U.S. Customs and Border Protection

Slip Op. 12–6

UNITED STATES, Plaintiff, v. SWEET LITTLE MEXICO CORP., Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 10–00374

INTERNATIONAL FIDELITY INS. CORP., Plaintiff, v. UNITED STATES, Defendant.

Court No. 09–00236

[Explaining earlier denial of motion to enjoin execution of judgment from the U.S. District Court for the Southern District of Texas.]

Dated: January 12, 2012

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Snyder* for 10–00374 and *Alexander Vanderweide* for 09–00236), for the United States.

The Law Office of Lawrence W. Hanson, P.C. (*Lawrence W. Hanson*), for Sweet Little Mexico Corporation.

Meeks, Sheppard, Leo & Pillsbury (*Taylor Pillsbury*), for International Fidelity Insurance Corporation.

OPINION

Musgrave, Senior Judge:

I.
Introduction

Familiarity with slip opinion 11–35, 35 CIT ___ (Apr. 4, 2011), is presumed. After the parties joined issue in Court No. 09–00236, that action was assigned off the reserve calendar. Sweet Little Mexico Corp. ("SLM") filed a motion for a preliminary injunction to prevent International Fidelity Insurance Co. ("IFIC") from taking further action to execute on summary judgment obtained from the U.S. District Court for the Southern District of Texas in *International Fidelity Insurance Co. v. Sweet Little Mexico Corp.*, Civ. No. B-09–02 (S.D. Texas), *aff'd* No. 11–40449, 2011 WL 6413960 (5th Cir. Dec. 22, 2011), and IFIC and the United States Customs and Border Protection ("Customs") both filed oppositions thereto. At a hearing held on Janu-

ary 11, 2012, the court denied SLM's motion after concluding it problematic. This opinion memorializes the reasons therefor.

SLM filed the motion with respect to Court No. 09–00236. Although Court No. 0900236 and Court No. 10–00374 have been consolidated "in part" only with respect to trial of the overlapping issue (*i.e.*, whether the entries underlying both actions are entitled to preferential treatment pursuant to the North American Free Trade Agreement), it is questionable whether SLM's motion could be considered proper. SLM's posture with respect to Court No. 09–00236 is technically not that of a party to that action, and only a party may make a motion on a particular case. *See* Slip Op. 11–35 at n.1.

Further, the judgment SLM would enjoin was issued pursuant to the jurisdiction of the district court for the Southern District of Texas. An application to prevent IFIC from executing on the judgment of the Southern District of Texas is properly made to that district court or to the Court of Appeals for the Fifth Circuit. SLM did seek such a stay, but the motion was denied. As this court has no jurisdiction over that matter, concurrent or otherwise, it is presumptively improper to interfere in that process. *Cf. United States v. E.C. McAfee Co.*, 19 CIT 1243, 901 F. Supp. 367 (1995) (court lacked jurisdiction to remove action by surety on customs bond against importer from state court); *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295 (4th Cir. 2001) (due to operation of 11 U.S.C. § 362(a), prior receivership injunction does not render subsequent bankruptcy filing void *ab initio*, and to conclude otherwise "would make the injunction of one court determinative of the jurisdiction of another, setting courts in different districts against one another").

Furthermore, even if it were possible to propound a plausible theory that this court in fact exercises concurrent jurisdiction over the customs bond contract dispute and SLM provided a valid reason as to why it would not be improper to order a stay of execution of the judgment of another district court on the matter, the judgment against SLM that IFIC obtained encompasses more than the amount of IFIC's bond contract with SLM for the customs duties IFIC paid (and which Customs alleged were owed) on the 70 entry bonds that are the sole subject to IFIC's protest action in Court No. 09–00236. That judgment purportedly encompasses, in addition, the amount of IFIC's liquidated damages payment on 27 additional claims demanded by Customs against SLM, to which SLM failed to respond, for which Customs sought recompense against IFIC, and for which SLM has refused to reimburse IFIC even though, as the district court concluded on summary judgment, SLM is contractually obligated to do so. IFIC asserts that it amended the Southern District court

complaint to reflect those claims and they are included in the judgment. In other words, as IFIC points out, "both CIT actions are based on the propriety of SLM's NAFTA claims[and] neither case involves the FDA[-]related claims underlying the liquidated damages payments made by IFIC on behalf of SLM on the 27 claims." Surety Plaintiff's Opp. to Sweet Little Mexico Corp.'s Mot. for Prelim. Injunc. at 3. SLM's motion does not even attempt to touch upon that disposition.

Even if all the above concerns could somehow be overcome, SLM also does not persuade that its petition satisfies the traditional four factors to be considered on a motion for preliminary injunction: (1) immediate and irreparable harm if preliminary injunctive relief is not granted, (2) a likelihood of success on the merits, (3) the potential harm to the moving party in the absence of a preliminary injunction outweighs the harm that a preliminary injunction would cause to the non-moving party; and (4) the public interest is better served by granting the preliminary injunction.[1] *See*, *e.g., Sakar International, Inc. v United States*, 30 CIT 183, 184 (2006).

It may be true that SLM is in danger of suffering immediate and irreparable harm if injunctive relief is not granted, based on SLM's representation that it is a small business with minimal assets operating on the basis of small margins on inventory it imports from Mexico and sells for distribution in the United States, and that without injunctive relief, and if IFIC takes steps to execute on its judgment, then SLM's continued existence and operation are jeopardized. But, SLM does not, at least at this stage, persuade that its predicament with IFIC is not one of its own making. *See supra*. One must do equity to get equity, *e.g.*, *Fosdick v. Schall*, 99 U.S. 235, 253 (1878), and the record indications of SLM ignoring or failing to respond to demands from Customs or IFIC and in not abiding what it had promised to do on its contract with IFIC (if the judgment of the Southern District of Texas as well as the appellate opinion of the Court of Appeals for the Fifth Circuit are any indication) are not matters tending to tip the scales towards SLM's favor. SLM contends it sought, unsuccessfully, agreement with IFIC to forestall collection efforts until after a CIT judgment, but the fact remains that IFIC is the one that has been out of pocket well over a million dollars for quite some time, and SLM is immediately obligated to repay IFIC the amount involved in the 27 additional claims *regardless* of the outcome of the matters before this Court of International Trade.

[1] The weakness of a showing on one factor may be overborne by the strength of others, *Mittal Canada Inc. v United States*, 30 CIT 154, 161 (2006).

SLM argued two reasons why it could succeed on the merits: (1) SLM will prevail as a matter of law in its defense of the CIT's jurisdiction over the question of customs duties owed, and (2) SLM will likely prevail on the underlying question of whether customs duties are owing in the first place. Elaborating on the first proposition, SLM argues that "[f]or IFIC, through one counsel, to avail itself of CIT jurisdiction to contest an assessment of duties or other charges and tender those amounts as required but then, through different counsel, to seek interim reimbursement before a judgment by the CIT is rendered, means that the dispute over the duties or other charges will be heard in the collection action in the Southern District of Texas and not before the Court with exclusive jurisdiction over these matters." Sweet Little Mexico Corp.'s Mot. for Prelim. Injunc. at 6. But that is not so. It is also beside the point. IFIC's action on the bond contract and IFIC's action on its customs duty protest are conceptually distinct matters. The jurisdiction of the Southern District of Texas does not extend to deciding any questions related to the latter, *see* 28 U.S.C. § 1581(a) ("[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930"), and the fact that IFIC initiated the matter of its customs duty protest here (a court of exclusive jurisdiction over such protests) did not preclude it from initiating an action to recover customs duty payments from SLM on the bond contract in a separate district court.

As to the second proposition, SLM's brief argued that it has on hand documentation to demonstrate that the peanuts in the imported products were harvested in Mexico. The court therefore requested SLM to transmit such documentation in advance of the hearing, and the court also examined the entry documentation related to Court No. 09–00236. The Spanish documents (and such English translations as were provided) reviewed do provide a degree of support for SLM's position, but the court was unable to conclude that the strength of this factor was sufficient to overcome the deficiencies of the other aspects of SLM's motion.

Regarding the balance of hardships, SLM argued that they favor it, not IFIC, and that granting the injunction outweighs the potential harm to IFIC. Specifically, SLM argued there is no potential harm to IFIC that would be caused by granting the injunction, just as this court concluded that IFIC would not suffer prejudice as a result of consolidation of Court No. 09–00236 and Court No. 10–00374. Given SLM's admitted current financial circumstances, *supra*, and the uncertainty on IFIC's ability to recover on its valid judgment in the

future created by injunction, were one to issue, the court concluded SLM's proposition appeared dubious as to this factor, or at best deserving of neutral weighting.

As to the public interest factor, SLM argued it heavily favors granting the injunction, because IFIC has sought to "circumvent" the statutory framework for challenging Customs' actions by commencing Court No. 09–00236 and

> then seeking to recover the payments made to Customs [that were made] in order to invoke the CIT's jurisdiction by commencing another action against the bond principal in federal district court. IFIC has undermined the interests of judicial economy and initiated duplicative litigation by burdening two federal courts with a dispute that is properly heard exclusively in the CIT
>
> In the case of [SLM], IFIC has undertaken action to expedite the result sought in the CIT in a manner whcih is contrary to the public interest in due process of law. By pleading its case in the district court as a breach of contract/indemnification claim, IFIC obtained a summary judgment against [SLM], depriving [SLM] of an opportunity to be heard and without any judicial review of whether Customs properly assessed the duty on the imported product.

Id. at 10–11.

This court can empathize with SLM's plight, but that is as far as it goes at this stage. As indicated, nothing in the Court's jurisdictional statute binds a surety's cause of action against its principal arising from a payment to Customs to the surety's cause of action against Customs, and SLM still has an "opportunity to be heard" in defense of the government's penalty action against it. The public interest, rather, is served by respect for judicial process.

The foregoing considerations of SLM's motion for preliminary injunction to prevent IFIC from taking further action to execute on summary judgment obtained from the U.S. District Court for the Southern District of Texas persuaded this court to deny the motion at the hearing on January 11, 2012. The parties were then ordered to confer and submit either a joint proposed scheduling order covering both Court No. 09–00236 and Court No. 10–00374 or their respective proposals for scheduling by January 25, 2012.

As ordered.

Dated: January 12, 2012
New York, New York

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

Slip Op. 12–7

SHANTOU RED GARDEN FOODSTUFF CO., LTD., Plaintiff, v. UNITED STATES Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00080 UNITED STATES,

[Affirming in part, and remanding in part, final determination and amended final determination issued by the U.S. Department of Commerce in an investigation of sales at less than fair value of shrimp from the People's Republic of China]

Dated: January 13, 2012

John J. Kenkel, *J. Kevin Horgan*, and *Gregory S. Menegaz*, deKeiffer & Horgan, of Washington, D.C., for plaintiff.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Peter D. Keisler*, Assistant Attorney General, and *David M. Cohen*, Director. Of counsel on the brief were *Kemba Eneas*, *Marisa B. Goldstein*, and *Christine J. Sohar*, International Attorney-Advisors, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

Shantou Red Garden Foodstuff Co., Ltd. ("Red Garden") challenges the final determination ("Final Determination"), and its amendment ("Amended Final Determination"), issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude an investigation of sales at less than fair value of certain frozen warmwater shrimp ("subject merchandise") imported from the People's Republic of China ("PRC" or "China") from April 1, 2003 to September 30, 2003 (the "period of investigation" or "POI"). Compl. ¶ 1 (Mar. 1, 2005), ECF No. 7; *see Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen & Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70,997 (Dec. 8, 2004) ("*Final Determination*"); *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China*, 70 Fed. Reg. 5,149 (Feb. 1, 2005)

("*Amended Final Determination*").[1] Before the court is plaintiff's USCIT Rule 56.2 motion for judgment on the agency record and supporting memorandum, which bring seven claims: (1) that Commerce unlawfully drew an adverse inference in selecting from among the "facts otherwise available" for certain sales by Red Garden in the United States, Mem. in Supp. of Pl. Shantou Red Garden Foodstuff Co., Ltd.'s Rule 56.2 Mot. for J. upon the Agency R. 22 (June 23, 2005), ECF No. 25 ("Pl.'s Mem."); (2) that the Department's selection of a surrogate value for fresh, raw, head-on, shell-on shrimp was unlawful, *id.* at 35; (3) that the Department's selection of a surrogate value for shrimp feed was unlawful, *id.* at 52; (4) that the Department's selection of surrogate financial ratios was unlawful, *id.* at 54; (5) that Commerce unlawfully used inaccurate production volume data for one of Red Garden's suppliers despite the presence of accurate data on the record, *id.* at 57; (6) that the Department's selection of a surrogate value for labor expenses was unlawful, *id.* at 49; and (7) that Commerce unlawfully refused to allow Red Garden to correct a miscalculation submitted prior to verification, *id.* at 59–59. Defendant requests a voluntary remand as to the final two claims but opposes plaintiff's position on each of the other claims. Def.'s Mem. in Resp. to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Sept. 26, 2005), ECF No. 35 ("Def.'s Resp.").

The court concludes that Commerce erred in applying an adverse inference when selecting from among the facts otherwise available to determine factors of production for certain of Red Garden's sales, that Commerce must reconsider its determination of the surrogate value for fresh, raw, head-on, shell-on shrimp, that plaintiff is not entitled to relief on its challenges to the surrogate value of shrimp feed and the surrogate financial ratios, and that Commerce must recalculate Red Garden's margin using correct production volume for a certain Red Garden supplier. On the issues for which defendant requests a voluntary remand, the court will direct Commerce to redetermine the

[1] The scope of the investigation ("subject merchandise") was originally defined as "certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farm raised (produced by aquaculture), headon or head-off, shell-on or peeled, tailon or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form." *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen & Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70,997, 71,000 (Dec. 8, 2004). The scope of the antidumping duty order excluded "canned warmwater shrimp and prawns" due to a finding by the U.S. International Trade Commission that "a domestic industry in the United States is not materially injured or threatened with material injury by reason of imports of canned warmwater shrimp and prawns from the PRC." *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China*, 70 Fed. Reg. 5,149, 5,150 (Feb. 1, 2005).

valuation of labor expenses and to reconsider the decision not to incorporate certain corrected data.

II. BACKGROUND

After initiating the antidumping investigation of Chinese exports of subject merchandise, Commerce selected four "mandatory respondents,"[2] Allied Pacific Group ("Allied Pacific"), Yelin, Zhanjian Guolian Aquatic Products Co., Ltd ("Guolian"), and Red Garden.[3] *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen & Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China & the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876 (Jan. 27, 2004) ("*Initiation Notice*"); *Notice of Prelim. Determination of Sales at Less Than Fair Value, Partial Affirmative Prelim. Determination of Critical Circumstances & Postponement of Final Determination: Certain Frozen & Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 42,654, 42,656 (Jul. 16, 2004) ("*Prelim. Determination*"). In the preliminary determination issued in this investigation ("Preliminary Determination") Commerce found that goods were being sold in the United States at less than fair value and assigned Red Garden a preliminary weighted-average dumping margin of 7.67%. *Prelim. Determination*, 69 Fed. Reg. at 42,654 & 42,671.[4] The Final Determination assigned Red Garden a weighted-average dumping margin of 27.89%. *Final Determination*, 69 Fed. Reg. at 71,003. Commerce then issued an Amended Final Determination that responded to ministerial error allegations but left Red Garden's margin unchanged. *Amended Final Determination*, 70 Fed. Reg. at 5,151.

Plaintiff initiated this action by filing its summons on February 2, 2005 and its complaint on March 1, 2005. Summons (Feb. 2, 2005), ECF No. 1; Compl. On June 22, 2005, plaintiff moved for judgment on the agency record under USCIT Rule 56.2 and filed a memorandum in

[2] "Mandatory respondents" receive margins based on their own sales when Commerce examines fewer than all respondents in the review. The Department has limited authority to decline to examine each respondent pursuant to section 777A(c)(2) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677f-1(c)(2) (2000).

[3] The International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") also conducted parallel investigations of exports from Brazil, Ecuador, India, Thailand and the Socialist Republic of Vietnam. *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen & Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China & the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, 3,876 (Jan. 27, 2004).

[4] The Department published an amendment to its preliminary determination that did not affect this action. *Notice of Amended Prelim. Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen & Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 53,409 (Sept. 1, 2004).

support of its motion. Pl.'s Mem. The court heard oral argument on January 11, 2006. Subsequently, the parties filed supplemental briefs addressing specific questions from the court. *Letter from Red Garden to the Ct.* (Mar. 3, 2006), ECF No. 46; Def.'s Supplemental Br. in Resp. to the Ct.'s Questions of Jan. 31, 2006 (Mar. 3, 2006), ECF No. 47.

On February 14, 2007, the court stayed this action pending a final decision in the related case *Allied Pacific Food (Dalian) Co. v. United States* (Consol. Court No. 05–00056). Order (Feb. 14, 2007), ECF No. 50. This stay was lifted by the final decision in that case, which was issued on July 29, 2010. *Allied Pacific Food (Dalian) Co. v. United States*, 34 CIT __, 716 F. Supp. 2d 1339 (2010). The court conducted a telephone conference with the parties in July 2011 to address questions that had arisen on various matters, including the questions of whether additional submissions were appropriate pertaining to defendant's request for a voluntary remand on redetermining a surrogate labor rate and the wording that would be appropriate for a remand order addressing that redetermination. The conference concluded in the concurrence of all parties that the court should consider the case to be under submission.

III. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. 1581(c) (2000), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a (2000), including an action contesting a final determination of sales at less than fair value that Commerce issues under section 735 of the Tariff Act, 19 U.S.C. § 1673d(a). The court will uphold the Department's findings, conclusions, and determinations unless they are unsupported by substantial evidence on the record or otherwise not in accordance with law. *Id*. § 1516a(b)(1)(B)(i).

A. For Red Garden's Sales of Merchandise from a Certain Supplier, Commerce Unlawfully Used an Adverse Inference in Selecting from Among the Facts Otherwise Available

Commerce ordinarily determines the normal value of subject merchandise of an exporter or producer from a non-market economy ("NME") country "on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). For a non-producing exporter, Commerce typically will determine normal value using the factors of production ("FOPs") pertaining to the exporter's suppliers. *See id*. § 1677(28). Because Red Garden was not a producer during the POI and instead was an exporter of subject merchandise produced by others, Commerce required Red Garden to

weight-average the factors of production of its various shrimp-producing suppliers using a database consisting of the FOP data of each supplier. For this purpose, Commerce directed Red Garden to obtain completed Section D ("Factors of Production") questionnaires from each supplier.

Three of Red Garden's suppliers did not provide Red Garden with completed Section D questionnaires. Commerce accepted Red Garden's explanation that two of those suppliers, each of which supplied only a negligible portion of Red Garden's subject merchandise, each had informed Red Garden that due to size and limited administrative staff it could not provide the information requested. The third non-complying supplier, Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd. ("Meizhou"), which also was a party in the investigation, had supplied Red Garden more than a negligible quantity of subject merchandise during the POI. Meizhou informed Red Garden that, due to the company's having changed hands and due to a shareholder dispute, Meizhou could not provide the completed Section D response because Meizhou's former owners had removed books and records necessary for preparation of that response. Invoking its authority under section 776 of the Tariff Act, 19 U.S.C. § 1677e, Commerce, concluding that Red Garden failed to cooperate by not acting to the best of its ability to comply with the information request, decided to assign as facts otherwise available, and with an adverse inference, a margin of 112.81%, which it described as the "PRC-wide rate," to all of Red Garden's sales of subject merchandise supplied by Meizhou. *Final Determination*, 69 Fed. Reg. at 71,002–03. Commerce based its decision to use an adverse inference on findings that Red Garden, after being informed by the current Meizhou ownership that the former owners had removed the necessary records, did not contact or attempt to contact Meizhou's former owners. Issues & Decision Mem., A-570–893, at 26–27 (Nov. 29, 2004) (Admin. R. Doc. No. 1126) ("*Decision Mem.*")

Plaintiff claims that the use of an adverse inference was contrary to law on the grounds that: (1) the Department failed to give Red Garden proper notice that it would use an adverse inference, Pl.'s Mem. 22–25; (2) contrary to the Department's finding, Red Garden did all it could to comply with the request for Meizhou's FOP information, *id.* at 26–29; (3) any further efforts by Red Garden to obtain the Section D response from Meizhou would have been futile, *id.* at 29–31; and (4) Commerce improperly refused to accept affidavits Red Garden submitted with ministerial error allegations establishing Red Garden's attempts to contact the former owners of Meizhou, *id.* at 31–32.

The court concludes that Commerce, on this record, was justified in using "facts otherwise available" but that the record lacks substantial evidence to support the finding of a failure to cooperate upon which Commerce drew an adverse inference.

1. Commerce Was Justified in Resorting to "Facts Otherwise Available"

Under section 776(a)(2) of the Tariff Act, 19 U.S.C. § 1677e(a)(2), Commerce is directed generally to use facts otherwise available "in reaching the applicable determination under this subtitle" if an interested party "withholds information" that Commerce has requested or "provides such information but the information cannot be verified as provided in section 1677m(i) of this title [title 19]." 19 U.S.C. § 1677e(a)(2)(A), (D). In the Final Determination, Commerce found as facts that "Red Garden withheld information that had been requested by the Department and provided unverifiable information." *Final Determination*, 69 Fed. Reg. at 71,002. Commerce based these findings on what it considered to be an inconsistency between information Meizhou's ownership provided at Meizhou's verification and an exhibit to Red Garden's August 5, 2004 questionnaire response. *Id.* (citing *Letter from Red Garden to the Sec'y of Commerce* exhibit 1 (Aug. 5, 2004) (Admin. R. Doc. No. 960) ("*Aug. 5 Questionnaire Resp.*")). The two findings Commerce made under § 1677e(a)(2) are unsupported by record evidence. First, despite what Commerce alleges as an inconsistency, there is no record evidence that Red Garden ever possessed the Meizhou FOP data that Commerce sought. Red Garden could not have withheld information it did not possess. Second, with respect to the issues surrounding the Meizhou FOP data, Commerce failed to identify what, if any, information Red Garden provided that was "unverifiable." If Commerce was referring to the Meizhou FOP data, the finding would be invalid because the information was never submitted.

The two findings, although plainly wrong, are harmless errors. In an "Issues and Decision Memorandum" incorporated by reference into the Final Determination ("Decision Memorandum"), the Department stated that it "finds applying facts available is warranted for the portion of Red Garden's sales produced by Meizhou because Red Garden failed to provide the FOP data that the Department had requested." *Decision Mem.* 26–27. Under section 776(a)(1) of the Tariff Act, Commerce is directed to use facts otherwise available where, as here, "necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1). Commerce was authorized to use facts otherwise available to substitute for the missing FOP information.

2. Substantial Evidence Does Not Support the Finding that Red Garden Failed to Cooperate by Not Acting to the Best of its Ability to Comply with the Department's Information Request

In both the Final Determination and the Decision Memorandum, Commerce stated its finding that Red Garden, for purposes of 19 U.S.C. § 1677e(b), had failed to cooperate by not acting to the best of its ability to comply with the request for the Meizhou FOP data. *Final Determination*, 69 Fed. Reg. at 71,002; *Decision Mem.* 26–27. In support of its ultimate finding of a failure to cooperate, Commerce relied on a subordinate factual finding that it modified upon issuing the Amended Final Determination, in response to a ministerial error allegation by Red Garden. The finding that Commerce modified was contained in the second sentence of the following text from the Final Determination:

> During the time period that Meizhou completed its own responses, company officials had access to the records needed by Red Garden. . . . Thus, we find that Red Garden, despite its information to the contrary, by not contacting current ownership of Meizhou, or the ownership that was in place when Red Garden was responding to the Department's questionnaires, did not act to the best of its ability to obtain the FOP information from Meizhou.

