U.S. Customs and Border Protection

Slip Op. 12–112

UNITED STATES, Plaintiff, v. ACTIVE FRONTIER INTERNATIONAL, INC., Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 11–00167

[Denying without prejudice plaintiff's application for default judgment in action seeking civil penalty for alleged false statements of country of origin made upon entry of wearing apparel]

Dated: August 30, 2012

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Jean M. Del Colliano*, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

Plaintiff United States brought this action to recover a civil penalty under section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592 (2006) ("Section 592"), from Active Frontier International, Inc. ("AFI" or "Active Frontier"), a New York corporation, alleging that AFI falsely declared the country of origin of wearing apparel on seven entries made during 2006 and 2007. Compl. ¶¶ 1, 3, 16 (May 31, 2011), ECF No. 2. Plaintiff alleges that the wearing apparel on the seven entries was manufactured in the People's Republic of China ("China") but that the documentation filed with U.S. Customs and Border Protection ("Customs" or "CBP") for each of the entries showed one of three countries, specifically, Indonesia, South Korea or the Philippines, as the country of origin on the entry documentation. *Id.* ¶¶ 6, 8(a)-(b). After AFI failed to plead or otherwise defend itself, the Clerk of the Court entered AFI's default. Before the court is plaintiff's application for a judgment by default seeking a civil penalty of $80,596.40, an

amount calculated as 20% of the aggregate dutiable value of the merchandise on the seven entries. Mot. for Default J. (Dec. 2, 2011), ECF No. 9 ("Pl.'s Mot."). Because the complaint lacks well-pled facts establishing defendant's liability for a civil penalty, the court denies the application without prejudice.

II. BACKGROUND

In August 2010, Customs issued a pre-penalty notice informing AFI that Customs was considering imposing a civil penalty under Section 592. Compl. ¶ 10. This notice calculated a proposed penalty of $80,596.40, based on a degree of culpability of negligence. *Id.* AFI did not respond to the pre-penalty notice. *Id.* In September 2010, Customs issued to AFI a notice of penalty demanding payment of $80,596.40. *Id.* ¶ 11. AFI did not respond to the notice of penalty. *Id*.

Plaintiff initiated this action to recover a civil penalty against AFI on May 31, 2011. After defendant failed to plead or otherwise defend itself, the Clerk of the Court, at plaintiff's request, entered AFI's default on August 4, 2011. Entry of Default (Aug. 4, 2011), ECF No. 7; Request for Entry of Default (Aug. 3, 2011), ECF No. 6. On December 2, 2011, plaintiff filed an application for a judgment by default under USCIT Rule 55(b), seeking a civil penalty of $80,596.40, plus an award of post-judgment interest. Pl.'s Mot. In the application, plaintiff stated that "the well-pled facts demonstrate that the false country of origin statements prohibited CBP from effectively mak[ing] determinations as to the origin and admissibility of the merchandise entered by Active Frontier." *Id.* at 3; *see* Compl. ¶ 9 (alleging that AFI's origin statements "influenced, among other things, CBP's determinations as to the origin and admissibility of the merchandise entered by AFI"). Plaintiff attached to the application a declaration by Raymond J. Irizarry, a CBP Import Specialist, stating that "all of the merchandise imported by Active Frontier through the seven entries . . . were [*sic*] subject to quota." Pl.'s Mot. 3 & Decl. of Irizarry ¶ 14 ("First Irizarry Declaration").

On June 18, 2012, the court issued an order inviting plaintiff to make an additional submission to identify the quota provision or provisions applicable to the merchandise on the seven entries. Order (June 18, 2012), ECF No. 11. In the order, the court noted that plaintiff's submissions failed to cite any quota provision and stated that the declaration of Mr. Irizarry did not suffice to resolve the issue. *Id.* The supplemental brief plaintiff filed on August 1, 2012 in response to the court's June 18, 2012 order acknowledged that some of the wearing apparel at issue was not subject to quota and that Mr. Irizarry's declaration that all of the merchandise was subject to quota

was "a misstatement." Pl.'s Supplemental Br. 4 (Aug. 1, 2012), ECF No. 15. The submission and exhibits, including a second declaration of Mr. Irizarry ("Second Irizarry Declaration"), cited a quota provision and stated that certain merchandise on each of the seven entries was subject to that quota provision; this merchandise was described as having an aggregate entered value of $190,900 out of a total aggregate entered value of $402,982 for all merchandise on the seven entries. *Id.* at 4 & exhibit C. The August 1, 2012 submission reiterated plaintiff's request that the court enter a judgment by default in the amount of $80,596.40, plus post-judgment interest.

III. DISCUSSION

Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1) (2006), grants the court jurisdiction over this action to recover a civil penalty under Section 592. Under Section 592, the court determines all issues *de novo*, including the amount of any penalty. 19 U.S.C. § 1592(e)(1). In evaluating an application for judgment by default, the court accepts as true all well-pled facts in the complaint but must reach its own legal conclusions. 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2688, at 63 (3d ed. 1998).

Section 592(a)(1) provides, in pertinent part, that

> [N]o person, by fraud, gross negligence, or negligence-
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material[.]

19 U.S.C. § 1592(a)(1)(A). For a negligent violation that did not result in a loss of revenue to the United States, the statute prescribes a maximum penalty of 20% of the dutiable value. *Id.* § 1592(c)(3)(B). In this case, plaintiff may obtain a judgment by default for a civil penalty under Section 592 if it presents well-pled facts from which the court can conclude that AFI entered merchandise by means of statements of country of origin that were "material and false." *Id.* § 1592(a)(1)(A)(i). Where, as here, the United States seeks a penalty under Section 592 based on a culpability level of negligence, "the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a

result of negligence." *Id.* § 1592(e)(4). Because defendant has defaulted, plaintiff need not plead facts from which the court could conclude that statements alleged to be material and false occurred by negligence.

The complaint alleges that "[on] seven separate occasions, between June 5, 2006 and March 2, 2007, AFI entered and/or introduced, or caused to be entered and/or introduced, certain articles of wearing apparel manufactured in the People's Republic of China into the commerce of the United States . . . ." Compl. ¶ 6. It further alleges that, for each of the seven entries, AFI declared on entry documentation that the country of origin of the goods was a country other than China. *Id.* ¶ 8. The complaint states that "AFI submitted to CBP bills of lading, entry summaries, and/or other entry documents stating that such articles of wearing apparel were . . . manufactured in Indonesia, Korea, and/or the Philippines." *Id.* ¶ 8(a). It also states that AFI submitted "Manufacturer's Identification Codes" that incorrectly indicated that the goods were manufactured in countries other than China. *Id.* ¶ 8(b). The complaint states that the violations alleged therein did not affect the assessment of duties. *Id.* ¶ 13.

By using the terms "material and false" in subparagraph (1)(A)(i) of subsection (a) of Section 592, Congress signified that not every false statement made in connection with the entry of merchandise will subject an importer to civil penalty liability. Section 592, however, does not define the term "material." The purpose of Section 592, as stated in the Senate Report accompanying enactment of the 1978 amendments to the section, which introduced a general materiality requirement into the text of the statute, is "to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws." *See* S. Rep. No. 778, at 17 (1978) ("*Senate Report*"). *Black's Law Dictionary* contains a definition of the word "material" relevant to this stated purpose: "[of] such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary 998 (8th ed. 2004).

The government's complaint does not allege facts from which the court can conclude that the alleged false statements of country of origin made upon entry were "material" within the meaning of Section 592. Within the complaint, only one paragraph, paragraph nine, addresses the question of materiality. Paragraph nine reads as follows:

> The documents, statements, acts, and/or omissions referenced in paragraphs six through eight were materially false because these documents, statements, acts, and/or omissions influenced,

> among other things, CBP's determinations as to the origin and admissibility of the merchandise entered by AFI.

Compl. ¶ 9. The first "fact" alleged in the paragraph—that the allegedly false *origin* statements affected CBP's determinations as to the *origin* of the merchandise—is circular and fails to inform the court of any relevant fact. The implied premise underlying this allegation is a conclusion of law: that any false country of origin statement made in connection with the entry of merchandise is, *per se*, "material" within the meaning of Section 592(a)(1)(A)(i), a premise plaintiff reiterates in its subsequent submissions. The second "fact" alleged in paragraph nine of the complaint, that the allegedly false statements of country of origin "influenced, among other things, CBP's determinations as to the . . . admissibility of the merchandise entered by AFI," is too conclusory to qualify as a well-pled fact. The complaint alleges no actual facts from which the court may conclude that the declarations of country of origin were relevant to the admissibility of the merchandise at issue in this case. Below, the court addresses these two allegations separately.

Plaintiff cites no binding authority for the proposition that any false statement of country of origin made upon entry of merchandise is, *per se*, material for purposes of Section 592, and the court is aware of none. Customs defined the term "material" as used in Section 592 in its "Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592" ("Penalty Guidelines"), which were published as an appendix to the Customs regulations after notice and comment. 19 C.F.R. Part 171 Appendix B(B) (2006) ("*Penalty Guidelines*"). The Penalty Guidelines define a material statement as one that "has the natural tendency to influence or is capable of influencing" a decision by Customs as to, *inter alia*, "the source, origin, or quality of merchandise." *Id.* The false origin statements plaintiff alleges AFI to have made would appear to be material under that broad definition.

