U.S. Customs and Border Protection

Slip Op. 13–83

ZHAOQING NEW ZHONGYA ALUMINUM CO., LTD. and ZHONGYA SHAPED ALUMINUM (HK) HOLDING LTD., Plaintiffs, and EVERGREEN SOLAR, INC., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

PUBLIC VERSION

Before: Donald C. Pogue,
Chief Judge
Court No. 11–00181

[Commerce's final determination is AFFIRMED IN PART and REMANDED IN PART]

Dated: June 27, 2013

Peter J. Koenig, Squire Sanders LLP, of Washington, DC, for Plaintiffs Zhaoqing New Zhongya Aluminum Co., Ltd, and Zhongya Shaped Aluminum (HK).

Craig A. Lewis and *Theodore C. Weymouth*, Hogan Lovells LLP, of Washington, DC, for the Plaintiff-Intervenor, Evergreen Solar, Inc.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Joanna Theiss*, Attorney, Office of the Chief Counsel for the Import Trade Administration, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *Derick G. Holt*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, DC and *Stephen A. Jones*, *Gilbert B. Kaplan*, and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for Defendant-Intervenor, Aluminum Extrusions Fair Trade Committee.

OPINION

Pogue, Chief Judge:

In this action, Plaintiffs, producers and importers of extruded aluminum seek review of two aspects of Commerce's calculations of countervailing duties on certain aluminum extrusions from the People's Republic of China ("PRC" or "China"). *See* Aluminum Extrusions from the People's Republic of China, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative CVD determination) ("Final Determination") and accompanying Issues and Decision Memorandum ("I&D Memo"). Plaintiffs first challenge Commerce's inclu-

sion of import duties in its calculation of a world market price for use as the benchmark for determining the benefit received from government-supplied primary aluminum. Plaintiffs also challenge Commerce's finding that a plot of land acquired by New Zhongya (hereinafter "Zhongya") was, at the time of acquisition, comparable to a fully developed Thai industrial park. For the reasons stated below, the court finds that Commerce's inclusion of import duties was in accordance with law, but that Commerce's finding that the land leased by Zhongya in 2006 was, at the time the land use rights were acquired, comparable to a fully developed industrial park was not supported by a reasonable reading of the evidence of record. Therefore, Commerce's Final Determination is affirmed in part and remanded in part.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

BACKGROUND

In its 2010 investigation of certain extruded aluminum products from the PRC, Commerce determined that countervailing duties ("CVD"s) were appropriate to offset subsidies provided to Chinese producers of extruded aluminum. *See Aluminum Extrusions* from the People's Republic of China, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (CVD order). Specifically, during the investigation, Commerce found that the respondents received financial contributions in the form of primary aluminum inputs supplied by companies that were government authorities. *I&D Memo* cmt. 21 at 96. In deciding whether these financial contributions conferred a benefit, Commerce selected an appropriate benchmark against which to measure the adequacy of the price paid for government-supplied primary aluminum. *Id.* When selecting the appropriate benchmark, Commerce found that actual transaction prices within the PRC were "significantly distorted" due to a high percentage of state owned enterprises in the market, and chose to use the world market price as the appropriate benchmark. *Id.* In calculating the world market prices, and in accordance with its regulations, Commerce included applicable delivery charges and import duties. 19 C.F.R. § 351.511(2)(iv). Plaintiffs challenge this calculation, arguing that the inclusion of import duties was improper because Plaintiffs paid no duties on their imports of primary aluminum from Hong Kong.

Commerce also investigated allegations that China provided land-use rights for less than adequate renumeration to aluminum extrusion producers and concluded that provision of such land-use rights constituted a countervailable subsidy. *I&D Memo* cmt. 24. As with the supplies of primary aluminum, Commerce sought to find an appro-

priate benchmark to determine whether the respondents received any benefit. Commerce selected the purchase price of a fully developed industrial park in Bangkok, Thailand, as the benchmark and found that when compared to a land-use lease signed by Zhongya in 2006, Zhongya received a benefit. *Id.* at cmt. 24. Plaintiffs also seek judicial review of this determination, arguing that the record as a whole shows that the price Zhongya paid in 2006 was for land that contained no infrastructure and required significant improvements before manufacturing could occur, and therefore the purchase price of a fully developed industrial park is not a comparable benchmark. *Id.*

STANDARD OF REVIEW

The court will sustain Commerce's "determination[s], finding[s], or conclusion[s]" 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). To be in accordance with law, the agency's decision must be authorized by the statute, and consistent with the agency's regulations. See, e.g., Hontex Enter., Inc. v. United States, 27 CIT 272, 293, 248 F. Supp. 2d 1323, 1340 (2003). 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).

DISCUSSION

I. Import Duties

Plaintiffs first challenge Commerce's inclusion of import duties in its benchmark calculation when it investigated Chinese producers imports of primary aluminum. Specifically, Plaintiffs assert that because they paid no import duties on imports of primary aluminum from Hong Kong, Commerce's inclusion of import duties improperly inflates the benchmark value used to determine the value of this benefit.[1] Plaintiffs claim that when, as here, Commerce uses world market prices, it errs in including import duties in its calculations.

19 C.F.R. § 351.511(a)(2) describes Commerce's methodology for calculating benefits received. Generally, Commerce compares the government price to the actual market price for the good or service received. 19 C.F.R. § 351.511(a)(2)(i). This is commonly referred to as

[1] Plaintiffs also claim that Commerce's inclusion of [[
]] was improper [[
]] and therefore not supported by substantial evidence. However, Commerce notes correctly that Plaintiffs failed to raise this issue at the administrative level and thus have not exhausted their administrative remedies on this issue. *See* Dorbest, Ltd. v. United States, 604 F.3d 1363, 1375 (Fed.Cir. 2010).

a "tier-one benchmark." *See also* I&D Memo cmt. 21 at 96 (noting that a tier-one benchmark is preferred to a tier-two benchmark). However, should Commerce determine, as it did here, that "there is no usable market-determined price" to use as the benchmark, then it proceeds to the second tier benchmark, the world market price. *See* 19 C.F.R. § 351.511(a)(2)(ii); I&D Memo cmt. 20 at 94 (deciding that distortion in the PRC market makes tier-one pricing unusable as a benchmark). The regulation is specific in stating that when using the world market price, Commerce is to include delivery charges and import duties in its calculations. 19 C.F.R. § 351.511(a)(2)(iv) ("[Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.")

Here, Commerce found that the "market for primary aluminum is significantly distorted by the presence of companies determined to be government authorities" and that the preferred tier-one benchmark was therefore unusable. *I&D Memo* cmt. 21 at 94, 96. Pursuant to its regulation, Commerce then proceeded to use tier-two pricing, the world market price, as a benchmark price and adjusted it to include delivery charges and import duties. I&D Memo cmt. 20 at 94; 19 C.F.R. § 351.511(a)(2)(iv).

Plaintiffs challenge the inclusion of import duties, claiming that the regulation calls for adjusting the tier-two benchmark to reflect what a firm actually paid or would pay, and that because they paid no import duties, the tier-two benchmark impermissibly includes such duties. But Plaintiffs' understanding of the regulations is flawed. As the government notes, both in its I&D Memo and before the court, Plaintiffs are asking for a "company-specific, tier-one benchmark" but have failed to challenge Commerce's finding that tier-one pricing is unavailable. Def.'s Opp'n to Pls.' Mot. For J. on the Agency R., ECF No. 53 at 11–12 ("Gov't Br."). Therefore, Commerce's decision that tier-one pricing is unusable, and the consequent use of the tier-two pricing, the world market price, as a reasonable benchmark is well grounded in the applicable regulations. Accordingly, because the world market price by regulation must include import duties, Commerce's decision to include such import duties in its calculation of the benchmark is reasonable and in accordance with law.[2] *See Hontex*, 27 CIT at 292–93, 248 F. Supp. 2d at 1340–41.

II. Land Use Benchmark

[2] Plaintiffs also challenge the applicable regulation as impermissibly violating the statute, 19 U.S.C. § 1677(5)(E). However, not only is this argument barely set forth in Plaintiffs' brief, Plaintiffs failed to raise the issue at the administrative level, and it is therefore not appropriate for the court to consider it. *See Dorbest*, 604 F.3d at 1375.

Plaintiffs next claim that Commerce's selection of a fully developed industrial park purchase price in Bangkok, Thailand as the land purchase price benchmark is not comparable to Zhongya's 50 year lease of wholly undeveloped land.

Plaintiffs refer to numerous citations to the record which show that, from the beginning of the investigation, it has maintained that the land leased by Zhongya was completely undeveloped and required significant development, such as infrastructure for water and electricity, before it could be used as a production facility. *See* Pls.' Mot. For J. on the Agency R., ECF No. 44 at 5 n.11 ("Pls.' Br.")(listing extensive record citations to documents showing that Zhongya developed the land). Indeed, the lease for Zhongya's land contains an article providing timelines for Zhongya to begin construction and provides for repossession should Zhongya fail to do so in a timely manner. Zhongya Supplemental Questionnaire Resp. (Aug. 6, 2010), Admin. R. Con. Doc. 21 [Pub. Doc. 120] at 297, Exhibit 15. Furthermore, the lease states that Zhongya is "solely responsible for the construction and improvement of the supporting facility of sewage and drainage" on the land.[3] *Id.*

Commerce fails to squarely address Plaintiffs' argument that the land it leased was completely undeveloped in 2006 and required significant improvement. In the I&D Memo, Commerce cites a promotional website provided by Petitioners on July 13, 2010, and claims that the data on the website dates back to 2004. *I&D Memo* cmt. 24 at 106. The website exists to promote the region in which Zhongya leased its land. In its brief to the court, Commerce notes that the excerpted pages have a note stating, "Copyright 2004 ZhaoQing Government," and the website currently describes the region as an "industrial estate which has been well-equipped with electricity, water, cable, road {sic}. . . ." Gov't Br. at 18 (citing Petitioner's First New Subsidy Allegations (Jul. 13, 2010), Pub. Doc. 91, Exhibit 1 at 12). This argument completely misses the point. First, promotional websites which exist to advertise and attract business are not held to any standards of accuracy and fact and do not carry the same weight as, for example, findings that arise from a thorough administrative in-

[3] Plaintiffs have also submitted a copy of a construction contract which they assert is for the construction of infrastructure such as electricity, water, and gas. Pls.' Br. at 5 n.11 (citing Zhongya Third Supplemental Questionnaire Resp. (Oct. 13, 2010), Admin. R. Con. 48 [Pub. Doc. 233], Exhibit 5). Commerce has failed to address the construction contract or the terms of the land lease in both its court briefings and the I&D Memo.

vestigation.[4] *See Constantine Polites v. United States*, __ CIT __, 780 F. Supp. 2d 1351, 1356 n.11 (2011). Because websites are fluid in nature and may be edited at any point in time with no discernable trace, a note that the pages are copyrighted 2004 does not guarantee that the information was placed there in 2004. While it is, of course, for Commerce to decide the weight of this evidence, *F. Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000), Commerce's weighing must not be unreasonable. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Second, the amenities currently advertised as available in the general region have absolutely no bearing on the condition of the specific plot as it existed when Zhongya assumed the land use rights in 2006.

Defendant-Intervenor argues that the publication date of the website is irrelevant because the website states that by "August 2005, more than 170 enterprises have found their homes in the industrial park among which 60 have gone into operation." Resp. In Opp. to Pls.' Mot. For J. on the Agency R., ECF No. 52 at 17. Again, this argument misses the point. Nothing in a promotional website for the general region supports a finding that the specific plot leased by Zhongya in 2006 was comparable to a fully developed industrial park in Bangkok, Thailand. Indeed, the language cited by Defendant-Intervenor, stating that 60 of 170 enterprises in that region were operational in 2005, tends to suggest that the region in 2005 was not a fully equipped industrial park allowing tenants to immediately begin manufacturing.

Commerce's sole argument concerning the specific plot leased by Zhongya also fails. Commerce states that it "collected" photographs during verification which show power lines and a canal on or near the site. Gov't Br. at 17 ("Concerning the parcel for which New Zhongya purchased land-use rights, Commerce noted that, during verification, it collected pictures showing power lines and a canal on or near the site."); *I&D Memo* at 107. Commerce does not clearly indicate the provenance of these photographs, but Plaintiffs state that they were selectively chosen from a slideshow they created to show the improvements they made to the land from 2005 to 2010. Pls.' Br. at 7. Plaintiffs assert that the photographs Commerce used were taken after Zhongya had completed its improvements to the land and therefore these photographs do not show the condition of the plot as it existed when Zhongya assumed the lease in 2006. *Id.* Given the record as a whole, the court is not persuaded that these photographs

[4] The court notes that it is possible to find websites advertising products that range from mundane health products to "petite lap giraffes," and that it is often difficult to discern what is fact and what is "mere puffery" on these promotional websites. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

provide substantial evidence that the land Zhongya leased was a fully developed industrial park in 2006, or that the photographs even depict the land as it existed in 2006.

In sum, the court cannot conclude that a reasonable reading of the record as a whole supports Commerce's rebuttal of Plaintiffs' claim that the land they leased was undeveloped in 2006 and therefore not comparable to a fully developed industrial park. Commerce relies on a 2010 screenshot of a promotional website for the region to support its claim that the plot as it existed in 2006 was a fully developed industrial park and has not placed any evidence on the record rebutting or addressing Plaintiffs' claims that photographs showing a canal and power lines on or near the property were taken in 2010 and not 2006. The court therefore holds that Commerce's finding that the land as it existed in 2006 was comparable to a fully developed industrial park is not supported by substantial evidence and remands for reconsideration or further explanation.[5] See Nippon Steel, 458 F.3d at 1350–51.

CONCLUSION

For the reasons stated above, Commerce's Final Determination is affirmed in part and remanded in part for reconsideration of its selection of a fully developed industrial park as a benchmark for the land-use rights acquired by Plaintiffs in 2006. Commerce shall file its remand determination with the court by August 5, 2013. The parties will have until August 19, 2013 to file comments, and Commerce has until September 2, 2013 to file a response.

It is so ORDERED.

Dated: June 27, 2013
New York, NY

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

[5] Plaintiffs challenge the Thai benchmark data on other grounds, but because the court is remanding to Commerce for reconsideration, it does not reach these arguments.

ERRATA

Zhaoqing New Zhongya Aluminum Co., Ltd. and Zhongya Shaped Aluminum (HK) Holding Ltd., v. United States, Court No. 11–00181, Slip Op. 13–83, dated June 27, 2013.

Page 3: Following the sentence ending on Line 11, place footnote marker 1. Footnote 1 should read: "This action challenging a final affirmative countervailing duty determination was brought pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i)."

July 19, 2013

Slip Op. 13–88

LATITUDES INTERNATIONAL FRAGRANCE, INC., A CALIFORNIA CORPORATION D/B/A MAESA HOME, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00010

[Judgment for Plaintiff.]

Dated: July 17, 2013

Michael K. Grace, Grace & Grace, LLP of Los Angeles, CA argued for Plaintiff Latitudes International Fragrance, Inc.

Edward F. Kenny, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant United States. With him on brief were *Tony West*, Assistant Attorney General and *Barbara S. Williams*, Attorney in Charge of International Trade Field Office. Of counsel was Beth Brotman, Office of Chief Counsel, U.S. Customs and Border Protection of Washington, DC.

OPINION

Gordon, Judge:

This opinion follows a bench trial. Plaintiff, Latitudes International Fragrance, Inc., a California Corporation d/b/a Maesa Home ("Latitudes"), challenges the decision of Defendant U.S. Customs and Border Protection ("Customs") denying Latitudes' protest of Customs' classification of the imported merchandise, described as "Bottle glass wavy RCL Machine blown diffuser bottle" ("subject merchandise," "diffuser bottles," or "bottles") within the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs classified the subject merchandise as "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Other: Valued over $0.30 but not over $3 each" with a 30 percent ad valorem duty rate under HTSUS subheading 7013.99.50. Plaintiff claims that the diffuser bottles are properly classified as "bottles . . . and other containers, of glass, of a kind used for the conveyance or packing of goods; preserving bottles of glass; stoppers, lids and other closures, of glass . . . [o]ther containers (with or without their closures)" duty free under HTSUS subheading 7010.90.50. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006). For the reasons set forth below, the subject merchandise is properly classifiable under HTSUS subheading 7010.90.50, and the court will enter judgment for Plaintiff.

I. Background

Each diffuser bottle measures approximately 9.67 centimeters in height by 6.96 centimeters in diameter, and has a decal logo measuring ¾ inches in diameter. *See* Figure 1. The subject merchandise was imported and sold to Plaintiff empty. The bottles, in their imported condition, were not marketed or sold by Plaintiff to retailers or customers, and did not include any stoppers, diffuser reeds, or diffuser oils. Latitudes assembled in the United States diffuser kits ("finished product"), which included the subject merchandise filled with fragranced diffuser oil, a stopper inserted in the bottle's top affixed with shrink wrapped plastic, diffuser reeds, instructions, and the retail packaging. *See* Figure 2. Plaintiff's customers are retailers who market the finished product to consumers as a "scented diffuser" for resale under retailers' private label brands. Target is a retailer, who purchased Plaintiff's finished product branded under the "Smith & Hawken" private label. The cost of the imported merchandise was a small percentage of the cost of the finished product. The suggested retail price for the finished product at Target was approximately $18.00. *See* Pretrial Order, Schedule C ("Uncontested Facts"), Mar. 21, 2013, ECF No. 32.

The ultimate consumer of the finished product is one who wishes to fragrance an enclosed space with a scented diffuser. The ultimate consumer uses the finished product by removing the bottle from the carton, unwrapping the plastic seal around the neck of the bottle, removing the stopper, and inserting the diffuser reeds into the mouth of the bottle, which allows the fragranced oil to be drawn up through the reeds and the scent to be diffused. The bottle is designed to allow the fragranced oil to be diffused for a period of 60 to 90 days, depending on the airflow in the area where the bottle is located. Plaintiff does not sell oil refills or replacement diffuser reeds for its finished scented diffuser product. *Id.*

Figure 1 (Pl.'s Ex. 2; Def.'s Ex. C)

Figure 2 (Pl.'s Ex. 14)

Customs liquidated the entries of the subject merchandise under HTSUS subheading 7013.99.50 as glassware for indoor decoration. Latitudes claimed that the diffuser bottles were classifiable under HTSUS subheading 7010.90.50 as bottles for the conveyance of oils. Latitudes filed a timely protest, Pl.'s Ex. 12 & Def.'s Ex. A, and an application for further review challenging Customs' classification, Def. Ex. B. Customs determined that the imported diffuser bottles were properly classified as an article of glassware used for table, kitchen, toilet, office, indoor decoration or similar purposes under HTSUS heading 7013. *See* HQ H097637 (Sept. 20, 2010), Pl.'s Ex. 14 & Def.'s Ex. H. Customs reasoned that glassware used for the conveyance or packing of goods covered by heading 7010 are "jars designed to remain closed as they transport liquids or solids from one location to another." HQ H097637 at 5. To the contrary, Customs explained that glassware for indoor decoration under heading 7013 is "designed to be displayed in the home or office as they hold material inside of them" and "may remain open as they display their contents and are meant to lend decoration to the items they display." *Id.* In deciding to classify the imported merchandise under heading 7013, Customs also relied on a series of prior ruling letters covering similar merchandise. *Id.*

II. Standard of Review

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1) (2006). A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which when disputed, is a question of fact. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

While the court accords deference to Customs' classification decisions relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("*Skidmore*")), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of the HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

Customs enjoys a statutory presumption of correctness as to the factual components of its classification decision. *See* 28 U.S.C. § 2639(a)(1) (2006). To overcome that presumption, an importer must

produce evidence that demonstrates by a preponderance of the evidence that the factual basis of Customs' classification decision is incorrect. *See Universal Elecs. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

III. Discussion

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation ("ARIs"). *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section or chapter notes. *Id.* Pursuant to GRI 1, merchandise that is described "in whole by a single classification heading or subheading" is classifiable under that heading. *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011).

