Slip Op. 07–151

Before: Nicholas Tsoucalas, Senior Judge

YANTAI TIMKEN CO., LTD. and THE TIMKEN COMPANY, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and PEER BEARING COMPANY, Defendant-Intervenor.

Court No.: 06–00020
PUBLIC VERSION

Held: The United States Department of Commerce's final results areaffirmed. is denied. Plaintiffs' motion for judgment upon the agency record is denied. This action is dismissed.

October 22, 2007

Stewart and Stewart, (*Terence P. Stewart*, *John D. Stirk* and *William A. Fennell*); Special Counsel: *Geert DePrest*, for Yantai Timken Co., Ltd. and The Timken Company, Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Commercial LitigationBranch, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael D. Panzera* and *L. Misha Preheim*); Of Counsel: *David Richardson*, Senior Attorney, International Trade Administration, Department of Commerce, for the United States, Defendant.

Arent Fox, PLLC, (*John M. Gurley, Nancy A. Noonan* and *Diana Dimitriuc Quaia*) for Peer Bearing Company, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge: Plaintiffs Yantai Timken Co., Ltd. ("Yantai") and The Timken Company ("Timken") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging the determination of the International Trade Administration of the United States Department of Commerce ("Defendant" or "Commerce") in *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 71 Fed. Reg. 2,517

(Jan. 17, 2006) ("*Final Results*"), *as amended* 71 Fed. Reg. 9,521 (Feb. 24, 2006) ("*Amended Final Results*").[1]

BACKGROUND

On June 15, 1987, Commerce issued an antidumping duty order covering tapered roller bearings and parts thereof, finished and unfinished ("TRBs"), from the People's Republic of China ("PRC"). *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 52 Fed. Reg. 22,667 (June 15, 1987) ("*Antidumping Duty Order*").

On June 1, 2004, Commerce published a notice of opportunity to request an administrative review of the *Antidumping Duty Order* for the period of review, June 1, 2003 through May 31, 2004 ("POR"). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 69 Fed. Reg. 30,873 (June 1, 2004). On June 30, 2004, Yantai requested that Commerce conduct a review of the entries of the TRBs that it exported to the United States for the POR. *See* Admin. R. Doc. 2. On July 28, 2004, Commerce initiated the seventeenth administrative review of the *Antidumping Duty Order*. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 Fed. Reg. 45,010 (July 28, 2004).

During the period August 5, 2004 through May 5, 2005, Yantai responded to Commerce's original questionnaire and six supplemental questionnaires. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part* ("*Preliminary Results*"), 70 Fed. Reg. 39,744, 39,745 (July 11, 2005). During the period April 25 through April 29, 2005, Commerce conducted a factors-of-production ("FOP") verification at Yantai's manufacturing plant in the PRC. *See Preliminary Results*, 70 Fed. Reg. at 39,746. During the period May 16 through May 19, 2005, Commerce conducted a constructed export price ("CEP") verification at the facilities of Yantai's parent company, Timken,[2] in Canton, Ohio. *See id.*

On June 30, 2005, Commerce issued the FOP and CEP verification reports. *See* Public Admin. R. Doc. 176 ("CEP Verification Report"); Public Admin. R. Doc. 177 ("FOP Verification Report"). In the verification reports, Commerce identified several factors of productions and expenses that were not verified, including U.S. rebates and com-

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[1] The *Amended Final Results* did not impact the *Final Results* with respect to Yantai. *See Amended Final Results*.

[2] Yantai is a wholly owned subsidiary of Timken. *See* Pls.' Disclosure of Corporate Affiliation and Financial Interest.

missions, U.S. indirect selling expenses ("ISEs"),[3] electricity and gas consumption, and U.S. warehouse expenses. *See id.*

On July 11, 2005, Commerce issued the *Preliminary Results*, wherein Commerce found, *inter alia*, "that the information necessary to calculate an accurate and otherwise reliable margin is not available on the record with respect to Yantai." *Preliminary Results*, 70 Fed. Reg. at 39,749. Commerce further found that Yantai "withheld information, failed to provide information requested by [Commerce] in a timely manner and in the form required, significantly impeded the proceeding, and provided unverifiable information." *Id.* Thus, pursuant to sections 776(a)(2)(A), (B), (C) and (D) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e, Commerce preliminarily determined to resort to the facts otherwise available. *Id.* In addition, Commerce found that Yantai "failed to act to the best of its ability in supplying [Commerce] with the requested information." *Id.* at 39,750. Thus, pursuant to section 776(a) and (b), Commerce preliminarily determined to apply total adverse facts available in its calculation of the dumping margin. *Id.* at 39,751.

At a meeting held on July 19, 2005, Yantai requested permission from Commerce to submit additional information and/or explanations describing what it had demonstrated during verification regarding its ISEs. Pls.' Mem. P. & A. Supp. Mot. J. Agency R. ("Pls.' Mem.") at 12; Def.'s Resp. Mot. J. Agency R. ("Def.'s Resp.") at 11. On August 4, 2005, Yantai requested permission to "submit additional information for the record." Def.'s Resp. at 11; Public Admin. R. Doc. 189. On August 8, 2005, Yantai again requested permission to submit additional information and a chance to verify its reported information. *See* Def.'s Resp. at 11; Public Admin. R. Doc. 191. On August 15, 2005, Peer Bearing Company ("Peer"), a respondent in the administrative review, submitted a letter arguing that Commerce should reject Yantai's untimely factual information. *See* Def.'s Resp. at 11. On September 21, 2005, Commerce issued a letter denying Yantai's request. *See* Public Admin. R. Doc. 198.

On October 6, 2005, Yantai submitted its case brief. *See* Confidential Admin. R. Doc. 75. Thereafter, Commerce determined that portions of the case brief contained new factual information and requested that Yantai submit a revised case brief with the new information redacted. *See* Confidential Admin. R. Doc. 77. As a result of meetings between Yantai and Commerce held in October and November 2005, Commerce reconsidered its rejection of the materials previously deemed to be new factual information in Yantai's case brief and accepted some portions upon finding that they constituted

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[3] "[ISEs] are selling expenses that the seller would incur regardless of whether particular sales were made but that reasonably may be attributed, in whole or in part, to such sales (e.g., salesperson's salaries)." U.S. Dep't of Commerce, Antidumping Manual, Ch. 8 at 44.

argument of facts already on the record or information requested by Commerce. *See* Def.'s Resp. at 12–13; Confidential Admin. R. Doc. 77. Still other portions were determined to be new factual information and Commerce requested that Yantai submit a revised case brief redacting those portions. *See* Confidential Admin. R. Doc. 77.

On November 30, 2005, Yantai submitted its revised and redacted case brief arguing, *inter alia*, that: (1) it should not be given an adverse facts available rate because they cooperated to the best of their ability; and (2) Commerce apply partial adverse facts available because application of total adverse facts available was unwarranted. *See* Confidential Admin. R. Doc. 78. Peer submitted a rebuttal brief arguing that Yantai should continue to receive total adverse facts available. *See* Public Admin. R. Doc. 223. On December 9, 2005, Commerce held a hearing on the issues raised in the briefs of interested parties. *See* Pls.' Mem. at 13.

On January 17, 2006, Commerce published the *Final Results*, wherein Commerce determined, *inter alia*, that application of partial adverse facts available was warranted with respect to Yantai's ISEs, rebates and commissions. *See Final Results* 71 Fed. Reg. at 2520–21. Commerce found, *inter alia*, that Yantai could not substantiate its ISEs, rebates and commissions, and that Yantai did not act to the best of their ability to provide requested information to Commerce during verification. *See id.* Commerce thus used the total verified ISEs based on Timken's financial reports and applied to all sales the maximum amount of rebates and commissions that customers and sales agents could earn. *See id.* The antidumping margin was reduced from the total adverse facts available rate of 60.98% to a calculated rate including partial adverse facts available for the expenses that failed verification of 41.58%. *See id.* at 2523.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (a) (2000) and 28 U.S.C. § 1581 (c) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). 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 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence

does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). In an administrative review, the court cannot substitute its judgment for that of Commerce when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984)(quoting *Universal Camera*, 340 U.S. at 488).

DISCUSSION

I. Parties' Contentions

A. Plaintiffs' Contentions

Plaintiffs challenge several aspects of the *Final Results*. First, Plaintiffs take issue with Commerce's determination to resort to partial adverse facts available in calculating Yantai's ISEs. Pls.' Mem. at 22. Plaintiffs explain that, in employing partial adverse facts available, Commerce used the figure for total ISEs from Timken's audited financial statements, which included administrative expenses, corporate costs and "other costs" attributable to manufacturing expenses. *Id.* Plaintiffs contend that ISEs are to be limited to expenses supporting sales activities pursuant to 19 U.S.C. § 1677a(d)(1)(D). Plaintiffs further contend that Commerce is obligated to calculate dumping margins as accurately as possible even when employing adverse facts available. *Id.* at 27. Because Commerce's methodology results in using a figure for Yantai's ISEs that includes manufacturing expenses, Plaintiffs argue that the method Commerce employed in calculating its ISEs is unreasonable and assert that Commerce must employ a more accurate methodology. *Id.* Claiming that Commerce was provided all of the possible expenses to be included in calculating Yantai's ISEs, *id.* at 32–33, Plaintiffs argue that Commerce unlawfully departed from its practice by applying adverse facts rather than adding those expenses that Commerce believed were improperly excluded, *id.* at 32.

Second, Plaintiffs contend that Commerce acted contrary to its practice and contrary to case law when it directed Yantai to redact certain portions of its case brief following the issuance of the *Preliminary Results* on the ground that they contained unsolicited new information submitted beyond the agency's deadline for the submission of factual information. *Id.* at 27. In support, Plaintiffs cite to 19 C.F.R. § 351.309(b)(1), which provides that Commerce "will consider written arguments in case or rebuttal briefs." *Id.* at 28. Plaintiffs claim that their submittal contained explanations and statements regarding the facts already on the record, and therefore, Commerce's rejection was improper. *Id.*

Plaintiffs assert that Commerce has, in other cases, accepted such explanations of factual information already in a record as not constituting new factual information. *Id.* at 28–29. Arguing that Commerce rejected materials that "corroborate claims and data previously timely submitted," Plaintiffs contend that Commerce's refusal to do so in the instant matter is contrary to its practice. *Id.*

Third, Plaintiffs contend that Commerce acted contrary to its obligation to calculate a dumping margin that is as accurate as possible when it refused to accept the supplemental materials submitted to verify the ISEs following the issuance of the *Preliminary Results*. *Id.* at 30–31. Citing *Timken U.S. Corp. v. United States*, 28 CIT 329, 318 F. Supp. 2d 1271 (2004), *aff'd*, 434 F.3d 1345 (Fed. Cir. 2006), Plaintiffs contend that Commerce is required to accept new information following issuance of a preliminary determination if necessary to determine dumping margins as accurately as possible. *Id.* at 30–31.

Fourth, Plaintiffs argue that the record does not support Commerce's determination that the reported ISEs were not tied to the financial statements. *Id.* at 33–34. Plaintiffs explain that Commerce had identified the following issues as problematic: "(1) the company's failure to include certain expenses in the reported ISEs, (2) the failure to identify the ratios used to allocate expenses between the auto bearing, industrial bearing, and steel businesses, and (3) the fact that cost center information for all of the costs was not available until the end of verification so that the information in verification Exhibit 8 could not be used to demonstrate completeness." *Id.* at 34. Plaintiffs, however, contend that "these issues do not detract from the evidence showing that the reported expenses were tied and accounted for." *Id.* at 36.

Specifically, Plaintiffs claim that: (1) "all expenses were duly reported in the response, and were tied to the Company's books and records," *id.* at 35; (2) although Commerce was not provided the allocation ratios of Timken's Corporate Center costs at verification, the reported figures should be accepted as Plaintiffs' methodology was conservative and over-inclusive, *id.*; and (3) regardless of the availability of cost center data, Commerce was able to judge the completeness of the company's reporting because all of the line items for expenses were included on the internal reports used to calculate the reported expenses, *id.* at 36. Plaintiffs thus contend that the record does not support Commerce's conclusion that the expenses did not tie to the financial statements. *Id.* at 33.

Finally, Plaintiffs claim that Commerce's decision to reject the rebates and commissions on aftermarket sales as reported was contrary to its normal practice. *Id.* at 37. Plaintiffs claim that Yantai reported commissions and rebates that customers and agents were entitled to earn rather than the actual amounts paid. *Id.* According to the Plaintiffs, Commerce found during verification that Yantai's customers and agents had, in fact, earned less than the reported

amounts. *Id.* Claiming that the inaccurate reporting was adverse to Yantai's interests, Plaintiffs contend that Commerce should have accepted the reported amount as a conservative estimate pursuant to Commerce's normal practice. *Id.*

Additionally, Plaintiffs assert that Commerce, in applying adverse facts available, improperly determined to deduct amounts for rebates and commissions from all U.S. sales, including sales to original equipment manufacturers ("OEM"), when findings applied only to aftermarket sales. *Id.* Plaintiffs thus contend that the resulting dumping margin was improperly punitive and assert that Commerce acted contrary to its obligation to determine an accurate dumping margin. *Id.* at 38–39.

Plaintiffs further contend that Commerce's normal practice is to accept information presented by a respondent on the record absent any information to the contrary. *Id.* at 39. Arguing that the record is "consistent and unchallenged" in that rebates and commissions were paid only in the context of aftermarket sales, Plaintiffs state that Commerce acted contrary to its normal practice by applying adverse facts available to its OEM sales. *Id.* Plaintiffs thus complain that Commerce erred by refusing to apply the reported rebates and commissions on aftermarket sales and by applying the rebates and commissions to all sales including OEM sales. *Id.* at 40.

B. Defendant's Contentions

Commerce contends that its application of partial adverse facts available with respect to Yantai's ISEs, rebates and commissions is supported by substantial evidence and is otherwise in accordance with law. Def.'s Resp. at 21. Commerce states that Yantai failed verification and Commerce was not obligated to accept the post-verification submissions. *Id.*

With respect to its ISEs, Commerce claims Yantai failed to "provide the explanation and information necessary to trace its reported [ISEs] to its audited financial statements." *Id.* at 21–22. According to Commerce, the cost center information provided "did not include all of the cost centers for Yantai Timken's U.S. entity" and therefore "[could not] be used to demonstrate completeness, or as a basis for tracing down from the financial statements to proof of payment for these expenses." *Id.* Commerce notes that Yantai provided the incomplete cost center information after Commerce had completed the ISEs section of the verification "so that it was not possible to identify whether all the appropriate expenses were included in Timken's calculation of [ISEs] for the POR." *Id.*

Moreover, Commerce states that, prior to verification, Yantai had not reported in its questionnaire responses the ratios it used to allocate its ISEs to the various sections of the company by either manufacturing or selling functions. *Id.* at 22. Commerce further states that, at verification, Yantai similarly failed to provide the allocation

ratios. *Id.* According to Commerce, it was thus unable to verify Yantai's allocation methodology for its ISEs without these ratios and the financial records tied to the audited financial statements. *Id.*

Commerce states that it only learned during verification that Yantai's reported ISEs in its questionnaire responses did not include all of the ISEs reported in its audited financial statements. *Id.* at 22–23. According to Commerce, it identified additional ISEs that should have been reported, but were not, upon examination of the profit and loss statements. *Id.*

Based on the foregoing, Commerce concluded that Yantai's reported ISEs were not verified with the exception of the total ISEs figure in Timken's audited financial statements. *Id.* Because Yantai failed to report all of its ISEs and it failed to support its reported ISEs figures and allocations, Commerce contends that it was required to resort to facts available pursuant to the antidumping statute and that it had "substantial basis for rejecting Yantai's request for a second verification." *Id.* at 23–24.

Commerce argues that it properly determined to apply an adverse inference to facts available because the record demonstrates that Plaintiffs did not cooperate to the best of their ability. *Id.* at 26. Commerce states that Plaintiffs' "failure to submit in a timely manner the supporting documentation that Commerce requested precluded Commerce from verifying the company's reported [ISEs]." *Id.* at 28. In addition, Commerce contends that Yantai "did not provide any documentation beyond the audited financial statements to support the calculations and representations at issue" and this failure "precluded Commerce from determining whether the submitted information was accurate and complete." *Id.* Commerce also discovered information at verification which contradicted Yantai's questionnaire responses. *Id.*

According to Commerce, Plaintiffs admitted their capacity to comply with Commerce's requests in their post-verification brief, yet Plaintiffs offered no justification for failing to provide the information in a timely manner. *Id.* at 28–29. Commerce notes that Plaintiffs do not argue that they were unable to understand the nature of Commerce's request for information, that they were unfamiliar with the verification or that Commerce's instructions were unclear. *Id.* at 29. Commerce contends that "[a]n adverse inference was warranted because a reasonable respondent would have made some effort to ensure Commerce would be able to verify the information that it had reported for verification rather than waiting until after the verification report has been issued to seek a second round of verification." *Id.* Finding that Plaintiffs had the ability to provide the requested information, but failed to provide complete and accurate information without any justification, Commerce concludes that it properly determined that Plaintiffs failed to cooperate to the best of their ability. *Id.*

Commerce next argues that it cannot simply add the unreported ISEs discovered at verification to the reported ISEs figure as suggested by the Plaintiffs because the reported ISEs figure and allocations also failed verification. *Id.* at 34–35. Furthermore, Commerce contends that its selection of the total ISEs from Timken's audited financial statement is based upon a reasonable inference. *Id.* at 35. Even though the figure may include manufacturing expenses, Commerce notes that "the allocation Yantai Timken reported between indirect manufacturing and selling expenses *failed verification* and is therefore not reliable information upon which to make any allocation." *Id.* at 35–36. As Yantai had failed verification of its ISEs allocations, Commerce states that it had "no information upon the record as to what portion, if any, of the total [ISEs] figure in the audited financial statements is associated with manufacturing." *Id.* at 36. Accordingly, Commerce claims that its selection of the total ISEs figure from the audited financial statements as partial application of adverse fact available is supported by substantial evidence. *Id.*

In response to Plaintiffs' assertion that Commerce improperly rejected explanations provided after verification had been completed, Commerce claims that Timken's submissions were properly rejected as they contained discussion of new facts. *Id.* at 24–26. Commerce argues that it may, at its discretion, accept new information after verification, but it is not obligated to do so. *Id.* at 24. Commerce further argues that it did not abuse its discretion by refusing to accept new information submitted by Timken. *Id.* at 25. Since verification serves to ascertain the accuracy and completeness of respondents' submissions without requiring their entire books and records to be on the record of the administrative proceedings, Commerce argues that accepting new information submitted post-verification would undermine this purpose. *Id.* at 25–26. As such, Commerce asserts that Yantai should not be permitted to rehabilitate its failed verification by submitting new information and explanation. *Id.* at 26. Indeed, Commerce suggests that Plaintiffs, by referring to "extra-record facts" in their motion, are essentially asking the Court to conduct a new verification. *Id.* at 29–31.

Commerce argues that Plaintiffs' reliance on 19 C.F.R. § 351.309(b)(1) as authority to submit its post-verification submissions is unavailing because "that regulation refers to the presentation of legal arguments and explanations concerning information already submitted on the record and subjected to verification." *Id.* at 32. Citing case law, Commerce argues that "case and rebuttal briefs are *not* an appropriate place to provide new information along with explanations of that new information." *Id.* In the instant matter, Commerce states that it "reasonably determined that it was too late in the proceeding to accept new information and explanations about that new information because the deadline for submission of new factual information had passed and such information was not sub-

ject to the test of the verification which took place." *Id.* Commerce agrees with the Plaintiffs that its usual practice is to accept explanations of factual information already on the record, but notes that Plaintiffs here sought to submit new factual information. *Id.* at 33.

In addition, Commerce argues that Plaintiffs' reliance on *Timken*, 28 CIT 329, 318 F. Supp. 2d 1271 (2004), is misguided because the respondent there sought to correct errors in its questionnaire response and miscategorized sales after the preliminary determination. *Id.* Commerce argues that Plaintiffs here seek to submit new information and explanations of new information after verification to remedy failures at verification. *Id.* If Plaintiffs were permitted to do so, Commerce argues that there would be no incentive for respondents to report information accurately in their pre-verification submissions since they would be permitted to submit new information following verification guised as "corrections." *Id.* at 34.

With respect to Plaintiffs' claim regarding rebates and commissions, Commerce contends that its determination to apply the maximum rebates and commission rate as partial adverse facts available is supported by substantial evidence. *Id.* at 36. Commerce states that at verification Yantai failed to demonstrate the total amount of rebates and commissions paid to its customers and to tie the reported amounts to its audited financial statements. *Id.* Specifically, Commerce states that while Yantai reported that it granted rebates and paid commissions on U.S. sales, it could not demonstrate the amounts or the recipients of those rebates and commissions. *Id.* at 37. Commerce further states that Yantai submitted worksheets at verification indicating that no rebate and commission payments were made, but those worksheets could not be tied to internal accounting documents. *Id.* at 38. Accordingly, Commerce found that it had "no verifiable way to determine what sales received the reported rebates and commissions, and therefore properly resorted to facts available." *Id.* Commerce thus determined that Yantai had not acted to the best of its ability because it failed to provide information and explanation within Yantai's control. *Id.* at 38–39. Commerce therefore contends that it reasonably exercised its discretion to apply as adverse facts available the highest of the reported commission and rebate rates to all U.S. sales. *Id.* at 39.

In response to Plaintiffs' assertion that Yantai's reported figures should be accepted as conservative estimates, Commerce argues that it could not even verify that the reported figures were conservative as claimed. *Id.* Because Commerce was not provided with Yantai's books and records with which to verify the reported rebates and commissions figures, Commerce contends its application of the highest of the reported commission and rebate rates to all U.S. sales was proper and reasonable. *Id.*

C. Defendant-Intervenor's Contentions

Peer supports Commerce's application of partial adverse facts available, and accordingly, requests that the Court deny Plaintiffs' motion. Defendant-Intervenor's Mem. P. & A. Opp'n Pls.' Mot. J. Agency R. ("Peer's Opp'n") at 1–2. In addition to the arguments put forth by Commerce in support of the *Final Results*, Peer notes that Plaintiffs, in support of their proposed adjustment of the ISEs, erroneously rely on "Commerce decisions and court cases predicated on reliable data, not on partial adverse facts available." Peer's Opp'n at 10–11.

Peer goes on to argue that Yantai failed verification of a number of expenses and notes that some of the expenses reported to Commerce were based on preliminary or hypothetical data. *Id.* at 11–12. Peer contends that such significant verification failures would normally result in the application of total facts available and adds that the deficiencies in Plaintiffs' response and their inadequate efforts at verification are more egregious in light of the fact that Plaintiffs initiated the review and knew that verification was mandatory. *Id.* at 12.

Peer next argues that Commerce properly applied the full amount of ISEs listed on the audited financial statements of Timken consistent with the statute. *Id.* at 12–17. Moreover, Peer contends that "[o]nce it determines that it is appropriate to assign adverse facts available, Commerce has discretion in choosing a specific dumping margin." *Id.* at 17. Noting that "Commerce is not required to prove that the adverse facts available rate is the best information," *id.*, Peer thus concludes that Commerce properly "used Timken's [ISEs] at the level at which such expenses were verified and substantiated on the record," *id.* at 18.

Rather than adopting Yantai's approach of adding the expense items that were excluded from the reported ISEs, Peer contends that, at minimum, Yantai should have demonstrated the appropriateness of excluding a part of the ISEs appearing on the audited financial statements. *Id.* Indeed, Peer notes that "it is the respondent, and not Commerce, that bears the burden of demonstrating its entitlement to a favorable adjustment." *Id.* at 19. Peer contends, however, that the "record of this case does not substantiate Yantai Timken's claim that the company's [ISEs] should be allocated between the selling and the manufacturing function." *Id.* Because Yantai failed to provide Commerce with source documents that could demonstrate that Yantai sought to exclude expenses supporting functions other than sales, Peer contends that Commerce was correct to include the entire amount of the ISEs on Timken's audited financial statements. *Id.* at 19–20.

Peer also contends that Commerce did not err in refusing Yantai's post-verification submission and requesting Yantai to redact a portion of its case brief. *Id.* at 20–24. According to Peer, Plaintiffs rely on cases which involve verified information and respondents in those

cases did not seek to recharacterize unverified data. *Id.* at 20–26. While conceding that courts have allowed parties to submit information which corrected or corroborated the record after the factual information deadline and after the issuance of preliminary results, Peer contends that those cases did not involve unreliable respondent data. Indeed, Peer contends that the controlling case law requires finding that Plaintiffs should have provided the additional explanations during verification and not afterwards. *Id.* at 21–22.

Peer thus agrees with Commerce that application of partial adverse facts available with respect to Yantai's ISEs was appropriate and disagrees with Plaintiffs' argument that Commerce should have simply added to Yantai's ISEs those expense items that were not included. *Id.* at 25–28. Peer further contends that "Commerce's decision to include all [ISEs] appearing on the audited financial statements, as partial adverse facts available, is consistent with other determinations." *Id.* at 27. Peer notes that, in any event, the statute does not allow Commerce to rely on unverified data to calculate dumping margins as suggested by the Plaintiffs. *Id.* at 26.

Peer adds that Yantai is the only party in possession of the documents that could prove completeness, but it has failed to put forth its best effort. *Id.* at 26. In Peer's view, Plaintiffs' proposed adjustment would reward them for failing to adequately report to Commerce accurate and complete figures or to support the figures with company's books and records. *Id.* at 26–27. Peer further contends that Commerce's determination to employ partial adverse facts available here is consistent with prior practice. *Id.* at 27.

In addition, Peer concurs with Commerce's application of adverse facts available to Yantai's commissions and rebates. Peer contends that: (1) Plaintiffs failed to meet their burden of "building an adequate record" and providing "accurate and complete" information," *id.* at 30; (2) Commerce could not verify even one transaction selected at verification, *id.* at 31; and (3) in arguing that Commerce's normal practice is to accept conservative estimates, Plaintiffs cite to Commerce decisions that are inapplicable to the instant matter because they are based on verified respondent data, *id.* Peer further contends that Commerce's calculation of the rebates and commission was not punitive and was consistent with Commerce precedent. *Id.* at 34–35.

II. Analysis

A. Verification

The Court first addresses whether Commerce properly determined that Yantai's reported ISEs were not tied to the financial statements. The Court reviews Commerce's verification procedures for an abuse of discretion. *See Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1383–84 (Fed. Cir. 2001)

(citing *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997)).

The antidumping statute mandates that Commerce verify "all information relied upon in making . . . a final determination in a review." 19 U.S.C. § 1677m(i)(3). However, it does not set forth any particular method for conducting verification. Rather, "[t]he decision to select a particular [verification] methodology rests solely within Commerce's sound discretion." *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987). Indeed, "the statute gives Commerce wide latitude in its verification procedures." *American Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994).

In the instant case, the Court finds that Commerce did not abuse its discretion in finding that Yantai's ISEs figures were not verified. The record indicates that Yantai, in calculating the ISEs it reported to Commerce, allocated certain costs to Yantai's various divisions. *See* CEP Verification Report at 14. Each expense was allocated depending on the way each division benefitted from the expense. *See id.* Expenses were also allocated depending on the selling and manufacturing functions of each division. *See id.* Prior to verification Yantai did not provide the ratios it used to allocate its ISEs to the various divisions of the company and between manufacturing and selling functions. *See id.* At verification, Yantai similarly failed to provide the allocation ratios. *See id.*

The record further indicates that Yantai provided no documentation for its ISEs below the level of the profit and loss statement for the bearings division. *See id.* Yantai failed to provide "sub-ledgers and other source documents to tie reported expenses such as warehousing expenses, international freight, commissions, rebates or ISEs to its audited financial statements" despite clear statements in the verification outline that such documents were required. Issues and Decision Memorandum for the Final Results of the 17th Administrative Review of the Antidumping Duty order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China ("Issues & Decision Memo") at 13. Indeed, Yantai was informed that it "must demonstrate how the data submitted in the response reconciles to Timken's general ledger, cost accounting system, and financial statements." Public Admin. R. Doc. 152. Commerce therefore determined that it was not able to verify the accuracy of Yantai's questionnaire responses or rely on the reported figures to calculate accurate margins due to Yantai's failure to provide the requisite requested documents that would tie the reported data to the audited financial statements. *See* Issues & Decision Memo at 13–14.

The record indicates that Commerce learned at verification that Yantai did not report all of the ISEs on its audited financial statements "despite the statement in its questionnaire response that it included the ISEs as classified in its accounting system." Issues &

Decision Memo at 22. At verification, Yantai explained to Commerce that it had excluded certain expenses on the belief that they "did not pertain to the production of the subject merchandise in the PRC or the sale of the subject merchandise in the United States." *Id.* At verification, Commerce identified yet more expenses that Yantai failed to report that should have been reported.

The record further indicates that Yantai provided a list of cost centers after the relevant section of verification had been completed, and therefore, the expenses could not be verified. *See* CEP Verification Report at 14. The list provided failed to include all of the cost centers, and it "[could not] be used to demonstrate completeness, or as a basis for tracing down from the financial statements to proof of payment for these expenses." Issues & Decision Memo at 23.

The Court finds no support in the record for Plaintiffs' conclusory allegations that "all expenses were duly reported in the response, and were tied to the Company's books and records" and that "Commerce was able to judge the completeness of the company's reporting because all of the line items for expenses were included on the internal reports used to calculate the reported expenses." Pls.'s Mem. at 35, 36. Similarly meritless is Plaintiffs' argument that Commerce should accept their reported figures because their methodology is conservative and over-inclusive. Given the wide latitude accorded Commerce with respect to its verification method, the Court finds Commerce did not abuse its discretion in finding that Yantai failed verification of its ISEs.

B. Supplemental Materials

The Court next addresses Plaintiffs' argument that Commerce: (1) acted contrary to its obligation to calculate a margin that isas accurate as possible when it refused to accept the supplemental materials submitted to verify the ISEs following the issuance of the preliminary determination, Pls.' Mem. at 30–32; and (2) acted contrary to its practice and to case law when it directed Yantai to redact certain portions of its case brief, *id.* at 27–29.

With respect to the former argument, Plaintiffs rely on *Timken*, 28 CIT at 339, 318 F. Supp. 2d at 1279, for the proposition that Commerce is required to accept new information following issuance of a preliminary determination to fulfill its obligation to calculate accurate dumping margins. Pls.' Mem. at 30–31. Plaintiffs, however, misinterpret *Timken*. As correctly stated by Commerce and Peer, *Timken* permits submission of information after a preliminary determination to correct errors of information already on the record. *See* 434 F.3d at 1353–54. *Timken* is inapplicable to the instant case because Plaintiffs here sought to introduce new factual information after Commerce issued the preliminary results.

"Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and en-

forcement of time limits." *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002). Courts have acknowledged "Commerce's policy of setting time limits to be reasonable" and necessary to "complete its work." *Reiner Brach*, 26 CIT at 559, 206 F. Supp. 2d at 1334.

In the instant matter, the deadline for submitting new factual information was October 18, 2004. *See* Public Admin. R. Doc. 217. Plaintiffs, however, sought to submit new factual information in August 2005. By then, the deadline to submit new factual information had long passed, the verification had taken place and the *Preliminary Results* had been issued. Moreover, throughout the administrative review process, Yantai had ample opportunities to submit complete and accurate information. Indeed, Yantai submitted responses to Commerce's original questionnaire and to Commerce's six supplemental questionnaires. Having determined that Yantai failed verification because it did not report complete and accurate information to Commerce in its questionnaire responses and because it did not provide the necessary documents to Commerce during verification, Commerce reasonably rejected Yantai's supplemental submissions in enforcing its time limitations. In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations. *See e.g., Tatung Co., v. United States*, 18 CIT 1137, 1140–41, 1994 WL 704952, at *4 (1994)(stating that "[d]ue to stringent time deadlines and the significant limitations on Commerce's resources, 'it is vital that accurate information be provided promptly to allow the agency sufficient time for review' ").

The Court also finds no merit to Plaintiffs' latter argument that Commerce acted contrary to its own regulations when it rejected explanations and statements regarding the facts already on the record. Pls.' Mem. at 28. Plaintiffs claim that Commerce should not have redacted portions of its case brief pursuant to 19 C.F.R. § 351.309(b)(1), which provides that Commerce "will consider written arguments in case or rebuttal briefs filed within the time limits in this section."

The record demonstrates that the materials Plaintiffs sought to submit to Commerce in Yantai's case brief, which Commerce then rejected, directly relate to issues that Commerce determined unverified. Commerce reviewed Plaintiffs' case brief and accepted materials that explain and/or corroborate information already on the record and specifically rejected information it deemed to constitute new information. Commerce reasonably determined that the new information could not be accepted because the deadline had long passed and the information was not subjected to verification. The regulation relied upon by the Plaintiffs, of course, does not require Commerce to accept new factual information beyond the established deadline for

submitting such information. *See* 19 C.F.R. § 351.309(b)(1). The Court therefore finds that Commerce properly exercised its discretion in compliance with its regulation in rejecting new factual information.

Based on the foregoing, the Court finds little merit to Plaintiffs' arguments and holds that Commerce properly determined to: (1) reject the supplemental materials submitted following the issuance of the preliminary determination; and (2) request redaction of the new factual information in the case brief. The Court finds Commerce's determinations reasonable and supported by substantial evidence.

C. Application of Partial Adverse Facts Available

Plaintiffs argue that Commerce erred in applying adverse facts available to Yantai's ISEs, commissions and rebates. Application of adverse facts available is a two-step process. First, Commerce may resort to "facts otherwise available" or "facts available" if:

(1) necessary information is not available on the record, or
(2) an interested party or any other person—
(A) withholds information that has been requested by the administering authority or the Commission under thissubtitle,
(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
(C) significantly impedes a proceeding under this subtitle, or
(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle. 19 U.S.C. § 1677e(a).

First, "[t]he focus of subsection (a) is respondent's *failure to provide information*. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information — for any reason — requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

Second, pursuant to 19 U.S.C. § 1677e(b), Commerce may employ adverse inferences to the "facts otherwise available" or "facts available" if:

the administering authority or the Commission (as the case maybe) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may

be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,
(2) a final determination in the investigation under this subtitle,
(3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
(4) any other information placed on the record.

The Court of Appeals for the Federal Circuit ("CAFC") has clarified that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel*, 337 F.3d at 1382. Accordingly, Commerce must: (1) "make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained," then (2) "make a subjective showing that the respondent . . . not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* at 1382–83.

Within this statutory framework, the Court determines whether Commerce properly resorted to adverse facts available with respect to Yantai Timken's ISEs, rebates and commissions.

1) Indirect Selling Expenses

Plaintiffs take issue with Commerce's application of partial adverse facts available with respect to Yantai Timken's ISEs. Specifically, Plaintiffs complain that Commerce violated its obligation to calculate the most accurate dumping margin possible by using a figure for ISEs that includes manufacturing expenses.

It is true that Commerce has an obligation to calculate the most accurate dumping margin possible even when applying adverse facts available. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002)(citing *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)(noting that "[i]t is clear . . . that [Congress] intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance")).

Plaintiffs' argument, however, fails to recognize that Commerce would be in violation of its obligation to calculate accurate dumping margins if it were to use unverified information in its calculations as Plaintiffs suggest. Moreover, Commerce would be in violation of sec-

tion 1677m(i) requiring Commerce to verify all information upon which it relies. Rather, as discussed above, the antidumping statute specifically sets forth the requirements that compel Commerce to resort to facts available. Also, as noted above, the antidumping statute provides that Commerce may apply adverse inferences to the facts available upon determination that the respondent did not cooperate to the best of its ability. Indeed, courts have noted that "[w]here a party has not cooperated, Commerce . . . may employ adverse inferences about the information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *E.g. Nippon Steel*, 337 F.3d at 1381 (citing Uruguay Round Agreements Act, Pub.L. No. 103–465, 108 Stat. 4809 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4198–99).

In the instant matter, the Court finds that Commerce properly resorted to facts available with respect to Yantai's ISEs. The record evidence demonstrates that Yantai withheld information, failed to provide information requested by Commerce, significantly impeded the proceeding and provided unverifiable information. As discussed in detail above, the record indicates that Yantai Timken failed to: (1) include certain expenses in its reported indirect selling expenses; (2) identify the ratios used to allocate expenses amongst the various divisions; and (3) timely provide complete cost center information.

The Court further finds that Commerce's application of adverse inference to the facts available was reasonable. The record demonstrates that Plaintiffs did not cooperate to the best of their ability or do the maximum they are able to do. In the verification outline, Commerce informed Yantai of its obligation to account for the total value of each expense and to trace each expense to both the audited financial statements and to the proof of payment. *See* Public Admin. R. Doc. 152. However, Yantai did not provide sub-ledgers and other source documents, other than the cumulative profit and loss statements, to tie the ISEs to financial statements. *See* Issues & Decision Memo at Comment 7. Plaintiffs do not allege that the source documents that would have enabled Commerce to verify Yantai's reported figures do not exist. Indeed, Plaintiffs' offer to provide documents responsive to Commerce's request made immediately after the issuance of the *Preliminary Results* evidences Plaintiffs' capacity to timely comply. *See* Public Admin. R. Doc. 189. Moreover, Plaintiffs do not otherwise offer any justification for failing to provide the information in a timely manner. Nor do the Plaintiffs allege that they were unable to understand the nature of Commerce's request for information, that they were unfamiliar with the verification process or that Commerce's instructions were unclear. Because Plaintiffs failed to provide the requested information without any justification despite their ability to do so, Commerce reasonably concluded that Plaintiffs failed to cooperate to the best of their ability.

Having determined that Commerce properly resorted to adverse facts available, the Court now turns to the issue of whether Commerce erred in its methodology of calculating the figures for ISEs, rebates and commissions. Commerce has broad discretion in choosing which facts to rely on in applying an adverse inference, but it may not be overly punitive in its selection of facts otherwise available. *See, e.g., De Cecco*, 216 F.3d at 1032–33. Indeed, the CAFC has "repeatedly held that Commerce's special expertise makes it the 'master' of the antidumping law, entitling its decisions to great deference from the courts." *De Cecco*, 216 F.3d at 1032.

Section 1677e(b) grants Commerce the discretion to use adverse inferences when relying on information from various "facts otherwise available" sources. *See* 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.308(c). Commerce has "discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative." *De Cecco*, 216 F.3d at 1032. "Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." *Id.* Moreover, "[t]he Court's role is not to determine whether the information chosen was the 'best' actually available. Rather the Court must affirm the [agency's] choice if supported by substantial evidence on the record and otherwise in accordance with law." *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 623, 799 F. Supp. 110, 114 (1992).

Here, the record evidence indicates that Yantai's reported figures were based on allocation ratios. *See* CEP Verification Report at 14. Because Yantai's allocation ratios were not reported and not verified, Commerce had no reliable information on the record upon which to determine if any portion of the total ISEs in the audited financial statement was attributable to manufacturing expenses. *See id.* Thus, Commerce employed the total ISEs figure from the audited financial statement, which was verified. *See* Issues & Decision Memo at 23.

The Court finds Commerce's methodology reasonable and supported by substantial evidence. Plaintiffs' alternative, to add the expenses Yantai failed to report, is untenable, as it would require Commerce to employ figures that failed verification. As such, the Court finds that Commerce's determination is supported by the record and is otherwise in accordance with law. The Court accordingly sustains Commerce's determination to apply, as partial adverse facts available, the total ISEs figure from Timken's audited financial statements.

2) Rebates and Commissions

Plaintiffs also take issue with Commerce's decision to "apply the highest amount of rebate or commissions that could have been in-

curred for each U.S. sale based upon Yantai Timken's rebates and commissions agreements with its customers and sales agents." Issues & Decision Memo at 29. Specifically, Plaintiffs argue that the record is "consistent and unchallenged" in that rebates and commissions were paid only in the context of aftermarket sales and contend that Commerce erred by applying the rebates and commissions to all sales including OEM sales. Pls.' Mem. at 39.

As discussed in detail above, the antidumping statute requires Commerce to resort to facts available if a respondent fails to provide requested information or provides information that cannot be verified. Commerce may employ adverse inferences to the facts available if the respondent failed to cooperate by not acting to the best of its ability.

The Court finds that Commerce's determination to resort to facts available is substantially supported by record evidence. The record indicates that Yantai supplied information regarding rebates and commissions that could not be verified and further failed to provide source documents requested by Commerce. Yantai reported that it granted rebates and paid commissions on U.S. sales, but could not demonstrate to Commerce the amounts or the recipients of those rebates and commissions. *See* Issues & Decision Memo at 27–29.

Commerce provided detailed instructions to Yantai regarding the documents it required to complete verification. *See* Public Admin. R. Doc. 152. In a letter to Yantai, Commerce advised that it must provide "complete supporting documentation for each pre-selected sales transaction and each verification procedure" and that "[c]omplete supporting documentation would consist of a complete trail of calculations, supporting schedules, selected invoices and copies of pages from sub-ledgers tracing the reported per unit cost back to the general ledger accounts and source documents." *Id.* The verification outline additionally provided a summary of required source documents. *See id.* Yet Yantai failed to provide responsive documents to "tie the total annual amount of commissions and rebate payments to its audited financial statements, and could not demonstrate the total value of commissions and rebates paid to each of its customers or sales agents." Issues & Decision Memo at 28.

Indeed, Commerce could not verify any of the sales traces. "For sales involving rebates and commissions, Timken provided the 'Service Agreement' signed between Timken and the sales agent, but Timken did not provide primary source documents as evidence of its commission payments." CEP Verification Report at 18. With respect to one sales trace, Commerce states "[a]lthough the Section C response reported that [Timken] also paid a [certain percentage] rebate to this customer, Timken claimed at verification that [the customer] did not meet the requirements to earn [that rebate]." *Id.* at 20. In addition, "Timken's Section C response reported that it also paid [a certain percentage] of net sales as commission to the sales

agent. *Id.* Timken provided the service agreement signed by both Timken and the sales agent, but at verification, Timken claimed that because the sales agent's customer returned a significant number of products, the sales agent did not earn any commission [in the relevant period]." *Id.* Yantai submitted worksheets to Commerce officials during verification, but those worksheets could not be tied to internal accounting documents. *See id.* Commerce thus concluded that Yantai's claims were not substantiated. *See id.*

Examining another sales trace, Commerce states with respect to a rebate paid to a customer that "although Timken claimed that this rebate covered sales of subject merchandise sold during [the relevant time period], it did not provide any documentation supporting the sales that the rebate covered. In fact, the only document Timken provided for this rebate trace was a cancelled check, with a handwritten note indicating that the check applied to [this customer's] rebates for [the relevant time period]." CEP Verification Report at 19. Based on the foregoing, the Court finds Commerce's determination that Yantai failed verification of its reported rebates and commissions reasonable and supported by substantial evidence.

Commerce's finding that Yantai had not acted to the best of its ability is reasonable and supported by substantial evidence. Commerce requested "general ledger, or sub-ledger accounts for accounts receivable or rebate expense for all rebates paid to relevant customers in order to demonstrate that rebates and commissions were not paid to the sales agents and customers that Timken now claims were not entitled to a rebate." *Id.* at 22. Plaintiffs did not provide those documents. *See id.* Plaintiffs do not allege that they did not possess the requested documents. Indeed, shortly after Commerce issued the *Preliminary Results*, Plaintiffs "offered to submit corrections to remove its over-reporting of rebates and commissions along with documentation confirming that there were no unreported rebates or commissions." Pls.' Mem. at 18. Worksheets provided by Yantai purporting to show that it made no payments were not tied to internal accounting documents. *See* CEP Verification Report at 22. The record further indicates that Yantai did not propose any other means for Commerce to verify its rebates and commissions. *See* Issues & Decision Memo at 28; CEP Verification Report at 20.

Commerce therefore reasonably determined that Yantai failed to cooperate to the best of its ability. The Court finds substantial support in the record evidence that Plaintiffs failed "to put forth its maximum efforts to investigate and obtain the requested information from its records," *Nippon Steel*, 337 F.3d at 1382–83, and that their behavior fell below the standard for a "reasonable respondent." The Court, therefore, sustains Commerce's determination to apply, as adverse facts available, the highest of the reported commission and rebate rates to all U.S. sales.

Plaintiffs assert that Commerce's normal practice is to accept estimated figures if the inaccuracy works against the respondent's interest. However, the record supports Commerce's finding that it could not determine whether Yantai's reported figure was a conservative estimate. *See* Issues & Decision Memo at 28. The Court has also considered Plaintiffs' arguments that Commerce violated its obligation to calculate accurate margins and that the resulting margin is punitive. Plaintiffs, however, presuppose that the information they rely on is accurate. Because Commerce cannot rely on unverified information, the Court is satisfied that the dumping margin calculated by Commerce is as accurate as possible and not punitive.

CONCLUSION

For the reasons discussed above, the Court finds that Commerce's *Final Results* are supported by substantial evidence in accordance with law. Accordingly, the Court denies Plaintiffs' Motion for Judgment Upon the Agency Record. This matter is dismissed.

Before: Nicholas Tsoucalas, Senior Judge

YANTAI TIMKEN CO., LTD. and THE TIMKEN COMPANY, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and PEER BEARING COMPANY, Defendant-Intervenor.

Court No.: 06–00020

JUDGMENT

This case having been duly submitted for decision and theCourt, after due deliberation, having rendered a decision herein;now, in accordance with said decision, it is hereby

ORDERED that the final determination of the United States Department of Commerce, International Trade Administration, entitled *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 71 Fed. Reg. 2,517 (Jan. 17,2006), *as amended* and it is further 71 Fed. Reg. 9,521 (Feb. 24, 2006), is affirmed;

ORDERED Plaintiffs' motion pursuant to USCIT R. 56.2 is denied; and it is further

ORDERED that this case is dismissed.

Slip Op. 07–161

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

SNR ROULEMENTS, KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK CORP., NSK BEARINGS EUROPE, LTD., NSK LTD., NTN-BCA CORP., NTN BOWER CORP., NTN-DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN BEARING CORP. OF AMERICA, NTN CORP., INA–SCHAEFFLER KG, INA USA CORP., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORP., *f/k/a "THE TORRINGTON COMPANY"* Defendant-Intervenor.

Consol. Court No. 01–00686

[Plaintiffs' Motion for Extension of Preliminary Injunction isdenied]

Dated: November 2, 2007

Grunfeld, Desiderio, Lebowitz & Silverman & Klestadt, LLP (*BruceMitchell*) for Plaintiff SNR Roulements.

Sidley Austin Brown & Wood, LLP (*Neil R. Ellis*) for Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Crowell & Moring, LLP (*Matthew P. Jaffe* and *Robert A. Lipstein*) for Plaintiffs NSK Corporation, NSK Bearings Europe, Ltd., and NSK Ltd.

Baker & McKenzie, LLP (*Donald J. Unger, Diane Alexa MacDonald* and *Louisa Vassilova Carney*) for Plaintiffs NTN-BCA Corporation, NTN Bower Corporation, NTN-Driveshaft, Inc., American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America and NTN Corporation.

Sonnenschein Nath & Rosenthal (*Stephen L. Gibson*) for Plaintiffs INA-Schaeffler KG and INA USA Corporation.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; (*Claudia Burke*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Deborah King*), Of Counsel, for Defendant United States.

Stewart & Stewart (*Geert M. DePrest* and *William A. Fennell*) for Defendant-Intervenor Timken U.S. Corp.

OPINION

GOLDBERG, Senior Judge: This case is before the Court on Plaintiffs' joint motion for extension of the existing preliminary injunction. Plaintiffs also request that this motion be heard on an expedited basis. For reasons indicated below, this Court denies Plaintiffs' motions.

I. BACKGROUND

In September 2001, Koyo Seiko Co. Ltd., Koyo Corp. of U.S.A., NTN-BCA Corp., NTN Bower Corp., NTN-Driveshaft, Inc., American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, and NTN Corp. (collectively "Plaintiffs") challenged the results of the

Department of Commerce's ("Commerce") 11th administrative review of antidumping orders on ball bearings from Japan and other countries. This Court granted Plaintiffs' separate motions for preliminary injunction, enjoining Commerce from issuing liquidation instructions for the pendency of the action.

This Court remanded several issues to Commerce for reconsideration, eventually sustaining Commerce's remand results. *See SNR Roulements v. United States*, Slip. Op. 05–12, 2005 WL 189737 (CIT Jan. 27, 2005). Plaintiffs appealed to the Federal Circuit, which affirmed this Court in an unpublished opinion. *See SNR Roulements v. United States*, 210 Fed. Appx. 992 (Fed. Cir. 2006). Subsequently, Plaintiffs filed a motion for a panel rehearing. The Federal Circuit also denied this petition. *See NSK Ltd. et al. v. United States*, 2007 U.S. App. LEXIS 11681 (Fed. Cir. 2007). Plaintiffs next filed a writ of certiorari to the Supreme Court, which the Supreme Court denied on October 29, 2007.

During the course of the *SNR Roulements* litigation, the WTO Appellate Body found that the United States had acted inconsistently with the WTO antidumping agreement by utilizing zeroing procedures in administrative reviews. Appellate Body Report, *United States–Measures Related to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007). The United States announced "it intended to comply in this dispute with its WTO obligations and would be considering carefully how to do so." Dispute Settlement Body, Minutes of the Meeting, WT/DSB/M/226, ¶ 34 (Mar. 26, 2007). Additionally, the United States and Japan mutually agreed to provide the United States with a reasonable amount of time to consider its response to the DSB recommendations. This period will expire December 24, 2007. Agreement on Reasonable Time, *United States–Measures Related to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007).

II. DISCUSSION

This Court may issue a preliminary injunction to enjoin the liquidation of covered entries. 19 U.S.C. § 1516a(c)(2) (2000); *see Yancheng Baolong Biochemical Prods. Co. v. United States*, 28 CIT 578, 581–82, 343 F. Supp. 2d 1226, 1229 (2004). Under such an injunction, all enjoined entries "shall be liquidated in accordance with the final court decision in the action." 19 U.S.C. § 1516a(e)(2). A decision becomes final when it can no longer be appealed, and the preliminary injunction dissolves at this point. *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002). Accordingly, the Supreme Court's decision to deny certiorari terminates the current preliminary injunction, and constitutes a final decision mandating liquidation under § 1516a(e)(2).

Even if it could be argued that this Court had the inherent authority to modify an injunction beyond the final decision in an action, it would not grant Plaintiffs' motion. Courts have the "discretion to modify injunctions for changed circumstances." *Aimcor, Ala. Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999) (*citing Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961)). However, the party seeking to modify a preliminary injunction bears the burden of establishing a change in circumstances. *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 340 (3d Cir. 1993). Plaintiffs argue that Commerce's statement indicating their intent to comply with the WTO Appellate Body decision merits extension of the current injunction.

Plaintiffs' argument is unavailing in light of the recent decision in *Corus Staal BV v. United States*. 2007 WL 2741470 (Fed. Cir. Sept. 21, 2007). In *Corus Staal*, an importer argued that the Federal Circuit should remand the final results of an administrative review in light of U.S. statements indicating Commerce was considering abandoning zeroing methodology, which are the same statements at issue in this case. The Federal Circuit noted that the United States has stated it " 'intends to comply in this dispute with its WTO obligations,' [and] 'it will be considering carefully how to do so.' " *Id.* at *3. Clearly, "[t]hose statements do not amount to the unequivocal adoption of the WTO decision." *Id.* (citation omitted). The Court also noted that Commerce had specifically declined to change its policy, because no change had been made to its zeroing methodology within the context of administrative reviews.

More recently, in its 17th administrative review of antidumping duties on ball bearings, Commerce addressed similar comments arguing that Commerce's current interpretation of the statute is unreasonable in light of the recent DSB recommendations concerning zeroing. *See* Issues and Decision Memorandum, *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, A–100–101 (Oct. 12, 2007), at 9, *available at* http://ia.ita.doc.gov/frn/summary/multiple/E7–2015101.pdf. Commerce justified the continuing use of the current approach by explaining that "because no change has yet been made with respect to the issue of 'zeroing' in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties for those administrative reviews." *Id.*

In light of *Corus Staal* and Commerce's recent statements, it is clear that no change in circumstances has occurred. The fact that the United States has stated that it will consider the DSB recommendations, and has agreed to do so within a set time frame, do not constitute changed circumstances as to merit modification of the preliminary injunction.

III. CONCLUSION

In light of the foregoing, Plaintiffs' motion for extension of the preliminary injunction is denied.[1] A separate order will be issued in accordance with this opinion.

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

SNR ROULEMENTS, KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSKCORP., NSK BEARINGS EUROPE, LTD., NSK LTD., NTN-BCA CORP., NTN BOWER CORP., NTN-DRIVESHAFT, INC., AMERICAN NTN BEARING MANUFACTURING CORP., NTN BEARING CORP. OF AMERICA, NTN CORP., INA SCHAEFFLER KG, INA USA CORP., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORP., *f/k/a "THE TORRINGTON COMPANY"* Defendant-Intervenor.

Consol. Court No. 01–00686

ORDER

Upon consideration of Plaintiffs' Joint Motion for Extension ofPreliminary Injunction, Joint Request for Emergency Hearing on Joint Motion for Extension of Preliminary Injunction, and Joint Request for Order to Show Cause Why Joint Motion for Extension of Preliminary Injunction Should Not Be Heard on an Expedited Basis, Defendant United States' and Defendant-Intervenor Timken U.S. Corp.'s Responses thereto, and all accompanying papers, and upon due deliberation, it is hereby:

ORDERED that Plaintiffs' Joint Motion for Extension of Preliminary Injunction is **DENIED**; it is further

ORDERED that Plaintiffs' Joint Request for Emergency Hearing on Joint Motion for Extension of Preliminary Injunction is **DENIED**; it is further

ORDERED that Plaintiffs' Joint Request for Order to Show Cause Why Joint Motion for Extension of Preliminary Injunction is **DENIED**.

IT IS SO ORDERED.

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[1] This Court need not discuss Plaintiffs' additional motions for expedited briefing and for a hearing in light of this opinion.

SLIP OP. 07–162

WHITNEY BROTHERS, INC., *Plaintiff*, v. UNITED STATES SECRETARY OF AGRICULTURE, *Defendant*.

BEFORE: GREGORY W. CARMAN, JUDGE

Court No. 06–00426

Date: November 6, 2007

[Defendant's motion for judgment upon the agency record is GRANTED; and Plaintiff's case is dismissed. Judgment for Defendant.]

Steven D. Schwinn, Attorney, The John Marshall Law School, and *Maria Caldera*, Student Attorney, University of Maryland School of Law, for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; *Delisa M. Sánchez*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, for Defendant.

Jeffrey Kahn, of Counsel, Office of the General Counsel, U.S. Department of Agriculture, International Affairs & Commodity Programs Division, for Defendant.

OPINION

CARMAN, JUDGE: This matter is before the court on a motion for judgment upon the agency record. Defendant, the U.S. Department of Agriculture ("USDA" or "Defendant"), moves pursuant to USCIT R. 56.1 to request that this Court affirm the agency decision by the USDA, which denied Plaintiff trade adjustment assistance ("TAA") benefits. Plaintiff, Whitney Brothers, Inc. ("Whitney Brothers" or "Plaintiff"), argues in opposition that Defendant's agency determination was not supported by substantial evidence and otherwise failed to adequately explain its reasoning. Plaintiff requests that this Court deny Defendant's motion and remand the matter to the USDA with special instructions to reconsider its application for TAA benefits. After considering all the briefs and other papers[1] filed in this matter and for the reasons that follow, this Court holds that the USDA's findings of fact with regard to this matter are supported by substantial evidence on the record and that the USDA's legal conclu-

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[1] Plaintiff attached to its response brief an affidavit that was not part of the administrative record ("AR"). (Plaintiff's Mem. of P. & A. of Law in Opp'n to Def.'s Mot. for J. on the Agency R. ("Pl. Resp. Br."), App. B, affidavit of Phil Whitney, Pres., Whitney Brothers) As this Court did not find that the record was incomplete, the affidavit's contents were not considered. *See Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999) ("relevant materials that were neither directly nor indirectly considered by agency decision makers should not be included") (emphasis omitted); *see also Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 259, 261, 661 F. Supp. 1198, 1201, 1202 (1987) (A court will only consider matters outside of the administrative record when there has been a "*strong showing* of bad faith or improper behavior on the part of the officials who made the determination" or when a party demonstrates that there is a "*reasonable basis* to believe the administrative record is incomplete.") (emphasis in original).

sions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the USDA's motion is granted and its administrative determination is affirmed.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

On February 21, 2006, the National Grape Cooperative Association, representing Concord juice grape producers from the State of Washington, petitioned the Foreign Agricultural Service of the USDA for TAA certification. *Trade Adjustment Assistance for Farmers*, 71 Fed. Reg. 15,691 (Dep't Agric. Mar. 29, 2006) (notice) [hereinafter "TAA: *Concord Grapes*"]. The FAS approved the petition, effective March 15, 2006, following an investigation that determined that "increased imports of grape juice, non-concentrated (frozen and not frozen) contributed importantly to a decline in producer prices of Concord juice grapes in Washington by 36 percent during August 2004 through July 2005, when compared with the previous 5-year average." *Id.* Under the TAA program, following petition certification by the USDA, qualified Concord grape producers became eligible to apply for TAA cash benefits.

Whitney Brothers is a family-operated grape farm, located in Prosser, Washington, which grows Concord grapes.[2] (Pl. Resp. Br. 1.) As a result of the approved certification, Plaintiff was eligible to apply for TAA benefits. The application filing deadline for Concord grape juice producers seeking TAA benefits for fiscal year 2006 was set for June 26, 2006. TAA: *Concord Grapes*, 71 Fed. Reg. at 15,691. Plaintiff filed its application with the local branch office of the USDA's Farm Service Agency on May 24, 2006 for TAA cash benefits concerning crop year 2004. (Administrative Record ("AR") at 1.) Along with its application, Plaintiff also submitted to the USDA part of its 2003 and 2004 tax returns (the Schedules F, Internal Revenue Service ("IRS") form 1040) as well as its USDA forms CCC–526. (Confidential ("Conf.") AR at 2 & 3; Compl., Ex. 3 & 4; AR at 13–22.)

Thereafter, the USDA notified Plaintiff by letter, dated October 16, 2006 (the "October 16 Letter"), that its TAA benefits application had been denied. (AR at 37.) The letter stated that Whitney Brothers was denied TAA benefits because it (1) failed to "provide a completed form CCC–526 by the certification deadline (September 30) to verify that [its] average adjusted gross income did not exceed program lim-

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[2] The Concord grape is a robust grape cultivated from ancestral native species–a derivative of a wild *Vitis labrusca* grape that could withstand the harsh New England weather. Concord grapes were first developed near Concord, Massachusetts by Ephraim Wales Bull in 1849. This grape variety is widely produced domestically in the cooler climates of the northern United States, with Washington State producing the largest quantity of Concord grapes. Grape juice, jams, jellies and wine can be made from Concord grapes. *See* www.oncordgrape.org (last visited Oct. 29, 2007); www.uga.edu/fruit/grape.html (last visited Oct. 29, 2007).

its" and (2) "did not provide acceptable documentation of net farm . . . income by the certification deadline (September 30) to show that [its] net income declined from that reported during the petition's pre-adjustment tax year."(*Id.*) A subsequent letter from the USDA, dated November 19, 2006, reiterated the denial of Plaintiff's application and informed them that they had sixty days from November 6, 2006 in which to file an appeal to this Court. (AR at 39.)

Plaintiff timely filed a letter complaint, *pro se*, to the U.S. Court of International Trade on November 20, 2006. Pursuant to Administrative Order 06–01 of this Court, Plaintiff retained counsel.[3] On March 30, 2007, Defendant moved for judgment on the agency record requesting that this Court affirm USDA's denial of Plaintiff's application for TAA benefits. This motion is now before the court.

PARTIES' CONTENTIONS

I. *Defendant's Contentions*

The USDA maintains that it denied the Whitney Brothers's application for TAA cash benefits because its "2004 net farm income[4] was not less than its 2003 net farm income" as the TAA statute requires. (Def.'s Mot. For J. Upon the Agency R. ("Def.'s Reply Br.") 7(emphasis omitted).) The USDA determined that Plaintiff's "2003 net farm loss was $141,252.00 and its 2004 net farm loss was $109,018. Accordingly, Whitney Brothers had an *increase in net farm income* from 2003 to 2004." (*Id.* at 8.)

Defendant in its reply brief concedes that Whitney Brothers had indeed provided a completed form CCC–526, as evidenced by its presence in the administrative record. (*See* Def.'s Reply Br. 11.) Thus, USDA acknowledges that its October 16 Letter is "not accurate in this regard." (*Id.*) Accordingly, this Court will treat the matter as conceded.

II. *Plaintiff's Contentions*

Whitney Brothers contends that the USDA's determination is not supported by "substantial evidence" since the agency failed to conduct a "reasonable inquiry" as required under 19 U.S.C. § 2401e(a)(1) (2000) and it failed to "cogently" explain the basis for its determination. (Pl. Resp. Br. 5.) In essence, Plaintiff argues that

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[3] Plaintiff is ably represented by law student Ms. Maria Caldera of the University of Maryland School of Law, under the supervision of Professor Steven D. Schwinn, Esq., The John Marshall Law School. *See* Administrative Order 06–01, U.S. Court of Int'l Trade (2006). This Court notes that Ms. Caldera did admirable work in preparing Plaintiff's Reply Brief.

[4] "Net farm income" is defined by the USDA as "net farm profit or loss, excluding payments under this part, reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102 (2006). Plaintiff does not dispute this regulatory definition. (*See* Pl. Resp. Br. 6.)

the statute requires that the USDA "*determine* an applicant's 'net farm income[ ]' [and] not merely determine the *meaning* of 'net farm income.' " (*Id.* (emphasis in original; *citing Lady Kim T, Inc. v. U.S. Sec'y of Agriculture*, 30 CIT ___ , ___ , 469 F. Supp. 2d 1262, 1266 (2006)).) Plaintiff goes on to assert that the USDA merely compared the "net farm income" lines from Plaintiff's 2003 and 2004 tax returns (lines 36, Schedules F, IRS forms 1040) and conducted no further inquiry–a determination that is "per se invalid."(*Id.* at 8–11.) The USDA, Plaintiff argues, had "an obligation" to conduct a "reasonable inquiry"–it "must determine an applicant's 'net farm income' based on the 'record as a whole,' including the various factors that went into calculating the applicant's net income as reported" to the IRS.(*Id.* at 8(citations omitted).) Whitney Brothers insist that the USDA failed to consider its "non-recurring deduction" that formed part of Plaintiff's calculation of "net farm income" for 2003:

> [H]ad the Department examined the tax forms more closely, it would have noted that Plaintiff's net farm income in 2003 was drastically distorted by a one-time, non-recurring deduction in the amount of $82,655 (reflected in line 34c) for restoring the farm's irrigation system. . . . In contrast, in 2004, no similar deduction was taken. . . . Thus, if not for this deduction, which accounted for 31% of Plaintiff's gross income, Plaintiff's net farm loss in 2003 would have been –$58,597, less than Plaintiffs 2004 net farm loss of –$109,018 . . . [entitling them] to TAA cash benefits.

(*Id.* at 13–14.)

In addition, Plaintiff argues that there were "other varying operating expenses" reported as deductions on its tax returns that "distorted" its net farm income. (*Id.* at 14.) Whitney Brothers assert, for example, that its deductions for hired labor (line 24 of the 1040 tax return) went from $60,117 in 2003 to $49,830 in 2004; gasoline, fuel, and oil deductions (line 21 of the 1040 tax return) went from $72,088 in 2003 to $36,927 in 2004; and supplies purchased (line 30 of the 1040 tax return) dropped from $23,472 in 2003 to $8,270 in 2004. (*Id.*) Consequently, Plaintiff had "fewer expenses to deduct from its tax return in 2004, thereby creating the appearance that its net farm income increased–or at least that losses fell–between 2003 and 2004. (*Id.*) As a result of the distorting effect of the deductions and in light of Whitney Brothers's "drastic decline of gross income and operating expenses (deductions) in 2004, [the USDA] should have conducted a more comprehensive review" of Whitney Brothers's Schedules F to "understand fully the circumstances that led to the net figures." (*Id.*)

JURISDICTION & STANDARD OF REVIEW

This Court has jurisdiction over this action pursuant to section 142 of the Trade Act of 2002, as amended, 19 U.S.C. § 2395 (Supp. 2004).[5] This Court may affirm, set aside, or remand the actions of the USDA "in whole or in part." 19 U.S.C. § 2395(c).

The court employs a split standard of review, which varies for questions of fact and for questions of law. For factual determinations made by the USDA, the court must accept the findings-of-fact as conclusive if they are supported by "substantial evidence."[6] 19 U.S.C. § 2395(b); *Cabana v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1232, 1233 (2006). "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." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted); *accord Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003); *Wooten v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , 441 F. Supp. 2d 1253, 1255 (2006). "Courts have found that substantial evidence 'is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " *Wooten*, 30 CIT at ___ , 441 F. Supp. 2d at 1255 (*quoting Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

With respect to judicial review of the USDA's decisions on questions of law, because the TAA statute is silent in this regard, the court looks to the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706 (2000). The APA provides that agency determinations shall be held invalid if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.; Anderson v. U.S. Sec'y of Agric.*, 31 CIT ___ , ___ , 491 F. Supp. 2d 1305, 1309–10 (2007). Furthermore, the scope of review of the agency's actions is limited to the administrative record. 28 U.S.C. § 2640(e); *Defenders of Wildlife*

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[5] All further citations to the Trade Act of 1974, as amended by the Trade Act of 2002, are to the relevant provision in Title 19 of the U.S. Code, 2004 Supplement.

[6] Under the Administrative Procedures Act, *de novo* review is applicable only when (1) "the action is adjudicatory in nature and the agency fact-finding procedures are inadequate," or (2) "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *rev'd on other grnds., Califano v. Sanders*, 430 U.S. 99, 105 (1977).

v. Hogarth, 25 CIT 1309, 1315, 177 F. Supp. 2d 1336, 1342–43 (2001). To be sustained, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation & citation omitted). Thus, if this Court finds that the USDA did not provide a cogent explanation for its decision, the Court will set aside that decision. *Id.* at 48–49.

DISCUSSION

The essential issue in this case is whether Plaintiff satisfied the requirements of 19 U.S.C. § 2401e(a)(1)(C) and 7 C.F.R. § 1580.301 (e)(4) (2006).[7] In pertinent part, 19 U.S.C. § 2401e(a)(1)(C) requires that

> [t]he producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part.

19 U.S.C. § 2401e(a)(1)(C). The USDA implements this provision through 7 C.F.R. § 1580.301(e)(4), which requires that applicants "[c]ertif[y] that net farm or fishing income was less than that during the producer's pre-adjustment year." 7 C.F.R. § 1580.301(e)(4).

Whitney Brothers filed, along with its TAA application, copies of its 2003 and 2004 Schedules F, IRS form 1040. (Conf. AR at 2 & 3; Compl., Ex. 3 & 4.) No other documents evidencing Whitney Brothers net farm income were submitted, nor were any additional documents requested. Based on this submission, the USDA determined that Plaintiff did not meet the statutory and regulatory income requirements because its "2004 net farm income was not less than its 2003 net farm income." (Def.'s Reply Br. 7–8 (emphasis omitted) (*citing* 19 U.S.C. § 2401e and 7 C.F.R. § 1580.302(e)(4)[8].)

The letter of denial sent to Plaintiff–the October 16th Letter–cryptically stated that Plaintiff "did not provide acceptable documentation of net farm or fishing income by the certification deadline (September 30) to show that [its] net income declined from that reported during the petition's pre-adjustment tax year." (AR at 37.) This statement seems to imply that Plaintiff's application was denied based on the absence of financial documentation, which was, to

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[7] Notwithstanding that the USDA has revised the relevant section of the Code of Federal Regulations ("C.F.R."), this Court refers to the 2006 version of the C.F.R. since it was in effect at the time Plaintiff completed its application and the USDA rendered its decision. *See Steen v. United States*, 468 F.3d 1357, 1359–60 (Fed. Cir. 2006).

[8] Defendant in its brief incorrectly cites to 7 C.F.R. § 1580.102(e)(4).

be sure, an incorrect statement. (*See* AR at 2 & 3.) Alternatively, the statement could also suggest that Plaintiff's application was denied based on the quality or insufficiency of its submitted financial documentation, which showed that its reported net farm income increased from 2003 to 2004. (*See id.*) In either instance, the October 16th Letter appears to be an opaque form-letter response from an inundated agency, burdened by numerous applications. Notwithstanding the possibility that Plaintiff may have been confused by the USDA's inartfully drafted letter, as discussed below, the agency's reasoning may be fairly discerned from the letter's contents. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974) (A court "will uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned."); *accord Nucor Corp. v. United States*, 414 F.3d 1331, 1339 (Fed. Cir. 2005) ("Where an agency has not made a particular determination explicitly, the agency's ruling nonetheless may be sustained as long as the path of the agency may be reasonably discerned.") (quotes and citation omitted); *see also* Def.'s Reply Br. 11 ("While this particular wording may not provide the ideal language plaintiff seeks, it is indisputable that the documentation submitted by Whitney Brothers reflects . . . its net farm income, as reported to the IRS, increased, rather than decreased . . . .").

Plaintiff's complaint alleged that the USDA's determination was incorrect because "if you look at our *gross income* figure on line 11, of schedule F, form 1040 (1065) in 2003, we took in $259,231.00 and in fiscal year 2004, we only took in $131,368.00 or a drop of $127,863.00." (Compl. ¶3(emphasis added).) Congress, however, requires, *inter alia*, that in order to qualify for agricultural TAA benefits a producer's net *farm* income–and not its *gross* income–is the statutory preference for measure of income that triggers benefits. *See* 19 U.S.C. § 2401e(a)(1)(C). Moreover, the statute expressly grants the Secretary of Agriculture the authority to define "net farm income." *Id.* ("The producer's net farm income (as determined by the Secretary) . . . ."). The USDA, in turn, promulgated regulations that defined "net farm income" as "net farm profit or loss . . . reported to the [IRS] for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102. This definition has been upheld by the U.S. Court of Appeals for the Federal Circuit. *See Steen v. United States*, 468 F.3d 1357, 1362–63 (Fed. Cir. 2006). Additionally, Plaintiff does not challenge the USDA's definition of net farm income. (Pl. Resp. Br. 5 & 6.) Based on the submitted financial information, the USDA found that Plaintiff's net farm income in 2003 was a loss of $141,252 and its 2004 net farm income was a loss of $109,018. (*See* Def.'s Br. 8.) The Agriculture TAA statute and rules provide that benefits will be provided to farmers whose "net farm . . . income was less than that during the producer's preadjustment year." 7 C.F.R. § 1580.302(e)(4); 19 U.S.C. § 2401e(a)

(1)(C) ("The producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part."). As a result the agency rejected Whitney Brothers's application for TAA funds because it could not certify a decrease in reported income from 2003 (the baseline pre-adjustment year) to 2004. (*See* Conf. AR at 2 & 3; AR at 37.)

The main thrust of Plaintiff's argument is that in determining its net farm income, the USDA failed to conduct a "reasonable inquiry" because it "ignored the nonrecurring deductions that went into the [net farm income] calculation." (Pl. Resp. Br. 11.) Plaintiff reasons that the USDA's mere scanning of a "single line" of Plaintiff's tax returns to ascertain its net farm income, did not satisfy the agency's obligation to make a "reasonable inquiry" and is thus "per se invalid." (Pl. Resp. Br. 9–11.) Plaintiff contends that the USDA is required to go beyond this "single line" comparison of Plaintiff's tax returns and must determine its "true" net farm income. (Pl. Resp. Br. 5, 9, 14, 15.) As support, Plaintiff cites to several decisions of this court for the proposition that the USDA "must look beyond a plaintiff's tax return in determining net income." (Pl. Resp. Br. 10 n.5. (*citing, e.g., Dus & Derrick, Inc. v. U.S. Sec'y of Agric.*, 31 CIT ___ , ___ , 469 F. Supp. 2d 1326, 1337 (2007); *Lady Kim T, Inc.*, 30 CIT at ___ , 469 F. Supp. 2d at 1267–68; and *Van Trinh v. U.S. Sec'y of Agric.*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1259, 1268 (2005))). Plaintiff also argues that the only Federal Circuit decision on point, *Steen*, 468 F.3d at 1363, supports this rule, as well as USDA regulation 7 C.F.R. § 1580.301(e)(6). (*Id* at 10.)

Defendant counters that this "reasonable inquiry" requirement is misplaced in light of the statutory language and regulatory definition of net farm income. (Def.'s Reply Br. 3, 6–8.) Nowhere in the statute is the agency required to conduct an "ad hoc" examination into the hardships faced by Whitney Brothers (Def.'s Reply Br. 4.) Indeed, Defendant states, the regulations only require "a comparison of net income as reported to the IRS."(*Id.*) Defendant explains that Plaintiff's reliance on the "reasonable inquiry" requirement stems from a fundamental "confus[ion]" between the "two different statutes–one pertaining to the Department of Labor ("Labor") [19 U.S.C. §§ 2271–2298] and another pertaining to the USDA [19 U.S.C. §§ 2401–2401g]." (Def.'s Reply Br. 6.) Although 19 U.S.C. § 2401–*et seq*, furnishes the USDA with a duty "to investigate *group certifications*, it creates no such duty for *individual applications*." (Def.'s Reply Br. 7 (emphasis supplied) (*comparing* 19 U.S.C. § 2401a(a) (mandating "investigation" of petitions for group certification) *with* 19 U.S.C. § 2401e (enumerating required "conditions" for individual applicants).) Furthermore, the cases that Plaintiff relies on for support of a "reasonable inquiry" requirement rely upon

interpretations of the Labor TAA statute, which, in contrast, includes an obligation to investigate.[9] (Pl. Resp. Br. 6, 7, & 10 n.5); *see also* 29 C.F.R. § 90.12 (2007) (Labor "shall initiate . . . such investigation" in order "to marshal all relevant facts to make a determination on the petition"). To date, no court has ruled on the specific legal distinction drawn above and advanced by the USDA. *See, e.g., O'Toole v. Sec'y of Agric.*, 31 CIT ___ , ___ , 471 F. Supp. 2d 1323, 1341 n.32 (2007) (noting that the court has not squarely addressed this issue).

As a preliminary matter, this Court confines its review of USDA determinations to the record before it. 28 U.S.C. § 2640(c); *Defenders of Wildlife*, 25 CIT at 1315, 177 F. Supp. 2d at 1342–43; *Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998). Following a careful analysis of the record and the case law, this Court concludes that it need not reach the issue of whether there exists an "extra-statutory threshold of reasonable inquiry" under the Agriculture TAA statute. *O'Toole*, 31 CIT at ___ , 471 F. Supp. 2d at 1342. Because it is clear that on this record the only financial documents submitted by Plaintiff were its 2003 and 2004 Schedules F, the Court holds that the USDA's determination is unequivocally supported by "substantial evidence" and is in accordance with the law. *See Steen*, 468 F.3d at 1360 (affirming the trial court's judgment upholding USDA's denial of TAA application because plaintiff failed to show that his net income decreased from the pre-adjustment year to the marketing year); *see also Lady Kim T, Inc.*, 30 CIT at ___ , 469 F. Supp. 2d at 1267 n.6 ("It should be noted, that the Court does not suggest that in reaching a determination, the [USDA] need conduct an independent exploratory investigation into the net income of the producer. In conformity with the statutory and regulatory scheme, the [USDA] need rely only on the information submitted to it by the producer.")

The USDA regulations provide that a TAA applicant,

> shall provide either–(i) Supporting documentation from a certified public accountant or attorney, or (ii) Relevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency.

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[9] For example the court in *Van Trinh*, cited by Plaintiff, was grounded on case law that itself interpreted the Labor TAA statute. *Van Trinh*, 29 CIT at ____ , 395 F. Supp. 2d at 1268 (*citing Former Employees of Sun Apparel v. U.S. Sec'y of Labor*, 28 CIT 1389, 1398 (2004) (*quoting Fmr. Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 26 CIT 1272, 1274, 245 F. Supp. 2d 1312, 1318 (2002))). The *Van Trinh* court, though analyzing Labor TAA case law for use in the Agriculture TAA realm, cautions that the case law is likely "not analogous" but is nevertheless "instructive." *Id.*

7 C.F.R. § 1580.301(e)(6). Plaintiff had until the filing deadline (September 30) to furnish substantiating documents supporting certification that its net farm income in 2004 was less than that of its pre-adjustment year (2003). Plaintiff only submitted to the USDA copies of its 2003 and 2004 Schedules F; there were no balance sheets, other financial statements, or documents from a certified public accountant or attorney. (Conf. AR 2 & 3; Compl. Ex. 3 & 4; *see* 7 C.F.R. § 1580.301(e)(6).) To be sure, this is not a case where Plaintiff has submitted other or additional financial information and the agency ignored or otherwise refused to account for such submissions in determining the applicant's net farm income.[10] Indeed, Plaintiff has not argued that there is any other financial information that it seeks to have supplemented to the record. (Pl. Resp. Br. 17; *see generally* Compl.) The Federal Circuit makes clear that USDA's determination of net farm income is "not to be made solely on the basis of tax return information *if other information is relevant* to determining the producer's net income from all farming or fishing sources." *Steen*, 468 F.3d at 1363 (emphasis added); *see also Dus & Derrick, Inc.*, 31 CIT at ___ , 469 F. Supp. 2d at 1338 ("[T]he agency may not rely solely on the information contained in plaintiff's tax return *when other information is available*.") (emphasis added). Here, Plaintiff submitted only the Schedules F as evidence of its net farm income. The USDA considered all that Plaintiff submitted and determined net farm income from the record in toto, honing in on the applicant's "net farm profit or loss, excluding [TAA] payments . . . [as] reported to the" IRS.[11] 7 C.F.R. § 1580.102. On this point Defendant notes that the USDA's "calculation of each producer's net income is fairly complex" and that "the line item that USDA looked to in this case, taxable income, is the product of various calculations based upon

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[10] *See, e.g., Wooten*, 30 CIT at ____ , 414 F. Supp. 2d at 1316 (granting motion to supplement the record where Schedules F from relevant tax returns were missing); *Anderson*, 31 CIT at ____ , 493 F. Supp. 2d at 1290 (though plaintiff's tax returns showed an increase in net fishing income, plaintiff had submitted "other supporting information" that evidenced a decline; USDA should have considered this data).

[11] Plaintiff also argues that, though a one line comparison of its tax returns gives the appearance that its "net farm income increased," the USDA's rote reliance on its submitted tax returns "fail to take into account deductions that distorted its net farm income." (Pl. Resp. Br. 13.) On closer analysis, they argue, had the USDA accounted for an $82,655 deduction for restoration of its irrigation system, its base year (2003) net farm income would actually show a loss of $58,597 and not a loss of $141,252, thus qualifying Plaintiff for TAA benefits. (*Id.* at 13–14.) This Court, however, need not credit this argument having already determined above that Plaintiff, on this record, can not certify that its net farm income (as defined by statute and regulation) decreased from 2003 to 2004. Moreover, had Plaintiff desired the USDA to consider this "one-time, nonrecurring deduction" as something different from how it was reported to the IRS, Plaintiff should have submitted supporting documentation and raised it at the agency level as this pertinent information was solely in its own hands. *Cf. Kandra v. United States*, 145 F. Supp. 2d 1192, 1208 (D. Or. 2001) ("it is presumed that agencies have used the best data available unless those challenging agency actions can identify relevant data not considered by the agency").

other line items in the tax return." (Def.'s Reply Br. 8 & n.1.) Therefore, on this record, this Court finds that the USDA's determination was reasonable and supported by substantial evidence. *See Steen*, 468 F.3d at 1360 (affirming the trial court's judgment upholding USDA's denial of TAA application because plaintiff failed to show that his net income decreased from the pre-adjustment year to the marketing year). Significantly, this is not a case where the USDA's "chosen methodology is so marred that [its] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Van Trinh*, 29 CIT at ___ , 395 F. Supp. 2d at 1269 (*quoting Former Employees of Galey & Lord Indus. v. Chao*, 26 CIT 806, 808–09, 219 F. Supp. 2d 1283, 1286 (2002)); *see also* 19 U.S.C. § 2395(b) (The CIT "for good cause shown" may remand the case to the USDA to "take further evidence.").

CONCLUSION

Though not unsympathetic to the Plaintiff's difficult economic circumstances, this Court is nonetheless simultaneously guided by, and constrained to act within, the law. Therefore, for the foregoing reasons, Defendant's motion is granted; this Court holds that the USDA's determination of Whitney Brothers's ineligibility for Agriculture TAA benefits is supported by substantial evidence and is otherwise in accordance with the law. The USDA's determination is affirmed and Plaintiff's case is dismissed. This Court will enter judgment accordingly.

WHITNEY BBOTHERS, INC., *Plaintiff*, v. UNITED STATES SECRETARY OF AGRICULTURE, *Defendant*.

BEFORE: GREGORY W. CARMAN, JUDGE
Court No. 06–00426

JUDGMENT

Upon due consideration of Defendant's Motion for Judgment Upon the Agency Record, Plaintiff's Response thereto, Defendant's Reply thereto, and all other papers filed and proceedings in this action, it is hereby,

ORDERED that Defendant's denial of Plaintiff's application for Trade Adjustment Assistance for Farmers benefits for the fiscal year 2006 is affirmed; and it is further,

ORDERED that this case be dismissed.

SO ORDERED.

Slip Op. 07–164

MITTAL STEEL GALATI S.A., FORMERLY KNOWN AS ISPAT SIDEX S.A., Plaintiff, v. UNITED STATES, Defendant, and, IPSCO STEEL., INC. Defendant-Intervenor.

BEFORE: Pogue, Judge
Court No. 05–00307

[Defendant's remand determination affirmed]

Decided: November 7, 2007

Arent Fox Kintner Plotkin & Kahn (*John M. Gurley, Nancy A. Noonan*) for Plaintiff.
Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Allessandris*, Trial Attorney) for Defendant.
Schagrin Associates (*Roger B. Schagrin*) for Defendant-Intervenor.

JUDGMENT

Pogue, Judge: In this action, on July 18, 2007, the court affirmed-in-part and remanded-in-part the final results of the Ct. No. 05–00311 Page 2 2002–3 administrative review, conducted by the United States Commerce Department ("the Department" or "Commerce"), of the antidumping duty order on cut-to-length carbon steel plate from Romania. *See Mittal Steel Galati S.A. v. United States*, ___ CIT ___ , 502 F. Supp. 2d 1295 (CIT 2007).[1] The matter now returns to the court following remand.

On remand, as directed by the court's remand order, Commerce reconsidered two decisions in the final results of the administrative review, specifically Commerce's decision to place a value on Mittal's recycled scrap and Commerce's selection of Filipino data as a surrogate value for limestone. Based on this reconsideration, Commerce, in its remand determination, revised its calculations to provide an offset for Mittal's recycled scrap and selected a different surrogate value for limestone. As a result of these changes, Commerce then recalculated Mittal's weighted-average margin for the period of review, reducing it from 13.5% to 7.29%. No party objects to Commerce's determination on these remanded issues, and it is clear to the court that the agency has complied with the court's remand order.

Nonetheless, Plaintiff, as in its original challenge to Commerce's 15-day policy, again asks that the court's judgment explicitly address

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[1] In its July 18 opinion, the court also rejected Plaintiff's facial challenge to Commerce's "15 Day Policy" under which the agency states its intent to issue liquidation instructions to U.S. Customs within 15 days of the publication of the final results of an administrative review. *Int'l Trade Comm'n, Dep't of Commerce, Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews* (August 9, 2002), *available at* http://ia.ita.doc.gov/download/liquidation-announcement.html.

certain liquidated entries that Plaintiff has protested. At the same time, Plaintiff does not seek affirmative injunctive or mandamus relief with regard to these entries, arguing that such relief is unnecessary because Plaintiff's protests have prevented the liquidations at issue from becoming final. *See* Pl.'s Comments on Remand Results at 5 ("With respect to the entries covered by Protests One, Two and Three 'final' liquidation has not yet occurred as a result of the importer's efforts to file timely protests and to commence a civil action for the denial of one such protest."). Plaintiff also makes no claim that its protest remedy is inadequate.

In the absence of any claim that Plaintiff's protest remedy is inadequate, or for extraordinary relief, the court need not reach this issue. There is nothing on the record here which indicates a need for action other than entry of judgment. *Cf. Decca Hospitality Furnishings, LLC v. United States*, ___ CIT ___ , 427 F.Supp.2d 1249, 1255(2006)(construing plaintiff's request to enforce judgment as a request for mandamus where the relief requested required direction of Customs' action).

Therefore, in accordance with the court's prior decision in this matter, and after considering all the papers and proceedings herein, it is hereby

ORDERED that Commerce's determination on remand in this action is hereby affirmed, and that, in accordance with 19 U.S.C. § 1516a(e), liquidation of any entries heretofore enjoined in this action be in accordance with the final results of this litigation, including any and all appeals.