

# U.S. Court of International Trade

Slip Op. 15–71

CHANGZHOU HAWD FLOORING CO., LTD., ET AL., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge  
Court No. 12–00020

[remand redetermination affirmed]

Dated: July 6, 2015

*Gregory S. Menegaz* and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, DC, for the Plaintiff, Changzhou Hawd Flooring Co., Ltd.

*Alexander V. Sverdlov*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

## OPINION

### **Pogue, Senior Judge:**

This action is again before the court following a fourth remand and redetermination.<sup>1</sup> The only issue remaining for review is the anti-dumping (“AD”) duty rate assigned to one separate rate respondent – Changzhou Hawd Flooring Co., Ltd., (“Changzhou Hawd” or “Plaintiff”).<sup>2</sup>

<sup>1</sup> The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c) (2012) (all further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition)

<sup>2</sup> This action was previously consolidated with Court Numbers 11–00452, 12–00007, and 12–00013, under Consolidated Court Number 12–00007. Order, May 31, 2012, Consol. Ct. No. 12–00007, ECF 37. Court Number 11–00452 was ultimately severed and dismissed. Am. Order Nov. 27, 2012, Consol. Ct. No. 12–00007, ECF No. 75; Judgment, Ct. No. 11–00452, ECF No. 68; see *Baroque Timber Indus. (Zhongshan) Co. v. United States*, \_\_ CIT \_\_, 853 F. Supp. 2d 1290 (2012); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, \_\_ CIT \_\_, 865 F. Supp. 2d 1300 (2012). Following the first redetermination, Final Results of Redetermination Pursuant to Ct. Order, Consol. Ct. No. 12–00007, ECF No. 132 (“*First Redetermination*”), Court Numbers 12–00007 and 12–00013 were severed and final judgment entered. Order Granting Mot. to Sever, Consol. Ct. No. 12–00007, ECF No. 162; Judgment, Ct. No. 12–00007, ECF No. 163; Judgment, Ct. No. 12–00013, ECF No. 32. These

Previously, in the second and partial third redeterminations, the Department of Commerce (“Commerce”) had, belatedly, sought to individually investigate Changzhou Hawd.<sup>3</sup> However, this decision was challenged as<sup>4</sup> and found to be arbitrary and capricious. *Changzhou Hawd Flooring Co. v. United States*, \_\_ CIT \_\_, 44 F. Supp. 3d 1376, 1388–90 (2015). On remand, Commerce determined that the separate rate, and therefore Changzhou Hawd’s rate, was more than *de minimis*. Rather than then calculate a rate for Changzhou Hawd, however, Commerce decided to continue applying the company’s current cash deposit rate, as established in the original final determination,<sup>5</sup> pending the final results of the Second Administrative Review, where Changzhou Hawd is again a separate rate respondent.<sup>6</sup> Final Results of Redetermination Pursuant to Ct. Order, ECF No. 130 (“*Fourth Redetermination*”). Plaintiff challenges this determination as not in accordance with law, not supported by substantial evidence, and not compliant with the court’s previous remand order.<sup>7</sup>

Because Commerce’s decision is based on a reasonable reading of the law and of the evidentiary record, satisfying the court’s previous remand instructions, the determination is affirmed.

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were appealed by Defendant-Intervenor (the Coalition for American Hardwood Parity). Notice of Appeal, Ct. No. 12–00007, ECF No. 166; Notice of Appeal, Ct. No. 12–00013, ECF No. 33. Defendant-Intervenor moved to voluntarily dismiss the appeal, without opposition. The motion was granted. *Zhejiang Layo Wood Indus. Co. v. United States*, 576 F. App’x 1000 (Fed. Cir. 2014).

<sup>3</sup> Final Results of Redetermination Pursuant to Ct. Order, ECF No. 52 (“*Second Redetermination*”), at 8–9; Final Results of Redetermination Pursuant to Ct. Order, ECF No. 107 (“*Third Redetermination*”), at 16–17.

<sup>4</sup> See Comments of Certain Separate Rate Appellants to 2d Remand Redetermination, ECF No. 69 (“*Pls.’ Comments on Second Redetermination*”), at 33–36.

<sup>5</sup> *Multilayered Wood Flooring from the People’s Republic of China* [“*PRC*”], 76 Fed. Reg. 64,318 (Dep’t Commerce Oct. 18, 2011)(final determination of sales at less than fair value) (“*Inv. Final Determination*”); *Multilayered Wood Flooring from the [PRC]*, 76 Fed. Reg. 76,690, 76,691–92 (Dep’t Commerce Dec. 8, 2011) (amended final determination of sales at less than fair value and antidumping duty order) (“*Inv. Amended Final Determination*”).

<sup>6</sup> See *Multilayer Wood Flooring from the [PRC]*, 80 Fed. Reg. 1388 (Dep’t Commerce Jan. 9, 2015) (preliminary results of AD duty administrative review; 2012–2013) (“*AR2 Prelim. Determination*”).

<sup>7</sup> Comments of Changzhou Hawd Flooring Co., Ltd. in Opp’n to 4th Remand Redetermination, ECF No. 132 (“*Pl.’s Br.*”).

## BACKGROUND

Previous litigation of the separate rate in this investigation has produced two court opinions<sup>8</sup> and two corresponding redeterminations by Commerce,<sup>9</sup> a voluntary remand and redetermination,<sup>10</sup> a third court opinion,<sup>11</sup> and now a fourth redetermination by Commerce.<sup>12</sup> While the court presumes familiarity with the progression of this case, the immediately pertinent facts are summarized below.

In the second and supplementing partial third redeterminations, Commerce inferred that, because there were 110 non-cooperative respondents in the investigation, the separate rate was more than *de minimis*. *Second Redetermination*, ECF No. 52, at 3–7. Commerce, however, declined to calculate a specific separate rate. *Id.* at 7–8. Instead, the agency assigned seven of the Plaintiffs<sup>13</sup> the rate calculated for them in the First Administrative Review (which had already, by that time, been completed),<sup>14</sup> as limited by the provisional measures deposit cap.<sup>15</sup> *Id.* Changzhou Hawd, however, did not have a rate from the First Administrative Review.<sup>16</sup> Commerce, concluding that it did not have enough data on the record to calculate a rate reflective of Changzhou Hawd’s economic reality, belatedly initiated

<sup>8</sup> *Baroque Timber Indus. (Zhongshan) Co. v. United States*, \_\_\_ CIT \_\_\_, 925 F. Supp. 2d 1332 (2013); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, \_\_\_ CIT \_\_\_, 971 F. Supp. 2d 1333 (2014)

<sup>9</sup> *First Redetermination*, Consol. Ct. No. 12–00007, ECF No. 132; *Second Redetermination*, ECF No. 52.

<sup>10</sup> *Third Redetermination*, ECF No. 107.

<sup>11</sup> *Changzhou Hawd*, \_\_\_ CIT \_\_\_, 44 F. Supp. 3d 1376.

<sup>12</sup> *Fourth Redetermination*, ECF No. 130.

<sup>13</sup> Fine Furniture (Shanghai), Ltd. (“Fine Furniture”); Dunhua City Jisen Wood Industry Co., Ltd; Dunhua City Dexin Wood Industry Co., Ltd; Dalian Huilong Wooden Products Co.; Kunshan Yingyi-Nature Wood Industry Co., Ltd.; Armstrong Wood Products (Kunshan) Co., Ltd. (“Armstrong”); and Karly Wood Product Ltd. *Second Redetermination*, ECF No. 52, at 1–2, 7–8.

<sup>14</sup> See *Multilayered Wood Flooring from the [PRC]*, 79 Fed. Reg. 26,712, 26,713, (Dep’t Commerce May 9, 2014) (final results of antidumping duty administrative review; 2011–2012) (“*ARI Final Determination*”).

<sup>15</sup> The provision measures deposit cap “ensures that, for the interstitial period of the investigation — after the preliminary determination but prior to the issuance of an AD order — importers are not liable for more than the rate set for them at the time of entry.” *Changzhou Hawd*, 44 F. Supp. 3d at 1388 (citing 19 U.S.C. § 1673f(a); 19 C.F.R. § 351.212(d)(2014)). This means that “[i]f the AD duty rate set in the first administrative review (or subsequent litigation) is less, the difference between it and the cash deposit, bond, or other security provided at entry, is refunded. If the AD duty rate is ultimately more, then the difference is not owed.” *Id.* (citing *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1086 (Fed. Cir. 2001)).

<sup>16</sup> Changzhou Hawd was found to have no shipments for the period of the first administrative review. *ARI Final Determination*, 79 Fed. Reg. at 26,713.

an individual investigation of the company. *Id.* at 8–9; *Third Redetermination*, ECF No. 107.<sup>17</sup> While the court affirmed as reasonable Commerce’s inference of a more than *de minimis* separate rate and use of rates from the First Administrative Review, *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1385–88, it found Commerce’s decision to individually investigate Changzhou Hawd at such a late date in the proceeding — and after repeatedly refusing to investigate a would-be voluntary respondent, claiming lack of administrative resources — to be arbitrary and capricious, and remanded accordingly. *Id.* at 1388–91.

On remand, Commerce again inferred that the separate rate was more than *de minimis*, but declined, as it did previously, to calculate a separate rate. *Fourth Redetermination*, ECF No. 130, at 4–5. Instead, because of “the limited time for which Changzhou Hawd’s specific margin will be effective, and in the continued interest of conserving administrative resources,”<sup>18</sup> Commerce has proposed to continue applying the 3.30 percent cash deposit rate as calculated in the *Inv. Amended Final Determination*, 76 Fed. Reg. at 76,691–92,<sup>19</sup> until the Second Administrative Review, where Changzhou Hawd is again a separate rate respondent, sets Changzhou Hawd’s assessed

<sup>17</sup> Changzhou Hawd subsequently filed a petition for a writ of mandamus to compel Commerce to refrain from the individual investigation “until such time as this Court is satisfied that [Commerce] has complied with its legal obligation to calculate a lawful separate rate.” Pl. Changzhou Hawd Flooring Co., Ltd. Pet. for Writ of Mandamus, ECF No. 71. Commerce agreed to suspend the deadlines for Changzhou Hawd’s individual investigation, Letter from Commerce to Ct., ECF No. 82, and sought voluntary remand to reconsider its decision to conduct a full investigation of Changzhou Hawd, Def.’s Mot. for a Voluntary Remand, ECF No. 92. The court accordingly denied Plaintiff’s petition as moot. *Changzhou Hawd Flooring Co. v. United States*, \_\_ CIT \_\_, 6 F. Supp. 3d 1358, 1360 n.9 (2014). Plaintiff now seeks to renew its petition for writ of mandamus. *Pl.’s Br.*, ECF No. 132, at 15–16. However, as the court has already found Commerce’s decision to conduct a full individual investigation of Changzhou Hawd arbitrary and capricious, and remanded to Commerce with instructions to find a different, reasonable method of establishing Changzhou Hawd’s rate, *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1388–90, this motion remains moot and therefore is again DENIED AS MOOT.

<sup>18</sup> In making this determination, Commerce emphasizes that its “discretion in carrying out antidumping and countervailing duty law should provide [Commerce] [with] the ability to conduct a full individual examination of a respondent if [Commerce] finds it necessary to do so,” and only eschews this method because of the court’s remand order. *Fourth Redetermination*, ECF No. 130, at 6. Commerce is correct that it has the discretion to reopen the record, *Essar Steel Ltd. v. United States*, 678 F.3d 1268,1278 (Fed. Cir. 2012), however the exercise of that discretion cannot be arbitrary and capricious, see *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1388–90.

<sup>19</sup> This was the separate rate, calculated by taking the simple average of the two non-de minimis mandatory respondent rates per 19 U.S.C. § 1673d(c)(5)(A). *Inv. Final Determination*, 76 Fed. Reg. at 64,322; *Inv. Amended Final Determination*, 76 Fed. Reg. at 76,691–92 (recalculating the separate rate, because of a change in a mandatory respondent rate, to equal 3.30 percent). On remand, however, changes to the underlying surrogate values and calculation methodology reduced the rates for all mandatory respondents to

rate.<sup>20</sup> *Fourth Redetermination*, ECF No. 130, at 5–6. Commerce’s deadline for the completion of the Second Administrative Review is July 8, 2015. *Id.* at 5.