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of the term as well as upon lexicographic and scientific authorities. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the World Customs Organization's Harmonized Description and Coding System's Explanatory Notes ("Explanatory Notes" or "ENs") "accompanying a tariff subheading, which—although not controlling—provide interpretive guidance." *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309). In making its determination, the court must decide "whether the government's classification is correct, both independently and in comparison to the importer's alternative [proposed classification]." *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

The parties agree that headings 7010 and 7013, HTSUS, are "principal use" provisions. Principal use provisions are governed by ARI 1(a). *See Group Italglass U.S.A., Inc. v. United States*, 17 CIT 1177, 839 F. Supp. 866 (1993); *Dependable Packing Solutions, Inc. v. United States*, 37 CIT ___, ___, Slip Op. 13–23 (Feb. 20, 2013) (citing *Automatic Plastic Molding, Inc. v. United States*, 26 CIT 1201, 1205 (2002)). ARI 1(a) states:

> [i]n the absence of special language or context which otherwise requires . . . a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Accordingly, when classifying goods pursuant to principal use, it is the use of the class or kind of merchandise to which the imported merchandise belongs, rather than the use of the article itself, which is decisive. *BenQ Am. Corp. v. United States*, 646 F.3d 1371 (Fed. Cir. 2011). And, principal use is that use "'which exceeds any other use.'" *Aromont USA Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (quoting *Lenox Collections v. United States*, 20 CIT 194, 196 (1996)) (internal citation omitted).

ARI 1(a) calls for "a determination as to the group of goods that are commercially fungible with the imported goods." *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999). "The so-called *Carborundum* factors provide guidance in determining what goods are commercially fungible with the imported goods." *Aromont USA*, 671 F.3d at 1312–13. These factors are (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale of the merchandise, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; (5) the use of the goods at issue, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use ("the *Carborundum* factors"). *See United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976).

Plaintiff maintains that the principal use of the diffuser bottles is to convey the fragranced oil to the ultimate consumer, and thus the bottles are classifiable under heading 7010. Plaintiff contends that consumers purchase the scented diffuser product for the fragranced oil contained in the bottle, not for the bottle that conveys the diffuser oil. Plaintiff further claims that the bottle and diffuser reeds are intended to be discarded by the consumer after the fragranced diffuser oil evaporates, and that the imported merchandise and the finished product are neither intended nor marketed for reuse by the consumer. Lastly, Plaintiff claims that the imported merchandise and finished product are not marketed to consumers for storage purposes. Defendant, on the other hand, contends that the diffuser bottle does more than convey oil to a place. Rather, it argues that the bottle's pleasing design and principal use as an attractive ("decorative") means to fragrance a space in a home or office for extended periods of time make the bottle similar to a vase, and therefore, classifiable under heading 7013.

This case depends upon whether the *Carborundum* factors indicate that the diffuser bottles are of the class or kind of goods principally used to commercially convey oils, or of the class or kind whose prin-

cipal use is as indoor decoration. If the factors demonstrate that the subject merchandise is used to carry or transport fragranced oil from one place to another or to serve as a channel or medium to cause the fragranced oil to pass from one place to another, then that would indicate a finding that the diffuser bottles are glassware used commercially for the conveyance of goods. *See* Webster's Third New International Dictionary of the English Language Unabridged 499 (1986). On the other hand, if these factors show that the subject merchandise is "decorative," *i.e.,* used to adorn, beautify, or enhance the attractiveness of something, then that would indicate the diffuser bottles are of a class or kind of glassware principally used as indoor decoration. *Id.* at 587.

There are no relevant section or chapter notes for either heading, but the Explanatory Notes aid in understanding the scope of the two respective headings. Heading 7010, HTSUS, encompasses types of glass used commercially for the conveyance or packing of goods, whereas heading 7013 includes glassware used for a table, kitchen, toilet, office, indoor decoration or similar purposes, other than glassware within the scope of heading 7010 or 7013. The ENs for heading 7010 indicate that it includes bottles (including siphon vases) and similar containers, of all shapes and sizes, used as containers for, among other things, oils, and perfumery preparations, are made of ordinary glass, colored or colorless, and are generally designed for some type of closure, which may take the form of ordinary stoppers (of cork, glass, etc.), or special devices. *See* Explanatory Notes, 70.10(A) (2007). [1] The ENs also state that these containers remain in this heading even if they are decorated. *Id.*

The Explanatory Notes for heading 7013 indicate that it covers items including "**[g]lassware for indoor decoration** . . . such as vases, ornamental fruit bowls, statuettes, fancy articles (animals, flowers, foliage, fruit, etc.), table-centres (**other than those of heading 70.09**), aquaria, incense burners, etc., and souvenirs bearing views." *Id.* at 70.13(4) (emphasis in original). Glassware under heading 7013 may consist of ordinary glass that is cut, frosted, etched or engraved, or otherwise decorated. *Id.* at 70.13. Finally, the ENs for both heading contain reciprocal language indicating that heading 7010 excludes containers under heading 7013, but does include containers used primarily for the commercial conveyance of goods. *Id.* at 70.10(c), 70.13(b).

[1] Further citations to the ENs are to the relevant provisions of the 2007 edition, which were in effect at the time of the importation of the subject merchandise.

A. Carborundum Factors

1. General Physical Characteristics of the Merchandise

The first *Carborundum* factor looks to the general physical characteristics of the merchandise. The bottles are approximately 9.67 centimeters in height and 6.96 centimeters in diameter, and have a decal logo that is ¾ inches in diameter. Uncontested Facts ¶ 1; Tr. 70:14–16 (Cashman Direct for Pl.). The bottles are described as wavy, Tr. 28:6–20 (Klein Direct for Pl.); 81:6–11 (Cashman Direct for Pl.), with a pebbly finish, Tr. 141:12–15 (Cashman Direct for Def.). They are designed with a wide base and short narrow neck with an opening at the top to take a stopper. Tr. 142:10–15 (Cashman Direct for Def.). The stopper is intended to prevent the fragranced oil from leaking out of the diffuser bottle prior to the actual use of the diffuser kit. Tr. 86:10–88:6 (Cashman Direct for Pl.). The narrow concave beveled neck and wide base allow the ultimate consumer to spread out diffuser reeds at the top of the bottle to permit the fragranced oil to be disbursed in a home or office for 60–90 days. Tr. 38:17–19 (Klein Direct for Pl.); 74:11–21 (Cashman Direct for Pl.). While the diffuser bottles have a pleasing design, that design is not unique to Latitudes. Tr. 84:10–23 (Cashman Direct for Pl.); 155:16–25 (Cashman Direct for Def.).

For Defendant this pleasing design is key to what makes these imported diffuser bottles decorative glassware. Defendant argues that the bottles are similar to the vases found classifiable under heading 7013 in *Dependable Packaging*. Plaintiff concedes the subject merchandise has a pleasing design, Tr. 84:10–23 (Cashman Direct for Pl.), and has a logo, Uncontested Facts ¶ 1. However, these facts alone do not require a finding that the bottles are decorative due to their physical characteristics. *See* ENs, 70.10(A) (glassware remains in heading even if decorated).

Where an article is designed with a finish capable of closure, that fact is "probative as to . . . [the article's] principal use as a container for the conveyance or packing of goods.'" *Dependable Packaging*, 37 CIT at ___, Slip Op. 13–23 at 9 (citing *Accurate Plastic Moulding, Inc. v. United States*, 26 CIT 1201, 1204 n.3). Here, the uncontroverted testimony of George Cashman, Plaintiff's former Chief Financial Officer, along with a physical examination of the finished product demonstrate that the diffuser bottles were designed to take a stopper, which prevents the fragranced oil from leaking out of the bottles. The capacity of the bottles to take a stopper is a physical characteristic that distinguishes glassware for the conveyance of goods under head-

ing 7010 from decorative glassware under heading 7013. *See* ENs, 70.10(A) (heading 7010 includes bottles generally designed for some type of closure that take the form of an ordinary stopper). It is also the physical characteristic that distinguishes the diffuser bottles from the vases in *Dependable Packaging*. Accordingly, after considering the physical characteristics of the imported bottles the court finds that they are more appropriately in a class or kind of glassware for the conveyance or packing of fragranced oil.

2. Expectations of the Ultimate Purchaser

The second factor is the expectations of the ultimate purchaser. The parties agree that Plaintiff imports the bottles empty and does not sell them in their imported condition to retailers or the ultimate consumer. Uncontested Facts ¶¶ 2 & 3. They also agree that the ultimate consumer purchases the finished product, *i.e.*, the diffuser kit, Uncontested Fact ¶ 6, and that the bottles have a pleasing design, Tr. 84:10–23 (Cashman Direct for Pl.). However, Plaintiff contends that the ultimate consumer buys the bottles, as part of the diffuser kits, to consume the fragranced oil, while Defendant maintains that the consumer displays the bottles as a safe and attractive way to fragrance a space in a home or office for an extended period of time. Additionally, the parties differ over whether the bottles are intended to be discarded after initial use or to be reused with refill kits.

Unfortunately, neither party proffered evidence in the form of consumer or industry studies, or expert reports that provide a basis for the court to determine the expectations of the ultimate consumer. George Cashman, as Plaintiff's USCIT Rule 30(b)(6) witness, testified that the ultimate consumer expects to use the diffuser bottles in combination with the fragranced oil and diffuser reeds to fragrance an area in a home or office. Tr. 81:21–83:4 (Cashman Direct for Pl.). Mr. Cashman also testified that Latitudes does not produce or market refill kits. Tr. 76:11–77:5 (Cashman Direct for Pl.). Jeffrey Klein, the Chief Financial Officer of Plaintiff's corporate parent, Maesa LLC, and Mr. Cashman's supervisor, testified, in his lay capacity, that he discards the subject merchandise once the fragranced oil evaporates. Tr. 38:12–16 (Klein direct for Pl.). Lauren Juszak, a buyer of home fragrance, candles, and home décor for Bed, Bath & Beyond, testified for Defendant regarding the existence of reed diffuser refill kits in the marketplace at the time of the subject importation. Tr. 132:2–18 (Juszak Direct for Def.). From Ms. Juszak's testimony, Defendant wishes the court to infer that the existence of refill kits in the marketplace means that the ultimate consumer expects to use diffuser bottles as indoor decoration. The credible testimony of Messrs. Cash-

man and Klein, taken separately or together, are not sufficiently indicative of whether the expectations of the ultimate purchaser are to discard diffuser bottles after the fragranced oil evaporates. Similarly, the credible testimony of Ms. Juszak provides an insufficient basis for the court to determine that the expectations of the ultimate consumer are that diffuser bottles are used as an indoor decoration. In sum, the testimony of these witnesses alone is not probative of the expectations of the ultimate purchaser.

The retail value of the finished product is, however, probative of those expectations. The record contains evidence that the value of the bottle is small compared to the overall price of the finished product. Uncontested Facts ¶ 12. That value ($.30-.50), Tr. 85:19–22 (Cashman Direct for Pl.), is incidental to the retail price ($18), Uncontested Facts ¶ 11, of the diffuser kit. It is the fragranced oil that makes a difference in Latitudes' pricing of diffuser kits. Tr. 154:12–155:5; 162:10–14 (Cashman Direct for Def.). Taken together, these facts suggest that the ultimate purchaser pays a *de minimis* price to obtain the diffuser bottles in connection with the fragranced oil. Based on the value of the subject merchandise, as compared to the value of the fragranced oil, there is no evidence in the record that would indicate that the merchandise and not the fragranced oil was the item being offered for sale. Therefore, the retail price of the finished product in conjunction with the testimony of Messrs. Cashman and Klein demonstrate that the ultimate consumer expects to purchase the bottles, as part of the finished product; to consume the fragranced oil; discard the bottles after the oil evaporates; and not display the bottles as an indoor decoration.

3. Channels of Trade in Which the Merchandise Moves

The third factor examined by the court is the channels of trade in which the merchandise moves. It is undisputed that the diffuser bottles are imported empty, Uncontested Facts ¶ 2, and are not sold to the ultimate retailer or purchaser as imported, Uncontested Facts ¶ 3. The diffuser bottles are first combined with diffuser reeds and fragranced oil, and then assembled and packaged as diffuser kits before being sold to the retailer, Tr. 73:16–74:3 (Cashman Direct for Pl.), and in turn, to the ultimate purchaser, Uncontested Fact ¶ 6. These circumstances differ from those in *Dependable Packaging*, where the court found an imported vase decorative and not glassware used for the conveyance or packing of goods because the vase was sold either with or without flowers. *Dependable Packaging*, 37 CIT at ___, Slip Op. 13–23 at 13. Here, Plaintiff's diffuser bottles are only sold as part of the finished product. Tr. 86:2–7 (Cashman Direct for Pl.). The

merchandise was not sold empty at the retail level, nor were they ever marketed or sold directly to the ultimate consumer unless filled with fragranced oil and as part of the finished product. Uncontested Facts ¶ 3. Again, Defendant seeks to have the court infer from the testimony of Ms. Juszak, regarding the existence of refill kits in the marketplace, that the bottles are capable of reuse and thus are decorative glassware. The court is unwilling to draw that inference. To the contrary, the court believes that the weight of the evidence demonstrates that the imported merchandise moves in channels of trade of glassware whose principal use is for the conveyance of oils.

4. Environment of Sale

The fourth factor examined by the court is the environment in which the merchandise is advertised and sold. As noted previously, Plaintiff's diffuser bottles are combined with fragranced oil and diffuser reeds, which are then packaged and sold in their totality as a diffuser kit. Tr. 73:16–74:3 (Cashman Direct for Pl.). The bottles are not sold, advertised, or displayed separately by Latitudes' retail customers, such as Target. Uncontested Facts ¶¶ 6 & 7. Once again, Plaintiff's diffuser bottles are unlike the vases in *Dependable Packaging*, which were displayed packed with flowers, "encouraging the retail customer to purchase the flowers and the vase for their combined decorative value" and appeared in an advertising brochure "in a separate 'floral' section, depicting both packed and unpacked vases." *Dependable Packaging*, 37 CIT at ___, Slip Op. 13–23 at 14. Here the record shows that the packaging and labeling of the diffuser kits emphasize the fragranced oil, which provides an aromatic scent to an area in a home or office, and not the diffuser bottle. Tr. 39:9–16 (Klein Direct for Pl.). While the diffuser bottles are aesthetically pleasing, that aesthetic value is incidental to its principal use – the conveyance of the fragranced oil.

5. Use in the Same Manner as Merchandise Which Defines the Class

The fifth factor is the usage of the merchandise which defines the class. It is undisputed that the bottles are not sold empty to retailers or to the ultimate purchaser, Uncontested Facts ¶¶ 2 & 3. The imported bottles are combined with the diffuser reeds and the fragranced oil, Tr. 73:16–74:3 (Cashman Direct for Pl.), to provide an aromatic scent in an area in a home or office for an extended period of time, Tr. 82:17–83:4 (Cashman Direct for Pl.); 38:17–19 (Klein direct for Pl.). There is some evidence of the existence of refill kits in the marketplace, Tr. 132:2–12 (Juszak Direct for Def.); 162:20–172:9

(Cashman Direct for Def.), thereby suggesting that diffuser bottles are reusable, Tr. 168:19–169:22 (Cashman Direct for Def.). While this evidence demonstrates that the subject merchandise *may be used* as indoor decoration, that evidence is not sufficiently probative to show that the decorative use of the merchandise is its principal use, namely the use "which exceeds any other use." *Aromont*, 671 F.3d at 1312 (internal quotation omitted). Additionally, there was no evidence, in the form of industry studies or customer surveys, or testimony offered by Defendant demonstrating that the decorative use of diffuser bottles exceeded any other use of the bottles. Therefore, the court finds that this factor indicates that the principal use of the subject merchandise is for the conveyance of fragranced oils.

6. Economic Practicality of So Using the Imported Merchandise

The next factor is the economic practicality of using the imported merchandise. As indicated above, the value of the bottle is a small percentage of the overall price of the finished product. Uncontested Facts ¶ 12. That value ($.30-.50), Tr. 85:19–22 (Cashman Direct for Pl.), is incidental to the retail price ($18), Uncontested Facts ¶ 11, of the diffuser kit. Mr. Cashman testified that Latitudes chose the subject diffuser bottles based on customer preference, Tr. 72:21–73:9 (Cashman Direct for Pl.), and a low price point, Tr. 71:20–72:10 (Cashman Direct for Pl.), because the fragranced oil is the costly component of the finished product, Tr. 154:12–155:5; 162:10–14 (Cashman Direct for Def.). He also testified that the low price point for diffuser bottles was a driver for Latitudes' customers. Tr. 145:19–146:9 (Cashman Direct for Def.). Mr. Cashman further stated that it does not make economic sense to reuse the bottles by purchasing oil refills and replacement diffuser reeds because the cost of the bottles is so low. Tr. 78:9–79:10 (Cashman Direct for Pl.). Defendant offered no evidence regarding the economic practicality of using the diffuser bottles in the same manner as other decorative glassware in a home or office. Additionally, it did not provide evidence of selling diffuser bottles empty at the retail level. The absence of this type of evidence distinguishes the subject merchandise from the vases in *Dependable Packaging*. *See Dependable Packaging*, 37 CIT at ___, Slip Op. 13–23 at 15–16. Accordingly, this factor supports the classification of the diffuser bottles as glassware under HTSUS heading 7010.

