Slip Op. 07–95

JINFU TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION and SIOUX HONEY ASSOCIATION, Deft.-Ints.

Before: Richard K. Eaton, Judge
Court No. 04–00597
Public Version

[Commerce's Final Results of Redetermination Pursuant to Remand are remanded.]

Dated: June 13, 2007

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Collier, Shannon, Scott, PLLC (*Michael J. Coursey, Adam H. Gordon* and *Jennifer E. McCadney*), for defendant-intervenors.

OPINION AND ORDER

Eaton, Judge: Before the court are the United States Department of Commerce's ("Commerce" or the "Department") final results of its redetermination pursuant to the court's remand order in *Jinfu Trading, Co., Ltd. v. United States*, 30 CIT ___ , Slip Op. 06–137 (Sept. 7, 2006) ("*Jinfu I*").[1] *See* Final Results of Redetermination Pursuant to

[1] For purposes of confidentiality, the court will employ the same shorthand references used in *Jinfu I*. Specifically, Jinfu Trading ("U.S.A.") Co., Ltd.'s sole employee is referred to as "Mr. A"; the chief executive officer of Jinfu Trading Co., Ltd. as "CEO B"; the unaffiliated U.S. buyer as "Customer C"; and the original owner of what was then Yousheng Trading ("U.S.A.") Co., Ltd. ("Yousheng USA") as "Mr. D." The attorney retained in October 2002 to

Remand (Dep't of Commerce Dec. 5, 2006) ("Remand Redetermination"). In *Jinfu I*, the court remanded Commerce's decision to rescind plaintiff Jinfu Trading Co., Ltd.'s ("Jinfu PRC") new shipper review upon concluding that Jinfu PRC was not affiliated with either Yousheng Trading (U.S.A.) Co., Ltd. ("Yousheng USA") or its successor Jinfu Trading (U.S.A.) Co., Ltd. ("Jinfu USA") within the meaning of 19 U.S.C. § 1677(33)(F) or (G) (2000).[2] *See Jinfu I*, 30 CIT at ___ , Slip Op. 06–137 at 32; *see also* Honey from the People's Republic of China ("PRC"), 69 Fed. Reg. 64,029 (Dep't of Commerce Nov. 3, 2004) ("Final Results").[3] As a result of the new shipper review being rescinded, Commerce assigned the country-wide dumping rate of 183.80 percent to Jinfu PRC's honey exports to the United States. *See* Final Results, 69 Fed. Reg. at 64,030. On remand, the court directed Commerce to either reinstate plaintiff's new shipper review or reopen the record to provide plaintiff with an opportunity to submit additional evidence concerning the issue of affiliation. In particular, plaintiff would be provided with an opportunity to place on the record evidence that the chief executive officer of Jinfu PRC, CEO B, controlled the pricing[4] decisions made by Jinfu USA's sole employee, Mr. A. *See Jinfu I*, 30 CIT at ___ , Slip Op. 06–137 at 32–33.

On remand, Commerce reopened the record and plaintiff submitted additional evidence concerning affiliation. *See* Remand Redetermination at 2. After considering this additional evidence, plaintiff's accompanying explanation of that evidence and all other comments

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aid in the attempted transfer of ownership of Yousheng USA to CEO B is referred to as "Attorney E."

[2] Pursuant to 19 U.S.C. § 1677(33)(F), "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person" are considered affiliated. Under 19 U.S.C. § 1677(33)(G), Commerce will find affiliated "[a]ny person who controls any other person and such other person."

[3] Whether Jinfu PRC was affiliated with either Yousheng USA or Jinfu USA is relevant because under 19 C.F.R. § 351.214(b)(2)(iv)(C) (2005), a party seeking a new shipper review must provide documentation establishing "[t]he date of the first sale to an unaffiliated customer in the United States. . . ." Before Commerce, plaintiff submitted documentation in support of its claim that the new shipper sale was made by Jinfu PRC (via Jinfu USA) to Customer C on November 2, 2002. Based on that documentation, Commerce initiated the new shipper review. Having found the documentation insufficient to establish that Jinfu PRC was affiliated with either Yousheng USA or Jinfu USA as of that date, however, Commerce rescinded the review. Commerce took this action because, absent affiliation, the sale to Customer C could not be considered a sale by Jinfu PRC. Thus, it is the absence of documentation supporting plaintiff's claim that it was affiliated with either Yousheng USA or Jinfu USA on November 2, 2002, that resulted in Commerce's cessation of the new shipper review.

[4] The presence of control may be contingent on the existence of evidence that one party has the potential to control the pricing decisions of the other. *See* 19 C.F.R. § 351.102(b); *see also Hontex Enters., Inc. v. United States*, 27 CIT 272, 296, 248 F. Supp. 2d 1323, 1343 (2003) (holding that control, and thus affiliation, can only be had if "the relationship [is] such that it has the potential to impact decisions concerning production, pricing, or cost of subject merchandise") (internal quotation marks omitted).

from interested parties, Commerce continued to find that neither Yousheng USA nor its successor Jinfu USA were affiliated with Jinfu PRC at the time of the claimed new shipper sale. *See* Remand Redetermination at 3.

Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii). For the following reasons, the court remands Commerce's determination for a second time.

BACKGROUND

Familiarity with this case is presumed. The court sets forth only those facts relevant to this opinion. At issue in *Jinfu I* was plaintiff's contention that Commerce erroneously concluded that Jinfu USA and Jinfu PRC were not affiliated on the date of the claimed new shipper sale, November 2, 2002. The primary basis for the Department's conclusion was its finding that Jinfu PRC did not own either Yousheng USA or Jinfu USA as of that date. *See* Issues & Decision Mem. for the Final Results and Final Rescission, In Part, of the New Shipper Review of the Antidumping Duty Order on Honey from the PRC (Dep't of Commerce Oct. 25, 2004) ("Issues & Decision Mem.") at 10–11. In *Jinfu I*, the court's review of the record and the parties' submissions revealed that, while nothing indicated that CEO B owned either Yousheng USA or Jinfu USA on or before November 2, 2002, there was, in fact, evidence that CEO B not only had the potential to influence what was then Yousheng USA's pricing decisions, but actually exercised that control. *See Jinfu I*, 30 CIT at ____ , Slip Op. 06–137 at 28.

In reaching this finding, the court relied heavily on the contents of the Department's verification report. That report indicated that, while Mr. A negotiated the price of the honey with the U.S. customer, Customer C, the final transaction was consummated only after CEO B approved the sales price. *See id.* at ____ , Slip Op. 06–137 at 29. This approval was evidenced by facsimile transmissions exchanged between Jinfu USA and Jinfu PRC. *See id.* at ____ , Slip Op. 06–137 at 30–31 ("[T]he faxes indicate that Mr. A did not enter into the transaction at the quoted price before getting the approval of CEO B, and that he believed he was working for a single enterprise encompassing Jinfu PRC and Yousheng USA.").[5]

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[5] The faxes were exchanged on November 13, 2002. Mr. A initiated the discourse in his fax to CEO B:

> Firstly, I would like to report [to] you that the current market price of honey in the United States is between [[ ]] and [[ ]] per pound. Because of the sharp reduction of the export of honey from other countries, the domestic sales and price of honey in the United States is very promising.
>
> I contacted a US local client who was willing to order a container of honey at the ex-warehouse price of [[ ]] USD per ton on the condition that it can pass the examination of US customs and FDA. Since the annual purchasing amount of this client is

Based on the evidence of CEO B's control of the pricing decisions of the claimed U.S. affiliate and the absence from the Final Results of a thorough discussion of the matter, the court remanded the Final Results to the Department and instructed it "to either find that Jinfu PRC and Yousheng USA were affiliated as of November 2, 2002, and to reinstate plaintiff's new shipper review, or to provide other record evidence to support its conclusion that the companies were not affiliated." *Jinfu I*, 30 CIT at ____ , Slip Op. 06–137 at 32–33. If the Department chose not to find the companies affiliated, the court instructed the Department to "reopen the record to provide plaintiff with an opportunity to place thereon further evidence with respect to affiliation and to provide an explanation of that evidence." *Id.* at ____ , Slip Op. 06–137 at 33.