## STANDARD OF REVIEW

The court will sustain Commerce’s determination on remand if it is accordance with law, supported by substantial evidence on the record, and complies with the court’s remand order. 19 U.S.C. § 1516a(b)(1)(B)(i); *Jinan Yipin Corp., Ltd. v. United States*, 33 CIT 934, 936, 637 F. Supp. 2d 1183, 1185 (2009)

## DISCUSSION

### *I. Commerce’s Methodology*

Lacking more specific statutory guidance, Commerce follows 19 U.S.C. § 1673d(c)(5) (the “[m]ethod for determining [the] estimated all-others rate”) to establish the separate rate. *See Fourth Redetermination*, ECF No. 130, at 4. Generally, the separate rate is equal to the weighted average of the rates calculated for individually investigated respondents, “excluding any zero and *de minimis* margins, and any margins [based entirely on facts otherwise available].” 19 U.S.C. § 1673d(c)(5)(A). However, where, as here, all individually investi-

zero. *First Redetermination*, Consol. Ct. No. 12–00007, ECF No. 132, at 2, 52. The separate rate was subsequently estimated under 19 U.S.C. § 1673d(c)(5)(B). *Id.* at 27; *Second Redetermination*, ECF No. 52, at 6–8; *Fourth Redetermination*, ECF No 130, at 4.

<sup>20</sup> While Changzhou Hawd entered subject merchandise during the period of investigation (April 1, 2010 through September 30, 2010), *Inv. Final Determination*, 76 Fed. Reg. at 64,318, 64,323; *see also* 19 C.F.R. § 351.204(b)(1), it did not during the period of the First Administrative Review (May 26, 2011 (the publication of the preliminary determination in the investigation) through November 30, 2012 (the end of the month immediately preceding the first anniversary month of the order), *AR1 Final Determination*, 79 Fed. Reg. at 26,713; *see also* 19 C.F.R. § 351.213(e)(1)(ii); *Multilayered Wood Flooring from the [PRC]*, 76 Fed. Reg. 30,656, 30,657 (Dep’t Commerce May 26, 2011) (preliminary determination of sales at less than fair value) (dated May 26, 2011); *Inv. Amended Final Determination*, 76 Fed. Reg. at 76,690 (setting effective date of order at December 8, 2011). Changzhou Hawd again entered subject merchandise during the period of the second administrative review (December 1, 2012 through November 30, 2013). *AR2 Prelim. Determination*, 80 Fed. Reg. at 1388, 1389.

The “preliminary determination in an [AD] duty investigation constitutes the first point at which [Commerce may require duties],” 19 C.F.R. § 351.205(a), here from the period of the First Administrative Review, *AR1 Final Determination*, 79 Fed. Reg. at 26,713. Accordingly, all entries made by Changzhou Hawd that are actually subject to the AD duty order (and therefore to a cash deposit requirement) come from the Second Administrative Review period and are therefore “covered by” the Second Administrative Review. *See* 19 U.S.C. § 1675(a)(2)(C). The Second Administrative Review will “be the basis for the assessment of [AD] duties” on these entries, and “for deposits of estimated duties” going forward. *Id.* ; *see AR2 Prelim. Determination*, 80 Fed. Reg. at 1389.

gated rates are zero, *de minimis*, or based entirely on facts otherwise available, the statute allows Commerce to use “any reasonable method to establish the estimated [separate rate].” 19 U.S.C. § 1673d(c)(5)(B).

“[A]ny reasonable method” is a “lenient standard” that leaves much to Commerce’s discretion. *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013).<sup>21</sup> It is expected to mean a weighted average of the rates calculated for individually investigated respondents. 19 U.S.C. § 1673d(c)(5)(B); Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), HR. Doc. No. 103–316 (1994) at 873, *reprinted in 1994 U.S.C.C.A.N.* 4040, 4201.<sup>22</sup> However, if this method “is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers,” i.e., is not reasonable in context, then “Commerce may use other reasonable methods.” SAA at 873, *reprinted in 1994 U.S.C.C.A.N.* at 4201.

