U.S. Customs and Border Protection

Slip Op. 12–44

APPLIKON BIOTECHNOLOGY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 07–00364

[On defendant's motion for rehearing, *etc.*, judgment in part for the defendant.]

Dated: March 28, 2012

Carl D. Cammarata, Law Offices of George R. Tuttle, A.P.C., of San Francisco, CA, argued for plaintiff.

Beverly A. Farrell, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for the defendant. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney-In-Charge.

OPINION AND ORDER

Musgrave, Senior Judge:

Defendant United States challenges this court's decision in *Applikon Biotechnology, Inc. v. United States*, Slip Op. 11–154 (December 12, 2011) ("*Applikon I*"), familiarity with which is presumed. Defendant moves for rehearing, modification and/or reconsideration to correct "clear error" in the court's decision. According to the government, the decision must be modified to correct the court's failure to correctly classify the imported "BioBundle Cell Culture Bioreactor Systems" and "ez-Control Cell Culture BioBundle Bioreactor Systems" ("the Bioreactor Systems") in two alternate subheadings of Heading 8479, Harmonized Tariff Schedule of the U.S. ("HTSUS"). The government faults *Applikon I*'s failure to explain the analysis that led the court to classify the merchandise in subheading 8479.82.00, HTSUS. For the reasons explained below, the government's motion is granted to the extent it requests further explanation of the court's decision. The government's motion is denied with regard to its alternate classifications.

The court is loath to reopen the prior proceedings because there lacks "an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the

need to correct a manifest injustice."[1] Plaintiff argues that reconsideration is improper where, as appears here, the government seeks to assert classification theories it neglected to present before. Pl's Memorandum in Opposition to Def's Motion for Rehearing, *etc.*, at 3, citing *May Food Manufacturing v. United States*, Slip Op. 09–94, at 3 (CIT, 2009) (reconsideration denied when arguments raised could have been raised previously). Although plaintiff's argument is convincing, in the interest of judicial clarity the court will explain its rationale for classification at the subheading level and why the government's late-stated arguments are unconvincing.

The government argues that the court erred by failing to apply the General Rules of Interpretation ("GRI") at the subheading level in *Applikon I*. If the court had properly applied those rules, it says, the correct classification would have been found in subheading 8479.89.65 or 8479.89.98, HTSUS. This contrasts with the court's decision that subheading 8479.82.00 should apply. The government argues that subheading 8479.82.00 is incorrect because it does not describe "the entire imported merchandise rather than only one component." Def's Memorandum of Law in Support of [Its] Motion for Rehearing, *etc.* at 7. Ironically, the government's argument fails because of the operation of the GRIs which it asks the court to apply at the subheading level.

The subheadings in question provide as follows:

8479:	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof:	
	Other machines and mechanical appliances:	
8479.82.00:	Mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines	Free
8479.89.00:	Other:	
	Electromechanical appliances with self-contained electric motor:	
8479.89.65:	Other.	2.8%
	Other:	
8479.89.98:	Other.	2.5%

Under GRI 6, the GRIs apply, *mutatis mutandis*, to determine classification at the subheading level. The applicable section and chapter notes resolve the subheading classification dispute. Note 4 to Section XVI, HTSUS, provides:

[1] Def's Brief in Support of its Motion for Rehearing, Modification and/or Reconsideration, ("Def's Br.") at 2, quoting *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006).

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

Section XVI, Note 4, HTSUS. Note 7 to Chapter 84, HTSUS, instructs:

> [a] machine which is used for more than one purpose is, for purposes of classification, to be treated as if its principal purpose were its sole purpose. . . .Subject to note 2 to this chapter and note 3 to section XVI,[2] a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 8479.

Chapter 84, Note 7, HTSUS (2007) (footnote added). *Applikon I* cited the last sentence of Note 7 as support for classifying the Bioreactor Systems in Heading 8479. *Applikon I*, at 14–15. That Note also frames the court's decision at the subheading level.

In *Applikon I*, the court found it unnecessary to decide whether the mixing or temperature control functions provided the primary function of the Bioreactor Systems.[3] The court found that the Bioreactor Systems' primary function is cell growth, which function is not described in any Chapter 84 heading. In accordance with Chapter 84 Note 7, the court decided that the Bioreactors were properly classified in Heading 8479, HTSUS. *Applikon I*, at 15. However, in addressing the government's motion for rehearing, *etc.*, determining the primary function of the Bioreactor Systems is appropriate in order to apply Section XVI Note 4 and Chapter 84 Note 7 to the subheadings at issue.

The facts found in *Applikon I* show that mixing of the cell culture by the Bioreactor System is integral to the process of growing cells. As

[2] As stated in *Applikon I* at 15 n. 4, Note 3 to Section XVI is inapposite. The Bioreactor Systems do not qualify as "composite machines" for purposes of that Note because they are not fitted together to form a whole nor are they mounted to a common base. The Explanatory Notes to Section XVI Note 3 state that "multi-purpose machines . . . are to be classified according to the provisions of Note 7 to Chapter 84". Explanatory Note (VI) to Section XVI, HTS. Therefore, the court is guided by the provisions of Chapter 84 Note 7 rather than Section XVI Note 3.

[3] *Applikon I* at 14. The parties do not argue and the record does not support the notion that one of the other functions of the Bioreactor Systems could be deemed its "primary" function.

stated in *Applikon I*:

> The homogeneous environment is accomplished by continuous mixing or stirring of the cell culture, and mixing is routinely utilized when operating the Bioreactor System. The principal function of the Bioreactor is to grow cells in an aseptic, homogeneous environment, and that homogeneous environment is maintained by the mixing function.

Applikon I at 2–3, footnotes omitted, citing to Plaintiff's Concise Statement of Facts ("Pl's Stmt. of Facts"), paras. 32 and 16–17. The mixing function is used to effectively control other functions and without it cells will die. *Id.* at 4, citing Pl's Stmt. of Facts, paras. 33, 35. The Bioreactor System is normally only used when the mixing function is required. *Id.* at 6, citing Pl's Stmt. of Facts, para. 46. The mixing function is thus critical to the proper operation of the merchandise.

Examples given in the Explanatory Notes to Note 4 to Section XVI show that machines whose principal purposes are not included in a heading can be classified according to the primary mechanical function used to achieve that purpose. The Notes state that, *e.g.*, irrigation systems are classified in Heading 8424 and asphalt systems in Heading 8474. Those headings refer to, *inter alia*, "[m]echanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids" (Heading 8424), and "[m]achinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances" (Heading 8474). The headings do not describe the primary purposes of the devices (irrigation and asphalt manufacture), but rather the mechanical functions used to achieve those purposes.

The Bioreactor Systems' primary purpose of growing cells is achieved through the mechanical function of mixing the cell culture placed in the device. Based on the agreed facts discussed more fully in *Applikon I*, the court finds that for purposes of applying the notes to subheadings 8479.82 and 8479.89, HTSUS, the primary function of the Bioreactor Systems is the mixing function.[4] Under Note 4 to Section XVI, the various Bioreactor components contribute to the clearly defined function of "[m]ixing, . . . homogenizing, emulsifying or stirring", and they are thus classifiable in subheading 8479.82. The Bioreactors remain classifiable in subheading 8479.82 following ap-

[4] This finding does not affect the court's decision in *Applikon I*. For the reasons described therein, the Bioreactors are not classifiable in Heading 8419 as originally argued by the government due to operation of Chapter 84 Note 2(e). Under Chapter 84 Note 7, because there is no heading in Chapter 84 describing machines which mix material like that used in the Bioreactor Systems, they remain classifiable in Heading 8479.

plication of Chapter 84 Note 7 because their main function is mixing and under that Note that function is treated as "its sole purpose."

The government argues in its motion for reconsideration that two alternative subheadings (8479.89.65 or 8479.89.98) should apply. This argument fails due to the application of Section XVI Note 4 and Chapter 84 Note 7, described above. Even assuming *arguendo* those notes do not control, under GRI 3(a) the alternative subheadings are less specific than the subheading 8479.82. By definition, an "other" subheading (such as 8479.89) is less specific than a descriptive one (such as 8479.82), assuming both could apply. *Airflow Technology, Inc. v. United States*, 31CIT 524, 483 F. Supp. 2d 1337, 1351 (2007), *reversed and remanded on other grounds*, 524 F.3d 1287 (Fed. Cir. 2008). Finally, the government's argument fails because it improperly compares subheadings at the six-digit (8479.82) and eight-digit levels (8479.89.65). *Orlando Foods Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

Conclusion

After consideration of the papers and other proceedings in this action, and upon consideration of the government's motion for rehearing, modification and/or reconsideration, Applikon's Bioreactor Systems are correctly classified under subheading 8479.82.00, HTSUS. Defendant's motion is granted in part and denied in part.

SO ORDERED.

Dated: March 28, 2012
New York, New York

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

Slip Op. 12–45

LIFESTYLE ENTERPRISE, INC., TRADE MASTERS OF TEXAS, INC., EMERALD HOME FURNISHINGS, LLC, RON'S WAREHOUSE FURNITURE D/B/A VINEYARD FURNITURE INTERNATIONAL LLC, Plaintiffs, and DREAM ROOMS FURNITURE (SHANGHAI) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., CONSOLIDATED Plaintiffs, ORIENT INTERNATIONAL HOLDING SHANGHAI FOREIGN TRADE CO., LTD., Intervenor Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF COMMERCE Defendants, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, VAUGHAN-BASSETT FURNITURE COMPANY, INC. Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00378
Public Version

[Commerce's *Remand Results* remanded in part, affirmed in part.]

Dated: March 28, 2012

Jill A. Cramer, Mowry & Grimson, PLLC, of Washington, DC, and *John D. Greenwald*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for plaintiffs. With them on the brief were *Kristin H. Mowry*, *Jeffrey S. Grimson*, *Sarah M. Wyss*, and *Susan L. Brooks*.[1]

William E. Perry, Garvey Schubert Barer, of Washington, DC, for consolidated plaintiff, Dream Rooms Furniture (Shanghai) Co., Ltd.

John D. Greenwald, Cassidy Levy Kent (USA) LLP, of Washington, DC, and *Patrick James McLain*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for consolidated plaintiff, Guangdong Yihua Timber Industry Co., Ltd.

Nancy A. Noonan and *Matthew L. Kanna*, Arent Fox LLP, of Washington, DC, for intervenor plaintiff.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Counsel. Of counsel on the brief was *Shana Hofstetter*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

J. Michael Taylor, King & Spalding, LLP, of Washington, DC, argued for intervenor defendants. With them on the brief were *Joseph W. Dorn*, *Daniel L. Schneiderman*, and *Prentiss Lee Smith*.

OPINION AND ORDER

Restani, Judge:

This matter comes before the court following the court's decision in *Lifestyle Enterprise, Inc. v. United States*, 768 F. Supp. 2d 1286 (CIT 2011), in which the court remanded *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374 (Dep't Commerce Aug. 17, 2009) ("*Final Results*") to the United States Department of Commerce ("Commerce" or the "Department"). For the reasons stated below, the court finds that Commerce failed to comply with the court's remand instructions with regard to two contested issues.

BACKGROUND

The facts of this case have been well-documented in the court's previous opinion. *See Lifestyle Enter.*, 768 F. Supp. 2d at 1293 95. The court presumes familiarity with that decision but briefly summarizes the facts relevant to this opinion.

[1] Mowrey & Grimson, PLLC withdrew as counsel for Ron's Warehouse Furniture on January 6, 2011. The court gave Ron's Warehouse Furniture thirty days to retain counsel. It has not done so as of the date of this opinion.