On remand, Commerce chose the court's second option and reopened the record. On October 23, 2006, plaintiff submitted additional evidence regarding the issue of affiliation and provided an explanation of that evidence. *See* Remand Redetermination at 2. On November 13, 2006, the Department, having considered plaintiff's additional evidence, issued its draft remand redetermination in which it again concluded that the companies were not affiliated within the meaning of 19 U.S.C. § 1677(33) because CEO B did not control the pricing decisions of either Yousheng USA or Jinfu USA. On November 20, 2006, plaintiff commented on the draft redetermination. Commerce also permitted the American Honey Producers Association and the Sioux Honey Association, as interested parties, to comment on the draft results, which they did on November 22, 2006.

After considering the additional evidence and the accompanying comments and explanations, Commerce determined that it would "not change[ ] [its] finding of no affiliation between Jinfu PRC and Yousheng USA/Jinfu USA at the time of the relevant U.S. sale, i.e., November 2, 2002." Remand Redetermination at 2–3. Thus, Com-

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relatively significant, if a good relationship can be established with this client, it will be of great help to our company's sales to the US.

Please let me know you[r] opinion and advise me further.

Letter from Bruce M. Mitchell to Abdelali Elouaradia, Oct. 23, 2006, Ex. 19 ("Pl.'s Remand Submission"). On the same day CEO B responded, stating:

We received you[r] letter and felt happy that there are clients . . . interested in the honey product of our company. You did a good job on the report of US market. We finished a container . . . on November 5.

In order to open the US market and better understand the marketing information, I agree with you. We accept the client's quotation of [[ ]] USD per ton as ex-warehouse price on the condition that it passes the examination of the US customs and FDA. Please make the preparation and keep in touch with the client for purpose of long term cooperation. I hereby authorize you to sign contract with the client.

Please process as soon as possible.

Pl.'s Remand Submission, Ex. 20.

merce reaffirmed its earlier determination and declined to reinstate plaintiff's new shipper review.

STANDARD OF REVIEW

The court reviews Commerce's Remand Redetermination for substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) ("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."). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). To determine the existence of substantial evidence, the court must "consider[ ] the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id*. (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The possibility of drawing two opposite yet equally justified conclusions from the record will not prevent the agency's determination from being supported by substantial evidence. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

DISCUSSION

The court must now decide whether Commerce has, on remand, supported with substantial evidence from the record its conclusion that Jinfu PRC did not control or have the potential to control the pricing decisions of Yousheng USA or its successor Jinfu USA as of November 2, 2002.

In its Remand Redetermination, Commerce found that "the record d[id] not support a finding that CEO B had control over Mr. A's business decisions, particularly those dealing with pricing." Remand Redetermination at 7. The Department maintained this position despite the presence on the record of the faxes exchanged between Mr. A and CEO B.

Commerce first took issue with the faxes' credibility.

> At verification, Department officials questioned the credibility of the exchanged facsimiles given that neither document contained any fax communications commonly found at the top of most faxed transmissions. Mr. A stated that he did not have a facsimile report recording the date and time he transmitted the letter to CEO B. The lack of transmission information on the faxes, when viewed in the context of credibility problems[6] re-

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[6] A primary reason for Commerce's conclusion in the Final Results that CEO B did not own Jinfu USA on November 2, 2002, was its finding that the evidence supporting plain-

> garding corporate ownership documents submitted by Jinfu PRC to the Department, raises questions regarding the veracity and reliability of the facsimiles.

Remand Redetermination at 10. Commerce, therefore, appeared to take the view that, because it was justified in suspecting the reliability of plaintiff's proffered evidence of ownership, it was entitled to view all evidence relating to the claimed new shipper sale with skepticism.

The Department also concluded that even if the faxes were to be found credible, they would not support a finding of control because they were exchanged after the subject honey was shipped. The Department observes that the subject shipment, "[p]er the bill of lading, . . . left the port of Shanghai for Oakland [, California] on November 5, 2002," and that the facsimiles were exchanged on November 13, 2002. Remand Redetermination at 9. Commerce explained:

> According to the facsimiles, CEO B agreed to the price negotiated by Mr. A on November 13, 2002 (the date of the fax from CEO B to Mr. A), subsequent to which Mr. A entered into a sales contract with the U.S. customer. The price, according to statements at verification and as noted above, was reached through negotiations between Mr. A and the U.S. customer at a time that coincided withJinfu PRC's sale to Mr. A. . . .
>
> Given that the goods were on the water headed for Oakland . . . at the time the alleged facsimiles were exchanged between Mr. A and CEO B, these documents are irrelevant in establishing that Mr. A's price negotiations were subject to the approval of CEO B.

Remand Redetermination at 10. Commerce, then, concluded that in light of "the timeline presented above, the U.S. resale price was established and agreed upon prior to the date of the alleged facsimiles, i.e., November 13, 2002." Remand Redetermination at 11.

Commerce further discounted the faxes' probative value by stating that, "even if considered credible or reliable, [the faxes] merely indicate that Mr. A found a customer willing to pay X price per [metric ton] for the honey and that CEO B agreed to this price." Remand Redetermination at 11 (footnote omitted). The Department apparently concluded that, because the price of the honey remained unchanged from the original price negotiated by Mr. A, CEO B's approval could not be considered evidence of his control over Mr. A's pricing deci-

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tiff's ownership claim was incredible. *See* Issues & Decision Mem. at 26. In particular, Commerce found that plaintiff's "corporate resolutions, a certificate to transfer of stocks, amended articles of incorporation and by-laws, and a receipt for legal services preparing these documents," were backdated. Def.'s Resp. to Comments Upon Final Results of Redetermination Pursuant to Remand ("Def's Resp.") 12 n.4.

sions. *See* Remand Redetermination at 11 ("The contract with the U.S. customer is signed on November 15, 2002, on terms that d[id] not change between then and the shipment to the end-user. . . . The terms of this sale also did not change between contract and receipt of payment."). In reaching its conclusion, though, Commerce does not discuss the sentence in CEO B's fax to Mr. A "I hereby authorize you to sign contract with the client." Letter from Bruce M. Mitchell to Abdelali Elouaradia, Oct. 23, 2006, Ex. 20 ("Pl.'s Remand Submission").

As further evidence that CEO B did not have the potential to control Mr. A's pricing decisions, the Department relied on specific business-related actions taken by Mr. A without first consulting CEO B. *See* Remand Redetermination at 12. In particular, the Department asserted that, unbeknownst to CEO B, "the U.S. customer was financing the entire U.S. transaction in question." Remand Redetermination at 12. Commerce stated:

> The total amount paid by the U.S. customer by November 20, 2002, . . . was received by Mr. A prior to paying the bill from the freight forwarding company. Moreover, in reviewing Jinfu USA's checkbook registers at verification, Department officials discovered that Mr. A had also borrowed money from the U.S. customer in order to pay Jinfu USA'sfreight forwarding bill for a later sale. There is no evidence on the record to suggest that Mr. A requested approval from CEO B prior to receiving the loan, nor is there evidence on the record to suggest that Jinfu PRC sent money to its alleged affiliate to repay the loan.

Remand Redetermination at 12 (citation omitted). The Department, thus, concluded that CEO B could not be in a position to exercise control over Mr. A and Jinfu USA if Mr. A could receive the advance payment and obtain the loan without CEO B's approval.

Finally, the Department found the contents of affidavits of Mr. A, CEO B and Jinfu PRC's account manager submitted to establish that Mr. A believed he was under CEO B's control to be "contradicted by record evidence." Remand Redetermination at 20; *see* Mr. A Aff. ¶¶ 9, 12 (explaining that at the time of the new shipper sale, "I was working for and being paid by [CEO B]," and that "[i]t ha[d] always been my understanding that Jinfu USA was owned by [CEO B] at the time that Jinfu USA purchased honey from [CEO B's] company in China, and resold the honey to our customer in the U.S.").