The construction of the statutory term "material" supplied by the Penalty Guidelines, however, is not binding on the court. The Penalty Guidelines were designated upon issuance as non-binding on Customs and as being disseminated only to inform the public of internal agency guidance. *See Guidelines for the Imposition & Mitigation of Penalties for Violations of 19 U.S.C. 1592*, 65 Fed. Reg. 39,087, 39,089 (June 23, 2000) (stating that Customs "may depart from the guidelines as appropriate circumstances warrant"); *Penalties & Penalties Procedures*, 49 Fed. Reg. 1,672, 1,673 (Jan. 13, 1984) ("Customs is including the guidelines as an appendix to the regulations merely to

advise the public of them."). Because the Penalty Guidelines are not a legislative rule and, instead, are expressly intended as non-binding on the agency that issued them, they cannot bind the Judicial Branch. *See* Charles H. Koch, Jr., 3 Administrative Law & Practice § 10:22 (3d ed. 2010).

An agency's guidelines, although not binding on a court, still may be entitled to a degree of deference. *Id.* Where, as here, such guidelines are "interpretative rulings" construing a statute an agency is charged to administer, they may be "entitled to consideration in determining legislative intent," but "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (citations omitted). The Court in *Gilbert* noted that a "comprehensive statement of the role of interpretative rulings . . . is found in *Skidmore v. Swift & Co.*," *id.*, which instructed that courts may resort for guidance to a non-binding agency interpretative ruling and defer to such a ruling based on "all those factors which give it the power to persuade, if lacking the power to control." 323 U.S. 134, 140 (1944); *see also Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992) ("[A]gency pronouncements that are merely interpretive are given lesser deference, varying with such factors as the timing and consistency of the agency's position and the nature of its expertise.").

The court concludes that the definition of "material" adopted by the Penalty Guidelines is unpersuasive, and at odds with the statutory purpose, in categorically deeming any false statement of origin "material" within the meaning of Section 592. The Penalty Guidelines definition would subject an importer to penalty liability of up to 20% of the dutiable value of the merchandise for any negligently-made origin statement, even one that has no potential to affect a determination made under any law pertaining to the imported merchandise. Such a broad concept of "materiality" reaches well beyond the congressional purpose underlying Section 592. As stated in the Senate Report, that purpose is to ensure that Customs has accurate information with which to "assess duties and administer other customs laws." *Senate Report* 17. Thus, the legislative history indicates that a misstatement of country of origin made upon entry will be material for purposes of Section 592 if it affects, or has the potential to affect, some determination Customs is called on to make with respect to the

imported merchandise in question.[1] The complaint alleges no facts from which the court could conclude that the alleged false origin statements had the potential to influence any determination that any government agency was required to make with respect to the imported merchandise. Due to the insufficiency of the complaint in pleading facts relevant to the question of materiality, the court need not reach, at this point in the proceeding, the question of whether the alleged misstatements of origin were material under Section 592 for some other, as yet unspecified, reason. It is sufficient at this point for the court to conclude, first, that the overbroad Penalty Guidelines definition of materiality should not be applied in adjudicating this case, and, second, that aside from the question of admissibility, which the court addresses below, the complaint fails to plead any facts from which the court could conclude that these alleged misstatements were material.

As discussed previously, paragraph nine of the complaint also states that the alleged misstatements of country of origin affected the determination by Customs as to the admissibility of the merchandise. However, the complaint alleges no actual facts from which the court may conclude that the declarations of country of origin were relevant to the admissibility of the particular merchandise at issue in this case, as described in the complaint. Plaintiff's application for a default judgment, by means of Mr. Irizarry's original affidavit, informed the court (incorrectly) that all of the articles of Chinese-origin wearing apparel imported on the seven entries were subject to quota. First Irizarry Declaration ¶ 14. In response to the court's inquiry, plaintiff acknowledged in its supplemental brief that this statement was in error. Pl.'s Supplemental Br. 4. The error aside, both plaintiff's application and the supplemental brief allege facts beyond those stated in the complaint, which, in contrast to these two submissions, fails to describe the goods sufficiently to allow the court to conclude that some or all of the goods fall within a class, kind, or category of apparel that was subject to a quantitative restriction. Instead, the complaint offers only a vague description, "certain articles of wearing apparel

[1] A false statement made upon entry has been held to be material under section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592 (2006), even though the false statement had the potential to affect a determination to be made by an agency other than U.S. Customs and Border Protection. *United States v. Daewoo Int'l (America) Corp.*, 12 CIT 889, 895, 696 F. Supp. 1534, 1540 (1988) (holding that overvaluation of steel imports that did not result in duty underpayment nevertheless was material in disguising actual entered value, on which depended the administration of the "trigger price mechanism" implemented to identify potential situations in which the U.S. Department of Commerce would self-initiate an antidumping duty investigation).

manufactured in the People's Republic of China." Compl. ¶ 6.[2] The alleged false origin statements could have affected the admissibility of all the merchandise, as described in the complaint, only if all wearing apparel of Chinese origin were subject to quota at the time the entries were made, which was not the case. Plaintiff's complaint impermissibly would require the court to speculate that the unspecified apparel articles were quota merchandise. Because the court must rule on plaintiff's application according to well-pled facts, facts not pled in the complaint but offered only in a subsequent submission will not suffice.

Plaintiff argues in its supplemental brief that "[b]ecause each entry contains material subject to quota, Active Frontier's false country of origin in its entries statements are thus material." Pl.'s Supplemental Br. 4. For this argument, plaintiff is relying on factual allegations made not in the complaint but in the supplemental brief, which indicates that each of the seven entries contained apparel items subject to quota; exhibits to the supplemental brief indicate that six also contained non-quota items. *Id.* Even had these additional facts been alleged in the complaint, however, they would not establish that the mere presence of both non-quota and quota merchandise on the same entry, for all of which merchandise the origin was allegedly declared falsely, sufficed to make the origin declaration material as to the non-quota merchandise on the entry. None of the facts plaintiff alleges—within or outside of the complaint—would allow the court to conclude that the origin statements could have affected the determination of the admissibility of non-quota merchandise, whether or not present on the same entry as quota merchandise.

Plaintiff maintains, further, that "the false country of origin statement is material even in those instances where the material was not subject to quota." *Id.* Plaintiff argues that "false country of origin statements are 'always, or nearly always material'" based on their "'potential to affect all of Customs' core decisions'" including "'Cus-

[2] The exhibits attached to plaintiff's application for default judgment and supplemental brief indicate that the merchandise at issue consisted of women's jogging jackets, which plaintiff states were not subject to quota, and women's polyester jogging or capri pants, which plaintiff describes as subject to quota. *See Establishment of Agreed Import Levels & the ELVIS (Electronic Visa Information System) Requirement for Certain Cotton, Wool, Man-Made Fiber, Silk Blend & Other Vegetable Fiber Textiles & Textile Products Produced or Manufactured in the People's Republic of China*, 70 Fed. Reg. 74,777 (Dec. 16, 2005) (establishing 2006 quota); *Establishment of Agreed Import Levels for Certain Cotton, Wool, Man-Made Fiber, Silk Blend & Other Vegetable Fiber Textiles & Textile Products Produced or Manufactured in the People's Republic of China*, 71 Fed. Reg. 62,999 (Oct. 27, 2006) (establishing 2007 quota). Plaintiff provided as exhibits copies of entry summaries and certain other entry documentation for only four of the seven entries at issue in this case. For the other three entries, plaintiff provides limited documentation, on which the nature of the merchandise is revealed in only the most general of terms.

toms record-keeping, which in turn has the potential to affect decisions as to whether to bringing unfair trade action, which in turn has the potential to affect duties.'" *Id.* at 4 (quoting *United States v. Pentax Corp.*, 23 CIT 668, 670, 69 F. Supp. 2d 1361, 1363 (1999)).[3] The court rejects plaintiff's argument. The court cannot conclude from the facts pled in the complaint that the alleged misstatements of country of origin made upon entry affected admissibility or had any potential to affect any other determination Customs or another agency was required to make under any law applying to the importation of the merchandise. Nor do the facts as pled allow the court to discern any other plausible basis on which the alleged misstatements could be material.

Finding materiality to exist merely because a misstatement or material omission affected the accuracy of CBP record-keeping or of import statistics would impose serious penalty liability for any of a great number of common and inconsequential errors appearing in entry documentation. Such a low threshold for penalty liability would stretch the concept of Section 592 materiality to the point where it is practically meaningless. The Penalty Guidelines adopt just such an expansive "statistical" conception of Section 592 materiality with respect to classification, valuation, and import statistics in general. *Penalty Guidelines* (B) ("A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing . . . the classification [or] appraisement" of merchandise or the "collection and reporting of accurate trade statistics."). In this respect as well as in the respect discussed *supra*, these guidelines do not set forth a persuasive interpretation of the word "material" as used in 19 U.S.C. § 1592(a)(1)(A)(i). Many negligent errors in tariff classification or valuation do not result in a revenue loss to the government (and sometimes result in over-collection of duty) and have no effect on any determination to be made upon the imported goods under any law, yet invariably affect import statistics. Deeming all such negligent errors violations of Section 592 would produce anomalous and prejudicial results. For example, an importer who negligently misclassifies merchandise in a tariff provision that is subject to a duty might succeed upon a protest in obtaining reliquidation under the correct duty-free tariff provision, only to lose the benefit of the protest, and possibly much more, were Customs to seek and obtain a 20% nonrevenue-loss penalty under Section 592 for negligence, based on a determination of Section 592 materiality

[3] The decision of this Court in *United States v. Pentax Corporation*, 23 CIT 668, 69 F. Supp. 2d 1361 (1999), upon which plaintiff relies for its argument, was based, in part, on the presence of false country of origin marking.

grounded in nothing more than import statistics. Such inconsequential classification or valuation errors have not been recognized in the case law as material for purposes of Section 592. Moreover, it is not clear to the court that Customs, in actual practice, has applied a concept of materiality as broad as that contained in the Penalty Guidelines. As the court has noted, these guidelines are not binding on the administrative penalty proceedings that Customs conducts under Section 592(b). *See also* 19 C.F.R. § 141.61(e)(5) ("Penalty procedures relating to erroneous statistical information shall not be invoked against any person who in good faith attempts to comply with the statistical requirements of the General Statistical Note, HTSUS.").

