sidenor appears to have abandoned this argument. At oral argument, Sidenor clarified that "the argument is not that . . . AFA cannot be assigned in the absence of verification. Certainly it can be. . . . But the facts here are different." In any event, the court interprets Sidenor's failure to support its argument with citation to authority as tantamount to consent to denial of its argument. "'[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.'" *Fujian Lianfu Forestry Co. v. United States*, 2009 Ct. Int'l Trade LEXIS 92, *53 (CIT 2009) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)); *see also Fagersta Stainless AB v. United States*, 577 F. Supp. 2d 1270, 1279 n.6 (CIT 2008). "Briefs supporting motions for judgment on the agency record filed in actions arising under 28 U.S.C. § 1581(c) '*must* include the authorities relied on and the conclusions of law deemed warranted by the authorities.'" *MTZ Polyfilms, Ltd. v. United States*, 2009 Ct. Intl. Trade LEXIS 123, *9 (quoting USCIT Rule 56.2(c)(2)) (emphasis added in *MTZ*). "Failure to enforce [such requirements] will ultimately deprive [the appellate system] in substantial measure of that assistance of counsel which the system assumes." *Carducci v. Regan*, 714 F.2d 171, 230 U.S. App. D.C. 80 (D.C. Cir. 1982).

trative review of the *AD Order*. Moreover, this court has found that a respondent's act of purposefully withholding or providing misleading information is, in itself, grounds for the application of adverse facts available. *See Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 195, 360 F. Supp. 2d 1339, 1345 (CIT 2005).

Accordingly, Sidenor's verification argument cannot succeed.

C
The AFA Rate Selected By Commerce Was Supported By Substantial Evidence And Otherwise In Accordance With Law

Sidenor contends that, even if Commerce were correct in calculating its dumping margin on the basis of adverse facts available, the rate selected by Commerce is inappropriate for two reasons. First, Sidenor contends that the AFA rate was not corroborated. Second, Sidenor argues that the AFA rate is "aberrational" and "punitive."

1
Commerce Properly Corroborated The AFA Rate

Sidenor asserts that Commerce did not corroborate the AFA rate. Plaintiff's Motion at 34. This portion of Plaintiff's Motion contains no citations to authority, statutory or otherwise.[5] *See id.* at 34–35. According to Sidenor, "the sole basis for selecting this rate is that it was an adverse rate that applied to a company related to Sidenor in the original investigation. However, this is not a reasonable basis for corroboration." *Id.* at 34. Sidenor further argues that "[t]he rate is also not corroborated for time. The selected rate is from a period many years prior to the [period of review] at issue. There is no showing that it still reflects the current rate . . . ." *Id.* at 35. Commerce properly corroborated the AFA rate within the applicable legal framework.

Commerce is explicitly authorized to rely on "information derived from [a] previous administrative review or any other information placed on the record," including information derived from the petition, in establishing an AFA rate. *PAM, S.p.A.*, 2009 U.S. App. LEXIS 21118 at *7 (citing 19 U.S.C. § 1677e(b)). Information from a prior segment of the proceeding (for example, the AFA rate established in the initial LTFV investigation) is characterized as "secondary information." SAA at 870, 1994 U.S.C.C.A.N. at 4199. When Commerce uses secondary information, it is required "*to the extent practicable* . . . [to] corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c) (emphasis added).

[5]Plaintiff's failure to cite authority for this argument is, in effect, a consent to denial of its argument. *See* note 4, *supra*.

The Federal Circuit has interpreted Congress's purpose in enacting the corroboration requirement as follows:

> 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.

F.Lii de Cecco di Filippo Fara S. Martino S.p.A., 216 F.3d 1027, 1032 (Fed. Cir. 2000). To corroborate secondary information, Commerce must find that "the secondary information to be used has probative value." SAA at 870, 1994 U.S.C.C.A.N. at 4199. In addition, "Commerce needs to demonstrate how the selected proxy satisfies the *De Cecco* standard." *Fujian*, 2009 Ct. Int'l Trade LEXIS 92 at *14. If Commerce determines that it is not "practicable" to tie the selected AFA rate to the actual respondent, Commerce must explain why. *Id.* at *15.