Final Determination, 69 Fed. Reg. at 71,002 (citing *Mem. from Import Compliance Specialist to the File* 2 (Sept. 22, 2004) (Admin. R. Doc. No. 1012) ("*Meizhou Verification Rept.*")). In a memorandum that responded to the ministerial error allegation, which Commerce referenced in the Amended Final Determination, Commerce conceded that it had "incorrectly stated that Red Garden did not contact the current ownership" and recognized that there were "several instances where Red Garden contacted the current ownership." *Mem. from Case Analysts to Office Dir., AD/CVD Enforcement Office 9*, at 12–13 (Feb. 1, 2005) (Admin. R. Doc. No. 1178) ("*Resp. to Ministerial Error Claims*"). In that memorandum, Commerce restated as follows the second sentence from the Final Determination that is quoted above:

> Thus, we find that Red Garden, despite its information to the contrary, by not contacting the former ownership of Meizhou after the current ownership notified Red Garden that it did not have the FOP information requested by Red Garden, did not act to the best of its ability to obtain the FOP information from Meizhou.

Id. at 12. The memorandum further stated that "[we] continue to find that Red Garden did not cooperate to the best of its ability in obtaining Meizhou's FOP information as it did not contact Meizhou's previous ownership after it was informed as early as March 5, 2004, that the new owners did not have the requested FOP information." *Id.* at 13–14. In responding to the ministerial error allegations, Commerce did not withdraw or alter a finding it had made in the Decision Memorandum, which was that "[t]here is no information on the record demonstrating Red Garden's attempt to contact the former owners, even after Meizhou's current owners repeated their notification to Red Garden that the former owners possessed the information." *Decision Mem.* 26–27 (citing *Aug. 5 Questionnaire Resp*. exhibit 1; *Meizhou Verification Rept.* 2.) Summarizing the finding, the Decision Memorandum states that "[t]hus, we find that Red Garden did not act to the best of its ability to obtain the FOP information from Meizhou because Red Garden knew that Meizhou's former owners possessed the relevant information and Red Garden did not provide any evidence of its attempts to obtain that information from the former ownership." *Id.* at 27.

The statute authorizes Commerce to use an adverse inference if an interested party fails to "cooperate by not acting to the best of its ability to comply with *a request for information from the administering authority* . . . ." 19 U.S.C. § 1677e(b) (emphasis added). After analyzing the relevant record documents, and in particular the Department's questionnaires and Red Garden's responses, the court concludes that the Department erred when it decided to use an adverse inference. In the Decision Memorandum, the Final Determination, and the Amended Final Determination, Commerce construed its "request[s] for information," 19 U.S.C. § 1677e(b), differently than those requests actually were communicated to Red Garden. When the Section D questionnaire and three supplemental questionnaires Commerce submitted to Red Garden are read together, these documents reveal that the requests for information were more limited than Commerce later assumed. As discussed in further detail below, the questionnaires charged Red Garden with the specific tasks of sending Section D of the Department's initial questionnaire to Meizhou, attempting to convince Meizhou to complete that questionnaire with Meizhou's verifiable FOP data, and weight-averaging Meizhou's FOP data with FOP data of other producers in a revised Section D database. The various questionnaires never directed Red Garden to obtain or attempt to obtain business records, or information in business records, from the previous owners or from any party other than Meizhou.

The record reveals that the Department identified the issue of Red Garden's contacting Meizhou's former owners only in hindsight, not during the questionnaire process. Commerce knew on June 8, 2004 that verifiable data for Meizhou's factors of production were in the hands of Meizhou's former owners and not available to Meizhou. Even so, Commerce still was focusing on Meizhou's completing the Section D questionnaire seven weeks later, stating in its third and final supplemental questionnaire that it had taken it upon itself to "put Meizhou on notice that it must provide verifiable factors of production to Red Garden's counsel, such that you may weight-average those factors per CONNUM [*i.e.*, individual "control number"] in a revised Section D database." *Letter from Program Manager to Red Garden* 1 (Jul. 26, 2004) (Admin. R. Doc. No. 806) ("*Third Supplemental Questionnaire*"). The same supplemental questionnaire directed Red Garden to "provide the revised database in response to this questionnaire" and to "explain Red Garden's efforts and attempts to persuade Meizhou to respond to the Section D Questionnaire."

Because of the way Commerce defined its information requests, Commerce could not lawfully use an adverse inference under § 1677e(b) based on its irrelevant finding that Red Garden, in responding to those requests, did not attempt to contact the previous owners of Meizhou after Red Garden was informed that the new owners lacked the FOP information. The record does not support a finding that Red Garden failed to act to the best of its ability to comply with the information requests in the form in which Commerce actually communicated those requests. The court concludes, therefore, that the application of the PRC-wide rate to the merchandise Meizhou supplied Red Garden was unlawful. Below, the court reviews the relevant documents from the record and addresses the arguments defendant makes in support of the Department's decision.

The record shows that Commerce sent to Red Garden Sections C ("Sales to the United States"), D ("Factors of Production"), and E ("Cost of Further Manufacturing or Assembly Performed in the United States") of its "antidumping duty NME questionnaire" with a cover letter dated March 1, 2004. *Letter from Program Manager to Red Garden* 1 (Mar. 1, 2004) (Admin. R. Doc. No. 121) ("*Section D Questionnaire*"). Section D, the section of the questionnaire at issue here, is directed almost entirely to the submission of factor-of-production information of producers of subject merchandise. For a non-producing trading company such as Red Garden, the pertinent instruction in the Section D questionnaire, contained in part I ("General Explanation of Section D") is as follows: "If your company did not

produce the subject merchandise, we request that this section be immediately forwarded to the company that produces the subject merchandise and supplies it to you or to your customers." *Id.* at D-2.

In responding to the March 1 questionnaire, Red Garden reported FOP information for two major suppliers,[5] "Mingfeng" and "Longfeng," and also informed Commerce that three other suppliers, Meizhou, "Hengchang," and "Longfa," did not provide Red Garden FOP data. *Letter from Red Garden to the Sec'y of Commerce* D-1-D-2 (Apr. 21, 2004) (Admin. R. Doc. No. 308) ("*Apr. 21 Questionnaire Resp.*").[6] Red Garden stated that Meizhou "did not cooperate with Red Garden to provide its FOP data," and Red Garden requested, "given the minuscule amount of supply from Hengchang and Longfa, that the Department not require the factors of production for these companies." *Id.*

Commerce sent Red Garden's counsel a supplemental questionnaire ("First Supplemental Questionnaire") with a cover letter dated May 17, 2004, in which Commerce noted "numerous serious deficiencies in your Section C and D questionnaire." *Letter from Program Manager to Red Garden* 1 (May 17, 2004) (Admin. R. Doc. No. 351) ("*First Supplemental Questionnaire*"). Two paragraphs in the "Section D" portion of the supplemental questionnaire, numbered as paragraphs 1 and 4, are relevant to Red Garden's claim challenging the Department's use of an adverse inference. Paragraph 1, after noting that Red Garden stated that it did not provide factors of production from certain suppliers, requested that Red Garden report factors of production for the following three suppliers: Hengchang, Longfa, and Red Garden Food Processing Co., Ltd ("RGFP").[7] *Id.* at 10. The paragraph concludes with the directive that "[i]f any of these suppliers declines to provide Section D information, please clearly state so." *Id.* The paragraph makes no mention of Meizhou or the missing FOP

[5] The two suppliers Shantou Red Garden Foodstuff Co., Ltd. ("Red Garden") identified as its major suppliers were Shantou Jinyng District Mingfeng Quick-Frozen Factory ("Mingfeng") and Shantou Longfeng Foodstuffs Co., Ltd. ("Longfeng"). *Letter from Red Garden to the Sec'y of Commerce* D-1 (Apr. 21, 2004) (Admin. R. Doc. No. 308) ("*Apr. 21 Questionnaire Resp.*").

[6] The two suppliers Red Garden identified as "minuscule" suppliers were Chaoyang Jindu Hengchang Aquatic Products Enterprise Co., Ltd. ("Hengchang") and Raoping County Longfa Seafoods Co., Ltd. ("Longfa"). *Apr. 21 Questionnaire Resp.* D-2.

[7] This paragraph directed that Red Garden "[p]lease report the factors of production for Chaoyang Jindu Hengchang Aquatic Products Enterprise Co., Ltd ('Hengchang'), Raoping County Longfa Seafoods Co., Ltd ('Longfa'), and Red Garden Food Processing Co., Ltd. ('RGFP'), regardless of whether sales from RGFP occurred during the POI." *Letter from Program Manager to Red Garden* 10 (May 17, 2004) (Admin. R. Doc. No. 351) ("*First Supplemental Questionnaire*").

information of Meizhou. As discussed previously, Red Garden already had identified Meizhou as a supplier that declined to provide Section D information.

Paragraph 4 of the Section D portion of the supplemental questionnaire covers the same topic as paragraph 1 and, like paragraph 1, mentions Hengcheng, Longfa, and RGFP but does not mention Meizhou. *Id.* at 11.[8] The paragraph instructs Red Garden that "[y]ou must provide FOPs for each of Red Garden's suppliers which sold subject merchandise during the POI." However, the entire context of paragraph 4 is confined to obtaining FOP information from Hengcheng, Longfa, and RGFP. *Id.*

Read as a whole, the First Supplemental Questionnaire, which addressed the topic of suppliers' FOP data in paragraphs 1 and 4 as discussed above, did not inform Red Garden that the Department was dissatisfied with Red Garden's response to the Department's request for Meizhou's Section D information on factors of production. Instead, it directed Red Garden's attention to the missing FOP data of Hengcheng, Longfa, and RGFP.

Red Garden responded to the first supplemental questionnaire with a submission Commerce received on June 8, 2004. *Letter from Red Garden to the Sec'y of Commerce* (June 8, 2004) (Admin. R. Doc. No. 595) ("*June 8 Questionnaire Resp.*"). The June 8, 2004 response included the FOP data for RGFP. *Id.* exhibit SD-1. Regarding the Hengcheng and Longfa data, Red Garden informed Commerce in the response that both Hengcheng and Longfa declined to provide the Section D information and that "[d]espite the best efforts by Red Garde[n] to obtain their cooperation, these companies simply find that they are too small and have such limited administrative staffs that they cannot provide the information requested." *Id.* at 18.

Red Garden included in its June 8, 2004 response to the supplemental questionnaire additional information on the failure of Meizhou to cooperate, even though the First Supplemental Questionnaire did not contain a specific request that Red Garden address this matter. Red Garden told the Department that "even though after much effort on the part of Red Garden to convince Meizhou to cooperate in this investigation, Meizhou finds that it simply does not have

[8] The entire text of paragraph 4 is as follows:

> On page D-2, you stated that Red Garden did not receive FOP information from Hengchang or from Longfa. Further, there is apparently no reference to the factors of production used by RGFP during the POI. However we note that in your Section C database, you have reported sales with manufacturer codes [confidential information deleted]. You must provide FOPs for each of Red Garden's suppliers which sold subject merchandise during the POI. Please state whether the CONNUMs reported in your Section D database represent the factors of production for Mingfeng and Longfeng *only*.

First Supplemental Questionnaire 11.

adequate verifiable documents in the POI to satisfy the Department's requirements" because a group of stockholders had left the company and taken with them "many of the accounting books, including many covering the POI." *Id.* Red Garden offered the Department the following option: "If the Department decides that it will accept less than verifiable data, please let Red Garden know and Meizhou will be willing to provide it." *Id.* Red Garden included as an exhibit a letter on Meizhou's letterhead certifying Meizhou's inability to provide "the factors of production information required by the Department of Commerce in connection with the response of Red Garden Food Company." *Id.* exhibit SD-9 ("In the beginning of year 2004 shareholder and their management have left our company because of disputes between our shareholders. They have also brought our company's files with them. We therefore cannot trace any original documents on our sales and costs at the moment.").

Commerce sent a second supplemental questionnaire on June 23, 2004 ("Second Supplemental Questionnaire") that consisted of seven questions on a variety of topics. *Letter from Program Manager to Red Garden* 2 (June 23, 2004) (Admin. R. Doc. No. 662) ("*Second Supplemental Questionnaire*"). Only question 2 pertained to the topic of Meizhou's FOP data. In question 2, Commerce did not make even a general request that Red Garden attempt again to obtain the missing Section D information of Meizhou, either from Meizhou or from the former owners. The question focused only on Red Garden's past attempts to obtain Meizhou's FOP information. Quoted in its entirety, question 2 was as follows: "Please explain what measures you have taken to obtain Meizhou's factors of production for subject merchandise during the POI, and provide evidence of your actions (*e.g.* copies of faxes, emails, phone records, letters, etc.)." *Id.* Red Garden submitted its response to the Second Supplemental Questionnaire on June 30, 2004, responding to question 2 as follows:

> Mr. Lin, the vice general manager of Red Garden Foodstuff Co., Ltd., called Meizhou numerous times and met with Meizhou several times both alone and with Red Garden's legal counsel and accountant to try to find ways that Meizhou could report verifiable data. Due to the situation previously reported, Meizhou simply no longer has any verifiable data capable of meeting the Department's strict requirements. There are no written records of these phone calls or meetings. However, as a result of such meetings and discussions, Meizhou did agree to write to DOC the letter submitted in our June 8, 2004 submission.

Letter from Red Garden to the Sec'y of Commerce 2 (June 30, 2004) (Admin. R. Doc. No. 676) ("*June 30 Questionnaire Resp.*").

In the Preliminary Determination, published July 16, 2004, Commerce stated its intention to use facts otherwise available–specifically, FOP data from Mingfeng and Longfeng–as a substitute for the Meizhou FOP data. *Prelim. Determination*, 69 Fed. Reg. at 42,665–66. Commerce made no mention in the Preliminary Determination of an intention to use an adverse inference and, here also, expressed no discontent with Red Garden's efforts to date to obtain Meizhou's FOP data.

Commerce sent its third and final supplemental questionnaire on July 26, 2004 ("Third Supplemental Questionnaire"). In this questionnaire, Commerce addressed the matter of Meizhou's FOP information as follows:

> Red Garden has previously indicated that Meizhou could not provide verifiable factors of production. In the preliminary determination, we substituted Mingfeng's and Longfeng's factors of production to determine the normal value for sales produced by Meizhou. Please attempt again to obtain Meizhou's factors of production. We have put Meizhou on notice that it must provide verifiable factors of production to Red Garden's counsel, such that you may weight-average those factors per CONNUM in a revised Section D database. Please provide the revised database in response to this questionnaire. Finally, please explain Red Garden's efforts and attempts to persuade Meizhou to respond to the Section D Questionnaire. In addition, provide the Department with all documentation regarding Red Garden's effor[ts] and persuasions requesting that Meizhou respond to the Department's Section D questionnaire (*e.g.* letters, fax logs, phone records etc.).

Third Supplemental Questionnaire. Although the Department asked that Red Garden "[p]lease attempt again to obtain Meizhou's factors of production," the context of the paragraph is Red Garden's responsibility to use its efforts and persuasions to induce Meizhou to complete Section D of the Department's questionnaire using Meizhou's FOP information and Red Garden's use of that information in providing the Department a revised Section D database with weight-averaged FOPs. Read in that context, the topic of the paragraph is Red Garden's endeavoring to influence Meizhou to complete Section D. There is no general directive to seek the business records from any person who might possess them, and the paragraph, read in context, does not suggest that Commerce contemplated that Red Garden

would do so. To the contrary, the paragraph suggests that Commerce fully expected that Meizhou, after receiving the communication from Commerce, would provide the FOP information to Red Garden's counsel. In answering the Third Supplemental Questionnaire, Red Garden stated that it had "attempted again to obtain cooperation from Meizhou" and attached a list of the attempts to obtain Meizhou's factors of production. *August 5 Questionnaire Resp.* 2 & exhibit 1.[9]

In a case brief that Commerce received on October 20, 2004, the petitioners in the investigation urged Commerce to find that Red Garden did not act to the best of its ability in obtaining Meizhou's FOP information because, petitioners alleged, Red Garden did not contact the previous owners of Meizhou to seek that information. *Letter from Petitioners to the Sec'y of Commerce* 23–26 (Oct. 19, 2004) (Admin. R. Doc. No. 1049). Petitioners advocated that Commerce apply facts available with an adverse inference to all sales made by Red Garden from subject merchandise produced by Meizhou. *Id.*

In summary, the court concludes, from the questionnaires considered as a whole and read in the proper context, that the Department's information requests were that Red Garden: (1) provide Meizhou with Section D of the Department's questionnaire; (2) use its "efforts and persuasions" to induce Meizhou to complete that questionnaire; (3) again attempt to obtain Meizhou's FOP information in the wake of the Department's having "put Meizhou on notice that it must provide verifiable factors of production to Red Garden's counsel," *Third Supplemental Questionnaire* 1; and (4) using that verifiable FOP information, provide a revised Section D database with weight-averaged FOPs, in response to the Third Supplemental Questionnaire, *id.* The record does not contain substantial evidence that Red Garden failed to cooperate by not acting to the best of its ability to comply with these information requests.

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[9] The list did not include attempts to contact the former owners of Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd. ("Meizhou"). Under the court's disposition of Red Garden's claim challenging the adverse inference, it is not necessary that the court consider the effect of the affidavits Red Garden submitted with its ministerial error allegation. These affidavits, which Commerce did not admit to the record, speak of contact between Red Garden and the former owners during July 2004. *Letter from Red Garden to the Sec'y of Commerce* exhibits 8, 12, & 13 (Dec. 8, 2004) (Admin. R. Doc. No. 1144). Because Commerce requested on June 23, 2004 that Red Garden "explain what measures you have taken to obtain Meizhou's factors of production . . . and provide evidence of your actions," Red Garden's not having submitted in its response to this questionnaire evidence of contact with Meizhou's former owners may support an inference that Red Garden had not contacted Meizhou's former owners as of the date of that response, June 30, 2004. *Letter from Program Manager to Red Garden* 2 (June 23, 2004) (Admin. R. Doc. No. 662) ("*Second Supplemental Questionnaire*"); *Letter from Red Garden to the Sec'y of Commerce* 2 (June 30, 2004) (Admin. R. Doc. No. 676) ("*June 30 Questionnaire Resp.*").

Defendant attempts to support the Department's decision to use an adverse inference by raising several arguments. Defendant argues, *inter alia*, that Red Garden did not meet the "best of its ability" standard in complying with the Department's requests for Meizhou's FOP data because Red Garden did not, as required by the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003), "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." Def.'s Resp. 20–25. Defendant asserts, specifically, that after Red Garden told Commerce in Red Garden's Section D response that Meizhou did not cooperate with Red Garden to provide the FOP data, "Commerce subsequently issued a supplemental questionnaire notifying Red Garden of its deficiency and instructing that Red Garden 'must provide' factors of production for its suppliers who sold subject merchandise during the period of investigation." *Id.* at 21 (citing *First Supplemental Questionnaire* 11). Defendant's argument mischaracterizes the relevant language in the Department's First Supplemental Questionnaire. As the court discussed previously, the language cited by defendant, which was contained in the aforementioned paragraph 4, did not inform Red Garden that Commerce was dissatisfied with the efforts Red Garden had made up to that time in responding to the request for Meizhou's Section D information. Defendant would have the court conclude, erroneously, that in the First Supplemental Questionnaire Commerce notified Red Garden "of its deficiency" as to the Meizhou FOP data. *Id.* at 21. To the contrary, the First Supplemental Questionnaire directed Red Garden's attention to the missing FOP data of Hengcheng, Longfa, and RGFP. Defendant has quoted out of context a sentence that, when read in the proper context, did not refer to Meizhou's FOP information.

Defendant also argues that Commerce was justified in using an adverse inference because, in responding to the Second Supplemental Questionnaire, "Red Garden provided no documentation" to support the recollections that its vice general manager had of communications with Meizhou. *Id.* at 23. This argument is directed to an irrelevant point. In issuing the Amended Final Determination, Commerce revised the Final Determination to base its adverse inference on the finding that Red Garden failed to contact Meizhou's former owners. Defendant's argument overlooks the critical record fact that Commerce reversed the finding, which had been stated in the Final Determination, that Red Garden had not contacted the present ownership of Meizhou. Replacing that finding with a finding that Red

Garden had made a number of such contacts, Commerce shifted its focus to the topic of contacts with the former owners.

Defendant also emphasizes that Commerce, at Meizhou's verification, found "that, contrary to Red Garden's assertions, there was a period of time, overlapping with the time Red Garden was completing its questionnaire responses, when employees at Meizhou did have access to the required information." *Id*. at 23 (citing *Meizhou Verification Report* 2). Regardless of whether the cited finding is correct, that finding cannot support the use of an adverse inference on the record of this case. As the court concluded previously, the record does not support a finding that Red Garden failed to cooperate by not acting to the best of its ability to comply with the information requests as those requests were communicated in the questionnaires.

In addressing plaintiff's argument that the Department's actions were inconsistent with 19 U.S.C. § 1677m(d), defendant argues, further, that the Third Supplemental Questionnaire "again instructed Red Garden to attempt to obtain the data and again asked for documentary proof of its efforts" and that "[t]hus, Commerce plainly notified Red Garden that it was unsatisfied with Red Garden's previous efforts."[10] Def.'s Resp. 26 (citing *Third Supplemental Questionnaire* 1). Here again, defendant mischaracterizes a record document. The Third Supplemental Questionnaire, as the court discussed previously, asked Red Garden to document Red Garden's efforts to get Meizhou to complete the Section D questionnaire. Although the relevant paragraph contained the sentence, "[p]lease attempt again to obtain Meizhou's factors of production," the context was Red Garden's using its efforts and persuasions to have Meizhou fill out Section D. Nothing in the Third Supplemental Questionnaire or any of the other questionnaires communicated an expectation that Red Garden would attempt to obtain business records from the former owners. Knowing of the situation involving the former owners as of June 8, 2004, Commerce had multiple opportunities to communicate such an expectation to Red Garden but never did so.

Finally, the court concludes that defendant's reliance on *Nippon Steel Corp.* is misplaced. Nothing in the holding of *Nippon Steel Corp*. excuses Commerce from the obligation to ensure that any findings made under 19 U.S.C. § 1677e(b) are grounded in the language Commerce chose to communicate its information requests to an interested party.

[10] Because the court concludes that the record fails to support a finding that Red Garden did not act to the best of its ability to comply with the relevant information requests as those requests were communicated, the court does not reach plaintiff's argument based on 19 U.S.C. § 1677m(d).

In the circumstances disclosed by the record information considered as a whole, and specifically the questionnaires and responses, Commerce was not justified in using an adverse inference in selecting from among the facts otherwise available as substitutes for the Meizhou FOP data. On remand, Commerce must redetermine the rate it applied to Red Garden's sales of subject merchandise obtained from Meizhou and may not use an adverse inference.

B. Commerce Must Reconsider its Choice of Surrogate Value for Shrimp

Commerce valued fresh, raw, head-on, shell-on shrimp at $5.97 per kilogram using a value derived from the financial statement of an Indian seafood processor, Nekkanti Sea Foods Ltd. ("Nekkanti") for the period April 2002 through March 2003. *Prelim. Determination*, 69 Fed. Reg. at 42,668; *Mem. from Case Analyst to the File* 3 (Nov. 29, 2004) (Admin. R. Doc. No. 1118) ("*Red Garden Analysis Mem.*") (indicating no change from Preliminary Determination). Commerce chose this value over four other data sets on the administrative record: (1) data compiled by the Seafood Exporters' Association of India ("SEAI") pertaining to the price of head-on shell-on shrimp in two regions of India during the POI;[11] (2) the results of surveys of Indian shrimp processors compiled by the Aquaculture Certification Council ("ACC") pertaining to the price of head-on shell-on shrimp in India during the POI; (3) data from two Indian shrimp processors, Nekkanti and Devi Sea Foods, Ltd. ("Devi"), compiled for a parallel antidumping investigation pertaining to the price of head-on shell-on shrimp during the POI; and (4) data from the government of Ecuador pertaining to the price of head-on shell-on shrimp during the POI. *Decision Mem.* 12–13; *Prelim. Determination*, 69 Fed. Reg. at 42,667–68.

When determining normal value using factors of production, Commerce must use the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). The best available information, according to the Department's policy as described in the Decision Memorandum, is information reflecting "review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or

[11] According to other respondents, the Seafood Exporters Association of India "is the organization that represents Indian exporters and processors of shrimp and has offices in the main shrimp producing regions of India." *Letter from Allied Pacific & Yelin to Sec'y of Commerce* 3–4 (May 21, 2004) (Admin. R. Doc. No. 356) ("*SEAI Data*").

review, and publicly available data." *Decision Mem.* 14 (emphasis omitted).

The SEAI prices were contained in several documents on the record, prepared by the SEAI. *Prelim. Determination*, 69 Fed. Reg. at 42,668; *Letter from Allied Pacific & Yelin to Sec'y of Commerce* 3–4, exhibit 3 (May 21, 2004) (Admin. R. Doc. No. 356) ("*SEAI Data*"). Four of these documents were "Circulars" showing the price of head-on shell-on shrimp in one of India's shrimp producing regions, Andrha Pradesh, on specific dates during the POI. Another document was untitled and showed the average prices of shrimp in another of India's shrimp producing regions, Tamil Nadu, during each month of the POI. *SEAI Data*. Commerce cited five concerns in rejecting the SEAI data: that these data were not publicly available, that the data on Andhra Pradesh were not sufficiently contemporaneous with the POI because they represent prices from only four dates, that "it is unclear as to how the average was derived" for the Tamil Nadu data, that the SEAI data were reported using weight measurements different from those used in the data reported by respondents, and that the record did not make clear the extent to which the data on these two regions were representative of India. *Prelim. Determination*, 69 Fed. Reg. at 42,668. Regarding the last concern, Commerce noted that information it obtained directly from the SEAI indicated that Andhra Pradesh and Tamil Nadu accounted for 10–11% of India's shrimp purchases, a percentage that disagreed with statements by the respondents that submitted the SEAI data that these two regions accounted for more than 55% of India's shrimp purchases. *Id.*

Commerce also rejected the ACC data, which consisted of a table showing "average monthly farm gate price data for raw, whole, unprocessed black tiger shrimp based on weekly purchase invoices of packers in the states of Andhra Pradesh and Tamilnadu" during each month of 2003. *Letter from Allied Pacific & Yelin to the Sec'y of Commerce* exhibit 3 (Sept. 8, 2004) (Admin. R. Doc. No. 982) ("*ACC Data*"). Commerce based its rejection on its finding that the ACC was "not sufficiently insulated from conflict of interest." *Decision Mem.* 13. Although Commerce stated no findings of fact in support of this rejection, it apparently found persuasive the petitioners' argument that a conflict of interest existed because the "the membership and leadership of the ACC is composed of interests adverse to the Petitioners in the instant proceeding," as the ACC was "founded by and shares members, directors, officers, and its U.S. location with the Global Aquacultural Alliance, some of whose members are subject to the Department's companion investigations." *Id.* at 10.

The third alternative data set rejected by Commerce consisted of "quantity and value data for the POI for raw shrimp purchases of Nekkanti and Devi, two respondents in the companion Indian investigation, that have been ranged for public release." *Id.* at 13.[12] The Department rejected these data (the "ranged Nekkanti/Devi data") because "the record of this proceeding does not indicate how the data was ranged," so that "[if] the Department were to rely on the data from Nekkanti and Devi, it may be relying on figures that deviate substantially from the actual data." *Id.* at 13–14.

The fourth alternative data set rejected by Commerce showed prices for exports of head-on shell-on shrimp from Ecuador during the POI. *Id.* at 13. Commerce acknowledged that the "Ecuadorean data [were] obtained by requesting the data from the Ecuadorean Central Bank" and that the official who provided these data stated that this "information is already publicly available, but we hope to have them up in our website soon for public viewing . . . ." *Id.* at 15 (internal quotation omitted). Commerce nevertheless rejected the Ecuadorean data, stating that they were "not a reliable source for valuing the Respondents' raw shrimp input because they are not publicly available, consistent with the Department's long-established practice regarding the selection of surrogate values." *Id.* at 14 (citing 19 C.F.R. § 351.408(c)(1)). Commerce stated that it "cannot consider this [*sic*] data publicly available, as it is not available to the public without making a specific request to the Central Bank of Ecuador, who ultimately determine whether to provide the data to the public." *Id.* at 15.

Red Garden argues that Commerce inadequately explained the conclusion that the Nekkanti financial statement data were the best available information relative to other record data and, specifically, relative to the Ecuadorean export data, Pl.'s Mem. 36–42, unlawfully failed to adjust the price reflected by the Nekkanti financial statement to remove purchases of products other than head-on shell-on shrimp, *id.* at 44–47, and unlawfully refused to calculate count-size specific surrogate values for the purchases of Red Garden's suppliers, *id.* at 44.[13]

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[12] The Department's regulations require parties to provide a public summary of business proprietary information and specify that "[g]enerally, numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within 10 percent of the actual figure." 19 C.F.R. § 351.304(c) (2003).

[13] "Count-size" is a method of measuring the average size of shrimp by determining how many shrimp on average would constitute a given weight. *Letter from Allied Pacific & Yelin to Sec'y of Commerce* 1 (May 21, 2004) (Admin. R. Doc. No. 356). Defendant erroneously argues that Commerce used count-size specific surrogate values for Red Garden's suppliers. Def.'s Mem. in Resp. to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. 29 (Sept. 26, 2005), ECF No. 35 ("Def.'s Resp.") ("Commerce valued the raw shrimp input using a count size

Red Garden is justified in objecting that Commerce failed to adjust the price reflected by the Nekkanti financial statement to remove purchases of products other than head-on shell-on shrimp. In *Allied Pacific Food (Dalian) Co. v. United States*, 30 CIT __, 435 F. Supp. 2d 1295 (2006), the Court of International Trade resolved claims brought by two other respondents in this investigation that pertained to the same administrative record. In *Allied Pacific*, the court held unlawful the Department's using the price reflected by the Nekkanti financial statement as the basis for the surrogate value of head-on shell-on shrimp for the plaintiffs in that case. *Id.* at __, 435 F. Supp. 2d at 1309. The court noted the Department's failing to explain how the Nekkanti financial statement data were superior to the other record information and the Department's relying on several unlawful findings. *Id.* at __, 435 F. Supp. 2d at 1309. Among the unlawful findings was that the Nekkanti financial statement data referred exclusively to purchases of raw head-on shell-on shrimp. *Id.* at __, 435 F. Supp. 2d at 1311. The Department relied on the same unlawful finding in using the Nekkanti financial statement data to value the raw shrimp input of Red Garden's suppliers.

Commerce obtained the $5.97-per-kilogram surrogate value from a heading in a table in Nekkanti's financial statement, "Raw Material Consumed for Processing." *Mem. from Case Analyst to the File* exhibit 3 (Jul. 2, 2004) (Admin. R. Doc. No. 692) ("*Prelim. Factor Valuation Mem.*"). An excerpt from Nekkanti's questionnaire response in the parallel investigation on Indian exports states that "[w]hile many raw material purchases were of headless shell on raw shrimp, certain purchases were of head on shrimp or peeled and undeveined." *Letter from Allied Pacific & Yelin to the Sec'y of Commerce* 700 (Sept. 8, 2004) (Admin. R. Doc. No. 982) ("*Nekkanti's Questionnaire Resp.*"). Nekkanti also submitted quantitative data in the companion investigation showing substantial purchases of partially-processed shrimp. *Id.* at 1553 (exhibit SD-3).

The court concludes that substantial evidence did not support the Department's finding that the heading in the Nekkanti financial statement, "Raw Material Consumed for Processing," referred only to head-on shell-on shrimp. As the court explained in *Allied Pacific*, the "record evidence instead establishes that some of Nekkanti's purchases were of shrimp that had been partially processed." 30 CIT at

methodology that relied upon . . . a *combination* of three sources of data . . ."). Red Garden also argues that the Department improperly used certain data, the "Urner Barry data," to create count-size specific surrogate values for respondents other than Red Garden. Mem. in Supp. of Pl. Shantou Red Garden Foodstuff Co., Ltd.'s Rule 56.2 Mot. for J. upon the Agency R. 42–44 (June 23, 2005), ECF No. 25 ("Pl.'s Mem."). As Red Garden has no standing to raise this objection, the court does not reach these arguments.

__, 435 F. Supp. 2d at 1311; *Nekkanti's Questionnaire Resp.* 700 (indicating that Nekkanti purchased, in part, partially processed shrimp); *id.* at 1553 (quantitative data showing purchases of partially-processed shrimp). After the remand ordered in *Allied Pacific*, Commerce agreed that the Nekkanti financial statement was not limited to purchases of head-on shell-on shrimp and attempted to adjust the price reflected by the Nekkanti financial statement to remove distortions to the price caused by the processed shrimp, which are typically more expensive than head-on shell-on shrimp. *Allied Pacific Food (Dalian) Co. v. United States*, 32 CIT __, __, 587 F. Supp. 2d 1330, 1337 (2008) ("*Allied II*") ("Commerce explained that 'upon careful re-examination, we agree with the Court's observation that this value includes processed shrimp.'"). The court must reject the Department's choice of a surrogate value that rests on an invalid finding, the more so where, as here, that finding is fundamental to the identity of the merchandise being valued and alternatives existed on the record that did not suffer from this critical flaw.

The Department's error with respect to processed shrimp contained within the Nekkanti financial statement data undermines its ultimate finding that these data were the best available data, such that this ultimate finding lacks support in the record. The Department rejected each alternative data set on the record as not meeting one or more of the Department's criteria. However, the Nekkanti financial statement data fail to satisfy two of those criteria. Because these data were not confined to raw head-on shell-on shrimp, they were not specific to the input in question. Nor were they contemporaneous: the Nekkanti financial statement covered the twelve-month period immediately preceding the POI.

As an example of the flaws in the Department's comparisons, the court notes that the Department rejected the SEAI data in part because it found these data insufficiently contemporaneous with the POI, even though the SEAI data from the Tamil Nadu region were fully contemporaneous with the POI and the data from the Andhra Pradesh region pertained to four dates during the POI (June 6, 2003, June 21, 2003, July 26, 2003, and August 9, 2003). *Decision Mem.* 13–14. As a second example, Commerce rejected the ranged Nekkanti/Devi data because the method by which these data were ranged was unknown. *Decision Mem.* 13–14. That objection does not "support a conclusion that the surrogate values derived from the inherently flawed Nekkanti financial statement data are superior . . . ." *Allied Pacific*, 30 CIT at __, 435 F. Supp. 2d at 1322. The ranged Nekkanti/Devi data satisfy at least some of the Department's criteria

for choosing surrogate values, in that they are specific to head-on shell-on shrimp and apply to at least part of the POI, covering the period October 1, 2002 through September 30, 2003. *See Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1345.

Red Garden objects that Commerce unlawfully refused to calculate count-size specific surrogate values for the unprocessed shrimp purchases of Red Garden's suppliers. Pl.'s Mem. 44. The court concludes this refusal is inadequately explained in the Decision Memorandum. What is clear is that Commerce applied a single raw head-on shell-on shrimp surrogate value for all of Red Garden's subject shrimp rather than determining individual values for the different count-sizes of shrimp Red Garden sold. *Red Garden Analysis Mem.* 3 ("Unlike the shrimp surrogate values applied to [two other respondents] where the Department used a count size specific surrogate value, the Department is *not* applying a count size specific surrogate value to the portion of Red Garden's sales that use the whole shrimp input."). The reasoning for the Department's doing so, however, is less clear. Commerce stated that it was "not using the whole shrimp input based on our findings at verification where we found that Red Garden did not purchase shrimp on a count-size specific basis," *id.*, and cited an exhibit to the verification Commerce conducted of one of Red Garden's suppliers, Mingfeng, *Mem. from Case Analysts to the File* exhibit 17 (Sept. 22, 2004) (Admin. R. Doc. No. 1001) ("*Red Garden/Mingfeng Verification Rept*."). This exhibit consists of a summary table entitled "Worksheet for Shrimps Inputs," which includes a monthly recording of the quantities of shrimp Mingfeng processed, in the categories of "Self-farmed Shrimps," "Farmed Shrimps-Purchased," and "Ocean Shrimps," and also includes copies of Mingfeng's internal inventory control documents. *Id.*

It is difficult for the court to reconcile the first part of the Department's reasoning, that it was "not using the whole shrimp input," with statements in the Decision Memorandum that shrimp was the "main input accounting for a significant portion of normal value" and the "most important factor of production . . . ." *Decision Mem.* 14. The relevance of the second part of the Department's reasoning, that "Red Garden did not purchase shrimp on a count-size specific basis," needs further explanation. For a respondent such as Red Garden, which does not produce the subject merchandise, Commerce calculates normal value based on the factors of production of the producing companies. *Section D Questionnaire* D-2. Commerce does not explain why it is not significant that Red Garden's suppliers purchased their unprocessed shrimp input by count size. Though citing a record document pertaining to one supplier, Commerce did not find that any of

Red Garden's suppliers did not purchase shrimp by count size. *Red Garden Analysis Mem.* 3. The record appears to contain evidence that Red Garden sold shrimp by count size, which at least suggests that the Department apparently considered Red Garden's sales to have been count-size-specific. *Red Garden/Mingfeng Verification Rept*. 6 ("All sales made by Red Garden were based on a per-pound basis segregated by the size of the shrimp . . ."). If, on remand, the Department again decides not to determine Red Garden's margin using count-size specific surrogate values, it must support that decision with an adequate explanation.

Moreover, the Department's finding that the Ecuadorean data were not publicly available was not supported by substantial evidence. In support of this determination, Commerce cited a letter from the Central Bank of Ecuador, which supplied the Ecuadorean data to Red Garden, stating that "these reports are not yet available in Banco Central website." *Decision Mem.* 15. Commerce reasoned from this letter that these data were not publicly available because they are "not available to the public without making a specific request to the Central Bank of Ecuador, who ultimately determine whether to provide the data to the public." *Id.* The same letter from the Central Bank of Ecuador states that this "information is already publicly available, but we hope to have them up in our website soon for public viewing . . . ." *Id.* Commerce attempts to downplay the letter's clear statement that the provided data were publicly available by arguing that "[s]uch previously non-public information is also of unknowable internal and external validity unless verification is conducted." *Id.* The fact that the data were not yet on a website does not establish that the data were not publicly available. According to the Department's published interpretation of the regulation that contains the preference for publicly available data, data need not be published in order to be "public." *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,344 (Feb. 27, 1996) ("*Proposed Regs.*") (stating that the regulation "drops the preference for published information, limiting the preference to publicly available information."); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,367 (May 19, 1997) ("*Preamble*") ("[T]he Department elected to codify a preference for publicly available information rather than publicly available published information.").

Defendant's arguments in support of the Department's determination are not persuasive. Defendant argues that "the record provides substantial evidence that the vast majority of raw material purchased by Nekkanti was head-on, shell-on shrimp." Def.'s Resp. 31. This argument mischaracterizes the record in this case. As Commerce

came to recognize in the *Allied Pacific* litigation, Commerce erred in failing to recognize the serious flaw in the Nekkanti financial statement data. Both Nekkanti's questionnaire response and Nekkanti's ranged data show that a significant portion of the shrimp purchased by Red Garden's suppliers was partially processed. *See Allied II*, 32 CIT at __, 587 F. Supp. 2d at 1343. Defendant argues in the alternative that, even if the Nekkanti financial statement data include some purchases of partially-processed shrimp, the record lacks reliable data that Commerce could have used to adjust the surrogate value to remove such purchases. Def.'s Resp. 32. The alleged absence of record data suitable for correcting the obvious deficiency in the Nekkanti financial statement data is not a plausible argument for why the Department's use of the Nekkanti financial statement data should be sustained by the court.

Defendant further argues that Commerce was justified in refusing to rely on the Ecuadorean data, stating that the "record also demonstrates that the Ecuadorian data are not reliable surrogate values because they are export prices, which Commerce prefers not to use." *Id*. at 39. In addition, defendant argues that the "Ecuadorian prices are not from the appropriate surrogate country selected by Commerce for this investigation. Commerce selected *India* as the appropriate surrogate country." *Id.* at 40. These arguments were not part of the reasoning by which Commerce rejected the Ecuadorian data and, therefore, cannot justify the choice of the Nekkanti financial statement data.

Finally, defendant argues that Commerce had discretion to choose the Nekkanti financial statement data, arguing that it was not sufficient for Red Garden to identify alternative data sets that Commerce might reasonably have chosen as the surrogate value and that Commerce sufficiently explained how the Nekkanti data were the most reliable on the record. *Id.* at 40–43. Commerce does not have discretion to choose information for use as a surrogate value absent a finding, supported by substantial evidence on the record viewed as a whole, that the information is the best available information.

Because the record, viewed in the entirety, does not contain substantial evidence that the Nekkanti financial statement data were the best available information, Commerce must redetermine the surrogate value for raw, head-on, shell-on shrimp for use in calculating the normal value of Red Garden's subject merchandise.

C. Red Garden is Not Entitled to Relief on its Challenge to the Surrogate Value for Shrimp Feed

Commerce based the surrogate value for one of the factors of production of Red Garden's suppliers, shrimp feed, on World Trade Atlas

import data for Indian Harmonized Tariff Schedule ("Indian HTS") subheading 2309.90.31 ("Prawn and shrimps feed"), which reflected an average unit value ("AUV") of $1.31 per kilogram. *Prelim. Factor Valuation Mem.* 9 & exhibit 4. In choosing the AUV shown by the Indian HTS data, Commerce rejected as alternative sources three financial statements of Indian companies: the April 1, 2002-March 31, 2003 statement of Avanti Feeds Limited ("Avanti") ($0.80 per kilogram AUV); the April 1, 2003-March 31, 2004 statement of Avanti ($0.86 per kilogram AUV), and the April 1, 2002-March 31, 2003 financial statement of Goldmohur Foods & Feeds Ltd. ($0.73 per kilogram AUV). *Decision Mem.* 56–57; *Letter from Guolian to the Sec'y of Commerce* 9 (Oct. 19, 2004) (Admin. R. Doc. No. 1023) ("*Guolian Case Br.*").[14] Plaintiff claims that the Department's choice of the Indian HTS data was unlawful because the data in the Avanti financial statements were more specific to the shrimp feed used by the suppliers of Red Garden and because the Department's analysis in support of its chosen surrogate value was flawed. Pl.'s Mem. 52–53. The court rejects this claim.

In support of its choice of surrogate value, Commerce found that the Indian HTS data "contained a broad category of feed types to accurately account for the actual components of the shrimp feed purchased by Zhanjiang Guolian," which was a respondent that objected to the same surrogate value as used in the Preliminary Determination. *Decision Mem.* 57. Commerce also found that the Indian HTS price was "more accurate because it represents numerous transactions from a market economy country" and that because it did not know the "components of Avanti's shrimp feed," Commerce was unable "to compare and/or match the Avanti shrimp feed with Zhanjiang Guolian's shrimp feed components." *Id.* Commerce also characterized the Avanti data as "proprietary to that particular company." *Id.*

The court reaches the merits of Red Garden's objection to the shrimp feed surrogate value even though Red Garden did not present its objection to Commerce during the investigation. As it concedes, Red Garden failed to exhaust its administrative remedies, Pl.'s Reply Br. to Def.'s Mem. in Resp. to Pl.'s Rule 56.2 Mot. for J. for upon the Agency R. 22 (Oct. 21, 2005), ECF No. 42, a failure that normally would preclude the court from considering the claim. Customs Courts Act, § 301, 28 U.S.C. § 2637(d) (the Court of International Trade shall require exhaustion "where appropriate"). Excusing the failure to ex-

[14] Each of the three financial statements that Commerce did not use were submitted as potential surrogate value data by Zhanjian Guolian Aquatic Products Co., Ltd ("Guolian"). *Letter from Guolian to the Sec'y of Commerce* exhibits 5–6 (Sept. 8, 2004) (Admin. R. Doc. No. 991) (2002–2003 financial statements); *Letter from Guolian to the Sec'y of Commerce* exhibit 1 (Sept. 20, 2004) (Admin. R. Doc. No. 986) (2003–2004 financial statement).

haust is appropriate here because Commerce considered Red Garden's objection to the surrogate value when it addressed the argument advanced by Zhanjiang Guolian. *Decision Mem.* 56–57; *Guolian Case Br.* 9–10.

Red Garden argues that the Department irrationally chose the Indian HTS data as more accurate than the Avanti data, arguing that the "inclusion of feed for other species cannot more accurately portray what the respondents feed shrimp[.] Only by using shrimp feed and nothing else, will Commerce calculate an accurate cost." Pl.'s Mem. 52–53. Red Garden also takes issue with the Department's statement that the Avanti data were "proprietary," arguing that "the Avanti data is public on the record and hence is public information." *Id.* at 53.

The record supports with substantial evidence the Department's finding that the Indian HTS data were the best available information on the record for the valuation of the shrimp feed surrogate value. The record supports findings that the Indian HTS data satisfied each of the Department's criteria because these data are shown to be publicly available, net of taxes and duties, specific to prawn and shrimp feed, contemporaneous with the POI, and a broad market average. The record also contains substantial evidence that the financial statement data on the record were not as contemporaneous with the POI. Two of the financial statements applied to the twelve months preceding the POI, and the other applied to the POI as well as the subsequent six months. Even an average of the data in the three financial statements, which were confined to the purchases of two producers, would not provide as broad a market average as did the Indian HTS data.

The court finds little merit in Red Garden's objection that the Avanti financial statement data are more specific to the input and therefore more accurate than the Indian HTS data, which are confined narrowly to prawn and shrimp feed. Even if the court were to assume Red Garden to be correct in its assertions that the Avanti data are more specific and that the Department incorrectly categorized the Avanti data as proprietary, the court still would affirm the Department's choice of surrogate value based on the application of the Department's criteria as supported by the record evidence, as discussed above.

D. Commerce Did Not Err in Deriving Red Garden's Surrogate Financial Ratios Solely from Financial Statements of Integrated Producers

In determining the normal value of Red Garden's subject merchandise, Commerce based the surrogate financial ratios for factory overhead and for selling, general and administrative ("SG&A") expenses,

and the surrogate financial ratio for profit, on three financial statements of Indian shrimp producers: the April 2002-March 2003 financial statement of Devi, the April 2002-March 2003 financial statement of Sandhya Marines Ltd. ("Sandhya"), and the April 2003-March 2004 financial statement of The Waterbase Ltd. ("Waterbase"). *Mem. from Case Analyst to the File* exhibit 2 (Nov. 29, 2004) (Admin. R. Doc. No. 1112) ("*Final Analysis Mem.*"). This combination resulted in surrogate values of 6.05% for factory overhead, 8.37% for SG&A expenses, and 2.37% for profit. *Id*. at 3. Also on the record were the April 2002-March 2003 financial statement of the Indian shrimp processor Nekkanti, which showed factory overhead of 5.11%, SG&A expenses of 3.06% and profit of 0.32%, *id.*, and the April 2003-March 2004 financial statement of Indian shrimp processor Avanti, for which Commerce did not calculate financial ratios separately, *Letter from Guolian to the Sec'y of Commerce* exhibit 1 (Sept. 20, 2004) (Admin. R. Doc. No. 986) ("*Avanti Financial Statement*"). Red Garden claims that it was unlawful for Commerce to exclude the financial statements of Nekkanti and Avanti from the surrogate value calculation. The court does not find merit in this claim.

For the Preliminary Determination, Commerce based the surrogate financial ratios on the financial statements of Devi, Sandhya, and Nekkanti, yielding factory overhead of 5.81%, SG&A expenses of 4.09% and profit of 1.79%. *Prelim. Factor Valuation Mem.* 16. For the Final Determination, Commerce determined that averaging the data for Devi and Sandhya with the data of Waterbase, rather than those of Nekkanti, would yield the best available information, stating that this combination "would more accurately match Red Garden's aquaculture experience and expenses" than would a combination including the financial data of Nekkanti. *Red Garden Analysis Mem.* 5. The Department characterized its chosen combination as "an average of three integrated surrogate companies" and explained that "integrated companies" were those that "participate in aquaculture activities, rather than solely processing shrimp, as Nekkanti does." *Id.* Commerce previously considered Red Garden to be an integrated producer for purposes of the investigation, *Prelim. Factor Valuation Mem.* 16, and in this respect the court observes that the record indicates that Red Garden, during the POI, had suppliers that were integrated producers. *See June 8 Questionnaire Resp.* 22 ("Mingfeng both grows and buys live shrimp for processing. Long Feng buys wild shrimp and grows cultivated shrimp itself."). In response to comments from Guolian, Commerce stated in the Decision Memorandum that the financial statement of another Indian company, Avanti, should not be included in the surrogate financial ratio calculations

because there "is no evidence on the record that Avanti is an integrated producer of subject merchandise" and that Avanti is "primarily, a shrimp feed producer, with the majority of their resources focused on their shrimp feed and shrimp processing business activities." *Decision Mem.* 62.

Red Garden claims that Commerce failed to use the best available information for the surrogate financial ratios, arguing that "Commerce would more accurately calculate the financial ratios by including financial statements for both integrated and non-integrated producers in India, especially if they encompass the POI." Pl.'s Mem. 54. It argues, further, that "Red Garden's situation was unique–it was not solely a processor and not solely an integrated producer," and that accordingly the Department's reliance on only the financial statements of integrated producers, excluding those of any non-integrated shrimp processors, was unlawful. *Id.* at 55.

Before reaching the merits of this argument, the court first rejects defendant's argument that, by failing to include in its case brief an argument challenging the surrogate financial ratios, Red Garden failed to exhaust its administrative remedies. Def.'s Resp. 49–50. Red Garden was not required to raise this issue before the Department to exhaust administrative remedies because the Department's determination of these surrogate values changed between the Preliminary Determination and the Final Determination. In the Preliminary Determination, Commerce constructed these values from the financial statements of two integrated shrimp producers, Devi and Sandhya, and one non-integrated shrimp processor, Nekkanti. *Prelim. Factor Valuation Mem.* 16. In the Final Determination, Commerce excluded from its calculations the financial statement of Nekkanti, a shrimp processor, in favor of the financial statement of Waterbase, an integrated shrimp producer. *Final Analysis Mem.* exhibit 2. Because the ultimate composition of the financial statements appeared in the Final Determination but not in the Preliminary Determination, and because the resulting surrogate values were different, the court hears Red Garden's claim.

On the merits, the court determines that the claim does not merit relief. As the court discussed above, when Commerce determines normal value using factors of production, the statute requires that Commerce chose the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). As the court also discussed previously, Commerce looks to "review period-wide price averages, prices specific to the input in

question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." *Decision Mem.* 14 (emphasis omitted).

According to the Department's uncontested findings, Devi, Sandhya, and Waterbase, like Red Garden's suppliers, were integrated shrimp producers, *i.e.*, they processed shrimp they had grown. *June 8 Questionnaire Resp.* 22 (regarding Red Garden's suppliers); *Letter from Petitioners to Sec'y of Commerce* attachments 1 & 3 (Sept. 8, 2004) (Admin. R. Doc. No. 975) ("*Petitioners' Factor Values*"). The record establishes that Nekkanti, on the other hand, did not grow shrimp. *Petitioners' Factor Values* attachment 4. The Department's findings that there is "no evidence on the record that Avanti is an integrated producer of subject merchandise" and that Avanti's business activities focus on shrimp feed, *Decision Mem.* 62, are supported by Avanti's financial statement, which states that "[s]hrimp are purchased from the farmers," *Avanti Financial Statement* 44, and shows that Avanti's "Feed Division" constitutes the vast majority of its operations, *id*. at 9.

Red Garden argues, correctly, that the Avanti financial statement, which applies to the April 2003 to March 2004 period, is contemporaneous with the POI (April 1, 2003-September 31, 2003) and that the April 2002-March 2003 financial statements of Devi and Sandhya are not. Commerce chose, nevertheless, to exclude the Avanti data from its determinations because Avanti, unlike Devi, Sandhya, and Waterbase, was not an integrated producer and was primarily a shrimp feed producer. The record supports the Department's finding that Avanti, in these two significant respects, had operations dissimilar to those of Red Garden's suppliers, and the Department permissibly gave less probative weight to the contemporaneity of the Avanti data than it did to the dissimilarity between Avanti's operations and those of Red Garden's suppliers. As the record also shows, Nekkanti was dissimilar to Red Garden's suppliers in one of those respects–it was not an integrated supplier–and its financial statement was not contemporaneous with the POI. *Petitioners' Factor Values* attachment 4. For these reasons, the court concludes that substantial evidence on the record considered as a whole supported the Department's finding that the operations of Devi, Sandhya, and Waterbase were sufficiently similar to those of Red Garden's suppliers that the record data from the financial statements of these three companies constituted the best available information with which to determine surrogate financial ratios.

In contesting the Department's decision, Red Garden argues that its suppliers were in a "unique" position because they processed not

only shrimp they had grown but also shrimp they had purchased. This argument does not present a convincing reason why the court must disallow the Department's choice of the Devi, Sandhya, and Waterbase data. Although it may well have been permissible on this record for Commerce to have included the data of a non-integrated supplier in that database, Red Garden cannot show that Commerce acted contrary to law in declining to do so. Red Garden does not show that the record lacked substantial evidence to support the individual factual findings by which Commerce concluded that the operations of Nekkanti and Avanti were less similar to those of Red Garden's suppliers than were the operations of Devi, Sandhya, and Waterbase. The ultimate determination to use the data of the three integrated suppliers, which was consistent with and supported by these various findings, was within the discretion provided to the Department by 19 U.S.C. § 1677b(c)(1).

E. Commerce Unlawfully Refused to Use the Accurate and Verified Data on the Total Production of One of Red Garden's Suppliers

As explained previously, for non-producing exporters from non-market economy countries, Commerce determines normal value using the factors of production of the companies that supplied the subject merchandise. In doing so, Commerce determines the total quantity of subject merchandise each supplier provided so that it may create a weighted-average factor of production.

The amount Commerce used to represent the total quantity of Mingfeng's production was lower than the actual amount because it omitted several product categories. *Decision Mem.* 24–25. Commerce used the incorrect amount even though the correct amount was present on the record, Red Garden having previously reported it and Commerce having confirmed it as correct in the verification Commerce conducted on Mingfeng. *Id.* Plaintiff argues that Commerce acted unlawfully in using the incorrect amount and that the error artificially increased Red Garden's weighted-average dumping margin. Pl.'s Mem. 57–58. The court concludes that Commerce acted without authority in using the incorrect amount as "facts otherwise available" and that the error must be corrected on remand.

In April 2004, Commerce requested that Red Garden "[r]eport the total quantity of the subject merchandise produced in each factory during the POI," and in response, Red Garden provided a total quantity amount for Mingfeng. *Apr. 21 Questionnaire Resp.* D-5. In a June 8, 2004 questionnaire response, Red Garden, in response to the Department's request, included a table listing the factors of production

Mingfeng used to produce each product type, identified by individual control number ("CONNUM"), and the quantity Mingfeng produced of each CONNUM. *June 8 Questionnaire Resp.* exhibit SD-2(a). The sum of the quantities in this table did not agree with, and was approximately 10% less than, the total quantity of subject merchandise produced by Mingfeng as shown in Red Garden's April 21, 2004 questionnaire response.

Commerce provided additional instructions to Red Garden in the July 26, 2004 Third Supplemental Questionnaire. *Third Supplemental Questionnaire* 2. Commerce requested that Red Garden "recalculate the FOPs for Red Garden's suppliers" and "resubmit" a table detailing the "quantity of production of subject merchandise by CONNUM group . . . for each supplier." *Id.* Commerce specified that, to recalculate the FOPs, Red Garden should divide each supplier's total usage of the FOP (the "FOP Numerator") by each supplier's total output of CONNUMs utilizing that FOP (the "FOP Denominator"). *Id.* attachment II. Commerce further instructed Red Garden that the total output amounts used as FOP Denominators must reconcile with the total output amounts for each CONNUM and supplier listed in the separate production table. *Id.* at 2.

In its response to the Third Supplemental Questionnaire, submitted on August 5, 2004, Red Garden continued to calculate Mingfeng's FOPs using total production quantities that could not be reconciled with the table of CONNUM-specific production volumes, which Red Garden resubmitted.[15] *Aug. 5 Questionnaire Resp.* exhibits 2(A), 3. The Department then held a conference call in which it instructed Red Garden to remedy the discrepancy, directing "that Red Garden must match or reconcile its FOP denominators," *i.e.*, the total production by each supplier of the CONNUM utilizing an FOP, "to the appropriate product/CONNUM groups," *i.e.*, to the amount reported in the separate production volume table. *Mem. from Analyst to the File* 1 (Aug. 9, 2004) (Admin. R. Doc. No. 877).

Following the conference call, Red Garden filed on August 13, 2004 a letter explaining "why the denominators used do not reconcile to the quantity if one sums individual control numbers ('connums')." *Letter from Red Garden to the Sec'y of Commerce* 2 (Aug. 13, 2004) (Admin. R. Doc. No. 914) ("*Red Garden's Aug. 13 Resp*."). Red Garden explained that the "denominators used reflect the total production of the subject merchandise," and that its suppliers "maintain data on 27

[15] The quantities used to calculate FOPs in this questionnaire response are not entirely legible in the document the court examined, but some these quantities appear to match the total quantity reported in the April 21, 2004 questionnaire response. *Letter from Red Garden to the Sec'y of Commerce* exhibit 2(A) (Aug. 5, 2004) (Admin. R. Doc. No. 960) ("*Aug. 5 Questionnaire Resp.*").

product groups of subject merchandise." *Id.* Red Garden told Commerce that the Mingfeng data used for FOP Denominators do not reconcile to amounts listed in the production volume table for Mingfeng because "Red Garden only sold 23 of those product groups in the POI to the U.S.," *id.*, and, presumably, the production volume table listed only the amounts produced for sales to the United States. Red Garden once again calculated FOPs using total production amounts that were not reconcilable with the table listing production amounts by CONNUM and supplier.[16] *Id.* exhibits 2–3.

Commerce subsequently conducted a verification of Mingfeng, at which Commerce determined from Mingfeng's records that each CONNUM Mingfeng supplied Red Garden was supplied for sales to the United States. *Red Garden/Mingfeng Verification Rept*. 2, 16–17. According to the Department's report of that verification, Mingfeng company officials, after finding that two products erroneously had been listed in the records as not supplied for sales to the United States, "indicated that all other product codes listed in the 'Products Produced but Not Sold to the US' category . . . were in fact sold through Red Garden to the United States during the POI." *Id.* at 17. Based on this finding, Commerce, "[f]or purposes of factor ratio calculations . . . verified the total quantity produced by Mingfeng," including "the additional product codes which were misreported as having not been sold to the United States" and determined that the correct total production amount was the same amount that Red Garden reported in the April 21, 2004 questionnaire response. *Id.*

On October 19, 2004, approximately one month after its own verification, Red Garden requested in its case brief that Commerce use the total production quantity Red Garden had reported for Mingfeng in the April 21, 2004 questionnaire response, rather than the incorrect total that was later shown in the data reported in the separate tables, to weight-average the FOPs of Mingfeng and Longfeng. Red Garden gave as the cause of the error in the tables that "Mingfeng's accounting staff, not knowing the technical names of various types of shrimp, incorrectly determined what types of shrimp products were sold to the U.S." *Letter from Red Garden to the Sec'y of Commerce* 5–6 (Oct. 19, 2004) (Admin. R. Doc. No. 1040) ("*Red Garden's Case Br.*"). In support of its request to use the correct total, Red Garden stated in its case brief that "all of Mingfeng's factor-of-production data, including the total production quantity needed for this re-calculation, was veri-

[16] Some of the quantities used to calculate FOPs in this letter appear to match the total quantity reported in the April 21, 2004 questionnaire response. *Letter from Red Garden to the Sec'y of Commerce* exhibit 2 (Aug. 13, 2004) (Admin. R. Doc. No. 914).

fied by the Department" and that "such recalculation results in a lower weighted-average FOP for the two suppliers which in tu[rn] leads to a lower dumping margin." *Id.* at 6.

Commerce refused Red Garden's request to use the verified quantity for Mingfeng's total production, explaining in the Decision Memorandum that it decided instead to use the quantity from the separate tables as facts otherwise available. *Decision Mem.* 24–25. Commerce decided to use the lower quantity for Mingfeng's total production even though it knew as a result of the Mingfeng verification that this information was incorrect. Commerce grounded this decision in section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), the "facts otherwise available" provision, giving as its justification that "Red Garden failed to provide such information by the deadlines established by the Department in their supplemental questionnaires or as part of their pre-verification corrections." *Decision Mem.* 24. Commerce explained, further, that it considered the use of facts otherwise available appropriate "because Red Garden did not provide the Department with the correct Quantity and Value for Mingfeng on *three* separate occasions," *i.e.*, the June 8, 2004 questionnaire response, the August 5, 2004 questionnaire response, and the response to the August 2004 conference call. *Id.* at 25.

Red Garden challenges the Department's decision to use facts otherwise available, stating that the "minor calculation error committed by Mingfeng was submitted to the [Department] in conformity with the statute," and citing section 782 of the Tariff Act, 19 U.S.C. § 1677m(e), as requiring "the government to accept all information proffered by a respondent if it meets certain tests." Pl.'s Mem. 57. Plaintiff argues that the information submitted met each criterion in § 1677m(e) and that "Red Garden was dependent upon its unrelated suppliers for the accuracy of the data. The cause of the error was inadvertence to the extent that certain Mingfeng personnel did not appreciate that certain product codes were identical to other products that were sold to the U.S. in the POI." *Id.*

In determining Red Garden's margin, the Department had the choice of using the correct amount, or the incorrect amount, of Mingfeng's total production. It erred in using the incorrect amount. As the Court of Appeals has instructed repeatedly, the purpose of the antidumping statute is to "establi[sh] antidumping margins as accurately as possible." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("the basic purpose of the statute [is] determining current margins as accurately as possible.").

The use of information that the Department knew to be incorrect is contrary to the purpose. The statutory authority to use "facts otherwise available" on which Commerce relied to justify its decision is unavailable on the record facts of this case.

Section 776(a) of the Tariff Act directs Commerce to use facts otherwise available when "necessary information is not available on the record," 19 U.S.C. § 1677e(a)(1), and also provides for the use of facts otherwise available in certain situations in which the necessary information *is* available, *id.* § 1677e(a)(2). These situations are when "an interested party . . . withholds information that has been requested by the administering authority," *id.* § 1677e(a)(2)(A), "fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title," *id.* § 1677e(a)(2)(B), "significantly impedes a proceeding under this subtitle," *id.* § 1677e(a)(2)(C), or provides information that is unverifiable, *id.* § 1677e(a)(2)(D). Of these various criteria, Commerce invoked the criterion that the information in question was untimely submitted. *Decision Mem.* 24 (finding that Red Garden "failed to provide such information by the deadlines established by the Department in their supplemental questionnaires or as part of their pre-verification corrections."). However, the particular item of information that the Department refused to use, in favor of information it knew to be incorrect, was in the Department's possession as a result of Red Garden's April 21, 2004 questionnaire response, *Apr. 21 Questionnaire Resp.* D-5, a questionnaire response that Commerce did not find to have been untimely.

Commerce did not find that Red Garden failed to provide the information at issue "in the form and manner requested," as that phrase is used in 19 U.S.C. § 1677e(a)(2)(B), and the record casts doubt on whether such a finding could have been supported on this record. It appears from the record and from the Department's own analysis that the information Commerce needed for an accurate margin calculation at the time of preparing the Decision Memorandum, and nevertheless rejected, was the total production amount for Mingfeng, not the information in the tables that Red Garden was unable to reconcile with that amount. The court concludes that the Department's intentional use of the incorrect information and its failure to use the correct information were unauthorized by 19 U.S.C. § 1677e(a).

The Department's lack of authority under 19 U.S.C. § 1677e(a) to refuse to use the correct information is sufficient to require a remand. However, another statutory provision calls the Department's decision into further question. If the court presumes, as it appears, that

Commerce considered the correct quantity information not to have met all of its established requirements for submission, it also would conclude that the statute required Commerce to make a further determination before declining to use that information. Section 776(a) conditions on subsections (c)(1) and (e) of 19 U.S.C. § 1677m the Department's applying facts otherwise available in the circumstance of untimely submission of requested information. 19 U.S.C. § 1677e(a)(2)(B). Subsection (e) of § 1677m, requires Commerce, in that circumstance, to use information that is necessary to the Department's determination but does not meet all of the Department's established requirements.[17] In the Decision Memorandum, the Department did not address whether this provision required it to use the correct data on Mingfeng's total production despite the Department's finding that Red Garden had not complied with its instructions to reconcile the data in the tables with the total amount of Mingfeng's production reported in the April 21, 2004 questionnaire.

Before the court, defendant argues that the Department was justified in using the incorrect production amount for Mingfeng because "a correction would have rewarded Red Garden for its inaccurate reporting to Commerce by lowering its calculated margin." Def.'s Resp. 43. This argument is an *ex post* rationalization. Commerce did not base its refusal to make the correction on the importance of not rewarding inaccurate reporting. A court must review an agency's decision on the grounds the agency puts forth. *SEC v. Chenery*, 318 U.S. 80, 87 (1943).

Moreover, even had the Department's rationale been to avoid rewarding inaccurate reporting, the court would reject defendant's argument. Such a rationale would be appropriate to a finding under 19 U.S.C. § 1677e(b) that Red Garden had "failed to cooperate by not acting to the best of its ability" to comply with a request for information. Commerce made no such finding, and on this record it would appear that a finding to that effect could not have been supported. The record shows that Red Garden had difficulty attempting to rec-

[17] Under subsection (e) of section 782 of the Tariff Act, Commerce

> [S]hall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

oncile the data on the total amount of Mingfeng's production with the product-specific production data that Mingfeng provided it. The record contains some evidence that, as Red Garden informed Commerce, the difficulty in reconciling the data sets was the result of an error by Mingfeng. Commerce did not find to the contrary. What is more, it appears from the record that Commerce found the source of the error in Mingfeng's records at the Mingfeng verification. As the Department's own report of the Mingfeng verification reveals, Red Garden's reporting of total production volume by supplier and CONNUM omitted sales of several of Mingfeng's CONNUMs, an omission Red Garden attributes to incorrect reporting by Mingfeng. *Red Garden/Mingfeng Verification Rept.* 16–17; *Red Garden's Case Br.* 5–6. Even though Commerce made no finding under 19 U.S.C. § 1677e(b) that Red Garden failed to cooperate, the Department's decision to use the incorrect information resulted in an adverse consequence for Red Garden. In deciding to use information that understated Mingfeng's total production amount by approximately 10%, Commerce impermissibly inflated Red Garden's weighted-average dumping margin.

In summary, Commerce acted unlawfully in using information it knew to be incorrect and in refusing to make a straightforward adjustment that would have produced a more accurate result. On remand, Commerce must redetermine Red Garden's normal value using the correct information on the quantity of Mingfeng's production.

F. Commerce Must Redetermine the Surrogate Value for Labor Expenses

Red Garden contends that the Department's selection of a surrogate value for labor expenses was unlawful. Pl.'s Mem. 49–52. Defendant requests a voluntary remand "for the limited purpose of recalculating the labor wage rate using proper data." Def.'s Resp. 57. The court will order remand on this issue.

Commerce calculated a surrogate value for labor expenses pursuant to 19 C.F.R. § 351.408(c)(3) (2005), which required that for market economy countries Commerce "use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries," and for non-market economies, such as China, Commerce "will calculate the wage rate to be applied . . . each year." The Court of Appeals invalidated that regulation in *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010). As such, remand is appropriate to allow the Department to determine a surrogate value for labor according to a lawful method.

In its reply and in the July 2011 conference the court held with the parties, Red Garden advocated that the court's remand on this issue direct particular results. In the reply, Red Garden requested an order that Commerce "delete all countries not found to be at the same level of economic development as China" from the data used to calculate a surrogate labor rate. Pl.'s Reply 24–25. And in the July 2011 conference, Red Garden argued that the labor rate applied to Red Garden cannot exceed the rate applied to the other mandatory respondents at the conclusion of the *Allied Pacific* litigation. Upon considering plaintiff's arguments and defendant's counter-arguments, the court declines to direct the result upon remand. The court will require that the remand redetermination accord with law, be supported by substantial evidence, and comply with the decision of the Court of Appeals in *Dorbest.*

G. Commerce Must Reconsider its Refusal to Allow Correction of the Growth Stage Multiplier for Longfeng

Red Garden contends that the Department's refusal to correct a clerical error regarding the "growth stage multiplier" of one of Red Garden's suppliers, Longfeng, was unlawful. Pl.'s Mem. 59–60.[18] Defendant requests a voluntary remand "for the limited purpose of considering and addressing Longfeng's revised growth stage multiplier data." Def.'s Resp. 57. The court will order remand on this issue.

Red Garden states that Commerce arbitrarily refused to accept a corrected growth stage multiplier that Red Garden submitted on the first day of verification, Pl.'s Mem. 58–59; *Red Garden/Mingfeng Verification Rept.* exhibit 1, and resubmitted prior to the Final Determination, *Letter from Red Garden to the Sec'y of Commerce* (Nov. 26, 2004) (Admin. R. Doc. No. 1110). The incorrect growth stage multiplier stated that for one of Red Garden's suppliers, Longfeng, more than 100% of the farmed shrimp were used in processing, a logical impossibility. Pl.'s Mem. 58–59. Although Commerce required Red Garden to submit a revised sales database with minor corrections, Commerce without explanation refused to allow plaintiff to correct the growth stage multiplier. Def.'s Resp. 57–58. Defendant now seeks a remand to allow Commerce to reconsider this decision. *Id.* The court considers such reconsideration to be appropriate.

IV. CONCLUSION AND ORDER

The court concludes that Red Garden is entitled to relief on its challenge to the Department's use of an adverse inference regarding

[18] A "growth stage multiplier" refers to the percentage of shrimp grown by a producer that eventually are used in processing. Pl.'s Mem. 58.

the factors of production of Meizhou, its challenge to selection of a surrogate value for head-on shell-on shrimp, and its challenge to the Department's refusal to use correct data regarding the volume of Red Garden's sales supplied by Mingfeng. In addition, the court will order Commerce on remand to redetermine Red Garden's surrogate labor rate and to reconsider the decision to refuse to allow correction of Longfeng's growth stage multiplier. Red Garden is not entitled to relief on its challenge to the Department's selection of a surrogate value for shrimp feed and on its challenge to the Department's selection of surrogate financial ratios.

Therefore, upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record challenging the *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen & Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70,997 (Dec. 8, 2004) ("Final Determination") and the *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China*, 70 Fed. Reg. 5,149 (Feb. 1, 2005) ("Amended Final Determination") be, and hereby is, GRANTED in part and DENIED in part; it is further

ORDERED that the Final Determination and Amended Final Determination be, and hereby are, remanded to the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") for redetermination in accordance with this Opinion & Order; it is further

ORDERED that, on remand, Commerce shall issue a Remand Redetermination that recalculates the weighted-average dumping margin of Shantou Red Garden Foodstuff Co., Ltd. ("Red Garden"), is supported by substantial evidence on the record, and is in all respects in accordance with law; it is further

ORDERED that, on remand, Commerce shall not use an adverse inference in choosing from among the facts otherwise available for use as factors-of-production data pertaining to subject merchandise sold by Red Garden and produced by Meizhou Aquatic Products Quick-Frozen Industry Co., Ltd.; it is further

ORDERED that, on remand, Commerce shall redetermine the surrogate value or values for the fresh, raw, head-on, shell-on shrimp used by plaintiff's suppliers; it is further

ORDERED that, on remand, Commerce shall reconsider the decision not to apply count-size specific surrogate values for the fresh, raw, head-on, shell-on shrimp used by plaintiff's suppliers, and, if Commerce maintains that decision in the Remand Redetermination,

then Commerce shall provide an adequate explanation based on findings of fact supported by substantial record evidence; it is further

ORDERED that, on remand, Commerce, in redetermining the weighted-average dumping margin of Red Garden, shall use the correct data regarding the volume of Red Garden's sales that were supplied by Shantou Jinyuan District Mingfeng Quick-Frozen Factory ("Mingfeng"); it is further

ORDERED that, on remand, Commerce shall redetermine the surrogate value of labor expenses applied to Red Garden and shall provide an explanation for its decision on remand that is in all respects supported by substantial evidence and in accordance with law, adhering to the holding of the U.S. Court of Appeals for the Federal Circuit in *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010); it is further

ORDERED that, on remand, Commerce shall reconsider its decision to use incorrect data regarding the growth stage multiplier of Shantou Longfeng Foodstuff Co., Ltd. ("Longfeng") and take any corrective action necessitated by that reconsideration; and it is further

ORDERED that Commerce shall file the Remand Redetermination with the court within sixty (60) days of this Opinion & Order, that plaintiff shall file any comments thereon within thirty (30) days of the date on which the Remand Redetermination is filed, and that defendant shall file any response to plaintiff's comments within fifteen (15) days of the date on which plaintiff files comments.

Dated: January 13, 2012
New York, New York

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

Slip Op. 12–8

SCHAEFFLER GROUP USA INC., Plaintiff, v. UNITED STATES, UNITED STATES CUSTOMS and BORDER PROTECTION, AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and THE TIMKEN COMPANY and MPB CORPORATION, Defendant Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Consol. Court No. 06–00432

[Dismissing the consolidated action for failure to state a claim upon which relief can be granted]

Dated: January 17, 2012

Max F. Schutzman, and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for plaintiff.

David S. Silverbrand, and *Courtney S. McNamara,* Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant United States Customs and Border Protection. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, and *Andrew G. Jones*, Office of Assistant Chief Counsel, United States Customs and Border Protection, of counsel.

Patrick V. Gallagher, Jr., Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant, U.S. International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Geert De Prest, Stewart and Stewart, of Washington, DC, for defendant intervenors. With him on the brief were *Terence P. Stewart*, *Amy S. Dwyer*, and *Patrick J. McDonough*.

OPINION

CARMAN, JUDGE:

INTRODUCTION

Plaintiff brought five cases[1] challenging the constitutionality of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").[2] These cases were consolidated by order of the Court under Consol. Ct. No. 06 00432. (Order (Feb. 15, 2011), ECF No. 37.) Plaintiff claims that it unlawfully was denied affected domestic producer ("ADP") status, which would have qualified it to receive distributions under the CDSOA. The consolidated case is now before the Court on dispositive motions. Defendants United States Customs and Border Protection ("CBP") and the United States International Trade Commission ("ITC") each move to dismiss Plaintiff's complaints for failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(5), and for judgment on the pleadings under USCIT R. 12(c). (Defs. The United States and United States Customs and Border Protection's Mot. to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted and for Judgment on the Pleadings ("CBP Mot."), May 4, 2011, ECF No. 60); (Def. United States International Trade Commission's Mot. to Dismiss for Failure to State a Claim and For Judgment on the Pleadings ("ITC Mot."), May 2, 2011, ECF No. 56). Defendant Intervenors the Timken Company and MPB Corp. (collectively, "Timken") move for judgment

[1] Compl., Ct. No. 06 00432, Nov. 27, 2006, ECF No. 4 ("Compl. 1"); Compl., Ct. No. 07 00064, Feb. 26, 2007, ECF No. 2 ("Compl. 2"); Compl., Ct. No. 07 00477, Dec. 20, 2007, ECF No. 2 ("Compl. 3"); Compl., Ct. No. 08 00387, Nov. 3, 2008, ECF No. 4 ("Compl. 4"); Compl., Ct. No. 10 00048, Feb. 16, 2010, ECF No. 2 ("Compl. 5").

[2] Pub. L. No. 106 387, §§ 1001 1003, 114 Stat. 1549, 1549A 72 75 (codified at 19 U.S.C. § 1675c (2000)), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109 171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).

on the pleadings pursuant to USCIT Rule 12(c). (Timken's Mot. for J. on the Pleadings ("Timken Mot."), May 2, 2011, ECF No. 58.) Plaintiff also cross moved for judgment on the pleadings. (Pl.'s Cross Mot. for J. on the Pleadings ("Pl.'s Mot."), June 6, 2011, ECF No. 62.) For the reasons set forth below, Plaintiff's consolidated action will be dismissed for failure to state a claim upon which relief can be granted.

BACKGROUND

Plaintiff Schaeffler Group USA, Inc. ("Schaeffler"), a U.S. producer of antifriction bearings, is the legal successor to two U.S. producers of antifriction bearings[3] who participated in a 1988 investigation conducted by the ITC that culminated in the issuance of antidumping duty orders on antifriction bearings and parts thereof from Germany, France, Italy, Japan, Sweden, Romania, Thailand, Singapore, and the United Kingdom. (*See* Compl. 1 ¶¶ 1, 7.) During those proceedings, Schaeffler responded to the ITC's questionnaires but declined to indicate to the ITC that it supported the antidumping petition. (*Id.* at ¶ 10.) Consequently, the ITC has never included Schaeffler on a published list of ADPs, and, as a result, Schaeffler has never received a CDSOA distribution. (Compl. 1 ¶ 36; Compl. 2 ¶ 36; Compl. 3 ¶¶ 39, 42; Compl. 4 ¶ 39; Compl. 5 ¶ 39.)

Plaintiff brought a series of cases to challenge the government's refusal to provide it CDSOA distributions for fiscal years 2004 through 2009. (Compls. 1 5, Prayer for Relief.) Shortly after each of Schaeffler's cases was filed, the Court stayed the actions pending final resolution of other litigation raising the same or similar issues.[4] Following the decision of the U.S. Court of Appeals for the Federal Circuit in *SKF USA Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (2009) ("*SKF USA II*"), the Court ordered Plaintiff to show cause why its cases should not be dismissed. (Order (Jan. 3, 2011), ECF No. 31.) After Plaintiff responded to the Court's order, the Court lifted the stay in each of Plaintiff's cases for all purposes. (Order (Feb. 9, 2011), ECF No. 34.) The Court then consolidated Plaintiff's five cases under Consol. Ct. No. 06 00432. (Order (Feb 15, 2011)).[5]

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[3] The Court accepts Plaintiff's undisputed representation that it is the legal successor to INA Bearing Co., Inc. and FAG Bearings Corp., and will refer to these companies interchangeably as "Schaeffler."

[4] The Court's order stayed the action until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, Consol. Ct. No. 06 0290. (*See* Order (Feb. 23, 2007), ECF No. 23.)

[5] CBP has not made any CDSOA distributions affecting this case and indicates that it will refrain from doing so until January 31, 2012 at the earliest. (Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 43.)

JURISDICTION

The Court exercises subject matter jurisdiction over this action pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which grants the Court of International Trade exclusive jurisdiction of any civil action commenced against the United States that arises out of any law providing for administration and enforcement with respect to, *inter alia*, the matters referred to in § 1581(i)(2), which are "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." The CDSOA, under which this action arises, is such a law. *See Furniture Brands Int'l, Inc. v. United States*, 35 CIT __, __ __ Ct. No. 07 00026, Slip Op. 11 132 at 9 15 (Oct. 20, 2011).

DISCUSSION

The CDSOA amended the Tariff Act of 1930 to provide for an annual distribution (a "continuing dumping and subsidy offset") of duties assessed pursuant to an antidumping duty or countervailing duty order to affected domestic producers as reimbursements for qualifying expenditures.[6] 19 U.S.C. § 1675c(a) (d). ADP status is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered, and who remain in operation. *Id.* § 1675c(b)(1). The CDSOA directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists of persons with ADP status, *i.e.*, "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1). The CDSOA also provided for distributions of antidumping and countervailing duties assessed pursuant to existing antidumping duty and countervailing duty orders and for this purpose directed the ITC to forward to CBP a list identifying ADPs "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 or thereafter . . . ." *Id.* The CDSOA directed CBP to publish in the Federal Register, prior to each distribution, lists of ADPs potentially eligible for distributions based

[6] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109 171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111 291, § 822, 124 Stat. 3064, 3163 (2010).

on the lists obtained from the ITC, *id.* § 1675c(d)(2), and to distribute annually all funds, including accrued interest, from antidumping and countervailing duties received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).

The Court of Appeals, in *SKF USA II*, upheld the CDSOA against constitutional challenges brought on First Amendment and equal protection grounds. 556 F.3d at 1360 ("[T]he Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment."); *id.* ("Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.").[7]

Plaintiff challenges the constitutionality of Defendants' application of the CDSOA to Schaeffler on three grounds. In Count One, Plaintiff challenges the "in support of the petition" requirement of the CDSOA ("petition support requirement"), as applied, on First Amendment grounds. (Compl. 1 ¶¶ 41 43, Compl. 2 ¶¶ 41 43, Compl. 3 ¶¶ 44 46, Compl. 4 ¶¶ 41 43, Compl. 5 ¶¶ 41 43.) In Count Two, Plaintiff challenges the petition support requirement, as applied, on Fifth Amendment Equal Protection grounds. (Compl 1 ¶¶ 44 47, Compl. 2 ¶¶ 44 47, Compl. 3 ¶¶ 47 50, Compl. 4 ¶¶ 44 47, Compl. 5 ¶¶ 44 47.) In Count Three, Plaintiff claims that the petition support requirement violates the Fifth Amendment Due Process guarantee, in basing Schaeffler's eligibility for disbursements on past conduct, *i.e.*, support for a petition. (Compl. 1 ¶¶ 48 50, Compl. 2 ¶¶ 48 50, Compl. 3 ¶¶ 51 53, Compl. 4 ¶¶ 48 50, Compl. 5 ¶¶ 48 50.)

In ruling on motions to dismiss made under USCIT Rule 12(b)(5), we dismiss complaints that do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the reasons set forth below, we conclude that each of the claims in Plaintiff's complaints in this consolidated action must be dismissed for failure to state a claim upon which relief can be granted.

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[7] *SKF USA II* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006) ("*SKF USA I*"), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

I. Plaintiff's Challenges Under the First Amendment and the Equal Protection Clause Are Foreclosed by Binding Precedent

Plaintiff fails to plead facts allowing the Court to conclude that its as applied First Amendment and Equal Protection challenges to the CDSOA are distinguishable from claims brought, and rejected, in *SKF USA II*. The complaints contain no assertions that the CDSOA was applied to Schaeffler in a different manner than the statute was applied to other parties who did not support a petition. Plaintiff acknowledges that to qualify as an ADP, it "must have been a petitioner or supported a petition that led to an antidumping or countervailing duty order (which Schaeffler did not.)" (*See*, *e.g.*, Compl. 1 ¶ 10.) The facts as pled place Schaeffler on the same footing as other potential claimants who did not support the petition, such as SKF. *See SKF USA II*, 556 F.3d at 1343 ("Since it was a domestic producer, SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Consequently, because Plaintiff does not allege that there was anything unique about the way the CDSOA was applied to it, Plaintiff's as applied First Amendment and Equal Protection challenges in Counts One and Two are foreclosed by the holding in *SKF USA II*, and must be dismissed pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

Plaintiff's argument that the recent Supreme Court cases *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) effectively overturn *SKF USA II* is wholly unpersuasive. While it is conceivable that intervening Supreme Court precedent could "effectively overrule" a previous circuit court decision, we are not convinced that such is the case here.

In *Snyder*, the Supreme Court held that the First Amendment provided a valid defense to certain tort liability, because the defendant's speech, while "hurtful," was made in "a public place on a matter of public concern," and was therefore "entitled to 'special protection' under the First Amendment." *Snyder*, 131 S. Ct. at 1218 20. We conclude that *Snyder* has no bearing on the constitutionality of the CDSOA. To conclude otherwise is to ignore the Supreme Court's disclaimer that

> **[o]ur holding today is narrow**. We are required in First Amendment cases to carefully review the record, and **the reach of our opinion here is limited by the particular facts before us**. As we have noted, "the sensitivity and significance of the interests presented in clashes between First Amendment

> and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

Snyder, 131 S. Ct. at 1220 (*quoting Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)) (emphasis added). Plaintiff is incorrect in asserting that the Supreme Court intended in *Snyder*, "for the first time, [to identify] a discrete set of guiding principles to determine whether the speech at issue [in this case] constitutes 'public speech' subject to strict scrutiny." (Pl.'s Mot. 11.) Because this case does not involve the First Amendment as a defense to tort liability for inflammatory speech, nor a question regarding the clash of First Amendment and state law rights, the Court finds *Snyder* inapplicable.

Citizens United is similarly inapplicable. In that case, the Supreme Court invalidated a law that imposed "an outright ban, backed by criminal sanctions" on corporate spending on "electioneering communication," which the Supreme Court regarded as a ban on political speech. *Citizens United*, 130 S. Ct. at 897 (stating that the prohibitions at issue were "classic examples of censorship."). While "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter," the Supreme Court noted that at a minimum,"[l]aws that burden political speech are 'subject to strict scrutiny,'" and evaluated the challenged law under that framework. *Id.* at 898 (*quoting Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). The statute in *Citizens United* thus contrasts sharply with the CDSOA, which "does not prohibit particular speech." *SKF USA II*, 556 F.3d at 1350. This is a critical distinction. As *SKF USA II* noted, "[s]tatutes that are prohibitory in nature are rarely sustained, and **cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment.** " *Id.* (emphasis added). This Court agrees; *Citizens United* is of little assistance.

Therefore, the Court will dismiss Plaintiff's First Amendment and Equal Protection claims in Counts One and Two of its complaints for failure to state a claim upon which relief can be granted.

II. The Petition Support Requirement Does Not Violate the Due Process Guarantee Due to Retroactivity

Count Three of each of Plaintiff's complaints claims that the CDSOA is impermissibly retroactive, in violation of the Due Process guarantee of the Fifth Amendment, in basing Schaeffler's eligibility for disbursements on past conduct, *i.e.*, support for a petition. In *New Hampshire Ball Bearing v. United States*, 36 CIT __, __ __, Slip Op. 12

2, at 8 14 (Jan. 3, 2012), we recently considered a claim essentially identical to Plaintiff's retroactivity claims. We concluded then that "the retroactive reach of the petition support requirement in the CDSOA is justified by a rational legislative purpose and therefore is not vulnerable to attack on constitutional due process grounds." 36 CIT at __, Slip Op. at 14. We reasoned that "it would not be arbitrary or irrational for Congress to conclude that the legislative purpose of rewarding domestic producers who supported antidumping petitions . . . would be 'more fully effectuated' if the petition support requirement were applied both prospectively and retroactively." 36 CIT at __, Slip Op. at 13 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 31 (1984)). We conclude, therefore, that Congress did not violate Schaeffler's Fifth Amendment due process rights in basing potential eligibility for CDSOA disbursements on a decision on whether to support the petition that Schaeffler made prior to the enactment of the CDSOA. Based on this conclusion, we will dismiss the Due Process claims in Count Three of the complaints for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, all claims in the complaints in this consolidated action must be dismissed for failure to state a claim upon which relief can be granted.[8] Accordingly, we deny Plaintiff's motion for judgment on the pleadings. Plaintiff has not indicated, either in responding to the Court's order to show cause or in opposing the motions to dismiss, that there is a plausible basis for Plaintiff to seek leave to amend the complaints, and we *see* no such basis. Therefore, the Court shall enter judgment dismissing this action.

Dated: January 17, 2012
New York, New York

Gregory W. Carman
GREGORY W. CARMAN, JUDGE

[8] Because the Court is granting Defendants' motions to dismiss, the Court does not need to reach Defendants' and Defendant Intervenors' motions for judgment on the pleadings. Moreover, since the Court finds no merit in any of Plaintiff's claims, the Court has no reason to entertain Defendant Intervenors' arguments regarding the statute of limitations or failure to exhaust administrative remedies.

Slip Op 12–9

GROBEST & I-MEI INDUSTRIAL (VIETNAM) CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, AD HOC SHRIMP TRADE ACTION COMMITTEE, et al., Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 10–00238

[Remanding Department of Commerce's final results ofadministrative review of antidumping duty order]

Dated: January 18, 2012

David S. Christy and *Matthew R. Nicely*, Thompson Hine LLP, of Washington, D.C., for the Plaintiff Grobest & I-Mei Industrial (Vietnam) Co., Ltd.

Robert G. Gosselink and Jonathan M. Freed, Trade Pacific, PLLC, of Washington, D.C., for the Consolidated Plaintiffs Cam Ranh Seafoods Processing Enterprise Co.; Contessa Premium Foods Inc.; and H&N Foods International.

Adams Chi-Peng Lee, *Jay C. Campbell*, and *Walter J. Spak*, White & Case, LLP, for the Consolidated Plaintiff Amanda Foods (Vietnam) Ltd.

Matthew R. Nicely, Thompson Hine LLP, of Washington, D.C., for the Consolidated Plaintiffs Nha Trang Fisheries Joint Stock Co.; Nha Trang Seaproduct Co.; Minh Phu Seafood Corp.; Minh Qui Seafood Co., Ltd.; Bac Lieu Fisheries Joint Stock Co.; Camau Frozen Seafood Processing Import Export Corp.; Ca Mau Seafood Joint Stock Co.; Cadovimex Seafood Import-Export and Processing Joint-Stock Co.; Cafatex Fishery Joint Stock Corp.; Cantho Import Export Fishery Ltd. Co.; C.P. Vietnam Livestock Corp.; Cuulong Seaproducts Co.; Danang Seaproducts Import Export Corp.; Investment Commerce Fisheries Corp.; Minh Hai Export Frozen Seafood Processing Joint-Stock Co.; Minh Hai Joint-Stock Seafoods Processing Co.; Ngoc Sinh Private Enterprise; Phu Cuong Seafood Processing & Import-Export Co., Ltd; Phuong Nam Co. Ltd.; Sao Ta Foods Joint Stock Co.; Soc Trang Seafood Joint Stock Co.; Thuan Phuoc Seafoods and Trading Corp.; UTXI Aquatic Products Processing Corp.; Viet Foods Co., Ltd.; and Minh Phat Seafood Co., Ltd.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director.

Nathaniel J. Maandig Rickard, *Andrew W. Kentz*, *Jordan C.* Kahn, and Kevin M. O'Connor, Picard, Kentz & Rowe, LLP, of Washington D.C. for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific,PLLC, of Washington, D.C., for Defendant-Intervenors Cam Ranh Seafoods Processing Enterprise Co.; Contessa Premium Foods Inc.;and H&N Foods International.

Matthew R. Nicely and *David S. Christy*, Thompson Hine LLP, of Washington, D.C., for Defendant-Intervenors Minh Phu Seafood Corp.; Minh Phat Seafood Co., Ltd.; Minh Qui Seafood Co., Ltd.; and Nha Trang Seaproduct Co.

Geert M. De Prest and *Elizabeth J. Drake*, *Stewart and Stewart*, of Washington D.C., and *Edward T. Hayes*, Leake & Anderson, LLP, of New Orleans, LA, for the Defendant-Intervenor American Shrimp Processors Association.

OPINION AND ORDER

Pogue, Chief Judge:

INTRODUCTION

This is a consolidated action seeking review of determinations made by the United States Department of Commerce ("Commerce" or "the Department") in the fourth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam").[1] Plaintiffs Grobest & I-Mei Industrial (Vietnam) Co., Ltd. ("Grobest"), Nha Trang Seaproduct Company, *et al*. ("Nha Trang"), and Cam Ranh Seafoods Processing Enterprise Company, *et al*. ("Cam Ranh"); Consolidated Plaintiff Amanda Foods (Vietnam) Ltd. ("Amanda Foods"); and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("AHSTAC") now seek judgment on the agency record, *see* USCIT R. 56.2, raising for review seven of Commerce's determinations, findings, or conclusions.

Specifically, Plaintiffs Grobest, Nha Trang, and Cam Ranh collectively challenge Commerce's decision to use zeroing in calculating dumping margins during reviews but not during investigations. These Plaintiffs also challenge the exclusion of Bangladesh-to-Bangladesh import data from surrogate value calculations and the use of multi-country averaging in determining surrogate labor wage rates.

Defendant-Intervenor AHSTAC challenges Commerce's exclusion of Fine Foods Ltd.'s 2008–2009 financial statement and Gemini Sea Food Ltd.'s loading and unloading expenses when calculating surrogate financial ratios.

Plaintiff Grobest also challenges Commerce's denial of its request for revocation, and Consolidated Plaintiff Amanda Foods challenges Commerce's rejection of its separate rate certification on the basis of untimely filing.

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

The court discusses below each of the seven issues raised for review. The court concludes, using the following outline, that: (I) Commerce must provide further explanation for its use of zeroing in antidump-

[1] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 75 Fed. Reg. 47,771 (Dep't Commerce Aug. 9, 2010) (final results and partial rescission of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-552–802, ARP 08–09 (July 30, 2010), Admin. R. Pub. Doc. 233 ("*I & D Mem.*") (adopted in *Final Results*,75 Fed. Reg. at 47,772).

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

ing reviews but not investigations, consistent with recent decisions of the Court of Appeals for the Federal Circuit; (II) Commerce's decisions to exclude the Bangladesh-to-Bangladesh data from surrogate value calculations, to employ multi-country averaging to determine surrogate labor wage rates, and to exclude both Fine Foods' 2008–2009 financial statement and Gemini's loading and unloading expenses from surrogate financial ratio calculations are reasonable and will, therefore, be affirmed; (III) Commerce's decision not to review voluntary respondents under 19 U.S.C. § 1677m(a) is based on an impermissible construction of the relevant statutory provisions; and (IV) Commerce's decision to reject Amanda Foods' untimely submitted separate rate certification was an abuse of discretion.

Accordingly, the court will remand the *Final Results* to Commerce for reconsideration and redetermination consistent with this opinion.

BACKGROUND

The following background information is relevant to the seven issues before the court.[3] On March 26, 2009, Commerce, at the request of the domestic producers and certain Vietnamese respondents, initiated the fourth administrative review[4] of the 2005 antidumping duty order on certain frozen warmwater shrimp from Vietnam[5] (the "Order"). Commerce issued the preliminary results of its review on March 15, 2010, assigning preliminary dumping margins of 3.27% to mandatory respondent Minh Phu; 2.5% to mandatory respondent Nha Trang; 2.89% to the non-selected, separate rate respondents; and as the Vietnam-wide rate, 25.76%.[6] After taking comments from interested parties, Commerce released the final results of the review on August 9, 2010. *Final Results*, 75 Fed. Reg. at 47,771. In the *Final Results*, Commerce assigned Minh Phu a 2.96% rate, Nha Trang a 5.58% rate, the separate rate respondents a 4.27% rate, and a rate of 25.76% as the Vietnam-wide rate. *Id.* at 47,774–75.[7]

[3] Because this is a consolidated action, some factual information is relevant only to individual claims, and this will be provided as part of the discussion of individual issues.

[4] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 74 Fed. Reg. 13,178 (Dep't Commerce Mar. 26, 2009) (notice of initiation of administrative reviews and requests for revocation, in part, of the antidumping duty orders).

[5] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 70 Fed. Reg. 5,152 (Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order).

[6] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 75 Fed. Reg. 12,206, 12,215 (Dep't Commerce Mar. 15, 2010) (preliminary results, partial rescission, and request for revocation, in part, of the fourth administrative review) ("*Preliminary Results*").

[7] Commerce later amended the final results reducing Minh Phu's rate to 2.95%, Nha Trang's to 4.89%, and the separate rate respondents to 3.92%, but keeping the Vietnam-wide rate

STANDARD OF REVIEW

When reviewing the Department's decisions made in administrative reviews of antidumping duty orders, the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Use of Zeroing in Investigations but Not Reviews

Where, as here, Commerce and the International Trade Commission determine that imported goods are being sold at less than fair value in the United States to the detriment of domestic industry, the statute directs Commerce to impose an antidumping duty on those imported goods "equal to the amount by which the normal value[8] exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673.[9] Commerce calculates dumping duties by first determining a dumping margin, or "the amount by which the normal value exceeds the export price or constructed export price," 19 U.S.C. § 1677(35)(A), and then establishing a weighted average dumping margin, which is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer," § 1677(35)(B).

When calculating weighted average dumping margins, Commerce may, under the statute, employ either of two methodologies: zeroing or offsetting. *Timken Co. v. United States*, 354 F.3d 1334, 1341–45 (Fed. Cir. 2004) (holding that 19 U.S.C. § 1677(35) is ambiguous and that zeroing is a reasonable interpretation); *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1360–63 (Fed. Cir. 2010) (holding that 19 U.S.C. § 1677(35) is ambiguous and that offsetting is also a reasonable interpretation). Zeroing is the practice of "treat[ing] transactions [or sales] that generate 'negative' dumping margins (i.e., a dumping margin with a value less than zero) as if they were zero." *Timken*, 354 F.3d at 1338. Under this approach, only sales at less than normal

at 25.76%. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 75 Fed. Reg. 61,122, 61,123–26 (Dep't Commerce Oct. 4, 2010) (amended final results of antidumping duty administrative review) ("*Amended Final Results*"). The final results were amended due to ministerial errors made by Commerce in calculating surrogate values and surrogate financial ratios. *Id*. at 61,123.

[8] The statute defines "normal value" as "the price at which the foreign like product is first sold . . . for consumption in the exporting country . . . ." 19 U.S.C. § 1677b(a)(1)(B)(i).

[9] When a producer or exporter sells goods in the United States at a price below that at which the producer or exporter sells the same or comparable goods in its home market, those goods are considered dumped.

value contribute to the calculation of the dumping margin. In contrast, when using offsetting, "sales made at less than fair value are offset by those made above fair value. This means that some of the dumping margins used to calculate a weighted-average dumping margin will be negative." *U.S. Steel*, 621 F.3d at 1355.

Historically, Commerce has employed zeroing methodology in both antidumping duty investigations and reviews. *See Timken*, 354 F.3d at 1338 (reviewing use of zeroing in an antidumping duty administrative review); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (reviewing use of zeroing in an antidumping duty investigation). However, in 2005, the European Community successfully challenged Commerce's use of zeroing, in investigations, before the World Trade Organization ("WTO"), a decision upheld by the WTO's Appellate Body in 2006. *U.S. Steel*, 621 F.3d at 1354 (citations omitted). In response to the adverse ruling before the WTO, Commerce changed its methodology in antidumping investigations, choosing to use offsetting instead of zeroing, *id.* at 1354–55, but continued to use zeroing in other segments of antidumping proceedings, including administrative reviews, *id.* at 1355 n.2.[10]

Plaintiffs in this case challenge Commerce's use of zeroing, in the fourth administrative review, as an impermissibly inconsistent interpretation of a single statutory provision. Plaintiffs argue that Commerce may not reasonably read the same statutory provision, 19 U.S.C. § 1677(35), to permit concurrent use of zeroing and offsetting. Pls.' Mem. Supp. Mot. J. Agency R. 15–17, ECF No. 67–2 ("Pls.' Br."). Commerce argues before this court only that Plaintiffs failed to raise the issue of inconsistent interpretations before the agency and have, therefore, not exhausted their administrative remedies. Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. 34–39, ECF No. 102 ("Def.'s Resp. Br.").

The issue has currency because of two recent decisions from the Court of Appeals for the Federal Circuit, *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011), which have addressed Commerce's inconsistent interpretations of 19 U.S.C. § 1677(35). *Dongbu* held that "[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is arbitrary." 635 F.3d at 1372–73. Subsequently, *JTEKT* concluded that "[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question — why is it a reasonable interpretation of the statute to zero in

[10] For the full discussion of Commerce's change in policy*see Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) (final modification).

administrative reviews, but not in investigations?" 642 F.3d at 1384. In light of these decisions, the court will remand this issue to Commerce for reconsideration and redetermination consistent with now prevailing law.[11] *See also Union Steel v. United States*, 35 CIT __, Slip. Op. 11–144, *20 (Nov. 21, 2011) ("The court concludes, upon reconsidering its decision in *Union II*, that it is appropriate to set aside its affirmance of the use of zeroing and to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp.* . . . .").

II. Commerce's Surrogate Value Determinations

In order to determine a dumping margin, as discussed above, Commerce must first establish the normal value of the subject merchandise. However, if the merchandise is exported from a nonmarket economy ("NME") country,[12] the in-country price is presumed to be unreliable, and Commerce is directed to "determine the normal value of the subject merchandise 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). "[T]he valuation of the factors of production shall [in turn] be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce] [i.e., the surrogate market economy country]." *Id.*

[11] As the decision in *Dongbu* was not available prior to the final results in this administrative review, the court does not credit Commerce's exhaustion argument. *See JTEKT*, 642 F.3d at 1384 ("[Appellant] did not have the benefit of the *Dongbu* opinion before filing its briefs and thus could not have argued that the case requires us to vacate, but it nonetheless preserved the issue on appeal by arguing that Commerce's continuing practice of zeroing in administrative reviews, but not in investigations, is unreasonable."). The Defendant-Intervenor, citing *Hormel v. Helvering*, 312 U.S. 552, 559 (1941), claims that the Federal Circuit's decisions in *Dongbu* and *JTEKT* are not intervening judicial decisions justifying Plaintiffs' failure to exhaust because the decisions do not materially alter the result required in this proceeding, but merely require "Commerce to explain its authority for continuing to use zeroing in administrative reviews." Def.-Intervenor's Resp. Pls.' Mot. J. Agency R. 26, ECF No. 87 ("Def.-Intervenor's Resp. Br."). But *Hormel* requires only that the intervening judicial decision "might" have affected the result. Hormel, 312 U.S. at 558–59. Moreover, the Defendant-Intervenor does not claim that application of the Federal Circuit's decisions in *Dongbu* and *JTEKT will not* materially alter the result, only that it *may not* alter the result. It is equally clear that application of *Dongbu* and *JTEKT* may materially alter the result. If application of these intervening judicial decisions does not materially alter the result, remand will be harmless.

[12] A nonmarket economy country is defined as "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). None of the parties dispute that Vietnam is an NME.

Though the statute does not define "best available information" it does require Commerce to "utilize, to the extent possible, the prices or costs of factors of production in one or more [surrogate] market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." § 1677b(c)(4).[13]

Commerce has wide discretion in selecting surrogate value data. "[T]he process of constructing foreign market value for a producer in a nonmarket economy country [using surrogate values] is difficult and necessarily imprecise[,]" and, "[w]hile § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citation omitted) (internal quotation marks omitted). The court will not reverse Commerce's surrogate value decision or data choice because an alternative inference or conclusion could be drawn from the evidence. *Daewoo Elec. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[The] court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)); *see also Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1770, 298 F. Supp. 2d 1328, 1336 (2003) ("The Court's role . . . is not to evaluate whether the information Commerce used was the best available, but rather whether Commerce's choice of information is reasonable.").

As noted above, Plaintiffs and Defendant-Intervenor challenge several of Commerce's decisions or data choices concerning surrogate values, surrogate financial ratios, and surrogate labor wage rates. These determinations are discussed individually below.

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[13] For the administrative review under consideration, Commerce chose Bangladesh as the surrogate market economy. Mem. from Bobby Wong, Senior Analyst, to Scot Fullerton, Program Manager, 1 (Mar. 8, 2010), Admin. R. Pub. Doc. 176 ("Surrogate Value Mem."). No party challenges this determination.

A. Exclusion of Bangladesh-to-Bangladesh Import Data from Valuation of Factors of Production

As noted above, Bangladesh was chosen as the surrogate market economy country for this administrative review. The Department used United Nations ComTrade Statistics as its primary source of surrogate value data for factors of production in Bangladesh. *Preliminary Results*, 75 Fed. Reg. at 12,214. In the *Final Results*, Commerce chose to exclude imports into Bangladesh that were listed in the ComTrade data as originating from Bangladesh. Commerce reasoned that goods moving from Bangladesh-to-Bangladesh could not be considered imports. *I & D Mem.* Cmt. 6 at 21. Thus, Commerce concluded that "[b]ecause the constitution of this data is unclear, we do not find that it represents the best available information upon which to rely for valuation purposes." *Id.*

Plaintiffs argue that Commerce erred in excluding the Bangladesh-to-Bangladesh data because the result was to distort the values of the affected factors of production.[14] Pls.' Br. 25–27. Plaintiffs further argue that Commerce's decision to exclude the Bangladesh-to-Bangladesh data was inconsistent with Commerce's prior practice because the Bangladesh-to-Bangladesh data did not fall into one of three enumerated categories of data that Commerce generally excludes from consideration.[15] *Id.* at 25.

Commerce contends, as it did at the administrative level, that the nature of the Bangladesh-to-Bangladesh data is uncertain, which it believes is a sound basis for excluding the data as not the best available information. Def.'s Resp. Br. 28–30; *I & D Mem.* Cmt. 6 at 21. Commerce further contends that the data should be excluded

[14] According to an example provided by the Plaintiffs, "the altered price for cartons in the [*Final Results*] is dramatically higher than the value in the first review, second review, third review, and preliminary results of the fourth review, by the following percentages: 432 percent higher, 375 percent higher, 259 percent higher, and 355 percent higher, respectively." Pls.' Br. 23.

[15] To identify the three enumerated categories of excludable data, Plaintiffs point to the following statement in the Department's Issues and Decision Memorandum accompanying the Final Results in the third administrative review of this antidumping duty order:

> It is the Department's established practice, when using import data as a surrogate value source, to use the AUV for the input imported from *all* countries, with three exceptions: imports from countries that the Department has previously determined to be NME countries, imports from countries which the Department has determined subsidize exports, and imports that are labeled as originat[ing] from an "unspecified" country.

Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 74 Fed. Reg. 47,191 (Dep't Commerce Sept. 15, 2009) (final results and final partial rescission of antidumping duty administrative review) ("*AR3 Final Results*"), and accompanying Issues & Decision Memorandum, A-552–802, ARP 07–08 (Sept. 8,2009) Cmt. 7 at 33–34 ("*AR3 I & D Mem.*") (adopted in *Final Results*, 74 Fed. Reg. at 47,191–92).

without recourse to its prior enumerated categories because the Bangladesh-to-Bangladesh data is, by definition, not import data. Def.'s Resp. Br. 29.

On this record, Commerce's decision is reasonable. As Commerce noted in the *Final Results*, "[t]here is no record evidence as to whether the goods classified as imports from Bangladesh into Bangladesh are re-importations, another category of unspecified imports, or the result of an error in reporting." *I & D Mem.* Cmt. 6 at 21. Without a clear explanation of the source or nature of this data, it was reasonable for Commerce to exclude the Bangladesh-to-Bangladesh data as potentially aberrational. *See Guangdong Chem. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1419, 460 F. Supp. 2d 1365, 1370–71 (2006) (finding that lack of information on how data points were chosen for a data set was a reasonable basis for rejecting the data set).

Plaintiffs point to the increased values for factors of production, where Bangladesh-to-Bangladesh data was excluded, and note that by excluding that data only a fraction of total imports remained from which a value could be derived. However, the Plaintiffs' argument does not provide a basis for finding that the Bangladesh-to-Bangladesh data was reliable or the best available. The exclusion of the data may have changed the results, but such a change is not, alone, a basis for the court to insist that the data is the best available. Rather, Plaintiffs' argument assumes that because the resulting values are inconsistent with those generated in prior reviews, inclusion of the Bangladesh-to-Bangladesh data is the best available information. Plaintiff's assumption is insufficient to rebut Commerce's reasoned analysis that, without knowing the nature of the data, Commerce could not know the value of the data. *See Zhejiang*, 652 F.3d at 1342 (finding that plaintiff's assumption that one data set is correct is not sufficient to challenge Commerce's choice of the opposing data set). Furthermore, Plaintiffs are not now in a position to argue that Commerce should have further investigated the ComTrade data, when Plaintiffs could have assumed that responsibility themselves and placed such further evidence on the record. *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))).

B. Calculation of Surrogate Financial Ratios

After Commerce determines a surrogate value for the factors of production, there "shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See* 19 U.S.C. § 1677b(c)(1)(B). These expenses include factory overhead; selling, general, and administrative expenses ("SG&A"); and profit. To value factory overhead, SG&A, and profit, Commerce uses financial ratios derived from "nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4) (2011)[16]; *see also I & D Mem.* Cmt. 3 at 10.

In this review, Commerce received financial statements for five Bangladeshi companies and determined that only two, Apex Foods Ltd. ("Apex") and Gemini Sea Food Ltd. ("Gemini"), represented "the best available information." *I & D Mem.* Cmt. 3 at 10. Defendant-Intervenor AHSTAC challenges both Commerce's rejection of the 2008–2009 financial statement from Fine Foods Ltd. ("Fine Foods") and the classification of loading and unloading expenses listed on Gemini's financial statement. Def.-Intervenor's Mem. Supp. Mot. J. Agency R. 7–17, ECF No. 65 ("Def.-Intervenor's Br.").[17]

Though the two issues will be discussed independently below, the court reviews both determinations on a substantial evidence standard. The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting *SSIH Equip. SA v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983)). The court will not upset Commerce's decision simply because alternative inferences or conclusions can be drawn from the evidence, *Daewoo*, 6 F.3d at 1520, but only if no "reasonable mind could conclude that Commerce chose the best available information," *Zhejiang*, 652 F.3d at 1341 (quoting *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327) (internal quotation marks omitted).

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[16] Unless otherwise noted, all subsequent citations to the Code of Federal Regulations are to the 2011 edition.

[17] AHSTAC also asserts a third argument, contending that Commerce's approach to these two issues was arbitrary – because it inconsistently rejected the Fine Foods financial statement for lack of certainty regarding its status as a shrimp processor but determined that the Gemini loading and unloading expenses were movement expenses on even more uncertain record evidence. Def.-Intervenor's Br. 17–18. What AHSTAC points out is nothing more than the contextual nature of these determinations. So long as each decision is made using a reasonable methodology and based on a reasonable reading of the record evidence, the court will not upset the determinations.

1. Fine Foods Financial Statement

Commerce rejected the Fine Foods financial statement as not the best available information because "[a] careful review of the Fine Foods financial statement shows that Fine Foods is a farmer of fish and fish products, and is not a processor of shrimp." *I & D Mem.* Cmt. 3.D at 15. AHSTAC argues that because the Fine Foods financial statement lists "processing fish" among its main activities and shrimp among its turnover, the conclusion must be drawn that Fine Foods processes shrimp. Def.-Intervenor's Br. 9–11; *see also* Fine Foods Ltd. Annual Report 2009, ¶ 1.3, at 17, ¶ 21 at 26, *reprinted in* Letter from Pickard Kentz & Rowe LLP to Secretary of Commerce (Apr. 9, 2010), Admin. R. Pub. Doc. 195, attach 3 ("Fine Foods Financial Statement").

Even assuming, *arguendo*, that AHSTAC's conclusions may reasonably be drawn from the Fine Foods financial statement, it is equally reasonable to draw the conclusion that Fine Foods does not process shrimp. To arrive at either conclusion, Commerce must have drawn an inference from the record: either shrimp, being listed in turnover alongside fish, are considered fish when Fine Foods states that it "processes fish," or, because Fine Foods does not state that it processes shrimp, shrimp are treated differently from fish. There is nothing definitive in the financial statement to indicate that Fine Foods is or is not a processor of shrimp. Because two alternative inferences could reasonably be drawn from the record, the court defers to Commerce's decision. *Daewoo*, 6 F.3d at 1520.

In addition, Commerce's rejection of the Fine Foods financial statement does not rest solely on whether Fine Foods processes shrimp. Assuming, *arguendo*, that Fine Foods is a processor of shrimp, it must also be assumed that Fine Foods is a farmer of shrimp – as its financial statement lists production and breeding among its main activities.[18] Therefore, Fine Foods, unlike the mandatory respondents in this review, is vertically integrated. *I & D Mem.* Cmt. 3.D at 15. This is sufficient reason for Commerce to determine that Fine Foods' "production experience[ ] [is] less representative of respondents' production experience, [as shrimp processors] and therefore,

[18] Fine Foods' financial statement lists the "main activities of the company" as "[p]roduction of fish, fish product, fish spawn breeding, fingerling growing, production of fish meal & oil, processing fish and marketing the same products in local and foreign market. Plantations of good quality timber trees." Fine Foods Financial Statement ¶ 1.3 at 17. Assuming that "fish" includes shrimp in the phrase "processing fish," it is equally reasonable to assume that "fish" includes shrimp in the phrases "production of fish" and "fish spawn breeding."

[does] not represent the best information available for the purpose [ ] of calculating surrogate financial ratios." *Id.*[19]

2. Gemini's Loading and Unloading Expenses

In the *Final Results*, Commerce found that, "based on the limited description in Gemini's financial statement, loading and unloading expenses are best considered as movement expenses and thus should be excluded from the surrogate financial ratio calculation." *Id.* Cmt. 3.A at 11.[20] AHSTAC challenges Commerce's finding on two grounds. First, AHSTAC argues that Commerce's decision is not supported by substantial evidence on the record. Second, AHSTAC argues that Commerce has insufficiently explained its decision.

In its first line of argument, AHSTAC contends that the record does not contain substantial evidence supporting Commerce's decision to consider the line item for loading and unloading as movement expenses appropriate for exclusion from the surrogate financial ratio calculation. Def.-Intervenor's Br. 13–14. Rather, AHSTAC contends that these loading and unloading expenses are related to the movement of goods and materials within "production facilities or warehouses." *Id.* at 14.

AHSTAC does not, however, provide any compelling evidence supporting its interpretation of the expense in question or establishing that Commerce's conclusion is unreasonable. Rather, AHSTAC's argument before Commerce and again before this court is only that "the loading and unloading expenses are listed as a line item in the Gemini Financial Statement next to a line item for depreciation support[ing] their classification as SG&A, given that that [sic] Commerce calculates SG&A including line items for depreciation." *Id.* at 13–14; *see* AHSTAC Rebuttal Br., Admin. R. Pub. Doc. 209, at 6; *see also* Gemini Sea Food Ltd. Annual Report 2007–2008 at 29, *reprinted in* Surrogate Value Memo, exhibit 9 ("Gemini Annual Report"). The court finds no reason, based on the record evidence, to infer from the adjacent placement of these line items any relationship or correlation between them.

Even more importantly, Commerce's determination, based on its expertise and prior practice, is reasonable. In their Case Brief to Commerce, the Vietnamese respondents pointed out that the Depart-

[19] The court also notes that a straightforward reading of Fine Foods' financial statement clearly indicates that its basic character is that of a farm or plantation rather than a shrimp processor.

[20] The Department notes that it includes freight expenses in its dumping calculations for each company, therefore it excludes similar expenses from the SG&A calculation to avoid double-counting. *Id.*

ment excluded loading and unloading expenses from the surrogate financial ratio in the third administrative review of this Order. Vietnamese Resp'ts' Case Br., Admin. R. Pub. Doc. 206, at 12; *I & D Mem.* Cmt. 3.A. at 11. Similarly, Commerce noted in the *Final Results* that its practice is to exclude movement expenses from surrogate financial ratios in order to avoid double-counting. *I & D Mem.* Cmt. 3.A at 11; *see also Fuyao Glass Indus. Grp. v. United States*, 27 CIT 1892, 1909 (2003) (remanding to Commerce to demonstrate that valuing water as a separate factor of production did not result in impermissible double-counting). The Department pointed to a prior review where it had similarly classified "loading and unloading" expenses as movement expenses to be excluded from surrogate financial ratios. *I & D Mem.* Cmt. 3.A at 11 n.61; *Certain Frozen Warmwater Shrimp from India*, 74 Fed. Reg. 9,991, 9,995, 9,998 (Dep't Commerce Mar. 9, 2009) (preliminary results and preliminary partial rescission of antidumping duty administrative review) (unchanged in final results).[21]

This analysis is similar to that affirmed in *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 366 F. Supp. 2d 1264 (2005). In *Hebei*, Commerce determined on remand that "'internal consumption' represented only inter-facility transfers, which would be double-counted if not removed from the expense values in the surrogate ratios' denominators." *Id.* at 304, 1277. Though the plaintiffs attacked Commerce's determination as "unsupported speculation," the Court held that Commerce, relying on prior investigations where it deducted internal consumption, drew reasonable inferences from the record. *Id.* at 304–05, 1278–79. In this case, Commerce also drew a reasonable inference from the record evidence, using its past experience as a guide, that the loading and unloading expenses in the Gemini financial statement were movement expenses that should be excluded from the surrogate financial ratios to avoid impermissible double-counting.

[21] For other examples where Commerce has categorized "loading and unloading" expenses as movement expenses *see Certain Frozen Warmwater Shrimp from India*, 75 Fed. Reg. 12,175, 12,181, 12,184 (Dep't Commerce Mar. 15, 2010) (preliminary results of antidumping duty administrative review, partial rescission of review, notice of intent to rescind review in part, and notice of intent to revoke order in part); *Certain Frozen Warmwater Shrimp from India*, 73 Fed. Reg. 12,103, 12,109–10, 12,112 (Dep't Commerce Mar. 6, 2008) (preliminary results and preliminary partial rescission of antidumping duty administrative review); *Structural Steel Beams from Korea*, 69 Fed. Reg. 53,887, 53,889 (Dep't Commerce Sept. 3, 2004) (preliminary results of antidumping duty administrative review); *Structural Steel Beams from the Republic of Korea*, 68 Fed. Reg. 53,129, 53,131–32 (Dep't Commerce Sept. 9, 2003) (preliminary results of antidumping duty administrative review); *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China*, 61 Fed. Reg. 15,028, 15,033 (Dep't Commerce Apr. 4, 1996) (final results of antidumping administrative review).

As noted above, AHSTAC argues that Commerce insufficiently explained its decision to exclude loading and unloading expenses from the surrogate financial ratios, contending that "Commerce merely referenced the 'limited description' of these expenses and thereafter stated its general approach to calculating surrogate financial ratios." Def.-Intervenor's Br. 15. However, AHSTAC ignores the discussion in the *Final Results* of Commerce's policy of avoiding double-counting and its belief, based on prior experience, that loading and unloading expenses are best classified as movement expenses to avoid such double-counting. Though Commerce's discussion may not be as thorough as AHSTAC would like, the agency's "decisional path is discernable," and a more "explicit explanation . . . is not necessary." *AL Tech Specialty Steel Corp. v. United States*, 28 CIT 1468, 1489 (2004) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (internal quotation marks omitted)).

C. Multi-country Averaging for Surrogate Labor Wage Data

As noted above, when valuing most factors of production Commerce analyzes data from a single market economy country. *See* 19 C.F.R. § 351.408(c)(2); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367–68 (Fed. Cir. 2010). Until recently, Commerce valued surrogate labor wage rates differently, using regression analysis to determine wage rates based on "the observed relationship between wages and national income in market economy countries." *See* § 351.408(c)(3); *Dorbest*, 604 F.3d at 1368. However, in *Dorbest*, the Federal Circuit invalidated § 351.408(c)(3), holding that the regulation did not comply with 19 U.S.C. § 1677b(c)(4) which requires use of data from economically comparable countries that are significant producers of comparable merchandise. *Dorbest*, 604 F.3d at 1372 ("[19 C.F.R. § 351.408(c)(3)] improperly requires using data from both economically comparable and economically dissimilar countries, and it improperly uses data from both countries that produce comparable merchandise and countries that do not.").

Dorbest was decided on May 14, 2010, following the *Preliminary Results* but prior to the *Final Results* in the fourth administrative review at issue here. In light of the decision of the Court of Appeals in *Dorbest*, Commerce sought comments from interested parties on a new methodology for calculating surrogate wage rates in the instant review. *Final Results*, 75 Fed. Reg. at 47,772. After considering the comments, Commerce decided to value surrogate wage rates "by averaging earnings and/or wages in countries that are economically comparable to Vietnam and that are significant producers of compa-

rable merchandise." *Id.*; *see also I & D Mem.* Cmt. 9 at 27–31. Among the methodologies Commerce rejected was a proposal by the Vietnamese respondents to "value labor using wage data specific to the shrimp processing industry in Bangladesh taken from the Bangladesh Bureau of Statistics' 2007 Wage Survey." *I & D Mem.* Cmt. 9 at 26.

Plaintiffs now contend that it was error for Commerce to use Court No. 10–00238 Page 27 an averaging methodology that uses data from multiple countries, rather than using the industry specific data on shrimp processing wages in Bangladesh, the surrogate country used in valuing other factors of production. Pls.' Br. 27. Plaintiffs argue that the Bangladesh data is the "best available information," because it is the most industry specific data on the record, and that such specific data is required by the statute and relevant case law. *Id.* at 31–33. Commerce maintains that it has broad discretion to determine what is the best available information, and that its decision – that "reliance on wage data from a single country [is] unreliable and arbitrary" – is a reasonable determination. *I & D Mem.* Cmt. 9 at 27.

These competing positions require the court to decide whether the only reasonable interpretation of the statute is that industry specificity trumps other concerns when considering what constitutes best available information under 19 U.S.C. § 1677b. The court answers this question in the negative.

First, the plain language of the statute does not require that the best available information include industry specific information when such is available.

> The best available information concerning the valuation of a particular factor of production may constitute information from the surrogate country that is directly analogous to the production experience of the NME producer . . . or it may not. . . . Commerce need not duplicate the exact production experience of the [NME] manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value . . . .

See Nation Ford, 166 F.3d at 1377 (citation omitted) (internal quotation marks omitted).

While § 1677b(c)(3) directs Commerce to obtain values for the "factors of production utilized in producing [the subject] merchandise," § 1677b(c)(4) specifies that these values are, "to the extent possible," to come from "market economy countries that are significant producers of comparable merchandise." Assuming that by using the phrase "comparable merchandise," Congress intended Commerce to consider factors of production for industries in the surrogate country or coun-

tries as similar as possible to those in the NME, it unduly strains the language to hold that specificity is the sole touchstone of the analysis, to the exclusion of such factors as data stability and reliability.

Second, contrary to Plaintiffs' assertion, the legacy of *Dorbest* and this Court's decision in *Allied Pac. Food (Dalian) Co. v. United States*, __ CIT __, 587 F. Supp. 2d 1330 (2008), is neither that "the statute contains no exception for how the labor factor of production should be selected," nor that "the pursuit of the best available information requires Commerce to apply to the selection of labor surrogate values the same selection criteria it applies when selecting other surrogate values." Pls.' Br. 32. Plaintiffs read both decisions too narrowly and would constrain Commerce in an area where the Department has broad discretion. *See Nation Ford*, 166 F.3d at 1377. Contrary to Plaintiffs' reading, in *Dorbest* and *Allied Pac.*, the Court of Appeals and this Court, respectively, held specifically that 19 C.F.R. § 351.408(c)(3) was contrary to 19 U.S.C. § 1677b(c)(4) because it required the use of data that was prohibited by the statute. *Dorbest*, 604 F.3d at 1372; *Allied Pac.*, __ CIT at __, 587 F. Supp. 2d at 1357–61.

Dorbest held that, pursuant to § 1677b(c)(4), Commerce's regulation employing regression analysis was overbroad because it included non-comparable countries. *Dorbest*, 604 F.3d at 1372–73. *Dorbest* did not hold that the regulation lacked industry specificity, nor did it discuss the idea of industry specificity. *Id.* at 1371–72. By invalidating § 351.408(c)(3), *Dorbest* required that any new methodology must comport with the statute by limiting itself to countries that were of comparable economic development *and* significant producers of comparable merchandise. *Id.*

In *Allied Pac.*, this Court did endorse the use of industry specific data.[22] *Allied Pac.*, 587 F. Supp. 2d at 1357–58. However, it stopped short of holding that such data is required by § 1677b(c)(4). Rather, *Allied Pac.* held that Commerce's regression-based regulation, which prohibited Commerce from even considering such industry-specific data, could not withstand judicial scrutiny in light of the plain lan-

[22] The Court noted that "[l]egislative history supports the principle that Congress intended Commerce to use, where possible, information on the cost of the specific labor used to produce the subject merchandise." *Allied Pac.*, 587 F. Supp. 2d at 1357. The Court then went on to give the following example:

> It is at least conceivable that a party to a proceeding might obtain, from one or more countries that are economically comparable to China and are significant producers of merchandise comparable to the subject merchandise, information on wage rates in the specific industry that produces the comparable merchandise or on wage rates for the specific type of labor used. Such information would seem to be ideal, according to the statutory criteria of 19 U.S.C. § 1677(b)(c)(1) and (c)(4), for the purpose of valuing the hours of labor required to produce the subject merchandise.

Id. at 1358.

guage of the statute. *Id.* at 1357, 1361. Thus, in light of *Dorbest* and *Allied Pac.*, so long as all the data on the record is limited to countries meeting the § 1677b(c)(4) criteria and the record is not foreclosed to any data meeting that criteria, Commerce retains the discretion to consider all of the data on the record and determine what constitutes the best available information.

Third, Commerce's preference for industry-specific data does not necessarily outweigh its preference for labor data from multiple countries. Plaintiffs correctly note that Commerce has expressed a preference for industry-specific data. *See* Pls.' Br. 29–30. However, Commerce also has a long-standing policy of favoring data from multiple countries when calculating surrogate wage rates. *I & D Mem.* Cmt. 9 at 28 ("[T]he Department maintains its longstanding position that, even when not employing a regression methodology, more data are still better than less data for purposes of valuing labor."). Commerce, in this case, chose to use data from multiple countries over industry-specific data because it believed that this led to more accurate values. Def.'s Resp. Br. 34. Such a result is not inconsistent with Commerce's stated policies.

It follows that the language of the statute, the relevant case law, and the agency's established methodologies do not support the proposition that a predominating preference for industry-specificity is the only reasonable interpretation of the statute. *See Shandong Rongxin Imp. & Exp. Co. v. United States*, __ CIT __, 774 F. Supp. 2d 1307, 1314 (2011). Furthermore, Commerce's decision on this issue was reasonable. The court accepts, as does Commerce, that industry-specificity may add accuracy to data used to calculate surrogate values. However, Commerce has also repeatedly pointed out the discrepancies that exist between wages and gross national income ("GNI"), noting in the *Final Results* that:

> [f]or example, when examining the most recent wage data, even for countries that are relatively comparable to Vietnam in terms of GNI for purposes of factor valuation . . . the wage rate spans from USD 0.49 to USD 1.30. . . . There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries.

I & D Mem. Cmt. 9 at 27–28.

In this case, Commerce had industry-specific data for one country, Bangladesh. *Id.* at 24–27. With industry-specific data for only one country, Commerce was faced with making a choice between specificity and accounting for wage rate variance by averaging data from as

many countries as possible. It chose the latter. A reasonable mind could determine that Commerce chose the best available information, *see Zhejiang*, 652 F.3d at 1341; *see also Shandong*, __ CIT at __, 774 F. Supp. 2d at 1314, and the court will not upset Commerce's reasonable choice. *Zhejiang*, 652 F.3d at 1341.

Finally, the court does not find, as Plaintiffs suggest in their reply brief, that Commerce's subsequent decision – to use, in future reviews, wage rate data from a single surrogate country – is a basis for finding unreasonable the decision to use multi-country averaging in this review. Pls.' Reply Mem. Supp. Mot. J. Agency R. 7–8, ECF No. 95 ("Pls.' Reply Br."). The court recognizes that, going forward, Commerce has adopted a policy similar to that advocated by Plaintiffs in this review. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,094 (Dep't Commerce June 21, 2011) ("*Labor Valuation Methodology*") ("Pursuant to the comments received and the Department's analysis thereof, the Department will value the NME respondent's labor input using industry-specific labor costs prevailing in the primary surrogate country, as reported in Chapter 6A of the ILO Yearbook of Labor Statistics."). However, this policy change was issued almost eleven months after the *Final Results* in the fourth administrative review.[23]

Furthermore, Commerce's decision to move away from multi-country averaging was premised, in large part, on the intervening decision in *Shandong*, where this Court held that because 19 U.S.C. § 1677b(c)(4) requires that surrogate countries be *significant* producers of comparable merchandise, Commerce could not use data including countries which "almost certainly have no domestic production." *Shandong*, __ CIT at __, 774 F. Supp. 2d at 1316.[24] In light of the Court's holding in *Shandong*, Commerce found that "the base for an average wage calculation would be so limited that there would be little, if any, benefit to relying on an average of wages from multiple countries for purposes of minimizing the variability that occurs in wages across countries." *Labor Valuation Methodology*, 76 Fed. Reg. 36,093. Because the circumstances at the time of the fourth admin-

[23] The new policy, itself, cannot control in this case because it is not retroactive. *See Labor Valuation Methodology*, 76 Fed. Reg. at 36,093 (applying new methodology to antidumping proceedings "initiated on or after the date of publication of this Federal Register notice"); *see also Dorbest Ltd. v. United States*, __ CIT __, 789 F. Supp. 2d 1364, 1369 n.9 (2011) ("While Dorbest urges the court to hold that Commerce's current methodology is unlawful when considered in light of Commerce's recent announcement [valuing labor using a single surrogate country], the court cannot do so because Commerce's change in methodology is not retroactive.").

[24] No party claims that the data relied on here was inconsistent with *Shandong*.

istrative review were not the same as those that led Commerce to change its labor valuation methodology, the court will not hold Commerce's earlier decision unreasonable.

III. Commerce's Denial of Grobest's Revocation Request

Plaintiff Grobest contends that Commerce improperly denied its request for revocation on the grounds that it was not reviewed as a mandatory respondent.[25] Grobest makes three primary arguments supporting its claim for revocation review. First, Grobest asserts that 19 U.S.C. § 1677f-1(c)(2), which permits Commerce to limit the number of companies it reviews, does not apply in the context of a request for revocation. Pls.' Br. 43–46. Second, Grobest asserts that Commerce should have applied the procedure articulated in *Certain Fresh Cut Flowers from Colombia* ("*Flowers*") in this review.[26] Pls.' Br. 37–43. Third, Grobest asserts that Commerce should have reviewed it as a voluntary respondent in accordance with 19 U.S.C. § 1677m(a). Pls.' Br. 46–47.

Grobest's first and second arguments are addressed by the Court's recent decision in *Amanda Foods (Vietnam) Ltd. v. United States*, 35 CIT __, Slip Op. 11–155 (Dec. 14, 2011), which reviewed the third administrative review of this Order. The third issue, Grobest's request for voluntary respondent status, was not addressed in *Amanda Foods* because the plaintiff in that case did not seek voluntary respondent status. *Id.* at 28.

Regarding Grobest's first argument, the court notes, as discussed at length in *Amanda Foods*, that neither the statutes nor the regulations relevant to administrative review and revocation of antidumping duty orders require the Department to initiate an individual review upon request for revocation. *See Id.* at 21–22. In *Amanda Foods*, the Court held reasonable Commerce's interpretation of 19 U.S.C. § 1675(d)(1), which requires an individual review under § 1675(a) or (b) (i.e., in an administrative review or a changed circum-

[25] In the Respondent Selection Memorandum for the fourth administrative review, Commerce, pursuant to 19 U.S.C. § 1677f-1(c)(2)(B), limited the number of mandatory respondents selected for review to the two largest companies by import volume. Memorandum from Scot T. Fullerton, Program Manager, to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations 1–4 (June 11, 2009), Admin. R. Pub. Doc. 89 ("Resp't Selection Mem."). The companies selected as mandatory respondents were Minh Phu and Nha Trang. *Id.* at 7. The Department received 143 requests for review, of which eighteen respondents also requested revocation. *Id.* at 1. Twelve respondents subsequently withdrew their revocation requests but maintained their requests for review. *Id.* at 1–2.

[26] *Certain Fresh Cut Flowers from Colombia*, 62 Fed. Reg. 53,287, 53,290–91 (Dep't Commerce Oct. 14, 1997) (final results and partial rescission of antidumping duty administrative review) ("*Flowers Final Results*").

stances review) as a prerequisite to revocation. *Id.* at 13–18. It follows, that it is also a reasonable interpretation of the statute for Commerce to conclude that when the number of respondents is limited under § 1677f-1(c)(2) for the purpose of review, respondents who are not selected for individual review, whether mandatory or voluntary, are ineligible for revocation. *Id.* Furthermore, it is reasonable for the Department to interpret its regulations, found at 19 C.F.R. § 351.222, as procedures for conducting a revocation when a respondent has been selected for individual review. *Id.* at 18–22. This interpretation is consistent with both the regulatory language and the statutory structure. *Id.* Because neither 19 U.S.C. § 1675(d) nor 19 C.F.R. § 351.222 requires a separate review for the purposes of revocation, the court finds Grobest's appeal to these provisions unavailing.

The court also finds Grobest's second argument, that Commerce should have applied the *Flowers* procedure, unavailing. As the court articulated in *Amanda Foods*, the procedure announced in *Flowers* is not binding on Commerce. *Id.* at 27–28. The *Flowers* procedure was never implemented in practice, nor has Commerce subsequently relied upon this procedure to govern a review. *Id.* Furthermore, Commerce has "in practice, changed its policy to rely instead on the voluntary review process in order to achieve the objectives stated in *Flowers* . . . ." *Id.* Given this history, the court finds that the *Flowers* procedure is not a precedential agency policy.

Thus, the court turns to Grobest's third argument, which was not considered in *Amanda Foods*. Grobest argues that it should have been reviewed as a voluntary respondent, pursuant to 19 U.S.C. § 1677m(a),[27] because (1) Commerce limited the number of companies individually examined under § 1677f-1(c)(2); (2) Grobest complied with the statutory requirements for voluntary respondent status; and (3) the number of companies seeking voluntary respondent status, two, would not have been unduly burdensome to review. Pls.' Br. 46–47. Commerce maintains that considering companies as voluntary respondents is discretionary, and that because it determined

[27] Section 1677m(a) reads in relevant part:

> In . . . a review under section 1675(a) of this title in which the administering authority has, under section 1677f-1(c)(2) of this title . . . limited the number of exporters or producers examined . . . [Commerce] shall establish . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination . . . who submits to the administering authority the information requested from exporters or producers selected for examination, if (1) such information is so submitted by the date specified (A) for exporters and producers that were initially selected for examination . . . and (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

under § 1677f-1(c)(2) that it could only review two mandatory respondents, reviewing any voluntary respondents would have been unduly burdensome. Def.'s Resp. Br. 18–21.

Commerce's determination fails to comply with § 1677m(a), which requires that Commerce separately determine whether reviewing the voluntary respondents "would be unduly burdensome and inhibit the timely completion of the investigation." Commerce's determination is, therefore, an unreasonable interpretation of the statute because it violates the well-established principle that, where possible, the court should give effect to all parts of the statute. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (citations omitted) (internal quotation marks omitted)).[28]

Contrary to this principle of statutory construction, Commerce's interpretation of § 1677m(a) renders that provision meaningless. Commerce argues that when it limits the number of mandatory respondents under § 1677f-1(c)(2), it need not consider any voluntary respondents under § 1677m(a) because it has already determined the number of respondents that it can review (in this case two). Def.'s Resp. Br. 18. But this argument conflates the two statutory provisions and renders § 1677m(a) a dead letter. Though § 1677m(a) is written to have effect only when Commerce "has, under 1677f-1(c)(2) . . . limited the number of exporters or producers examined," Commerce's interpretation would mean that § 1677m(a) review of voluntary respondents is already curtailed once a § 1677f-1(c)(2) decision to limit the number of respondents is made.[29]

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[28] More generally, following step one of the familiar *Chevron* analysis, the court employs the traditional tools of statutory construction to determine whether Congress has spoken directly to the issue. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

[29] Commerce also argues that the purpose of § 1677m(a) is to permit voluntary respondents to fill vacancies created when one or more mandatory respondents are not reviewed. *See, e.g.*, *Calgon Carbon Corp. v. United States*, 35 CIT __, Slip Op. 11–21 (Feb. 17, 2011) (reviewing voluntary respondent where mandatory respondent refused to participate). Commerce further contends that, because a mandatory respondent could exit the review process opening a spot for voluntary respondents, using § 1677f-1(c)(2) to limit the number of respondents generally does not foreclose the opportunity for voluntary respondents to obtain review. Rather, according to Commerce, it only forecloses the opportunity for voluntary respondents when it declares, at the outset, that it will not consider *any* voluntary respondents. *See, e.g.*, *Zhejiang Native Produce & Animbal By-Products Imp. & Exp. Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1260 (2011).

The court finds this interpretation of the statute unreasonable. Such an interpretation fails to address the bifurcated nature of the two statutory provisions at issue, §§ 1677f-1(c)(2) and 1677m(a), as discussed above. Furthermore, such an interpretation surely discourages voluntary respondents because it confines the opportunity for voluntary

Furthermore, Commerce has misread the statute. According to Commerce, under § 1677m(a), "if Commerce limits the number of respondents it individually reviews, it *may* still consider voluntary respondents who request review only if 'the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.'" Def.'s Resp. Br. 18 (emphasis added) (quoting 19 U.S.C. § 1677m(a)). However, the language of the statute states:

> [Commerce] *shall establish* . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination . . . [if] the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

19 U.S.C. § 1677m(a)(emphasis added). Contrary to Commerce's view that the statute contains a discretionary grant of authority to review voluntary respondents if such review is practical, the statute plainly requires Commerce to conduct individual reviews unless such reviews would be unduly burdensome and inhibit the timely completion of the investigation.

Finally, Commerce ignores the separate standards set out in §§ 1677f-1(c)(2) and 1677m(a). Where § 1677f-1(c)(2) permits Commerce to limit the number of mandatory respondents "[i]f it is not practicable to make individual weighted average dumping margin determinations," § 1677m(a) sets a higher standard, requiring review of voluntary respondents unless such review "would be unduly burdensome and inhibit the timely completion of the investigation." The two, distinct standards call for separate determinations, and the latter determination, pursuant to § 1677m(a), sets a higher threshold of agency burden before the requirement of individual review can be avoided.

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respondent review to the irregular situation where a mandatory respondent is not reviewed. Such discouragement is contrary to the expressed intent of Congress, which noted in the Statement of Administrative Action for the Uruguay Round Agreements Act that "Commerce, consistent with Article 6.10.2 of the Agreement will not discourage voluntary responses and will endeavor to investigate all firms that voluntarily provide timely responses in the form required . . . ." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201. To limit voluntary respondents through § 1677f-1(c)(2) is to foreclose the review under § 1677m(a) barring the unexpected and irregular.

Arguing to the contrary, Commerce relies on this Court's opinion in *Longkou Haimeng Mach. Co. v. United States*, __ CIT __, 581 F. Supp. 2d 1344 (2008), for the proposition that Commerce may choose not to review voluntary respondents once it has limited the number of mandatory respondents it will review. Def.'s Resp. Br. 20. Commerce is correct that in *Longkou* the Court held that Commerce has exclusive authority to limit the number of respondents it examines, and that it may limit the number of respondents solely to mandatory respondents. *Longkou*, __ CIT at __, 581 F. Supp. 2d at 1352. In other words, Commerce is not absolutely required to review voluntary respondents, as the exception clause at § 1677m(a)(2) makes clear. However, *Longkou* does not stand for the proposition that Commerce's determination under § 1677f-1(c)(2) is effective in determining whether it will review voluntary respondents. That question was not reached in *Longkou*.[30]

Thus, the court finds that Congress has spoken directly to the issue of whether Commerce's determination under § 1677f-1(c)(2) controls its decision to review voluntary respondents under § 1677m(a). *See Chevron*, 467 U.S. at 842–43. Congress intended for respondents to have the opportunity to seek voluntary respondent status, without having such efforts foreclosed by the Department's determination under § 1677f-1(c)(2), the very decision that initiates the § 1677m(a) process. Thus, in order for § 1677m(a) to be meaningful, it must be read as requiring Commerce to make an independent determination of whether it can review the voluntary respondents without such review being unduly burdensome and inhibiting the timely completion of the investigation.

For these reasons, Commerce's determination will be remanded.

IV. Commerce's Rejection of Amanda Foods' Separate Rate Certification

In antidumping proceedings concerning NME countries, such as Vietnam, Commerce presumes that all exporters and producers in the country are subject to government control unless the exporter or producer rebuts this presumption by showing *de jure* and *de facto*

[30] The court acknowledges that the *Longkou* opinion states that "[t]he provisions in sections 1677m(a) and 1677f-1(c)(2) are clear expressions of Commerce's statutory authority to limit the number of respondents it chooses to review." *Longkou*, __ CIT at __, 581 F. Supp. 2d at 1351. This statement is consistent with today's opinion. The court affirms its prior position that Commerce has exclusive authority to limit the number of respondents it will review, *id.* at 1352, but such determinations must be made consistent with statutory guidelines, and the court holds today that § 1677m(a) requires an independent determination of whether reviewing the voluntary respondents would be unduly burdensome and inhibit the timely completion of the investigation.

independence from government control. *See Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT __, 647 F. Supp. 2d 1368, 1374 n.9 (2009) (citation omitted).[31] Exporters or producers demonstrating such independence receive separate-rate status. If an exporter or producer received a separate rate in a prior review and has not undergone relevant changes, it may submit a separate-rate certification ("SRC") to maintain separate-rate status in subsequent reviews. *Preliminary Results*, 75 Fed. Reg. at 12,210 n.6. All other companies seeking separate-rate status must file a separate-rate application ("SRA"). *Id.*

Amanda Foods received separate-rate status based on its SRA in the initial investigation,[32] and retained its separate rate in all subsequent reviews prior to the fourth by filing an SRC.[33] In this fourth administrative review, Amanda Foods filed its SRC on July 31, 2009, ninety-five days after the deadline, Amanda Foods' Separate Rate Certification, Admin. R. Pub. Doc. 109, but more than seven months before the *Preliminary Results*. Shortly after filing the SRC, Amanda Foods sent a letter to Commerce requesting that the Department accept its late-filed submission. Letter from Mayer Brown to Secretary of Commerce (Aug. 4, 2009), Admin R. Pub. Doc. 115. On August 7, 2009, Commerce rejected Amanda Foods' SRC as untimely under 19 C.F.R. § 351.302(d)(2).[34] Letter from Scot Fullerton, Program Manager, to Amanda Foods (Aug. 7, 2009), Admin. R. Pub. Doc. 117. Amanda Foods resubmitted the SRC on August 12, 2009 requesting reconsideration. Letter from Mayer Brown to Secretary of Commerce (Aug. 12, 2009), Admin. R. Pub. Doc. 118. However, in the *Preliminary Results* Commerce maintained that it would not consider Amanda Foods' SRC because it was untimely filed and preliminarily assigned

[31] An exporter or producer that can rebut the presumption of government control will receive a separate rate; all other exporters and producers receive the country-wide rate. *Preliminary Results*, 75 Fed. Reg. at 12,210.

[32] *Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71,005, 71,009 (Dep't Commerce Dec. 8, 2004) (final determination of sales at less than fair value) ("*Investigation Results*").

[33] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 71 Fed. Reg. 42,628, 42,629 (Dep't Commerce July 27, 2006) (partial rescission of the first administrative review) (assigning respondents prior rate following rescission of review); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 73 Fed. Reg. 52,273, 52,274 n.3 (Dep't Commerce Sept. 9, 2008) (final results and final partial rescission of antidumping duty administrative review) ("*AR2 Final Results*"); *AR3 Final Results*, 74 Fed. Reg. at 47,194 n.9.

[34] 19 C.F.R. § 351.302(d)(2) states that "[Commerce] will reject such [untimely filed] information, argument, or other material, or unsolicited questionnaire response with, to the extent practicable, written notice stating the reasons for rejection."

Amanda Foods the Vietnam-wide rate. *Preliminary Results*, 75 Fed. Reg. at 12,210. Commerce maintained this position in the final results, assigning Amanda Foods the Vietnam-wide rate of 25.76%. *Final Results*, 75 Fed. Reg. at 47,776 n.16; *I & D Mem.* Cmt. 11 at 35–36.

The law applicable to this issue recognizes that Commerce has discretion both to set deadlines and to enforce those deadlines by rejecting untimely filings. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995); *see also Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1371 (2007) ("In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations."). However, Commerce's discretion in this regard is not absolute. *NTN Bearings*, 74 F.3d at 1207 ("[A] regulation which is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion."); *see also Fischer S.A. Comercio, Industria and Agricultura v. United States*, __ CIT __, 700 F. Supp. 2d 1364, 1375–77 (2010).

When considering whether Commerce's rejection of an untimely filing amounts to an abuse of discretion, the court is guided first by the remedial, and not punitive, purpose of the antidumping statute, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990), and the statute's goal of determining margins "as accurately as possible," *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The court also weighs "the burden imposed upon the agency by accepting the late submission," *Usinor Sacilor v. United States*, 18 CIT 1155, 1164, 872 F. Supp. 2d 1000, 1008 (1994), and "the need for finality at the final results stage," *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006). Thus, while deferring to Commerce's necessary discretion to set and enforce its deadlines, the court will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality.

The court's analysis of this issue is necessarily case specific. On the facts of this case, Commerce abused its discretion by refusing to accept Amanda Foods' late-filed SRC. The Vietnam-wide rate of 25.76% assigned to Amanda Foods, *Final Results*, 75 Fed. Reg. at 47,776 n.16, stands in stark contrast to the 4.27% rate assigned to the separate-rate respondents, *id.* at 47,774–75, which was later revised down to 3.92% in the *Amended Final Results*, 75 Fed. Reg. at 61,123–25. In both the second and third reviews, Commerce noted

that "because [Amanda Foods] is wholly foreign-owned, and we have no evidence indicating that its Court No. 10–00238 Page 47 export activities are under the control of the Vietnamese government, a separate rates analysis is not necessary to determine whether this company is independent from government control."[35] In the SRC that was rejected in the fourth administrative review, Amanda Foods again indicated that it was wholly owned by foreign entities located in a market economy country, Singapore. Amanda Foods' Separate Rate Certification 2. Amanda Foods received separate-rate status in the initial investigation and has maintained that status in each subsequent review prior to the fourth due to it being wholly foreign-owned; thus, it appears likely that, but for the untimeliness of its submission, Amanda Foods would have received a separate rate in the fourth administrative review, as it remains wholly foreign-owned. Therefore, Commerce's rejection of Amanda Foods' submission as untimely appears to have worked a substantial hardship upon that company and resulted in an inaccurate dumping margin.[36] This conclusion, however, is only the first step in the analysis.

As noted above, the court must weigh the interests in accuracy and fairness against the burden placed on the Department. Amanda Foods argues at length that consideration of SRCs is not a burdensome process.

> [Commerce's] stated justification of needing early submission of SRCs in order to have sufficient time to pursue questions that may arise and provide opportunities to comment on the submitted information is undermined by the fact that [Commerce's] consideration of SRCs has always been minimal and not time-consuming. By design, the SRC was structured to limit the amount of information that respondents had to submit and that [Commerce] had to review.

Consol. Pl.'s Mem. Supp. Mot. J. Agency R. 17, ECF No. 63 ("Consol. Pl.'s Br."). Commerce responds that Amanda Foods' argument is entirely speculative regarding how Commerce would react to the SRC.

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[35] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 73 Fed. Reg. 12,127, 12,132 (Dep't Commerce Mar. 6, 2008) (preliminary results, preliminary partial rescission and final partial rescission of the second administrative review) ("*AR2 Preliminary Results*"); *see also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 74 Fed. Reg. 10,009, 10,013 (Dep't Commerce Mar. 9,2009) (preliminary results, preliminary partial rescission and request for revocation, in part, of the third administrative review) ("*AR3 Preliminary Results*").

[36] The court notes that the Vietnam-wide rate of 25.76% is over six times greater than the rate of 3.92% assigned to the separate-rate respondents in the *Amended Final Results*, 75 Fed.Reg. at 61,123–25.

"Commerce cannot speculate about how it would have reacted to the information in the certification because Commerce rejected it as untimely. Thus, Amanda Foods' arguments that Commerce would not have spent much time reviewing the certification fail because they depend upon the substance of the untimely certification Commerce rejected." Def.'s Resp. Br. 41.

The court must reject both lines of argument as overbroad. The court cannot, as Amanda Foods' suggests, assume that the consideration of an SRC is perfunctory. The court acknowledges that consideration of an SRC may require further inquiry and investigation of the respondent by Commerce. However, contrary to Commerce's reasoning, a wholly hypothetical burden does not carry compelling weight. While it is not the court's place to determine whether further inquiry into Amanda Foods' SRC is necessary, every indication suggests that the burden of reviewing the SRC would not be great. Commerce has not conducted a separate-rate analysis in response to any of Amanda Foods' prior SRCs. *See AR2 Preliminary Results*, 73 Fed. Reg. at 12,132; *AR3 Preliminary Results*, 74 Fed. Reg. at 10,013. Nor did Commerce conduct any further questioning of the other separate-rate respondents in this review, whether they submitted SRCs or SRAs. *Preliminary Results*, 75 Fed. Reg. at 12,210–11. Furthermore, the court is not convinced that if further investigation of Amanda Foods' SRC were necessary, the burden on Commerce would be sufficient to outweigh the interests in fairness and accuracy.[37] While the court acknowledges, both generally and in this case, that Commerce's resources are limited, the burden on Commerce is not sufficient in this case. This is because the court finds two further considerations weigh in favor of accepting Amanda Foods' late-filed SRC.

First, though the submission was ninety-five days late, it arrived early in the review process: more than seven months before Commerce released the preliminary results[38] and one year before Commerce released the final results. Thus, there is no concern with finality in this case. *Timken*, 434 F.3d at 1353–54. Second, Amanda Foods was diligent in seeking to correct the omission of its SRC, promptly filing its late submission as soon as it discovered the omis-

[37] The court notes that of the twenty-nine SRCs or SRAs submitted in this review, only Amanda Foods' was submitted late.

[38] When Amanda submitted its SRC, the *Preliminary Results* were due in three months' time, on October 31, 2009; however, on October 27, 2009, Commerce extended the filing deadline until March 1, 2010. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China*, 74 Fed. Reg. 55,192, 55,192 (Dep't Commerce Oct. 27, 2009) (extension of preliminary results of antidumping administrative reviews).

sion. *See* Letter from Mayer Brown to Secretary of Commerce (Aug. 4, 2009), Admin. R. Pub. Doc. 115, at 3. Though late, Amanda Foods filed its SRC early in the review and promptly upon discovering its error, and the court credits these efforts to cooperate in the review and to maintain the accuracy of the dumping margins.

The court therefore finds that in this case: (1) the margin assigned to Amanda Foods was likely inaccurate and disproportionate; (2) Amanda Foods was diligent in correcting its submission; (3) Amanda Foods' submission was early enough in the proceeding to minimize concerns for finality; and (4) the burden on Commerce in considering the late-filed SRC would likely be minimal given that only one SRC was filed late, the late-filed SRC appears to maintain the status quo, and no follow-up was conducted with regard to other separate-rate requests. In light of these findings, the court holds that in this case, the interests in fairness and accuracy outweigh the burden upon Commerce; therefore, Commerce's rejection of Amanda Foods' late-filed submission was an abuse of discretion. In light of the foregoing, this issue is remanded.

CONCLUSION

For all of the foregoing reasons, the Department's *Final Results*, 75 Fed. Reg. at 47,771, are REMANDED to the agency for reconsideration and redetermination consistent with this opinion.

Upon remand, Commerce will provide further explanation or reconsideration of its zeroing policy in administrative reviews consistent with the Federal Circuit's opinions in *Dongbu* and *JTEKT*; will review the voluntary respondents or provide an explanation consistent with the statutes, regulations, and Commerce's policies; and will accept Amanda Foods' separate-rate certification, conduct the necessary review of the certification, and reconsider Amanda Foods' duty rate as appropriate.

All other determinations challenged in this case are AFFIRMED.

Commerce shall have until March 16, 2012 to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until March 30, 2012 to file comments. Plaintiffs, Defendant, and Defendant-Intervenors shall have until April 13, 2012 to file any reply.

It is **SO ORDERED**.

Dated: January 18, 2012
New York, New York

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

Slip Op. 12–10

KYD, INC., Plaintiff, v. UNITED STATES, Defendant. POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, and SUPERBAG CORPORATION, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Court No. 09–00034

[Affirming Department of Commerce's remand results.]

Dated: January 18, 2012

David John Craven, Riggle and Craven, of Chicago, IL, for Plaintiff.

Carrie Anna Dunsmore, *Renee A. Gerber*, *Stephen Carl Tosini* and *Vincent dePaul Phillips*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were Rachel Elizabeth Wenthold and Scott McBride, Attorneys, U.S. Department of Commerce, of Washington, DC.

Daniel Lawrence Schneiderman and *Stephen Andrew Jones,* King & Spalding LLP, of Washington, DC, for Defendant-Intervenors.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This action returns to court following a second remand to the Department of Commerce ("Commerce" or the "Department").[1] Plaintiff KYD, Inc. ("KYD"), an unaffiliated domestic importer, challenges these Final Remand Redetermination Results ("*Second Remand Results*").[2]

Specifically, KYD challenges the dumping margin ("rate") that Commerce selected in the *Second Remand Results* for KYD's entries of subject merchandise, certain retail carrier bags ("carrier bags"), imported from Thailand and exported by King Pac Industrial Co., Ltd. ("King Pac") and Master Packaging Co., Ltd. ("Master Packaging").

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

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[1] The second remand was ordered by the court's decision in *KYD, Inc. v. United States*, __ CIT __, 779 F. Supp. 2d 1361(2011) ("*KYD III*").

[2] Defendant-Intervenors are Polyethylene Retail Carrier Bag Committee et al. ("PRCBC").

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

For the reasons discussed below, the court concludes that the *Second Remand Results* comply with the court's remand order, are free of legal error, are based on a reasonable reading of the record evidence, and therefore are affirmed.

BACKGROUND

This matter arises from Commerce's third administrative review of its 2004 antidumping duty order on carrier bags from Thailand, *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 48,204 (Dep't Commerce Aug. 9, 2004) (the "Order").[4] KYD and PRCBC requested the third review, with respect to King Pac, and PRCBC requested review with respect to Master Packaging and three other suppliers. While KYD fully participated in the review, King Pac and Master Packaging did not. *Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 73 Fed. Reg. 52,288, 52,290 (Dep't Commerce Sep. 9, 2008) ("Preliminary Results").[5]

Because the exporter/producers did not so participate, Commerce determined that use of facts available, *see* 19 U.S.C. § 1677e(a),[6] was

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[4] The third administrative review covered entries for the period of review ("POR") from August 1, 2006–July 31, 2007. *See Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 2,511 (Dep't Commerce Jan. 15, 2009) (final results of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-549–821, ARP 06–07 (Jan. 7, 2009). The court presumes knowledge of the facts and proceedings of the previous determinations in this matter. *See KYD III* at 1365–72.

[5] No party disputes that King Pac and Master Packaging failed to cooperate to the best of their abilities by not responding to Commerce's requests for information. *Second Remand Results* 18, Aug. 18, 2011, ECF No. 98.

[6] "(a) In general

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle."

19 U.S.C. § 1677e(a).

required and that an adverse inference, *see* 19 U.S.C. § 1677e(b),[7] was warranted to determine KYD's rate (an adverse facts available ("AFA") rate). *Preliminary Results* at 52,290. Commerce ultimately assigned a rate of 122.88 percent, from the original investigation, for KYD's entries. *Id.* In doing so, Commerce declined to use information that KYD provided, including specifically its sales data, and did not calculate an importer-specific assessment rate. *Id.* at 52,291. The *Final Results* mirrored these decisions. *Final Results* at 2,511–12.

KYD commenced this action, challenging the application of adverse inferences with respect to the relevant entries and Commerce's selection of an antidumping duty rate for those entries. The court remanded, concluding that 19 U.S.C. § 1677m(e)[8] required Commerce to either consider KYD's information or explain why it declined to do so. *KYD, Inc. v. United States*, __ CIT __, 704 F. Supp. 2d 1323, 1334 (2010) ("KYD II").

In response, Commerce filed its First Remand Results on September 2, 2010, explaining but not altering the 122.88 percent rate. Reviewing those results, the court concluded that the statute permitted Commerce to select a rate adverse to KYD, but that the 122.88 percent rate was neither corroborated[9] nor supported by substantial

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[7] "If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."
19 U.S.C. § 1677e(b).

[8] "(e)Use of certain information
In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if-
(1) the information is submitted by the deadline established for its submission,
(2) the information can be verified,
(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
(5) the information can be used without undue difficulties."
19 U.S.C. § 1677m(e).

[9] *See* 19 U.S.C. § 1677e(c)("When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case maybe, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal."); *see also Gallant Ocean (Thai.) Co., Ltd v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010).

evidence in the record. *KYD III* at 1368. The court recognized that although that rate may have been reliable when first used, it was no longer relevant to KYD's imports in the third review, especially when considered in light of KYD's own data. *Id.* at 1381–83.

Invoking a prior opinion in an earlier review of the Order, the court explained that, in selecting an AFA rate, "Commerce is permitted to use a 'common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." *KYD Inc. v. United States*, 607 F.3d 760, 766–67 (Fed. Cir. 2010) ("*KYD I*") (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) ("the *Rhone* presumption"[10]); *KYD III* at 1378. But the court also recognized that the *Rhone* presumption is both rebuttable and limited to previously examined exporters,[11] *KYD III* at 1379–81, and that "[e]ven if a party is uncooperative, Commerce is still constrained by 'commercial reality.' *Gallant*, 602 F.3d at 1323." *KYD III* at 1371. Accordingly, the court again remanded to Commerce. *Id*. at 1384.

In its *Second Remand Results*, the Department reviewed KYD's submitted data and selected an AFA rate of 94.62 percent. *Second Remand Results* 6. That rate represented sales transactions made by two cooperative respondents reviewed in the third administrative review, but was nonetheless higher than the highest weighted-average margin of a cooperative respondent in that review. *Second Remand Results* 4–6.

KYD now challenges the 94.62 percent rate.

STANDARD OF REVIEW

The Department, in its remand redetermination, must comply with the terms of the court's remand order. *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009). In addition, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Koyo Seiko Co. v. United States*, 20 F.3d 1160, 1164 (Fed. Cir. 1994).

[10] "Despite the changed statutory context, the Federal Circuit has since cited *Rhone Poulenc* for the proposition that Commerce can select the highest prior dumping rate, *see Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc*, 899 F.2d at 1190), and for the proposition that Commerce is to 'calculate dumping margins as accurately as possible,' *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) (citing *Rhone Poulenc*, 899 F.2d at 1191)." *KYD II*, 704 F. Supp. 2d at 1330 n.8.

[11] Commerce had not previously examined Master Packaging. KYD III at 1380.

The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting *SSIH Equip. S.A. v. U. S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983)); *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993)("The specific determination we make is 'whether the evidence and reasonable inferences from the record support'" Commerce's findings.). The "court reviews the record as a whole, including any evidence that 'fairly detracts from the substantiality of the evidence,' in determining whether substantial evidence exists." *Gallant Ocean*, 602 F.3d at 1323 (Fed. Cir. 2010) (quoting *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997).

DISCUSSION

Plaintiff's main argument against the *Second Remand Results* is that there is a more accurate method to calculate KYD's rate than Commerce's chosen methodology, and that Commerce's determination is contrary to law because KYD's data is "more than sufficient" to establish Plaintiff's rate. Pl.'s Cmts. on *Second Remand Results* 9, Sep. 9, 2011, ECF No. 101 ("Pl.'s Br.").[12] KYD contends that Commerce should have selected its rate based on its own submitted data, and that any missing information could have been approximated using data from the two cooperative respondents. Pl.'s Br. 10–12.[13]

Regarding its own average price data, Plaintiff submits that the U.S. price for KYD's purchases exceeded the price paid by the two cooperative respondents by approximately a third, and that these substantial differences illustrate that the AFA rate was aberrational. Pl.'s Br. 10–11. To Plaintiff, this data indicates that Commerce's selected rate reflects a price that far exceeds the average price KYD paid and King Pac and Master Packaging received. *Id.* at 10. Plaintiff claims that its pricing data, while admittedly not sufficient to calcu-

[12] The court has already rejected KYD's argument that Commerce is required to use KYD's pricing information, finding Commerce's argument that 19 U.S.C. § 1677m(e) does not require the use of such information when it is "so incomplete that it cannot serve as a reliable basis" for calculating a dumping margin for the entries at issue to be reasonable. *KYD III* at 1377–78.

[13] Plaintiff correctly argues that *Gallant Ocean (Thai.) Co. v. United States* requires only that Commerce determine a "reasonably accurate estimate" of the rate that would have been applied had the entity cooperated. Gallant Ocean, 602 F.3d at 1323 (Fed. Cir. 2010); Pl.'s Br. 13–14. The phrase originated in *F.lli De Cecco di Filippo Far S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2010): "It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance."

late an exact rate, is still sufficient to establish a "reasonably accurate estimate of the respondent[s'] actual rate" for KYD's imported entries. *Id.* at 9, 14.

Commerce disagrees, arguing that KYD's data does not take into account the differences in the products it purchased or the normal values of the merchandise King Pac or Master Packaging sold, rendering KYD's conclusions on average prices it paid versus average prices for merchandise sold by cooperative respondents "meaningless." *Second Remand Results* 18.

To Commerce, because the carrier bags KYD purchased are not identical to those the cooperative respondents sold, and Commerce does not know the manufacturing costs of the merchandise KYD purchased, Commerce cannot simply make an adjustment in normal value to calculate KYD's margin. *Id.* at 19.[14] Moreover, Commerce notes that it does not have sufficient information regarding the adjustment amounts required under 19 U.S.C. § 1677a(c),[15] nor does it have sufficient normal value information.[16] *Second Remand Results* 4.

Plaintiff disagrees, stating that because KYD's sales were purchased on an FOB Thailand basis, international freight, marine insurance and U.S. brokerage and handling would not have been deducted from the U.S. price. Thus, Plaintiff maintains that the necessary information for these data elements was not missing. Pl.'s Br. 6.

Commerce counters that while this is correct for international freight, Commerce would still need more information such as the relative location of factories, domestic freight expenses and insurance costs, and identities of the freight companies exporters' used, rendering KYD's solutions insufficient because this information is not on the record. Def.'s Resp. to Cmts. Regarding Remand Determination 7–8, Oct. 3, 2011, ECF No. 114 ("Def.'s Resp."); Pl.'s Br. 5–7.

Nonetheless, Commerce did consider KYD's submitted U.S. sales data. *Second Remand Results* 4–5. Specifically, it "used KYD's information to establish certain physical parameters of the U.S. sales King Pac and Master Packaging made to KYD as a guide in selecting an

[14] Plaintiff relies on *Changzhou Wujin Fine Chem. Factory Co. v. United States*, __ CIT __, 2010 WL 3239213 (2010) to argue that Commerce strayed from a practice of calculating rates for uncooperative respondents by using normal values from cooperative respondents. But Plaintiff presents no facts to indicate that the mandatory respondent's merchandise at issue there was different from that of the uncooperative respondent, as Commerce demonstrates here. Pl.'s Br. 12.

[15] Examples include inland freight in Thailand, international freight and marine insurance. *Second Remand Results*

[16] Including prices or adjustments to price such as imputed credit expense. *Id.*

appropriate adverse facts-available rate from [two cooperative respondents',] Naraipak's or Polyplast's[,] transaction-specific margins." *Id.* at 5; Def.'s Resp. 3.

Commerce explained further, reasoning that the physical characteristics of the models examined may influence pricing behavior. *Second Remand Results* 5. Commerce noted that, in general, in this proceeding, Commerce used thirteen physical characteristics to match products. *Id.* KYD submitted information on only eight of those thirteen characteristics, so in examining products sold by Naraipak or Polyplast, Commerce looked for sales similar to KYD's imports based on those eight factors. *Id.*; *see also Preliminary Results*, 73 Fed. Reg. at 52,292 (unchanged in *Final Results*). Commerce did this to ensure that the sales of the responding companies considered were sales of products reasonably similar to KYD's imports. *Second Remand Results* 5–6.

Based on these parameters, Commerce, applying an adverse inference,[17] chose the highest transaction-specific margin of Naraipak and Polyplast's sales that shared the eight physical characteristics of the products imported by KYD from King Pak and Master Packaging. *Second Remand Results* 6; Def.'s Resp. 3.[18]

Commerce argues that the margin selected in the *Second Remand Results* is reliable as well as consistent with the court's order; and that the corroboration requirement[19] in the statute does not apply because Commerce used transaction-specific information obtained during the investigation and thus did not use secondary information in need of corroboration. Def.'s Resp. 4; *see also* 19 U.S.C. § 1677(e)c; *KYD III* at 1371. Commerce adds that even if the corroboration requirement were in play, that the margin would still be relevant to

[17] Pursuant to 19 U.S.C. § 1677e(b).

[18] Commerce selected a rate of 73.70 percent. However, after taking interested parties' comments into consideration, Commerce decided on a rate of 94.62 percent. *Second Remand Results* 6. Plaintiff notes that after the adjustment of a computer program relating to ink coverage was modified, Commerce selected a new and higher "outlier" as the basis for the AFA rate. Plaintiff argues that after this modification, less than a third of KYD's reported observations were of bags falling within the criteria for this new sale. *Id.* at 15.
Commerce admits a calculation error in the program comparing the physical characteristics data, that it fixed accordingly in the *Second Remand Results*. *Id.* at 14–16; Def.'s Resp. 10. Commerce notes that KYD is not challenging that all eight characteristics that KYD's products shared with examined transactions exist, but rather only that the corrected value for the ink-coverage characteristic resulted in a higher margin. Def.'s Resp. 10. Commerce discarded a rate based on only seven of the physical characteristics as it would not have been as accurate. *Second Remand Results* 15.

[19] 19 U.S.C. § 1677e(c).

King Pac and Master Packaging's commercial reality because the carrier bags share the same characteristics as those imported by KYD. Def.'s Resp. 4.

While a selected rate must reflect commercial reality, it does not have to reflect the rate Commerce would have calculated had King Pac and Master Packaging participated in the review. *Second Remand Results* 18. Rather, Commerce adequately reasoned that because KYD's purchased carrier bags are not identical to those sold by the cooperative respondents, an "apples-to-apples" comparison is not likely. *Id.* at 19.

Accordingly, using KYD's own data to "describe the bounds of transactions made by the cooperative respondents that [it] considered for use as adverse facts available," *id.*, Commerce chose a rate that, on this record, could reasonably be accepted as an approximation of KYD's rate, albeit with a built in increase intended as a deterrent to non-compliance. Commerce thus satisfied the requirements of the remand order and gave an adequate explanation for why it reviewed but did not utilize KYD's other information. *Id.* at 18–19.

Accordingly, because King Pac and Master Packaging did not provide sufficient usable information for the record, Commerce's transaction-specific margin for an adverse rate does not conflict with statutory requirements, and Commerce's selection is based on substantial evidence, the *Second Remand Results* will be sustained.[20]

CONCLUSION

For the reasons discussed above, the *Second Remand Results* are AFFIRMED in all respects.

IT IS **SO ORDERED** :

Dated: January 18, 2012
New York, N.Y.

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

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[20] Defendant-Intervenors (Petitioners) contend that, in *KYD III*, the court usurped the agency's investigative role and should therefore vacate its decision and affirm Commerce's initial determination. Def.-Int.'s Reply to KYD's Cmts. on Second Remand Results, 4–6, Oct. 3, 2011, ECF No. 117 ("Def.-Int.'s Br."). Because Defendant-Intervenors agree with the Remand Determination, *id.* at 1, Commerce did not respond to their comments, "as they are outside the scope of the [c]ourt's remand order." Def.'s Resp. 10. Plaintiff agrees with Commerce that most comments filed by Petitioners do not relate to the remand. Pl.'s Br. 8. The court has discussed above Plaintiff's one issue with Petitioner's comments: the adjustment of the computer program relating to ink coverage. Pl.'s Br. 8.

On the Petitioners' remaining argument, Commerce contends, persuasively, that it did not select a transaction-specific margin of 108.64 percent because that transaction is less similar to KYD's purchased merchandise than the merchandise corresponding to Commerce's considered transactions. Def.'s Resp. 5.