Plaintiff also argues that "knowing where merchandise from arrives [*sic*] affects security considerations, including risk assessment and advance targeting of arriving merchandise." Pl.'s Supplemental Br. 4 (citing Second Irizarry Declaration). This argument is unavailing. The correctly-determined country of origin of merchandise is, of course, not necessarily the country from which the merchandise arrives. Rather than depend on the country from which the good is exported to the United States, country of origin instead is determined according to rules of origin that consider, *inter alia*, the origin of materials and the level of processing undertaken in a given country. And an incorrect statement of country of origin does not prevent Customs from knowing the country from which merchandise was exported, a fact that is reported separately. *See* First Irizarry Declaration exhibits 1–14.

Plaintiff states, further, that "knowing where merchandise arrives from also supports CBP's mission for national and economic security, in that it implicates the accounting considerations for determining whether merchandise should be subject to quota in the future." Pl.'s Supplemental Br. 5. This argument is also flawed. Quotas are administered typically, if not invariably, according to country of origin, not the country from which merchandise arrives. Even had this argument been expressed as to origin, the court still would reject it. An error in an import statistic potentially might affect future legislation imposing a quota, but the highly speculative nature of that prospect cautions against basing materiality on such a slender reed. Section 592 is written in the present tense, imposing liability for a false statement or act, or an omission, that "is material." 19 U.S.C. § 1592(a)(1)(A)(i), (ii). Virtually any import statistic might be consulted as to enactment of a future trade law and, for reasons the court has discussed, basing Section 592 materiality on the effect an error has on

trade statistics renders the materiality concept practically meaningless. The legislative history discusses the need for accurate information with which to "assess duties and administer other customs *laws*." *Senate Report* 17 (emphasis added). The court does not glean from the legislative history a congressional intent that any error affecting import statistics should be deemed material under Section 592 simply because it conceivably could be considered by Congress in enacting a future law.

IV. CONCLUSION AND ORDER

In conclusion, the court denies plaintiff's application for a judgment by default because the complaint fails to allege facts from which the court can conclude that the alleged false country of origin statements made upon entry were material within the meaning of Section 592(a)(1)(A)(i).

Therefore, upon consideration of plaintiff's application and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's application for judgment by default be, and hereby is, denied without prejudice; and it is further

ORDERED that plaintiff shall have thirty days from the date of this Opinion and Order in which to seek leave to amend its complaint according to USCIT Rule 15(a).

In the absence of a timely motion for leave to amend the complaint, the court will issue a further order giving notice of the pending dismissal of this action according to USCIT Rule 41(b)(3).

Dated: August 30, 2012
New York, New York

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

Slip Op. 12–113

FINE FURNITURE (SHANGHAI) LIMITED, et al., Plaintiffs, and HUNCHUN FOREST WOLF INDUSTRY COMPANY LIMITED, et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE COALITION FOR AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00533[1]

[affirming, in part, and remanding, in part, the Department of Commerce's *Final Determination*]

[1] This action was consolidated with portions of the complaints from Court Nos. 12–00009, 12–00017, and 12–00022. Order, Apr. 5, 2012, ECF No. 50.

Dated: August 31, 2012

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Susan L. Brooks*, *Sarah M. Wyss*, and *Keith F. Huffman*, Mowry & Grimson, PLLC, of Washington, DC, for the Plaintiffs Fine Furniture (Shanghai) Ltd.; Great Wood (Tonghua) Ltd.; and Fine Furniture Plantation (Shishou) Ltd.

Francis J. Sailer, *Mark E. Pardo*, *Andrew T. Schutz*, and *Kavita Mohan*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, for the Consolidated Plaintiffs Baroque Timber Industries (Zhongshan) Co., Ltd.; Riverside Plywood Corp.; Samling Elegant Living Trading (Labuan) Ltd.; Samling Global USA, Inc.; Samling Riverside Co., Ltd.; Suzhou Times Flooring Co., Ltd.; Shanghai Eswell Timber Co., Ltd.; Shanghai Lairunde Wood Co., Ltd.; Shanghai New Sihe Wood Co., Ltd.; Shanghai Shenlin Corp.; Vicwood Industry (Suzhou) Co. Ltd.; Xuzhou Shenghe Wood Co., Ltd.; and A&W (Shanghai) Woods Co., Ltd.

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, DC, for the Plaintiff-Intervenors Changzhou Hawd Flooring Co., Ltd.; Dunhua City Jisen Wood Industry Co., Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Dalian Huilong Wooden Products Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; and Karly Wood Product Ltd.

Jeffrey S. Neeley, *Michael S. Holton*, and *Stephen W. Brophy*, Barnes, Richardson & Colburn, of Washington, DC, for Plaintiff-Intervenors Hunchun Forest Wolf Industry Co. Ltd.; Dunhua City Dexin Wood Industry Co., Ltd.; Nanjing Minglin Wooden Industry Co., Ltd.; Dalian Penghong Floor Products Co., Ltd.; Dongtai Fuan Universal Dynamics, LLC; Zhejiang Fudeli Timber Industry Co., Ltd.; Dunhua City Jisen Wood Industry Co., Ltd.; Fusong Qianqiu Wooden Product Co., Ltd.; Power Dekor Group Co., Ltd.; Jiafeng Wood (Suzhou) Co., Ltd.; Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.; Shenyang Haobainian Wooden Co., Ltd.; Guangzhou Pan Yu Kang Da Board Co., Ltd.; Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd.; Yixing Lion-King Timber Industry Co., Ltd.; Guangzhou Panyu Southernstar Co., Ltd.; Dalian Kemian Wood Industry Co., Ltd.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Fu Lik Timber (HK) Co. Ltd.; Puli Trading Ltd.; Zhejiang Shiyou Timber Co., Ltd.; Shanghai Lizhong Wood Products Co., Ltd.; and Shenzhenshi Huanwei Woods Co. Ltd.

Daniel L. Porter, *Matthew P. McCullough*, *Ross E. Bidlingmaier*, and *William H. Barringer*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for the Plaintiff-Intervenor the Bureau of Fair Trade for Imports & Exports, Ministry of Commerce, People's Republic of China.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant United States. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director. Of Counsel on the briefs was Jonathan Zielinksi, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, and John B. Totaro, Jr., Neville Peterson, LLP, of Washington, DC, for the Defendant-Intervenor the Coalition for American Hardwood Parity.

OPINION AND ORDER

Chief Judge Pogue:

INTRODUCTION

This is a consolidated action seeking review of determinations made by the United States Department of Commerce ("Commerce" or "the Department") in the countervailing duty ("CVD") investigation of multilayered wood flooring from the People's Republic of China ("China").[2] Currently before the court is Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. In their motion, Plaintiffs challenge three aspects of Commerce's *Final Determination*: (1) Commerce's use of adverse facts available ("AFA") in determining the benchmark rate for calculating the benefit Plaintiff Fine Furniture received from the provision of electricity for less than adequate remuneration; (2) Commerce's inclusion of the Basic Electricity Tariff in the calculation of the electricity subsidy rate in the *Final Determination* without notice and opportunity to comment by respondents; and (3) the inclusion of Shanghai Eswell Enterprise Co., Ltd. and Elegant Living Corporation on the list of non-cooperating companies.

As explained below, the court (1) affirms Commerce's use of AFA in determining the benchmark for provision of electricity at less than adequate remuneration; (2) affirms the inclusion of the Basic Electricity Tariff as a component of the electricity subsidy; and (3) remands the *Final Determination* to Commerce to reconsider and remove or provide further explanation for including Shanghai Eswell Enterprise Co., Ltd. and Elegant Living Corporation on the list of non-cooperating companies.

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006)[3] and 28 U.S.C. § 1581(c) (2006).

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[2] *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,313 (Dep't Commerce Oct. 18, 2011) (final affirmative countervailing duty determination) ("*Final Determination*"), and accompanying Issues & Decision Memorandum, C-570–971, POI 09, Admin R. Pt. 2 Pub. Doc. 20, available at http://ia.ita.doc.gov/frn/summary/PRC/2011–26892–1.pdf (last visited Aug. 28, 2012) ("*I & D Mem.*") (adopted in the *Final Determination*, 76 Fed. Reg. at 64,313).