Commerce evaluates whether secondary information has probative value by assessing its reliability and relevance. *KYD, Inc. v. United States*, 613 F. Supp. 2d 1371, 1378 (CIT 2009); *Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d 1273, 1278 (CIT 2007) (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711, 54,712–13 (September 16, 2005)). The reliability of an AFA rate is assessed by determining whether the rate was reliable when first used. *See KYD*, 613 F. Supp. at 1379 (citing *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 2007 Ct. Int'l Trade LEXIS 137, *44 (CIT 2007)). The relevance of an AFA rate is measured against "'past practices in the industry in question.'" *Id.* at 1380 (quoting *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223–24 (Fed. Cir. 1997)) and *Shanghai Taoen*, 29 CIT at 197, 360 F. Supp. 2d at 1346).

In this case, Commerce stated that it "reviewed all potential rates in the history of the proceeding which could be applied to Sidenor as an [AFA] rate in this segment of the proceeding." *Final Decision Memo* at 15. The potential rates available for Commerce were from the initial LTFV investigation; these included the 7.7% weighted-average margin calculated for a cooperative respondent, the 25.77% all-others rate, and the 62.85% rate calculated for a non-cooperative

respondent. *Id.* Commerce "found the rate of 62.85 percent to be reliable in the investigation" and, "[b]ecause the information was supported by source documents, . . . determine[d] that the information is still reliable." *Id.* at 17. Commerce found that the rate remained reliable because it has not been judicially discredited and because there was no new information that called into question its reliability. *Id.* at 18. With respect to relevance, Commerce evaluated whether there were any circumstances that would render the margin irrelevant. *Id.* According to Commerce, such circumstances might include judicial invalidation or a finding that the rate was based on another company's uncharacteristic business expense. *Id.* Commerce found "that [such] unusual circumstances . . . are absent in the instant review and, therefore, the selected rate retains its relevance." *Id.* With respect to the *De Cecco* standard, Commerce explained that "because Sidenor is a first-time participant in the current administrative review . . . , there are no prior weighted-average dumping margins that were ever calculated for Sidenor in prior segments of the proceeding." *Id.* at 19.

Thus, because Commerce found that the AFA rate applied in the initial LTFV investigation remained reliable and relevant, and because Commerce explained why it was not practicable to demonstrate that the rate was a reasonable approximation of Sidenor's actual rate, Commerce properly corroborated the rate for use in this administrative review.

2

The AFA Rate Is Neither "Aberrational" Nor "Punitive"

Sidenor also argues that the rate selected by Commerce cannot be "aberrational" or "punitive." Plaintiff's Motion at 35. Sidenor asserts that "if an [AFA] rate is selected, it should reasonably reflect the rate that would have applied had the data been able to be used with a reasonable additional amount to deter non-compliance." *Id.* (citing *Shandong Huarong Gen. Group Corp. v. United States*, 2007 Ct. Int'l Trade LEXIS 3 (CIT 2007)). In addition, Sidenor asserts that "the principles underlying" the 1:1 ratio for punitive damages established in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), "should have guided [Commerce] in its examination of the calculated AFA rate." Plaintiff's Motion at 37.

Like the argument profferred in Section IV.C.1 above with respect to relevance, these arguments have been addressed and rejected by the court on numerous occasions. *See, e.g., KYD*, 2009 Ct. Int'l Trade LEXIS 15 at *27–28; *PAM, S.p.A. v. United States*, 577 F. Supp. 2d

1318, 1321 (CIT 2008). The court has already determined that *Shandong* does not provide a numerical limit and that Commerce "is unfettered by absolute numerical limitations" when selecting an AFA rate. *Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284, 1301 (CIT 2008). The Federal Circuit has unequivocally stated that "[n]othing in Exxon Shipping, a case with a very different fact pattern and legal issues, requires us to impose new limits on the discretion Congress granted to the Department of Commerce." *PAM, S.p.A.*, 2009 U.S. App. LEXIS 21118 at *11.

V.
Conclusion

For the above stated reasons, Plaintiff's Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade is DENIED and Commerce's determination in *Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 42,395 (August 2, 2007) is AFFIRMED.

Dated: October 30, 2009
New York, New York

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

Slip Op. 09–130

THYSSENKRUPP MEXINOX S.A. DE C.V. ET AL., Plaintiffs, v. UNITED STATES, et al., Defendant, AK STEEL CORPORATION, ALLEGHENY LUDLUM CORPORATION and NORTH AMERICAN STAINLESS, Defendant-Intervenors.