The plaintiffs, Lifestyle Enterprise, Inc. ("Lifestyle"), Orient International Holding Shanghai Foreign Trade Co., Ltd. ("Orient"), Guangdong Yihua Timber Industry Co., Ltd. ("Yihua Timber"), Dream Rooms Furniture (Shanghai) Co., Ltd., Ron's Warehouse Furniture, Emerald Home Furnishings, LLC, and Trade Masters of Texas, Inc., and defendant-intervenors American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively "AFMC") challenged the final results of an administrative review of the antidumping ("AD") duty order on wooden bedroom furniture from the People's Republic of China ("PRC" or "China"), which assigned Orient a weighted average dumping margin[2] of 216.01% as part of the PRC-wide entity and Yihua Timber the dumping margin of 29.89%. *See Final Results*, 74 Fed. Reg. at 41,380; *Wooden Bedroom Furniture from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 55,810, 55,810 (Dep't Commerce Oct. 29, 2009). Upon considering the parties' motions for judgment on the agency record, the court held that substantial evidence did not support denial of a separate rate for Orient and that the rate of 216.01% assigned to Orient was not corroborated. *Lifestyle Enter.*, 768 F. Supp. 2d at 1296 99. The court also held that substantial evidence did not support the Department's decisions on the data set for wood inputs, the choice of tariff heading for the surrogate value of medium density fiberboard, whether two companies produced comparable merchandise or used a comparable production process, negative export pricing, and surrogate labor value.[3] *Id.* at 1314 15. The court remanded for reconsideration or further explanation. *Id.*

On remand, Commerce 1) found "that the information on the record corroborates the rate of 216.01 percent, as it relates to Orient," based

[2] A dumping margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless nonmarket economy methodology is used, an NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)-(b). Under its nonmarket economy AD methodology, Commerce calculates NV "on the basis of the value of the factors of production utilized in producing the merchandise and 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). Surrogate values from market economy countries are used as a measure of these costs. *See id.*; *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1347 (CIT 2010), *aff'd*, 666 F.3d 732 (Fed. Cir. 2011).

[3] Commerce's determinations regarding the other issues raised by the parties were upheld and are not further contested before the court. *See Lifestyle Enter.*, 768 F. Supp. 2d at 1314 15.

on total adverse facts available ("AFA"), 2) "continue[d] to find that it is appropriate to value wood inputs using [World Trade Atlas ("WTA")] import data," and 3) "decided not to rely on the financial statements of Diretso Design[.]"[4] *Remand Results* at 8, 18, 31. Despite Commerce's recent explanation, defendant-intervenor AFMC continues to contest whether Commerce presented substantial evidence in its decisions to rely on WTA weight-based data for wood inputs and not to rely on the financial statements of Diretso Design. AFMC's Comments Concerning Commerce's Final Results of Redetermination Pursuant to Remand at 1 2 ("AFMC's Cmts."). Plaintiff Lifestyle challenges whether Commerce properly corroborated Orient's rate. Comments of Lifestyle Enterprise, Inc., Trade Masters of Texas, Inc. and Emerald Home Furnishings, LLC on Department of Commerce July 26, 2011 Final Results of Redetermination Pursuant to Court Remand at 12 ("Lifestyle Cmts."). The Government and consolidated plaintiff, Yihua Timber, ask the court to sustain the *Remand Results*. Def.'s Resp. to Pls.' Remand Cmts. at 1 ("Def.'s Resp."); Cmts. of Consolidated Pl. Guangdong Yihua Timber Ind. Co., Ltd. on the Commerce Dep't's Remand Determination at 1 ("Yihua Timber Cmts.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold Commerce's final determination in an AD review if 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).

DISCUSSION

I. Orient's AFA Rate

During an AD review, when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise

[4] In the *Remand Results*, Commerce addressed the tariff heading for medium density fiberboard, comparable production for Global Classic, negative net U.S. prices, and surrogate value for labor on remand; no party now raises these issues. *Final Results of Redetermination Pursuant to Court Remand* at 15 16, 19, 22, 31 (Dep't Commerce Aug. 26, 2011) (Docket No. 132) ("*Remand Results*"). The court reasonably may infer that the parties concur in the resolution of those issues, as set forth in the remand redetermination. *See JTEKT Corp. v. United States*, 780 F. Supp. 2d 1357, 1367 (CIT 2011). Accordingly, the court sustains the resolution of these issues in the remand redetermination.

available." 19 U.S.C. § 1677e(b). The AD duty rate under such circumstances is known as an AFA rate and may be based on information obtained from: "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under . . . [19 U.S.C. § 1675] or determination under . . . [19 U.S.C. § 1675b], or (4) any other information placed on the record." *Id.* Lifestyle challenges the *Remand Results* on the grounds that Orient's selected AFA rate of 216.01% violates 19 U.S.C. § 1677e(c) because Commerce corroborated the rate with data that were not probative and therefore the rate is not supported by substantial evidence. Lifestyle Cmts. at 4 7. Because Commerce failed to corroborate the rate with data that tied the AFA rate to Orient's commercial reality, the court remands the matter to Commerce.

Pursuant to 19 U.S.C. § 1677e(c), "[w]hen the administering authority . . . relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c). Here, the AFA rate of 216.01% is from the 2004 05 review of a new shipper company, Shenyang Kunyu Wood Industry Co., Ltd. ("Kunyu"), and thus is secondary information. *Lifestyle Enter.*, 768 F. Supp. 2d at 1297. Commerce must, therefore, corroborate this information "to the extent practicable."[5] 19 U.S.C. § 1677e(c); *see also Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). In order to corroborate an AFA rate, Commerce must show that it used "reliable facts" that had "some grounding in commercial reality." *Gallant*, 602 F.3d at 1324 (internal quotation marks omitted). In doing so, Commerce must tie the AFA rate to the commercial reality of the particular respondent under review. *Id.* (finding transaction-specific margins insufficient for corroboration where "Commerce did not identify any relationship between the small number of unusually high dumping transactions with [defendant's] actual rate").[6]

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[5] In the *Remand Results*, Commerce stated that "although we recognize the information from the 2004–2005 review (the original basis of the 216.01 percent rate) was supplied by a new shipper company, Kunyu, it is based on actual questionnaire responses and accompanying data of an exporter of wooden bedroom furniture which were not contradicted by any record evidence and were verified during that proceeding." *Remand Results* at 37. Thus, Commerce reasons, "[w]e . . . find the 216.01 percent rate to be reliable." *Id.* Commerce cannot "proceed[] on the basis that prior calculated margins are *ipso facto* reliable." *Ferro Union, Inc. v. United States*, 23 CIT 178, 203, 44 F. Supp. 2d 1310, 1334 (1999). Rather, it must do more to show relevancy and reliability in relation to Orient's commercial reality.

[6] Where Commerce has selected an AFA rate by assigning the rate of a different comparable, cooperating respondent from a prior administrative review, the court has been satisfied where Commerce has used a rate from the most recently completed segment of the pro-

Congress's intent for "an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance" limits what Commerce may permissibly impose on a non-compliant respondent. *F.Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (invalidating the 46.67% AFA rate imposed by Commerce because, inter alia, it "was many times higher than [respondent's] actual dumping margin"). Regardless of the manner of corroboration, Commerce cannot select a rate that does not reflect a reasonable estimate of a respondent's actual rate. An aberrantly high AFA rate or a rate diverging significantly from calculated rates for similarly situated participating companies normally indicates that a particular AFA rate may not reflect

ceeding. *See Tianjin Magnesium Int'l Co. v. United States*, Slip Op. 11–100, 2011 WL

a respondent's commercial reality.[7] In the past, Commerce has permissibly imposed rates of 45.49% and 30.95% where those rates were corroborated using respondents' own sales data. *See PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (finding an AFA rate of 45.49% corroborated where Commerce used twenty-nine sales over 45.49%, totaling just 0.5% of respondent's total U.S. sales during the current administrative review); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (finding an AFA rate of 30.95% valid because it was based on respondent's actual sales data). Using a small percentage of individual transactions of the company under review to corroborate an AFA rate where the record is empty may be valid under some circumstances, but is not the norm. Moreover, these two cases not only seem to represent the outer bounds of minimal corroboration, but also rely upon respondents' own sales data. Facts specific to a particular case may make transactions representing a small percentage of sales inadequate corroboration.[8]

Orient has never been individually examined and therefore Commerce was unable to corroborate the AFA rate using Orient's own data. Instead, Commerce reasoned that the AFA rate of 216.01% as applied to Orient was relevant and reliable, and therefore, "corroborated to the extent practicable," based on a small percentage of Yihua Timber's transaction-specific dumping margins that were in that

3489935, at *3 (CIT Aug. 10, 2011). Additionally, in *Tianjin Magnesium*, no reliable data existed for the respondent in either the current or past administrative reviews because the respondent had tampered with and destroyed its accounting books. *Id.* at 2 3.

[7] AFMC could not point to any evidence on or off the record supporting its assertion that any large manufacturing company in any sector was dumping at a rate over 200%. Indeed, the idea that a large profit-seeking corporation deemed separate from the country-wide entity would dump its merchandise at rates over 200% seems inconsistent with commercial reality, absent some evidence to the contrary.

[8] The Government seems to contend that absent record evidence of Orient's transactions, Commerce may extend *Ta Chen* and *PAM* to cases using transaction-specific sales of a different respondent, in this case Yihua Timber. *See* Def.'s Resp. at 15 16. Commerce's use of a respondent's own sales data, however, in *Ta Chen* and *PAM* mollified concerns that the AFA rate did not represent the commercial reality of those respondents. *See PAM, S.p.A.*, 582 F.3d at 1340; *Ta Chen*, 298 F.3d at 1339. Such concerns arise anew where Commerce uses a different respondent's sales data, as it has here, and Commerce has provided no reasoning to allay concerns that such a method of corroboration does not connect Kunyu's rate to Orient's commercial reality. Additionally, the need for the AFA rate to reflect the

range.[9] Commerce has not addressed the court's comments that Orient's rate increased 3000% from its prior margin[10] and remains "700% greater than the highest separate rate assigned in the review," *Lifestyle Enter.*, 768 F. Supp. 2d at 1299, except to argue that Orient "was not individually examined during that period." *Remand Results* at 33. Record evidence in the instant case overwhelmingly suggests that 216.01% does not reflect commercial reality. *See Gallant*, 602 F.3d at 1325 (stating that "the record showed a large body of reliable information suggesting the application of a much lower margin"). First, the rate offered by Commerce is not only from a new shipper review three to four years prior to this administrative review but also an extreme outlier when viewed in light of the prior new shipper reviews, the two previous administrative reviews, and the investigation. Other than the PRC-wide rate, which is itself an AFA rate, prior to this review the highest rate for a cooperating respondent was 49.60% and for a new shipper other than Kunyu was 8.30%.[11] All-

commercial reality of a particular respondent does not evaporate when a respondent has left the record barren. Even where the record is sparse, Commerce has tools available to it. *See PSC VSMPO-AVISMA Corp. v. United States*, Slip Op. 11–115, 2011 WL 4101097, at *2 (CIT Sept. 15, 2011) (finding an AFA rate of 43.58%, one of respondent's sales from a prior review, corroborated where Commerce checked that rate against U.S. sale prices and currency inflation rates); *Qingdao Taifa Grp. Co. v. United States*, 780 F. Supp. 2d 1342, 1347, 1349 (CIT 2011) (finding an AFA rate of 145.90%, a calculated weighted-average margin using data from the sales of the three models of hand trucks with the highest margins, corroborated because it accounted for 36% of respondent's total sales by quantity and the record was otherwise barren).