[3] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

BACKGROUND[4]

This case arises from Commerce's initiation of a countervailing duty investigation of multilayered wood flooring from China, on November 18, 2010, following a petition from Defendant-Intervenor the Coalition for American Hardwood Parity ("CAHP"). *See Multilayered Wood Flooring from the People's Republic of China*, 75 Fed. Reg. 70,719, 70,719 (Dep't Commerce Nov. 18, 2010) (initiation of countervailing duty investigation). In its investigation, and pursuant to 19 U.S.C. § 1677f-1(c)(2), Commerce limited the mandatory respondents to three companies and their affiliates: (1) Fine Furniture (Shanghai) Ltd., Great Wood (Tonghua) Ltd., and Fine Furniture Plantation (Shishou) Ltd. (collectively "Fine Furniture"); (2) Zhejiang Layo Wood Industry Co., Ltd. and Jiaxing Brilliant Import & Export Co., Ltd. (collectively "Layo"); and (3) Zhejiang Yuhua Timber Co., Ltd. ("Yuhua"). Respondent Selection Memo, C-570–971, POI 09 (Dec. 30, 2010), Admin. R. Pt. 1 Pub. Doc. 193 at 4; *Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 19,034, 19,038–39 (Dep't Commerce Apr. 6, 2011) (preliminary affirmative countervailing duty determination) ("*Preliminary Determination*"). In the *Preliminary Determination*, Commerce assigned zero rates to Layo and Yuhua; a 2.25% rate to Fine Furniture; a 2.25% all others rate for cooperating companies; and a 27.01% rate for non-cooperating companies. *Preliminary Determination*, 76 Fed. Reg. at 19,041–42. Following comments on the *Preliminary Determination*, Commerce issued the *Final Determination* on October 18, 2011. *Final Determination*, 76 Fed. Reg. at 64,313. In the *Final Determination*, Commerce adjusted the subsidy rates as follows: Layo and Yuhua received *de minimis* rates; Fine Furniture received a 1.50% rate; all other cooperating respondents received a 1.50% rate; and all non-cooperating respondents received a 26.73% rate. *Final Determination*, 76 Fed. Reg. at 64,315–17.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[4] The following summary of facts is provided as general background to the investigation at issue in this case; facts specific to the determinations challenged are included in the discussion of the relevant challenge.

DISCUSSION

A countervailing duty is imposed on an import whenever Commerce determines that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy . . . ." 19 U.S.C. § 1671(a).[5] To be countervailable, a subsidy must provide a financial contribution to a specific industry, and the respondent must benefit. *See* 19 U.S.C. § 1677(5)–(5A); *Essar Steel Ltd. v. United States*, 34 CIT __, 721 F. Supp. 2d 1285, 1292 (2010).

When investigating whether the statute requires imposition of a countervailing duty order, Commerce often requires both the respondent and the foreign government to submit factual information. *Essar Steel*, 34 CIT at __, 721 F. Supp. 2d at 1297 ("Typically, foreign governments are in the best position to provide information regarding the administration of their alleged subsidy programs, including eligible recipients. The respondent companies, on the other hand, will have information pertaining to the existence and amount of the benefit conferred on them by the program."). In addition, when determining whether or not a subsidy is countervailable, Commerce relies on facts placed on the record by interested parties.

When an interested party has failed to submit necessary information, Commerce may make its determination on the basis of facts otherwise available ("FOA"), and in certain circumstances on the basis of AFA. 19 U.S.C. § 1677e(a)–(b).[6] Before Commerce may employ FOA, 19 U.S.C. § 1677m(d) provides respondents with an opportunity to remedy or explain deficiencies in their submissions. § 1677e(a); *Reiner Brach GmbH & Co.KG v. United States*, 26 CIT 549, 555, 206 F. Supp. 2d 1323, 1330 (2002) (quoting *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 837–38, 77 F. Supp. 2d 1302, 1313 (1999)). In addition, FOA are only appropriate to fill gaps in the record evidence when Commerce must rely on other sources to complete the record. *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011). When Commerce can independently fill in the gaps, without the requested information, FOA and adverse inferences are not appropriate. *See id.* at 1348; *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 767–68, 387 F. Supp. 2d 1270, 1283 (2005). Nonetheless, if Commerce finds "that an interested party has failed to cooperate by not acting to the best of its

[5] To impose a countervailing duty, the International Trade Commission must also find "material injury" to a domestic industry, 19 U.S.C. § 1671(a); however, the ITC's determination is not at issue in this case.

[6] The statute authorizes Commerce to make use of FOA when (1) the record lacks necessary information or (2) a respondent withholds information, fails to provide information, impedes a proceeding, or provides unverifiable information. § 1677e(a).

ability to comply with a request . . . [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b); *Zhejiang*, 652 F.3d at 1346.

I. Commerce Properly Applied AFA in Determining the Benchmark for Provision of Electricity at Less than Adequate Remuneration

A. Background

In the *Final Determination*, Commerce used adverse inferences to determine that Plaintiff Fine Furniture received a countervailable subsidy through the provision of electricity at less than adequate remuneration (the "LTAR subsidy"). *Final Determination*, 76 Fed. Reg. at 64,315. Commerce made recourse to adverse inferences because the Government of China ("GOC") failed to provide requested information in the form of provincial electricity price proposals. *I & D Mem.* Cmt. 4 at 43–44.

> The GOC did not provide a complete response to the Department's January 3, 2011 questionnaire regarding the alleged provision of electricity for LTAR. Specifically, the Department requested that the GOC provide the original provincial price proposals for 2006 and 2008 for each province in which a mandatory respondent or any reported "cross-owned" company is located. Because the requested price proposals are part of the GOC's electricity price adjustment process, the documents are necessary for the Department's analysis of the program. . . . Consequently, we determine that the GOC has withheld necessary information that was requested of it and, thus, that the Department must rely on "facts available" in making our final determination. Moreover, we determine that the GOC has failed to cooperate by not acting to the best of its ability to comply with our request for information as it did not respond by the deadline dates, nor did it explain to the Department's satisfaction why it was unable to provide the requested information. Consequently, an adverse inference is warranted in the application of facts available.

I & D Mem. at 2 (footnotes omitted). Using FOA and applying an adverse inference, Commerce set a benchmark rate equal to the highest rate reported in the provincial price schedules for electricity. *I & D Mem.* at 3.

B. Analysis

The dispute between the parties centers on whether the adverse inferences drawn against the non-cooperating party, the GOC, are rendered impermissible when they are collaterally adverse to the cooperating party, Fine Furniture. Fine Furniture contends that the inferences drawn were impermissibly adverse to Fine Furniture, who was a cooperating party in the investigation. Commerce, however, argues that it properly employed inferences adverse to the GOC — the non-cooperating party — and that any impact on Fine Furniture was simply collateral, which does not render the inferences impermissible. Neither party contests the fact that the GOC failed to provide necessary information to Commerce.

Among the financial contributions that are potentially countervailable is the provision of goods and services at less than adequate remuneration. 19 U.S.C. § 1677(5)(E)(iv). In order to determine if a benefit is provided at less than adequate remuneration, the price paid is compared with a price set by "prevailing market conditions for the good or service being provided . . . in the country which is subject to the investigation or review." § 1677(5)(E). Commerce has promulgated further regulations for determining this "benchmark" value. 19 C.F.R. § 351.511(a)(2)(i)–(iii) (2012)[7]; *Essar Steel*, 34 CIT at __, 721 F. Supp. 2d at 1292.[8]

In this case, no benchmarks consistent with 19 C.F.R. § 351.511(a)(2)(i)–(ii) were available.[9] Therefore, Commerce sought to

[7] All subsequent citations to the Code of Federal Regulations are to the 2012 edition, unless otherwise noted.

[8] These regulations set up a three tier system for determining the benchmark. First, "[t]he Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). Second, if no market-determined price is available from within the country in question, then "the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." § 351.511(a)(2)(ii). Finally, if neither an actual market-determined price nor a world market price is available, "the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles." § 351.511(a)(2)(iii).

[9] As all parties agree in their responses to the court's further briefing request, electricity in China cannot be valued through actual transactions in the country, § 351.511(a)(2)(i), because rates are set by the government, nor can electricity be valued using a world market price, § 351.511(a)(2)(ii), because it cannot be purchased on the world market. *See* Def.'s Resp. to the Court's June 25, 2012 Letter at 3, ECF No. 73; Pls.' Letter Br. at 3, ECF No. 74; *see also Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) (final rule) ("We will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America.").

value the benchmark by assessing the relationship of the government price to market principles, pursuant to § 351.511(a)(2)(iii), but found that the GOC's refusal to provide the provincial price proposals prevented it from determining if the prices were consistent with any market principles. *I & D Mem.* Cmt. 4 at 43–44. Because it did not have the data to value a benchmark, Commerce relied upon FOA, 19 U.S.C. § 1677e(a), in the form of the provincial price schedules on the record. Because the necessary information was lacking as a result of the GOC's refusal to provide it, Commerce also applied an adverse inference pursuant to 19 U.S.C. § 1677e(b).

Fine Furniture's plea for the use of neutral facts in calculating the benchmark is not without some persuasive force. Often, the calculation of the benefit is drawn from the record submissions of the respondent companies. *See Essar Steel*, 34 CIT at __, 721 F. Supp. 2d at 1297 ("[T]he agency then attempts to use information provided by the individual respondent companies regarding the benefit, if any, conferred by the particular program."). Where the respondents have placed evidence on the record consistent with the Department's regulations for calculating benchmarks, *see* 19 C.F.R. § 351.511(a)(2), Commerce would be expected to consider such evidence. Furthermore, if an alternative benchmark meeting such criteria were available on the record and did not adversely affect a cooperative party, such a benchmark would be superior to one which does adversely affect a cooperative party.[10]

The problem for Fine Furniture is that there is no such benchmark on the record in this case. Commerce employed FOA because the lack of the provincial price proposals prevented it from determining whether the electricity rates provided by respondent companies were set pursuant to market principles. § 351.511(a)(2)(iii). Because the price proposals were necessary to determine the benchmark rate, and the GOC refused to provide them, Commerce also applied an adverse inference.[11] Though Fine Furniture was put on notice by the bench-

[10] Commerce is correct that the inference drawn in this case was not directly adverse to Fine Furniture. It is true that Fine Furniture is adversely affected by the use of the highest rates included in the provincial price proposals. However, the inference drawn was prompted by the GOC's failure to cooperate and was adverse to the interests of the GOC. We do not treat the GOC and Fine Furniture as a joint entity in making our determination; rather, we acknowledge that, in the context of a CVD investigation, an inference adverse to the interests of a non-cooperating government respondent may collaterally affect a cooperative respondent. While such an inference is permissible under the statute, it is disfavored and should not be employed when facts not collaterally adverse to a cooperative party are available.