Before: Pogue, Judge
Court No. 06–00236

ORDER

Presently before the court is Plaintiffs' request for declaratory and injunctive relief equivalent to that granted in *Canadian Lumber Trade Alliance v. United States*, 30 CIT 391, 443, 425 F. Supp. 2d 1321, 1373 (2006) ("*Canadian Lumber I*"), *aff'd in part & rev'd in part on other grounds*, 517 F.3d 1319 (Fed. Cir. 2008) and *Canadian Lumber Trade Alliance v. United States*, 30 CIT 892, 441 F. Supp. 2d 1259 ("*Canadian Lumber II*"), *aff'd as modified*, 517 F.3d 1319 (Fed. Cir. 2008) Responding to Plaintiffs' request, Defendant and Defendant-Intervenors both move to dismiss Plaintiffs' action in its entirety. Defendant also moves, in the alternative, for judgment on the agency record.

There is no doubt or dispute, however, that some entries of Plaintiff's merchandise — entries which are the subject of Plaintiff's complaint — remain unliquidated and therefore are subject to possible duty collection and disbursement under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), section 754 of the Tariff Act, 19 U.S.C. § 1675c. Accordingly, this matter is not moot, and, with regard to their request for declaratory relief, the Plaintiffs are correct. The court's opinions in *Canadian Lumber I* and *Canadian Lumber II* control this case, and the Plaintiffs are entitled to declaratory relief.

Canadian Lumber II also provides some support for Plaintiff's view that a balancing of equitable factors may weigh in favor of issuing a permanent injunction in this case. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction . . . must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be dis-served by a permanent injunction.").

Plaintiffs, however, have not yet made the necessary showing on the record here that these equitable factors weigh in favor of issuance of a permanent injunction. Specifically, plaintiffs have not demonstrated that, absent an order by the court, further collections or distributions contrary to section 408 are probable or imminent. As such, the court cannot at this time, absent further submissions and/or a hearing, conclude that a weighing of equitable factors requires entry of a permanent injunction here.

Therefore, in accordance with the court's determinations above, it is hereby:

ORDERED, ADJUDGED and DECREED that Defendant's and Defendant-Intervenors' Motions to Dismiss or, in the alternative, Motion for Judgment on the Agency Record are DENIED; and it is hereby

ORDERED, ADJUDGED and DECREED that, pursuant to section 408 of the North American Free Trade Implementation Act, 19 U.S.C. § 3438, the CDSOA does not apply to the antidumping orders on stainless steel sheet and strip products from Mexico; and it is hereby

ORDERED, ADJUDGED and DECREED that Defendant United States' disbursement under the CDSOA to domestic producers of antidumping duties assessed on imports of stainless steel sheet and strip products from Mexico was and is contrary to law; and it is hereby

ORDERED, ADJUDGED and DECREED that, as agreed by the parties, Count IV of Plaintiffs' Complaint is DISMISSED; and it is hereby

ORDERED that the parties shall confer and provide the court an agreed schedule for further submissions and/or a hearing addressing the appropriateness of permanent injunctive relief.

It is SO ORDERED.

Dated: November 16, 2009
New York,New York

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip Op. 09–131

ASAHI SEIKO CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 08–00363

[Granting in part and denying in part defendant's motion to dismiss]

Dated: November 16, 2009

Riggle & Craven (*David A. Riggle* and *Shitao Zhu*) for plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Deborah King*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Lane S. Hurewitz*, *Terence P. Stewart*, and *William A. Fennell*) for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

I.
Introduction

Plaintiff Asahi Seiko Co., Ltd. ("Asahi") contests the final determination ("Final Results") of the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the periodic administrative reviews of antidumping duty orders on ball bearings and parts thereof (the "subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. *See Ball Bearings & Parts Thereof From France, Germany, Italy, Japan,*

& the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Reviews in Part, 73 Fed. Reg. 52,823 (Sept. 11, 2008) ("*Final Results*"); Compl. ¶ 1. Asahi, a Japanese manufacturer and exporter of subject merchandise, challenges, *inter alia*, the Department's decision not to select Asahi for individual examination, as a result of which Asahi was not assigned a weighted-average dumping margin. Compl. ¶¶ 3, 26–29.