According to Commerce, the statements made by these individuals at verification, in particular those of Mr. A, tell a different story from that presented in the newly submitted affidavits. For instance, Commerce observed that at verification, "Mr. A stated that he did not want CEO B to have direct access to Jinfu USA's U.S. customers because of the possibility that Jinfu PRC would sell directly to the customers." Remand Redetermination at 20 (citation omitted). As an-

other example, the Department repeated its assertion that Mr. A "obtained a loan from the U.S. customer to pay for his freight Redetermination at 21 (citation omitted). Based on its conclusion that the statements in the newly submitted affidavits concerning Mr. A's belief that he was under the control of CEO B were not supported by the evidence already on the record, the Department found that they failed to justify a finding of affiliation by way of control.

Thus, after considering the additional evidence plaintiff placed on the record regarding the question of affiliation and comparing it with earlier submitted record evidence, the Department concluded that "[t]here is substantial evidence on the record that demonstrates . . . that Mr. A made the sale of honey to the U.S. customer without the approval of CEO B. . . ." Remand Redetermination at 18. Commerce, therefore, continued to find that Jinfu PRC was not affiliated with either Yousheng USA or its successor Jinfu USA as of the date of the claimed new shipper sale and that, as a result, plaintiff was not entitled to a new shipper review.

Plaintiff makes both factual and procedural objections to the Department's Remand Redetermination, insisting at all times that the record supports a finding of affiliation. *See generally* Pl.'s Comments Resp. Commerce's Final Results of Redetermination ("Pl.'s Comments"). In contesting Commerce's factual determinations, plaintiff reasserts its argument in *Jinfu I* that CEO B actually owned Jinfu USA on November 2, 2002. That is, plaintiff maintains that the evidence it claims shows ownership demonstrates, at a minimum, that CEO B controlled the company as of the date of the claimed new shipper sale.

In addition to that previously placed on the record, plaintiff cites two pieces of new evidence it submitted on remand to support its position. First, plaintiff points to an affidavit from Attorney E. According to Attorney E, he "was retained in October 2002 to transfer ownership of Jinfu USA to CEO B and that in October 2002 he drafted and provided to Mr. A and CEO B documents which, if they had been promptly and properly executed, actually transferred legal ownership of Yousheng/Jinfu USA to CEO B." Pl.'s Comments 12. Second, plaintiff asserts that affidavits of CEO B, Mr. D (the previous owner of Yousheng USA) and Mr. A each reveal that CEO B owned or controlled Jinfu USA as early as October 2002. *See* Pl.'s Comments 8–9. As plaintiff explains, the affidavits repeat its claims in *Jinfu I* regarding Mr. D's intention to transfer ownership to CEO B and CEO B's intention to purchase the company. Moreover, the affidavits are pointed to as proof of Mr. A's understanding that he needed CEO B's approval on all pricing and sales decisions. Plaintiff, therefore, contends that while

> the additional documents submitted [on remand] on October 23, 2006, are sufficient to establish that CEO B actually owned Jinfu USA prior to [Jinfu PRC]'s initial sale to the United

> States . . . this Court need not reconsider this issue at this time, since these documents also reconfirm that operational control of Yousheng/Jinfu USA had been transferred to CEO B, notwithstanding that legal ownership arguably remained with Mr. D.

Pl.'s Comments 12 n.4; *see also* Pl.'s Comments 12–13 (insisting that the new submissions "constitute[ ] compelling evidence that CEO B actually had operational control of Yousheng/Jinfu USA at the end of October 2002"). Thus, plaintiff takes the position that the evidence, if not demonstrating ownership, at least establishes that CEO B actually controlled Mr. A's pricing decisions.

Plaintiff next takes issue with the Department's conclusion that Mr. A finalized the sales price of the honey with Customer C without obtaining CEO B's approval. *See* Pl.'s Comments 14. For plaintiff, "[t]his determination is simply wrong." Pl.'s Comments 14. The key pieces of evidence for plaintiff's position remain the faxes transmitted between Mr. A and CEO B. Plaintiff characterizes as baseless the Department's decision not to attach substantial weight to these transmissions "because of their failure to have fax communications commonly found at the top of most transmissions." Pl.'s Comments 15 (internal quotation marks & citation omitted). For plaintiff:

> The facsimile exchange clearly conveys the message which the parties intended to convey – that Mr. A was seeking CEO B's approval ofa sales price to a particular customer and that CEO B approved this price and agreed to the sale. And as the Department implies, while "fax communication" may "normally" have notations at the top, the absence of such notation does not compel a conclusion (as the Department now suggests) that the facsimiles were never sent or received.

Pl.'s Comments 15 (footnote omitted).

Plaintiff further challenges the Department's characterization of the evidence that the honey was shipped before Mr. A received CEO B's approval of the price.

> The Department suggests that evidence supporting its claim is found in the facts that: (1) Mr. A negotiated prices with Customer C in late October and early November 2002; and (2) the merchandise was already on the water destined for Oakland prior to November 13, 2002. These facts do not constitute evidence that CEO B did not exercise operational control over Yousheng/Jinfu USA. In this regard, Mr. A and Customer C did not enter into a formal agreement for Jinfu USA to sell honey to Customer C until November 15, 2002. Contrary to the Department's suggestion, there does not exist a scintilla of evidence that this resale was consummated, and the material terms of sale established with certainty prior to this date. Mer-

> chandise is often resold by a U.S. importer (e.g., Jinfu USA) to an ultimate consumer (e.g., Customer C) while in-transit to the United States, and as Mr. A advised the Department at verification, "he was confident that if . . . Customer C . . . had not purchased the . . . honey, he would be able to find another buyer through his relationships with sales representatives/ importers. . . ."

Pl.'s Comments 15–16 (footnotes & citations omitted). Put another way, it is plaintiff's view that the honey's shipment prior to November 13, 2002, the date CEO B agreed to the purchase price, bore no relationship to a finding that CEO B controlled the price of the honey sold to Customer C.

Plaintiff also contends that in reaching its conclusion that CEO B was not in a position to exercise control over Jinfu USA, the Department gave undue credit to evidence indicating that: (1) Mr. A received pre-payment from Customer C for the new shipper sale; and (2) that he also obtained a loan from Customer C to finance a later transaction. *See* Pl.'s Comments 16–17. First, with respect to Mr. A's receipt of the advance payment, plaintiff insists that "the fact that Customer C may have financed the transaction by paying Jinfu USA for the merchandise prior to such time as Jinfu USA paid its freight forwarding company is completely unrelated to whether CEO B exercised operational control over Jinfu USA." Pl.'s Comments 17. Second, with regard to Customer C's loan to Mr. A, plaintiff argues that, because "the loan to which the Department refers relates to a transaction which took place in August 2003, . . . [t]he fact that there may be no evidence on this . . . record to suggest that Mr. A requested approval from CEO B prior to receiving the loan . . . is neither surprising nor significant." Pl.'s Comments 17. As plaintiff states, "a sales transaction subsequent to the [new shipper review] . . . normally is not subject to analysis in a verification of a [new shipper review]." Pl.'s Comments 17. That is, because the loan was for a sale that took place after Commerce initiated the new shipper review, the absence of any record evidence concerning the loan was to be expected.