[9] Commerce found that [[ ]] of Yihua Timber's transaction-specific dumping margins were at or above 180%, "which [Commerce found] to be within the range of the 216.01 percent AFA rate," *Remand Results* at 36, and that [[ ]] of Yihua Timber's transaction-specific dumping margins were at or above 216.01%. *Id.* at 55. Commerce also found that Yihua Timber made more than [[ ]] transactions covering [[ ]] pieces of wooden bedroom furniture "around and above the rate of 216 percent." *Id.* at 36. Lifestyle counters that only [[ ]] of Yihua Timber's sales by value were dumped at a rate at or above 216.01%. Lifestyle Cmts. at 5 (arguing that the discrepancy is dependant upon whether one looks only at the percentage of products which were dumped or at all products imported into the United States during the period of review). The percentage of sales by volume is rarely probative, particularly where Commerce selects small quantity sales that are statistical outliers. Specific transactions are generally uninformative. Sales from a considerably smaller company are insufficient to corroborate an overall rate of 216% for a large importer where such sales amount to only [[ ]] of all sales by value of the comparison importer.

[10] The court understands that Orient's prior rate was not based on its own data but it was a rate derived from the data of others in the same industry.

[11] *Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313, 67,317 (Dep't Commerce Nov. 17, 2004); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004–2005 Semi-Annual New Shipper Reviews*, 71 Fed. Reg. 70,739, 70,741 (Dep't Commerce Dec. 6, 2006); *Second Amended Final Results of Antidumping Duty Administrative Review: Wooden Bedroom Furniture From the People's Republic of China*, 72 Fed. Reg.

others rates have oscillated from around 9% at investigation, to around 35% in the first administrative review, to around 19% in the second administrative review, and to 30% in the current review. Second, record evidence suggests that Orient's commercial reality differs significantly from the commercial reality of Kunyu, a much smaller and newer company than Orient. *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of 2004–2005 Semi-Annual New Shipper Reviews and Notice of Final Rescission of One New Shipper Review*, 71 Fed. Reg. 38,373, 38,378 (Dep't Commerce July 6, 2006) (describing Kunyu as "small [in] size and [with] rudimentary factory operations"); Lifestyle Cmts. Ex. 2. Moreover, because Commerce selected Orient as one of the two largest exporters of wooden bedroom furniture from China, Commerce cannot now claim no knowledge of Orient's size. *Lifestyle Enter.*, 768 F. Supp. 2d at 1293; *Remand Results* at 58. Even where Commerce cannot link respondent's sales to commercial reality because no such sales exist in current or past records, Commerce cannot choose an AFA rate contradicted by nearly all information on record. The record evinces nothing connecting the calculated rate given to Kunyu and the rate given to Orient. Thus, Commerce has failed "to show some relationship between the AFA rate and the actual dumping margin." *Gallant*, 602 F.3d at 1325.[12] Although Orient has placed itself in a

62,834, 62,836 (Dep't Commerce Nov. 7, 2007); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 Fed. Reg. 49,162, 49,166 (Dep't Commerce Aug. 20, 2008); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Fourth New Shipper Reviews*, 73 Fed. Reg. 64,916, 64,918 (Dep't Commerce Oct. 31, 2008); *Wooden Bedroom Furniture from the People's Republic of China: Amended Final Results of the January 1, 2007, through July 31, 2007, New Shipper Reviews*, 74 Fed. Reg. 9,386, 9,386 (Dep't Commerce Mar. 4, 2009). Three other non-cooperating respondents received the AFA rate of 216.01%. This rate was upheld as an individual AFA rate in *Fujian Lianfu Forestry Co. v. United States* in the first administrative review. 700 F. Supp. 2d 1361, 1363 (CIT 2010). The decision does not indicate the percentage of the respondent's sales which fell within this range or any other specific information that is instructive here.

[12] Lifestyle offers three additional arguments which not only were not properly raised at the agency level but also are unconvincing. First, Lifestyle argues that Commerce's decision to look only at transaction-specific dumping margins rather than total U.S. sales constitutes zeroing and is impermissible. Lifestyle Cmts. at 5 (citing *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011); *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011)). Lifestyle failed to raise this argument before Commerce. Additionally, zeroing is

difficult position by not cooperating, the law does not permit Commerce to impose a rate for punishment purposes. *See* 19 U.S.C. § 1677e. Thus, it is highly unlikely, based on this record, that the court could sustain a rate similar to the one Commerce assigned Orient in the *Remand Results*. Commerce must make a finding as to what is a reasonable amount to add on to calculated rates to ensure compliance, based on this industry and this respondent's commercial reality.[13] Accordingly, Commerce is instructed to select a reasonable rate for Orient that is consistent with this opinion.

II. Database for Wood Input Valuation

As the court previously noted, and the parties agree, the valuation of wood has a significant impact on the AD margin. *Lifestyle Enter.*, 768 F. Supp. 2d at 1301 02; Lifestyle Cmts. at 12. To determine the surrogate value for wood, Commerce used Philippine Standard Commodity Classification ("PSCC") 4407.99 for poplar and ash, and PSCC 4407.10 for pine.[14] *See Issues and Decision Memorandum for the Final Results of the 2007 & New Shipper Reviews Antidumping Duty*

permissible. *See Union Steel v. United States*, Slip Op. 12–24, 2012 WL 611535, at *11 (CIT Feb. 27, 2012). Assuming arguendo, zeroing is impermissible as a margin calculation practice, Commerce is not necessarily limited in using zeroing as part of its corroboration methodology. Second, Lifestyle argues that the AFA rate does not properly reflect Orient's commercial reality because the average unit value ("AUV") for Orient's shipments is similar to the AUV for Yihua Timber's shipments. Lifestyle Cmts. at 11. Lifestyle failed to raise this claim below. Moreover, that the AUV for Yihua Timber and Orient are similar has little bearing on whether Orient is similar in size to Kunyu. (That does not mean that Commerce may not use AUVs to confirm its conclusions, if it so chooses.) Third, Lifestyle argues that all rates calculated using Commerce's old labor wage rate methodology may no longer be used as bases for AFA rates. Lifestyle Cmts. at 11. Lifestyle did not raise this argument before Commerce. Also, Commerce need not discard an AFA rate merely because an underlying surrogate value methodology has been changed. "Some inaccuracy is inherent in AFA rates, which are simply a proxy for missing data." *Tianjin Magnesium Int'l*, 2011 WL 3489935, at *3 n.4. Lifestyle's additional arguments, therefore, are unavailing.

[13] Commerce frequently uses the highest rate on record for any prior administrative review of the product in question. Instead, on these facts, Commerce should start with the highest rate calculated for a comparable respondent or respondents and then add an additional amount to ensure compliance. *See F.Lli De Cecco*, 216 F.3d at 1033 34.

[14] Both PSCC 4407.99 and 4407.10 are classified as wood "sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm." PSCC 4407.99 is a basket category while 4407.10 contains only coniferous species. Commerce used other tariff headings to value veneer and plywood inputs. In the *Remand Results*, Commerce found that "veneer and plywood are dried in the production process and thus the issue of green versus dried entries of these inputs is not present, because they are already dried when imported. . . . Therefore, with respect to veneer and plywood, there are no patent complications in calculating surrogate values due to moisture content." *Remand Results* at 44. The court makes no decision with respect to veneer and plywood. Commerce may make whatever adjustments it believes are necessary, consistent with the otherwise applied valuation methodology.

Administrative Review of Wooden Bedroom Furniture from the People's Republic of China, A-570–890, POR 1/1/07–12/31/07, at 8 & n.4 (Aug. 10, 2009), *available at* http://ia.ita.doc.gov/frn/summary/prc/E9–19666–1.pdf (last visited Mar. 19, 2012) ("*Issues and Decision Memorandum*"). Both of these tariff subheadings cover a wider variety of wood, including various species and higher-moisture content wood not used by Yihua Timber.[15] *Id.*; Amended App. to AFMC's Cmts. Concerning Commerce's Final Results of Redetermination Pursuant to Remand at Tab 18, Attach. III ("App. to AFMC's Cmts."). In the *Final Results*, Commerce measured Yihua Timber's consumption of wood by weight, relying on WTA weight-based data rather than Philippines National Statistics Office ("NSO") volume-based data. *Issues and Decision Memorandum* at 8. The court found Commerce's reasoning unsupported by substantial evidence and instructed Commerce on remand to "explain why volume data are not the superior approach given the patent complications with using gross weight data with wood inputs . . . ." *Lifestyle Enter.*, 768 F. Supp. 2d at 1301. In its *Remand Results*, Commerce concluded that WTA gross weight-based data were more reliable than NSO volume-based data[16] because "NSO volume-based data are distorted by the use of standard conversions from weight to volume . . . ." *Remand Results* at 9, 15. Although Philippine customs forms require all importers to report the weight of their entries, importers "sometimes but very seldom" fail to report the volume of their entries. *Remand Results* at 41. When importers do not report volume, Phillipine customs officials calculate volume from reported weight using a formula which Commerce found to be a standard conversion ratio. [17] *Id.* Commerce determined that 46 out of 119 import transactions (38.7%) covering the wood factors of production valued with NSO volume-based data used a standard

[15] The parties do not challenge the tariff subheadings used by Commerce to determine the value of wood for these particular production factors.

[16] The parties agree that these are the two potentially applicable data sets. The NSO also keeps data on net weight and gross weight, neither of which are proposed by any party. Thus, the focus is the choice between weight-based data and volume-based data.

[17] AFMC contends that Commerce's factual basis for this finding is insufficient. AFMC Cmts. at 9 11. AFMC also argues that it is equally plausible that the standard conversion ratio could have been used to convert volume-based data into weight-based data. AFMC Cmts. at 8 9. Commerce relied upon an e-mail exchange with an employee of the NSO that the "first unit of measure" is kilograms and the second unit of measurement was volume, the latter measurement being "sometimes but very seldom" not reported. *Remand Results* at 40 41. "[W]hen this occurs it is calculated by using a formula that was established by the 'pioneers of the section.'" *Id.* at 41. To the extent that AFMC argues Commerce must distinguish this review from the subsequent Fourth Administrative Review, in which volume-data was used, or questions why Commerce did not rely on this evidence in the Draft Redetermination, those challenges are not based upon any legal requirement. Absent any evidence to the contrary, the email exchange provides sufficient evidence that the NSO used a formula to convert weight-based data into volume-based data, not the reverse.

conversion factor of 0.848. *Id.* at 10 11. Commerce concluded that because "a portion of the NSO weight-based data were based on standard conversions from gross weight data, . . . the NSO volume-based data are less reliable than the WTA weight-based data . . . ." *Id.* at 48 49. The court first examines Petitioners' challenges to Commerce's choice to use weight-based data, then looks at Commerce's contentions regarding the alternative volume-based data.