Defendant moves to dismiss for lack of jurisdiction pursuant to USCIT Rule 12(b)(1), alleging the absence of a case or controversy due to liquidation of all of Asahi's entries of subject merchandise that occurred during the period of review. Def.'s Mot. to Dismiss & Mot. to Stay Case Pending Resolution of Mot. to Dismiss 1, 4–7 ("Def.'s Mot."). In the alternative, defendant moves to dismiss pursuant to Rule 12(b)(5) for a failure to state a claim upon which relief can be granted, arguing that Asahi, having withdrawn from the review, failed to exhaust its administrative remedies. *Id.* at 1, 7–8. The court concludes that Asahi's claim challenging Commerce's refusal to conduct an individual examination of Asahi raises an actual case or controversy. The court declines to dismiss this claim on the ground that Asahi failed to exhaust administrative remedies, concluding that resolving the exhaustion issue would require an examination of the administrative record that is beyond the scope of the court's inquiry at this stage of the litigation. The court dismisses the other claims in Asahi's complaint for lack of standing.

II.
Background

Asahi requested that Commerce review its shipments of subject merchandise that were entered or withdrawn from warehouse for consumption during the period May 1, 2006 through April 30, 2007 ("period of review"). *Initiation of Antidumping and Countervailing Duty Admin. Reviews, Request for Revocation in Part & Deferral of Admin. Review*, 72 Fed. Reg. 35,690, 35,692 (June 29, 2007). Commerce initiated the review on June 29, 2007, listing Asahi as one of the companies to be reviewed. *Id.* The following November, Commerce announced that the request for review of Asahi, which Commerce identified as a "self-requestor," had been withdrawn on September 26, 2007, and that Commerce had rescinded the review as to Asahi. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Notice of Partial Rescission of Antidumping Duty Admin. Reviews*, 72 Fed. Reg. 64,577, 64,578 (Nov. 16, 2007) ("*Rescission Notice*").

Commerce announced in the preliminary results of the review ("Preliminary Results") that, after collecting information on the

quantity and value of sales to the United States from the exporters/producers listed in the initiation notice in June and July of 2007, it had decided to examine individually the sales of only two Japanese respondents, JTEKT Corporation ("JTEKT") and NTN Corporation ("NTN"). *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent to Rescind Reviews in Part*, 73 Fed. Reg. 25,654, 25,655 (May 7, 2008) ("*Prelim. Results*"). Commerce preliminarily assigned weighted-average dumping margins of 8.02% and 12.58% to JTEKT and NTN, respectively, and preliminarily assigned to seven non-selected Japanese respondents a margin of 10.30%, which was a simple average of the weighted-average margins assigned to the examined respondents. *Id.* at 25,661.

In the Final Results, Commerce determined margins of 8.03% and 11.96% for JTEKT and NTN, respectively, and assigned a simple average margin of 10.00% to the seven non-selected Japanese respondents. *Final Results*, 73 Fed. Reg. at 52,825. Asahi states that it filed a case brief on June 17, 2008 and that on July 1, 2008, Commerce heard, and Asahi participated in, oral arguments on the Preliminary Results specific to Japan. Compl. ¶ 10. Neither the Preliminary Results nor the Final Results assigned a margin to Asahi. *Prelim. Results*, 73 Fed. Reg. at 25,661; *Final Results*, 73 Fed. Reg. at 52,825.

III.
Discussion

Asahi's complaint contains four counts. In Count 1, Asahi challenges Commerce's decision to apply to the seven non-selected Japanese respondents an antidumping duty assessment rate calculated as a simple average of the weighted-average margins of the two Japanese respondents that were selected for individual examination. Compl. ¶¶ 14–20; *see Final Results*, 73 Fed. Reg. at 52,825. In Count 2, Asahi claims that "in selecting a sampling technique in this review," Commerce should have, but did not, "consider differences in selling and pricing methods," Compl. ¶ 25, including "significantly different average unit values." *Id.* ¶ 22. Asahi claims that, as a result, the rate selected for respondents was not "reliable, relevant, or reasonable." *Id.* ¶ 24. Count 3 of the complaint claims that Commerce acted unlawfully in refusing to determine a separate antidumping duty assessment rate for Asahi. *Id.* ¶¶ 26–29. Count 4 alleges that Commerce acted contrary to its own policy in deciding not to conduct individual examinations of "non-producing exporters," *i.e.*, "small resellers," *id.* ¶ 31, and in this way "effectively denied non-producing exporters the right to have a rate based on their own data." *Id.* ¶ 33.