Finally, plaintiff claims that the Department made a procedural error in rendering the Remand Redetermination without providing plaintiff an opportunity to place on the record additional evidence intended to address Commerce's concerns regarding the credibility and reliability of the faxes and the circumstances surrounding the advance payment and loan by Customer C to Jinfu USA. *See* Pl.'s Comments 18. Plaintiff claims that it was prejudiced because the Department's primary reliance on the faxes, the Customer C pre-payment of the sales price for the claimed shipper transaction and the later loan was not made known until the issuance of the draft results of the remand redetermination. That is, plaintiff claims that while it was given the opportunity to, and in fact did submit comments on the draft redetermination, it was not allowed to place on the record

specific evidence rebutting the Department's new conclusions. *See* Pl.'s Comments 18 ("[Plaintiff], not surprisingly, was unable to read the Department's mind and to provide documentation addressing certain factors which the Department now considers relevant. . . ."). Thus, plaintiff asks that "in the event that this Court decides that the Department's Redetermination should not be reversed," it be allowed to supplement the record with additional evidence "which directly addresses the Department's rationale." Pl.'s Comments 20.

As the court noted in *Jinfu I*, "[i]n its affiliation analysis, Commerce must examine the subject relationship in accordance with 19 U.S.C. § 1677(33)." *Jinfu I*, 30 CIT at ___ , Slip Op. 06–137 at 12–13 (footnote omitted). The court further stated that, in this case, under 19 U.S.C. § 1677(33), a finding of control, and thus affiliation requires "proof that one person . . . 'ha[s] the potential to impact the decisions concerning the . . . pricing . . . of the subject merchandise.' " *Jinfu I*, 30 CIT at ___ , Slip Op, 06–136 at 27 (quoting *TIJID, Inc. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1286, 1293 (2005)); *see also* 19 C.F.R. § 351.102(b) ("The Secretary will not find that control exists . . . unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise. . . ."). Thus, as was its charge in *Jinfu I*, the court now "must determine whether Commerce reasonably concluded that the evidence [on remand] failed to demonstrate that on November 2, 2002, CEO B had, at a minimum, the potential to exercise control over the pricing decisions of Yousheng USA." *Jinfu I*, 30 CIT at ___ , Slip Op. 06–137 at 16.

The Court of Appeals for the Federal Circuit has made it clear that, when reviewing an agency determination for substantial evidence, this Court "do[es] not make the determination; [it] merely vet[s] the determination." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006). In other words, the Court "must affirm a [Commerce] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the [Department]'s conclusion." *Id*. (internal quotation marks & citation omitted).

In its Remand Redetermination, Commerce has again found that the evidence, including that newly submitted on remand by plaintiff, fails to demonstrate that CEO B had the potential to control or actually controlled Jinfu USA as of November 2, 2002. On remand, the Department took into consideration affidavits of CEO B, Mr. A, Mr. D and Attorney E. In addition, the Department emphasized the faxed communications between Mr. A and CEO B regarding the price Mr. A was to charge Customer C for the honey. In large part because it found this evidence to be incredible, the Department continued to find that CEO B did not control Jinfu USA's pricing decisions. Commerce, however, failed to explain adequately why the evidence on the

record as supplemented on remand supports its finding that CEO B was not in control of Jinfu USA at the time of the claimed new shipper sale.

In particular, Commerce has not explained why its finding that the faxes, "even if considered credible or reliable, merely indicate that Mr. A found a customer willing to pay X price per [metric ton] for the honey and that CEO B agreed to this price." Remand Redetermination at 11 (footnote omitted). That is, Commerce has not articulated a rational connection between its conclusion that CEO B did not control Jinfu USA's pricing decisions and its statement that the faxes, if valid, would not evidence control. Of particular concern is Commerce's failure to expressly state why CEO B's approval of the sales price and authorization to execute the contract do not evidence control. *See* Pl.'s Remand Submission, Ex. 20 ("We accept the client's quotation . . . as ex-warehouse price on the condition that it passes the examination of the US customs and FDA. . . . I hereby authorize you to sign contract with the client."). Indeed, it is difficult to read the facsimiles without concluding that, if they are authentic, they are evidence that Mr. A sought CEO B's approval of the transaction and the price, and that he received it. Therefore, the court remands this matter to Commerce to permit the agency to explain why, if proven to be genuine, the contents of that exchange would not demonstrate that CEO B controlled Jinfu USA.

In addition, the court also finds it proper to allow plaintiff, on remand, to put on the record specific evidence aimed at rebutting Commerce's conclusions, which were first made known in the draft remand redetermination, regarding: (1) the credibility and reliability of the faxes; and (2) the circumstances surrounding Customer C's pre-payment of the sales price and the loan. This situation is not unlike those presented in *AK Steel Corporation v. United States*, 22 CIT 1070, 34 F. Supp. 2d 756 (1998) and *Böwe-Passat v. United States*, 17 CIT 335 (1993) (not reported in the Federal Supplement). Here, as in those cases, plaintiff was first made aware of the prominent role played by certain evidence in Commerce's decision after the record was closed. *See AK Steel Corp.*, 22 CIT at 1092, 34 F. Supp. 2d at 773 (sustaining Commerce's use of respondent's explanation of data discrepancy as record evidence because respondent "first became aware that reconciliation was in dispute upon receiving a copy of [d]omestic [p]roducers' [c]ase [b]rief"); *Böwe-Passat*, 17 CIT at 343 (remanding matter, and holding that Commerce's refusal to permit respondent to address previously unknown deficiencies in its submissions, made known after record was closed, was a "predatory 'gotcha' policy"). Plaintiff rightly complains that it had no way of knowing that the lack of a reference date would be pivotal to its case. Also, nothing in any of the proceedings had before the draft remand redetermination indicated that the Department would rely so heavily on Customer C's having made early and full payment for the claimed new shipper

sale and having loaned Mr. A money to finance a later transaction without the latter having secured CEO B's approval. Therefore, on remand, Commerce is instructed to reopen the record and permit plaintiff to submit new evidence with respect to these matters.

CONCLUSION

Based on the foregoing, the court finds to be unsupported by substantial evidence Commerce's Remand Redetermination and remands this case for a second time. On remand, Commerce is to: (1) take into account the court's opinion and provide anexplanation as to why the contents of the faxes exchanged between Mr. A and CEO B, if credible and reliable, do not support a conclusion that CEO B controlled Jinfu USA; and (2) reopen the record to allow plaintiff to put on the record new evidence regarding the credibility and reliability of the faxes, the circumstances surrounding Customer C's prepayment of the sales price for the claimed new shipper sale and the facts behind Mr. A's obtaining a loan from Customer C for a later transaction without first obtaining CEO B's approval. Remand results are due September 11, 2007. Comments to the remand results are due October 11, 2007. Replies to such comments are due October 22, 2007.

Slip Op. 07–103

PAM, S.P.A and JCM, LTD., Plaintiffs, v. UNITED STATES, Defendant, and A. ZAREGA'S AND SONS, AMERICAN ITALIAN PASTA COMPANY, NEW WORLD PASTA COMPANY, and DAKOTA GROWERS PASTA COMPANY, Defendants-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 04–00082

[Plaintiffs' motions for judgment on the agency record GRANTED in part; Commerce's administrative review results SUSTAINED in part and REMANDED in part.]

July 2, 2007

Law Offices of David L. Simon (*David L. Simon*) for Plaintiff PAM, S.p.A.

Rodriguez O'Donnell Ross Fuerst Gonzales & Williams, PC (*Thomas J. O'Donnell*, *Michael A. Johnson*, and *Lara A. Austrins*) for Plaintiff JCM, Ltd.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, Ada E. Bosque, and *Stefan Shaibani*); of counsel, *Rachael E. Wenthold* and *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Collier, Shannon, Scott, PLLC (*David C. Smith, Jr.*, and *Paul C. Rosenthal*) for Defendants-Intervenor.

OPINION & ORDER

Carman, Judge: This matter is before this Court on motion for judgment upon the agency record. Plaintiffs, PAM, S.p.A. ("PAM") and JCM, Ltd. ("JCM"),[1] appeal the final results of the sixth administrative review of the antidumping order on certain pasta from Italy. *See Certain Pasta from Italy and Determination not to Revoke in Part*, 69 Fed. Reg. 6,255, 6,257 (Dep't Commerce Feb. 10, 2004) (notice of final results and determination not to revoke in part) ("*Final Results*"). Specifically, Plaintiffs challenge Commerce's decision to apply a dumping margin of 45.49 percent to PAM, based on total adverse facts available. As discussed below, this Court finds that Commerce's decision to apply adverse facts available to PAM is supported by substantial evidence and is otherwise in accordance with law. However, this Court finds that Commerce's application of the 45.49 percent rate to PAM is not supported by substantial evidence. This Court therefore grants in part Plaintiffs' motion for judgment on the agency record and remands the Final Results to Commerce for further proceedings consistent with this Opinion and Order.

PROCEDURAL HISTORY

Commerce published the Final Results of the sixth administrative review of the antidumping order on certain pasta from Italy in February 2003. Plaintiffs timely appealed the Final Results on two grounds. First, Plaintiffs argued that the results of the administrative review were void as to PAM because the domestic industry petitioners[2] failed to provide notice to PAM that they requested an administrative review.[3] Second, Plaintiffs argued that Commerce was not justified in applying adverse facts available to PAM. This Court in *PAM, S.p.A. v. United States*, 29 CIT ___ , 395 F. Supp. 2d 1337, 1345 (2005), *rev'd*, 463 F.3d 1345 (Fed. Cir. 2006) ("*PAM I*"), held that the Final Results were void *ab initio* as to PAM due to the petitioners' failure to provide notice of the administrative review. On appeal, the Court of Appeals for the Federal Circuit ("CAFC") reversed, holding that PAM was not prejudiced by the lack of notice and re-

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[1] PAM is an Italian pasta manufacturer subject to the antidumping order on certain pasta from Italy. JCM imports pasta from PAM.

[2] A number of the petitioners, A Zarega's and Sons, American Italian Pasta Company, New World Pasta Company, and Dakota Growers Pasta Company, intervened in this action as Defendants-Intervenor.

[3] Commerce's regulations require a party that requests an administrative review to serve notice on "each exporter or producer specified in the request . . . by the end of the anniversary month [of the antidumping order] or within ten days of filing the request for the review, whichever is later." 19 C.F.R. § 351.303(f)(3)(ii) (2006).

manding the case to this Court for further proceedings on the merits. *PAM, S.p.A. v. United States*, 463 F.3d 1345, 1349 (Fed. Cir. 2006). Plaintiffs now challenge Commerce's application of adverse facts available to PAM.

FACTUAL BACKGROUND[4]

On August 27, 2002, Commerce initiated the sixth administrative review of the antidumping order on certain pasta from Italy, covering the period of review July 1, 2001, through June 30, 2002. *Certain Pasta from Italy*, 67 Fed. Reg. 55,000, 55,002 (Dep't Commerce Aug. 27, 2002) (notice of initiation). Soon thereafter, Commerce sent out questionnaires to the respondents, including PAM. The questionnaires requested sales and production information from the respondents and set a deadline of October 7, 2002 for responses to be filed. (Letter from James Terpstra to Salvatore Lubrano 3 (Aug. 29, 2002), Pub. R. Doc. 19.) PAM notified Commerce via letter that Petitioners had not properly served PAM with their requests for review, and as a result, PAM was not notified of Commerce's administrative review in a timely manner. (Letter from David J. Craven to the Honorable Donald Evans 1 (Sept. 3, 2002), Pub. R. Doc. 33.) PAM requested and was granted a series of extensions of time to file responses to the initial questionnaire and two supplemental questionnaires. (*See* Letters granting extensions to PAM, Pub. Docs. 53, 179, 202 & 245.) PAM submitted its completed questionnaires by the extended deadlines.

At the time Commerce conducted a verification of PAM's questionnaire responses, the agency discovered that PAM had not reported a large number of sales made in the home market. (Verification of the Sales Response of PAM in the 01/02 Administrative Review of the Antidumping Duty Order of Certain Pasta from Italy 3 (Jul. 28, 2003) ("PAM Verification Rep."), Pub. R. Doc. 305.) When asked about the missing sales, PAM explained that some of the sales were omitted due to a computer programming error and that another portion of the sales were not reported because they were made outside the ordinary course of trade. (*Id.* at 17–18.)

Regarding the computer programming error, PAM explained that it designated invoices with one of three codes: "FT, for regular invoices; FA, for invoices issued for merchandise to be shipped; and FP, for invoices that are issued by PAM for merchandise sold from a non-PAM warehouse."[5] (*Id.* at 17.) To extract sales data from PAM's accounting system, PAM used the same computer programs in this ad-

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[4] This Court's prior opinion in this matter contains a recitation of the facts. *See PAM I*, 395 F. Supp. 2d at 1339–40. This Opinion and Order includes only those facts relevant to deciding the motion for judgment on the agency record.

[5] This Court refers to the FP-invoice sales as "external warehouse sales" throughout the Opinion and Order.

ministrative review as it had used in a prior administrative review. Because PAM had not used FP invoices in the home market during the period covered by the prior administrative review, the computer programs were not coded to extract invoices with the FP designation. As a result, the external warehouse sales were omitted from PAM's home market sales database. (*Id.*)

The other portion of unreported invoices reflected sales to a single customer, AG.E.A., "an Italian government[al] agency [that] supplies pasta to charitable organizations in Italy."[6] (*Id.* at 18.) PAM explained that it did not report the sales to AG.E.A. because they were made outside the ordinary course of trade.[7] PAM believed the AG.E.A. sales to be outside the ordinary course of trade because the pasta sold to AG.E.A. was not for commercial use and was produced in larger quantities at lower cost than pasta sold commercially. (*Id.*)

Altogether, Commerce estimated that PAM failed to report almost two-thirds of its home market sales.[8] (Issues & Decision Mem. 13, 18.) Commerce determined that its "ability to calculate PAM's dumping margin using the data reported by PAM [was] severely compromised" because "[s]uch a small sample may not provide a reasonable approximation of PAM's actual sales practice in the home market. *Certain Pasta from Italy*, 68 Fed. Reg. 47,020, 47,026 (Aug. 7, 2003) (notice of preliminary results of the sixth administrative review) ("*Preliminary Results*").

Commerce further determined that PAM failed to cooperate with Commerce's requests for information, warranting application of adverse facts available. (Issues & Decision Mem. for the Final Results of the Sixth Antidumping Duty Administrative Rev. of Certain Pasta from Italy 13–14 (Feb. 3, 2004) ("Issues & Decision Mem."), Nonconfidential App. of PAM for J. upon an Agency R Ex.1.) Commerce determined that

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[6] PAM actually made these sales to a private company, which served as an intermediary for AG.E.A. Because the name of the company is confidential, and because AG.E.A. was the ultimate customer, this Court will refer to AG.E.A. as the customer. At verification, PAM explained the commercial relationship between PAM, the private company, and AG.E.A. as follows:

> AG.E.A. has a supply of French wheat. The AG.E.A. offers to give this wheat to whoever will provide them with the largest quantity of pasta. [The private company] wants the wheat, but does not produce pasta, so [it] contract[s] with PAM [to buy pasta from PAM] and then gives the pasta to AG.E.A. in exchange for wheat.

(PAM Verification Rep. 18.)

[7] Commerce generally excludes sales that are not made "in the usual commercial quantities and in the ordinary course of trade," 19 U.S.C. § 1677b(a)(1)(B) (2000), because sales made in unusual quantities or outside the ordinary course of trade might not be made at market prices.

[8] PAM reported home market sales of approximately ten thousand tons. (Pr. Br. of Pl. for J. upon the Agency R. Pursuant to R. 56.2 ("PAM's Br.") 24.) PAM failed to report approximately twenty-one thousand tons, of which its external warehouse sales accounted for five thousand tons and the AG.E.A. sales accounted for sixteen thousand tons. (*Id.*)

> PAM [did] not act[ ] to the best of its ability in failing to report approximately two-thirds of its home market sales in this review, because, (1) [Commerce] issued clear instructions requiring this information in its initial questionnaire; (2) PAM had the opportunity to provide the information in responding to two supplemental questionnaires, all of the deadlines of which were extended at PAM's request by [Commerce]; (3) [Commerce] had instructed PAM to report all sales, including those claimed to be outside the ordinary course of trade, and (4) PAM has successfully participated in previous reviews. Additionally, the fact that [Commerce] was readily able to obtain general information regarding the existence of such sales at verification supports our determination that PAM did not act to the best of its ability in reporting its home market sales.

(*Id.* at 18.) Commerce assigned PAM a dumping margin of 45.49 percent *ad valorem* based on adverse facts available.[9] *Final Results*, 69 Fed. Reg. at 6,257.

JURISDICTION

This Court has exclusive jurisdiction to review final results of administrative reviews pursuant to 28 U.S.C. § 1581(c) (2000).[10]

STANDARD OF REVIEW

When reviewing Commerce's final results of administrative reviews the United States Court of International Trade must sustain Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). "More specifically, when reviewing whether Commerce's actions are unsupported by substantial evidence, the Court assesses whether the

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[9] The 45.49 percent margin is the highest dumping margin given to any respondent at any point in the proceedings that has been upheld by the courts. Commerce calculated this dumping margin as an adverse facts available rate for another uncooperative respondent, Barilla, in the first administrative review. (Issues & Decision Mem. 21.) Commerce used a domestic price list of Barilla's as a proxy for home market price and U.S. import statistics as a proxy for U.S. price. *World Finer Foods, Inc. v. United States*, 24 CIT 1235, 1235 (2000) ("*World Finer Foods II*"). Using the proxies, Commerce calculated individual dumping margins for three different categories of pasta. The individual dumping margins were 39.63, 60.06, and 63.36 percent. *Id.* at 1236. While Commerce selected the highest of the three calculations, 63.36 percent, as Barilla's adverse facts available rate, the court reduced the adverse facts available rate to 45.49 percent, a simple average of the three individual dumping margins. *Id*. at 1238.

[10] 28 U.S.C. § 1581(c) provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930[, codified as amended at 19 U.S.C. § 1516a]." Section 516A of the Tariff Act of 1930 provides for judicial review of, *inter alia*, final results of administrative reviews of antidumping duty orders. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000).

agency action is 'unreasonable' given the record as a whole." *Mittal Steel Galati S.A. v. United States*, 31 CIT ___ , Slip Op. 07–73 at 2–3 (May 14, 2007) (*citing Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006)).

DISCUSSION

I. *Commerce's Use of Adverse Facts Available.*

A. Parties' Contentions

Plaintiffs[11] argue that Commerce erred in applying adverse facts available to PAM because the omissions in PAM's questionnaire responses "were not of a nature to justify the application of adverse facts available." (Pr. Br. of Pl. for J. upon the Agency R. Pursuant to R. 56.2 ("PAM's Br.") 24.) Plaintiffs explain that the omissions stemmed from two errors. First, "PAM omitted the AG.E.A. sales on the advice of counsel" because the sales were outside the normal course of trade. (*Id*.) PAM contends "that the failure to report the AG.E.A sales was *harmless* error" because Commerce "conclud[ed] that these sales were not for commercial purposes, and were to a government agency for purposes of charity." (*Id.* at 30 (*citing* PAM Verification Rep. 3).)

The second error, omitting the external warehouse sales, was the result of a "minor clerical error in the computer program" used to extract sales information from the company's database.[12] (*Id.* at 24.) PAM blames its failure to discover this error on prior counsel. PAM contends that prior counsel "failed to respond to the portion of [Commerce's] questionnaire requiring PAM to submit a complete reconciliation of its reported sales to its accounting system."[13] (*Id*. at 30.) PAM argues that the company would have detected the omission of the external warehouse sales had a reconciliation occurred, but "prior counsel never called upon PAM to prepare any reconciliations, and never reviewed such issues with PAM." (*Id*. at 31.) PAM argues that "its errors were attributable to counsel rather than to PAM it-

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[11] Both PAM and JCM filed memoranda in support of their respective motions for judgment upon the agency record. Because the arguments of Plaintiffs track each other, this Court refers only to PAM's briefs except in instances where Plaintiffs differ.

[12] The computer program used to extract data from the company's accounting system did not pick up on any of the external warehouse sales because those sales were coded differently than PAM's other home market sales. (*See* PAM Verification Rep. 17.)

[13] It appears that PAM's prior counsel submitted to Commerce on March 31, 2004, a purported reconciliation of sales quantities with production quantities. The document showed that the total "quantity [of pasta] *produced* [by PAM] was some 90 thousand tons, while the quantity [reported by PAM in its questionnaire as] *sold* was some 22 thousand tons . . . . [Prior] counsel simply presented these figures to [Commerce], with no explanation whatsoever." (PAM's Br. 31.) This Court understands PAM's argument to be that the submission filed by prior counsel purporting to be the reconciliation did not actually reconcile the sales data with the production data.

self, as the company had done everything within its capacity to comply with the requirements of [Commerce] as relayed by its attorney."[14] (*Id*.) Therefore, PAM "submits that the application of adverse facts available is unlawful because PAM used its best efforts to answer to questionnaire." (*Id*. at 33.)

In contrast, the Government and Defendants-Intervenor argue that Commerce properly applied adverse facts available to PAM.[15] First, the Government stresses that Commerce appropriately resorted to facts otherwise available in making its determination because PAM failed to report around two-thirds of its home market sales. (Def.'s Mem. in Opp'n to Pls.' R. 56.2 Mots. for J. upon the Agency R. ("Def.'s Mem.") 20.) Because of the significant omissions from PAM's home market sales data, "Commerce was unable to verify whether PAM's reported home market sales reflected the entire universe of its sales." (*Id*. at 22–23 (emphasis omitted).) As a result, "Commerce had no choice but to resort to total facts available as a result of PAM's reporting failure." (*Id*. at 24–25.)

Second, the Government argues that Commerce was justified in applying adverse inferences to the facts available because PAM did not cooperate to the best of its ability in responding to Commerce's questionnaires. (*Id*. at 25.) The Government notes that PAM, as "an experienced producer" that "had participated in previous reviews of the antidumping order at issue," was aware of the Commerce's reporting requirements. (*Id*. at 26–27.) The Government also contends that PAM had the ability to comply with Commerce's requests for information, as evidenced by "Commerce's discovery of information at verification regarding the existence of the unreported sales." (*Id*. at 27.)

The Government contends that PAM's excuses for failing to report two-thirds of its home market sales do not establish that PAM acted to the best of its ability. The Government submits that PAM's argument that it did not need to report its AG.E.A. sales as they were outside the ordinary course of trade runs counter to Commerce's instructions to report "all sales, including those sales which you believe are outside the ordinary course of trade." (*Id*. (*quoting* Questionnaire Instructions G–7; Pub. R. Doc. 31).) Likewise, the

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[14] JCM argues that Commerce, when evaluating whether PAM cooperated to the best of its ability, should have taken into consideration the difficulty PAM faced in responding to Commerce's questionnaire. "Unlike companies with U.S. affiliates, PAM could not draw upon U.S. based personnel to help with the task of translating, computerizing, collating[,] and reconciling its confidential business information." (Principal Br. of Pl. JCM in Supp. of Mot. Pursuant to R. 56.2 for J. upon the Agency R. ("JCM Br.") 34–35.) Furthermore, "[t]he Record shows that [Commerce] was informed that [PAM] had a very small staff, including only two people fluent in English." (*Id*.) JCM contends that PAM "did, indeed, do its best, given its resources." (*Id*. at 37.)

[15] Because many of the arguments raised by Defendants-Intervenor track those made by the Government this Court will refer only to the Government's briefs.

Government contends, the inadvertent coding error that led to the omission of PAM's external warehouse sales is not a valid excuse; "inadvertent errors are insufficient to demonstrate that one is acting to the best of its ability." (*Id.* at 28.) Furthermore, the Government contends that PAM cannot shield itself by blaming prior counsel for the deficiencies in PAM's submissions because PAM certified the accuracy and completeness of its responses. (*Id.*) Therefore, the Government declares that Commerce's decision to apply adverse facts available is supported by substantial evidence on the record and is in accordance with law.

B. Analysis

19 U.S.C. § 1677e governs the use of facts available. Section 1677e provides:

> (a) *In general*
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> If—
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> * * *
>
> (2) an interested party or any other person—
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> * * *
>
> (B) fails to provide [requested] information by the deadline for submission . . . [or]
>
> * * *
>
> (D) provides such information but the information cannot be verified . . .
>
> [Commerce] shall . . . use the facts otherwise available in reaching the applicable determination.
>
> (b) *Adverse inferences*
>
> If [Commerce] . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply for a request for information . . . [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

First, this Court finds that Commerce's decision to resort to facts available is supported by substantial evidence on the record and is otherwise in accordance with law. Commerce is justified in applying facts available when a respondent fails to provide Commerce with information that it needs to make a determination, or the information the respondent provides cannot be verified. 19 U.S.C. § 1677e(a)(B) & (D) (2000); *see also Nippon Steel*, 337 F.3d at 1381 ("There mere failure of a respondent to furnish the requested infor-

mation—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.").

Commerce determined that PAM's home market sales could not be verified because PAM failed to report roughly two-thirds of its home market sales.[16] Due to the significant omissions, Commerce's "ability to calculate PAM's dumping margin using the data reported by PAM has been severely compromised. Such a small sample may not provide a reasonable approximation of PAM's actual sales practice in the home market." *Preliminary Results*, 68 Fed. Reg. at 47,026. The Government explains that "a *complete* record of sales is indispensable for an accurate measure of dumping." (Def.'s Mem. 23 (emphasis added)) Allowing respondents to report only a portion of their sales might lead to manipulation of dumping margins as respondent's "selectively report sales that are the most favorable to their dumping margin." (*Id*.)

Second, this Court finds that Commerce's decision to apply adverse inferences to the facts available is similarly supported by substantial evidence on the record and is otherwise in accordance with law. Commerce may apply adverse facts available if it "finds that [a respondent] has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." 19 U.S.C. § 1677e(b). As the CAFC has stated:

> Whether a respondent has lived up to [the requirement to act to the best of its ability] is assessed by determining whether [the] respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While that standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.

NSK, Ltd. v. United States, 481 F.3d 1355, 1361 (Fed. Cir. 2007) (internal citations and quotations omitted) (first bracket added; second bracket in original).

Here, Commerce determined that PAM had not put forth its maximum effort to provide Commerce with the information it needed to determine PAM's dumping margin because PAM neglected to report two-thirds of its home market sales. Commerce based its determination on the following: (1) Commerce "issued clear instructions" re-

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[16] PAM reported home market sales of around ten thousand tons. (PAM's Br. at 24) PAM did not report twenty-one thousand tons of home market sales (AG.E.A. sales of sixteen thousand tons and external warehouse sales of five thousand tons). It should be noted that PAM alleges that the AG.E.A. sales are properly excludable from PAM's home market sales because they were made outside the ordinary course of trade. (*See* PAM's Br. 30.) However, Commerce's instructions to PAM were clear that PAM "must report all sales, *including those sales which you believe are outside the ordinary course of trade*." (Questionnaire Instructions G–7 (emphasis added), Pub. R. Doc. 31.)

garding the information it requested from PAM; (2) PAM was provided several opportunities to report its complete home market sales prior to verification; (3) PAM had "successfully participated in previous administrative reviews"; and (4) Commerce was "readily able to obtain general information regarding the existence of [the omitted] sales at verification." (Issues & Decision Mem. 18.)

PAM's attempts to explain the omitted home market sales information are not persuasive. First, PAM contends that it did not provide AG.E.A. sales because they were made outside the ordinary course of business. Yet, Commerce explicitly asked for *all* home market sales, *including those made outside the ordinary course of business*. (Questionnaire Instructions G–7, Pub. R. Doc. 31.) Regardless of whether the AG.E.A. sales were in fact made outside the ordinary course of business, Commerce was clear that PAM was required to report them.[17] PAM failed to cooperate by not complying with Commerce's explicit instructions.

Second, PAM contends that the omission of the external warehouse sales was the result of a minor clerical error in the computer program used to extract the home market sales information from PAM's accounting system. However, PAM was provided with several opportunities to report its complete home market sales prior to verification. Specifically, Commerce issued an initial questionnaire and two supplemental questionnaires to PAM and granted PAM's requests for extensions of time to respond to each of the questionnaires. Further, Commerce was "readily able" to detect at verification that PAM had omitted a large amount of home market sales. (Issues & Decision Mem. 18.) Because the omitted sales were so readily discoverable, this Court finds reasonable Commerce's position that PAM did not act to the best of its ability in reporting the sales to Commerce. "While that standard [of acting to the best of one's ability] does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping." *NSK*, 481 F.3d at 1361.

Finally, PAM contends that its omissions should be excused as they are attributable to prior counsel, and not to PAM itself. This Court reiterates the answer Commerce gave when PAM raised this argument at the administrative level: "PAM cannot blame the acknowledged deficiencies in its responses on previous counsel, its software house, or its consultants, *because PAM certified the accuracy of these submissions*." (Issue & Decision Mem. 16 (emphasis added).)

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[17] Commerce's requirement that respondents report all sales—even those sales the respondent believes to be excludable—is reasonable. Commerce is thus able to verify that the sales alleged to be excludable were in fact made outside the ordinary course of trade. Commerce would not be able to verify the circumstances of the sales and to determine whether those sales should be excluded if the respondent failed to report these sales in the first instance.

Commerce's regulations require a representative of the company participating in an administrative review or investigation to certify that he has read the attached submission, and that to the best of his knowledge, the information contained in the submission is complete and accurate. *See* 19 C.F.R. § 351.303(g)(1) (2006). Furthermore, this argument is particularly unpersuasive when made by a respondent like PAM, that has successfully participated in previous administrative reviews and thus should presumably be aware of Commerce's reporting requirements. In addition, it makes sense not to distinguish between a respondent's and its counsel's actions because counsel acts on behalf of the respondent. If this Court were to sanction a "bad counsel" defense, it might create an incentive to hire ineffective counsel. In sum, this Court affirms Commerce's decision to apply adverse facts available to PAM.

II. *Commerce's Application of the 45.49 Percent Dumping Margin to PAM.*

A. Parties' Contentions

PAM contends that the 45.49 percent dumping margin Commerce applied to PAM "was corroborated for Barilla, but it was never corroborated for PAM." (Reply Br. of PAM 15.) Instead, PAM argues, the rate is punitive and not reasonably related to PAM's activity. (PAM's Br. 34.) PAM contends that the rate is punitive because PAM has "established itself as an exporter with a [dumping] margin in the range of 4 to 5 percent."[18] (*Id.* at 35.) In fact, PAM offers, if facts-available margins are excluded, the overall dumping margins for *all* Italian exporters across all periods of review "have been in low single digits." (*Id.*)

PAM also argues that the 45.49 percent rate bears no relation to PAM's own activity during the period of review. PAM insists that Commerce need not have resorted to applying to PAM a dumping margin calculated for another respondent, Barilla, because PAM had placed sales and cost information on the record sufficient for Commerce to calculate a dumping margin specific to PAM. (*Id.* at 36.) PAM contends that Commerce could have constructed an adverse facts available rate for PAM given the information PAM had placed on the record: a verified U.S. sales database, the (incomplete) home market sales data, home market sales adjustments, and PAM's cost of production data. (*Id.*) PAM suggests that Commerce could have

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[18] PAM states that it

> participated in two reviews before the instant review. In the third review period (1998/99), PAM received a 5.04 percent rate. In the fourth review period, PAM received a rate of 4.10 percent. In fact, in the seventh review period, i.e., the period immediately following the period on appeal, PAM has now preliminarily received a rate of 4.79 percent, following a full verification.