7. Recognition in the Trade of this Use

The final element of the *Carborundum* factors is the recognition of this use in the trade. The competing evidence on this factor is not very probative. Mr. Cashman states that the diffuser bottle is designed for single use and that Latitudes does not sell refills for their diffuser kits. Tr. 78:9–79:3 (Cashman Direct for Pl.). He acknowledges, however, that other private labels sell refills for the diffuser kits, encourage reusing diffuser bottles, Tr. 162:20–173:3 (Cashman Direct for Def.), and even sell diffuser bottles separately, rather than as a part of a diffuser kit, Tr. 150:14–23 (Cashman Dir. for Def.). Additionally, there is testimony from Ms. Juszak regarding refill kits in the marketplace. Tr. 132:2–18 (Juszak Direct for Def.). Encouraging their reuse and the existence of some refill kits in the marketplace does not equate to diffuser bottles being principally used as an indoor decoration. Equally, the record is devoid of industry studies or consumer surveys reflecting that the principal use of the merchandise is to convey fragranced oils.

B. Examination of the Diffuser Bottle

The imported merchandise is "often a potent witness in classification cases." *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989). After examining samples submitted by the parties, Pl.s Ex. 2 & Def.'s Ex. C (Figure 1); Pl.'s Ex. 15 (Figure 2), the court finds that the diffuser bottles fit the description in the ENs for glassware included within heading 7010, namely that they were made of ordinary glass, were designed for some type of closure, and were used as a container to convey oils.

C. Headquarters Ruling Letter H097637

Defendant argues that HQ H097637 ("Ruling Letter") is entitled to *Skidmore* deference because it is thorough and persuasive. The court disagrees. In classifying the subject merchandise, Customs analyzed whether the subject merchandise was glassware for the conveyance or packing of goods within the meaning of heading 7010 or glassware for indoor decoration under heading 7013. In considering heading 7010, Customs focused on whether the subject merchandise was a jar and was imported with lids or caps. The latter was significant in distinguishing glassware that was designed to remain closed in transporting its contents from one place to another (heading 7010) from glassware that remained open as it displayed its contents and lent decoration to those contents (heading 7013). *See* Ruling Letter at 5. For Customs, because the subject merchandise did not meet the

characteristics of a jar for purposes of heading 7010, it was classifiable as indoor decoration under heading 7013.

The problem with this analysis is that Customs fails to address Plaintiff's claim that the subject merchandise is a *bottle* - not a jar - whose principal use is the conveyance or packing of fragranced oils. Additionally, it appears that, despite focusing on jars, Customs ignored the relevant ENs, which describe jars principally used for the conveyance or packing of "certain foodstuffs, . . . cosmetic or toilet preparations, . . . pharmaceutical products, polishes, cleaning preparations, etc." *See* ENs, 70.10(B). None of these descriptors apply to the fragranced oils that fill the subject diffuser bottles. Interestingly, Customs did not reference ENs 70.10(B) in its analysis, but did consider ENs 70.10(A), which describes bottles used for the conveyance or packing of oils. The bottles envisioned by ENs 70.10(A) are made of colored or colorless glass and are generally designed for some type of closure, which may take the form of ordinary stoppers, which describe the subject merchandise.

Customs also reasoned that, based on its characteristics, the subject merchandise was similar to other diffuser bottles that were previously classified under heading 7013. *See* Ruling Letter at 5 (citing HQ 960162 (Oct. 17, 1997), HQ 956470 (Sept. 28, 1994), HQ 961409 (Oct. 22, 1998) (collectively the "Rulings")). The problem with this part of Customs' analysis is that none of the glass articles in the Rulings are bottle diffusers, and all are significantly different in physical form from the subject merchandise. These physical differences played a major role in determining that, except in one instance, the glass containers and not their contents were emphasized to customers. Here, however, the Ruling Letter speaks in generalizations that do not easily allow the court to understand the similarities between the characteristics, and in particular the physical form, of the subject merchandise as compared to the glass containers of the Rulings. Accordingly, HQ Q097637 is not so thorough or logical to warrant deference.

IV. Conclusion

Based on a consideration of the *Carborundum* factors, particularly the merchandise's physical characteristics and the expectations of the ultimate purchaser, and the court's examination of the subject merchandise, the court finds that the subject diffuser bottles are of a class or kind of commercially fungible goods principally used as glass containers to convey fragranced oils, rather than as glassware for

indoor decoration. Accordingly, the diffuser bottles are classifiable under HTSUS subheading 7010.90.50. The court will therefore enter judgment for Plaintiff.

Dated: July 17, 2013
New York, New York

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

ERRATA

Latitudes International Fragrance Inc. v. United States., Court No. 11–00010, Slip Op. 13–88, dated July 17, 2013.

Page 20: In line 9, replace "HQ Q097637" with "HQ H097637".

July 18, 2013

ERRATA

Latitudes International Fragrance Inc. v. United States., Court No. 11–00010, Slip Op. 13–88, dated July 17, 2013.

Page 9: In line 9, replace "7013" with "7018".

July 22, 2013

Slip Op. 13–89

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES Defendant, and HILLTOP INTERNATIONAL, and OCEAN DUKE CORPORATION, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Court No. 10–00275

ORDER

In *Ad Hoc Shrimp Trade Action Committee v. United States*, No. 2012–1416 (Fed. Cir. May 24, 2013), the Court of Appeals for the Federal Circuit granted Defendant-Appellee United States' motion for voluntary remand and remanded the above-captioned matter to this court with instructions to remand the case to the Department of Commerce for reconsideration.

Therefore, *Ad Hoc Shrimp Trade Action Committee v. United States*, Ct. No. 10–00275, is hereby remanded to the Department of Commerce for reconsideration consistent with the Court of Appeals' order.

Commerce shall have until September 17, 2013, to complete and file its remand redetermination. Plaintiff and Defendant-Intervenors shall have until October 1, 2013, to file comments. Defendant shall have until October 15, 2013, to file any reply.

IT IS SO ORDERED.

Dated: July 19, 2013
New York, NY

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

Slip Op. 13–90

MARSAN GIDA SANAYI VE TICARET A.S., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, and NEW WORLD PASTA COMPANY, Defendant-Intervenors.

Court No. 11–00431

[Denying Plaintiff's Motion for Judgment on the Agency Record]

Dated: Dated: July 19, 2013

David L. Simon, Law Offices of David L. Simon, of Washington, D.C., argued for Plaintiff.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the brief were *Stuart*

F. Delery, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Paul C. Rosenthal, Kelley Drye & Warren, LLP, of Washington, D.C., argued for Defendant-Intervenors. With him on the brief was David C. Smith.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Marsan Gida Sanayi ve Ticaret A.S. ("Marsan") – a Turkish exporter of pasta – contests the final results issued by the U.S. Department of Commerce in the 14th antidumping duty review of certain pasta from Turkey. *See* Certain Pasta from Turkey: Notice of Final Results of 14th Antidumping Duty Administrative Review, 76 Fed. Reg. 68,399 (Dep't Commerce Nov. 4, 2011) ("Final Results"); Certain Pasta from Turkey: Issues and Decision Memorandum for the Final Results of the 14th Antidumping Duty Administrative Review (Oct. 26, 2011) (IA Pub. Doc. No. 5) ("Issues & Decision Memorandum") at 1.[1]

In the Final Results, Commerce rejected Marsan's claims that it was affiliated with Turkish pasta producers Birlik Pazarlama A.S. ("Birlik") and Bellini Gida Sanayi A.S. ("Bellini"), both suppliers to Marsan. The subject entries were therefore liquidated at the rate of 51.49% – a rate that was higher than the rate which would have applied if the companies had been found to be affiliated. *See* Principal Brief of Plaintiff Marsan Gida Sanayi ve Ticaret A.S. for Judgment upon the Agency Record Pursuant to Rule 56.2 ("Pl.'s Brief") at 15.

Pending before the Court is the Motion of Plaintiff Marsan Gida Sanayi ve Ticaret A.S. for Judgment on the Agency Record. Marsan

[1] The administrative record consists of two sections, designated "Public" and "Non-Public." The "Public" section consists of copies of all documents in the record of this action, with all confidential information redacted. The "Non-Public" section consists of complete, unredacted copies of only those documents that include confidential information.

During the course of this administrative review, Commerce began using an electronic filing system known as IA ACCESS. *See* Pl.'s Brief at 2 n.1 (*citing* Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures, 76 Fed. Reg. 39,263 (Dep't Commerce July 6, 2011)). Certain documents filed through IA ACCESS were submitted to the court under a separate index which was generated by IA ACCESS instead of Commerce's Central Records Unit (CRU). The indices of the public documents provided by each of the two filing systems are not numbered sequentially within the administrative record. The "Public" section of the administrative record is divided into two sections, with one designated as "CRU Pub. Doc. No.___" for documents from the CRU index and the other designated as "IA Pub. Doc. No. ____" for documents from the IA ACCESS index.

All record documents containing business proprietary information are included only in the non-public record generated by CRU and are identified as "Non-Pub. Doc. No. ____."

claims that, in determining that Marsan was not affiliated with its suppliers, Commerce misapplied the legal standard for control and failed to adequately consider certain record evidence. *See generally* Pl.'s Brief at 1–4; Reply Brief of Plaintiff Marsan Gida Sanayi ve Ticaret A.S. for Judgment upon the Agency Record Pursuant to Rule 56.2 ("Pl.'s Reply Brief") at 6–8. Marsan urges the court to remand the matter to Commerce and to instruct the agency to find Marsan affiliated with its suppliers. *See* Pl.'s Brief at 24–25; Pl.'s Reply Brief at 15.

Marsan's motion is opposed by the Government and by Defendant-Intervenors – American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company (collectively, "Domestic Producers") – who maintain that Commerce's determination is supported by substantial evidence and in accordance with law, and should be sustained. *See generally* Defendant's Response to Plaintiff's Motion for Judgment upon the Agency Record ("Def.'s Brief"); Defendant-Intervenors' Response to the Motion for Judgment on the Agency Record and Supporting Memorandum of Law by Marsan Gida Sanayi ve Ticaret A.S. ("Def.-Ints.' Brief").

Jurisdiction lies under 28 U.S.C. § 1518(c) (2006).[2] As discussed in detail below, Marsan's Motion for Judgment on the Agency Record must be denied.

I. *Background*

A. *Overview of the Statutory and Regulatory Framework*

In determining whether two companies are affiliated for purposes of selecting the sales to be used in an antidumping duty determination, Commerce must examine the relationship between the companies in accordance with 19 U.S.C. § 1677(33).[3] Although the statute includes seven subsections describing what constitutes affiliation,

[2] All citations to federal statutes are to the 2006 edition of the United States Code. Similarly, all citations to federal regulations are to the 2009 edition of the Code of Federal Regulations.

[3] According to the statute, "affiliated persons" may be:

> (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, *or under common control with, any person.*
>
> (G) Any person who controls any other person and such other person.

subsection (F) is the sole subsection at issue here. *See* Pl.'s Brief at 7 (summarizing Marsan's argument under 19 U.S.C. § 1677(33)(F)); *id*. at 15 (explaining that Marsan is affiliated with its suppliers under subsection (F)); *see also id*. at 25 (same).[4]

Pursuant to subsection (F), "affiliated" parties include "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." 19 U.S.C. § 1677(33)(F). Three scenarios of affiliation are thus envisioned by the subsection: (1) two or more persons, directly or indirectly, *controlling* any person; (2) two or more persons, directly or indirectly, *controlled by* any person; and (3) two or more persons, directly or indirectly, *under common control with* any person. *See* 19 U.S.C. § 1677(33)(F). The question of "control" is the key issue in the analysis.

Under the statutory scheme, "control" may exist where a party is merely "legally or operationally *in a position* to exercise restrain or direction over the other party." 19 U.S.C. § 1677(33) (emphasis added). In other words, evidence of the actual exercise of control by one party over another is not required. Rather, the focus is on one party's ability to control another.

In considering affiliation based on control, Commerce is to evaluate, "among others," the following factors: (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing; and (iv) close supplier relationships. 19 C.F.R. § 351.102(b)(3). In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act explains that, in evaluating the existence of affiliation based upon control, Commerce is to consider not only whether control arises from traditional relationships (such as the specific relationships enumerated in the agency's regulations), but also from more "modern business arrangements." *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R.

> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally *in a position to exercise restraint or direction* over the other person.
>
> 19 U.S.C. § 1677(33) (emphases added).

[4] Marsan alludes in passing to subsection (G) of the statute in its principal brief, and to subsection (B) of the statute in its reply brief. *See* Pl.'s Brief at 6, 16; Pl.'s Reply Brief at 1, 2. However, Marsan elsewhere makes it clear that subsection (F) is its sole focus in this action. In any event, Marsan did not brief subsection (B) or (G). By its silence, Marsan has waived any claims it may have had under those provisions. *See*, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006) (explaining, *inter alia*, that it is "well established that arguments not raised in the opening brief are waived"); *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (same).

Doc. No. 103–316, vol. 6 at 838 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4174–75 ("SAA").[5] The focus on more "modern business arrangements" is intended to reflect the realities of the marketplace. *See id*.

Finally, the existence of one of these relationships – while necessary – is not sufficient to support a determination of affiliation based on control. Commerce will find affiliation based on control only if the relationship in question "has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise." 19 C.F.R. § 351.102(b)(3).

B. *The Facts of This Case*

Marsan commenced this action to contest the results of the 14th administrative review of the antidumping duty order on pasta from Turkey for the period of July 1, 2009 to June 30, 2010 (the "period of investigation"). *See* Issues & Decision Memorandum at 1.

From the outset of the administrative review, Marsan argued that it was affiliated with its suppliers pursuant to each of the seven subsections of 19 U.S.C. § 1677(33). *See* Issues & Decision Memorandum at 2. In its Preliminary Results, Commerce found insufficient evidence to support any of Marsan's affiliation claims, and therefore made an initial determination that Marsan was not so affiliated. *See* Certain Pasta From Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 Fed. Reg. 23,974, 23,975–77 (Dep't Commerce April 29, 2011) ("Preliminary Results"). Following publication of the Preliminary Results, Marsan filed an administrative case brief with Commerce, arguing that the agency erred in its analysis of Marsan's affiliation arguments under each of the seven subsections of the statute. *See* Issues & Decision Memorandum at 2 (noting that Marsan argued that it was affiliated with its suppliers pursuant to sections (A)-(G) of 19 U.S.C. § 1677(33)).

The record of the underlying agency proceeding documents Commerce's careful and thorough consideration of Marsan's claims of "affiliation" pursuant to each statutory provision, both at the Preliminary Results stage and, again, in the agency's issuance of the Final Results. In the Issues & Decision Memorandum accompanying the Final Results, Commerce summarized its analysis of the arguments that Marsan made claiming affiliation under each of the seven subsections of the statute, and once again concluded that Marsan was not

[5] The SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." SAA at 656. The SAA notes the Administration's understanding that "it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in [the] Statement." *Id*.

affiliated with its suppliers under any of the subsections. *See* Issues & Decision Memorandum at 3–5.

For purposes of this action, Marsan has narrowed its focus to a single theory of affiliation, under subsection (F). Marsan contends that both Marsan and Birlik/Bellini (Marsan's suppliers) were under the *common control* of the Ülker group, a Turkish conglomerate in the food sector. Specifically, Marsan asserts that the Ülker group was in a position to control Birlik/Bellini by virtue of being their parent company. Pl.'s Brief at 4.[6] In addition, Marsan contends that the Ülker group was in a position to control Marsan via Mr. Tevfik Arikan, as described in detail below. It is this latter relationship of alleged control – *i.e.*, the Ülker group's ability to control Marsan, via Mr. Arikan – that is in dispute.

Marsan made a two-prong argument to Commerce in an effort to establish the Ülker group's ability to control Marsan. It is this argument that lies at the heart of this case. Marsan first argued that *the Ülker group* was in a position to control Marsan via *Mr. Arikan*, a top-level General Manager within the Ülker group[7] and a member of the board of directors of one of Ülker's subsidiaries, Pasifik Tuketim Urunleri A.S. ("Pasifik"). *See* Pl.'s Brief at 9, 11 n.2, 15; Marsan Case Brief (CRU Pub. Doc. No. 43) ("Case Brief") at 10. And, second, Marsan argued that *Mr. Arikan* – in turn – was in a position to control *Marsan* by virtue of his service as vice-chairman of Marsan's five-member board of directors. *See* Case Brief at 9–19; Pl.'s Brief at 15, 22. Marsan maintains that, through these two relationship links (*i.e.*, the Ülker group/Mr. Arikan and Mr. Arikan/Marsan), the Ülker group was in a position to control Marsan, because – according to Marsan – Mr. Arikan served on Marsan's board of directors "as a direct representative of the Ülker [g]roup." Pl.'s Brief at 11; *see also* Case Brief at 11, 25–27.

Marsan provided Commerce with extensive information concerning Marsan's business dealings with its suppliers, as alleged evidence of

[6] In its Complaint, Marsan alleged that Ülker Biskuvi A.S. ("Ülker Biskuvi") – the Ülker group's flagship company – was in a position to control Marsan and its suppliers. Complaint ¶16. In contrast, in its principal brief Marsan argues that the Ülker group itself was in a position of control. *See* Pl.'s Brief at 1. Marsan attempts to clarify its position in its reply brief, stating that the entity in a position to control Marsan and its suppliers was Ülker Biskuvi or, alternatively, its chairman, Mr. Murat Ülker. *See* Pl.'s Reply Brief at 1. Whether the Ülker group, its flagship company (Ülker Biskuvi), or its chairman (Mr. Ülker) is the party alleged to be in a position to control Marsan and its suppliers has no material effect on the factual analysis at hand. Thus, for the sake of simplicity, the third party that Marsan claims is in a position of common control over Marsan and its suppliers is referred to herein as the Ülker group.

[7] Mr. Arikan's title was General Manager of Shared Services in the Ülker group's Customer Relationship and Distribution Channel Coordination. Case Brief at 10; Pl.'s Brief at 11 n.2.

the Ülker group's ability to control Marsan. *See* Pl.'s Brief at 14; Case Brief at 11. For example, Marsan explained that, prior to the period of review, Marsan owned and operated a pasta production facility in Hendek, Turkey and sold the pasta produced at that facility under its own brand name – PIYALE. Pl.'s Brief at 14. Marsan further explained that, during the period of review, Marsan and the Ülker group's subsidiaries – Birlik and Bellini – entered into a production agreement and a lease for the entire Hendek facility. Pursuant to the agreement, Marsan agreed to lease its pasta-producing assets to Birlik, and Birlik agreed to produce Marsan's brand of PIYALE pasta. Pl.'s Brief at 12–14. Shortly thereafter, the ownership of all of Marsan's pasta-producing assets was transferred to Bellini. Pl.'s Brief at 12–14; Pl.'s Reply Brief at 5.[8] Ultimately, Marsan retained ownership over the Hendek facility buildings and silos, as well as the soft wheat milling equipment. However, Marsan's pasta was produced by Birlik/Bellini, and Bellini became the owner of all other pasta-producing assets that had previously belonged to Marsan. Pl.'s Brief at 12–13.