A. Asahi Lacks Standing to Assert the Claims in Counts 1, 2, and 4 of its Complaint

To establish standing to bring a claim, Asahi must show that it has suffered an injury in fact, that there is a causal relationship between the injury and the conduct complained of, and that the injury can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). Asahi was not among the non-selected Japanese respondents that were assigned the 10.00% rate in the Final Results, and the complaint fails to allege any facts from which the court could conclude that Asahi was affected in any way by that rate or by Commerce's assignment of that rate to companies other than Asahi. *See Final Results*, 73 Fed. Reg. at 52,825. Therefore, Asahi lacks standing to challenge the 10.00% rate or Commerce's decision to apply that rate to the seven non-selected respondents. Accordingly, the court must dismiss Count 1 of the complaint. Count 2 of the complaint fails for the same reason, as the claim stated therein also pertains to the rate that Commerce assigned to the non-selected respondents. *See id.* In Count 4, plaintiff attempts to assert the rights of non-producing exporters to be assigned rates based on an individual examination of the sales of those exporters. Asahi, however, is not a non-producing exporter, and therefore Count 4 also fails for lack of standing. *See* Compl. ¶ 3.

In its remaining claim, which contests the Department's decision not to select Asahi for individual examination, Asahi challenges an agency decision that directly affected it. *See id.* ¶¶ 26–29. For the reasons discussed below, the court concludes that Asahi has standing to bring this claim and that this claim, contrary to defendant's motion to dismiss, is not moot.

B. Asahi Has Standing for its Remaining Claim, which Presents an Actual Case or Controversy

In support of dismissal, defendant first argues that any of Asahi's entries of subject merchandise made during the period of review that Customs has not liquidated are by now deemed liquidated pursuant to 19 U.S.C. § 1504(d) (2006), and as a result this case is moot. Def.'s Mot. 4–7. Plaintiff does not contest that its entries are liquidated but responds that the case is not moot because review of its entries would have resulted in a zero or *de minimis* margin, which is relevant to possible revocation of the antidumping duty order as to Asahi. Pl.'s Resp. to Def.'s Mot. to Dismiss 2–3 ("Pl.'s Resp."); *see* 19 C.F.R. § 351.222(b)(2) (2009) (allowing revocation of an antidumping duty order based on three consecutive zero or *de minimis* margins). Asahi also points out that it has challenged in another judicial review

proceeding the 1.28% margin that Commerce assigned to it in the previous administrative review and that "Asahi believes that its calculated rate of 1.28% will be reduced to zero or *de minimis* upon conclusion of the litigation." Pl.'s Resp. 2–3.

The court rejects the government's argument that liquidation of Asahi's entries moots this case. The Court of Appeals for the Federal Circuit ("Court of Appeals") has held that liquidation of entries does not of itself moot a challenge to the final results of an administrative review if the antidumping duty rate determined upon judicial review could affect future revocation of the antidumping duty order. *Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336, 1341–42 (Fed. Cir. 2008); *see Hylsa, S.A. de C.V. v. United States*, 31 CIT 52, 469 F. Supp. 2d 1341 (2007). The government argues that "Asahi did not receive a *de minimis* margin in either of the past two reviews in which it participated (the fifteenth and seventeenth reviews)." Def.'s Mot. 7. However, Asahi need not establish to a certainty that it will be able to achieve revocation. Asahi received a low margin in the previous review, 1.28%, of which the court takes judicial notice, which rate could be reduced further upon judicial review in this court. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053, 58,054 (Oct. 12, 2007). Because a zero or *de minimis* margin could result should Asahi prevail in this action, the court may not dismiss this case on the ground that all of Asahi's entries made during the period of review are liquidated.

Defendant also argues that this case presents no live case or controversy because, Commerce having rescinded the review with respect to Asahi, the Final Results did not cover Asahi. Def.'s Mot. 7. Defendant points out that "Commerce did not calculate an antidumping duty rate for Asahi for the period of review or for use as Asahi's cash deposit rate going forward." *Id*. Defendant concludes from this fact that "Asahi lacks a legally cognizable interest in the outcome" and that "even if this Court were to rule in Asahi's favor and remand the case to Commerce, any changes made in light of the remand could not affect Asahi's antidumping duty rate for entries made during the period of review or cash deposit rate for future entries." *Id*.