[11] In the letter briefing requested by the court, Plaintiffs argue that there was sufficient indicia in the record for Commerce to determine that the provincial price schedules reflected market-determined rates. Pls.' Letter Br. at 3–4. When reviewing Commerce's determinations on a substantial evidence standard, the court considers whether the

mark regulation, it did not place on the record any alternative benchmarks consistent with § 351.511(a)(2).

Fine Furniture did propose what it terms a "neutral benchmark," which would be calculated by averaging all rates within the same user category of the provincial price schedule as Fine Furniture's rate, and argued that its proposed benchmark would be more appropriate. However, there is nothing to indicate that Fine Furniture's proposed neutral benchmark would more accurately reflect a market-determined price for electricity. Therefore, Fine Furniture's proposed neutral benchmark is, in fact, not a benchmark, *see* § 351.511(a)(2), because it fails to establish the relationship that Fine Furniture's electricity rates bear to a market determined rate. In a situation such as this, where an interested party "failed to cooperate by not acting to the best of its ability to comply with a request for information," 19 U.S.C. § 1677e(b), and that information was necessary to the subsidy calculation, 19 U.S.C. § 1677e(a) — thereby fulfilling the prerequisites for the use of both FOA and adverse inferences — Commerce acted within its statutory authority in applying both FOA and an adverse inference.

If the record contained evidence that met one of the three regulatory requirements for setting a benchmark, Fine Furniture may have been able to argue that Commerce should have relied upon that record evidence. However, the neutral benchmark requested by Fine Furniture does not meet this test. The neutral benchmark is no better proxy for a market determined rate than the AFA benchmark. Without showing that the neutral benchmark better complies with the statutory and regulatory requirements, Fine Furniture is asking the court to substitute its judgment for that of Commerce, but this is not the court's role. *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1360–61 (Fed. Cir. 1999); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 36 CIT __, 828 F. Supp. 2d 1345, 1350 (2012).

Accordingly, because Commerce's decision to apply AFA in calculating the LTAR subsidy is consistent with the statute and regulations, and because the court does not substitute or displace Commerce's

determination is supported by substantial evidence on the record as a whole. *See Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997). "[T]he possibility of drawing two inconsistent conclusions from the evidence does prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966), and "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califeno v. Sanders*, 430 U.S. 99, 105 (1977). Though there is some evidence on the record suggesting that the provincial price schedules could reflect market-determined prices, the court will not upset Commerce's determination that the provincial price proposals were a critical element in arriving at such a conclusion.

judgment with regard to the weight or credibility of the evidence, the use of AFA in setting the LTAR subsidy benchmark is affirmed.

II. Commerce's Failure to Provide Notice and Opportunity to Comment on Inclusion of the Basic Electricity Tariff Was Harmless Error

A. Background

In the *Final Determination*, Commerce included the Basic Electricity Tariff ("BET") in the calculation of the benefit for the LTAR subsidy. *I & D Mem.* at 14. This cost was not included in the calculation of the LTAR subsidy in the *Preliminary Determination*. *Id.* Nor were Plaintiffs given any notice that Commerce had decided to include the BET in calculation of the LTAR subsidy prior to publication of the *Final Determination*.

B. Analysis

Plaintiffs raise a procedural challenge to the inclusion of the BET, arguing that Commerce's failure to provide notice and an opportunity for comment violated 19 U.S.C. § 1677m(g).[12] Plaintiffs premise their argument, in large part, on the contention that the BET was a separate subsidy from the LTAR subsidy, and therefore, it required a separate subsidy investigation.

Commerce responds that the BET is not a separate subsidy, rather it is a component of the LTAR subsidy. Therefore, according to Commerce, the inclusion of the BET in the *Final Determination* was merely the correction of an oversight in the *Preliminary Determination*.

Commerce's response has weight because the BET is best characterized as a component of the LTAR subsidy. The BET is an element of respondents' overall electricity payment; therefore, it is reasonable for Commerce to include the BET in the calculation of benefit under the LTAR subsidy. This determination is also consistent with Commerce's practice in other countervailing duty determinations regarding merchandise from China.[13]

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[12] 19 U.S.C. § 1677m(g) reads, in relevant part:
[Commerce] . . . before making a final determination under section 1671d, 1673d, 1675, or 1675b of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by [Commerce] . . . upon which the parties have not previously had an opportunity to comment.

[13] *See, e.g.*, *Drill Pipe from the People's Republic of China*, 76 Fed. Reg. 1971 (Dep't Commerce Jan. 11, 2011) (final affirmative countervailing duty determination) and accompanying Issues and Decision Memorandum at 27, C-570–966, POI 09 (Jan. 11, 2011), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2011–392–1.pdf (last visited Aug. 29,

Nonetheless, our finding that the BET was an aspect of the LTAR subsidy does not lead us to conclude that Commerce followed proper procedure when it included the BET in the *Final Determination* without first including it in the *Preliminary Determination* or otherwise providing notice and an opportunity to comment. To the contrary, Commerce should have included the BET in the *Preliminary Determination*, thereby permitting Plaintiffs an opportunity to challenge that determination at the administrative level. Commerce did not do this. In this regard, the inclusion of the BET was procedurally defective.[14]

However, in the absence of a substantive challenge to the inclusion of the BET, the procedural defect is harmless error. *See Cummins Engine Co. v. United States*, 23 CIT 1019, 1032, 83 F. Supp. 2d 1366, 1378 (1999) ("In reviewing an agency's procedural error for which the law does not prescribe a consequence . . . it is well settled that principles of harmless error apply. . . . Under the rule of prejudicial error, or harmless error analysis, the Court will not overturn an agency's action 'if the procedural error complained of was harmless.'" (quoting *Barnhart v. United States Treasury Dep't*, 7 CIT 295, 302, 588 F. Supp. 1432, 1437 (1984))).

Because Plaintiffs do not raise any compelling substantive arguments, the court finds no reason to remand the case to Commerce for further explanation or proceeding.[15] Plaintiffs' primary argument, that Commerce should have initiated a separate investigation of the

2012); *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China*, 75 Fed. Reg. 28,557 (Dep't Commerce May 21, 2010) (final affirmative countervailing duty determination) and accompanying Issues and Decision Memorandum at 33–34, C-570–946, POI 08 (May 14, 2010), *available at* http://ia.ita.doc.gov/frn/summary/prc/2010–12292–1.pdf (last visited Aug. 29, 2012).

[14] The court need not decide whether the specific action challenged here was a violation of 19 U.S.C. § 1677m(g). It is sufficient to note that plaintiffs challenging agency action before the Court of International Trade are required to exhaust their administrative remedies. 28 U.S.C. § 2637(d) (2006); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed.Cir. 2003). When Commerce fails to provide an opportunity for comment, it inhibits a plaintiff's opportunity to exhaust its administrative remedies. While the court finds that it may hear a challenge in such a case, *see infra* note 15, the procedural defect may be relevant when the record is insufficiently developed for the court to render a decision.

[15] Plaintiffs would not have been barred from bringing substantive claims before this court by the exhaustion of administrative remedies doctrine. Prior case law supports the court's capacity to hear and decide a challenge on substantive grounds that was not raised at the administrative level, when no opportunity for comment was provided. *See China Steel Corp. v. United States*, 28 CIT 38, 59, 306 F. Supp. 2d 1291, 1310 (2004) ("[I]n determining whether questions are precluded from consideration on appeal, the [Court of International Trade] will assess the practical ability of a party to have its arguments considered by the administrative body." (citation omitted)); *see also Lifestyle Enter. v. United States*, 35 CIT __, 768 F. Supp. 2d 1286, 1300 n.17 (2011) ("A party, however, may seek judicial review of an issue that it did not brief at the administrative level if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full

BET subsidy, is unavailing because Commerce reasonably determined that the BET was merely an element of the larger LTAR subsidy. Plaintiffs do not raise any further substantive arguments in their letter brief to the court, except for a fleeting reference to other non-included payments purportedly analogous to the BET. Pls.' Letter Br. at 6 ("Even without the benefit of a proper investigation, however, there is evidence to suggest that the BET is different from the other electricity charges that Commerce found to be countervailable subsidies."). What has been provided is insufficient for the court to conclude that Plaintiffs have a substantive claim regarding the BET. Therefore, Commerce's inclusion of the BET in the benefit calculation for the LTAR subsidy in the *Final Determination* without first addressing it in the *Preliminary Determination* is harmless error.

III. Inclusion of Elegant Living and Eswell Enterprise on the AFA List Was Not Supported by Substantial Evidence

A. Background

In order to select mandatory respondents for the instant CVD investigation, Commerce issued quantity and value ("Q&V") questionnaires to, *inter alia*, Shanghai Eswell Enterprise Co., Ltd. ("Eswell Enterprise"), Elegant Living Corp. ("Elegant Living"), and Times Flooring Co., Ltd. ("Times Flooring"). Issuance of Q&V Questionnaires, C-570–971, POI 09 (Dec. 3, 2010), Admin. R. Pt. 1 Pub. Doc. 91 attach. 1. When no company under these names responded, Commerce placed these companies on the list of non-cooperating companies that would receive an AFA rate. *Preliminary Determination*, 76 Fed. Reg. at 19,042.

Following the *Preliminary Determination*, Plaintiffs filed ministerial error allegations protesting the inclusion of Eswell Enterprise, Elegant Living, and Times Flooring on the AFA list. In the ministerial error allegations, Plaintiff Shanghai Eswell Timber Co., Ltd. ("Eswell Timber") argued that Eswell Enterprise was its non-exporting parent company, Eswell Timber Ministerial Error Comments, C-570–971, POI 09 (Mar. 25, 2011), Admin. R. Pt. 1 Pub. Doc. 256 at 1–2 ("Eswell Allegation"), and Plaintiff Samling Group argued that Elegant Living and Times Flooring represented inaccurate listings of, respectively, Baroque Timber Industries (Zhongshan) Co., Ltd., ("Baroque Tim-

and fair opportunity to raise the issue at the administrative level."); *Globe Metallurgical, Inc. v. United States*, 29 CIT 867, 873 (2005) ("The court has recognized certain exceptions to the application of the exhaustion doctrine. One such applicable exception arises when the respondent is not given the opportunity to raise its objections at the administrative level because Commerce did not address the issue until the final determination.").

ber") and Suzhou Times Flooring Co., Ltd., Samling Group Consol. Ct. No. 11–00533 Page 21 Ministerial Error Allegation, C-570–971, POI 09 (Mar. 24, 2011), Admin. R. Pt. 1 Pub. Doc. 255 at 2 ("Samling Allegation").

In response to the ministerial error allegations, Commerce requested additional information from Plaintiffs. Ministerial Error Allegations Mem., C-570–971, POI 09 (Apr. 21, 2011), Admin. R. Pt. 1 Pub. Doc. 270 at 4; *I & D Mem.* Cmt. 6 at 47–48. Eswell Timber provided business and shareholder information outlining Eswell Enterprise's ownership of Eswell Timber and a statement from Eswell Enterprise confirming that it did not independently export subject merchandise. Eswell Timber Questionnaire Resp., C-570–971, POI 09 (June 30, 2011), Admin. R. Pt. 1 Pub. Doc. 326 at 5, attach. 1 ("Eswell Resp."). Samling Group provided information on its corporate and capital structure, noting that, though no company under the name Elegant Living existed within the Samling Group hierarchy, Baroque Timber occasionally uses "Elegant Living" as a trade name. Samling Group Questionnaire Resp., C-570–971, POI 09 (June 30, 2011), Admin. R. Pt. 1 Pub. Doc. 325 exs. A, B ("Samling Resp."); Samling 6/30 Questionnaire Public Version Narrative, C-570–971, ARP 09 (July 1, 2011), Admin. R. Pt. 1 Pub. Doc. 328 at 2 ("Samling Narrative Resp.").

Commerce eventually removed Times Flooring from the AFA list but not Eswell Enterprise or Elegant Living. *Final Determination*, 76 Fed. Reg. at 64,315–17; *I & D Mem.* Cmt. 6 at 49. According to Commerce, although the strong similarities in names and addresses shared by the "Times Flooring" companies justified merging the two, Baroque Timber and Elegant Living did not share equally dispositive similarities. *I & D Mem.* Cmt. 6 at 49. Commerce primarily justified its decision by relying on evidence that separate companies within Samling Group used "elegant living" as part of their names. *Id.*; Samling Resp. ex. B. Therefore, Commerce reasons, since a company separate from Baroque Timber potentially existed, a separate response should have been filed on behalf of Elegant Living. *See I & D Mem.* Cmt. 6 at 49. Likewise, Commerce concluded that Eswell Enterprise was a separate company from Eswell Timber, and therefore, it should have responded separately to the Q&V questionnaire it received. *Id.*

B. Analysis

In the instant case, Commerce emphasizes Plaintiffs' failure to submit information by the Q&V deadline as a failure to cooperate, thereby justifying the application of AFA. Def.'s Resp. at 26–27. And, certainly, setting and enforcing its own deadlines is within Com-

merce's discretion. *See, e.g.*, *Reiner Brach*, 26 CIT at 559, 206 F. Supp. 2d at 1334 ("Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits . . . ."); *Yantai Timken Co. v. United* Consol. Ct. No. 11–00533 Page 23 *States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1371 (2007) ("In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, its must be permitted to enforce the time frame provided in its regulations."). Furthermore, this Court has upheld Commerce's enforcement of its regulatory deadlines when it rejects new factual information submitted after the applicable deadline and subsequently applies AFA. *Hyosung Corp. v. United States*, 35 CIT __, Slip. Op. 11–34 at *9–11 (Mar. 31, 2011) (upholding Commerce's use of adverse inferences when the respondent failed to report that it did not have shipments of subject merchandise in response to a Q&V questionnaire); *see also Uniroyal Marine Exps. Ltd. v. United States*, 33 CIT __, 626 F. Supp. 2d 1312, 1316–17 (2009); *Yantai Timken*, 31 CIT at 1755–56, 521 F. Supp. 2d at 1371; *Reiner* Brach, 26 CIT at 559, 206 F. Supp. 2d at 1334.

Nevertheless, Commerce's discretion in rejecting untimely information is not absolute. Rather, as the Court of Appeals has held, Commerce abuses its discretion when it refuses to consider untimely "corrective" information. *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208–09 (Fed. Cir. 1995). "[A] regulation which is not required by statute," such as the timeliness regulation, "may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion." *NTN Bearing Corp.*, 74 F.3d at 1207. In addition, when considering correction of an error at the preliminary results stage, the court "balance[s] the desire for accuracy . . . with the need for finality at the final results stage." *Timken*, 434 F.3d at 1353–54. When a respondent seeks to correct an error after the preliminary results but before the final results, this court may require Commerce to analyze the new information. *See id.*[16]

[16] The Court of Appeals recently held in *PSC VSMPO-AVISMA v. United States*, Appeal No. 2011–1370, -1395 at *17 (Fed. Cir. July 27, 2012) that "[t]he role of judicial review is limited to determining whether the record is adequate to support the administrative action. A court cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered." However, PSC VSMPO-AVISMA is distinguishable from the Court of Appeals' prior holdings in *NTN Bearings* and *Timken*. Whereas *PSC VSMPO-AVISMA* concerned submission of factual information to supplement the record, *NTN Bearings* and *Timken* concerned

When considering whether a rejection of untimely information amounts to an abuse of discretion, the court weighs the burden of accepting late submissions and the need for finality against the statute's goals of accuracy and fairness. *See Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT __, 815 F. Supp. 2d 1342, 1365 (2012); *Fischer S.A. Comercio, Industria & Agricultura v. United States*, 34 CIT __, 700 F. Supp. 2d 1364, 1375–77 (2010). "Thus, while deferring to Commerce's necessary discretion to set and enforce its deadlines, the court will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality." *Grobest*, 36 CIT at __, 815 F. Supp. 2d at 1365. "Finality concerns only begin to counterbalance accuracy concerns when [Commerce] reaches the final results stage." *Fischer*, 34 CIT at __, 700 F. Supp. 2d at 1375.

In this case Commerce, following the *Preliminary Determination* and in response to Plaintiffs' ministerial error allegations, sought additional evidence in support of Plaintiffs' claims, which Plaintiffs subsequently placed on the record. Commerce's failure to take into account that evidence amounts to an abuse of discretion where, as here, the concerns for accuracy and fairness outweigh concerns of finality and agency burden.[17] Furthermore, Commerce's failure to take into account evidence on the record that supported removing Elegant Living and Eswell Enterprise from the AFA list renders the determination unsupported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

The record contains evidence that Elegant Living is a misidentification of Baroque Timber. The Samling Group put evidence on the record that Baroque Timber (1) uses "Elegant Living" as a trade name and brand, (2) resides at the address listed for Elegant Living, and (3) exports subject merchandise. Samling Allegatin at 2; Samling Narrative Resp. at 1–2. Furthermore, Samling Group submitted evidence demonstrating that no company with the exact name of Elegant

correction of errors at the preliminary results stage. We do not read *PSC VSMPO-AVISMA*'s holding that the court should not interfere with the creation of the administrative record to be in tension with the court's responsibility to review Commerce's consideration of errors for abuse of discretion. Furthermore, in this case Commerce requested new factual information to supplement the record, so the concerns expressed in *PSC VSMPO-AVISMA* are not present.

[17] Because both the ministerial error allegations and the new record evidence occurred prior to the *Final Determination*, there are no significant finality concerns here. Nor does the relatively small amount of new record evidence to be considered present any concern with regard to agency burden. *Cf. Fischer*, 34 CIT at __, 700 F. Supp. 2d at 1376–77.

Living Corporation exists within the company hierarchy. *See* Samling Resp. ex. B.[18]

In rejecting the evidence supporting Plaintiffs' claim, Commerce pointed to Samling's annual report to demonstrate the existence of several "Elegant Living" companies within Samling Group, notably a company in the PRC owned by Baroque Timber and named Shanghai Elegant Living Timber Products. *I & D Mem.* Cmt. 6 at 49. Commerce may be correct in asserting that because "Elegant Living" could have identified multiple companies separate from Baroque Timber, "additional Q&V Questionnaire responses should have been submitted, even if they indicated 'no exports.'" *Id.* However, such argument simply ignores the evidence indicating that the "Elegant Living" in the petition was Baroque Timber, as well as evidence that no actual Elegant Living Corporation exists.[19] Failure to take this evidence into account fails the substantial evidence test. If Commerce wishes to keep an "Elegant Living" company on the AFA list, the interests of accuracy and fairness demand that Commerce must either determine, based on substantial evidence, that Elegant Living Corporation does exist or determine what company within Samling Group, if any, failed to cooperate.

Commerce has a stronger case for including Eswell Enterprise, but not one which ultimately meets the substantial evidence standard. A determination of affiliation or collapsing falls to Commerce to decide and not to respondents in deciding what information to supply. *Cf. Reiner Brach*, 26 CIT at 556–57, 206 F. Supp. 2d at 1331. Moreover, the Q&V questionnaire clearly requested from the recipient, Eswell Enterprise, information regarding exportation of subject merchandise. Q&V Questionnaire, C-570–971, POI 09 (Dec. 3, 2010), Admin. R. Pt. 1 Pub. Doc. 90 Attach. 1. The accompanying letter also warned that failure to cooperate to the best of one's ability could result in the use of adverse inferences. *Id.* at 1. Thus, Eswell Enterprise could have simply responded with "no exports."

Had no further evidence regarding Eswell Enterprise been placed on the record, our inquiry might end here. *Cf. Hyosung*, 35 CIT at __, Slip. Op. 11–34 at *10–11. However, unlike the facts of *Hyosung*, where Commerce rejected untimely new information, in this case Commerce sought and permitted Plaintiffs to place additional infor-

[18] The court notes that the exact same evidence led Commerce to remove Times Flooring from the AFA list. *See I & D Mem.* Cmt. 6 at 49.

[19] Commerce does not contend in its briefs that Elegant Living Corporation exists. In this sense, there is no dispute between the parties as to the existence of Elegant Living; rather they dispute the application of AFA. It is difficult to *see* how leaving Elegant Living on the AFA list serves any purpose when no such company exported or will export anything to the United States.

mation on the record. This includes evidence indicating that Eswell Enterprise is the parent company of Eswell Timber and that Eswell Enterprise does not independently export subject merchandise.

Commerce may not request and subsequently ignore record evidence. As discussed above, Eswell Enterprises's failure to respond to the Q&V Questionnaire is not dispositive once a correction is requested and new evidence is placed on the record. Under these circumstances, Commerce must consider the evidence so long as the concerns for accuracy and fairness outweigh those for finality and agency burden — which they do here — and failure to consider the evidence renders a determination unsupported by substantial evidence.

Because the record contains evidence permitting Commerce to determine that Elegant Living and Eswell Enterprise Consol. Ct. No. 11–00533 Page 29 were not companies that belonged on the AFA list and Commerce unjustifiably failed to take into account this evidence, the court finds Commerce's decision unsupported by substantial evidence and remands for reconsideration.

CONCLUSION

In accordance with the foregoing opinion, the *Final Determination*, is affirmed, in part, and remanded, in part.

Commerce's decisions to use AFA in calculating the value of the LTAR subsidy and the inclusion of the BET in the *Final Determination* are affirmed. Commerce's inclusion of Elegant Living and Eswell Enterprises is remanded for reconsideration or further explanation consistent with this opinion.

Commerce shall have until October 30, 2012, to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until November 13, 2012, to file comments. Plaintiffs, Defendant, and Defendant-Intervenors shall have until November 27, 2012, to file any reply.

Dated: August 31, 2012
New York, New York

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

Slip Op. 12–114

GLOBE METALLURGICAL INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 10–00032

[Results of remand of administrative review sustained.]

Dated: September 5, 2012

William D. Kramer, *Martin Schaefermeier*, DLA Piper LLP (US), of Washington, DC, for Plaintiff Globe Metallurgical Inc.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant United States. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. *Joanna V. Theiss*, Of Counsel, Office of the Chief Counsel for Import Administration U.S. Department of Commerce.

Duane W. Layton, *Sydney H. Mintzer*, *Margaret-Rose Sales*, Mayer Brown LLP, of Washington, DC, for Defendant-Intervenors Shanghai Jinneng International Trade Co., Ltd. and Jiangxi Gangyuan Silicon Industry Co., Ltd.

OPINION

Gordon, Judge:

I. Introduction

This consolidated action involves an administrative review conducted by the United States Department of Commerce ("Commerce") of the antidumping duty order covering silicon metal from the People's Republic of China ("China"). *See Silicon Metal from the People's Republic of China*, 75 Fed. Reg. 1,592 (Dep't of Commerce Jan. 12, 2010) (final admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum, A-570–806 (Dep't of Commerce Jan. 5, 2010) *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–378–1.pdf (last visited September 5, 2012)[1] ("*Decision Memorandum*"). Before the court are the Final Results of Redetermination, Sept. 6, 2011, ECF No. 76, ("*Remand Results*"), filed by Commerce pursuant to *Globe Metallurgical Inc. v. United States*, 35 CIT ___, 781 F. Supp. 2d 1340 (2011). 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),[2] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the *Remand Results* are sustained.

II. Standard of Review

For administrative reviews of antidumping duty orders, the court 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). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

[1] All Commerce unpublished decision memoranda were last visited the date of this opinion.

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

Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., Administrative Law and Practice § 9.24[1] (3d. ed. 2012). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2012).

III. Discussion

Defendant-Intervenors, Shanghai Jinneng International Trade Co., Ltd. and Jiangxi Gangyuan Silicon Industry Co., Ltd. ("Respondents"), challenge Commerce's treatment in the *Remand Results* of a surrogate financial statement of FACOR Alloys Limited ("FACOR"), a ferroalloy producer in India, which was used by Commerce to calculate Respondents' selling, general and administrative expenses ("SG&A") for the margin calculation. Specifically, Respondents challenge as unreasonable Commerce's exclusion of FACOR's sale of a captive power plant as a non-routine transaction. *See* Def.-Intervenors' Comments on Final Results of Redetermination Pursuant to Remand, Oct. 14, 2011, ECF No. 80.

When calculating SG&A, Commerce includes "gains or losses incurred on the routine disposition of fixed assets . . . because it is expected that a producer will periodically replace production equipment and, in doing so, will incur miscellaneous gains or losses. Replacing production equipment is a normal and necessary part of doing business." *Stainless Steel Sheet and Strip in Coils from Mexico*, 75 Fed. Reg. 6,627 (Dep't of Commerce Feb. 10, 2010); Issues and Decision Memorandum, A-201822 (Feb. 3, 2010) cmt. 8 at 44, *available at* http://ia.ita.doc.gov/frn/summary/mexico/ 2010–2987–1.pdf ("*SSSS in Coils from Mexico*"). Commerce excludes from its SG&A calculation any resulting gains and losses from non-routine sales of fixed assets because they "do not relate to the general operations of a company."

Id. In determining whether to include or exclude a fixed asset sale from SG&A, Commerce considers the nature and significance of the sale, and the relationship of the transaction to the general operations of the company. *Id*.

Commerce has applied this framework many times to various transactions, including: the sale of a pulp mill by a lumber producer (non-routine, excluded), *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,921 (Dep't of Commerce Dec. 20, 2004), Issues and Decision Memorandum, A-122–838 (Dec. 13, 2004) cmt. 9 at 56, *available at* http://ia.ita.doc.gov/frn/summary/canada/E4–3751–1.pdf; the sale of a shipping vessel by a rebar producer (non-routine, excluded), *Certain Concrete Reinforcing Bars from Turkey*, 70 Fed. Reg. 67,665 (Dep't of Commerce Nov. 8, 2005), Issues and Decision Memorandum, A-489–807 (Nov. 2, 2005) cmt. 25 at 83, *available at* http://ia.ita.doc.gov/frn/summary/turkey/05–22242–1.pdf; the sale of a sawmill by a lumber producer (non-routine, excluded), Issues and Decision Memorandum accompanying *Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,437 (Dep't of Commerce Dec. 12, 2005), Issues and Decision Memorandum, A-122–838 (Dec. 5, 2005), cmt. 8 at 38, *available at* http://ia.ita.doc.gov/frn/summary/canada/0523932–1.pdf ("*Softwood Lumber Products from Canada 2003–04*"); the sale of a warehouse by a stainless steel producer (non-routine, excluded), *SSSS in Coils from Mexico*, cmt. 8 at 45; the sale of land for corporate headquarters by a PET film producer (non-routine, excluded), *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 75 Fed. Reg. 70,901 (Dep't of Commerce Nov. 19, 2010), Issues and Decision Memorandum, A-580–807 (undated), cmt. 3 at 6, *available at* http://ia.ita.doc.gov/frn/summary/korea-south/2010–29271–1.pdf; the sale of timber tracts by a lumber producer (routine, included), *Softwood Lumber Products from Canada 2003–04*, cmt. 40 at 111; and the sale of certain production equipment by an orange juice producer (routine, included), *Certain Orange Juice from Brazil*, 76 Fed. Reg. 50,176 (Aug. 12, 2011), Issues and Decision Memorandum, A-351–840 (Aug. 5, 2011), cmt. 7 at 21, *available at* http://ia.ita.doc.gov/frn/summary/brazil/2011–20563–1.pdf.

In *Softwood Lumber Products from Canada 2003–04* Commerce explained the difference between the routine disposition of a fixed asset and the disposition of an entire facility:

> It is the Department's practice to include gains or losses incurred on the routine disposition of fixed assets in the G&A expense ratio calculation. The Department follows this practice because it is expected that a producer will periodically replace

production equipment and, in doing so, will incur miscellaneous gains or losses. Replacing production equipment is a normal and necessary part of doing business. The costs associated with assets currently being used in production are recognized, and become part of the product cost, through depreciation expenses. The Department includes such gains and losses from the routine disposal of assets in G&A expense rather than as a manufacturing expense, because the equipment, having been removed from the production process prior to the sale or disposal, is not an element of production when the disposal or sale takes place. It rather is simply a miscellaneous asset awaiting disposal. The gains or losses on the routine disposal or sale of assets of this type relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations. In short, it is a cost of doing business. The Department's approach for these types of gains and losses is to allocate them over the entire operations of the producer.

We disagree with Abitibi that the question is whether the closed or sold facility pertains to the merchandise under review. Once a facility is sold or shut-down, by definition it no longer relates to the ongoing or remaining production, and it becomes either an asset owned by another party or an asset awaiting sale or disposal. Prior to the sale or shut-down, the cost of the facility would be allocated to the products produced at that facility in the form of depreciation expenses. Post shutdown or sale, the associated cost no longer is a direct or indirect production cost. The question is whether such costs are appropriate for inclusion in G&A expenses and relate to the company as a whole. The policy of not basing our decision on whether the facility in question produced the merchandise under review or merchandise not under review is consistent with our treatment of such costs in past cases.

As discussed above, these respondents either sold or shut down entire production facilities during the POR. These respondents are in the business of producing and selling commercial goods to customers: they are not the business of manufacturing and selling entire production facilities. From a cost perspective, it would not be reasonable to assign the gain or loss on the disposition of a facility to the per-unit cost of manufacturing of the products that are still being produced at the respondent's other facilities, because the facility in question now has nothing to do with

> producing the respondent's products. The question, again, is whether the shut-down and sale, or the outright sale, of a production facility supports the general operations of the company. The reason for including financial and G&A expenses in COP or CV is that companies incur various costs and expenses, apart from those associated with production operations, to maintain and generally support the company. . . .
>
> Moreover, we disagree with the petitioner that the permanent closure or sale of a production operation is routine and the type of transaction that should be picked up as part of G&A expense. The sale of an entire production facility is a significant transaction, both in form and value, and the resulting gain or loss generates non-recurring income or losses that are not part of a company's normal business operations, and are unrelated to the general operation of the company. The sale of an entire production facility does not support a company's general operations, rather it is a sale or removal of certain production facilities themselves. It represents a strategic decision on the part of management to no longer employ the company's capital in a particular production activity. These are transactions that significantly change the operations of the company. If the task before the Department is to determine a particular producer's cost to manufacture a given product (including the costs associated with financing and supporting the producer's general operations) it is not reasonable to include gains or losses on the sale of an entire production facility as a product cost.
>
> While the Department has included such gains and losses in the past, in more recent cases, we have changed our practice and excluded the gains and losses associated with plant closures and sales. . . .

Softwood Lumber Products from Canada 2003–04, cmt. 8 at 33–35. Commerce echoed this explanation in *SSSS in Coils from Mexico*:

> The sale of an entire warehouse does not support a company's general operations. Rather, it represents a strategic decision on the part of management to no longer employ the company's capital in a particular production activity. These are transactions that significantly change the operations of the company and are non-routine in nature. From a cost perspective, it would not be reasonable to assign the gain or loss on the disposition of an entire facility to the per-unit cost of manufacturing of the products that are still being produced at the respondent's other

> facilities, because the facility in question now has nothing to do with producing the respondent's products. . . .
>
> . . .
>
> Mexinox is in the business of manufacturing and selling stainless steel products and not in the business of selling warehouses.

SSSS in Coils from Mexico, cmt. 8 at 45.

In the *Remand Results* Commerce reasoned that FACOR's sale of its captive power plant was not a routine disposition of production equipment, but a non-routine disposition of a complete production facility:

> A functioning power plant is a type of production facility, and therefore, its sale is more similar to the sale of an ongoing business line (such as the Kraft pulp mill in *Softwood Lumber from Canada 2002–2003* or the shipping line in *Concrete Reinforcing Bar from Turkey*) than the routine disposition of equipment or machinery. Since FACOR's primary business activity is the production and sale of ferrochrome, its sale of a power-producing facility is non-routine in nature, and unrelated to its general operations. This is consistent with the determinations cited by Respondents. In *SSSS from Mexico*, the Department excluded profits on the sale of an entire warehouse from SG&A, stating that the sale of its warehouse "does not support a company's general operations." Likewise, in *PET Film from Korea*, the Department excluded profits on the sale of land, because selling land was not part of its normal business operations. As noted above, FACOR is in the business of producing and selling ferroalloys, not power plants. The Department's treatment of the sale of the power plant as non-routine is consistent with past practice.
>
> Further, in its *Draft Remand Results*, the Department cited to the large change in profit on the sale of the fixed asset between the prior and current period merely as supporting evidence that FACOR's sale of a power plant was an unusual, non-routine transaction. Slight fluctuations in the profits and losses realized by companies from year to year are to be expected, however, in this case, FACOR's profits on the sales of fixed assets increased over 1000% year-over-year (from the 2006–2007 accounting period to the 2007–2008 accounting period). This sizeable increase in profits on the sale of fixed assets is indicative of an unusual transaction, and FACOR's financial statements show that the unusual transaction accounting for this change is the company's

sale of an entire power plant in the current period. Contrary to the Respondents' argument, the consideration of the change in profit was but one part of the evidence which the Department considered in its determination that the sale of the power plant is non-routine.

Second, with respect to the significance of FACOR's sale of its power plant, we continue to find that FACOR's sale of a power plant was a significant transaction in both form and value. We disagree with Respondents' interpretation of *Softwood Lumber from Canada 2003–2004* as requiring that only the sale of a production facility can be categorized as non-routine. For instance, in *Reinforcing Bars from Turkey*, the Department excluded the profit from the sale of shipping vessels from SG&A, and in *SSSS from Mexico*, the Department excluded the profit from the sale of a warehouse, which are not production facilities. Moreover, an entire power plant is a type of production facility. The Department does not require a demonstrable change in the operations of the company to consider the sale of a plant or facility to be significant in form. The primary business lines of respondents whose asset sales were determined to be non-routine in *Softwood Lumber from Canada 2002–2003, Softwood Lumber from Canada 2003–2004*, and *Concrete Reinforcing Bars from Turkey* all continued with no minor changes after the non-routine sales of fixed assets, as is the case of FACOR.

FACOR's sale of a power plant was also significant in value. As Petitioner has noted, FACOR's power plant accounted for over 50 percent of the book value of its fixed assets, and even when considering the accumulated depreciation of the power plant, the power plant in question still represented over 40 percent of the company's total fixed assets, calculated on the same basis. Moreover, the Department has not determined that the significance of a transaction must be determined by examining its proportion of total revenue, nor has the Department set a lower limit for the percentage of total revenue that an asset sale must reflect in order for the sale to be considered non-routine. Although Respondents rely on *Chlorinated Isos Prelim* in support of their argument that the Department should consider the sale to be not significant, in *Chlorinated Isos Prelim*, the Department did not explain why it determined to treat the profits from the sale of a fixed asset as an offset to SG&A. This issue was also not discussed in the final results. Therefore, this determination does not support Respondents' contention that,

where a sale of a fixed asset results is a small percentage of total revenue, the Department must treat the sale as routine.

The Department also continues to find that the sale of a surplus asset may also be significant. The simple fact of a company stating that it has excess capacity does not preclude a transaction from being considered significant. A surplus asset is one that is no longer needed by the company, not necessarily an asset that is insignificant to the company in terms of its productive capacity and value, or one that a company routinely sells.

With respect to the relationship of FACOR's sale of its power plant to its general operations, we continue to find that the sale of the power plant was not related to the general operations of FACOR. Again, a power plant is a production facility, and whether or not the products and services produced by the production facility are used in the manufacture or sale of the company's primary product, the sale of a production facility remains outside the scope of the company's primary, general business. We continue to find that whether or not power plants are commonly owned by ferroalloy producers is not determinative of whether the sale of a power plant is routine or not.

Many categories of businesses are likely to possess certain manufacturing facilities that are not directly related to their primary business line - whether the "side" line be the production of Kraft pulp or the provision of shipping. The commonality between these examples and a power plant is that each of these facilities generates output of a product or service - paper, transport, or power -that is outside the scope of the company's primary business line. These unrelated goods and services may be employed in the manufacture of the company's own products -such as the shipping services the respondent provided for its own inputs and outputs instead of contracting a shipping company in *Concrete Reinforcing Bars from Turkey* - or they may be sold for profit to customers. The way the outputs of a productive manufacturing facility are employed by a specific company are not determinative of whether the sale of the asset is routine.

Remand Results at 13–16.

Respondents' contend that if properly applied, Commerce's practice governing fixed asset sales should yield only one reasonable outcome: FACOR's power plant sale must be included as a routine transaction in the SG&A calculation. Respondents do a creditable effort briefing their case, although it simply is too difficult a case to make. Unlike in

the market economy context where a respondent benefits from the wisdom and insight of its own accountants analyzing its own fixed asset sales, here, Respondents (along with Commerce and petitioner) are interpreting the power plant sale through the limited information provided in surrogate financial statements. Against such an administrative record (which does not specifically detail the frequency with which Indian ferroalloy producers buy or sell entire power plants), and against the litany of Commerce decisions excluding comparable fixed asset transactions, it is too tall an order for the court to direct Commerce via affirmative injunction to include the power plant sale within its SG&A calculation. Such an order would have to explain how the sale of an entire power plant by ferroalloy producers, not in the business of selling power plants, amounts to an insignificant, routine transaction, and further, why that determination is the *only* outcome that the administrative record reasonably supports. The standard of review contemplates that more than one reasonable outcome is possible on a given administrative record, and Commerce's decision here to exclude the power plant sale from its SG&A calculation is consistent with its past practice and certainly is as reasonable, if not more so, than Respondents' proposed alternative. The court must therefore sustain the *Remand Results*.

IV. Conclusion

For the foregoing reasons the court sustains Commerce's *Remand Results*. Judgment will be entered accordingly.

Dated: September 5, 2012
New York, New York

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