Marsan argued that the transfer of assets and the production agreement significantly altered its business structure. According to Marsan, the "transformation" from pasta producer to pasta trader that followed the transfer of its pasta-production assets to Birlik/Bellini resulted in Marsan's loss of control over the production of its own brand of pasta, its profits, and – since it was no longer the buyer of raw materials – the cost of its pasta. *See* Pl.'s Brief at 14.

Marsan claimed that the transfer of its pasta-producing assets to Bellini, one of its suppliers, would never have occurred absent some influence by the Ülker group on Marsan's board of directors. *See* Pl.'s Brief at 12–14; Case Brief at 25–27. Marsan further maintained that the transfer of its assets was financially detrimental to Marsan. In particular, Marsan argued that the lease was "hardly favorable to Marsan" because the rent paid by Birlik/Bellini was equal only to the value of the depreciation on the plant and equipment. Pl.'s Brief at 14.

In an effort to buttress its argument that Mr. Arikan served as a "representative" of the Ülker group on Marsan's board, Marsan pointed to a wide range of facts illustrating the shared business interests between Marsan's principal shareholder, Mr. Latif Topbaş,[9] and the chairman of the Ülkergroup, Mr. Murat Ülker. Marsan noted,

[8] The pasta-producing assets included a soft-wheat mill for the production of bread flour, and a durum-wheat mill for the production of semolina (used in making pasta), as well as a pasta production plant. Pl.'s Brief at 8–9.

[9] Mr. Topbaş and his relatives are the sole owners of Marsan, via a holding company. Pl.'s Brief at 8.

inter alia, the ownership of minority shares by the Ülker group's flagship company – Ülker Biskuvi – in Birlesik Magazalar A.S. ("BIM"), a Turkish supermarket chain in which Mr. Topbaş held a minority interest and where he served as chairman of the board of directors. Case Brief at 32; Pl.'s Brief at 8–12. In addition, Marsan noted that, during the period of review, Mr. Topbaş – who owned Marsan and served as the chairman of its board – also had "substantial holdings and directorship in the Ülker [g]roup." Pl.'s Brief at 11. Marsan explained that Mr. Topbaş and his brothers "together have an investment of over $40 million in no fewer than 10 Ülker manufacturing, distribution or sub-holding subsidiaries." Pl.'s Brief at 11. Marsan pointed out that Mr. Topbaş and his brothers were also members of the boards of directors and had ownership interests in various Ülker companies. Pl.'s Brief at 11.[10]

Marsan coined the phrase "an economic community of interests" to characterize this web of shared business interests. Issues & Decision Memorandum at 7; Pl.'s Brief at 22. According to Marsan, the "economic community of interests" explained why Mr. Topbaş allowed an Ülker group "representative" – Mr. Arikan – to sit on Marsan's board. *See* Pl.'s Brief at 12, 22.

Commerce waded through the extensive, detailed information that Marsan placed on the record in the course of the administrative review, but ultimately determined in the Final Results that the positions that Mr. Arikan held in Ülker group companies were not sufficient to establish that he served on Marsan's board on behalf of the Ülker group. Issues & Decision Memorandum at 13. Commerce further found that Mr. Arikan's position on Marsan's board was not sufficient to prove that Mr. Arikan was in a position to directly or indirectly control Marsan. Issues & Decision Memorandum at 13. As for the history of business dealings between Marsan and its suppliers,

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[10] At the administrative level, Marsan emphasized this "economic community of interests" not only to explain why Mr. Topbaş, as owner of Marsan, would welcome an Ülker representative as vice-chairman of the Marsan board, but also to advance an alternative theory of affiliation. Pl.'s Brief at 12–13.

Under that alternative theory of affiliation, Marsan contended that the economic interests of Mr. Topbaş and Mr. Ülker were so intertwined that they gave rise to a "corporate grouping" within the meaning of 19 C.F.R. § 351.102(b)(3). Pl.'s Brief at 11. Marsan argued that it was this "Topbaş-Ülker" corporate grouping that was in a position to restrain and control Marsan and its suppliers, rendering Marsan and Birlik/Bellini affiliated. Pl.'s Brief at 12. However, Marsan has not pursued this alternative theory of affiliation in this action. *See* Pl.'s Reply Brief at 7–8 (explaining that, in this forum, Marsan does not claim that "the intertwining of economic interests" creates affiliation).

As discussed below, Marsan's contention in this action is that Commerce failed to consider the "economic community of interests" in determining whether the Ülker [g]roup (via Mr. Arikan) was in a position to exercise restraint or control over Marsan. *See* section III.A.2, *infra*.

and the "economic community of interests" between Mr. Ulker and Mr. Topbaş, Commerce determined that none of the evidence was indicative of affiliation. Issues & Decision Memorandum at 13–14. Commerce therefore concluded in the Final Results that Marsan had failed to establish affiliation under any of the seven subsections of 19 U.S.C. § 1677(33). *See* Issues & Decision Memorandum at 1, 7–8.

In light of its negative affiliation determination in the Final Results and in accordance with its reseller policy, Commerce instructed the Bureau of Customs and Border Protection to liquidate entries for which Birlik was the producer and Marsan the exporter at the "all others" rate of 51.49%. Pl.'s Brief at 25; Def.'s Brief at 6.[11]

This action followed.

I. *Standard of Review*

In reviewing a challenge to a final determination, Commerce's determination must be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence" is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–78 (1951) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (defining "substantial evidence" as "something less than the weight of the evidence").

It is, of course, true that any evaluation of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (*quoting Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380–81 (Fed. Cir. 2008) (same). However, the mere fact that it may

[11] Under the reseller policy, company-specific assessment rates are based on the sale by the first company in the commercial chain that had knowledge that the merchandise was destined to the United States. *See* Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 Fed. Reg. 55,361, 55,362 (Oct. 15, 1998).

Here, because Marsan and its suppliers were found not to be affiliated, under the agency's reseller policy, Marsan's suppliers, as the producers of the merchandise, were treated as the first to know that the merchandise was destined for the United States. Def.'s Brief at 5–6; *see also* Preliminary Results, 76 Fed. Reg. at 23,977. Accordingly, since Marsan's suppliers were not covered by the administrative review and did not have a company-specific rate from an earlier segment of the proceeding, the rate applied in liquidating the subject merchandise was not the rate applicable to Marsan, but – rather – the "all others" rate. Def.'s Brief at 5–6; *see also* Preliminary Results, 76 Fed. Reg. at 23,977.

be possible to draw two inconsistent conclusions from the record does not prevent the agency's determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo*, 383 U.S. at 620.

Finally, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Nevertheless, "the path of Commerce's decision must be reasonably discernable" to support judicial review. *NMB Singapore Ltd.*, 557 F.3d at 1319 (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (explaining that "it is well settled that an agency must explain its action with sufficient clarity to permit 'effective judicial review,'" and that "[f]ailure to provide the necessary clarity requires the agency action be vacated") (*quoting Camp v. Pitts*, 411 U.S. 138, 14243 (1973)); 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

II. *Analysis*

Marsan here challenges Commerce's determination that Marsan is not affiliated with its suppliers, Birlik/Bellini, to the extent that the agency's determination is based on subsection (F) of the statute, which concerns affiliation based upon control. *See* Pl.'s Brief at 7, 15, 25; Pl.'s Reply Brief at 1–3, 5, 14; 19 U.S.C. § 1677(33).

Marsan contests Commerce's determination on four principal grounds. First, Marsan contends that Commerce failed to adequately take into account certain evidence pertinent to the agency's affiliation analysis. *See* Pl.'s Brief at 16, 19, 24; *see also* section III.A, *infra*. Second, Marsan faults Commerce for evaluating theories of affiliation beyond those that Marsan has argued. Pl.'s Brief at 20–21, 16, 24; *see also* section III.B, *infra*. Third, Marsan asserts that Commerce failed to properly apply relevant legal standards in the course of its affiliation analysis. *See* Pl.'s Brief at 15–20; *see also* section III.C, *infra*. And, fourth, Marsan argues that Commerce erred in not conducting an on-site verification of Marsan's questionnaire responses. *See* Pl.'s Brief at 22–23; *see also* section III.D, *infra*.

Each of Marsan's arguments is lacking in merit.

A. *Commerce's Evaluation of the Record Evidence*

Marsan attacks Commerce's affiliation determination on the grounds that Commerce failed to properly consider evidence concerning two relationships that are critical to Marsan's theory of affiliation

– the relationship between Mr. Arikan and Marsan, and the relationship between the Ülker group and Mr. Arikan.

As summarized above, Marsan's overarching theory of affiliation is that Marsan and its suppliers, Birlik/Bellini, were affiliated because both Marsan and Birlik/Bellini were *under the common control* of the Ülker group – *i.e.*, that the Ülker group was in a position to control both Marsan and Birlik/Bellini. Establishing the Ülker group's ability to control Birlik/Bellini is a relatively straightforward matter, because the Ülker group is the parent of Birlik/Bellini. On the other hand, the Ülker group's ability to control Marsan is hotly contested.

Marsan claims that the Ülker group was in a position to control Marsan, *via Mr. Arikan*. This part of Marsan's theory of control is thus rather attenuated. In other words, to prove that Marsan was subject to the control of the Ülker group, Marsan must establish *both* (1) that Mr. Arikan was in a position to control Marsan *and* (2) that the Ülker group was in a position to control Mr. Arikan. As outlined below, Commerce did not err in concluding that Marsan failed on both counts.

Marsan first takes issue with Commerce's determination that Mr. Arikan was not "in a position to control Marsan" by virtue of his position on Marsan's board. Pl.'s Brief at 4, 17–18; *see* section I.B, *supra*. In addition, Marsan contends that Commerce improperly accounted for certain evidence that Marsan submitted in support of its claim that Mr. Arikan served on Marsan's board as a "representative" of the Ülker group. Pl.'s Brief at 19, 22; Pl.'s Reply Brief at 6, 7–8, 15. Neither challenge is persuasive.

1. *Whether Mr. Arikan Was Positioned to Control Marsan*

Marsan contends that Commerce's determination that Mr. Arikan was not in a position to exercise control over Marsan lacks an adequate evidentiary basis. *See* Pl.'s Brief at 4, 16–17, 19–20; Pl.'s Reply Brief at 5–6, 8–10. Specifically, Marsan argues that Commerce failed to accord proper weight to Mr. Arikan's position as vice-chairman of Marsan's board of directors, which – according to Marsan – in turn constituted evidence of the Ülker group's ability to control Marsan. Pl.'s Brief at 4, 11, 15–16, 18; Pl.'s Reply Brief at 2, 5–6. Marsan contends that, as a member of the Marsan board, Mr. Arikan directed the "strategy and direction of the company" and was thus in a position to legally or operationally exercise restraint or control over Marsan. Pl.'s Brief at 18.

In the Issues & Decision Memorandum, Commerce determined that Mr. Arikan's role was limited to that of a board member (albeit the

vice-chairman of the board), and that there was no showing that Mr. Arikan individually had any authority to make decisions on behalf of Marsan. *See* Issues & Decision Memorandum at 13; Def.'s Brief at 14–15. Commerce concluded that Mr. Arikan's position as vice-chairman of the Marsan board did not suffice to demonstrate that he was in a position to control that company. *See* Issues & Decision Memorandum at 13.

As a threshold matter, the administrative record includes no "directives, minutes from meetings or other documentation" that might serve as direct proof that Mr. Arikan was in a position to control Marsan. Issues & Decision Memorandum at 13. Moreover, as the Domestic Producers observe, it generally takes a majority of the board of directors to exercise control over a company – not one director alone. Def.-Ints.' Brief at 11. In this case, Mr. Arikan might have exercised restraint or direction over Marsan if he were the sole member of the company's board. But the Marsan board consisted of five members. Pl.'s Brief at 18.

There is nothing in the record here to indicate that Mr. Arikan or any other single Marsan board member possessed any greater powers than those enjoyed by individual directors serving on typical boards. Nor is there any record evidence to indicate that, as vice-chairman of the Marsan board, Mr. Arikan's voice or vote was any more potent than those of his four colleagues. Commerce's determination that Mr. Arikan was not in a position to control Marsan thus was supported by substantial evidence. *See* Def.'s Brief at 11–12 (*citing* Issues & Decision Memorandum at 12).[12]

Marsan's claims to the contrary have no merit.[13]

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[12] For the first time in its reply brief, Marsan refers to other members of the Marsan board who are also asserted to have relationships with the Ülker group. *See* Pl.'s Reply Brief at 9 (stating that one member of Marsan board was former auditor in Ülker group, and second was related to Mr. Topbaş). Marsan seems to suggest that these two individuals – together with Mr. Arikan – controlled Marsan on behalf of the Ülker group.

However, Commerce took these other relationships into account in reaching its negative determination on affiliation. Issues & Decision Memorandum at 5, 7–8. Thus, for example, as the Issues & Decision Memorandum explained, the fact that "board members of one company are officers of another company" does not constitute affiliation pursuant to subsection (F) of the statute. Issues & Decision Memorandum at 8. Moreover, Marsan has pointed to no evidentiary support for its implication that the Ülker group was in a position to control all three of these individuals.

[13] Because (as detailed above) Marsan's theory of affiliation requires that it establish both (1) that Mr. Arikan was in a position to control Marsan and (2) that the Ülker group was in a position to control Mr. Arikan, sustaining Commerce's determination as to prong (1) obviates the need to reach Marsan's arguments vis-a-vis prong (2).

Nevetheless, for the sake of completeness, Marsan's "substantial evidence" challenge to Commerce's determination concerning the Ülker group's ability to control Mr. Arikan (prong

2. *Whether The Ülker Group Was Positioned to Control Mr. Arikan*

Marsan similarly contends that Commerce failed to properly consider evidence that – according to Marsan – demonstrates that the Ülker group controls Mr. Arikan by virtue of his employment within the Ülker group. Marsan argues that, because of this control, Mr. Arikan (the vice-chairman of Marsan's board of directors) serves on the Marsan board as a "representative" of the Ülker group and on the Ülker group's behalf. *See* Pl.'s Brief at 19–20, 22, 23; Pl.'s Reply Brief 2–3, at 6.

Marsan first alleges that Commerce failed to adequately consider the many overlapping economic interests between Marsan and the Ülker group in determining whether Mr. Arikan acted as a "representative" of the Ülker group on Marsan's board. *See* Pl.'s Brief at 22; Pl.'s Reply Brief at 7–8 (asserting that "the intertwining economic interests . . . show[] why . . . affiliation is a natural outcome of the relationships among the parties"). According to Marsan, it is the existence of the economic community of interests between Marsan and the Ülker group that explains why Marsan would allow an Ülker "representative" – Mr. Arikan – to sit on Marsan's board. *See* Pl.'s Brief at 22 (arguing that "the economic community of interests between Topbaş and Ülker . . . show[s] why Topbaş would afford Ülker the possibility of exercising restraint or direction over Marsan"); Pl.'s Reply Brief at 7–8 (same). Marsan thus views the economic community of interests as proof that Mr. Arikan's service on Marsan's board was as a "representative" of the Ülker group and on its behalf. *See* Pl.'s Brief at 4, 8–11 (summarizing economic community of interests and stating that Mr. Arikan serves on Marsan board as a "representative" of Ülker group); Pl.'s Reply Brief at 5–6, 8 (same).

But Marsan's claim that Commerce failed to adequately consider evidence of the overlapping economic interests of Marsan and the Ülker group is not borne out by the record. The Issues & Decision Memorandum amply evidences Commerce's consideration of Marsan's "economic community of interests" argument. Commerce scru-

(2)) is addressed in section III.A.2, below. *See generally* section III.A.2, *infra* (analyzing, and rejecting, Marsan's "substantial evidence" challenge to Commerce's determination that Ülker group was not in a position to control Mr. Arikan).

By the same token, the conclusion that there is no merit to Marsan's "substantial evidence" challenge to Commerce's determination that the Ülker group was not in a position to control Mr. Arikan (*see* section III.A.2, *infra*) moots Marsan's "substantial evidence" challenge to Commerce's determination that Mr. Arikan was not in a position to control Marsan – the issue that is analyzed, and rejected, here (*i.e.*, in section III.A.1).

tinized the facts that Marsan identified (*i.e.*, the overlapping economic interests between Marsan and the Ülker group) and evaluated whether, as a matter of law, those facts were sufficient to demonstrate the ability to control. *See generally* Issues & Decision Memorandum at 8–10, 12–15.

For example, as Commerce candidly acknowledged, the evidence placed on the record by Marsan indicates that Marsan and the Ülker group may well "share a common interest in the food and beverage industry in Turkey." Issues & Decision Memorandum at 8. However, as a matter of law, those shared interests do not establish that Marsan and the Ülker group are affiliated within the meaning of the statute. *See generally id*. Marsan cites nothing to cast doubt on Commerce's expert judgment to that effect.

Commerce similarly considered the corporate relationships of Marsan and the Ülker group, and the relationship between the Topbaş and Ülker families. Issues & Decision Memorandum at 7–8. Thus, Commerce analyzed, among other things, Mr. Arikan's role on the Marsan board and the fact that Mr. Topbaş and Mr. Ülker each own common (non-controlling) shares in the Turkish supermarket chain, BIM. *See generally* Issues & Decision Memorandum at 12–15.

Ultimately, however, Commerce determined that the facts and relationships that Marsan cited in support of its "economic community of interests" argument did not advance Marsan's claim that Mr. Arikan served on Marsan's board as a "representative" of the Ülker group. Issues & Decision Memorandum at 13. As Commerce explained, the bottom line is that none of the information and evidence on which Marsan relies concerning the asserted economic community of interests establishes that Marsan or its board in fact acted in the company's business dealings at the command of Mr. Arikan (on behalf of the Ülker group), or even that Mr. Arikan was in a position to exercise such control. Issues & Decision Memorandum at 13. As the Government puts it, Marsan can cite no evidence whatsoever of a "causal link indicative of the potential to 'control.'" Def.'s Brief at 13.[14]

In short, contrary to Marsan's claims, Commerce adequately considered the record evidence of the "economic community of interests" between Marsan and the the Ülker group. That Marsan disagrees

[14] In its reply brief, Marsan argues that it does not have to "adduce some 'causal link'" to show that the Ülker group controls Marsan. *See* Pl.'s Reply Brief at 6. According to Marsan, its representation that Mr. Arikan is an "Ülker nominee on Marsan's board" is sufficient evidence to meet the "control" requirement of the statute. *Id*. However, that is precisely the evidentiary link that Commerce has found lacking. As Commerce explained in the Issues & Decision Memorandum, the evidence cited by Marsan fails to demonstrate that Mr. Arikan is controlled by the Ülker group, or that Mr. Arikan controls Marsan. Issues & Decision Memorandum at 13.

with the conclusions that Commerce drew based on that evidence in no way detracts from the reasonableness of the agency's determination.