Although defendant is correct that the Final Results do not assign Asahi either an individually-determined rate or the rate determined for the non-selected Japanese respondents, the conclusions defendant draws from this fact are unwarranted. Commerce made a determination during this administrative review not to conduct an individual examination of Asahi's sales, a determination that Asahi seeks to

have overturned upon judicial review. Because this determination caused an injury in fact by denying Asahi an individual weighted-average dumping margin, which could have been a zero or *de minimis* margin, Asahi has standing to litigate the remaining claim in its complaint. Defendant is not correct in asserting that Asahi has no legally cognizable interest in this case. If Asahi were to succeed in demonstrating that Commerce acted unlawfully in refusing to examine its sales, the court would be required to order a remand to effect an appropriate remedy. Because such a remand could result in a margin that is beneficial to Asahi in contributing to a possible future revocation of the order as to Asahi, the court considers Asahi to have a stake in the outcome of this litigation.

C. The Court Declines to Rule on Issues Pertaining to Exhaustion of Administrative Remedies

Defendant argues that Asahi, having withdrawn from the administrative review, failed to exhaust its administrative remedies. Def.'s Mot. 7–8. Although defendant acknowledges that Asahi, during the administrative review, filed a case brief commenting on the issues raised in the complaint, defendant maintains that Commerce did not address those issues because of Asahi's withdrawal and the rescinding of the review with respect to Asahi. *Id.* at 8. Defendant argues that "Asahi must have been a respondent in the review to exhaust its administrative remedies." *Id.*

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the court considers only "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d. Cir. 1991). The court declines to review the administrative record in this case but takes judicial notice of determinations announced in the various Federal Register notices relevant to Asahi's claims, and of the issues and decision memorandum, which is incorporated by reference into the published Final Results. *Final Results*, 73 Fed. Reg. at 52,824; *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2006, through April 30, 2007*. Asahi's withdrawal of its review request and the rescission of the review as to Asahi are apparent from the relevant Federal Register notice. *Rescission Notice*, 72 Fed. Reg. at 64,578. It is equally apparent that Asahi was not assigned a margin in either the Preliminary Results or the Final

Results. *Prelim. Results*, 73 Fed. Reg. at 25,661; *Final Results*, 73 Fed. Reg. at 52,825. However, the pleadings in this case, even when supplemented by matters of which the court may take judicial notice, are not sufficient for the court to reach a proper determination on whether Asahi exhausted its administrative remedies or whether a recognized exception to the exhaustion doctrine could apply.[1] At this point in the proceedings, the court need not decide the question of whether a respondent's withdrawal from a review, and the subsequent rescission of the review as to that respondent, necessarily require denial of relief for failure to exhaust administrative remedies. For example, a party participating in a review conceivably could have withdrawn its request for review only after learning that Commerce had not selected it for individual examination and that Commerce would not, under any circumstances, review it as a voluntary respondent under 19 U.S.C. § 1677m(a) (2006). In such a circumstance, it could be argued that further participation would not have resulted in assignment of an individual margin to that party and therefore would have been futile. The court will decide issues relating to exhaustion when adjudicating Asahi's remaining claim on the merits, based on a full consideration of the administrative record and briefing by the parties. The court will have the opportunity to do so after Asahi's filing of a motion for judgment upon the agency record pursuant to USCIT Rule 56.2.

IV.
Conclusion

For the reasons stated in the foregoing, all claims in Counts 1, 2, and 4 of plaintiff's complaint must be dismissed for lack of standing. The court will consider issues pertaining to exhaustion of administrative remedies when adjudicating the claim in Count 3.

ORDER

Upon consideration of all proceedings and submissions had herein, and upon due deliberation, it is hereby

ORDERED that defendant's motion to dismiss plaintiff's complaint is hereby GRANTED in part and DENIED in part; it is further

ORDERED that all claims in Counts 1, 2, and 4 of the complaint be, and hereby are, dismissed for lack of standing; it is further

ORDERED that the parties, in complying with the court's order of January 23, 2009, need not, in the proposed briefing schedule and

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[1] Recognized exceptions to exhaustion requirement include: (1) argument based on pure question of law, (2) lack of timely access to the confidential record, (3) judicial decision rendered subsequent to the administrative determination materially affecting the issue, or (4) futility. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT __, __, 601 F. Supp. 2d 1370, 1377 (2009).

joint status report, address the jurisdictional issues decided in this Opinion and Order; and it is further

ORDERED that the parties specifically shall address in their briefs the issue of whether the record demonstrates that Asahi exhausted its administrative remedies with respect to the remaining claim in this case, and the issue of whether any recognized exception to the exhaustion requirement applies on the record facts.

Dated: November 16, 2009
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE