Slip Op. 10–134

JINING YONGJIA TRADE CO., LTD., QINGDAO TIANTAIXING FOODS CO., LTD., AND HEBEI GOLDEN BIRD TRADING CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH LLC, THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 08–00386

[Denying plaintiffs' motion for judgment on the agency record and sustaining Department of Commerce's final determination.]

Dated: December 16, 2010

Trade Bridge (*Li Jasmine Zhao*), for plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Scott McBride*), of counsel, for defendant.

Kelley Drye & Warren, LLP (*Michael J. Coursey and John M. Herrmann*), for defendant-intervenors.

OPINION

Eaton, Judge:

INTRODUCTION

This matter is before the court on the motion for judgment on the agency record of plaintiffs Jining Yongjia Trade Co., Ltd. ("Yongjia"), Qingdao Tiantaixing Foods Co., Ltd. ("QTF"), and Hebei Golden Bird Trading Co., Ltd. ("Golden Bird") (collectively, "plaintiffs"). *See* Pls.' Br. Supp. Mot. J. Agency R. ("Pls.' Br."). Defendant the United States and defendant-intervenors the Fresh Garlic Producers Association, Christopher Ranch LLC, The Garlic Company, Valley Garlic, and Vessey and Company (collectively, "defendant-intervenors") oppose the motion. *See* Def.'s Mem. Opp. Pls.' Mot. J. Agency R. ("Def.'s Mem."); Def-Ints.' Br. Resp. Pls.' Mot. J. Agency R ("Def.-Ints.' Br.").

By their motion, plaintiffs challenge the final results of the United States Department of Commerce's ("Commerce" or the "Department") twelfth new shipper reviews of the antidumping duty order on fresh

garlic[1] from the People's Republic of China ("PRC" or "China") for the period of review November 1, 2006 to April 30, 2007 ("POR"). *See* Fresh Garlic from the PRC, 73 Fed. Reg. 56,550 (Dep't of Commerce Sept. 29, 2008) (final results and rescission, in part, of twelfth new shipper reviews) ("Final Results") and the accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (Dep't of Commerce Sept 19, 2008). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

For the reasons set forth below, the court denies plaintiffs' motion and sustains Commerce's Final Results.

BACKGROUND

On May 21, 2007, plaintiffs asked Commerce to initiate new shipper reviews on their sales of fresh garlic to the United States. Fresh Garlic from the PRC, 72 Fed. Reg. 38,057, 38,05758 (Dep't of Commerce, July 12, 2007) (initiation of antidumping duty new shipper reviews). Commerce initiated the twelfth new shipper reviews on July 12, 2007. *Id*. at 38,060. The purpose of a new shipper review is to determine whether an exporter or producer is entitled to its own antidumping duty rate under an order, and if so, to calculate that rate. *See Hebei New Donghua Amino Acid Co., Ltd., v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005).

On May 1, 2008, Commerce published its preliminary results. Fresh Garlic from the PRC, 73 Fed. Reg. 24,042, (Dep't of Commerce May 1, 2008) (preliminary results of the twelfth new shipper reviews) ("Preliminary Results"). In reaching its Preliminary Results, Commerce compared each company's export price[2] to normal value[3] in order to to determine if its sales were at prices below fair value. *See* 19 U.S.C. § 1677b(a). Because China is a non-market economy

[1] Fresh garlic under the antidumping duty order includes:

> all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing.

Fresh Garlic from the PRC, 73 Fed. Reg. 24,042, 24,042 (Dep't of Commerce May 1, 2008) (preliminary results of the twelfth new shipper reviews) ("Preliminary Results").

[2] The "export price" is "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States," as adjusted by 19 U.S.C. § 1677a(c). 19 U.S.C. § 1677a(a).

[3] Normal value is defined as

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

("NME"),[4] Commerce, pursuant to 19 U.S.C. § 1677b(c)(1), selected India as the surrogate country for purposes of calculating normal value. Preliminary Results, 73 Fed. Reg. at 24,044. Commerce then calculated the normal value of fresh garlic for QTF and Golden Bird using its standard factors of production ("FOP") methodology.[5]

For grower Yongjia, however, Commerce employed a modified methodology to construct normal value that used the surrogate value for the whole garlic bulb as an intermediate product.[6] As a result, the cost (or value) of the whole garlic bulb was used as a substitute for the costs of the growing and harvesting FOPs ("upstream FOPs") actually reported by Yongjia. The Department stated that it used this intermediate input methodology because it was unable to verify the values for Yongjia's upstream FOPs. Issues & Dec. Mem. at Comm. 2.

Commerce arrived at the value for whole garlic bulbs using a simple average of prices for the "Super A" grade garlic bulb in India from daily data published by the Azadpur Agricultural Produce Marketing Committee ("APMC") in its "Market Information Bulletin" ("APMC Bulletin"). Preliminary Results, 73 Fed. Reg. at 24,046. The Department published its final results on September 29, 2008, having calculated margins of 32.78 percent for QTF, 13.83 percent for Golden

[4] A "nonmarket economy country" is "any foreign countrythat [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise."*Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480,481, 318 F. Supp. 2d 1339, 1341 (2004).

[5] Plaintiffs QTF and Golden Bird are processors and exporters of garlic that purchase whole garlic bulbs and process them for export. In determining the standard FOPs for these respondents, Commerce began with the surrogate value of the whole garlic bulb. Preliminary Results, 73 Fed. Reg. at 24,045 n.4.

[6] Commerce articulated the difference between the whole garlic bulb and fresh garlic in the Issues and Decision Memorandum for the tenth administrative review when it stated:

> It is important to distinguish the fact that the raw garlic bulb that is harvested from the ground, however, is not immediately shipped to the United States. Rather, the garlic that PRC exporters ship to the United States requires at least a minimum amount of processing and packing prior to export. We have learned through the conduct of several administrative and new shipper reviews that the garlic harvested from the ground is, at a minimum, cleaned to remove the outer skins in order to give the garlic bulb its characteristic white, fresh appearance. This whole [garlic bulb] is then typically packed in mesh bags and cartons for shipment to the United States. In the case of peeled garlic, the processing is more extensive and typically involves additional labor, energy, and several packing inputs (including the use of an antiseptic solution and nitrogen gas).

Fresh Garlic from the People PRC, 71 Fed. Reg. 26,329 (Dep't Commerce May 4, 2006) (final results and partial rescission of antidumping Duty administrative reviews and final results of new shipper reviews) ("Tenth Admin. Review Final Results") and accompanying Issues and Decision Memorandum ("Tenth Admin. Review Issues & Dec. Mem.") at 13.

Bird, and 18.88 percent for Yongjia.[7] Final Results, 73 Fed. Reg. at 56,552. Yongjia contests the use of Commerce's intermediate input methodology in calculating its rate, but not the methodology itself. The other plaintiffs and Yongjia all challenge Commerce's decision to use the APMC Bulletin data for the surrogate value of the whole garlic bulbs.

STANDARD OF REVIEW

The court must uphold a final determination by the Department in an antidumping proceeding 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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (internal citations omitted) ("*Huaiyin")*. The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Id.* at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The possibility of drawing two equally justifiable, yet inconsistent conclusions from the record does not prevent the agency's determination from being supported by substantial evidence. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004).

DISCUSSION

I. Calculation of Normal Value

For merchandise exported from NMEs, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production used in producing the merchandise, to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). The statute directs Commerce to use the "best available information regarding the values of such factors . . . ." *Id*.

Further, in valuing the FOPs, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . (A) at a level of economic development comparable to that of the nonmarket economy country,

[7] The small change in margins from the Preliminary Results to the Final Results was a result of Commerce adopting are vised wage rate of U.S. $1.04 for the PRC, as well as a post-preliminary results clarification/correction to the margin calculations with respect to the cost of mesh bags for all plaintiffs. Final Results, 73 Fed. Reg. at 56,551.

and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4). The FOPs used in the valuation include, but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." *Id.* § 1677b(c)(3).

A. Development of the Intermediate Input Methodology

In accordance with the NME statutory scheme outlined above, Commerce usually determines normal value based on the FOPs as reported by respondents. *See* 19 U.S.C. § 1677b(c)(1), (3). In valuing the FOPs, the Department uses the cost that would have been incurred for each of them in a surrogate country. In the two periodic administrative reviews that preceded Yongjia's request for a new shipper review, however, Commerce questioned the use of its normal factors of production methodology for the respondents that grew garlic because of vagaries in the reporting of the FOPs for garlic farming in China.

Specifically, in the ninth administrative review, Commerce found that environmental factors, not within the control of the farmers, i.e., weather, were difficult to accurately record and could impact growth patterns and yield rates. Fresh Garlic from the PRC, 70 Fed. Reg. 34,082 (Dep't of Commerce June 13, 2005) (final results of ninth administrative review) and accompanying Issues and Decision Memorandum ("Ninth Admin. Review Issues & Dec. Mem.") at 11–12. The Department also found that respondents were not able to "capture or record in their books and records information such as the amount of fertilizer blown away by wind or the amount of seed destroyed by a heavy rainfall." *Id.* at 12.

In addition, Commerce found it important that respondents did not own the land on which the garlic was grown. *Id*. Garlic has an eight-to-nine month growing season, and because respondents leased the land, three or four months out of the year other crops were grown on it. *Id.* As a result, respondents had no control over the land for this time period and the effect on the land of the "off season" crops was not reported by respondents. *Id*. Commerce found significant "the effect that such crops might have on the acidity or nitrogen content of the soil, [and that] farmers using this land might use liquid or granular herbicide or pesticide that remains on the land or in the soil and benefits subsequent crops." *Id*. Thus, for the Department, the possible effects of these off season activities "might explain a poor, or positive, yield in the subsequent garlic crops, and none of this will appear in

the breakdown of FOPs provided in a respondents' [sic] books and records, thereby diminishing the respondents' [sic] ability to measure and report accurate FOPs to the Department." *Id*.

Commerce also expressed concern that the respondents in the ninth administrative review did not "keep the types of books and records that would allow the Department to establish the appropriateness or accuracy of the reported FOPs." Ninth Admin. Review Issues & Dec. Mem. at 12. According to the Department, the deficiencies in the respondents' records could not be corrected by on-site reviews because the long growing and harvesting process for garlic did not permit it to observe planting, growing and harvesting activities in the PRC, and, thus, Commerce could "conduct only paper verifications" of these processes. *Id*. at 13.

Commerce continued to use its usual FOP methodology in the ninth administrative review, but stated that it "intend[ed] in future administrative reviews to examine whether or not, and the extent to which, standard verification procedures can be applied to respondents' books and records, as they relate to the growing and harvesting FOPs of fresh garlic in the PRC." *Id*. The Department also stated that it "intend[ed] to examine more closely the ability of respondents to provide accurate, complete and most importantly, verifiable FOP data in questionnaire responses to the Department, when the normal books and records of these respondents apparently do not reflect all of the information relevant to such an analysis." *Id*.

Following its stated intentions from the ninth administrative review, Commerce, in the tenth administrative review, concluded that it would endeavor to capture the complete costs of producing "fresh garlic" by valuing the "fresh garlic bulb" as an intermediate product. Fresh Garlic from the People PRC, 71 Fed. Reg. 26,329 (Dep't Commerce May 4, 2006) (final results and partial rescission of antidumping duty administrative reviews and final results of new shipper reviews) ("Tenth Admin. Review Final Results") and accompanying Issues and Decision Memorandum ("Tenth Admin. Review Issues & Dec. Mem.") at Comm. 1.[8] Because of this change, rather than base normal value on the sum of surrogate values for the upstream FOPs reported by respondents, Commerce would assume that these costs were all contained in the price of the end product, the whole garlic bulb itself.

Building on the findings it made during the ninth administrative review, in the tenth administrative review, Commerce found that "respondents in this industry do not track actual labor hours incurred

[8] The tenth administrative review is currently before this Court in *Jinan Yipin Corp., Ltd. v. United States*, Court No.06–00189.

for growing, tending, and harvesting activities and, thus, do not maintain appropriate records which would allow them to quantify, report and substantiate this information." Tenth Admin. Review Issues & Dec. Mem. at 11. In addition, Commerce found "significant problems with respondents' ability to report yield loss that results from the shrinkage that occurs during the production of garlic." *Id.* The Department "noted that there are many unknown variables that may affect or influence reported FOPs which are not accounted for in the respondents' books and records." *Id*. Commerce also concluded that "the respondents also differed significantly in how each reported its garlic seed usage." *Id*. Finally, Commerce "determined that the books and records maintained by the respondents do not report or account for all of the relevant information and do not allow the respondents to identify all of the FOPs necessary to grow and harvest garlic, which significantly inhibits the Department's ability to conduct a meaningful verification of reported information" *Id*.