Marsan further argues that, in determining whether Mr. Arikan served on Marsan's board as a "representative" of the Ülker group, Commerce failed to give adequate consideration to the facts surrounding what Marsan characterizes as the "hollowing-out" of Marsan during the period of review. Pl.'s Brief at 24. According to Marsan, its pasta-producing assets were transferred to the Ülker group subsidiaries, Birlik/Bellini, "with no consideration other than the payment of depreciation expenses." Pl.'s Brief at 20. Marsan points to this absence of profit in the transaction as proof that the asset transfer could not have occurred absent some influence by the Ülker group over Marsan's board. *See* Pl.'s Reply Brief at 14. Marsan contends that the transaction thus is evidence that Mr. Arikan served as a "representative" of Ülker group interests on the Marsan board. *See* Pl.'s Brief at 19–20 (asserting that Marsan's "transformation [was] so exceptional that it can be characterized as mere commercial dealing only by deliberately ignoring the fact that Ülker's representative was vice-chairman of Marsan's board").

In the Issues and Decision Memorandum, Commerce reviewed the terms of the business dealings between Marsan and the Ülker group, and found nothing that was inconsistent with ordinary business transactions. *See* Issues & Decision Memorandum at 14–15. For example, the production contract between Marsan and Birlik (in which Birlik agreed to produce Marsan's brand of pasta and sell it to Marsan) specified that the price of the product sold to Marsan was to be jointly determined by both parties based on "market conditions." Issues & Decision Memorandum at 14–15. Moreover, nothing in the contract prevented Marsan from purchasing pasta from sources other than Birlik. Issues & Decision Memorandum at 14.

Commerce also reviewed the lease agreement for the pasta production facility entered into by Marsan and Birlik, and, again, found nothing particularly striking. *See* Issues & Decision Memorandum at 14–15.[15] Thus, for example, the lease required Birlik to pay Marsan

[15] As discussed herein, the Issues & Decision Memorandum reflects Commerce's close review of various contracts and business dealings between Marsan and the Ülker group for purposes of addressing Marsan's contention that those transactions constituted evidence that Mr. Arikan served on Marsan's board as a representative of as a "representative" of the Ülker group. However, Commerce made no specific determination as to whether the progressive transfer of Marsan's assets to its suppliers was an "arm's length" transaction. Nor was the agency required to do so. As Commerce explained in the Issues & Decision Memorandum, even if the transfer of assets from Marsan to Birlik/Bellini was not at arm's length, that fact would not constitute "irrefutable evidence of affiliation." Issues & Decision Memorandum at 14. Moreover, under the statute, whether or not transactions are at arm's

not only a lease fee, but also the cost of the equipment, raw material, labor, energy, and other overhead provided. Issues & Decision Memorandum at 15. Birlik further assumed all liability in connection with the production facility, and was required to provide warehouse storage for Marsan's inventory. *See* Pl.'s Appx. at Tab 2, Exh. 2 (Marsan-Birlik Lease and Production Agreement); Issues & Decision Memorandum at 10.

In analyzing Marsan's claims of affiliation, Commerce thus considered the terms of the production contract and the lease agreement, and determined that "[n]othing about [them] . . . shows evidence of affiliation or control." *See generally* Issues & Decision Memorandum at 13–15. Specifically, Commerce concluded that the agreements indicated "that the commercial interests of both parties were taken into consideration," and that the specific terms reflected "negotiation between the parties," rather than "control by either entity." Issues & Decision Memorandum at 15.

Notwithstanding the charges of irregularity that Marsan has leveled, there appears to be nothing about the transactions at issue that is anything other than routine. Even more to the point, even assuming, *arguendo*, that something about the terms of the various business dealings could be interpreted to be unusual, there is no evidence whatsoever to suggest that Mr. Arikan – one of five members of the Marsan board – was in a position to exercise control over Marsan for purposes of such contract negotiations. Issues & Decision Memorandum at 13.

Commerce therefore properly concluded that the history of business dealings between Marsan and the Ülker group – including, in particular, the circumstances surrounding the transfer of Marsan's pasta-producing assets to Birlik/Bellini – were not sufficient to demonstrate that the transactions were at the direction of Mr. Arikan or that Mr. Arikan served on Marsan's board on behalf of the Ülker group. Issues & Decision Memorandum at 13. Marsan's claims to the contrary must be rejected.[16]

length is not a factor in determining affiliation. *See* Issues & Decision Memorandum at 14. In accordance with agency regulations, Commerce "first determines whether parties are affiliated and then considers whether their transactions are arm's length." *Id*. (*citing* 19 C.F.R. § 351.403(d)).

[16] As previously noted, this rejection of Marsan's "substantial evidence" challenges to Commerce's determination that the Ülker group was not in a position to control Mr. Arikan renders it unnecessary to consider Marsan's "substantial evidence" challenges to Commerce's determination that Mr. Arikan was not in a position to control Marsan – the issue analyzed in section III.A.1 above. *See* n.13, *supra* ; section III.A.1, *supra* (analyzing, and rejecting, Marsan's "substantial evidence" challenge to Commerce's determination that Mr. Arikan was not in a position to control Marsan).

In sum, Commerce gave proper consideration to Marsan's evidence concerning both the "economic community of interests" between Marsan and the Ülker group, and the history of business dealings between the two. Commerce's determinations therefore must be sustained.

B. *Commerce's Consideration of Additional Theories of "Control"*

Two of Marsan's remaining arguments amount to complaints that Commerce's analysis in the Issues & Decision Memorandum evaluated additional theories of control above and beyond the particular theory that Marsan focuses on in this action.

Specifically, Marsan criticizes Commerce because the Issues & Decision Memorandum considers whether or not Marsan had a "close supplier relationship" with Birlik/Bellini – an issue that Marsan here characterizes as a "straw man" which, according to Marsan, the agency "came up with . . . simply to justify its finding of non-affiliation." Pl.'s Brief at 20–21; *see also* Pl.'s Brief at 16 (referring to Commerce's "close supplier" analysis as part of an alleged "bait-and-switch game"); Pl.'s Brief at 24 (asserting broadly that "Commerce's conclusion that Marsan and Birlik/Bellini are not affiliated because they . . . do not have a 'close supplier relationship' is legally wrong because it relies on an erroneous legal test, and it is factually wrong because it fails to take into account evidence pertinent to the correct legal test of [§ 1677(33)(F)] of the statute").[17]

As discussed above, however, Marsan's claims at the administrative level were much broader, and encompassed all seven subsections of the statute. *See generally* section II.B, *supra*; *see also* Case Brief at 3 (asserting existence of affiliation "by reason of subparagraphs (A) through (E)," as well as "under the control subsections, (F) and (G)"). Further, the applicable regulation instructs that, "[i]n determining whether control over another person exists" for purposes of subsections (F) and (G) of the statute, Commerce is to consider, *inter alia*, the existence of "close supplier relationships." 19 C.F.R. § 351.102(b)(3).

[17] Read in context, this assertion – which appears in the "Conclusion" section of Marsan's principal brief – alleges nothing more than that Commerce's Issues & Decision Memorandum improperly focused on the existence of a "close supplier relationship" (rather than properly analyzing affiliation under the two theories that Marsan pursues in this action). Nowhere in the briefs that Marsan has filed in this forum does Marsan claim that there was a "close supplier relationship" between Marsan and Birlik/Bellini, or that Commerce should have found "affiliation" based on that theory. Indeed, as discussed above, Marsan now disclaims any reliance on the concept of a "close supplier relationship." Marsan now contends that its earlier references to a "close supplier relationship" were "plainly not central to the factual development of the case." *See* Pl.'s Brief at 21.

In fact, in the administrative case brief that it filed with Commerce, Marsan expressly challenged the merits of the agency's determination in the Preliminary Results that "Marsan and Birlik/Bellini are not affiliated by reason of . . . a close supplier relationship," asserting that "[the agency's] analysis is flawed and its conclusions are wrong." *See* Case Brief at 4. Under these circumstances, Commerce's decision to analyze the existence of a "close supplier relationship" in the Issues & Decision Memorandum cannot fairly be criticized. The agency did nothing more than address an argument that Marsan itself had raised. *See generally* Def.'s Brief at 14–15 (explaining that Commerce analyzed "close supplier relationship" because, if established, such relationship "could . . . demonstrate Birlik/Ülker being in a position to control Marsan"); Def.-Ints.' Brief at 1921 (same).

Marsan also faults Commerce for considering whether "either Marsan or Birlik are in a position to be controlled, either legally or operationally, by each other." *See* Pl.'s Brief at 20 (*quoting* Issues & Decision Memorandum at 13). Marsan contends that it "does not claim that Birlik was in a position to control Marsan or that Marsan was in a position to control Birlik." Pl.'s Brief at 20. *But see* Def.-Ints.' Brief at 20 (noting that, at administrative level, Marsan argued that Marsan and Birlik were affiliated under all seven subsections of the statute, and, further, explaining that "[a]ffiliation would exist under subsection (G) if Marsan controlled Birlik, or vice versa").

In any event, whether or not Marsan has ever claimed that Birlik was in a position to control Marsan (or vice versa) is of no moment. Even assuming that – in the interest of completeness or out of an abundance of caution – the Issues & Decision Memorandum considered theories of control *above and beyond* those that Marsan asserted, there was no resulting injury to Marsan. In this action, what matters is whether Commerce adequately and properly considered the theories of affiliation that *were* raised before the agency (to the extent that Marsan's claims of alleged agency error have been properly preserved and presented here).

In sum, there is no substance to Marsan's criticisms of the Issues & Decision Memorandum for addressing whether a "close supplier relationship" existed between Marsan and Birlik/Bellini, and whether Marsan or Birlik/Bellini were in a position to be controlled by each other. Even Marsan does not contend that Commerce's consideration of those other theories affected in any way the agency's determinations on the only theory of affiliation that Marsan continues to press here.

C. *The Legal Standards That Commerce Applied*

The gravamen of several of Marsan's other arguments is that Commerce failed to properly apply various legal standards in the course of the agency's analysis. Thus, for example, Marsan insists that Commerce improperly applied a standard of "actual control." *See* Pl.'s Brief at 4, 17–18; Pl.'s Reply Brief at 7; 19 U.S.C. § 1677(33). Marsan similarly maintains that Commerce improperly required Marsan to demonstrate that it was subject to "unilateral control." *See* Pl.'s Brief at 18–19, 20; Pl.'s Reply Brief at 6. In addition, Marsan contends that Commerce improperly interpreted the statute to require Marsan to demonstrate the existence of "cross-ownership that 'controls' or has the ability to control Marsan." *See* Pl.'s Brief at 21 (*quoting* Issues & Decision Memorandum at 13); *see also* Pl.'s Brief at 16–17, 24; Pl.'s Reply Brief at 8.

As detailed below, none of these arguments holds water.

1. *Actual Control vs. Ability to Control*

Marsan first insists that, in its analysis of affiliation, Commerce improperly imposed a higher, more stringent standard of "actual control," when the relevant statute requires only that an entity be "in a position" to control (*i.e.*, have the ability to control) another entity. *See* 19 U.S.C. § 1677(33); Pl.'s Brief at 4, 17–18; Pl.'s Reply Brief at 7; *see also* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,297–98 (May 19, 1997) (explaining that the statute requires Commerce to focus "on the ability to exercise 'control' rather than the actuality of control over specific decisions").

As support for its charge, Marsan points to an excerpt from the Issues & Decision Memorandum in which Commerce noted the absence from the administrative record of "directives, minutes from meetings or other documentation" that might indicate that Mr. Arikan, "given his various positions, directly or indirectly controlled Marsan or Birlik." *See* Pl.'s Brief at 17 (*quoting* Issues & Decision Memorandum at 13); *see also* Pl.'s Reply Brief at 7. According to Marsan, Commerce thereby applied a standard of actual control, in violation of the statute and the Court of Appeals' holding in *Crawfish Processors Alliance*. *See* Pl.'s Brief at 17–18 (*citing Crawfish Processors Alliance v. United States*, 477 F.3d 1375, 1380–82, 1384 (Fed. Cir. 2007)); 19 U.S.C. § 1677(33); *see also* Pl.'s Brief at 8 (discussing

Crawfish Processors Alliance).[18] But Marsan seeks to make much too much of this isolated passage from Commerce's determination.

Throughout the Issues & Decision Memorandum, Commerce repeatedly reiterates the correct legal standard – that is, that the statutory standard for control requires only that an entity be "in a position" to control (*i.e.*, have the ability to control) another entity. *See*, *e.g.*, Issues & Decision Memorandum at 4, 12, 13; 19 U.S.C. § 1677(33); *see also* Preliminary Results, 76 Fed. Reg. at 23,976 (stating that Commerce "does not require evidence of actual control," and instead "focus[es] upon one party's ability to control the other"). It is thus clear beyond cavil that the agency knew and appreciated the proper standard under the statute. Even more to the point, Marsan reads the language on which it relies entirely out of context. Marsan's argument would have traction only if Commerce's affiliation analysis began and ended with its observation concerning the referenced documentation. But that is plainly not the case here.

In short, Commerce here correctly interpreted and applied the statute, as a matter of law, to require only proof that a third party (*i.e.*, the Ülker group) was in a position to control both Marsan and Birlik/Bellini. However, Commerce ultimately concluded, as a matter of fact, that the record evidence does not support Marsan's claims. *See* Def.'s Brief at 7, 14–15; Def.-Ints.' Brief at 14–15; *see generally* Issues & Decision Memorandum at 13 (stating that Commerce "[did] not find anything in the record that indicates that . . . Marsan [is] in a position to be controlled, either legally or operationally, by . . . a third party"). Marsan's assertion that Commerce improperly applied a standard of "actual control" therefore must be rejected.

2. Unilateral Control

Marsan similarly maintains that Commerce improperly required Marsan to demonstrate that it was subject to "unilateral control" by Mr. Arikan. *See* Pl.'s Brief at 18–19, 20; Pl.'s Reply Brief at 6, 11. In particular, Marsan highlights Commerce's conclusion in the Issues & Decision Memorandum that the events surrounding Marsan's conversion from a pasta producing company to a pasta trading company do not "demonstrate *unilateral control* by Mr. Tevfiv Arikan . . . or control by the Ülker [g]roup." *See* Pl.'s Brief at 19 (emphasis added by Mar-

[18] In *Crawfish Processors Alliance*, the Federal Circuit reversed Commerce's affiliation determination based on a finding that the agency had imposed requirements to demonstrate affiliation that were more stringent than those required by statute. *See generally Crawfish Processors Alliance*, 477 F.3d at 1380–82); *see also* Pl.'s Brief at 4, 8, 18 (discussing *Crawfish Processors Alliance*); Def.'s Brief at 14 (same); Def.-Ints.' Brief at 14–15 (same); Pl.'s Reply Brief at 6–7 (same).

san) (*quoting* Issues & Decision Memorandum at 13); *see also* Pl.'s Brief at 18–19, 20; Pl.'s Reply Brief at 6, 11.

Citing the agency's determination in Certain Welded Carbon Steel Pipes and Tubes from Thailand, Marsan argues that "Commerce's own precedents envision that a company may be subject to control . . . by more than one party." *See* Pl.'s Brief at 19 (*citing* Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 53,808, 53,810 (Oct. 16, 1997)); *see also* Pl.'s Brief at 20 (same). As the Government observes, the principle that Marsan invokes "is not necessarily in dispute." Def.'s Brief at 15. However, as the Government further explains, the administrative determination that Marsan relies on is inapposite in this case:

> To the extent that Certain Welded Carbon Steel Pipes and Tubes is relevant, it serves as a clearly distinguishable example in which record evidence demonstrated that a respondent company was under common control with certain home market customers by various family relationships. . . . [T]here are no facts here linking Marsan and Birlik in a similar fashion.

Def.'s Brief at 15 (*citing* Issues & Decision Memorandum at 15).

The bottom line is that Marsan simply misinterprets Commerce's (admittedly inept) use of the term "unilateral control" in the quoted excerpt from the Issues & Decision Memorandum. Contrary to Marsan's claims, Commerce here did not actually require evidence that the Ülker group exercised unilateral control over Marsan. Nor did Commerce require evidence that Mr. Arikan exercised unilateral control over Marsan. *See* Issues & Decision Memorandum at 13. In essence, in the language at issue, the agency merely reasoned, as a matter of fundamental logic, that – absent evidence that Mr. Arikan had the ability himself (alone) to control the transfer of Marsan's pasta-producing assets – it cannot be assumed that the transfer of those assets is indicative of a third party's control over Marsan (*i.e.*, the Ülker group). *See* Issues & Decision Memorandum at 13.

As such, Commerce did not, as a matter of law, require any sort of showing of "unilateral control" in this case. Instead, Commerce ultimately concluded, as a matter of fact, that the record evidence did not support Marsan's claim that the transfer of Marsan's pasta-producing assets proved affiliation. Marsan's assertion that Commerce improperly required Marsan to demonstrate that it was subject to "unilateral control" is therefore devoid of merit.

3. *Cross-Ownership*

Marsan further contends that Commerce improperly interpreted the statute to require that Marsan demonstrate the existence of "cross-ownership that 'controls' or has the ability to control Marsan." *See* Pl.'s Brief at 21 (*quoting* Issues & Decision Memorandum at 13); *see also* Pl.'s Brief at 16–17 (arguing that statute "does not require direct cross-ownership, nor does it require common shareholders; its requirement is that two or more companies be controlled by the same third party"), 21 (faulting Commerce for requiring "a cross-ownership that controls" in violation of the statute), 24 (disputing "Commerce's conclusion that Marsan and Birlik/Bellini are not affiliated because they do not own shares in each other" as "legally wrong" because "it relies on an erroneous legal test")[19]; Pl.'s Reply Brief at 8 (same).

Marsan argues that "[c]ontrary to Commerce's formulation, . . . [19 U.S.C. § 1677(33)(F)] does not require a 'cross-ownership that controls . . . ' another company. Rather, the subsection requires examination of whether, by reason of corporate groupings or otherwise, one entity is in a position legally or operationally to exercise restraint or direction over each of two or more other entities." Pl.'s Brief at 21. If so, Marsan argues, "then the two controlled entities are affiliated with each other." Pl.'s Brief at 21.

At first blush, Marsan appears to fault Commerce for considering the extent of cross-ownership among the entities at issue. However, in its administrative case brief, Marsan emphasized the existence of cross-ownerships and common directors and officers between Marsan and the Ülker group. *See*, *e.g.*, Case Brief at 4 (asserting that "[t]he Topbaş family and the Ülker group have extensive cross-ownerships; common directors, officers, and employees"), 9–19 (summarizing the cross-ownerships and common shareholders, directors, and officers); *see also* Def.-Ints.' Brief at 5 (noting that "Marsan contended that it was affiliated with Birlik and Bellini by virtue of cross-ownership and common directors and officers").

The fundamental thrust of Marsan's complaint seems to be a suggestion that Commerce limited its analysis of control to cross-

[19] Read in context, Marsan's claim that Commerce's conclusion that Marsan and Birlik/Bellini do not own shares in each other is "legally wrong" and "factually wrong" (a claim which appears only in the "Conclusion" section of Marsan's principal brief) is nothing more than a claim that Commerce's Issues & Decision Memorandum improperly focused on whether or not Marsan and Birlik/Bellini owned shares in each other (rather than properly analyzing affiliation under the two theories that Marsan pursues in this action). *See* Pl.'s Brief at 21. Nowhere in the briefs that Marsan has filed in this forum does Marsan claim that Marsan and Birlik/Bellini owned shares in one another, or that Commerce should have found "affiliation" based on that theory.

ownership, and failed to evaluate other means of proving control within the meaning of the statute. Nothing could be further from the truth. Commerce also considered, *inter alia*, the existence of a corporate grouping, Mr. Arikan's position on Marsan's board, business dealings between Marsan and the Ülker group companies, and facts related to Marsan's "economic community of interests." *See*, *e.g.*, Issues & Decision Memorandum at 7 (discussing corporate grouping); *id*. at 13 (addressing Arikan's role on Marsan board); Def.'s Brief at 7, 11–12, 13–14, 16 (discussing agency's analysis of Arikan's role on Marsan board); Def.-Ints.' Brief at 1–2, 9–11, 12, 15–16, 19 (same); Issues & Decision Memorandum at 13–15 (discussing various documented business dealings between Marsan and Ülker group companies); Def.'s Brief at 7, 12, 16 (discussing agency's analysis of Marsan-Ülker group business dealings); Def.-Ints.' Brief at 18–19 (same); Issues & Decision Memorandum at 8 (considering "economic community of interests"); Def.'s Brief at 11, 13, 14 (discussing agency's analysis of "economic community of interests" and facts related thereto); Def.-Ints.' Brief at 2, 6, 7, 8, 16–19 (same).

Accordingly, there can be no claim that Commerce in this case confined its analysis of control to evidence of cross-ownership. Marsan's argument to that effect cannot be sustained.

D. *Verification*

Marsan's final argument is that Commerce erred by not conducting an on-site verification of Marsan's questionnaire responses. *See* Pl.'s Brief at 22–23; Pl.'s Reply Brief at 9 n.4. Marsan speculates that Commerce decided against such a verification because the agency did not want to risk obtaining "better information" in support of Marsan's claims of affiliation and a "more complete understanding" of the "pivotal role of Tevfik Arikan" and his alleged "role as Ülker's representative on Marsan's board." *See* Pl.'s Brief at 23.

Marsan initially took the position that the absence of an on-site verification was "in contravention of the statute" and constituted a failure by Commerce to fulfill "its statutory responsibility to conduct a full and complete administrative review." *See* Pl.'s Brief at 22–23. At oral argument, however, Marsan was quick to back-pedal on that bold charge. Specifically, counsel for Marsan stated that Marsan "concede[s] that the Government [was] not compelled to do a verification in this case." Recording of Oral Argument at 56:26–56:36. Marsan's counsel further acknowledged that an on-site verification was not something "mandatory that [Commerce] had to do," and that the agency "did not break the law." Recording of Oral Argument at

1:00:19–1:00:32. Although Marsan did not expressly state that it was abandoning its verification argument, its position seems clear enough from the record.

Even if Marsan did not intend to abandon its verification claim, the doctrine of exhaustion of administrative remedies would bar Marsan from pressing the argument. *See generally* Def.'s Brief at 16–18. As a general matter, the doctrine of exhaustion holds that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (*quoting McKart v. United States*, 395 U.S. 185, 193 (1969)) (internal quotation marks omitted). Thus, it is a well-settled principle of administrative law that "[a] reviewing court usurps the agency's function when it sets aside [an agency] determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see*, *e.g.*, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

As the Government notes, Commerce's regulations require that a party's administrative case brief "present all arguments . . . relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." *See* Def.'s Brief at 17 (*quoting* 19 C.F.R. § 351.309(c)(2)). "If a party does not exhaust available administrative remedies, 'judicial review of [Commerce's actions] is inappropriate.'" *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (*quoting Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988)). "'[T]he [Court of International Trade] generally takes a "strict view" of the requirement that parties exhaust their administrative remedies.'" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (*quoting Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (citations omitted)).

Requiring exhaustion even in a discretionary, non-jurisdictional context is generally sound policy, because it allows the agency to apply its expertise, to correct its own mistakes, and to compile an adequate record to support judicial review, advancing the dual purposes of protecting agency authority and promoting judicial efficiency. *See Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (discussing two main purposes of doctrine of exhaustion, *i.e.*, protecting "administrative agency authority" and promoting judicial economy); *Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) (same). Accordingly, in

actions challenging determinations in antidumping administrative reviews, the Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d); *see also Corus Staal*, 502 F.3d at 1379 (stating that 28 U.S.C. § 2637(d) "indicates a congressional intent that, absent a strong contrary reason," court should require exhaustion of administrative remedies); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (explaining that, even "where Congress has not clearly required exhaustion, sound judicial discretion governs").

Here, Marsan implicitly concedes (as it must) that it never once proposed that Commerce conduct on-site verification as part of this review. *See* Pl.'s Brief at 23 (noting that only "petitioners [*i.e.*, the Domestic Producers] requested verification"). Instead, Marsan relies on the fact that verification was requested by the Domestic Producers. *See* Pl.'s Brief at 23. As the Government points out, however, the Domestic Producers' request was limited to verification of Marsan's "sales and cost data." *See* Def.'s Brief at 17 n.4 (*citing* Domestic Producers' Verification Submission (CRU Pub. Doc. No. 21)). More importantly, neither Marsan nor the Domestic Producers preserved any arguments concerning on-site verification by raising the issue in their administrative case briefs.

Because Marsan did not include its argument concerning on-site verification in its administrative case brief, Commerce was not put on timely notice of Marsan's claim. Marsan is therefore precluded from raising the issue for the first time in this action. *See* Def.'s Brief at 18.[20] Marsan's failure to timely assert its verification argument at the administrative level means that it cannot now be heard to criticize Commerce for failing to undertake such a verification. By its silence, Marsan waived its right to press that issue in this forum. *See AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998).

[20] There are a limited number of narrow exceptions to the requirement that a party exhaust its administrative remedies. *See*, *e.g.*, 5 J. Stein, G. Mitchell, & B. Mezines, *Administrative Law* § 49.02, at 49–47 (2012) (summarizing exceptions to requirement of exhaustion, including inadequacy of administrative remedy, impending irreparable harm, *ultra vires* agency action, futility, and pure legal question); *see also* 2 R. Pierce, *Administrative Law Treatise* §§ 15.2–15.8, 15.10 (5th ed. 2010)(summarizing doctrine of exhaustion and discussing exceptions); 4 C. Koch, *Administrative Law and Practice* § 12:22 (3d ed. 2010) (discussing exceptions); *SeAH Steel Corp. v. United States*, 35 CIT ____, ____, 764 F. Supp. 2d 1322, 1325–26 (2011) (summarizing exceptions); *Corus Staal BV v. United States*, 30 CIT 1040, 1050 n.11 (2006), *aff'd* 502 F.3d 1370 (Fed. Cir. 2007) (same); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 645 n.18, 342 F. Supp. 2d 1191,1206 n.18 (2004) (same).

However, Marsan has not sought to claim the benefit of any of the established exceptions. Nor do the facts suggest that Marsan could successfully do so.

In any event, contrary to Marsan's implication, on-site verification would not have accorded Marsan the opportunity that it contemplates – that is, the ability to further supplement the record with "better information on affiliation" and other additional evidence favorable to its case. *Compare* Pl.'s Brief at 23 *with* Def.-Ints.' Brief at 21. As the Domestic Producers correctly point out, "[t]he purpose of verification is not to collect new information, and Commerce warns respondents in its verification agenda that verification will not provide the opportunity to submit new factual information." *See* Def.-Ints.' Brief at 21.

Like all of its other arguments, Marsan's argument concerning on-site verification is also unavailing.

III. Conclusion

For the reasons set forth above, Marsan's Motion for Judgment on the Agency Record must be denied, and Commerce's Final Results of the 14th Antidumping Duty Administrative Review of Certain Pasta from Turkey, 76 Fed. Reg. 68,399 (Nov. 4, 2011), are sustained.

Judgment will enter accordingly.

Dated: July 19, 2013
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE

Slip Op. 13–91

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, and IDI CORPORATION and THIEN MA SEAFOOD COMPANY, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00252

[Remanding seventh antidumping new shipper reviews for reconsideration of certain aspects.]

Dated: July 22, 2013

Valerie A. Slater, *Jarrod M. Goldfeder*, *Natalya D. Dobrowolsky*, and *Nicole M. D'Avanzo*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

Courtney S. McNamara, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director.

Matthew J. McConkey and *David M. Wharwood*, Mayer Brown LLP, of Washington DC, for defendant-intervenors IDI Corporation and Thein Ma Corporation.

OPINION AND ORDER

Musgrave, Senior Judge:

This action contests the final results of the seventh new shipper review of the antidumping duty order on three species of *Pangasius* fish conducted by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department"). *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty New Shipper Reviews*, 76 Fed. Reg. 35403 (June 17, 2011), PDoc 246 ("*Final Results*") and the issues and decision memorandum ("I & D Memo") accompanying those results, PDoc 242, 76 ITADOC 35403 (June 10, 2011). The review period is August 1, 2009 through February 15, 2010. For the *Final Results*, Commerce determined zero margins of dumping for the respondents, IDI Corporation ("IDI") and Thein Ma Seafood Company ("THIMCO"), who are fish processors of Vietnam. and defendant-intervenors here. The plaintiffs, domestic industry petitioners,[1] move for judgment on the administrative record. The defendant argues for remand of some of the issues and for sustaining the results in all other respects, and the defendant-intervenors submit no substantive comments. The matter will be remanded accordingly, as follows.

Discussion

Jurisdiction is properly here pursuant to 19 U.S.C. §1516a(a)(2)(B)(iii) and 28 U.S.C. §1581(c). Commerce's antidumping duty determinations are to be upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i).

The I & D Memo is dated approximately two and half months after Commerce issued its issues and decision memorandum for the sixth administrative and new shipper reviews. *Cf.* I & D Memo *with Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15941 (Mar. 22, 2011) ("*Sixth Reviews*") and accompanying issues and decision memorandum, 76 ITADOC 15941 (Mar. 14, 2011). For purposes of this matter, the relevant reasoning of the I & D Memo is a virtual restatement of

[1] Plaintiffs are Catfish Farmers of America and individual U.S. domestic catfish processors America's Catch, Consolidated Catfish Companies, LLC d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, and Simmons Farm Raised Catfish, Inc (collectively, plaintiffs or Catfish Farmers).

Commerce's rationale for its similar determinations in the *Sixth Reviews*, albeit tailored to the circumstances of respondents IDI and THIMCO.

The plaintiffs' challenges to the *Sixth Reviews* via Court Nos. 11–00109 and 11–00110 resulted in remands to Commerce for further consideration, *see* Slip Ops 13–63 & 13–64 (May 23, 2013), and in this matter they restate two broad claims pertaining to Commerce's surrogate valuation methodology, namely the choice in the *Final Results* of Bangladesh rather than the Philippines as the primary surrogate country upon which to value the respondents' factors of production, and Commerce's decision to use import statistics as a surrogate value for the respondents' fish waste and fish skin by-products. In the interest of brevity, familiarity with slip opinion 13–63 will therefore be presumed, but before turning to the heart of the plaintiffs' complaint, first addressed is Commerce's request for remand in part, as follows.

I. Surrogate Valuation of Fish By-Products

A. Fish Waste Valuation -- Voluntary Remand

In the *Final Results*, as in the *Sixth Reviews* and prior reviews, Commerce again selected surrogate values for fish waste based upon Philippine import statistics for Harmonized Tariff Schedule ("HTS") category 0304.90 (other fish meat of marine fish) maintained in the World Trade Atlas ("WTA") and again rejected the plaintiffs' proffer of price quotes obtained from Vitarich Corporation, a Philippine fish and seafood processor, for per kilogram pickup prices of *Pangasius* fish waste (and trimmings and skin) in Philippine pesos. *See Final Results* I&D Memo at 30–32. The rationale for the determination being virtually the same as for the *Sixth Reviews*, the plaintiffs here likewise repeat their arguments from those reviews. *See*, *e.g.*, Slip Op 13–63 at 4–6. Commerce, again without admitting error, requests remand in order to reconsider surrogate fish waste valuation. The matter will be remanded therefor. *See id*. Upon remand Commerce will also address the plaintiffs' concerns as articulated in their briefs, and if on remand Commerce continues to be inclined toward reliance upon HTS data, it will clearly explain why neither the Vitarich price quote nor the previously-relied-upon Indian price quotes for fish waste were not the best available information to value fish waste as compared with the HTS data.

B. Fish Skin Valuation

In the *Final Results*, as in the prior *Sixth Reviews*, Commerce again valued the fish skin by-product by selecting WTA import price statistics for Bangladesh HTS category 2301.20 (flours, meals, and pellets, of fish or of crustaceans). *See Seventh New Shipper Review* I&D Memo at 17. The plaintiffs again here repeat their previous arguments. *See* Slip Op. 13–63 at 6–7. And again, the defendant asks that the instant determination be sustained. There being no arguable distinction in this matter from the discussion in slip opinion 13–63 on the issue, for the reason stated therein Commerce shall reconsider the broken meat and fish skin valuations from a clean slate, alongside its reconsideration of the proper valuation of fish waste, *supra*. *See id.*

II. Surrogate Country Selection

The plaintiffs' main challenge here, once again, is to Commerce's consideration of the data leading to its selection of Bangladesh as the primary market surrogate. *Cf. Final Results* I&D Memo at 7–14 *with* Slip Op. 13–63 at 7–16. The relevant portions of the administrative record for this review are the same as those described in the prior opinion, the only difference here being submission from IDI and THIMCO to Commerce of copies of the same worksheets described in the prior opinion that were obtained from the Bangladesh Department of Agriculture and Marketing ("DAM"). *See* Slip Op. 13–63 at 9–11. *Cf.* Respondents' Second Surrogate Value Submission (Apr. 12, 2011), PDoc 92, at Ex. 1, *with* Court No. 11–00109, Interested Party Second Surrogate Value Submission (Nov. 10, 2010), PDoc 195, at Ex. 7 & Ex. 7A. As between the Bangladesh data and the Philippines data, Commerce's rationale for its selection of Bangladesh as the choice of surrogate country for the *Final Results* is identical in formulation to that for the *Sixth Reviews*:

> [W]e find that both sources are publicly available, from a potential surrogate country, contemporaneous with the POR, broad-market averages, and equally specific to the main input. Simultaneously, both can be considered equally to contain information which suggests the prices are not solely farm-gate prices. Given this degree of equivalence with respect to these factors, we examined the information upon which the Bangladeshi and Philippine potential surrogate whole live fish values were based, concluding that the Bangladeshi data represent a fuller set of data more appropriate for use as [a surrogate value]. Therefore, as a result of the totality of the information considered above, we conclude that the DAM data represent the best available data on the record with which to value the whole live fish input. Given

> the significance of the whole live fish input in the calculation of [normal value], we therefore conclude that the choice of Bangladesh offers more reliable [surrogate value] information and thus select Bangladesh as the primary surrogate country for purposes of these final results.

I&D Memo at 13.

Commerce's analysis of surrogate country selection for the *Final Results*, the plaintiffs' arguments thereon, and the defendant's response thereto, are all identical in substantive respects to the papers filed for Court No. 11–00109. Having reflected upon the issue at length, albeit in the circumstances pertinent to slip opinion 13–63, the court perceives no reason to justify a different outcome here, in the matter at bar, which will therefore be remanded for further consideration in accordance with that opinion:

> As it is unclear what impact any particular factor has had on Commerce's analysis to this point, remand of the entire issue of surrogate country selection as a whole is appropriate, and without precluding reconsideration of the entire record for and against the selection of the primary surrogate country upon which to value the respondents' factors of production. If Commerce also deems it necessary to gather additional information, it has the discretion to reopen there record.

Slip Op. 13–63 at 34.

Conclusion

For the reasons stated above and in slip opinion 13–63 , the matter will be, and hereby is, remanded for reconsideration and further explanation.

The results of remand shall be filed by November 1, 2013, comments thereon, if any, by December 2, 2013, and rebuttal commentary, if any, by December 17, 2013.

So ordered.

Dated: July 22, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–92

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and TARGET CORPORATION, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 10–00247

TSOUCALAS, Senior Judge:

ORDER

On July 18, 2013, the United States Court of Appeals for the Federal Circuit ("CAFC") vacated and remanded this court's judgment in *Mid Continent Nail Corp. v. United States*, 36 CIT __, Slip Op. 12–97 (2012) ("*Mid Continent II*") (not reported in the Federal Supplement), with instructions to remand the matter back to the United States Department of Commerce ("Commerce") for further proceedings. *Mid Continent Nail Corp. v. United States*, Nos. 2012–1682, 2012–1683, 2013 WL 3746081, at *1 (Fed. Cir. July 18, 2013) ("*Mid Continent III*").

Mid Continent II upheld Commerce's redetermination issued pursuant to the court's earlier decision in *Mid Continent Nail Corp. v. United States*, 36 CIT __, 825 F. Supp. 2d 1290 (2012) ("*Mid Continent I*"). In *Mid Continent I*, the court held that Commerce impermissibly limited the scope of an antidumping duty order by excluding in-scope steel nails packaged and imported as a component of certain household tool kits because the scope lacked clear language regarding mixed media applications. *Id.* at 1292–96. The CAFC "disagree[d] . . . that Commerce is foreclosed by the broad language of the antidumping order from interpreting the order to exclude nails included within mixed media tool kits," but agreed "that Commerce has not yet reasonably interpreted the order in this case so as to justify such an exclusion." *Mid Continent III*, 2013 WL 3746081, at *5. The CAFC also provided an extensive roadmap for Commerce to follow in analyzing this and future mixed media cases. *Id.*

Accordingly, it is hereby

ORDERED that this case is remanded to Commerce for redetermination in accordance with the CAFC's opinion in *Mid Continent III*; and it is further

ORDERED that the remand results are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

Dated: July 23, 2013
New York, New York

/s/ *NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 13–93

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and HILLTOP INTERNATIONAL and OCEAN DUKE CORP., Defendant-Intervenors.