A. Weight Data

AFMC challenges Commerce's choice to use weight-based data on the basis that the weight-based data are significantly distorted by the presence of high-moisture content (or "green") wood in the tariff headings used to determine the surrogate value. AFMC's Cmts. at 17. The Government counters that "given the absence of any record evidence of the moisture/species mix underpinning the WTA/NSO data, and the existence of alternative explanations for . . . why the NSO densities exceed the density of the wood used by Yihua, AFMC cannot demonstrate distortion." Def.'s Resp. at 8. AFMC also argues that the presence of packing materials further distorts the surrogate value if weight data are used. AFMC's Cmts. at 28 29.

i. Distortion Due to Moisture Content

AFMC argues that "the relatively high average density . . . [of] lumber imported under PSCC 4407.99[] indicates that at least some portion of the imports is comprised of 'green wood.'" AFMC's Cmts. at 17 (citing *Remand Results* at 12).[18] Thus, because Yihua Timber "consumes *only* kiln-dried lumber," *id.*, there is a tremendous risk of substantial undervaluation of the surrogate value. *Id.* at 15. Commerce acknowledged "a mix of dried and green wood" in imports under PSCC 4407.99, *Remand Results* at 12,[19] but "disagree[d] . . . that a density of 670 kilograms per cubic meter is compelling evidence of high moisture content wood," *id.* at 12. Here, the record clearly demonstrates that the use of weight-based data understates the wood input surrogate value. Yihua Timber uses only low-moisture, kiln-dried wood, a very specific subset of the wood imported under the

[18] The parties agree that in general higher moisture results in higher density.

[19] The Government contends that Commerce never made such a finding, Def.'s Resp. at 8, but this contention contradicts the explicit language of the *Remand Results*, *see Remand Results* at 12 ("As the Philippine lumber imports are an average density, there is some amount of wood covered above and below the average of 670 kilograms, indicating a mix of dried and green wood.").

tariff heading.[20] This type of wood should command a higher price per kilogram than the average wood imported under that tariff heading because it yields more cubic meters of wood per kilogram. The use of weight-based data in conjunction with a basket tariff heading, therefore, places an artificially low value on the wood used by Yihua Timber because the inclusion of higher-moisture content wood and wood that lacks the value added from the kiln-drying process depresses the surrogate value.[21] Moreover, because wooden bedroom furniture requires a certain volume of wood, not a certain weight of wood, this distortion due to the presence of green wood imported under the tariff headings is only present when weight-based data are used.[22]

ii. Species Mix

Commerce rejects AFMC's claim of distortion due to the presence of high-moisture content wood in the relevant tariff headings by arguing that the actual size of this distortion is unknown and possibly non-existent because the alleged distortion in the surrogate value might instead be due to species mix.[23] *Remand Results* at 45. The

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[20] Presuming the lumber to have "been dried to a [[ ]] percent" as AFMC alleges, AFMC Cmts. at 17, it would be reasonable to assume that a majority of the lumber imported does not fit that description.

[21] At oral argument, Lifestyle argued that, as a matter of logic, no company would ever ship green wood into the Philippines because to do so would add unnecessarily to shipping costs, because the green wood would be heavier due to moisture content. This line of reasoning fails to account for potential differences in the cost of drying between the Philippines and other countries. Thus, there is no support in the record for Plaintiff's contentions.

[22] Commerce argues that moisture content also distorts volume data because of shrinkage that occurs during drying which is unaccounted for when the wood is reported by volume. *Remand Results* at 13. This contention does not constitute substantial evidence in support of the choice of weight-based data because shrinkage decreases the total cubic meters, implying a higher cost per cubic meter. Thus, the failure to account for shrinkage likely results in some undervaluation as well, and it cannot be used as the basis for preferring a data set resulting in a greater undervaluation. *See* AFMC's Cmts. at 24 25.

[23] Commerce found that "neither database accounts for the different moisture content of green versus dried woods" because both weight-based and volume-based data would be artificially inflated by moisture content. *Remand Results* at 13. With regard to the impact of species mix, Commerce found that "species-specific densities roughly correlate to prices: the higher the species-specific density, the higher the price." *Id.* at 45. According to Commerce, this implies that "average values [will] only be improperly diluted if the mix was disproportionately made up of high moisture green wood," *id.*, and because Commerce "[did] not know the full mix of low-moisture kiln dried wood, high moisture green wood, natural low-density woods or natural high-density woods," it concluded that neither data set was preferable on the basis of either moisture content or species mix, *id.* at 46.
Commerce supported its finding that species' densities correlate with price based on a broad list of hardwood lumber, whereas AFMC bases its statement to the contrary on a more limited list of lumber chosen from Yihua Timber's briefing at the agency level. *See* Def.'s Resp. at 9; *Remand Results* at 45; AFMC's Reply to Def.'s Resp. Regarding the Final Results of Redetermination at 6. So long as the selection is reasonable, Commerce may select any

lower per unit cost chosen by Commerce theoretically might be accurate because some of the wood imported into the Philippines could be of higher quality than the wood used by Yihua Timber. *See id.* at 45 ("[T]he average value of any basket HS category will be a function of the mix of natural high density woods, low density woods, and high moisture content green woods.").

High-moisture content wood has a definitive value-suppressing effect when weight-based data are used. In contrast, the impact of species mix has variable and indeterminate effects based on the record and Commerce's findings. Although it is true that species mix could have the effect of overvaluation under both data choices, it is does not have the same clearly one-sided impact as high-moisture content wood on weight-based data. Without regard to the impact of high-moisture content wood, species mix affects valuation in three different ways, contingent upon the correlation between species and the price of wood. First, where price rises faster than density as between two types of wood, weight-based data are preferable because although weight-based data still overvalue the types of wood in question, the use of volume-based data would result in an even greater distortion. Second, where price drops with an increase in density, volume-based data would be preferable because although both data sets undervalue wood, the use of volume-based data would result in less of an undervaluation than the use of weight-based data. (Commerce rejected this possibility.) Third, for all correlations falling in between where price rises but not as fast as density, no clear choice exists because both volume-based and weight-based data will be distorted by species mix. Commerce made no finding as to whether density correlates with price in a manner similar to the first or the third scenarios.

Commerce acknowledged that the impact of species mix did not provide a basis upon which to find that volume-based data were superior to weight-based data. *See Remand Results* at 47 ("[S]everal variables affecting the numerator and denominator cannot be quantified using data on the record . . . . Therefore, there is no basis to state that the NSO volume data is superior to WTA weight data for purposes of calculating surrogate values . . . ."). Critically, Commerce did not find that the impact of species mix on volume-based data was comparable to or exceeded the impact of high-moisture content wood on weight-based data. Commerce simply found that species mix did not support the assertion that volume-based data were superior. A wider variety of results require additional findings before species mix

list in order to demonstrate the correlation between price and density. Commerce, however, made no findings as to the degree of the correlation or its impact on the surrogate value.

may be used as a basis for rejecting volume-based data in favor of weight-based data in this case. In contrast, moisture content necessitates no balancing because moisture content cannot result in an overstatement of value determined by volume-based data. Commerce's findings as to species mix were therefore insufficient to support Commerce's next logical step: the rejection of volume-based data in favor of weight-based data. Without additional evidence showing that a clearer correlation between price and density for the woods covered by PSCC 4407.99 and 4407.10, or at least showing that the higher-value woods were a substantial import into the Philippines, species mix distortions do not provide substantial evidence to support Commerce's preference for weight-based data.

iii. Packing Materials in Gross-weight Data

AFMC argues that Commerce has failed to explain "why use of a weight-based approach is not distortive given that 'different types of packaging of the same wood may result in distortions in the gross-weight data.'" AFMC Cmts. at 28 (quoting *Lifestyle Enter.*, 768 F. Supp. 2d at 1301). Commerce seems to have conceded that packing materials are included in some of the data, because it agreed that it did "not have sufficient information on this record to conclude that packing does not generally account for the divergent differences in gross versus net weight data from the NSO . . . ."[24] *Remand Results* at 14. Thus, inclusion of packing materials may be one more reason why weight-based data should not be used. At the very least it does not weigh against using volume-based data.

B. Volume Data

Having concluded that the record evidence that weight-based data are clearly distortive due to, at least, the presence of high-moisture content wood is uncontradicted, the court now turns to volume-based data, the alternative considered and rejected by Commerce. At oral argument, the Government conceded that the sole basis upon which Commerce rejected volume-based data was that a certain percentage of imports under the relevant tariff headings converted weight-based

[24] Commerce added that packing did not account for the divergence in gross versus net weight data "in instances where the value recorded under net weight is larger than the value recorded for the gross weight of the same transaction." *Remand Results* at 14 15. Commerce does not explain how the value of a net weight transaction could ever be larger than the value of a gross weight transaction. *Id.* at 15. Based on the logical incoherence of such a situation and the absence of an explanation, those instances may be excluded from consideration.

data into volume-based data using a standard conversion ratio.[25] AFMC argues that the standard conversion ratio affects an insignificant number of relevant wood imports and therefore is an improper basis upon which to discard the NSO volume-based data. AFMC's Cmts. at 6.

In the preliminary remand results, Commerce found that 38% of data for transactions in the NSO volume-based data set were the result of the use of a standard conversion ratio, not the actual reported volume. *Remand Results* at 10 11. In the final *Remand Results*, Commerce agreed with AFMC that this percentage was based on the number of transactions and that when measured by volume or quantity "the application of the standard conversion of 0.848 to the inputs of ash, poplar and pine appears to be minimal . . . ." *Id.* at 42. [26] Given Commerce's agreement that the standard conversion ratio is demonstrated to be distortive of only a very small amount of the volume data (apparently about 1%), and the fact that the transactions affected by the standard conversion ratio may even be removed, the mere presence of a standard ratio being used in some circumstances does not constitute substantial evidence supporting the use of weight-based data.[27]

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[25] In its prior opinion, the court rejected Commerce's finding of "anomalies . . . in separate sections of the tariff code, pertaining to nails and adhesives," *Lifestyle Enter.*, 768 F. Supp. 2d at 1302 n.18, as a basis for relying on weight-based data or volume-based data. *Id.* at 1302 ("Commerce did not support its finding that numeric anomalies present in the NSO data are not present in the WTA data or why measuring the input in gross weight is superior to measuring the input by volume"). Commerce did not rely on this finding in its *Remand Results* and explicitly disavowed this position at oral argument.

[26] On brief, the Government argues that the limited use of a standard conversion ratio "is merely speculation because Commerce cannot look behind the aggregate numbers used in both the NSO and WTA data." Def.'s Resp. at 7. The Government conjectures that "[a] more plausible assumption would be that the small country imports represented single importers or filers, who always failed to report actual volume, whereas, some fraction of importers from the larger countries reported actual volume in conjunction with the required weight field," thereby masking "the use of a standard conversion factor . . . for the 99 percent of the imports to which AFMC refers." *Id.* at 8 (citing *Remand Results* at 41). Commerce, however, did not reach this conclusion, finding that it "cannot determine whether, as Yihua argues, the standard conversion was applied to a significant portion of these inputs but masked by the concurrent application of specific conversions." *Remand Results* at 8, 40, 42 ("While we agree with Yihua Timber that it is possible that the standard conversion was used in combination with actual reported volumes, thereby masking its use, we cannot know for certain that this is the case"). Although Commerce cannot be sure that the standard conversion ratio is limited to 1% of all imports under the relevant tariff heading, Commerce cannot be sure that is not limited to 1%. Such a finding is insufficient to support a preference for either the use of weight-based data or volume-based data.

[27] Although there is some concern about failing to account for shrinkage, *Remand Results* at 13, as this would imply an understatement of value by using volume because shrinkage would decrease the denominator (total cubic meters), implying a higher cost per cubic

There is no question that a distortive conversion ratio is being used in all cases if weight-based data are the metric chosen and any amount of green wood was imported under the relevant tariff headings, as Commerce concluded was the case. Speculation as to the impact of species mix and a widespread use of a standard conversion ratio from weight to volume are unsupported by the evidence. Commerce has yet to provide a single significant reason why the use of volume-based data does not resolve all or nearly all of the patent complications with the use of weight-based data. Given the above discussion, it seems clear that problems inherent in use of weight data necessarily result in an undervaluation, and any use of such data could only be justified if volume data were at least as distortive. The court finds Commerce has failed to support its rejection of a volume-based approach, and therefore, Commerce's decision to use WTA weight-based data in lieu of NSO volume-based data is not based on substantial evidence.[28] On this record, there are only two choices, and only the selection of volume-based data is supported.

III. Use of Diretso's Financial Statements

The court instructed Commerce to "determine if the financial statements match the correct company." *Lifestyle Enter.*, 768 F. Supp. 2d at 1308. AFMC argues that "[t]he record conclusively demonstrates that the financial statements of Diretso Design . . . match the website at *www.diretso.com*." AFMC Cmts. at 30. Specifically, AFMC argues that Diretso Design's audited financial statement list www.diretso-.com as the company's website, provide the same physical address as the website, refer to the same manufacturing plant, and bear the same logo. *Id.* at 30 31. Commerce agreed that the contact information, "address, logo, [and] principal activity" were the same in the financial statement and on www.diretso.com but found that the financial statement did "not address the issue that an affiliation may

meter. *See* AFMC's Cmts. at 24 25. Nonetheless, this distortion is favorable to respondent's and is accepted by AFMC. Commerce does not claim it outweighs the distortion in the other direction caused by weight-based data.

[28] Even if we ignore the Government's reliance solely on the standard conversion ratio and interpret Commerce's *Remand Results* expansively to find that species mix and high-moisture content wood render weight-based data and volume-based data equally flawed, Commerce has still failed to comply with the court's instruction to "explain why volume data are not the superior approach given the patent complications with using gross weight data with wood inputs . . . ." *Lifestyle Enter.*, 768 F. Supp. 2d at 1301. When instructed by the court to explain which data set is superior, Commerce must do more than inform the court that it lacks the ability to determine which data set is better. Commerce has chosen to discard the obvious choice of volume-based data, as Yihua Timber requires a certain volume of wood not a particular weight of wood to produce wooden bedroom furniture. *See, e.g.*, App. to AFMC's Cmts. at Tab 1, Ex. D-11.

exist between Diretso Design and Diretso Trading, nor does it definitively demonstrate that www.diretso.com . . . belongs solely to Diretso Design, rather than Diretso Trading.[29] *Remand Results* at 18, 50. Because Commerce had six other usable financial statements, it chose not to rely on the financial statements of Diretso Design.[30] *Id.* at 18. Given Commerce's inability to conclusively identify the owner of www.diretso.com or to ascertain the relationship between Diretso Design and Diretso Trading, Commerce permissibly concluded that the other six financial statements were sufficient. Thus, Commerce presented substantial evidence in excluding the financial statement of Diretso Design.

CONCLUSION

For the foregoing reasons, the court remands the matter for Commerce to redetermine Orient's AFA rate and, unless it chooses to reopen the record to gather more evidence, to use the volume data set for wood inputs. Commerce's determination as to the financial statements of Diretso Design is sustained.

Commerce shall file its remand determination with the court within 60 days of this date. The parties have 30 days thereafter to file objections, and the Government will have 15 days thereafter to file its response.

Dated: This 28th day of March, 2012.
New York, New York.

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

[29] AFMC argues that Commerce impermissibly relied on a third-party website. AFMC Cmts. at 30 32. In part, Commerce declined to use Diretso Design because a third-party website indicated that www.diretso.com was registered to Diretso Trading. *Remand Results* 17 18. Commerce agreed with AFMC "that it is the Department's practice not to rely on third-party websites to call into question the credibility of the audited financial statements." *Id.* at 50. On account of Commerce's practice, Commerce chose to focus its "analysis on the information contained in the financial statements and the www.diretso.com website, as well as, the factual information submitted by Petitioners from the SEC of the Philippines for Diretso Trading." *Id.* Commerce clearly chose to rely on other evidence. Thus, the issue is irrelevant.

[30] Commerce found that Diretso Design's sales figures do not match the website's contention that it has sales in thirty-seven overseas markets. *Remand Results* at 50. It seems that Commerce, in expanding the record on remand, examined a more recent version of the website with updated information and sales figures.

Slip Op. 12–46

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and EHWA DIAMOND INDUSTRIAL CO., LTD., SH TRADING INC., AND SHINHAN DIAMOND INDUSTRIAL CO. LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 06–00248

[Motion to amend preliminary injunction denied, motion to amend complaint granted.]

Dated: March 29, 2012

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, D.C., for plaintiff Diamond Sawblades Manufacturers Coalition.

Eric Emerson and *Laura R. Ardito*, Steptoe and Johnson, LLP, of Washington, D.C., for consolidated plaintiff Hyosung D&P Co., Ltd.

Delisa M. Sanchez, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel on the brief was *Hardeep K. Josan*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Bruce M. Mitchell, *Andrew B. Schroth*, *Mark E. Pardo*, *Ned H. Marshak*, and *Andrew T. Shultz*, Grunfeld, Desiderio, Lebowitz, Silverman & Kledstadt, LLP, of Washington, D.C., for defendant-intervenor Ehwa Diamond Industrial Co., Ltd.

Michael P. House and *Mary Rose Hughes,* Perkins Coie, LLP, of Washington, D.C., for defendant-intervenors SH Trading Inc. and Shinhan Diamond Industrial Co. Ltd.

OPINION AND ORDER

Musgrave, Senior Judge:

Presuming familiarity with slip opinion 11–137 (Nov. 2, 1011), which granted the motion of Diamond Sawblades Manufacturers Coalition ("DSMC") for preliminary injunction against liquidation of entries of merchandise subject to the final administrative determination of sales at less than fair value ("LTFV") *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (Dep't Comm. May 22, 2006), the court now considers a motion filed by the defendant to amend the injunction against liquidation of subject merchandise in order to permit liquidation of subject merchandise entered on or after the effective date of a certain notice revoking the

antidumping duty order ("Revocation Notice"),[1] *see* Section 129 of the Uruguay Round Agreements Act ("section 129"), 19 U.S.C. § 3538, which implicates the relief DSMC seeks in its underlying challenge to the LTFV final results. DSMC has also interposed a motion to permit amendment of its complaint. For the following reasons, modification of the injunction will be disallowed but amendment of DSMC's complaint allowed.

I

This court has inherent power and the discretion to modify the injunction in the event of changed circumstances. *See Aimcor v. United States*, 23 CIT 932, 939, 83 F. Supp. 2d 1293, 1299 (1999). A party may move for modification pursuant to USCIT Rules 7(b) and 65(b)(4), but a movant "for dissolution must make a very compelling demonstration, both of changed circumstances and resulting inequities for the moving party, to justify dissolution of the injunction prior to a final decision on the merits of the action." *Id*. An opponent does not bear a burden of reproving the case for an injunction's continuance. *See*, *e.g.*, *Ad Hoc Shrimp Trade Action Committee v. United States*, 32 CIT 666, 669, 562 F. Supp. 2d 1383, 1387 (2008); *SKF USA Inc. v. United States*, 28 CIT 170, 182, 316 F. Supp. 2d 1322, 1334 (2004).

The defendant contends amendment of the injunction is necessary because the U.S. Department of Commerce, International Trade Administration ("Commerce" or "the Department") "has not been able to fully implement the section 129 determination" until the injunction is lifted, and the "Court does not possess jurisdiction over entries subject to the section 129 determination and has no basis upon which to maintain the current injunction with respect to those entries." Def's Mot. at 2, 7–8.

DSMC originally sought enjoinder of revocation of the antidumping duty order in addition to enjoinder of liquidation, arguing that Commerce could not revoke without the Court's permission because jurisdiction over the LTFV determination had vested here. In any event,[2]as the defendant here impresses, revocation is denied its full effect for so long as liquidation continues to be enjoined. Unresolved

[1] *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof From the Republic of Korea*, 76 Fed. Reg. 66892 (Dep't Comm. Oct. 28, 2011). The effective date thereof is October 24, 2011.

[2] The argument was not incorrect, but at the time enjoinder of revocation was considered an unwarranted intrusion into the administrative process and the agency's interpretation of its obligations under the antidumping law. *See* Order of Aug. 26, 2011, ECF No. 47; *see also* Slip Op. 11–117 at 6.

in the earlier opinions was how revocation should be challenged, in the event it occurred as a consequence of instruction from the USTR interpreted as requiring immediate revocation of the antidumping duty order with respect to all unliquidated entries entered on or after the date the USTR so instructs. *Cf.* 19 U.S.C. § 3538(c)(1)(B) *with* Slip Op. 11–137 at 13.[3]

Now, due to the present injunction against liquidation, DSMC takes the position that it was not required to challenge revocation in order to preserve its right to appeal the underlying LTFV determination. DSMC argues that the court continues to have jurisdiction over those entries and that the motion to amend the injunction should be rejected for the same reasons articulated in slip opinion 11–137 for rejecting opposition to its issuance (*i.e.*, the injunction) in the first place. Opp. to Def's Mot. to Amend Prelim. Inj. at 3. More precisely, DSMC argues that ultimate success on this matter (its challenge to the LTFV determination) resulting in above-*de-minimis* dumping rates and reinstatement of the antidumping duty order *is* a challenge to Commerce's revocation decision "in some fashion" as contemplated by slip opinion 11–137.

With the benefit of time, and upon further reflection, the court is persuaded that the Revocation Notice does not, in fact, delineate or delimit the Court's jurisdiction over the entries subject to DSMC's challenge to the LTFV determination. Commerce is required to "implement" its section 129 determination if instructed to do so by the USTR, and an unchallenged zero-percent margin determined pursuant thereto would certainly seem to remove the antidumping duty order's legal underpinning and imply that revocation of the anti-

[3] The court conjectured it might be procedurally cleaner to challenge revocation separately and consolidate herewith. *See* Slip Op. 11–137 at 13; *see also* 19 U.S.C. §§ 1516a(a)(2)(A)(i)(III) & 1516a(a)(2)(B)(vii) (a party is required to challenge the "determination . . . under section 3598" within 30 days after publication if it believes the determination was erroneous); *American Chain Ass'n v. United States*, 14 CIT 666, 669, 746 F. Supp. 116, 118 (1990) (litigant cannot challenge revocation, which became final when litigant missed statutory deadline for filing challenge, under guise of challenge to administrative review rendered moot by such final revocation). *Cf. Elkem Metals Co. v. United States*, 31 CIT 672, 676 (2003) (domestic industry challenge to revocation of an antidumping duty order, filed in order to preserve right to judicial review in parallel action challenging results of earlier administrative review, stayed pending disposition of that parallel action) *with Globe Metallurgical Inc. v. United States*, 31 CIT 1722, 1727, 530 F. Supp.2d 1343, 1349 (2007) (domestic industry challenge to revocation determination predicated upon a material injury determination in a sunset review; on plaintiff's motion for stay and defendant's motion to dismiss for failure to state a claim upon which relief could be granted, motion to stay denied and motion to dismiss granted, on ground that whether act of revocation was "correctly performed" under 19 U.S.C. § 1675(d)(2) was not dependent upon separate challenge to material injury determination).

dumping duty order is the necessary consequence. *Cf.* 19 U.S.C. § 3538(c)(1)(A). But, nowhere in the statute is it decreed that immediate liquidation is the consequence of such implementation, only that unliquidated entries entered on or after the effective date of the section 129 determination get the benefit thereof. *See* 19 U.S.C. § 3538(c)(1)(B).

DSMC has foregone challenging revocation. It maintains, however, a right to reinstatement that is dependent upon success in this LTFV challenge. Such a right is independent of whatever challenge DSMC could have brought against "implementation" of the section 129 determination that has resulted in revocation, a determination with which DSMC contends it has no legal complaint. *See Globe Metallurgical*, *supra*, 31 CIT at 1728, 530 F. Supp. 2d at 1349 (plaintiff not required to challenge revocation separately in order to maintain right to reinstatement of unfair trade order). By contrast, the defendant's motion essentially asks the court to undertake an act that could moot most of the relief sought in this case. Its papers do not persuade that such a result is required, or that either it or the other parties will be prejudiced by continuation of the injunction until the matter is concluded. Given the posture of the litigation at this point, the Revocation Notice is interlocutory. Which matter is left standing remains to be seen.

II

DSMC's motion to amend its complaint reasons that amendment serves the interests of justice due to the "unusual" circumstances occasioned by the section 129 determination, that had the antidumping duty margin been *de minimis* from the outset it would "likely" have challenged additional issues. DSMC Mot. at 4. DSMC also calls attention to the fact that the court granted a previous motion to amend its complaint after Commerce amended the final LTFV margin results to correct for ministerial errors. *Id.*

The court will not speculate on likelihood, but it will reflect on the fact that the margins were not *de minimis* when the litigation was filed and on the fact that the litigation's *status quo* is now with respect to *de minimis* estimated dumping margins, below the level needed to support the antidumping duty order.[4]

[4] DSMC goes too far in stating that the section 129 determination "has now substantially changed the final results under appeal" and that "[p]ursuant to its Section 129 determination, the Department has altered the decision under appeal." DSMC Mot. at 4. The section 129 determination altered the effect of the final results of the LTFV determination as to future entries but not the final results themselves or the decision under appeal. Be that as it may, DSMC has previously indicated awareness that the margin determined pursuant to section 129 is an entirely new determination.

USCIT Rule 15(a)(2), which is identical to Rule 15(a)(2) of the Federal Rules of Civil Procedure, directs that leave to amend a complaint should be "freely" given "when justice so requires," which implies the absence of a valid reason for denial such as futility and undue prejudice. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Intrepid v. Pollock*, 907 F.2d 1125, 1128–29 (Fed. Cir. 1990).

In opposition to DSMC's motion, the defendant argues amendment would be futile. That is, if DSMC "wished to extend any relief it may obtain with respect to the LTFV determination into the legally distinct section 129 determination," DSMC was required to challenge the section 129 determination but failed to do so. The defendant also contends DSMC fails to provide any "factual" support for the contention that prevailing on its amended claims would result in non-*de-minimis* margins even in the absence of zeroing. Def's Opp. to DSMC's Mot. at 4–5, referencing DSMC Mot. at n.1.

The court does not consider the proposed amendments in isolation but in relation to the entire complaint. Any factual support necessary therefor would be in the administrative record. The real question on futility is best measured on the basis of whether the proposed amendments would survive a motion to dismiss or for summary judgment. *See*, *e.g.*, *FYH Bearing Units USA, Inc. v. United States*, 35 CIT ___, 753 F. Supp. 2d 1348 (2011). Facially, none of the proposed pleadings appears to be deficient for the purpose of such motions.[5]

The consolidated plaintiff Hyosung D&P Co., Ltd. ("Hyosung"), and the defendant-intervenors SH Trading Inc. and Shinhan Diamond Industrial Co., Ltd. ("Shinhan"), and Ehwa Diamond Industrial Co., Ltd. ("Ehwa"), all argue DSMC's motion is unduly prejudicial. Undue prejudice is typically the most important consideration on a Rule 15(a) motion. *See* 6 Charles A. Wright, Arthur R. Miller, Mary K.

[5] Which observation, of course, should not be interpreted as precluding any such motion. Defendant-intervenor Ehwa Diamond Industrial Co., Ltd., helpfully summarizes DSMC's proposed additional allegations as follows: 1. The Department's decision not to issue Section E questionnaires to respondents was not supported by substantial evidence and was otherwise contrary to law; 2. The Department's determination regarding whether to adjust Ehwa's and Shinhan's purchases from affiliated suppliers was not supported by substantial evidence and was otherwise contrary to law; 3. The Department's determination not to adjust the reported costs for purchases from unaffiliated non-market economy suppliers was not supported by substantial evidence and was otherwise not in accordance with law; 4. The Department's determination not to collapse Ehwa and Shinhan into a single entity for purposes of the investigation was not supported by substantial evidence and was otherwise not in accordance with law; 5. The Department's determination not to collapse Shinhan with its Korean affiliates was unsupported by substantial evidence and was otherwise contrary to law; 6. The Department's determination regarding whether to adjust the production quantities of CONNUMs not produced in the period of investigation was not supported by substantial evidence and was otherwise contrary to law; and, 7. The Department's determination regarding whether to base Shinhan's financial expense rate on facts available was not supported by substantial evidence and was otherwise contrary to law. *See* Ehwa's Resp. to DSMC's Mot. at n.1.

Kane, and Richard L. Marcus, *Federal Practice and Procedure* § 1487 (3d ed., Supp. 2011).[6] The focus here is generally on whether delay in moving to amend increases the risk that the opposing party will not have an adequate opportunity to prepare its case on the new issues raised by the amended pleading. *See Ford Motor Co. v. United States*, 19 CIT 946, 956, 896 F. Supp. 1224, 1231 (1995).

Hyosung contends DSMC should have disclosed all counts at the outset in 2006, and that amendment should not be permitted for a development that has no "legal effect" on the administrative determination that has been challenged. If amendment is permitted now, Hyosung argues, it "would then have grounds to seek to amend their complaint to add claims designed to reduce their margins" which might be repeated *ad nauseum*. The "better practice," Hyosung argues, is to require a statement of all claims at the outset of pleadings, which could then be discarded if success appears unlikely or are not worth the effort to pursue.

This court will not infer immateriality from the fact of non-inclusion of particular counts in a complaint filed at the outset of litigation, and it is unwilling to require a kitchen-sink-and winnowing-out approach to pleading on these papers before it. Further, the court does not presently have before it a motion from Hyosung to amend its complaint, but should one be submitted, it will be duly considered.

Shinhan characterizes the proposed amendment as inexcusably belated and coming on the eve of scheduled briefing. *See generally* Shinhan Opp. Br. at 3–9, referencing, *inter alia*, *Systems Unlimited, Inc. v. Cisco Systems, Inc.,* 228 Fed. Appx. 854, 855 (11th Cir. 2007);

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[6] *See*, *e.g.*, *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005) (delay in delineating defendants, in identifying their respective acts or omissions, and in complying with the discovery schedule, directly prejudiced defendants' ability to mount an effective qualified-immunity defense); *Invest Almaz v. Temple-Inland Forest Products Corp.*, 243 F.3d 57 (1st Cir. 2001) (amendment of pleadings at close of plaintiff's case, to assert affirmative fraud claims raised obliquely prior thereto, and immediately prior to beginning of defendant's case via videotaped deposition testimony of key defense witness, would have left limited ability to adapt defense to counter new claims); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990) (amendment of seven-year-old action originally alleging only discriminatory discharge to include allegations of threats and intimidation at time of discharge would have been prejudicial), *cert. denied*, 501 U.S. 1250 (1991); *Jackson v. Bank of Hawaii,* 902 F.2d 1385 (9th Cir. 1990) (amendment of complaint that would have required the bank to relitigate a portion of state-court action brought by its insurer held prejudicial in absence of justification for delay in motion to amend); *Earlie v. Jacobs*, 745 F.2d 342 (5th Cir. 1984) (attempted amendment of race-discrimination complaint adding nothing of substance to original allegations and solely in order to circumvent earlier ruling denying jury trial would only have delayed trial and prejudiced employer); *Frank v. Dana Corp.*, 649 F. Supp. 2d 729 (N.D. Ohio 2009) (plaintiffs could have amended complaint in response to motion to dismiss, but amendment after responsive pleading would cause an extensive delay).

Dal-Tile Corp. v. United States, 23 CIT 631, 638, 63 F. Supp. 2d 1341, 1349 (1999); *Ruby Int'l, Inc. v. United States*, 18 CIT 513, 514 (1994); *Saint Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 633, 795 F. Supp. 453 (1992). And yet, alacrity has not been a hallmark of this litigation. The parties have generally consented to motions for the various extensions of time requested in this matter, and DSMC's parallel motion to extend briefing a further 45 days after a decision on the motion to amend its complaint (to which the other opponents consent) is no exception.

Shinhan also relies upon *Ad Hoc Utilities Group v. United States*, 33 CIT ___, ___, 650 F. Supp. 2d 1318, 1330 (2009) to argue DSMC was well aware of the particular methodological approaches applied by Commerce in the LTFV final results that DSMC believed were erroneous. The argument implies the motion to amend the complaint is predicated upon a "strategic" decision not to include the proposed amendments in the original complaint. The argument is unpersuasive.

A motion to amend a complaint that is included in a reply brief on a motion for rehearing, where a case has already been heard and a judicial decision rendered upon it, and which amending motion was only in order to include individual-named companies as plaintiffs that had been "strategically" omitted from being named plaintiffs at the outset of the litigation, is of a different order (if not class) than the motion to amend at bar. *Cf. Ad Hoc Utilities Group*, 33 CIT at ___, 650 F. Supp. 2d at 1329–30. The circumstances behind the proposed amendment are not indicative of motivation calculated to undermine valiant defense. Although Rule 16 contemplates entry of scheduling orders in litigation that "limit the time to . . . amend the pleadings,"[7] the matter at bar is governed by Rule 56.2, and by Rule 16 only indirectly. The scheduling advised to the court via the parties' joint status report, ECN No. 43 (Jul. 8, 2011), does not contemplate a date certain after which pleadings may not be amended. Nor need it have. *See* USCIT Rule 56.2(a) & (d).

Ehwa argues that it would be specifically prejudiced by "additional and unwarranted burdens" if amendment of the complaint were allowed, and that "DSMC wishes to amend its complaint based on issues unrelated to the reason why the margin was altered." Ehwa Resp. to DSMC Mot. at 3. Shinhan, similarly, complains that amendment adds complexity to the litigation and would require "reach[ing]

[7] *See* USCIT Rule 16(b)(3)(A). The purpose thereof is for the parties to acknowledge in advance that "at some point . . . the pleadings will be fixed" and act accordingly. *See* Advisory Committee Notes to the 1983 Amendments to Fed.R.Civ.P. 16(b); *cf.*, *e.g.*, *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154 (2004).

back in time and into the massive detail of the administrative record (containing evidence dating back to 2004)". Shinhan Opp. Br. at 8.

In one sense, of course, having to answer to *any* complaint can be regarded as an "unwarranted burden," and the court can agree that the *cause* for the alteration of the margin has no bearing on the motion to amend the complaint. But, the consequence thereof – elimination of the margin altogether – puts DSMC's challenge (to the final results of the antidumping investigation as a whole) in a different light, concerning which DSMC maintains the right to complain of injustice.

"[A] long-and still-standing principle of Anglo-American jurisprudence is that a party plaintiff is the master of its complaint." *Neenah Foundry Co. v. United States*, 24 CIT 202, 203 (2000) (citations omitted). Typically, plaintiffs have been denied leave to amend to add new claims or theories when the amendment is sought after the case has been pending for some time, discovery has closed, and the court is about to rule on defendant's summary-judgment motion. In a case such as this, discovery is not an issue, nor is there any danger of a loss of valuable evidence or the unavailability of an important witness, nor has the court been asked to rule on a dispositive motion.

Although DSMC initiated this litigation in August 2006, further substantive proceedings had to abide a successful challenge to the negative final determination of the U.S. International Trade Commission in the same antidumping investigation as well as Commerce's subsequent issuance of the antidumping duty order in November 2009, after which the Government of Korea immediately instituted proceedings before the World Trade Organization to obtain the panel decision in early 2011 that determined Commerce's "zeroing" calculation methodology impermissible under WTO Agreements as applied to the diamond sawblades investigation. *See United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402 (Jan. 18, 2011). Commerce then instituted section 129 proceedings to implement that panel decision, and it preliminarily determined that in the absence of zeroing methodology all antidumping margins were equal to zero,[8] at which point, as mentioned, DSMC sought a temporary restraining order and preliminary injunction against both revocation and liquidation of subject merchandise, which motions were denied at the time as unripe.

Arguably, DSMC might have requested leave to amend its complaint at that time as well. But since the initial motion for injunction

[8] *See* Memorandum, re: *Preliminary Results Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Diamond Sawblades and Parts Thereof from the People's Republic of Korea* at 3–4 (July 26, 2011), attached as Exhibit 2 to DSMC's Mot.

was unripe, the prospect of a definite change in the margin was also uncertain. It was not until Commerce made its final section 129 determination in October 2011 that the *status quo* of the underlying matter changed (*i.e.*, the estimated antidumping duty rates). Thus it would be a stretch to conclude at this point that DSMC has been "dilatory" in seeking to amend its complaint.

In brief: the underlying matter is appeal of an agency determination made on the basis of an administrative record; the claims DSMC would amend its complaint to include are, with one alleged exception, not a matter of surprise or discovery, having been raised before Commerce at the administrative proceeding; the matter to this point has involved a complaint, not an answer or other responsive pleading, and it has not been submitted for final disposition (indeed, briefing has yet to begin); and the complexity (such as it may be) of the additional proposed amendments to the complaint does not appear to be such as would amount to undue prejudice to the opposing parties, nor is any other discernible. The opponents of the motion do not persuade as to the existence of actual unfair disadvantage as a result of the timing of DSMC's motion or otherwise.

Conclusion

For the above reasons, the defendant's motion to amend the injunction is hereby denied, the plaintiff's motion to amend its complaint is hereby granted, and the dispositive briefing is hereby extended a further 45 days after the date of this opinion.

So ordered.

Dated: March 29, 2012
New York, New York

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

Slip Op. 12–47

MACLEAN-FOGG COMPANY, et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 11–00209

[Commerce's all-others countervailing duty rate REMANDED.]

Dated: April 4, 2012

Mark B. Lehnardt, Lehnardt & Lehnardt LLC, of Liberty, MO, for the Plaintiff-Intervenors Eagle Metal Distributors, Inc. and NingboYili Import and Export Co., Ltd.

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Thomas M. Keating, and *Lisa M. Hammond*, Hodes, Keating and Pilon, of Chicago, IL, for Plaintiffs Maclean-Fogg Co. and Fiskars Brands, Inc.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were *Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Reginald T. Blades Jr.*, Assistant Director. Of counsel on the briefs were, *Joanna Theiss*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, and

Stephen A. Jones, *Christopher T. Cloutier*, *Daniel L. Schneiderman*, *Gilbert B. Kaplan*, *Joshua M. Snead*, and *Patrick J. Togni*, King and Spalding LLP, of Washington, DC, for the Defendant-Intervenor Aluminum Extrusions Fair Trade Committee.

OPINION

Pogue, Chief Judge:

In this action, Plaintiffs, four domestic importers and one exporter of extruded aluminum, challenge the all-others countervailing duty ("CVD") rate set by the Department of Commerce ("the Department" or "Commerce") in its investigation of their goods imported from the People's Republic of China. We have jurisdiction under Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. 1516a(a)(2)(B)(i)(2006)[1] and 28 U.S.C. § 1581(c).

After a brief review of the relevant background and applicable standard of review, the court will explain why it concludes that Commerce has not presented, for its rate choice, a logical basis or explanation which considers the important aspects of the problem presented. Accordingly, the all-others rate is remanded for reconsideration.

BACKGROUND

This case arises from Commerce's initiation of companion CVD and antidumping ("AD") investigations into various Chinese exporters and producers of aluminum extrusions.[2] *See Aluminum Extrusions from the People's Republic of China*, 75 Fed. Reg. 22,114 (Dep't Commerce Apr. 27, 2010) (Initiation of Countervailing Duty Investigation) ("*CVD Initiation*"). Because Commerce's investigation involved 114

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

[2] The merchandise covered by the investigation are aluminum shapes and forms created by the extrusion process and made from aluminum alloys which correspond to the Aluminum Association designations beginning with the numbers 1, 3, or 6. *Final Determination*, 76 Fed. Reg. at 18,521. These forms are produced in a variety of shapes, ranging from solid to hollow profiles in pipes, tubes, bars, and rods. They may also be prepared for assembly by being cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun. *Id.*

potential exporter/producers ("respondents"), *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (Final Affirmative Countervailing Duty Determination) ("*Final Determination*") and accompanying Issues and Decision Memorandum ("*I&D Memo*") at Comment 10 (Mar. 28, 2011), Commerce initially selected the three largest respondents by volume as mandatory respondents.[3] However, none of these three mandatory respondents responded to Commerce's initial questionnaire. *See* Respondent Selection Memorandum at 4, May 18, 2010, ECF No. 39, Tab D (citing 19 U.S.C. § 1677f-1(e)(2)) ("*Respondent Selection Memo* "); *I&D Memo*, Section VI at 5. Commerce therefore found that these mandatory respondents "withheld requested information and significantly impeded [the] proceeding." *I&D Memo*, Section VI. Commerce further found that because the three mandatory respondents failed to act to the best of their abilities in the investigation, an adverse inference was warranted, such that Commerce would use adverse facts available ("AFA") in calculating their countervailing duty rate. Commerce intended to calculate an AFA rate to ensure the mandatory respondents did not obtain a more favorable rate than if they had cooperated with Commerce's request for information. *Id.* (relying on and citing 19 U.S.C. § 1677e(b)). Accordingly, and citing its long standing practice, in calculating, for the three mandatory respondents, an AFA CVD rate, *Final Determination*, 76 Fed. Reg. at 18,523,[4] Commerce selected the "highest calculated rate in any seg-

[3] Where there is such a large number of potential respondents, the statute permits Commerce to select either a statistically valid set of exporters and producers or those that are the largest by volume. *See* 19 U.S.C. § 1677f-1(e)(2):

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number ofexporters or producers involved in the investigation orreview, the administering authority may—
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largestvolume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.")

[4] Commerce, pursuant to its statutory mandate, uses information derived from the petition, final determination, any previous review or determination and/or any other information placed on the record. *Preliminary Determination*, 75 Fed. Reg. at 54, 304 (citing 19 U.S.C. § 1677e(b) and 19 C.F.R.§ 351.308(c)(1) and (2).

ment of the proceeding." *Aluminum Extrusions from the People's Republic of China*, 75 Fed. Reg. 54,302, 54,305 (Dep't Commerce Sep. 7, 2010) (preliminary affirmative countervailing duty determination) ("*Preliminary Determination*") (citing *Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances*, 73 Fed. Reg. 35,639 (Dep't Commerce June 24, 2008)). More specifically, Commerce typically uses the highest program-specific rates calculated for cooperating respondents in the current or in prior CVD proceedings. Here, Commerce used the "highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies" and arrived at a final rate of 374.15% for each of the three mandatory respondents.[5] *Id.* at 54,305; *Final Determination*, 76 Fed. Reg. at 18,523.

Two other companies submitted responses and were chosen by Commerce to participate in the investigation as voluntary respondents: Zhaoqing New Zhongya Aluminum Co., Ltd., Zhongya Shaped Aluminum HK Holding Ltd., and Karlton Aluminum Company Ltd. (collectively "Zhongya") and Guang Ya Aluminum Industries Co., Ltd., Foshan Guangcheng Aluminum Co., Ltd., Guang Ya Aluminum Industries Hong Kong, Kong Ah International Company Limited, and Yongji Guanghai Aluminum Industry Co., Ltd. (collectively "Guang Ya"). In the final determination, Commerce issued a final CVD rate of 8.02% *ad valorem* for Zhongya, and 9.94% *ad valorem* for Guang Ya. *Final Determination*, 76 Fed. Reg. at 18,522–23.[6]

Having calculated rates for the mandatory and voluntary respondents, Commerce then calculated the CVD rate for the remaining "all-other" respondents, arriving at a rate of 374.15%. *Final Determination*, 76 Fed. Reg. at 18,822–23. This rate is identical to and calculated as a weighted average of the AFA rates Commerce issued for the three non-cooperating mandatory respondents. In choosing to use the weighted average of the rates determined for the mandatory respondents, Commerce excluded the rates calculated for the voluntary respondents. In doing so, Commerce relied on 19 C.F.R. § 351.204(d)(3) which permits Commerce to exclude any rates calculated for voluntary respondents when calculating the all-others rate. *I&D Memo*, Section XI, Comment 9 at 54; 19 C.F.R. § 351.204(d)(3).

[5] In its preliminary determination, Commerce calculated an AFA rate of 137.65%. Preliminary Determination, 75 Fed. Reg. at 54,320–21.

[6] Unlike the AFA rate, the final voluntary respondents' rates did not differ significantly from the preliminary rates,which were 10.37% *ad valorem* and 6.18% *ad valorem* respectively-.*See Preliminary Determination*, 75 Fed. Reg. at 54,321.

Plaintiffs allege that when averaging rates to calculate the all-others rate, Commerce's decision to omit any rates calculated for voluntary respondents is expressly prohibited by the governing statute, 19 U.S.C. § 1671d(c)(5)(A)(i)–(ii) ("section 1671d"). Plaintiffs also contend that 19 C.F.R. § 351.204(d)(3) is invalidly promulgated in light of the alleged lack of ambiguity of the statute. Finally, Plaintiffs assert that Commerce's chosen methodology is unreasonable and not supported by substantial evidence.

STANDARD OF REVIEW

When reviewing Commerce's "determinations, findings or conclusions" in a countervailing duty investigation, the Court determines whether 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). Substantial evidence is evidence which, considering the record as a whole, "a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 491 (1951) (citing *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). In presenting its findings, the agency must explain its standards and "rationally connect them to the conclusions drawn from the record." *U.S. Steel Corp. v. United States*, Slip Op. 10–104, 2010 Ct. Intl. Trade LEXIS 107 (CIT Sep. 13, 2010) at *4 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43(1983); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The conclusion Commerce reaches need not be the best or only possible conclusion, merely a reasonable one. *See Lifestyle Enterprise, Inc. v. United States*, Slip-Op 11–16, 2011 WL 637667 at *10 (CIT Feb. 11, 2011).

DISCUSSION

Because Plaintiffs' first two claims are related, the court will consider them in Part A below, and then turn to Plaintiffs' remaining claim in Part B.

A.

Plaintiffs first raise a straightforward *Chevron* challenge,[7] asserting that section 1671d unambiguously requires that the all-others

[7] Under this familiar standard, when the court reviews an agency's statutory interpretation, it must first determine whether Congress "has directly spoken to the precise question a tissue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress has clearly expressed its intent on the issue, then the court must give effect to this unambiguous intent. *Chevron*, 467 U.S. at 842–43. If the court finds that "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute." *Id.* at 843. In this "second step" review, the court must look to the structure and language

rates be based on all "individually investigated" respondents and therefore Commerce erred by excluding voluntary respondents from the calculation of the all-others rate.

Section 1671d states, in relevant part:

> [T]he all-others rate shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and de minimis countervailable subsidy rates, and any rates determined entirely under section 1677e.[8]
>
> If the countervailable subsidy rates established for all exporters and producers individually investigated are zero or de minimis rates, or are determined entirely under section 1677e of this title, the administering authority may use any reasonable method to establish an all-others rate for exporters and producers not individually investigated, including averaging the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated.

19 U.S.C. § 1671d(c)(5)(A)(i)–(ii).

Plaintiffs assert that the statute is unambiguous and clearly refers to all individually investigated respondents, whether mandatory or voluntary. They urge the court to read the statute as establishing only two distinct categories of respondents: those that are individually investigated and those that are not. Plaintiffs' Br. at 17, Oct. 31, 2011, ECF No. 29 (referring to 19 U.S.C. § 1671d(c)(5)(A)(i)).

But the statute does not say "all." Nor does the statute clearly specify which particular subset of respondents Commerce is to rely upon when setting the all-others rate. While section 1671d does refer to "individually investigated" respondents, Congress does not define "individually investigated" as used in 19 U.S.C. § 1671d(c)(5)(A)(i)–(ii), *see* 19 U.S.C. § 1202 *et seq*, and the statutory language does not articulate the exact sources from which Commerce is required to extract data when making its calculations.

Plaintiffs contend that because Congress did not differentiate between mandatory and voluntary respondents in section 1671d, but

of the statute as a whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281,291 (1988); *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990). If it determines that the agency's interpretation is reasonable, then the court must uphold that interpretation, even if the court does not believe it to be the best statutory interpretation. *Adair v. United States*, 497 F.3d 1244, 1252 (Fed. Cir. 2007) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.967, 980 (2005)); *Chevron*, 467 U.S. at 842–43; *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

[8] Section 1677e refers to rates for the mandatory respondents that are calculated, as here, with adverse facts available. 19 U.S.C. § 1677(e).

did so in other portions of the statute, it must have intended all individually investigated respondents, whether mandatory or not, to be encompassed by the statutory language. Plaintiff's Br. at 17.

Plaintiffs are correct insofar as they claim that the court is to read a statutory provision in the context of the statute as a whole. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). But the statute as a whole includes another provision, 19 U.S.C. § 1677f-1(e), which at least suggests that Congress intended for Commerce to, in some reasonable way, use rates from mandatory respondents when calculating the all-others rate under section 1671d. *See* 19 U.S.C. § 1677f-1(e). Section 1677f-1(e) states that when there are too many importers or producers to make it practical for Commerce to set individual CVD rates, "individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5)." Subparagraph (A) sets forth the process by which Commerce selects mandatory respondents. 19 U.S.C. § 1677f-1(e). In light of this provision, Plaintiffs' contention that section 1671d unambiguously refers to all individually investigated respondents, whether mandatory or voluntary, fails. *See Union Steel v. United States*, __ CIT __, Slip Op. 12–24 (Feb. 27, 2012) at *17–19 (holding that the term "weighted average dumping margin" is not so specific as to require a particular calculation). Rather, Commerce correctly concludes that the statute is ambiguous. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,351 (Dep't Commerce May 19, 1997) (Final Rule) ("*Preamble*").

In their second and related claim, Plaintiffs assert that because section 1671d is unambiguous, Commerce therefore invalidly promulgated and relied on 19 C.F.R. § 351.204(d)(3). Commerce responds that the regulation was validly promulgated and necessary to fill the uncertainty created by the statute.

Commerce explains that when it was promulgating 19 C.F.R. § 351.204(d)(3), it looked to Article 9.4 of the World Trade Organization ("WTO") Antidumping Agreement for guidance. That Article contemplates "parallel proceedings for voluntary respondents." Commerce also states that, for policy reasons, it excluded voluntary respondents' rates from its all-others calculation. Gov't Response at 17–19, Jan. 4, 2012, ECF No. 33.

All parties agree that the WTO Subsidies and Countervailing Measures Agreement, which governs countervailing duty measures, contains no provision parallel to Article 9.4 of the WTO Antidumping

Agreement. The parties, however, arrive at two different conclusions from this difference. Plaintiffs contend that the absence of such a provision, in the Subsidies Agreement, indicates that the Antidumping Agreement should have no bearing on a CVD investigation. Commerce, on the other hand, relies on legislative history to conclude that Congress believed it was "appropriate to treat voluntary responses in countervailing duty investigations in a similar manner." Gov't Response at 19 (citing S.R. 103–412 at 83 (1984)). Commerce further argues that voluntary respondents are unrepresentative of the remaining companies because of the incentives in the statute. Commerce contends that respondents will voluntarily seek review only when, knowing their own commercial practices, they have good reason to believe that their rates will be lower than those set for the mandatory respondents, regardless of whether those mandatory respondents are cooperative or not. Gov't Response at 24. Therefore, Commerce reasons, including rates from a "self selected group" such as the voluntary respondents, would "be expected to distort the weighted-average for the respondents selected by the Department on a neutral basis." Gov't Response at 22 (citing *Preamble*, 62 Fed. Reg. at 27,310).

This explanation for promulgating and relying on 19 C.F.R. § 351.204(d)(3) is reasonable. As the WTO Subsidies and Countervailing Measures Agreement is silent on the issue, 19 C.F.R. § 351.204(d)(3) was validly promulgated as a reasonable interpretation of 19 U.S.C. § 1671d(c)(5)(A).[9]

B.

Our decision that the establishment of an all-others rate is not controlled by the Plaintiffs' reading of the statute's provisions, and to uphold Commerce's regulation, is not the end of the matter. Nor is it conclusive either that Commerce's regulation permits it not to include, in its all-others calculation, CVD rates calculated for voluntary respondents, 19 CFR § 351.204(d)(3), or that Commerce is permitted to use the individual AFA subsidy rates determined for the high-volume mandatory respondents in its establishment of an all-others rate. 19 U.S.C. §1677f-1(e). This is because the statute also requires

[9] Plaintiffs also argue that the final all-others rate chosen by Commerce, 374.15%, amounts to an unlawful application of an AFA rate because it is identical to the AFA rate but was imposed without the statutorily required finding of non-cooperation. Plaintiff's Br. at 26–27. The statute, however, expressly allows Commerce to use facts available rates, at least in some reasonable way, to calculate the all-others rates. 19 U.S.C. § 1671d(c)(5)(A)(ii). Therefore, Plaintiff's argument is unavailing.

that Commerce must use a "reasonable method" for establishing that all-others rate. 19 U.S.C. §1671d(c)(5)(A)(ii).[10]

The issue therefore is whether Commerce's decision to calculate the all-others rate using the weighted average of the rates determined for the mandatory respondents, all of whom were non-cooperative and therefore received AFA rates, is reasonable.[11]

We begin our analysis of whether Commerce's method used here was reasonable with a brief consideration of the two prior agency decisions upon which Commerce relies, *Certain Potassium Phosphate Salts from the PRC*, 75 Fed. Reg. 30,375 (Dep't Commerce Jun. 1, 2010) (Final Affirmative Countervailing Duty Determination and Termination of Critical Circumstances Inquiry) (*"Phosphate Salts From the PRC"*) and *Raw Flexible Magnets from the People's Republic of China*, 73 Fed. Reg. 39,667 (Dep't Commerce Jul. 10, 2008) (Final Affirmative CVD Determination) ("*Flexible Magnets from the PRC*"). Neither of these investigations involved voluntary respondents; rather the record was limited to mandatory respondents. Accordingly, these cases are not precedent for the decision here, and thus do not provide a basis for Commerce's choice.

Aside from its reliance on *Phosphate Salts from the PRC* and *Flexible Magnets from the PRC*, and after rejecting the arguments of the parties regarding its selection of an all-others rate, ultimately, Commerce states that it made the choice to set the all-others rate as equal to the AFA rate "[b]ecause there were no calculated rates for individually investigated mandatory respondents on this record." *I&D Memo*, Comment 9 at 52. But this was a situation of Commerce's own making. Nothing prevented Commerce from identifying other respondents for mandatory investigation.

Moreover, the rates for voluntary respondents were on the record. While Commerce was permitted not to use the voluntary respondents' rates in setting the all-others rate, these rates nonetheless demonstrate that the AFA rate was not attributable to all respondents. Similarly, while Commerce was permitted to recognize that the remaining or all-other producers/exporters had chosen not to seek voluntary respondent status, and thus could not assume or rely on being granted a rate based on the voluntary respondents' rates, there is nothing on the record here that indicates that the AFA rate is attributable to these other parties.

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[10] As noted above, section 1671d provides for Commerce to "use any reasonable method to establish an all-others rate for exporters and producers not individually investigated" when the rates determined for exporters and producers is zero, *de minimis*, or calculated entirely under AFA. 19 U.S.C. § 1671d(c)(5)(A)(i)–(ii).

[11] Plaintiffs also challenge Commerce's preliminary all-others rate. However, the court's jurisdiction under 28 U.S.C.§ 1581(c) is to review final agency action.

Commerce disputes this aspect of the Plaintiffs' challenge by noting that Plaintiffs have been unable to cite case law which holds that an all-others rate must be corroborated. But this argument misses the point. Administrative law is rooted in the reasonableness standard, and this standard applies with equal force regardless of whether the issue originates in an antidumping or countervailing duty investigation.

Certainly it is the parties' responsibility to create a record from which Commerce may decide the issues presented. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("Although Commerce has authority to place documents in the administrative record that it deems relevant, 'the burden of creating an adequate record lies with [interested parties] and not with Commerce.'" (alteration in original) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). Here, the Plaintiffs chose to leave Commerce with the difficult task of selecting an all-others rate with limited information before it.

Nonetheless, there is nothing in Commerce's decision which indicates a logical connection between the AFA rate and Commerce's conclusion to apply that rate to the remaining parties. *See Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) (requiring a rational connection between the facts found and the choice made). There is nothing to indicate that Commerce "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.*; *see also*, *China Kingdom Imp. & Exp. Co. v. United States*, 31 CIT 1329, 1358 (2007) (Commerce has a responsibility to ensure accuracy of rates).

Here Commerce chose to select the largest exporters/producers by volume as mandatory respondents rather than to select a representative, valid sample of exporters/producers as permitted by 19 U.S.C. § 1677f1(e)(2)(A)(i). *Respondent Selection Memo* at 4. While this choice is permitted by law, 19 U.S.C. § 1677f-1(c)(2)(B), having made such a choice – and having chosen not to select a representative, valid sample – Commerce cannot then claim that the rates determined for the large volume respondents are representative of other exporters/producers. Similarly, while Commerce's regulation states that the all-others rate shall exclude the weighted average of the voluntary respondents' rates, that regulation does not provide a basis for asserting that the mandatory respondents' AFA rate is appropriate for other exporters/producers.

Finally, an AFA rate is to be remedial, not punitive. *KYD, Inc. v. United States*, 607 F.3d 760, 767–78 (Fed. Cir. 2010). Nothing on the record here indicates that Commerce considered how to serve this

purpose in selecting the applicable all-others rate in this case. Thus Commerce, in making its choice, failed to consider an important aspect of the problem presented. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.

In this case, Commerce is required to make a reasonable decision, considering the important aspects of the problem presented, and explain why that decision complies with the statutory reasonableness requirement. We remand to give it the opportunity to do so.

CONCLUSION

For the forgoing reasons, Commerce's calculations are REMANDED.

Commerce shall have until May 4, 2012 to complete and file its Remand Results. Plaintiffs, Plaintiff-Intervenors, and Defendant-Intervenor shall have until May 18, 2012 to file comments. Plaintiffs, Plaintiff-Intervenors, Defendant, and Defendant-Intervenor shall have until May 30, 2012 to file any reply.

It is **SO ORDERED**.

Dated: April 4, 2012
New York, New York

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