Based on these findings, the Department determined that an intermediate input methodology was appropriate for growers of fresh garlic beginning with those in the tenth administrative review. *Id*. The tenth administrative review, however, was not the first time that the Department had used an intermediate input methodology. Commerce had previously relied on this methodology in the *Certain Frozen Fish Fillets* less than fair value determination. *See* Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 Fed. Reg. 4986, 4993 (Dep't of Commerce Jan. 31, 2003) (notice of preliminary determination of sales at less than fair value, affirmative preliminary determination of critical circumstances and postponement of final determination) ("*Fish Fillets*").[9]

In *Fish Fillets*, Commerce set out two exceptions to the standard FOP analysis that would permit the use of a surrogate value for an intermediate input. The second of these was where "it is clear that attempting to value the factors used in a production process yielding an intermediate product would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in

[9] Commerce's determination to use an intermediate input methodology in *Fish Fillets* was challenged before this Court in *An Giang Agriculture & Food Import Export Co. v. United States*, Court No. 03–00563. The case was voluntarily dismissed following the ruling in *Anshan Iron and Steel Co. v. United States*, 29 CIT306, 307, 366 F. Supp. 2d. 1280, 1280 (2005), that Commerce had, on remand, sufficiently explained it decision to value the respondents' self-made intermediate inputs by specifically explaining why the upstream FOPs were unreliable. *See Anshan Iron and Steel Co. v. United States,* 28 CIT 1728, 1737–38, 358 F.Supp. 2d 1236, 1244 (2004) ("If Commerce concludes that the value obtained from reliance upon Plaintiff's values for its factors of production for self-produced intermediate inputs would not fulfill its statutory obligation to use the best available information, it must specifically describe how the information is unreliable.").

the overall factors buildup." *Fish Fillets*, 68 Fed. Reg. at 4993. Commerce referenced this second exception from *Fish Fillets* in the tenth administrative review, and determined to use the value of the whole garlic bulb as the starting point to construct normal value. Tenth Admin. Review Issues & Dec. Mem. at 4.

B. Application of the Intermediate Input Methodology in the Current Review

Having employed the intermediate input methodology for existing shippers in the tenth administrative reviews, Commerce decided to continue this practice for Yongjia in the new shipper review now before the court. Preliminary Results, 73 Fed. Reg. at 24,045. In this new shipper review, Commerce found that Yongjia was the only respondent that farmed garlic (rather than buying it), and further concluded that the company "was unable to accurately record and substantiate the complete costs of growing garlic during the POR." *Id*. In other words, even though Yongjia grew its own garlic and supplied Commerce with the claimed upstream FOPs used in farming its product, Commerce found, as it had found with growers in the tenth administrative review, that it could not achieve an accurate result in constructing normal value if it used the FOPs reported by respondent. "The alternative to the standard FOP analysis, as articulated in *Fish Fillets*, is only applied when the Department conclude[s] that it simply is unable to apply the FOP analysis to a Respondent's overall reported data." Issues & Dec. Mem. at Comm. 2.

Thus, the Department decided to construct the company's normal value using the price for whole garlic bulbs sold in India as a beginning point, just as it had for shippers who farmed garlic in the tenth administrative review. Def.'s Mem. 13 ("Commerce found 'significant discrepancies between what Yongjia reported and what [Commerce] observed' at verification. Specifically, Commerce concluded that Yongjia's books and records did not accurately report factors of production relating to labor, yield loss, cold storage electricity, off-season activities, water usage and land usage.").

Yongjia does not question Commerce's practice of using its intermediate input methodology. Indeed, the company concedes the Department may employ the methodology under the right set of circumstances. Rather, Yongjia disputes the methodology's use in this case.[10]

[10] At no point in their complaint do plaintiffs question Commerce's authority to use its intermediate input methodology asset out in *Fish Fillets*. *See generally* Compl. Thus, the legality of the intermediate input methodology is not before the court. The court, therefore, expresses no opinion as to whether the methodology complies with 19 U.S.C. § 1677b(c)(1) and (3). It is worth noting, however, that the results in this case would be the same if, rather than using its intermediate input methodology, Commerce had chosen to treat the whole

Pls.' Br. 16. In doing so, Yongjia claims that Commerce's decision to use its intermediate input methodology was not supported by substantial evidence. Pls.' Br. 16 ("Although Commerce has discretion to resort to intermediate input, such discretion need to be validated by substantial evidence.").

The company argues that its upstream FOPs could have been valued by the Department and that the use of the second *Fish Fillets* exception to the standard FOP methodology was not supported by substantial evidence. Pls.' Br. 16 ("[I]t is completely necessary for Commerce to provide sufficient evidence to prove that a respondent is not able to provide sufficient factual evidence that it fails to maintain the necessary information in its internal books and records that would allow Commerce to establish the completeness and accuracy of the reported FOPs. The hurdle shall be higher. Minor findings of discrepancies or a different calculation method shall not be taken as sufficient evidence."). Yongjia insists that the intermediate input methodology cannot be used here because Yongjia provided complete and accurate FOP information, and, therefore, the normal FOP methodology should have been applied in calculating its normal value. Pls.' Br. 17.

The Department reached its conclusion that Yongjia could not accurately account for the upstream FOPs by evaluating the company's questionnaire responses and by making a site visit to the garlic fields. Commerce detailed its findings in the Issues and Decision Memorandum, setting out the problems it found with a number of the FOPs reported by Yongjia, i.e., it found: (1) that "Yongjia was unable to accurately track labor hours;" (2) that there were "problems with Yongjia's ability to report yield loss resulting from the shrinkage that occurs during the production of garlic;" (3) that there existed "major discrepancies between the farming labor reported and that observed during verification . . . [and] that Yongjia underreported harvesting labor in excess of 15 percent;" (4) that Yongjia did not weigh the harvested garlic for several weeks after harvest, and thus failed to take into account any yield loss from the garlic drying out; (5) that based on its finding that "Yongjia was unable to accurately report the garlic stored in its cold storage facility and because we were unable to verify its main electricity meter," that it did "not have the information necessary to accurately capture a proper cold storage electricity FOP;" (6) "that the reported water used for irrigation of the garlic crop was based on an estimate rather than actual water consumption;" (7) that supported by its knowledge of "the known structure of the Chinese garlic industry and the understanding that non-garlic

garlic bulb as a raw material. *See* 19 U.S.C. § 1677b(c)(3)(B).

inputs can have an effect on garlic production . . . the reported upstream inputs used to produce the raw garlic bulb are not entirely accurate and do not account for off-season factors;" (8) that, regarding land use, "the record shows that Yongjia cannot accurately report the precise land area under cultivation for its leased farm;" and, finally, (9) that "Yongjia's argument that the cotton grown in the off-season is a special kind of cotton which is resistant to pests and requires no pesticide" should be disregarded based on a lack of "record evidence concerning the type of cotton grown in the off-season, or whether this cotton is resistant to pests." Issues & Dec. Mem. at Comm. 2.

In making its claim that Commerce should have used its standard FOP methodology to construct normal value, Yongjia takes issue with three of the Department's findings. First, in response to Commerce's finding that there were major discrepancies between the farm labor reported and that observed during verification, Yongjia maintains that the discrepancy resulted from a misunderstanding of the facts. Pls.' Reply. Br. Supp. Mot. J. Agency R. ("Pls.' Reply Br.") 11. "When harvesting, farmers usually put out newly harvested wet garlic for four to five days for air dry. However, during verification, farmers had no time to dry the wet garlic, so they used wet garlic, which was more difficult to handle with and took longer time in later steps: trimming the roots and cutting the stems." Pls.' Reply Br. 11. Although this argument seems addressed at Commerce's statement that Yongjia failed to keep accurate records of labor used to grow its garlic, it does not appear to seriously call into question the Department's findings. Rather, Yongjia's statement tends to confirm that the Department was unable to verify Yongjia's reported labor FOP for growing the garlic.

With regard to Commerce's finding that Yongjia did not accurately calculate harvesting and cold storage yield loss, plaintiffs state that Commerce's request "to provide yield loss calculation from the point harvesting the garlic which is covered with water and mud . . . is not reasonable." Pls.' Reply Br. 11. Instead, "Yongjia reported its yield loss starting from total gross dry garlic minus garlic set aside for seed as denominator." Pls.' Reply Br. 11–12. Again, Yongjia does not directly address Commerce's finding regarding yield loss due to shrinkage during production. Instead, Yongjia urges the Department to start its analysis after the garlic was already dry.

Commerce's findings, however, were directed at what took place prior to the point at which the garlic was dry. For instance, Commerce found during verification that the total harvest reported did not include "[g]arlic which is too small or damaged that is given to the workers to take home[,] [t]he approximate percentage of water weight

the garlic loses from the time it is dug from the fields to the time it is first weighed, [or] [d]iscolored garlic which is thrown away." Admin. R. ("AR") Doc. No. 167 at 17–18. Commerce also found that Yongjia underrreported its "total harvest, the starting point for its yield loss calculation and the denominator for its farming factors of production." *Id*. at 18. By not directly addressing these findings, Yongjia tacitly confirms them.

Finally, the company argues that Commerce's statement that Yongjia estimated "electricity consumption for cold storage of garlic" is not accurate. Yongjia claims that it knew that each bag used for cold harvest weighed forty four kilograms per bag, and that it used the number of bags times forty four kilograms to find the cold storage weight used to calculate electricity consumption. Pls.' Reply Br. 12. Thus, for Yongjia, its calculation was not an estimate, and should have been accepted as a replacement for metered electricity. It is difficult to see, however, how Yongjia's proposed calculation would be a good substitute for metered electricty.

As discussed *supra*, Commerce identified a number of Yongjia's upstream FOPs that it determined could not be used in its normal FOP methodology. The company was given an opportunity to address the identified problems with its reported FOPs on several occasions and failed to do so to Commerce's satisfaction. *See*, *e.g.,* AR Doc. No. 182. As has been seen, Yongjia has continued to fail to directly address Commerce's findings before the court. Based on the material found in the Issues and Decision Memorandum, and Yongjia's apparent inability to produce evidence calling Commerce's findings into question, the court concludes that Yongjia's reported upstream FOPs do not provide the basis for calculating normal value. *See* Final Results, 73 Fed. Reg. at 56,552 (Commerce's reliance on Yongjia's reported FOPs "would lead to an inaccurate result because the Department would not be able to account for a significant element of cost . . . .").

Based on the foregoing discussion, the court holds that Yongjia's contention that Commerce exceeded its discretion by not using its reported upstream FOPs is without merit.[11]

---

[11] While the court does not have before it the question whether the intermediate input methodology conforms to the statute, it is worth noting that the cases Commerce cites do not necessarily support its use. For instance, the Department relies on *Shakeproof Indus. Assembly Components. of Illinois Tool Works Inc. v. United States,* 268 F.3d 1376 (Fed. Cir. 2001) ("*Shakeproof*"). In that case, the Federal Circuit was presented with the question of whether it was legally permissible for Commerce to value factors of production using market prices when constructing normal value. *Id*. at 1381–82. In other words, the question was not whether Commerce was required to use the four factors of production set out in 19 U.S.C. § 1766b(c)(3), but, rather, how to place a price on them. In reaching its conclusion that using market prices was a permissible interpretation of the statute, the Court relied on the language of 19 U.S.C.§ 1677b(c)(4), which directs Commerce to value factors of production using surrogate prices "to the extent possible." Thus, the Court found that where it was not possible to derive the "best possible information" from surrogate values, market

II. Surrogate Values of Garlic Bulbs

Yongjia, QTF and Golden Bird each challenge Commerce's selection of the APMC Bulletin data as the surrogate value for whole garlic bulbs. Pls.' Br. 2. Pursuant to statute, the information used by Commerce to value FOPs is to be the "best available information regarding the values of such factors [of production] in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1). Commerce's practice, in selecting the best available information for valuing FOPs, is to select "surrogate values which are product-specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties." Issues & Dec. Mem. at Comm. 4. This practice has found approval in this Court. *See, e.g., Allied Pacific Food (Dalian) Co. Ltd. v. U.S.*, 34 CIT __, __, 716 F. Supp. 2d 1339, 1343 (2010). As has been noted, Commerce decided to use the surrogate value for whole garlic bulbs from India: (1) as a raw material in its standard FOP methodology to construct normal value for QTF and Golden Bird; and (2) as the starting point to calculate normal value for Yongjia using the intermediate input methodology. No party disputes Commerce's choice of India as the surrogate country.

The APMC Bulletin price data chosen by the Department as the data source for whole garlic bulbs was submitted by defendant-intervenors. AR Doc. No. 116, Ex. 2. Commerce chose to use this source, even though plaintiffs placed two other possible data sources on the record: (1) the World Trade Atlas ("WTA") data; and (2) data from AGMARKNET, an online database maintained by the Indian Ministry of Agriculture. Plaintiffs also put the Azadpur APMC data

values (which were the best possible information) could be used. *Id*. Thus, the case stands for the proposition that Commerce may use market *prices* to value FOPs, but does not hold that it may ignore the direction in 19 U.S.C. § 1677b(c)(3) to use specific FOPs in its methodology.

Commerce also cites *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994). There, Commerce valued some factors of production using surrogate values, and some using the values from market purchases made by the exporter. The Court affirmed the use of this "mix and match" methodology, stating that, "[i]n this case, the best available information on what the supplies used by the Chinese manufacturers would *cost* in a market economy was the price charged for these prices on the international market." *Id.* at 1446 (emphasis added). As a result, both cases stand solely for the proposition that when valuing factors of production, i.e., placing a price on them, Commerce may use market value prices that represent the "best available information."

Commerce's intermediate input methodology, however, may not take advantage of the "to the extent possible" language found in § 1677b(c)(4) because that phrase is restricted to the "prices or costs" of factors of production, and not to the factors themselves. Nor may Commerce rely on the "best available information" language cited by the Federal Circuit in *Shakeproof* as this language also relates solely to valuation.

found *online* on the record in order to demonstrate the claimed unreliability of the APMC Bulletin data. AR Doc. No. 103 at 3–5.

In reaching its decision to value whole garlic bulbs using the prices reported in the APMC Bulletin, Commerce found that the data was the best available because: (1) it was publicly available as a result of being posted at the APMC facilities for public viewing, could be obtained in pamphlet form at the APMC facilities, and is electronically archived and accessible on request; (2) it was product specific, in that it was the only data on the record that included information on grades of garlic, which are size dependant, a factor that, according to Commerce, plays heavily in the valuation of garlic bulbs; (3) it represented a broad market average as a result of APMC being "the largest fruit and vegetable market in Asia [that] has become a 'National Distribution Centre' for important Indian agricultural products, such as garlic;" and (4) it was from a source that contained information for each day on which the Super-A bulbs were traded during the POR, and, therefore, was contemporaneous with the POR. Issues & Dec. Mem. at Comm. 4 (internal citations omitted).

Plaintiffs argue that, during the administrative proceedings, they "disagreed with Commerce's use of Azadpur APMC Bulletin data because (a) it is not publicly available information;[12] (b) it is not product specific, as size-specific criterion distorts product-specific requirement by Commerce's practice; and (c) the values of [the Super-A bulbs were] not contemporaneous with the POR." Pls.' Br. 4.

A. Public Availability of Azadpur APMC Bulletin Data

In making their arguments with respect to public availability, plaintiffs first submit that the APMC Bulletin data is not the same as that which can be downloaded from the official APMC website. Pls.' Br. 7. Plaintiffs then assert that because it differs from that on the APMC website, the APMC Bulletin data is not publically available. Pls.' Br. 7–8.

It is apparent that plaintiffs' claim is without merit. First, the APMC website does not purport to contain all of the APMC Bulletin data; rather, it provides a summary of the APMC Bulletin data. AR Doc. No. 158 ("the Azadpur APMC website (www.apmcazadpurdelhi .com) provides summary information on garlic arrival quantity, maxi-

[12] When Commerce has determined that it must use a surrogate value for calculating normal value, it will "normally use publicly available information" for valuation purposes. 19 C.F.R. § 351.408(c)(1) (2009). "Publicly available" is not defined by statute or regulation. Further, the word "normally" indicates that Commerce is well within its bounds to use non-public information if it determines that it is the best information available. *Dorbest Ltd. v. United States,* 30 CIT 1671, 1678, 462 F. Supp. 2d 1262, 1270 (2006) (stating that "use of the word 'normally' means that Commerce may select other data as warranted under the circumstances").

mum price, modal price and minimum price but as yet does not provide grade-wise information."). This is apparently why plaintiffs were unable to find some of the information found in the APMC Bulletins online, particularly information relating to garlic grades. Pls.' Br. 7 ("On Azadpur APMC official website, there is no report of garlic grading as grade A, B C [sic] or [Super-A]."). That all of the data found in the APMC Bulletins is not also found on the website, however, does not render the APMC Bulletins somehow unavailable to the public.

Next, plaintiffs claim that because the APMC Bulletins can only be obtained at the APMC market, they are necessarily not publically available. According to the Chinese companies, because the data cannot be downloaded from the internet, it is unavailable to the public. Pls.' Br. 8. As defendant points out, however, "court documents generally are considered to be publicly available if one can go to the courthouse to request the documents." Def.'s Mem. 24. For the Department, because the APMC Bulletins could be obtained by anyone who went to the market and asked for them, and because the APMC Bulletin information was publicly posted and maintained on the APMC database in electronic form, it was publicly available. Issues & Dec. Mem. at Comm. 4.

In addition, according to the Department, the APMC Bulletins were public even if not available on the internet in their entirety. That is, Commerce determined that the full APMC Bulletin data was publicly available because, while it "is not readily available on the internet, it is readily available to its intended public audience, wholesalers and buyers at Azadpur APMC in India." Issues & Dec. Mem. at Comm. 4. Moreover, Commerce states that it has electronic versions of each daily bulletin for the POR; a full six months of data, on which it based its surrogate values. *Id*.

The APMC Bulletin documents are clearly public as that word is normally understood. That is, they are available to anyone who goes to the market and asks for them. Plaintiffs fail to explain why the APMC Bulletins are not publicly available merely because they are not on the internet. As a result, plaintiffs' argument that the APMC Bulletin data was non-public is unconvincing.

Next, plaintiffs take issue with the identities of the consultants defendant-intervenors hired to author the Market Research Report.[13] *See* Pls.' Br. 8–9. The companies argue that because the names of the consultants were never disclosed to plaintiffs, the data in the Market

[13] The Market Research Report was prepared by defendant-intervenors to support the use of the APMC Bulletin data as the surrogate value data. The only information to which plaintiffs' counsel did not have access in the Market Research Report was the name of the expert hired by defendant-intervenors to prepare the report, and the names and titles of

Research Report is unverifiable. *See* Pls.' Br. 8–9. According to plaintiffs, there was no way to "figure out the existence of such a database ready for pick-up by physically visiting Azadpur APMC market," except by being told so by defendant-intervenors' consultants. Pls.' Br. 8.

In the Issues and Decision Memorandum, Commerce concluded that because "the report does identify the organization that each of the sources represents, and all other information in the report is public[,]" the confidentiality granted to the identities of the independent consultants had no bearing on the verifiability of the APMC Bulletin data. Issues & Dec. Mem. at Comm. 4. In other words, Commerce's decision to keep the names of the defendant-intervenors' consultants confidential did not prevent plaintiffs from challenging the accuracy or reliability of the APMC Bulletin data, because the sources of the data were clearly stated. Thus, had plaintiffs wished to find out for themselves if the APMC Bulletins were publically available and contained the information Commerce found therein, they could have done so, whether defendant-intervenors' consultants were known to them or not. Therefore, plaintiffs' argument cannot be credited.

Finally, plaintiffs contend that the AGMARKNET data is more public than the APMC Bulletin data because it is "[a]n internet-based market information system . . . sponsored by Indian Agricultural Marketing Information System under the Department of Agriculture & Cooperation, Ministry of Agriculture . . . . Furthermore, people get access to the information through the internet; it bypasses middlemen, which is different from government related APMC." Pls.' Br. 9. Regardless of whether the AGMARKNET data is more easily accessible, for the reasons previously noted, Commerce's determination that the APMC data is publicly available remains valid. The Department's longstanding preference is for "publicly available information," not necessarily the most publicly available information. Under the facts of this case, there is nothing to indicate that the APMC Bulletins were not publically available. 19 C.F.R. § 351.408(c)(1) (2009).

B. Product Specificity of APMC Bulletin Data

Plaintiffs also challenge the APMC Bulletin data on the grounds that it was not product specific. Pls.' Br. 3. The Chinese companies argue that, in order to make its analysis product specific, Commerce should have looked at the local factors in India and China, including

certain persons who provided information, but the name of the company hired, as well as all of the actual information used in preparing the report, was not treated as privileged. Issues & Dec. Mem. at Comm. 4.

the natural endowments of the land, climate, labor skills, traditions and experiences, while conducting its FOP analysis. Pls.' Br. 10–11 ("As the Department decides India as the surrogate country in this review, it is necessary to compare the garlic production and local producer prices in the two countries."). In other words, plaintiffs maintain that, while the size of the garlic bulb was a relevant factor in selecting the surrogate value, Commerce failed to take into account the numerous differences between growing and harvesting the garlic in India and in China. In addition, the Chinese companies contend that Commerce should have considered that China produces more garlic at cheaper prices than India. Pls.' Br. 11 ("According to the statistics from the Food and Agriculture Organization, China, as compared to India, has much higher garlic production and lower prices.").

For its part, defendant insists that "[s]uch a comparison of the production experience of a non-market economy, such as China, and a market economy, such as India, is illogical. The use of surrogate values recognizes that market principles apply differently in non-market economies." Def.'s Mem. 25. In a similar vein, defendant-intervenors contend that Commerce's "non-market economy methodology does not provide for the consideration of growing conditions in China, but rather requires normal value to be derived based on the value of the factors of production in a surrogate market economy country." Def.-Ints.' Br. 17.

Plaintiffs' argument that the local factors of China and India should be compared in the surrogate value calculation is unconvincing. The surrogate value statute is not intended to make adjustments for local factors in the NME country at issue. On the contrary, the purpose of 19 U.S.C. § 1677b(c) is to avoid the potentially skewed local factors in a NME country by replacing them with suitable surrogates from a comparable market economy country. This is, of course, particularly true with respect to the price for which a product is sold in an NME country. *Rhodia, Inc. v. United States*, 25 CIT 1278, 1286, 185 F. Supp. 2d 1343, 1351 (2001) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999)) (finding that the purpose of the statute is "to construct the product's normal value as it would have been if the NME country were a market economy country"). Therefore, the court holds that Commerce was not required to consider the differences between China and India, as identified by plaintiffs, when determining the surrogate value of the whole garlic bulb.

Plaintiffs also take issue with Commerce's decision to use Super A grade garlic prices as surrogate values.[14] Pls.' Br. 11–12. The Department based its decision to use the values for Super A grade garlic bulbs, when constructing normal value, on its conclusion that all plaintiffs "reported garlic bulb size in excess of 55 mm, and because bulb sizes that are 55 mm and above are typically classified as [Super A] grade garlic." Issues & Dec. Mem. at Comm. 4. Put another way, Commerce used the Super A grade garlic prices, which covered bulbs larger than fifty five millimeters in diameter, because plaintiffs reported sales of bulbs of fifty five millimeters and larger in their questionnaire responses. The APMC Bulletins reported price data for each grade based on size.

Plaintiffs assert that Commerce's decision was not supported by substantial evidence. Pls.' Br. 12 ("Besides the inference from the statements by unidentified consultants hired by the Petitioners, Commerce did not obtain any substantial evidence to support its using the values of [Super A] garlic, as its size is above 55 mm according to Commerce, to calculate the surrogate value for the Respondents."). Plaintiffs, however, fail to point to any evidence tending to support a conclusion that some other type or grade of garlic bulb should have been used. Rather, they argue solely that Commerce's conclusion to use the Super A grade garlic bulb must have been based on statements made by defendant-intervenors' consultants, and, therefore, was not supported by substantial evidence. Pls.' Br. 12.

Clearly that is not the case. There is no dispute that all of plaintiffs' reported sales were of bulbs fifty five millimeters or larger, and that the price of garlic is based on size. Issues & Dec. Mem. at Comm. 4. Bulbs of this size were recorded in the APMC Bulletins as having been graded and sold as Super A grade garlic. The court, therefore, holds that Commerce's use of Super A grade garlic values was supported by substantial evidence.

C. Contemporaneity of Azadpur APMC Super A Grade Garlic Data

Plaintiffs next argue that, because the APMC Bulletin data for Super A grade garlic lacks entries for the period between March 22, 2007 and April 30, 2007, it is not contemporaneous with the POR, and, therefore, is unsuitable as surrogate data. Pls.' Br. 13. Commerce, however, had APMC Bulletins for the days with which plaintiffs take issue, and found that there were no sales of Super A grade

[14] In previous reviews, Commerce has determined that the price at which garlic is sold is heavily dependant on physical characteristics such as bulb size. Preliminary Results, 73 Fed.Reg. at 24,046.

garlic on those days. Issues & Dec. Mem. at Comm. 4 ("Moreover, the Department has reviewed the Bulletin price data and is satisfied that each day where data could have been available at the APMC, that data was submitted."). Plaintiffs insist that, because Commerce did not seek further evidence to prove that no transactions occurred during that period, its decision to use the APMC Bulletin data was "lacking substantial evidence." Pls.' Br. 14. Plaintiffs, thus, argue that the APMC data is incomplete, and, therefore, not contemporaneous with the POR. Pls.' Br. 13. As an alternative to the Super A grade garlic data, plaintiffs contend that Commerce should have used other information on the record, such as the A grade garlic data, as there were transactions for the A grade garlic on the missing days. Pls.' Reply Br. 5.

The Department states that it had every APMC bulletin for the POR on the record, and determined that, for the period of March 22, 2007 through April 30, 2007, there were no transactions for Super A grade garlic. Issues & Dec. Mem. at Comm. 4 n.44. Plaintiffs failed to put any evidence on the record challenging this conclusion. Instead, they assert that "the missing information is extremely unfavorable to the [plaintiffs]." Pls.' Br. 14. As a result, it is clear that the Department had on the record all of the Super A sales made during the POR.

As to plaintiffs' argument that Commerce should have used values for A grade garlic in addition to the values for Super A grade garlic in its calculations, the Department considered this possibility and rejected it. Issues & Dec. Mem. at Comm. 4. Commerce concluded that there was no justification for using A grade garlic prices because A grade bulbs are of a smaller average diameter than Super A grade bulbs, and, therefore, less similar to the garlic bulbs plaintiffs exported, which were all larger than A grade. *Id*. ("[B]ecause the Respondents have all reported sizes of 55 mm and above, and because bulb sizes that are 55 mm and above are typically classified as [Super A] grade garlic, we have continued to value the whole garlic bulb using [Super A] grade data from the *Bulletin*.") (emphasis in original). As a result, using the price values for A grade garlic would have led to a less accurate result than using just Super A grade garlic. Plaintiffs provided no compelling reason for including in the average a product that they did not actually sell. Because the Super A grade bulbs were more product specific and because Commerce had APMC Bulletin data for each date that garlic bulbs similar to that exported by plaintiffs were actually sold, Commerce's decision to use the Super A grade garlic based on sales contemporaneous with the POR, is supported by substantial evidence and is sustained.

D. Broad Market Average of Super A Grade Garlic Values

Plaintiffs also challenge Commerce's determination that the APMC data represents a broad market average. Pls.' Br. 14. In making their argument, the Chinese companies correctly state that it is Commerce's practice to use country-wide data instead of regional data when the former is available. Pls.' Br. 14; Issues & Dec. Mem. at Comm. 4. In support of this argument plaintiffs note that the Azadpur APMC is one of 7,000 APMCs throughout India and that the Azadpur APMC garlic transactions accounted for 5.583 percent of all garlic transactions across India in 2006. Pls.' Br. 14–15.

Commerce, however, found that the APMC Bulletin data was country-wide and "a reliable and credible representation of a broad market representation."[15] Issues & Dec. Mem. at Comm. 4 ("A careful examination of the Bulletin shows that agricultural products from all over India are sold at Azadpur APMC. . . . In addition, we note that the data set used by the Department to calculate the garlic bulb surrogate value for [Super A] grade garlic represents over 11 million kilograms of garlic sold from six Indian states."). In other words, Commerce found that, based on the size and scope of the Azadpur APMC and the volume of goods traded at the market, the APMC Bulletin data met Commerce's preferred criteria for surrogate values.

The Department has sufficiently demonstrated that the APMC data set does in fact represent a broad market average, as it is from a large agricultural market in India and is for a substantial portion of the garlic market in that country. The evidence plaintiffs placed on the record is insufficient to call into question any of Commerce's findings regarding whether the APMC Bulletin data represents a broad market average. In sum, Commerce's decision to use the APMC Bulletin data as a broad market average is supported by substantial record evidence.

E. Commerce's Determination That the AGMARKNET Data did not Constitute the "Best Available Information"

During the administrative proceedings, plaintiffs urged Commerce to select either the WTA data or the AGMARKNET data. Before the court, plaintiffs have made no argument for the WTA data, and insist that the information on the AGMARKNET website should be used. Commerce considered the AGMARKNET data offered by plaintiffs, but found that the "four-page descriptive brochure and a sample page

[15] In order to meet its own preference for a country-wide data set, Commerce chose to use data for grade Super A garlic produced in six different Indian states sold at the Azadpur APMC, and not data from a single state as had been done in previous reviews. Issues & Dec. Mem. at Comm. 4 n.43.

from [AGMARKNET]'s website showing garlic prices for one day" did not constitute the best available evidence. Def.'s Mem. 23. An examination of the AGMARKNET data reveals that it does not have information relating to garlic by grade.

Commerce's decision not to use the AGMARKNET data is sustained. This is because one day of the ungraded AGMARKNET sales did not satisfy the Department's preference for product specific data that is contemporaneous with the POR. Thus, it is apparent that Commerce, as required by statute, considered the AGMARKNET data, and was reasonable in concluding that it did not constitute the "best available information." *See* 19 U.S.C. § 1677b(c)(1).

III. Plaintiffs' Evidence Concerning Effect of Flooding on Garlic Prices in India

Finally, plaintiffs assert that Commerce failed to take into account a rise in garlic prices in India during the POR, resulting from the disruption of the growing season by flooding. Pls.' Br. 17. Although plaintiffs assert that the flooding caused an abnormal increase in garlic prices during the POR, the sole evidence they placed on the record is a newspaper article speculating on the possible effect of local flooding on garlic prices. AR Doc. No. 103, Ex. 10 ("Retail prices of garlic *may* double by December because of low production and wastage due to floods.") (emphasis added).

This article does not constitute any evidence that flooding did, in fact, affect prices or to what degree prices were affected. Plaintiffs could have timely placed factual information of flooding on the record in the administrative proceedings before Commerce, but failed to do so. As such, the Department correctly concluded that it had no information from which to draw a conclusion, one way or another, about the effect of flooding on the price of garlic when determining the surrogate price for the whole garlic bulbs.

CONCLUSION

Based on the foregoing, the court denies plaintiffs' motion for judgment upon the agency record and sustains Commerce's final results.

Dated: December 16, 2010
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 10–135

FORD MOTOR COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00217

[Defendant's motion for summary judgment granted; Plaintiff's cross-motion for summary judgment denied.]

Dated: December 16, 2010

Katten Muchin Rosenman, LLP (*Bruce J. Casino*); *Office of General Counsel, Ford Motor Company* (*Paulsen K. Vandevert*) for Plaintiff Ford Motor Company.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Tara K. Hogan*, Trial Attorney); and Office of Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, U.S. Department of Homeland Security (*Richard McManus*), of counsel, for Defendant United States.

OPINION

Gordon, Judge:

Introduction

Plaintiff, Ford Motor Company ("Ford"), challenges a decision of the United States Customs and Border Protection ("Customs") denying Ford's protest of Customs' refusal to refund harbor maintenance taxes ("HMT") Ford allegedly paid. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006).[1] The court has already granted partial summary judgment for Defendant, sustaining Customs' denial of Ford's protest for the refund of alleged pre-July 1, 1990 HMT export payments. *Ford Motor Co. v. United States*, No. 06–00217 (CIT Jan. 27, 2010), ECF No. 66 ("Jan. 27, 2010 Order"); *see also Chrysler Corp. v. United States*, 592 F.3d 1330 (Fed. Cir. 2010) ("*Chrysler*") (sustaining Customs' denial of a refund request for HMT allegedly paid on exports prior to July 1, 1990). Before the court are cross-motions for summary judgment for Ford's remaining claims for refunds of alleged post-July 1, 1990 HMT export payments. For the reasons set forth below, the court grants summary judgment for Defendant.

Background

Familiarity with the HMT, 26 U.S.C. §§ 4461, 4462, and Customs' HMT refund regulation, 19 C.F.R. § 24.24(e)(4)(iv), is presumed. *See generally Chrysler*, 592 F.3d 1330, 1332–36 (Fed. Cir. 2010) (explaining history of HMT, HMT court decisions, and Customs' HMT refund regulation). The HMT refund regulation carries the force of law and

[1] Further citations to Title 28 of the United States Code are to the 2006 edition.

is binding on the court. *Id.* at 1335–36. It provides that for alleged HMT export payments made on or after July 1, 1990, if Customs' records and the corresponding Harbor Maintenance Tax Payment Report ("HMT Payment Report") do not reflect either a paper or electronic record of the alleged payments, then the claimant must substantiate its refund request with "supporting documentation" to verify proof of payment. 19 C.F.R. § 24.24(e)(4)(iv)(C). Among the supporting documentation necessary to establish entitlement to a refund is a "copy of the Export Vessel Movement Summary Sheet" that "Customs *accepted* with the payment at the time it was made." *Id.* (emphasis added). In this action Ford has not challenged the validity of the Customs' HMT refund regulation, but instead seeks to prove its compliance with Customs' HMT refund regulation as an evidentiary matter. *See* Pl.'s Second Cross-Mot. for Summ. J. at 7 ("Ford fully complied with the express conditions of the regulation."), *Ford Motor Co. v. United States*, No. 06–00217 (CIT Sept. 3, 2010), ECF No. 78.

Standard of Review

The Court of International Trade reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). Customs' protest decisions enjoy a statutory presumption of correctness, 28 U.S.C. § 2639(a)(1), which allocates to plaintiff the burden of proof on contested factual issues arising from the protest. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). Applied to this action, where plaintiff is attempting to establish its compliance with Customs' HMT refund regulation as an evidentiary (or factual) matter, the applicable statutory standards place on Ford the burden of establishing by a preponderance that it has complied with Customs' HMT refund regulation. Rule 56 of this Court, in turn, permits summary judgment when "there is no genuine issue as to any material fact . . . ." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc. ,* 477 U.S. 242, 248 (1986). Additionally, where a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, summary judgment is mandated against that party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Discussion

Ford's HMT refund request involves alleged payments made after July 1, 1990, but for which there are no paper or electronic records reflected in Customs' HMT Payment Report. Under such circumstances Ford must produce "supporting documentation" to verify its

alleged payments. 19 C.F.R. § 24.24(e)(4)(iv)(C). As noted above, "supporting documentation" includes, among other things, a copy of the Export Vessel Summary Sheet that Customs *accepted* with the alleged HMT payment at the time it was made. *Id.*

Ford relies upon twenty Export Vessel Summary Sheets as its "supporting documentation" to substantiate its claimed HMT refund.[2] Missing from the record before the court, however, is any evidentiary proffer from Ford that the Export Vessel Summary Sheets were "accepted" by Customs at the time of Ford's alleged HMT payments, leaving unfulfilled a regulatory requirement that Ford had to prove that it satisfied by a preponderance of the record evidence. The record lacks evidence that Ford's Export Vessel Summary Sheets were ever mailed, transmitted, or delivered to, and ultimately accepted by, Customs at the time of Ford's alleged HMT payments. *Compare* Appendix to Def.'s Second Mot. for Summ. J. at 13–43, *Ford Motor Co. v. United States*, No. 0600217 (CIT July 1, 2010), ECF No. 74–3, and Appendix A to Pl.'s Second Cross-Mot. for Partial Summ. J., *Ford Motor Co. v. United States*, No. 06–00217 (CIT Sept. 3, 2010), ECF No. 78 (containing internal Ford documents with no evidence of transmission, submission, or filing with Customs) *with* Appendix K (Stec Declaration and Attachments) to Pl's. First Mot. for Partial Summ. J., *Ford Motor Co. v. United States*, No. 06–00217 (CIT May 5, 2009), ECF No. 53 (containing pre-July 1, 1990 Export Vessel Summary Sheet, Declaration of Ford signatory attesting to filing with Customs) and Joint Status Report, *Ford Motor Co. v. United States*, No. 06–00217 (CIT April 7, 2010) ECF No. 71 ("The parties have concluded that this is the type of supporting documentation that would support a claim but that this particular payment was refunded to Ford during a prior administrative refund process."). Ford has therefore failed to make a showing sufficient to establish the existence of an element essential to Ford's case, and on which Ford bears the burden of proof at trial, mandating entry of summary judgment

[2] Ford's protest underlying this action covers, among other things, the twenty Export Vessel Summary Sheets. Ford, however, only referenced nine of them in its summons and complaint, waiting four and a half years into the litigation to raise the other eleven in its cross-motion for partial summary judgment. Defendant has moved to dismiss for lack of jurisdiction the court's consideration of these eleven Export Vessel Summary Sheets. It is undisputed, though, that Ford's protest covered the eleven Export Vessel Summary Sheets. The court, therefore, has jurisdiction to review Ford's HMT refund claims with respect to them. *See Pollack Import-Export Corp. v. United States*, 52 F.3d 303, 307–308 (Fed. Cir. 1995) (holding that failure to list in summons each individual entry covered by protest was not jurisdictional). Alternatively, the court does not reach the question of whether Ford waived its right to pursue them by waiting so long to raise the issue because, as explained within the opinion, Ford failed make a required evidentiary proffer demonstrating compliance with the HMT refund regulation for all twenty of Ford's Export Vessel Summary Sheets.

against Ford. *See Celotex*, 477 U.S. 322. Judgment will be entered accordingly.

Dated: December 16, 2010
New York, New York

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

Slip Op. 10–136

NTN CORPORATION, et al., Plaintiffs, and JTEKT CORPORATION and KOYO CORPORATION OF U.S.A., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00286

[Denying plaintiff-intervenors' motion for preliminary injunction without prejudice]

Dated: December 17, 2010

Baker & McKenzie LLP (*Donald J. Unger*, *Kevin M. O'Brien*, *Kevin J. Sullivan*, and *Diane A. MacDonald*) for plaintiffs, NTN Corporation, NTN Bearing Corporation of America, NTN-Bower Corporation, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, and NTN Driveshaft, Inc.

Sidley Austin LLP (Neil R. Ellis, Jill Caiazzo, Lawrence R. Walders, and *Rajib Pal)* for plaintiff-intervenors JTEKT Corporation and Koyo Corporation of U.S.A.

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

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

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiffs NTN Corporation, NTN Bearing Corporation of America, NTN-Bower Corporation, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, and NTN Driveshaft, Inc. (collectively, "NTN") contest the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), in periodic administrative reviews of antidumping duty orders on imports of ball bearings and parts thereof (the "subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom for the period from May

1, 2008 through April 30, 2009 (the "period of review"). *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("*Final Results*"). NTN brings three claims. First, NTN challenges Commerce's use of its "zeroing" practice to calculate their dumping margin in the review of the order pertaining to Japan, under which practice Commerce deems sales of subject merchandise made in the United States at prices above normal value to have individual dumping margins of zero rather than negative margins. Compl. ¶¶ 19–26 ("Count One"). Second, NTN contests the application in the review of the Department's policy of issuing duty assessment and liquidation instructions to United States Customs and Border Protection ("Customs" or "CBP") fifteen days after the publication of the final results of the administrative reviews ("fifteen-day policy"). Compl. ¶¶ 27–32 ("Count Two"). Third, NTN asserts that Commerce "may have made other programming, clerical, or methodological errors, including errors that can only be determined by reference to the confidential administrative record." Compl. ¶ 34 (Count Three).

Before the court is the motion of plaintiff-intervenors JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") for a preliminary injunction to prohibit Customs from liquidating entries of subject merchandise produced by or on behalf of JTEKT that were made during the period of review. Mot. of Pl.-Intervenors JTEKT Corp. and Koyo Corp. of U.S.A. for Prelim. Inj. ("Pl.-Intervenors' Mot."). Defendant United States and defendant-intervenor the Timken Company ("Timken"), oppose plaintiff-intervenors' motion for a preliminary injunction. Def.'s Opp'n to JTEKT Corp. and Koyo Corp. of U.S.A.'s Mot. for Prelim. Inj. ("Def.'s Opp'n"); Timken's Opp'n to JTEKT's Mot. for Prelim. Inj ("Timken's Opp'n").

The court concludes that JTEKT has failed to demonstrate any likelihood that plaintiffs will succeed on the merits of the claims in Counts One and Three of the complaint. Plaintiff-intervenors have not intervened with respect to Count Two, which challenges the Department's fifteen-day policy. The court, therefore, must deny plaintiff-intervenors' motion for an injunction against liquidation.

II. Background

Pursuant to 19 U.S.C. § 1675(a) (2006), Commerce initiated the administrative reviews of the orders on the subject merchandise.

Initiation of Antidumping & Countervailing Duty Admin. Reviews and Requests for Revocation in Part, 74 Fed. Reg. 30,052 (June 24, 2009). On April 28, 2010, the Department published its preliminary results. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Admin. Reviews, Preliminary Results of Changed-Circumstances Review, Rescission of Antidumping Duty Admin. Reviews in Part, and Intent to Revoke Order in Part*, 75 Fed. Reg. 22,384 (Apr. 28, 2010). On September 1, 2010, the Department published the Final Results, which assigned a weighted-average margin of 13.46% to plaintiffs and a 10.97% weighted-average margin to JTEKT. *Final Results*, 75 Fed. Reg. at 53,662.

On September 16, 2010, plaintiffs commenced this action. Summons; Compl. On September 17, 2010, plaintiffs moved for a preliminary injunction to prohibit Customs from liquidating entries of subject merchandise produced by or on behalf of plaintiffs that were made during the period of review. Consent Mot. for Prelim. Inj. Defendant consented to this motion, which was granted. Order, Sept. 27, 2010. On October 12, 2010, the court granted JTEKT's motion to intervene as of right. Consent Mot. to Intervene by JTEKT Corp. and Koyo Corp. of U.S.A.; Order, Oct. 12, 2010. Plaintiff-intervenors filed their motion for a preliminary injunction on November 11, 2010, which defendant and defendant-intervenor oppose. Pl.-Intervenors' Mot.; Def.'s Opp'n; Timken's Opp'n. On November 22, 2010, defendant moved to dismiss all three counts set forth in plaintiffs' complaint. Def.'s Mot. to Dismiss ("Def.'s Mot."). Responses to this motion are due on January 21, 2011. On December 9, 2010, plaintiffs moved for leave to file a reply to defendant's response to plaintiff-intervenors' motion for a preliminary injunction. Pl.'s Mot. for Leave to File a Reply to the Government's Resp. to JTEKT Corp. and Koyo Corp. of U.S.A.'s Mot. for Prelim. Inj.

III. Discussion

The court has subject matter jurisdiction under 28 U.S.C. § 1581(c) (2006) to adjudicate Counts One and Three of the complaint. 28 U.S.C. § 1581(c). As provided in Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), the court has jurisdiction to review actions commenced under Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a (2006), including an action contesting a final determination issued in an administrative review conducted under 19 U.S.C. § 1675(a). *See id.* The court is provided subject matter jurisdiction by 28 U.S.C. § 1581(i) to adjudicate plaintiffs' claim in Count

Two, which challenges the decision to issue liquidation instructions to implement the Final Results fifteen days after publication of the Federal Register notice. *See* 28 U.S.C. § 1581(i); *SKF USA Inc. v. United States*, 31 CIT 405, 409–10 (2007) (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004), and *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002–03 (Fed. Cir. 2003)).[1]

In ruling on plaintiff-intervenors' motion for preliminary injunctive relief, the court considers whether the movant is likely to succeed on the merits, whether the movant will suffer irreparable harm if the relief is not granted, whether the balance of the hardships tips in the movant's favor, and whether a preliminary injunction will not be contrary to the public interest. *See Belgium v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (quoting *U.S. Ass'n of Importers of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1346 (Fed. Cir. 2005). "No one factor, taken individually, is necessarily dispositive." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

A. Plaintiff-Intervenors Have Not Intervened in Support of Plaintiffs' Claim Contesting Commerce's Fifteen-Day Policy

The court granted plaintiff-intervenors' unopposed motion to intervene, which sought intervention as a matter of right according to 28 U.S.C. § 2631(j)(1)(B). Consent Mot. to Intervene by JTEKT Corp. and Koyo Corp. of U.S.A. 2; Order, Oct. 12, 2010. Under the statute, "in a civil action under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a], only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right." 28 U.S.C. § 2631(j)(1)(B). As expressly limited by § 2631(j)(1)(B), the intervention as a matter of right that JTEKT was granted pertains only to the counts within the complaint that arise under section 516A, which in this case are Counts One and Three. Plaintiffs' claim in Count Two challenging the Department's fifteen-day policy, which depends on 28 U.S.C. § 1581(i) for subject matter jurisdiction, does not arise under Section 516A and instead arises under the Administrative Procedure

[1] The court held in *SKF USA Inc. v. United States* that jurisdiction over a claim challenging a previous fifteen-day policy does not fall under 28 U.S.C. § 1581(c), explaining that "[t]he language in the Federal Register notice to which plaintiffs direct the court's attention is a statement of a *present* intention on the part of Commerce to take, within fifteen days of the publication of the Final Results, the *future* action of instructing Customs to liquidate, in accordance with the Final Results, the affected entries." *SKF USA Inc. v. United States*, 31 CIT 405, 409 (2007). The court reached the same conclusion in subsequent actions regarding plaintiffs' claim challenging the Department's revised fifteen-day policy. *SKF USA Inc. v. United States*, 34 CIT __, __, Slip Op. 10–57, at 6–7 (May 17, 2010); *SKF USA Inc. v. United States*, 33 CIT __, __, Slip Op. 09–121, at 17–18 (Oct. 27, 2009).

Act, 5 U.S.C. § 702 (2006). *See Motion Systems v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006). Therefore, JTEKT could intervene with respect to the claim in Count Two only as a matter of permissive intervention. *See* 28 U.S.C. § 2631(j). Plaintiff-intervenors have not filed a motion for permissive intervention as to that claim.

Moreover, were JTEKT now to move to intervene with respect to Count Two, it is probable that the court would be required to deny any such motion for lack of standing. According to 28 U.S.C. § 2631(j), permissive intervention is available only to persons "adversely affected or aggrieved by a decision in a civil action," a requirement grounded in the standing requirement under Article III of the United States Constitution. It is unlikely that JTEKT would be able to demonstrate that they were affected in any way by the agency action NTN is challenging in Count Two, which is the Department's application of the fifteen-day policy to implement the Final Results. In Count Two, NTN's claim is that "[t]he Department's determination to send liquidation instructions to Customs and Border Protection prior to the time allowed by law for initializing judicial review of the publication of the final determination is unsupported by substantial evidence of record and otherwise not in accordance with law." Compl. ¶ 32. To demonstrate standing, NTN asserted as a fact that "[t]o prevent premature liquidation of its entries, NTN was required to file its summons and complaint within less than the statutorily permitted periods"; NTN did so in order to move for and obtain a preliminary injunction against liquidation. *Id.* ¶ 29. In referring to "the statutorily permitted periods" and the "time allowed by law for initializing judicial review," NTN's complaint must be construed to mean a period that is, at most, sixty days from the date of publication of the Final Results. *See* 19 U.S.C. § 1516a(a)(2) (allowing a party thirty days from the publication of final results of an administrative review to file a summons and thirty days from the filing of a summons to file a complaint). JTKET did not move for an injunction against liquidation until November 11, 2010, seventy-one days after publication of the Final Results. Pl.-Intervenors' Mot.; *see Final Results*. It is not apparent from these facts that the act of which NTN complains, *i.e.,* issuance of liquidation instructions according to a policy requiring such issuance before the statutory period for commencing litigation has run, had or could have had any adverse effect on JTEKT.

B. Plaintiff-Intervenors Fail to Show that Plaintiffs' Claims in Counts One and Three Have Any Likelihood of Success on the Merits

Plaintiff-intervenors have failed to demonstrate that the plaintiffs in this case have any likelihood of succeeding on the merits of the

claims stated in Counts One and Three of the complaint. In Count One, plaintiffs' complaint alleges that due to recent developments in the World Trade Organization ("WTO"), the Department's methodology in calculating NTN's weighted-average dumping margin "fails to comply with U.S. law and U.S. obligations under international law." Compl. ¶¶ 19–26 (citing to Appellate Body Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294 (Apr. 18, 2006); Appellate Body Report, *United States - Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 137, 156, 165 and 185, WT/DS322/AB/R (Jan. 9, 2007)). Plaintiffs report that, as a result, "the United States agreed to implement the WTO decision on zeroing by December 24, 2007." Compl. ¶ 24 (citing to *U.S. Zeroing*, WT/DS322/20 (May 8, 2007)).

The U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") repeatedly has sustained Commerce's application of the zeroing methodology in administrative reviews. *See Koyo Seiko Co. v. United States*, 551 F.3d 1286 (Fed. Cir. 2008); *SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007). Under this binding precedent, the court previously has denied a party's motion for an injunction where the sole claim in the case was contesting Commerce's zeroing practice, on the ground that the party failed to demonstrate any likelihood of success on the merits. *NSK Ltd. v. United States*, 34 CIT __, Slip Op. 10–117 (Oct. 15, 2010); *NSK Bearings Europe Ltd. v. United States*, 34 CIT __, Slip Op. 10118 (Oct. 15, 2010). Because plaintiffs' claim challenging zeroing is contrary to binding precedent established and repeatedly reaffirmed by the Court of Appeals, the court concludes that plaintiff-intervenors have failed to demonstrate a likelihood that plaintiffs will succeed on the merits of the claim stated in Count One.

Plaintiff-intervenors are also unable to demonstrate that plaintiffs will have any likelihood of succeeding on the merits of the claim in Count Three. In Count Three, NTN asserts that:

> [b]ased on information and belief, NTN alleges that the ITA may have made other programming, clerical, or methodological errors, including errors that can only be determined by reference to the confidential administrative record. The administrative record has not been filed with this Court, and, therefore, NTN has not yet been able to review it.[2]

[2] The confidential administrative record in this case was filed on December 10, 2010.

Compl. ¶ 34. The applicable pleading requirement for plaintiffs' claim in Count Three is set forth in USCIT Rule 8(a), which provides that a complaint shall contain "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." USCIT Rule 8(a)(2) (2010). Although a complaint need not contain detailed factual allegations, the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Because plaintiff-intervenors are seeking to intervene in support of a claim that is based only upon speculation that something contrary to law may have happened, the court concludes that plaintiff-intervenors have failed to demonstrate that plaintiffs will succeed on the merits of their claim in Count Three.

Plaintiff-intervenors urge the court to consider the likelihood of plaintiffs' success on the merits on a "sliding scale basis" that considers the showing of irreparable harm. Mem. of Pl.Intervenors JTEKT Corp. and Koyo Corp. of U.S.A. in Support of Mot. for Prelim. Inj. 5 (Pl.Intervenors' Mem."). Plaintiff-intervenors argue that "in the absence of an injunction, the Department and U.S. Customs and Border Protection will proceed with liquidation of the subject entries, once the litigation in *NSK* is completed. . . .[t]hus, without an injunction, JTEKT will be deprived of its right to judicial review to a significant degree." Pl.-Intervenors' Mem. 4–5. Pursuant to court order in connection with other pending litigation, liquidation of JTEKT's entries for the period of review at issue in this action is currently enjoined. *See NSK Corp. v. United States*, Court No. 06–00334, Order, Sept. 13, 2010 (in which NSK appeals the second sunset review determination of the U.S. International Trade Commission). Without deciding the question, the court presumes, for purposes of considering the other three factors, that upon completion of that other litigation JTEKT may be in a position to be harmed irreparably by any liquidation of the affected entries that does not reflect the outcome of this litigation.

Nevertheless, even a showing of irreparable harm would not convince the court that an injunction against liquidation is warranted in this case, in which there has been shown no likelihood of success on the claims in Counts One and Three. The court reaches this conclusion even though the "balance of the hardships" and "public interest" factors are also in JTEKT's favor. The government will not incur hardship if an injunction is granted, as it would be in a position to collect any additional duties owed upon eventual liquidation. Concerning the "public interest" factor, it is in the public interest that the entries at issue in this litigation be liquidated in accordance with the correct result on the merits. An injunction against liquidation of

entries pursuant to 19 U.S.C. § 1516a(c)(2) should not be ordered without at least a showing that the issue presented is not "so clear-cut as to warrant disposing of this appeal," *Belgium*, 432 F.3d at 1295, a showing plaintiff-intervenors are unable to demonstrate with respect to those claims. Therefore, the court will deny plaintiff-intervenors' motion for a preliminary injunction.

IV. Conclusion and Order

Plaintiff-intervenors have failed to demonstrate that plaintiffs will have any likelihood of success on the merits of the claims stated in Counts One and Three of plaintiffs' complaint. Plaintiff-intervenors have not intervened as to the claim stated in Count Two. Accordingly, the court declines to grant the injunction against liquidation sought in plaintiff-intervenors' motion.

ORDER

Upon consideration of plaintiff-intervenors' Motion for Preliminary Injunction, plaintiff-intervenors' memorandum in support thereof, Defendant's Opposition to JTEKT Corporation and Koyo Corporation of U.S.A.'s Motion for Preliminary Injunction, Timken's Opposition to JTEKT's Motion for Preliminary Injunction, and all other papers and proceedings herein, it is hereby

ORDERED that plaintiff-intervenors' Motion for Preliminary Injunction be, and hereby is, DENIED without prejudice; and it is further

ORDERED that Plaintiffs' Motion for Leave to File a Reply to the Government's Response to JTEKT Corporation and Koyo Corporation of U.S.A.'s Motion for Preliminary Injunction be, and hereby is, DENIED as moot.

Dated: December 17, 2010
New York, New York

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

Slip Op. 10–137

NATIONAL FISHERIES INSTITUTE, INC., et al., Plaintiffs, v. United States BUREAU OF CUSTOMS AND BORDER PROTECTION, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00683

[Denying defendant's motion under USCIT Rule 62 for a stay of the judgment pending possible appeal]

Dated: December 17, 2010

Steptoe & Johnson LLP (*Eric C. Emerson*, *Gregory S. McCue*, and *Michael A. Pass*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini* and *David F. D'Alessandris*); *Chi S. Choy*, Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Defendant moves pursuant to USCIT Rule 62 to stay the judgment entered in this case on October 21, 2010. *See* Mot. for Stay Pending Possible Appeal ("Def.'s Mot."); *Nat'l Fisheries Inst., Inc. v. United States*, 34 CIT __, Slip Op. 10–120 (Oct. 21, 2010) ("*Nat'l Fisheries V*"). The court concludes that a stay of the judgment is not warranted.

II. Background

Defendant filed its motion to stay the judgment on December 2, 2010.[1] Def.'s Mot. The judgment ordered the United States Bureau of Customs and Border Protection ("Customs" or "CBP") to cancel, and, if necessary, allow replacements for, plaintiffs' bonds affected by the amended second remand redetermination that Customs submitted in response to the court's order in *National Fisheries Institute, Inc. v. United States*, 34 CIT __, Slip Op. 10–61 (May 25, 2010). *Nat'l Fisheries V*, 34 CIT at __, Slip Op. 10–120, Judgment. For each plaintiff, the court allowed Customs sixty days from the date that judgment was entered or five days after a plaintiff tenders a replacement bond, whichever occurs later, to comply with the judgment by effectuating the amended second remand redetermination. *Id.* at __, Slip Op. 10–120, Judgment. Further, the court permanently enjoined Customs "from issuing any demand, claim, or charge upon any bond that has undergone the cancellation procedure" described in the judgment. *Id.* at __, Slip Op. 10–120, Judgment.

III. Discussion

Defendant seeks a stay of the judgment "pending the Government's possible appeal so as not to possibly render an appeal moot, thus denying the reviewing courts any opportunity to decide the important

[1] Plaintiffs' response to defendant's motion for a stay of the judgment is due on December 21, 2010. Because the time for the government to bring an appeal will be exhausted before that date, the court rules on defendant's motion prior to considering a possible response by plaintiffs.

issues presented by this case." Def.'s Mot. 1. Citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), defendant argues that all four factors that the United States Supreme Court identified as appropriate for adjudication of a motion for stay of a judgment pending appeal–specifically, whether the stay applicant has made a strong showing that he is likely to succeed on the merits, whether the applicant will be irreparably harmed absent a stay, whether the issuance of the stay will substantially injure the other parties, and where the public interest lies–favor granting a stay in this case. Def.'s Mot. 6. The court disagrees.

As a threshold matter, the court observes that no appeal is pending. In *Hilton v. Braunskill*, the Supreme Court discussed the equitable factors pertaining to the power of federal courts under Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a) to grant a stay pending an actual appeal, not a possible appeal. *See Hilton v. Braunskill*, 481 U.S. at 776. USCIT Rule 62(c), which parallels the Federal Rule of Civil Procedure, contemplates a stay in the event of an actual appeal. As of the time of issuance of this Opinion and Order, defendant has not filed a notice of appeal with the Clerk of the Court of International Trade. *See* F.R. App. P. 3. Defendant acknowledges in its motion that "[t]he decision of the appropriate official upon whether to appeal remains pending." Def.'s Mot. 1 n.1.

The lack of a pending appeal does not necessarily preclude the court from exercising its power to stay its judgment and in so doing modify the injunctive relief it has ordered in this case. *See*, *e.g.*, 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2904, at 516–17 (2d ed. 1995) (observing that courts have authority to stay an injunction pending appeal "[w]hen there is reason to believe that an appeal will be taken"). However, the court weighed the equitable considerations affecting a decision on a stay when ruling on the amended second remand redetermination. At that time, the court, in deciding whether to award permanent injunctive relief in this case, considered whether to stay the effective date of the judgment to avoid mooting any appeal of the judgment that the government might bring. *Nat'l Fisheries V*, 34 CIT at __, Slip Op. 10–120 at 6–12. Deciding against such a stay, the court concluded "that the bonds remaining at issue in this litigation must be canceled as soon as possible" and that "the possible mooting of defendant's appeal is not a sufficient reason for the court to deny plaintiffs the equitable relief to which plaintiffs are otherwise entitled." *Id.* at __, Slip Op. 10–120 at 11. In deciding defendant's current motion, the court reconsiders the matter and again concludes that the likely

mooting of defendant's appeal, were such an appeal to occur, is not a sufficient ground on which the judgment should be stayed.

Concerning possible success on appeal, defendant argues that "there is more than a serious and substantial question concerning whether bond determinations are committed to CBP's discretion by statute, given the lack of any statutory standards for the Court to apply in reviewing CBP's efforts to protect the revenue" and that, as a result, "the 'arbitrary and capricious' standard of review should not have applied to bond determinations." Def.'s Mot. 9–10. According to defendant, a court must uphold any bond determination by Customs unless Customs exceeded its statutory authority, there was a constitutional violation, or Customs violated its own regulation. *Id.* at 10 (citing *Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985); *Webster v. Doe*, 486 U.S. 592, 600 (1988)). The court previously rejected these arguments. *See Nat'l Fisheries Inst., Inc. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1270, 1283–85 (2009) ("*Nat'l Fisheries II*"). In considering the question anew, the court again finds meritless defendant's arguments to the effect that the "arbitrary and capricious" standard of review, as provided by Congress, Section 301 of the Customs Courts Act of 1980, 28 U.S.C. § 2640(e) (2000), does not apply to the judicial review of the agency actions that were contested in this litigation. Were defendant correct, individual bond liability limits determined by Customs essentially would be unreviewable even if arbitrary, capricious, or unreasonable. *Nat'l Fisheries II*, 637 F. Supp. 2d. at 1284. The court previously concluded from its examination of Section 623 of the Tariff Act of 1930, 19 U.S.C. § 1623(a), (2000), which expressly identifies as relevant factors "the protection of the revenue" and "compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce," that "there is law for a court to apply in this case." *Id.* __, 637 F. Supp. 2d at 1284 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

Defendant argues, in the alternative, that the bond determinations that remain at issue in this litigation must be sustained as reasonable upon judicial review. Def.'s Mot. 12–14. The court earlier concluded that the enhanced bonding requirement was contrary to law in multiple respects. At issue in this case are terminated bonds, the limits of liability of which Customs set at 100% of an importer's previous annual duty payments. *Nat'l Fisheries II*, 33 CIT at __, 637 F. Supp. 2d at 1275. After analyzing the allocation by Congress of authority between the two agencies, the court held that the U.S. Department of Commerce ("Commerce") has "the specific responsibility . . . to determine potential antidumping duty liability as accurately

as possible in the form of the cash deposit" and that Customs acted contrary to the limitations on its authority when it required a class of importers to post security for antidumping liability at double the level Commerce determined to be appropriate. *Id.* at __, 637 F. Supp. 2d at 1294. Moreover, this case involved not only individual bond determinations but an onerous new bond requirement that Customs arbitrarily imposed on a specific class of importers, without an adequate justification grounded in any particularized risk to the revenue. As the court previously concluded, "Customs arbitrarily and capriciously imposed its heightened bonding requirement solely on U.S. importers of subject shrimp, even though Customs did not consider whether U.S. shrimp importers pose a greater risk of defaulting on antidumping duties . . . ." *Id.* at __, 637 F. Supp. 2d at 1294.

As to whether the government will suffer irreparable injury in the absence of a stay, the court already considered this possibility and weighed it against other equitable factors upon concluding that complying with the court's judgment likely would render moot any appeal once the bonds subject to this case are canceled. *Id.* at __, Slip Op. 10–120 at 11. This factor does not outweigh the other factors, including the adverse effect on plaintiffs from a stay pending a possible appeal, for reasons discussed below.

Concerning whether issuance of the stay will substantially injure the other parties to the proceeding, defendant states that "NFI will not be injured by a stay. . . . [T]he importers have, for the most part, continued to import shrimp throughout this proceeding, and no party has contended that it would be significantly harmed should CBP be allowed to protect the revenue pending appeal." Def.'s Mot. 7. The record in this case does not support defendant's characterization of past events that are a matter of record in this case. The enhanced bonding requirement earlier forced some plaintiff importers to curtail certain importing activities and adversely affected all plaintiffs. As the court stated previously, "plaintiffs have been required to post collateral, typically in the form of letters of credit, to obtain bonds in amounts demanded by Customs according to the [enhanced bonding requirement]." *Id.* at __, Slip Op. 10–120 at 8. The court also observed that "[e]arlier, some plaintiffs agreed to cease or reduce importing activity to avoid the costs of enhanced bonding; others have incurred costs due to the reduced availability of their credit to conduct their general business activities." *Id.* As a general matter, "each of the plaintiffs has incurred, and will continue to incur absent permanent injunctive relief, adverse effects as a result of being made subject to the unlawful enhanced bonding requirement." *Nat'l Fisheries V*, 34 CIT at __, Slip Op.10–120 at 7. Additionally, it would be incorrect to

state or imply that plaintiffs, who have incurred irrecoverable costs as a result of an illegal agency action, have conceded that they will not be significantly harmed were the government to obtain a stay pending appeal. *Id.* at __, Slip Op. 10–120 at 8–9; Mem. of Points & Authority in Supp. of Pls.' Mot. for J. on the Agency R. 28–29. The unjust, discriminatory harm that would occur throughout the duration of a possible appeal were Customs permitted to continue to impose the unlawful, and now repealed, enhanced bonding requirement on a small group of importers weighs heavily against staying enforcement of the judgment.

With respect to the matter of the public interest, defendants cite to the importance of collecting all antidumping duties and of "multi-tiered review." Def.'s Mot. 8–9. Defendant's "public interest" argument addressing duty collection would appear to overlook the significance of the fact that Customs never imposed the enhanced bonding requirement on any importers other than shrimp importers and the fact that Customs, some time ago, discontinued the requirement prospectively for all importers, including the plaintiffs in this case. *Nat'l Fisheries II*, 34 CIT at __, 637 F. Supp. 2d at 1281. The revenue in question is already protected by cash deposits; in addition, the court's judgment does not preclude Customs from requiring superseding bonds according to the same general bond formula that Customs applies to all importers. The effect of the judgment is to extend to the duty liability secured by plaintiffs' terminated bonds the same regulatory treatment that Customs accords to continuous bonds of all other importers, instead of the unlawful treatment resulting from the enhanced bonding requirement that Customs, despite multiple opportunities, has refused to redress. Allowing the discriminatory and unlawful treatment to continue throughout an appellate process would be contrary to fair and equitable administration of the law. Nor does the importance of multi-tiered judicial review justify a stay of the judgment. The general principle is that an appeal does not stay the effect of an injunction. *See* USCIT Rule 62(a). In summary, as the court previously concluded, "[t]he public interest is not served by the discriminatory, arbitrary, and capricious continuation of an onerous and unlawful requirement against a single group of importers." *Nat'l Fisheries V*, 34 CIT at __, Slip Op. 10–120 at 10.

IV. Conclusion and Order

Defendant has not made a strong showing that it is likely to succeed on the merits should it bring an appeal. Plaintiffs would suffer irredressable harm were the court to grant the stay defendant seeks, and granting that stay would not serve the public interest. These factors

weigh strongly against a stay, which the court declines to grant even though recognizing that complying with the court's judgment likely will render moot any appeal that defendant may bring.

ORDER

For the aforementioned reasons, it is hereby

ORDERED that Defendant's Motion for Stay Pending Possible Appeal, filed on December 2, 2010, be, and hereby is, DENIED.

Dated: December 17, 2010
New York, New York

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

Slip Op. 10–138

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Hon. Jane A. Restani, Chief Judge
Court No. 05–00435

ORDER

I.
Introduction

This court having jurisdiction pursuant to 28 U.S.C. § 1581(a) to review Protest No. 2002–02–101218 timely filed November 26,2002, by Horizon Lines, LLC ("Horizon"), contesting the assessment of certain duties by Customs & Border Protection ("CBP") for Vessel Repair Entry No. C20–0060861–5 for the CRUSADER, Voyage 047; based upon the Findings of Fact, Conclusions of Law and Order dated August 31, 2010 (Slip Op. 10–98), made after a bench trial February 22 and 23,2010; and Plaintiff having further consulted with Defendant on September 14,23 and 24,2010, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. CBP incorrectly assessed duties for lay-up expenses incurred by Horizon at Karimun Sembawang Shipyard ("KSS") in Indonesia (Items 2, 3, 4, 5, 6a, 6b, 7a, 7b-l, 7b-2, 8a,8b,9, 10, 11a–2, 11a–3, 11b-1, 11lb–3, 11b–4, 11c, 11d–1 and 11d–2) because such work constitutes neither dutiable repairs, nor dutiable "expenses of repairs," nor proratable dual purpose expenses pursuant to 19 U.S.C. § l466(a) and *SL Serv., Inc. v. United States*, 357 F.3d 1358 (Fed. Cir. 2004), for the reasons set forth in Slip Qp. 10–98.

2. CBP incorrectly assessed duties under 19 U.S.C. § 1466(a) for proratable expenses incurred by Horizon at Jurong Shipyard ("Jurong") in Singapore because the proration ratio should not have included in its numerator or denominator any expenses incurred at KSS, for the reasons set forth in Slip Op. 10–98.

3. Because of the errors identified above, Horizon is entitled to a refund in the amount of $97,231.98 plus interest as provided by law.

Dated: September 29, 2010
New York, New York

/S/ Jane A. Restani
JUDGE

Slip Op. 10–139

THE WATANABE GROUP, Plaintiff v. UNITED STATES, Defendant, and ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Intervenor-Defendant.

Before: Jane A. Restani, Judge
Court No. 09–00520

[The plaintiff's motion for judgment on the agency record is denied.]

Dated: December 22, 2010

Riggle & Craven (*David A. Riggle*, *Lei Wang*, and *Shitao Zhu*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*), for the defendant.

Wiley Rein, LLP (*Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*) for the intervenor-defendant.

OPINION

Restani, Judge:

INTRODUCTION

This action—brought before the court on plaintiffs The Watanabe Group's ("Watanabe" or "Petitioner")[1] motion for judgment on the agency record pursuant to USCIT R. 56.2—challenges the Depart-

[1] Watanabe Group consists of Watanabe Paper Products (Shanghai) Co., Ltd., Watanabe Paper Products (Linqing) Co., Ltd., and Hotrock Stationary (Shenzen) Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R. Submitted by Pl. The Watanabe Group, Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("Pl.'s Br.") 1.

ment of Commerce's ("Commerce") final determination in a periodic review of an antidumping ("AD") duty order on certain lined paper products from the People's Republic of China ("PRC"). *Certain Lined Paper Products From the People's Republic of China: Notice of Final Results of the Second Administrative Review of the Antidumping Duty Order*, 74 Fed. Reg. 63,387, 63,389 (Dep't Commerce Dec. 3, 2009) ("*Final Results*"). For the reasons stated below, the court affirms Commerce's final results and denies Watanabe's motion for judgment on the agency record.

BACKGROUND

In September 2006, Commerce published its less than fair value ("LTFV") determination resulting in an AD duty order. *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia*, 71 Fed. Reg. 56,949, 56,949 (Dep't Commerce Sept. 28, 2006) ("*LTFV Determination*"). In September 2008, Commerce initiated the second administrative review of that order at the request of the American Association of School Paper Suppliers to examine entries of lined paper products from the PRC produced or exported by another entity (which was later dropped) and Watanabe for the period of review ("POR") from September 1, 2007 through August 31, 2008. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review*, 73 Fed. Reg. 64,305, 64,306 (Dep't Commerce Oct. 29, 2008).

Commerce asked Watanabe to respond to Sections A, C, and D of Commerce's AD questionnaire. App. to the Resp. Br. of Association of American School Paper Suppliers ("AASPS's App.") Tab 4. Watanabe responded that it had not exported merchandise during the POR. *See id.* Tab 5. Commerce informed Watanabe that subject merchandise produced or exported by Watanabe had entered the U.S. market during the POR. *See id.* Tab 6, at 1. Watanabe replied that all shipments but one were non-subject merchandise and the remaining shipment was shipped just prior to the POR.[2] *See id.* Tab 7. Commerce countered that the subject merchandise entered the United States during the POR. *See id.* Tab 8. Watanabe argued that the date of entry was irrelevant. *See id.* Tab 9, at 2–3. Commerce clarified that

[2] The parties agree that the merchandise was shipped before September 1, 2007, but dispute the exact date. Any discrepancy is immaterial because, as will be discussed, the date upon which the merchandise was shipped is irrelevant.

it evaluates subject merchandise based on entry, not sale. *See id.* Tab 10. Watanabe answered three questions put to it by Commerce by stating that the date of sale was prior to the POR, no subject merchandise was sold during the POR, it had no reviewable sales, and all other questions by Commerce were inapplicable. *See id.* Tab. 11. Commerce again clarified that the sales to be reviewed for the POR were identified by entry date and granted Watanabe's request for an extension. *See id.* Tab 12; Tab 13. In May 2009, Watanabe informed Commerce that it would not respond. *See id.* Tab 14; Tab 15.

Commerce published its preliminary results, finding Watanabe to be part of the PRC-wide entity based on its failure to respond to Commerce's questionnaire or to submit a certification of data supporting a rate separate from that of the PRC-wide entity. *Certain Lined Paper Products From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review*, 74 Fed. Reg. 36,662, 36,663 (Dep't Commerce July 24, 2009. In November 2009, Commerce published its *Final Results*, continuing to find that Watanabe had sold goods immediately prior to the POR but that those goods had entered the U.S. market during the POR, that Watanabe had failed to respond to Commerce's questions and was therefore deemed part of the PRC-wide entity, and that adverse inferences were warranted with respect to selection of an AD duty rate. *Final Results*, 74 Fed. Reg. at 63,389–90; *Issues and Decisions for the Final Results of the Second Amin. Review of the Antidumping Duty Order on Certain Line Paper Products from the People's Republic of China (Final Results)*, A-570–901, POR 09/01/2007–08/31/2008, at 4, 13–15 (Nov. 23, 2009) ("*Iss. & Dec. Memo.*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–28769–1.pdf (last visited Dec. 21, 2010). Commerce assigned a rate of 258.21% to the PRC-wide entity and to Watanabe. *Iss. & Dec. Memo.* at 15. In July 2010, Watanabe moved for judgment on the agency record.

JURISDICTION & STANDARD OF REVIEW

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

DISCUSSION

I. Subject Merchandise Is Reviewed by Entry

Watanabe contends that Commerce, absent a sale, must rescind the administrative review because 1) the regulation prevents Commerce

from using the date of entry to select sales to be reviewed, and 2) Commerce double-counted. Pl.'s Br. 10. This claim lacks merit.

First, Watanabe claims that Commerce's regulation does not permit Commerce to consider transactions for merchandise sold prior to the POR but which entered the United States during the POR. Pl.'s Br. 10. The regulation provides that Commerce "may rescind an administrative review . . . if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise."[3] 19 C.F.R. § 351.213(d)(3). Additionally, Commerce reviews "entries, exports, or sales during the" POR. 19 C.F.R. § 351.213(e)(1)(ii). Watanabe misreads the regulation and this Court's precedent. *Helmerich & Payne, Inc. v. United States*, 24 F. Supp. 2d 304, 312–14 (CIT 1988) (finding Commerce's examination of subject merchandise based on entry date valid, regardless of date of sale); *Corus Staal BV v. United States*, 387 F. Supp. 2d 1291, 1303 (CIT 2005) (affirming that Commerce's "entry-based methodology" is consistent with its practice and in accordance with law). Here, the commercial invoice shows that the subject merchandise was exported just before the POR began and plaintiff does not dispute that entry occurred during the POR. Because the regulation offers three alternatives for selection of sales—entry, export, or sale—Commerce has the discretion to choose entries, exports, or sales in determining whether sales activity occurred during the POR.[4] *See* 19 C.F.R. § 351.213(d)(3).

Second, Watanabe claims that Commerce double-counted the transaction in question, by examining it in this administrative review and the prior review. Pl.'s Br. 14. Commerce conducts its reviews, including the prior review, on the basis of entry. *Iss. & Dec. Memo.* at 6; *see*, *e.g.*, *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 55,578, 55,589 (Dep't Commerce Oct. 16, 1998). Additionally, Watanabe's sales were not individually examined by Commerce in the prior review because Watanabe was neither a voluntary nor a mandatory respondent in that review, although it qualified for a separate rate in the earlier review. Iss. & Dec. Memo. at 6. As Commerce

[3] The statutory basis for the regulation also mentions entries. In determining AD duties, "the administering authority shall determine -- (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A).

[4] Watanabe cites *Torrington Co. v. United States*, 818 F. Supp. 1563, 1574 (CIT 1993) for the proposition that the statute requires some "meaningful sale" to or in the U.S. market. Pl.'s Br. 15 (*quoting Torrington*, 818 F. Supp. at 1574). Unlike *Torrington* where the subject merchandise entered the United States without having been sold and was subsequently reexported without sale, the subject merchandise in the instant case was sold, entered the United States, and remained there. *See Torrington*, 818 F. Supp. at 1574. Thus, Commerce was deprived of any basis upon which to calculate a dumping margin. *See id.* at 1574.

permissibly relied on the date of entry of the subject merchandise in selecting sales for review and did not double-count any such entry, Commerce's decision in this regard is sustained.

II. Application of Adverse Inferences

Watanabe alleges Commerce improperly applied inferences adverse to the interests of Watanabe. Pl.'s Br. 17. This claim lacks merit.

Commerce may apply adverse facts available ("AFA") to a party who fails "to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). Cooperation means a party must "do the maximum it is able to do" to comply with the requests, *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003), if that party "would have known that the requested information was required," *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1338 (CIT 2009). Commerce gave Watanabe multiple opportunities to respond to its request for data. *See* AASPS's App. Tab5; Tab 6; Tab 8; Tab 12; Tab 14. Commerce informed Watanabe when the shipment in question took place, that its shipment was included in the POR, that an alternative reporting method existed, and that failure to respond would result in an adverse inference. *Id.* Tab 8; Tab 12. Watanabe offered every excuse available: it could not comment because of confidentiality, it did not know when or where the importer may have entered the merchandise, the shipment was not part of the POR, and it asked for a deadline extension before informing Commerce it would not submit a response. *See id.* Tab 7; Tab 13. Additionally, Watanabe never replied to Commerce's questions regarding its relationship with the PRC-wide entity. *See id.* Tab 11. Its only responses strongly implied that it possessed data on a sale from just prior to the POR that entered the United States during the POR. *Id.* Tab 7. Because Watanabe should have known what Commerce was seeking and did not do the maximum it could, Commerce's application of an inference adverse to the interests of Watanabe was permissible.[5]

Having received no information from Watanabe aside from its denial of shipments during the POR, Commerce applied adverse inferences in determining that Watanabe was part of the PRC-wide entity and selecting an AD duty rate. *Iss. & Dec. Memo.* at 13. Absent any information on the record, Commerce presumed that this non-

[5] Watanabe seems to argue that Commerce may not, and in the instant case did not, apply an adverse inference prior to determining that a respondent has not fully cooperated. Pl.'s Br. 17–20. This is contrary to the plain facts of the case: Prior to applying an adverse inference, Commerce found that "Watanabe failed to provide requested information" and that "[i]t is clear on the record of this case that Watanabe failed to cooperate to the best of its ability in this administrative review." *Iss. & Dec. Memo.* at 8, 11.

compliant respondent was part of the PRC-wide entity. *See Shanghai Taoen Int'l Trading Co. v United States*, 360 F. Supp. 2d 1339, 1348 (CIT 2005) (respondent has the obligation to place some evidence on the record to dispute an adverse inference). Because the record was empty of all information regarding Watanabe's relationship with the PRC-wide entity, here Commerce permissibly chose to find the respondent to be part of the PRC-wide entity.[6]

III. Corroboration of the PRC-wide Rate

Watanabe claims Commerce erred in not corroborating the PRC-wide rate, 1) as to Watanabe,[7] and 2) as to the PRC-wide entity.[8] *See* Pl.'s Br. 23–31. This claim lacks merit.

Watanabe alleges that Commerce did not corroborate the PRC-wide rate as to Watanabe because the rate chosen bore no rational relationship to Watanabe. Pl.'s Br. 23–28. Where Commerce has found the respondent part of the PRC-wide entity based on adverse inferences, Commerce need not corroborate the PRC-wide rate with respect to information specific to that respondent because there is "no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company." *Peer Bearing Co.-Changshan v. United*

[6] Watanabe does not seem to contest Commerce's determination that it is part of the PRC-wide entity, only that Commerce made an impermissible adverse inference. *See* Pl.'s Br. 17–22. Further, Watanabe does not challenge Commerce's general methodology of requiring exporters to demonstrate entitlement to a rate separate from that of the PRC-wide entity in each period that is reviewed.

[7] Watanabe argues that, because it received a rate of 22.35% as a separate rate respondent in a prior review, Commerce's application of 258.12% to it through the PRC-wide entity is punitive. Pl.'s Br. 28. First, because Watanabe submitted no evidence it is impossible to decide that something other than its prior rate is punitive as to Watanabe. Second, no party has placed evidence on the record suggesting that the PRC-wide rate is punitive as to the PRC-wide entity. *Issues and Decision Memorandum for the Less-Than-Fair Value Investigation of Certain Lined Paper Products from the People's Republic of China*, A-570–901, POI 01/01/2005–06/30/2005, at 38 (Aug. 30, 2006) ("*LTFV Iss. & Dec. Memo.*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/06–7538–1.pdf (last visited Dec. 21, 2010); *Final Results*, 74 Fed. Reg. at 63,390. Thus, the application of PRC-wide rate of 258.12% is not demonstrated to be punitive.

[8] Watanabe states that the "Adverse Facts Available rate selected by Commerce and applied to Watanabe (258.21%) was not supported by substantial evidence." Pl.'s Br. 23. As indicated, Commerce did not apply a separate AFA rate to Watanabe, but rather applied the PRC-wide rate through adverse inferences. *Iss. & Dec. Memo.* at 13. These are two distinct legal concepts: a separate AFA rate applies to a respondent who has received a separate rate but has otherwise failed to cooperate fully whereas the PRC-wide rate applies to a respondent who has not received a separate rate. *See Since Hardware (Guangzhou) Co. v. United States*, Slip Op. 10–108, 2010 WL 3982277, at *8 (CIT Sept. 27, 2010). This Court assumes that Watanabe argues Commerce failed to corroborate the PRC-wide rate as to Watanabe given Watanabe's insistence that Commerce must rely on primary information, AFA rates must bear a rational relationship to the respondent, and AFA rates cannot be punitive. *See* Pl.'s Br. 23–28.

States, 587 F. Supp. 2d 1319, 1327 (CIT 2008); *Shandong Mach. Imp. & Exp. Co. v. United States*, Slip Op. 09–64, 2009 WL 2017042, at *8 (CIT June 24, 2009) (Commerce has no obligation to corroborate the PRC-wide rate as to an individual party where that party has failed to qualify for a separate rate). Commerce's permissible determination that Watanabe is part of the PRC-wide entity means that inquiring into Watanabe's separate sales behavior ceases to be meaningful.

Watanabe argues for the application of recent Federal Circuit precedent, which found that "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." Pl.'s Br. 24 (*quoting Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010)). This misreads *Gallant*, a separate AFA rate case, which clearly states that an "*AFA rate* must be a reasonably accurate estimate of the respondent's actual rate." *Gallant*, 602 F.3d at 1323 (internal quotation marks omitted) (emphasis added). If a respondent receives an AFA rate separate from that of the PRC-wide entity, that respondent has presented a separate rate certification to Commerce and has established its separate identity.[9] *Since Hardware*, 2010 WL 3982277, at *8 (finding that "[i]f the record supports application of a separate rate, Commerce must determine a separate AFA rate . . . ; if not, Commerce may apply the PRC-wide rate"). Here, *Gallant* does not apply in the manner asserted by Watanabe because Commerce has determined Watanabe to be part of the PRC-wide entity and therefore Watanabe has not received a separate AFA rate.[10]

Watanabe also alleges that Commerce failed to corroborate the PRC-wide rate generally. Pl.'s Br. 28–30. Having intentionally left the record for this administrative review void of any evidence, Watanabe now asks this Court to require Commerce to corroborate the PRC-wide rate. Corroboration requires the use of independent sources to confirm the validity of secondary information. 19 U.S.C. § 1677e(c). Here, Commerce selected the highest rate from an earlier segment of the proceeding: the petition rate corroborated in the *LTFV Determi-*

[9] An alternative way of viewing this relationship is that it is the PRC-wide entity that initially receives the AFA rate for its failure to respond and where a respondent has been determined to be part of the PRC-wide entity the individual respondent receives that rate either because it accepts that such a rate applies or it does not successfully establish its separateness. Therefore, the underlying principle of *Gallant* applies insofar as it requires the AFA rate to be a reasonably accurate estimate of the PRC-wide entity's actual rate.

[10] Watanabe's reliance on other AFA rate cases is similarly misplaced as an adverse factual inference does not necessarily mean the receipt of a separate AFA rate. *See*, *e.g.*, *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004); *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States* , 216 F.3d 1027 (Fed. Cir. 2000); *Shandong Huarong Gen. Grp. Corp. v. United States*, 31 CIT 42 (2007).

nation. *See Final Results*, 74 Fed. Reg. at 63,390; *LTFV Iss. & Dec. Memo.* at 38. Neither Watanabe nor any other party has placed any evidence on the record calling into doubt the petition rate or Commerce's corroboration. *Final Results*, 74 Fed. Reg. at 63,390. With no evidence specific to this review and no evidence questioning the prior corroboration of the PRC-wide rate, Commerce may rely on the corroborated rate from an earlier segment of the proceeding because doing so is based on a reasonable inference from the current record. *See Ocean Harvest Wholesale, Inc. v. United States*, 26 CIT 358, 370 n.21 (2002) (permitting Commerce to use a petition rate corroborated in the investigation where no new evidence discredits that rate); *Peer Bearing*, 587 F. Supp. 2d at 1328 ("the reliability of [the corroborated rate] stems from its basis in prior verified information in previous administrative reviews"); *cf. Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990) (permitting Commerce to make a presumption where the respondent has failed to place any evidence on the record).

Commerce correctly assigned the PRC-wide rate to Watanabe because Commerce was not in a position to corroborate that rate with information specific to Watanabe and there is nothing to demonstrate that Commerce did not sufficiently corroborate the rate as to the PRC-wide entity in an earlier proceeding. Thus, Commerce's decision is affirmed.

CONCLUSION

For all the foregoing reasons, the court sustains Commerce's final results. Plaintiff's motion for judgment on the agency record is denied.

Dated: This 22nd day of December, 2010.
New York, New York.

/*s*/ *Jane A. Restani*
JANE A. RESTANI JUDGE