Here, Commerce has determined that the expected method results in a separate rate that is not reasonably reflective of respondents’ potential dumping margins. *Fourth Redetermination*, ECF No. 130, at 4–5; *Second Redetermination*, ECF No. 52, at 4–5.<sup>23</sup> Instead, citing to the *Second Redetermination* (and the court’s affirmance thereof), Commerce has inferred that the separate rate (and therefore Changzhou Hawd’s rate) is more than *de minimis*. *Fourth Redeter-*

<sup>21</sup> Presented with such broad language, the court considers only whether “the agency’s interpretation amounts to a reasonable construction of the statute.” *Bestpak*, 716 F.3d at 1377 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Further, “[t]o survive judicial scrutiny, [Commerce’s] construction need not be the only reasonable interpretation or even the most reasonable interpretation. Rather, a court must defer to an agency’s reasonable interpretation of a statute even if the court might have preferred another.” *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)) (emphasis original).

<sup>22</sup> The SAA is recognized by Congress as an authoritative expression concerning the interpretation and application of the Tariff Act of 1930. 19 U.S.C. § 3512(d).

<sup>23</sup> Plaintiff argues that Commerce “has no basis at all in this case to set aside the ‘expected method’ of calculating rates for cooperating non-mandatory respondents,” *Pl.’s Br.*, ECF No. 132, at 6, and asks that the court “direct [Commerce] to use the ‘expected method’ and assign Changzhou Hawd a *de minimis* antidumping duty margin, excluding Changzhou Hawd from the antidumping duty order on appeal in this case.” *Id.*, at 3.

This argument fails in the same way and for the same reasons it failed in *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d. at 1383–85. *Cf. Pls.’ Comments on Second Redetermination*, ECF No. 69, at 10–13 (making the same argument). The statute provides an “expected method,” not a compulsory method. “That ‘any reasonable method’ is available to Commerce, not just the expected method, indicates the statute contemplates the possibility of a more than *de minimis* separate rate even where, as here, all individually investigated rates are zero.” *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. at 1384 (citing 19 U.S.C. § 1673d(c)(5)(B)).

mination, ECF No. 130, at 4–5; see *Second Redetermination*, ECF No. 52, at 3–6. Rather than calculate a specific separate rate, however, Commerce decided to continue applying Changzhou Hawd’s current 3.30 percent cash deposit rate, as calculated in the *Inv. Amended Final Determination*, 76 Fed. Reg. at 76,691–92, in the brief interim until the Second Administrative Review sets the assessed rate for Changzhou Hawd’s entries (i.e., until July 8, 2015). *Fourth Redetermination*, ECF No. 130, at 5–6. Accordingly, having inferred from the record that the separate rate is more than *de minimis* and applied a (more than *de minimis*) rate calculated for Changzhou Hawd, Commerce may be said to have established a rate “reasonably reflective” of Changzhou Hawd’s “potential dumping margin[.]” See SAA at 873, reprinted in 1994 U.S.C.C.A.N. at 4201. Accordingly, Commerce’s methodology is within a reasonable construction of the statute. Cf. *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. at 1383–85 (holding the same for the other separate rate plaintiffs in this action).<sup>24</sup>

## II. Commerce’s Methodology in the Context of the Record

### A. Commerce’s Inference that the Separate Rate is More Than *De Minimis*

As in the *Second Redetermination*, Commerce has inferred that the separate rate is more than *de minimis* because 110 companies did not respond to Commerce’s quantity and value questionnaire. *Fourth Redetermination*, ECF No. 130, at 4; see *Second Redetermination*, ECF No. 52, at 4. Commerce again corroborates its inference with the non-*de minimis* rates calculated for separate rate respondents in subsequent administrative reviews. *Fourth Redetermination*, ECF No. 130, at 6–7; *Second Redetermination*, ECF No. 52, at 7, 30.<sup>25</sup>

<sup>24</sup> Contrary to Plaintiffs’ argument, *Pl.’s Br.*, ECF No. 132, at 2–3, this result is not barred by *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1388–90. While a redetermination must comply with the remand order, *Jinan Yipin*, 33 CIT at 936,637 F. Supp. 2d at 1185, the remand order here was “for further consideration” – that is, to find a “reasonable method” to establish Changzhou Hawd’s rate, rooted in the already robust evidentiary record, supplemented as necessary given Commerce’s continued “discretion to reasonably reopen the record.” *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1390–91. This is in keeping with this Courts role in reviewing Commerce’s decisions. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.”).

<sup>25</sup> In the First Administrative Review, Commerce found dumping margins of 0.00, 5.74, and 0.00 for Nanjing Minglin Wooden Industry Co. Ltd., Fine Furniture, and Armstrong (all

Commerce's inference of a more than *de minimis* separate rate was reasonable in the Second Redetermination, and remains reasonable here.<sup>26</sup> Commerce has made the same rational connection between the facts found (110 non-cooperating respondents) and the choices made (the inference of a more than *de minimis* separate rate for the investigation).<sup>27</sup> See *Changzhou Hawd*, \_\_\_ CIT at \_\_\_, 44 F. Supp. 3d at 1385–87 (holding that the same inference on the same record as that here was supported by substantial evidence).<sup>28</sup> This redetermination is only distinct in that now Commerce also has the preliminary results from the Second Administrative Review to corroborate its conclusion that “the separate rate respondents’ economic reality is separate rate respondents in the investigation, see *Inv. Final Determination*, 76 Fed. Reg. at 64,323, respectively. *AR1 Final Determination*, 79 Fed. Reg. at 26,714. Fine Furniture’s rate became the separate rate (as the only individually investigated non-*de minimis*, non-AFA rate). *Id.* The final results were subsequently amended, to correct a ministerial error, changing Fine Furniture’s rate to 5.92 percent (with the separate rate revised accordingly). *Multilayered Wood Flooring from the [PRC]*, 79 Fed. Reg. 35,314, 35,315–16 (Dep’t Commerce June 20, 2014) (amended final results of antidumping duty administrative review; 2011–2012).

In the Second Administrative Review, Commerce has preliminarily found dumping margins of 0.00 and 18.27 for individually investigated respondents Dalian Dajen Wood Co., Ltd. and Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (“Senmao,”) (both separate rate respondents in the investigation, see *Final Investigation*, 76 Fed. Reg. at 64,323, and First Administrative Review, see *AR1 Final Determination*, 79 Fed. Reg. at 26,714). *AR2 Prelim. Determination*, 80 Fed. Reg. at 1389. Senmao’s rate became the separate rate (as the only individually investigated non-*de minimis*, non-AFA rate). *Id.* Changzhou Hawd, as a separate rate respondent in the Second Administrative Review, is subject to this separate rate. *Id.* The final determination will be issued no later than July 8, 2015. *Fourth Redetermination*, ECF No. 130, at 5.

<sup>26</sup> See *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (explaining that the substantial evidence standard asks whether, given the record as a whole, the agency’s determination was reasonable).

<sup>27</sup> See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (holding that the agency must articulate “rational connection between the facts found and the choice made”).

<sup>28</sup> Nonetheless, Plaintiff again argues that this inference is unsupported by substantial evidence because Commerce relied on the non-cooperation of 110 respondents, which is tantamount to applying adverse facts available to cooperative respondents, and impermissibly considered the presence of non-*de minimis* calculated rates for separate rate respondents, including Changzhou Hawd, in the First and Second Administrative Reviews. *Pl.’s Br.*, ECF No. 132, at 4–11.

These arguments remain as unpersuasive as before, when Plaintiffs used them to challenge the same inference in the *Second Redetermination*. See *Second Redetermination*, ECF No. 52, at 4 (Commerce making the same inference); *Pls.’ Comments on Second Redetermination*, ECF No. 69, at 15–19 (Plaintiffs making the same argument against it); *Changzhou Hawd*, \_\_\_ CIT at \_\_\_, 44 F. Supp. 3d at 1385–87 (holding that Commerce’s inference of a greater than *de minimis* separate rate is supported by substantial evidence, is not the equivalent of applying AFA to separate rate respondents, and does not impermissibly consider rates from subsequent stages, rather using them permissibly, for corroboration).



more varied and complicated than the mandatory respondent *de minimis* rates [in the investigation] suggest” and to “confirm[] that the separate rate respondents merit the closer consideration that keeping them subject to the order affords, some receiving *de minimis* rates and others not.” *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1387.<sup>29</sup>

*Changzhou Hawd*, in successfully challenging Commerce’s attempt to individually investigate it (and thereby obtain an individual rate), retained its separate rate status, *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1388–90, and as such, it is subject to a reasonably determined separate rate. As before, “Commerce’s conclusion that — based on the silence of 110 respondents, the resultant gap in the record, and the mixed results of the first [and now second] administrative review[s] — the separate rate (and thus Plaintiff’s) rate) in this investigation is somewhat more than *de minimis* and less than AFA, while not the only possible inference, is a reasonable inference from the record.” *Id.* at 1387. Commerce’s inference of a more than *de minimis* separate rate remains supported by substantial evidence.

### *B. Changzhou Hawd’s Interim Cash Deposit Rate*

Commerce, having reasonably inferred that the separate rate is more than *de minimis*, again declines to calculate a specific separate rate. Instead, Commerce will continue to apply the 3.30 percent cash deposit rate from the *Investigation Amended Final Determination*, 76 Fed. Reg. at 76,691–92, until the Second Administrative Review is completed and sets *Changzhou Hawd*’s actual assessed rate. *Fourth Redetermination*, ECF No. 130, at 5–6.

As Plaintiff points out, *Pl.’s Br.*, ECF No. 132, at 13, and Commerce concedes, *Fourth Redetermination*, ECF No. 130, at 6, the 3.30 percent separate rate comes from the *Investigation Amended Final Determination* and was remanded because the individually-investigated rates from which it was calculated were held to be unsupported by

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<sup>29</sup> Plaintiff argues this does not follow because “the [c]ourt’s [previous] holdings were moored in the facts of [the First Administrative Review]” and “[t]hose results cannot have anything to do with *Changzhou Hawd*’s economic reality because the company had no sales in that period.” *Pl.’s Br.*, ECF No. 132, at 12. This misapprehends the nature of *Changzhou Hawd*’s status as a separate rate respondent. It is true that the separate rate must reflect “commercial reality” and “bear some relationship to [respondents]’ actual dumping margins.” *Bestpak*, 716 F. 3d at 1380 (quotation marks and citation omitted). However, the separate rate remains an estimate calculated for a group of respondents. See 19 U.S.C. §§ 1673d(c)(5), 1677f-1(c). Subsequently calculated rates from multiple separate rate respondents “bear some relationship to [respondents]’ actual dumping margins” and tethers the separate rate to economic reality. See *Bestpak*, 716 F. 3d at 1380. *Changzhou Hawd*, having eschewed individual investigation, is a separate rate respondent and subject to the separate rate.

substantial evidence. See *Baroque Timber*, \_\_ CIT \_\_, 925 F. Supp. 2d 1332. However, while this 3.30 percent rate lacks the under-pinnings to be a precise calculation, the particular circumstances presented here render it a reasonable estimate, a cash deposit rate, of Changzhou Hawd's duty liability and therefore supported by substantial evidence.

First, any specific rate used here is without more than temporary effect. Regardless of the precise rate calculated, Changzhou Hawd remains subject to the AD duty order because its rate, the separate rate, is reasonably more than *de minimis*. See 19 U.S.C. §§ 1673b(b)(3), 1673d(a)(4). Changzhou Hawd's actual liability will be determined in the Second Administrative Review, where the assessed rate for Changzhou Hawd's entries will be set. See 19 U.S.C. § 1675(a)(2)(C). The rate set here is only a cash deposit rate, an estimate of potential duties. 19 U.S.C. § 1673b(d)(1)(B).<sup>30</sup> Because the Second Administrative Review must be completed no later than July 8, 2015, this rate will only apply for a matter of weeks, for a shorter period of time than it would take to remand and redetermine the rate. *Fourth Redetermination*, ECF No. 130, at 5. Thus, any rate calculated now is teetering on the brink of mootness.

Second, a rate of 3.30 percent is a conservative estimate that aligns with the margins calculated for separate rate respondents (including Changzhou Hawd) in subsequent reviews. While each period of investigation or review is a "separate segment of proceedings with its own unique facts," *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1310, 587 F.Supp.2d 1319, 1325 (2008) (quotation marks and citation omitted), "if dumping occurred during the review, under the discipline of an AD order, it is likely to have also occurred [in the investigation], without the discipline of an AD order to disincentivize such pricing behavior," *Changzhou Hawd*, \_\_ CIT at \_\_, 44 F. Supp. 3d at 1386.<sup>31</sup> In the First Administrative Review, the separate rate is 5.92 percent. *Investigation Amended Final Determination*, 79 Fed. Reg. at 35,315. In the Second Administrative Review, the separate rate (Changzhou Hawd's rate as a separate rate respondent) is pre-

<sup>30</sup> Any difference between the assessed rate and cash deposit rate will result either in a refund if duties have been over-collected, or additional payments if duties have been under-collected. 19 U.S.C. § 1673f(b).

<sup>31</sup> This inference is in keeping with Commerce's permissible rational actor assumption – i.e., that respondents will make choices that will result in the lowest possible rate. See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d1330, 1338–39 (Fed. Cir. 2002) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, \_\_ CIT \_\_, 752 F. Supp. 2d 1336, 1347 (2011) ("In other words, [*Rhone Poulenc*] stands for the proposition that a respondent can be assumed to make a rational decision to either respond or not respond to Commerce's questionnaires, based on which choice will result in the lower rate.").

liminarily 18.92 percent. *AR2 Prelim. Determination*, 80 Fed. Reg. at 1389. This suggests that the 3.30 percent rate is a fair, if not conservative estimate (being less than any calculated rate) of Changzhou Hawd's potential AD duty liability, and therefore is reasonably reflective of the company's economic reality.<sup>32</sup>

Accordingly, because Commerce's estimated rate is both temporary and conservative, in the interest of administrative and judicial economy,<sup>33</sup> it is reasonable for Commerce to continue using it as the cash deposit rate for Changzhou Hawd.

### CONCLUSION

For the foregoing reasons, and consistent with the court's opinion in *Changzhou Hawd*, \_\_ CIT \_\_, 44 F. Supp. 3d 1376, Commerce's determination in the *Inv. Amended Final Determination*, 76 Fed. Reg. 76,690 as amended by the *Fourth Redetermination*, ECF No. 130, is AFFIRMED.

Judgment will be entered accordingly.

Dated: July 6, 2015

New York, NY

/s/ Donald C. Pogue

DONALD C. POGUE, SENIOR JUDGE

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<sup>32</sup> Cf. *Navneet Publications (India) Ltd. v. United States*, Slip-Op. No. 15-41, 2015 WL 1963768, at \*4 (CIT May 4, 2015) ("On remand, Commerce was tasked only with ensuring that the all-others rate reflected plaintiffs' reality. That the [selected, not calculated] 0.5% all-others rate aligns with all-others rates from past reviews suggests that Commerce fulfilled this task.") (citations omitted). Commerce further argues that "Changzhou Hawd's ability and willingness to sell subject merchandise in the U.S. market at a cash deposit rate of 3.30 percent reflects Changzhou Hawd's economic reality to the extent necessary under the specific facts of this redetermination"—that is, it is a temporary rate with a temporary effect, that has not yet pushed Changzhou Hawd out of the market. *Fourth Redetermination*, ECF No. 130, at 7.

<sup>33</sup> See USCIT Rule 1; *Union Camp Corp. v. United States*, 23 CIT 264, 280, 53 F. Supp. 2d 1310, 1325 (1999).