Before: Donald C. Pogue Chief Judge
Court No. 11–00335

[final results of redetermination on remand affirmed in part and remanded in part]

Dated: July 23, 2013

Andrew W. Kentz, Jordan C. Kahn, Nathaniel Maandig Rickard and *Nathan W. Cunningham*, Picard Kentz & Rowe LLP, of Washington, DC, for the Plaintiff.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With him on the brief were *Stuart Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Mark E. Pardo and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for the Defendant-Intervenors.

OPINION

Pogue, Chief Judge:

This action arises from the fifth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the People's Republic of China ("China" or the "PRC").[1] In prior proceedings, the court remanded certain aspects of the agency decision in this review for further consideration.[2] While remand was pending, the United States Department of Commerce ("Commerce"), by motion, sought permission to reopen the administrative record to consider new evidence suggesting that the antidumping duty assessment rate calculated in this review for respondent Hilltop International ("Hilltop") – a Defendant-Intervenor in this action – may have

[1] *See Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 51,940 (Dep't Commerce Aug. 19, 2011) (final results and partial rescission of antidumping duty administrative review) ("*Final Results*") and accompanying Issues & Decision Mem., A-570–893, ARP 09–10 (Aug. 12, 2011).

[2] *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __,882 F. Supp. 2d 1366 (2012).

been based on information that was false or incomplete.[3] Because Commerce's request to expand the scope of remand was based on a substantial and legitimate concern, the motion was granted.[4]

Upon consideration of the new evidence, Commerce concluded that Hilltop had significantly impeded this proceeding by submitting information containing material misrepresentations and inaccuracies.[5] Moreover, Commerce determined that the nature of Hilltop's misrepresentations and the circumstances of their eventual disclosure "call[ed] into question Hilltop's ownership structure as reported in [this review], and, consequently, its eligibility for a separate rate [from the PRC-wide entity]."[6]Accordingly, because the record contained no reliable evidence to rebut the presumption of government control attaching to Hilltop as an exporter of subject merchandise from China,[7] Commerce determined that Hilltop failed to demonstrate eligibility for a rate separate from the PRC-wide entity, and therefore assigned to Hilltop the antidumping duty assessment rate applied to that countrywide entity.[8] Hilltop now challenges Commerce's redetermination on remand as not supported by substantial evidence.[9]

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),[10] and 28 U.S.C. § 1581(c) (2006).

For the reasons set forth below, Commerce's determination to apply the PRC-wide antidumping duty assessment rate to Hilltop is sustained. However, Commerce's choice of an appropriate assessment

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[3] *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __,882 F. Supp. 2d 1377, 1379 (2013).

[4] *Id.* at 1381–82 (relying on *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005)).

[5] *Final Results of Redetermination Pursuant to Court Remand*, A-570–893, ARP 09–10 (Apr. 1, 2013), ECF No. 74 ("*Remand Results*") at 17.

[6] *Id.* at 24.

[7] *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed.Cir. 2002) (explaining that Commerce treats exporters "from countries with nonmarket economies ('NMEs') such as China" as "subject to a single, countrywide antidumping duty rate unless they [can] demonstrate legal, financial, and economic independence from the Chinese government," and noting that the Court of Appeals for the Federal Circuit has "upheld the application of this 'NME presumption'") (citing *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997)).

[8] *Remand Results* at 15.

[9] *See* Def.-Intervenors' Comments in Opp'n to Final Remand Results, ECF No. 76 ("Hilltop's Br.").

[10] 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.

rate for the PRC-wide entity (including Hilltop) is remanded for further consideration and/or additional explanation concerning the chosen rate's compliance with the antidumping statute's corroboration requirement.[11]

BACKGROUND

On remand, Commerce accepted into the record of this (fifth) review evidence submitted by Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC") – a petitioner for the underlying antidumping duty order – in the course of the subsequent (sixth) review of the order.[12] This new evidence showed that, contrary to Hilltop's representations in this review, Hilltop was affiliated with an undisclosed Cambodian shrimp exporter during the relevant time period.[13] Commerce concluded that the circumstances of Hilltop's eventual admission to this previously undisclosed affiliation impeached Hilltop's credibility with regard to its remaining representations in this review. *See Remand Results* at 16 ("Because Hilltop submitted material misrepresentations with regard to its affiliations, and certified the accuracy of such false information, we find that we cannot rely on any of the information submitted by Hilltop in this review."). Specifically, Commerce credited evidence that Hilltop did not disclose this affili-

[11] *See* 19 U.S.C. § 1677e(c).

[12] *Remand Results* at 2, 5 (citing *Placing Public Documents on the Record of the Fifth Administrative Review*, A-570–893, ARP 09–10 (Feb. 14, 2013), Remand Admin. R. Pub. Docs. 1–38 ("*Docs. from AR6*"), *[AHSTAC's] Comments on the Dep't's Preliminary Determination to Grant Hilltop's Request for Company-Specific Revocation Pursuant to 19 C.F.R. 351.222(b)(2) & Comments in Anticipation of Hilltop's Forthcoming Verification*, A-570–893, ARP 10–11 (Mar. 12, 2012), *reproduced in* Hilltop's Br. con. app., ECF No. 79–1, at ex. 6). All relevant portions of the administrative record relied on in this opinion are reproduced within the public and confidential appendices to the parties' court filings, ECF Nos. 79–80, 94–95. Hereinafter, all citations to documents from the sixth review that have been placed on the record of this (fifth) review include the label *Docs. from AR6*.

[13] *Compare Resp. of Hilltop Int'l & Affiliates to Antidumping Questionnaire Section A*, A-570–893, ARP 10–11 (June 15, 2010), Admin. R. Con. Doc. 6 [Pub. Doc. 36], *reproduced in* Def.'s Resp. Comments Regarding Remand Results ("Def.'s Resp.") con. app., ECF No. 94–5, at tab 19 ("*Hilltop's AR5 Sec. A Resp.* ") at 4–5 (representing that Exhibits A-2 and A-3 to Hilltop's AR5 Section A Response contain an exhaustive list of Hilltop's affiliations), *and id.* at Exs. A-2 & A-3 (making no mention of Ocean King (Cambodia) Co., Ltd. ("Ocean King")), *with Docs. from AR6*, *Hilltop's 7th Supp. Questionnaire Resp.*, A-570–893, ARP 10–11 (June 27, 2012), *reproduced in* Def.'s Resp. con. app. at tab 24 ("*Hilltop's AR6 7th Supp. Questionnaire Resp.*") at 2 (acknowledging that "an affiliation within the statutory definition of 19 U.S.C. § 1677(33) existed between the Hilltop Group and Ocean King until September 28, 2010"). *See Final Results*, 76 Fed. Reg. at 51,940 (noting that the period of review for this proceeding was February 1, 2009, through January 31, 2010).

ation until faced with clear evidence thereof[14]; that Hilltop failed to provide a satisfactory explanation for its omissions and misrepresentations in reporting its corporate structure – claiming only that the misrepresentations "may have been in error . . . for whatever reason"[15]; and that Hilltop continues to withhold information that Commerce requested regarding potential additional undisclosed affiliates.[16]

Commerce's determination that Hilltop is not a reliable source of complete and accurate information implicated Hilltop's representations in this review that neither it nor any of its PRC affiliates with potential for price manipulation were under the control of the Chinese government. *See Hilltop's AR5 Sec. A Resp.* at 3–5; *Remand Results* at 15. Because Commerce's decision to assign to Hilltop a separate rate from the PRC-wide entity in this review had been based on these representations,[17] which Commerce now found to be unreliable,[18] the agency determined that the basis for Hilltop's separate rate status had been invalidated. *Remand Results* at 15. Finding no valid evidence to rebut the presumption of government control applied to exporters of subject merchandise from China,[19] Commerce decided to no longer treat Hilltop as separate from the PRC-wide entity. *Id.* Accordingly, Commerce assigned to Hilltop the 112.81 percent antidumping duty assessment rate applied to the PRC-wide entity in this review. *Id.* at 2.

Hilltop challenges Commerce's redetermination on remand, arguing that it should be assessed an antidumping duty rate based at least in part on its own information. Hilltop's Br. at 3–24. In the alternative, Hilltop challenges the rate assessed for the PRC-wide entity (including Hilltop) in this review as not supported by substantial evidence. *Id.* at 24–37.

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[14] *See Docs. from AR6*, *Hilltop's AR6 7th Supp. Questionnaire Resp.* at 2 (admitting that this affiliation was not disclosed until Commerce placed on record public registration documents for Ocean King showing affiliation with Hilltop).

[15] *See Remand Results* at 19 (quoting *Docs. from AR6*, *Hilltop-Specific Issues Rebuttal Br.*, A-570–893, ARP 10–11 (July 23,2012), *reproduced in* Def.'s Resp. pub. app., ECF No. 95–4, at tab 18 ("*Hilltop's AR6 Rebuttal Br.* ") at 9).

[16] *See id.* at 21 n.83, 23.

[17] *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 8338, 8340 (Dep't Commerce Feb. 14, 2011) (preliminary results and preliminary partial rescission of fifth antidumping duty administrative review) ("*Preliminary Results*") (unchanged in the *Final Results*, 76 Fed. Reg. at 51,942).

[18] *Remand Results* at 15.

[19] *See supra* note 7.

STANDARD OF REVIEW

The court will sustain Commerce's redetermination on remand so long as it is supported by substantial evidence and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Pakfood Pub. Co. v. United States*, __ CIT __, 753 F. Supp. 2d 1334, 1341 (2011). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining "substantial evidence")), and the substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (internal quotation and alteration marks and citation omitted).

DISCUSSION

A. Commerce's Decision to Deny Hilltop Separate Rate Status in This Review Is Sustained.

The first question before the court is whether Commerce's decision to deny Hilltop separate rate status in this review is supported by substantial evidence. *See Remand Results* at 2 (finding that "Hilltop has failed to rebut the presumption that it is part of the [PRC]-wide entity"); Hilltop Br. at 18–24 (arguing that Commerce's decision to treat Hilltop as part of the PRC-wide entity is not supported by substantial evidence). For the reasons below, Commerce's decision to apply the PRC-wide antidumping duty assessment rate to Hilltop is supported by substantial evidence and is therefore sustained.

When dealing with merchandise from China, which Commerce treats as a nonmarket economy ("NME"),[20] Commerce "presumes

[20] A "nonmarket economy" is defined as "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). *See also* 19 U.S.C. § 1677b(c) (providing special rules governing Commerce's calculation of normal value for merchandise from nonmarket economy countries); *Preliminary Results*, 76 Fed. Reg. at 8340 ("In every case conducted by [Commerce] involving the PRC, the PRC has been treated as an NME country. In accordance with [19 U.S.C. § 1677(18)(C)(i)], any determination that a foreign country is an NME country shall remain in effect until revoked by [Commerce]. None of the parties to this proceeding has contested such treatment. Accordingly, we calculated [normal value] in accordance with [19 U.S.C. § 1677b(c)], which applies to NME countries.") (additional citation omitted) (unchanged in the *Final Results* or *Remand Results*).

that all companies within [China] are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities" and thus obtains "separate rate status".[21] Where record evidence supports a respondent's eligibility for separate rate status, Commerce must treat the respondent as separate from the countrywide entity unless the agency makes a specific finding, supported by substantial evidence, that the evidence regarding separate rate eligibility is deficient or otherwise unreliable. *See Jiangsu Changbao Steel Tube Co. v. United States*, __ CIT __, 884 F. Supp. 2d 1295, 1309–10 (2012).[22]

Hilltop's separate rate status in this review was based on representations contained in its responses to Commerce's information requests. *Preliminary Results*, 76 Fed. Reg. at 8340–41 (unchanged in the *Final Results*, 76 Fed. Reg. at 51,942). Because Hilltop "reported that it is a Hong Kong based exporter of subject merchandise," Commerce concluded that "a separate rate analysis [was] not necessary to determine whether [Hilltop] is independent from government control." *Id.* at 8341 (citations omitted).[23] Although Hilltop had disclosed a number of affiliations with companies located in China that were at

[21] Import Administration, U.S. Dep't Commerce, *Separate-Rates Practice & Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, Policy Bulletin No. 05.1 (Apr. 5, 2005) ("*ITA Policy Bulletin 05.1*") at 1 (citation omitted); *Preliminary Results*, 76 Fed. Reg. at 8340. Generally, Commerce evaluates "whether a firm is sufficiently independent from governmental control in its export activities to be eligible for separate rate status" on the basis of three criteria for demonstrating the absence of *de jure* government control and four criteria for demonstrating the absence of *de facto* government control. *ITA Policy Bulletin 05.1* at 2. The *de jure* freedom from government control criteria are "1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the government decentralizing control of companies." *Id.* The *de facto* freedom from government control criteria are "1) whether the export prices are set by, or subject to the approval of, a governmental authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses." *Id.*

[22] (discussing *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 387 F. Supp. 2d 1270 (2005); *Shandong Huarong Gen. Grp.Corp. v. United States*, 27 CIT 1568 (2003) (not reported in the Federal Supplement); *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, No. 10–00059, 2011 WL 4829947 (CIT Oct. 12, 2011); *Since Hardware (Guangzhou) Co. v. United States*, No. 09–00123, 2010 WL 3982277 (CIT Sept. 27, 2010)).

[23] *See id.* at 8340 ("[I]f [Commerce] determines that a company is wholly foreign-owned or located in a market economy, then a separate rate analysis is not necessary to determine whether itis independent from government control.") (citing *Petroleum Wax Candles from the People's Republic of China*, 72 Fed. Reg. 52,355, 52,356 (Dep't Commerce Sept. 13, 2007)

least partially owned by Chinese persons or entities, it represented that "[t]here is no control over any of the Hilltop Group companies by any local or national government entity." *Hilltop's AR5 Sec. A Resp.* at 3–4. Based on this information, Commerce determined that "there is no PRC ownership of Hilltop" and, notwithstanding Hilltop's affiliation with Chinese companies, the record presented "no evidence indicating that [any] of these companies are under the control of the PRC." *Preliminary Results*, 76 Fed. Reg. at 8341 (unchanged in the *Final Results*, 76 Fed. Reg. at 51,942).

As discussed above, however, on remand Commerce determined that Hilltop provided false and incomplete information in this review regarding its corporate structure and, given the nature and timing of Hilltop's omissions and misrepresentations in this regard, Commerce decided that none of Hilltop's submissions, including the statements used to support Hilltop's separate rate status, could be relied on to provide accurate information. *See Remand Results* at 2, 15. This conclusion "was based on the finding that Hilltop had a Cambodian affiliate, Ocean King, from [the first period of administrative review of this antidumping duty order] through most of [the sixth period of review], which Hilltop repeatedly failed to disclose to [Commerce]." *Id.* at 6.

Commerce's finding that Hilltop repeatedly withheld and misrepresented material information regarding its affiliation with Ocean King is supported by a reasonable reading of the record here. Specifically, record evidence shows that, although Hilltop's general manager and part owner was a board member and 35 percent shareholder in Ocean King during the period of review,[24] Hilltop nevertheless misrepresented to Commerce that "[n]one of the Hilltop Group com-

(final results of antidumping duty administrative review)); *see also, e.g.*, *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 35,312, 35,320 (Dep't Commerce June 24, 2004) (notice of preliminary determination of sales at less than fair value and postponement of final determination) ("It is [Commerce]'s policy to treat Hong Kong companies as market-economy companies.") (citing *Application of U.S. Antidumping and Countervailing Duty Laws to Hong Kong*, 62 Fed. Reg. 42,965 (Dep't Commerce Aug. 11,1997) (explaining that "Hong Kong [is] considered a separate Customs territory within the PRC" subsequent to the PRC's resumed exercise of sovereignty over its territory)).

[24] *See Remand Results* at 8 ("[Commerce] released public registration documents for Ocean King that identified To Kam Keung, Hilltop's general manager and part owner, as a board member and 35 percent shareholder beginning in July 2005 and ending in September 2010.") (citing *Docs. from AR6*, *Public Registration Docs. for Ocean King (Cambodia) Co., Ltd.*, A-570–893, ARP 10–11 (June 19, 2012), *reproduced in* Def.'s Resp. pub. app. at tab 17); *Docs. from AR6*, *Hilltop's AR6 7th Supp. Questionnaire Resp.* at 2 (acknowledging that "an affiliation within the statutory definition of 19 U.S.C. § 1677(33) existed between the Hilltop Group and Ocean King until September 28,2010"); *Final Results*, 76 Fed. Reg. at 51,940 (noting that the period of review for this proceeding was February 1, 2009, through January 31, 2010).

panies or their individual owners own 5 percent or more in stock in any third parties,"[25] and that none of Hilltop's managers "held positions with any other firm, government entity, or industry organization during the [period of review]."[26] The evidence also shows that Hilltop subsequently denied and concealed its affiliation with and investment in Ocean King until confronted with public registration documents contradicting its misrepresentations.[27] This is sufficient to reasonably support Commerce's conclusion that Hilltop withheld information requested of it in this review and significantly impeded this proceeding by submitting information containing material misrepresentations and inaccuracies. *See Remand Results* at 15, 17.

When a respondent fails to comply with Commerce's requests by withholding or failing to timely provide requested information, submitting information that cannot be verified, or otherwise significantly impeding an antidumping proceeding, Commerce may disregard all or part of the deficient submission if the respondent fails to timely and adequately remedy or explain the deficiency after receiving notice from the agency. 19 U.S.C. at §§ 1677e(a)(2), 1677m(d).[28] Here

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[25] *See Remand Results* at 12 (quoting Ex. A-2 to *Hilltop's AR5 Sec. A Resp.)*.

[26] *See id.* at 13 n.65 (quoting *Hilltop Int'l & Affiliates Supp. Section A Questionnaire Resp.*, A-570–893, ARP 09–10 (July 29, 2010), Admin. R. Con. Doc. 12 [Pub. Doc. 58], *reproduced in* Def.'s Resp. con. app. at tab 20, at 6).

[27] *Compare Docs. from AR6*, *Hilltop's Resp. to CBP Import Data*, A-570–893, ARP 10–11 (May 24, 2012), *reproduced in* Def.'s Resp. con. app. at tab 23, at 2 n.1 (claiming that Hilltop is not affiliated with any of the Cambodian shrimp manufacturers identified in *Docs. from AR6*, *Customs Data of U.S. Imports of Certain Frozen Warmwater Shrimp from Cambodia*, A-570–893, ARP 10–11 (May 17, 2012), *reproduced in* Def.'s Resp. con. app. at tab 25, which included Ocean King), *and Docs. from AR6, Hilltop's Reply to Pet'rs' Resp. to CBP Import Data*, A-570–893, ARP 10–11 (May 31, 2012), *reproduced in* Def.'s Resp. con. app. at tab 23, at 6 ("Hilltop is not affiliated with Ocean King. . . . Hilltop confirms that neither the company, nor its owners or officers, invested any funds in Ocean King."), *with Docs. from AR6*, *Hilltop's AR6 7th Supp. Questionnaire Resp.* at 2 (admitting to Hilltop's affiliation with Ocean King for the first time in response to Commerce's request to reconcile Hilltop's prior representations with the public registration documents for Ocean King).

[28] Where the deficiency identified in a respondent's submissions affects an isolated issue or data set, Commerce uses facts otherwise available solely to fill the evidentiary gap, while continuing to rely on the remainder of the respondent's non-deficient submissions. *E.g., Am. Silicon Techs. v. United States*, 24 CIT 612, 620 n.6, 110 F. Supp. 2d 992, 999 n.6 (2000)(citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–826 (1994) ("SAA") at 656, 869). Where, however, the deficiency affects information that is "core, not tangential, and there is little room for substitution of partial facts," Commerce may disregard the totality of the respondent's submitted information and reach its determination based on "total facts available." *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 199 n.13,360 F. Supp. 2d 1339, 1348 n.13 (2005). Where resort to the use of facts otherwise available is warranted, Commerce may employ an adverse inference when selecting among the facts available if it further determines that the respondent failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information. 19 U.S.C. § 1677e(b). But "[a]lthough separate determinations are

Commerce determined that Hilltop's conduct implicated the overall credibility of its representations in this review.[29] In particular, Commerce concluded that the credibility of Hilltop's statements regarding its affiliations, corporate structure, and ownership – which had formed the basis for Hilltop's separate rate status in this review – was undermined by Hilltop's withholding of critical information and repeated misrepresentation of the scope of its affiliates. *Remand Results* at 14–15. Specifically, Commerce could no longer rely on Hilltop's declaration that none of the Chinese companies with which it is affiliated – all of which possess "a significant potential for manipulation of [the] price or production [of subject merchandise]"[30] – was controlled by the PRC.[31]

Although Hilltop was afforded an opportunity to rehabilitate its impeached credibility by providing a reasonable explanation for its non-disclosure and subsequent denial of any affiliation with Ocean King, the evidence also supports Commerce's conclusion that Hilltop's explanation was unpersuasive.[32] Far from providing a reasonable explanation, Hilltop admitted only what was unequivocally evidenced

required for application of facts otherwise available under § 1677e(a), and adverse inferences under § 1677e(b), both standards are met where a respondent purposefully withholds, and provides misleading, information." *Shanghai Taoen*, 29 CIT at 195, 360 F. Supp. 2d at 1345.

[29] *See Remand Results* at 17; *cf. Changbao*, __ CIT at __,884 F. Supp. 2d at 1306 ("It is reasonable for Commerce to infer that a respondent who admits to having intentionally deceived Commerce officials, and does so only after Commerce itself supplies contradictory evidence, exhibits behavior suggestive of a general willingness and ability to deceive and cover up the deception until exposure becomes absolutely necessary."); *Shanghai Taoen*, 29 CIT at 199 n.13, 360 F. Supp. 2d at 1348 n.13 (explaining that a respondent's intentional deception of Commerce may reasonably implicate the overall credibility of that respondent).

[30] *Preliminary Results*, 76 Fed. Reg. at 8339.

[31] *See Hilltop's AR5 Sec. A Resp.* at 3–4; *Remand Results* at 15,24 ("Hilltop's refusal in AR6 . . . to disclose its full universe of affiliated companies and provide information regarding its affiliations with other persons/entities calls into question Hilltop's ownership structure as reported in [this review], and, consequently, its eligibility for a separate rate in this review."), 30 ("[B]ecause the disclosure of Hilltop's affiliation with Ocean King . . . reveals that substantial portions of Hilltop's Section A response contain material misrepresentations with regard to Hilltop's corporate structure and affiliations, Hilltop's entire Section A response, which details its eligibility for a separate rate and was submitted in lieu of a separate-rate application, is now fatally undermined and unusable for any purposes.") (citation omitted).

[32] *See Remand Results* at 32 ("Based on the record as a whole, we determine that Hilltop has failed to present any evidence or argument that explains its failure to disclose its dealings with Ocean King or its trading activity with persons/entities involved in its Cambodian enterprise.").

by the new documents,[33] trivialized its prior misrepresentation as having been in error "for whatever reason,"[34] and continued to evade Commerce's requests for information regarding possible additional undisclosed affiliates.[35] Commerce inferred that Hilltop's failure to disclose its affiliation with Ocean King until faced with undeniable evidence thereof rendered its representations regarding lack of PRC control over its Chinese affiliates untrustworthy. *Remand Results* at 15, 21. As this Court has previously held, "the inference that a respondent's failure to disclose willful deception until faced with contradictory evidence implicates the reliability of that respondent's remaining representations is reasonable." *Changbao*, __ CIT at __, 884 F. Supp. 2d at 1306 (citing *Shanghai Taoen*, 29 CIT at 199 n.13, 360 F. Supp. 2d at 1348 n.13). Here the reasonableness of this inference is bolstered by evidence that Hilltop may also have additional undisclosed affiliates, whose roles in the production and pricing of subject merchandise Hilltop continues to deny.[36]

Under these circumstances, Commerce reasonably determined to disregard the totality of Hilltop's representations in this review – including those previously used to support Hilltop's separate rate status – as inherently unreliable because Hilltop's conduct "raises questions regarding what other information is missing that could be relevant to [Commerce]'s proceeding." *Remand Results* at 23; *see* 19 U.S.C. at §§ 1677e(a)(2), 1677m(d). Hilltop's unexplained contradictions in representing its corporate structure in this review concern information that is core, not tangential, to Commerce's analysis because it goes to the heart of Hilltop's corporate ownership and control.[37] And as Hilltop continued to misrepresent its corporate structure – including by explicitly denying any affiliation with Ocean King or other undisclosed entities – until forced to reconcile its misrepre-

[33] *Docs. from AR6, Hilltop's AR6 7th Supp. Questionnaire Resp.* at 2 (admitting to Hilltop's affiliation with Ocean King for the first time in response to Commerce's request to reconcile Hilltop's prior representations with the public registration documents for Ocean King).

[34] *Docs. from AR6*, *Hilltop's AR6 Rebuttal Br.* at 9.

[35] *See Remand Results* at 21 (noting Hilltop's "potential affiliations with additional entities/persons") (citing *Docs. from AR6*, *Hilltop 6th Supp. Questionnaire*, A-570–893, ARP 10–11 (June 1, 2012), *reproduced in* Def.'s Resp. pub. app. at tab 17, at questions 5d, 5e, and 9a-c (requesting information regarding Hilltop's affiliation with certain entities/persons referenced in the record evidence) and noting that "Hilltop refused to respond to these questions" in its subsequent responses).

[36] *See supra* note 35.

[37] *See Remand Results* at 30 ("Hilltop's failure to disclose the affiliation [with Ocean King] goes to the heart of its Section A questionnaire response and the information that [Commerce] relies on to make separate-rate status determinations."); *cf. Shanghai Taoen*, 29 CIT at 199 n.13, 360 F. Supp. 2d at 1348 n.13.

sentations with contradictory evidence,[38] Commerce reasonably decided that Hilltop's remaining representations regarding its structure and ownership – particularly those concerning the role of PRC government control in its pricing decisions – may be similarly incomplete and inaccurate. *See Remand Results* at 15, 23.

Based on these findings, Commerce's conclusion that Hilltop's representations regarding its corporate structure, affiliations, and government control are not reliably accurate and complete is reasonable. Accordingly, because the record contains no other reliable information to rebut the presumption of government control,[39] Commerce's determination that Hilltop failed to demonstrate eligibility for a separate rate from the PRC-wide entity is supported by substantial evidence and is therefore sustained.

B. *The PRC-Wide Assessment Rate Applied in This Review Is Remanded for Further Consideration and/or Additional Explanation.*

Next, Hilltop argues that the antidumping duty assessment rate applied to the PRC-wide entity, including Hilltop, was based on secondary information that was not properly corroborated in accordance with 19 U.S.C. § 1677e(c). Hilltop's Br. at 24–37.[40] As explained below, remand is necessary for further consideration and/or explanation of the extent to which the PRC-wide rate applied in this review satisfies the corroboration requirement.

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[38] *See supra* note 27.

[39] While Hilltop emphasizes the record evidence that it is registered in Hong Kong, *see* Hilltop's Br. at 18–24 (relying on Exs. A-5 (Hilltop's Hong Kong Business License) & A-6 (Hilltop's Hong Kong Business Registration Form) to *Hilltop's AR5 Sec. A Resp.*), Hilltop's registration in Hong Kong does not address the potential for government control through Hilltop's disclosed and possibly additional undisclosed PRC affiliates. *Compare Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 24,892, 24,900 (Dep't Commerce May 6, 2010) (notice of preliminary determination of sales at less than fair value and postponement of final determination) (finding that a separate rate analysis was not required for a respondent located entirely in Hong Kong) (unchanged in the final determination, 75 Fed. Reg. 59,217 (Dep't Commerce Sept. 27, 2010)), *with Certain Woven Electric Blankets from the People's Republic of China*, 75 Fed. Reg. 5567, 5570 (Dep't Commerce Feb. 3, 2010) (preliminary determination of sales at less than fair value and postponement of final determination) (determining that a full seven factor separate rate analysis was necessary for a "collapsed entity [that was] a joint venture between a PRC and a foreign (i.e., Hong Kong) company" because the PRC government could exercise control through the PRC affiliate) (unchanged in the final determination, 75 Fed. Reg. 38,459 (Dep't Commerce July 2, 2010) and the amended final determination, 75 Fed. Reg. 46,911 (Dep't Commerce Aug. 4, 2010)).

[40] *See* 19 U.S.C. § 1677e(c) ("When [Commerce] relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [Commerce's] disposal.").

The rate applied to the PRC-wide entity in this review was calculated in the unfair pricing investigation that led to the issuance of this antidumping duty order, using information derived from the original petition to initiate these antidumping proceedings.[41] In that proceeding, Commerce concluded that the "112.81 percent [PRC-wide rate] [was] corroborated within the meaning of [19 U.S.C. § 1677e(c)]" because the agency had "compared that margin to the margin [Commerce] found for the largest exporting respondent" and "found that the margin of 112.81 percent ha[d] probative value."[42] The PRC-wide entity was then assigned this same rate in every subsequent administrative review of this antidumping duty order, including the fifth review at issue here, based on adverse inferences applied because of the PRC's failure to respond to Commerce's questionnaires and cooperate to the best of its ability. *See Preliminary Results*, 76 Fed. Reg. at 8342 (discussing history of the PRC-wide rate); cf. 19 U.S.C. § 1677e(b)(2) (providing that adverse inferences "may include reliance on information derived from . . . a final determination in the [underlying unfair pricing] investigation").

Commerce correctly posits that the PRC-wide rate need not be corroborated with respect to each particular respondent who, like Hilltop, is found to form a part of the PRC-wide entity and thus to be subject to the PRC-wide rate.[43] "Commerce's permissible determination that [a respondent] is part of the PRC-wide entity means that inquiring into [that respondent]'s separate sales behavior ceases to be

[41] *Preliminary Results*, 76 Fed. Reg. at 8342 (unchanged in the *Final Results*, 76 Fed. Reg. at 51,942) (unchanged in the *Remand Results* at 24–25); *see Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 Fed. Reg. 70,997,71,003 (Dep't Commerce Dec. 8, 2004) (notice of final determination of sales at less than fair value) ("*Final LTFV Determination*") (assigning 112.81 percent as the PRC-wide rate).

[42] *Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 Fed. Reg. 42,654, 42,662 (Dep't Commerce July 16, 2004) (notice of preliminary determination of sales at less than fair value, partial affirmative preliminary determination of critical circumstances and postponement of final determination) ("*Preliminary LTFV Determination*") (relying on SAA at 870 ("Corroborate [within the meaning of 19 U.S.C.§ 1677e(c)] means that [Commerce] will satisfy [itself] that the secondary information to be used [(which includes information derived from the petition)] has probative value.") and citing *Corroboration Memorandum*, A-570–893, Investigation (July 2,2004)) (unchanged in the final determination, 69 Fed. Reg. at 71,003).

[43] *Remand Results* at 38; *cf. Peer Bearing Co. – Changshan v.United States*, 32 CIT 1307, 1313, 587 F. Supp. 2d 1319, 1327(2008) ("[T]here is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company.. . . [This] rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole.") (citation omitted); *Shandong Mach. Imp. & Exp. Co. v. United States*, No. 07–00355, 2009 WL 2017042, at *8 (CIT June 24, 2009) (explaining that Commerce has no obligation to corroborate the PRC-wide rate as to an individual party where that party has failed to qualify for a separate rate).

meaningful."[44] But Commerce *is* required to corroborate the PRC-wide rate with respect to "its reliability and relevance to the countrywide entity as a whole." Peer Bearing, 32 CIT at 1313, 587 F. Supp. 2d at 1327.

To properly corroborate the PRC-wide rate, Commerce must determine that this rate "is relevant, and not outdated, or lacking a rational relationship to [the China-wide entity]." *Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (1999). Here, Commerce determined that the 112.81 percent PRC-wide rate was "corroborated, relevant, and reliable" because this rate "was fully corroborated during the investigation." *Remand Results* at 38.[45] During the investigation, this rate was corroborated by comparison with the rate determined for the largest exporting respondent,[46] which was 90.05 percent.[47] But as Hilltop emphasizes, this comparison rate was later changed; it was reduced to 5.07 percent following judicial review. Hilltop's Br. at 32–33 (relying on *Allied Pac. Food (Dalian) Co. v. United States*, __ CIT __, 716 F. Supp. 2d 1339 (2010)). Moreover, the rates for the remaining two mandatory respondents from the investigation who received rates above *de minimis* were also reduced following judicial review. *Id.* (relying on *Allied Pac. Food (Dalian)*, __ CIT __, 716 F. Supp. 2d 1339; *Shantou Red Garden Foodstuff Co. v. United States*, __ CIT __, 880 F. Supp. 2d 1332 (2012)). Thus the final liquidation rates for the four mandatory respondents from the investigation were *de minimis*, 5.07 percent, 7.20 percent, and 8.45 percent.[48] These numbers are significantly different from the (subsequently invalidated) 90.05 percent comparison rate that Commerce

[44] *Watanabe Grp. v. United States*, No. 09–00520, 2010 WL 5371606, at *4 (CIT Dec. 22, 2010).

[45] *See also Preliminary Results*, 76 Fed. Reg. at 8342 (assigning to the PRC-wide entity in this review the 112.81 percent rate as "the only rate ever determined for the PRC-wide entity in this proceeding," without additional corroboration) (unchanged in the *Final Results*, 76 Fed. Reg. at 51,942).

[46] *Preliminary LTFV Determination*, 69 Fed. Reg. at 42,662 ("To corroborate the [PRC-wide] margin of 112.81 percent, we compared that margin to the margin we found for the largest exporting respondent.") (unchanged in the *Final LTFV Determination*, 69 Fed. Reg. at 71,003).

[47] *See Preliminary LTFV Determination*, 69 Fed. Reg. at 42,660 (explaining that Commerce had limited its examination to "the four exporters and producers accounting for the largest volume of subject merchandise" and listing "Allied" as the largest of the four); *id.* at 42,671 (assigning a 90.05 percent weighted-average dumping margin to "Allied") (adjusted to 84.93 percent in the *Final LTFV Determination*, 69 Fed. Reg. at 71,003) (adjusted to 80.19 percent in *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 70 Fed. Reg. 5149, 5151(Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order)).

[48] *Final LTFV Determination*, 69 Fed. Reg. at 70,998 (listing "Zhanjian Goulian; Yelin; Allied; and Red Garden" as the four mandatory respondents in the investigation); *id.* at

used to corroborate the 112.81 rate assigned to the PRC-wide entity in the investigation and in every segment of this proceeding thereafter.

As the comparison margin used to corroborate the PRC-wide rate was subsequently shown not to reflect commercial reality,[49] Commerce may no longer rely on that comparison to satisfy itself that the PRC-wide rate assigned in this review has probative value. *Compare with Watanabe*, 2010 WL 5371606, at *4 (holding that Commerce may rely on a countrywide rate that was corroborated in an earlier segment of an antidumping proceeding if the record contains "no evidence questioning the prior corroboration") (citations omitted). Accordingly, Commerce has failed to establish that the 112.81 percent rate assigned to the PRC-wide entity (which includes Hilltop) in this review "is corroborated, relevant, and reliable." *See Remand Results* at 37–38. Remand is therefore necessary on the issue of proper corroboration of the secondary information used to calculate the PRC-wide rate in this review.[50] On remand, Commerce must either adequately corroborate the 112.81 percent rate and explain how its corroboration satisfies the requirements of 19 U.S.C. 1677e(c), or else calculate or choose a different countrywide rate that better reflects commercial reality, as supported by a reasonable reading of the record evidence.

CONCLUSION

For all of the foregoing reasons, Commerce's redetermination on remand is sustained except with regard to the antidumping duty assessment rate applied to the PRC-wide entity, which includes Hilltop. On remand, Commerce must either adequately corroborate the 112.81 percent PRC-wide rate and explain how its corroboration satisfies the requirements of 19 U.S.C. 1677e(c), or calculate or choose a different countrywide rate that better reflects commercial reality, as supported by substantial evidence. Commerce shall have until September 9, 2013 to complete and file its remand determination. Plaintiff and Defendant-Intervenors shall have until September 23, 2013

71,003 (listing a *de minimis* rate for "Zhanjian Goulian"); *Allied Pac. Food (Dalian)*, __ CIT at __, 716 F. Supp. 2d at 1342, 1352 (affirming reduction of the rate for "Allied" to 5.07 percent); *id.* (affirming reduction of the rate for "Yelin" to 8.45 percent); *Shantou Red Garden Foodstuff*, __ CIT at __,880 F. Supp. 2d at 1334–35 (affirming reduction of the rate for "Red Garden" to 7.20 percent).

[49] *See Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT 736, 435 F. Supp. 2d 1295 (2006) (remanding Commerce's calculation of Allied's rate during the investigation); *Allied Pac. Food (Dalian)*, __ CIT at __, 716 F. Supp. 2d at 1342, 1352 (affirming reduction of the rate for Allied to 5.07 percent).

[50] *See* 19 U.S.C. § 1677e(c) (requiring corroboration of "secondary information"); SAA at 870 (defining "secondary information" to include "information derived from the petition that gave rise to the investigation or review").

to file comments. Plaintiff, Defendant, and Defendant-Intervenors shall have until October 9, 2013 to file any reply.

It is SO ORDERED.

Dated: July 23, 2013
New York, NY

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