(PAM's Br. 34–35 (internal citations omitted).)

come up with a margin rationally related to PAM. One possibility of an adverse facts available rate for PAM would be "to take the average of PAM's previous rates, namely, 4.57%, and then double the rate, yielding 9.14%." (*Id*. at 36–37.)

The Government contends that Commerce's application of a 45.49 percent adverse facts available dumping margin is supported by substantial evidence on the record. First, the Government notes that Commerce has discretion "to select among an enumeration of secondary sources as a basis for its adverse factual inferences." (Def.'s Mem. 31 (*quoting F.lli de Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).) The Government contends that "Commerce's selection of the highest calculated rate from the proceeding to deter future uncooperative behavior by PAM is a reasonable exercise of its discretion and is fully supported by precedent." (*Id*. at 32.) "Further," the Government argues, "Commerce corroborated PAM's selected rate with contemporaneous information" by "examining individual transactions of other respondents during the period of review." (*Id*. at 33.) The Government concludes that "[b]ecause PAM did not cooperate to the best of its ability, PAM is [now] prohibited from controlling the selection of a more favorable adverse facts available rate." (*Id*. at 34.)

B. Analysis

In the case of an uncooperative respondent, Commerce has "discretion to choose which sources and facts it will rely on to support an adverse inference." *F.lli de Cecco*, 216 F.3d at 1032; *accord Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338–39 (Fed. Cir. 2002). Commerce may base an adverse facts available rate on information derived from:

(1) the petition,

(2) a final determination in [an antidumping duty] investigation,

(3) any previous [administrative] review . . . , or

(4) any other information placed on the record.

19 U.S.C. § 1677e(b).

However, when Commerce "relies on secondary information rather than information obtained in the course of an investigation or review" as the basis for adverse facts available, Commerce is required to "corroborate [, to the extent practicable,] that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). The Court of Appeals for the Federal Circuit explained that Congress included the corroboration requirement to ensure that an adverse facts available rate is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase as a deterrent to non-compliance." *F.lli de Cecco*, 216 F.3d at 1032. It is

not within Commerce's discretion "to select unreasonably high rates with no relationship to the respondent's actual dumping margin." *Id*.

"The statute does not prescribe any methodology for corroborating secondary information," *Mittal Steel*, Slip Op. 07–73 at 8, but legislative history explains that "[c]orroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value," Uruguay Round Agreements Act Statement of Administrative Action, H R. Rep. No. 103–316, vol. 1 at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4199. "Commerce assesses the probative value of secondary information by examining the *reliability* and *relevance* of the information to be used." *Mittal Steel*, Slip Op. 07–73 at 8 (emphasis added); (*accord* Issues & Decision Mem. 22.)

This Court finds Commerce's determination that it adequately corroborated the 45.49 percent margin to be unsupported by substantial evidence on the record. Commerce attempted to corroborate the margin by establishing that the "45.49 percent rate is still relevant to the level of dumping during the [period of review]." (Issues & Decision Mem. 22.) Commerce did so by finding "individual sales transactions of other respondents . . . at or above 45.49 percent." (*Id*.) However, Commerce's factual finding cannot be generalized absent information regarding whether those individual transactions represent a significant portion of the transactions that occurred during the period of review. *See World Finer Foods, Inc. v. United States*, 24 CIT 541, 547 (2000) ("*World Finer Foods I*") (pointing out the same shortcoming in Commerce's corroboration of an adverse facts available rate). During the sixth administrative review, overall dumping margins for cooperating respondents ranged from 0.24 percent to 7.23 percent. *See Final Results*, 69 Fed. Reg. at 6,257. Therefore, to this Court it appears that the transactions at or above 45.49 percent are aberrant. Even if Commerce was able to find a few transactions with dumping margins at or above 45.49 percent, it is *not* "reasonable to conclude that the 45.49 percent rate is still relevant to the level of dumping during the [period of review]" if high-margin transactions are the exception rather than the rule. (Issues & Decision Mem. 22.)

Furthermore, Commerce did not explain how other respondents' transaction specific margins were related *PAM's* dumping activity during the period of review. It is not sufficient for Commerce to establish that the margin it selects is related to the overall level of dumping during the period of review. Rather, Commerce must select an adverse facts available margin that is a "reasonably accurate estimate of *the respondent's actual rate*, albeit with some built-in increase as a deterrent to non-compliance." *F.lli de Cecco*, 216 F.3d at 1032 (emphasis added); *accord Shandong Huarong Gen. Group Corp. v. United States*, 31 CIT ___ , Slip Op. 07–4 at 7 (Jan. 9, 2007) (corroboration "requires that an assigned rate relate to the company to which it is assigned) (citation omitted).

For instance, courts have affirmed Commerce's selection of adverse facts available margins where Commerce corroborated the margin with respect to a respondent's *own* transaction specific margins, either from the period of review at issue, *Ta Chen*, 298 F.3d at 1339–40, or a previous period of review, *Mittal Steel*, Slip Op. 07–73 at 9. Similarly, Commerce adequately corroborated where it compared the adverse facts available margin selected to the highest previously calculated margin for that respondent. *Shandong Huarong*, Slip Op. 07–4 at 10–12. The *Shandong Huarong* court found that the rate was corroborated because "Commerce's chosen rate [was] not dramatically different from [the] rates that the [respondent] previously received." *Id.* at 14. Conversely, the courts have remanded for lack of corroboration adverse facts available rates where Commerce did not establish a link between the respondent and the rate selected. *See*, *e.g.*, *F.lli de Cecco*, 216 F.3d at 1032; *Gerber Food (Yunnan) Co., Ltd. v. United States*, 31 CIT ___ , Slip Op. 07–85 at 37 (May 24, 2007); *World Finer Foods I*, 24 CIT at 547–48; *Ferro Union, Inc. v. United States*, 23 CIT 178, 44 F. Supp. 2d 1310 (1999).

Here, the adverse facts available margin at issue has no apparent connection to PAM. Commerce calculated the margin for another uncooperative Italian respondent, Barilla, in the first administrative review. *World Finer Foods II*, 24 CIT at 1235. Commerce used a Barilla domestic price list as a proxy for Barilla's home market sales and U.S. import statistics as a proxy for Barilla's U.S. sales. *Id*. The court acknowledged that the margin was only Commerce's "best guess"[19] of Barilla's margin. *Id*. at 1238. Yet, the court accepted the rate as adequately corroborated because Commerce lacked alternative sources of information, as Barilla entirely neglected to submit sales and cost data to Commerce. *World Finer Foods I*, 24 CIT at 546 n.9.

In contrast, the instant record contains PAM-specific information, including dumping margins from previous administrative reviews, a verified U.S. sales database, an incomplete home market sales database, home market sales adjustments, and cost of production data. PAM's dumping margins in the two previous administrative reviews in which it participated were 5.04 percent and 4.10 percent. (Issues & Decision Mem. 23.) While this Court recognizes that previous dumping margins are not necessarily indicative of current margins as "each review stands on its own," (*id*.) there is a large disparity between PAM's previously calculated dumping margins and the adverse facts available rate selected in this administrative review. Absent findings that the rate is a "reasonably accurate estimate" of

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[19] Because Commerce's own "investigation revealed widespread discounting" by Italian pasta manufacturers off the price lists, *World Finer Foods II*, 24 CIT at 1237, Barilla's price list probably did not accurately capture the company's home market sales price. As a result, the dumping margins calculated using the price list were likely inflated. *See id*. at 1238.

PAM's dumping activity during the period of review, the 45.49 percent margin appears "punitive [and] aberrational." *See F.lli de Cecco*, 216 F.3d at 1032 (not within Commerce's discretion to select adverse facts available rate that is punitive or aberrational). That said, this Court recognizes that Commerce has "discretion to choose which sources and facts it will rely on to support an adverse inference," *F.lli de Cecco*, 216 F.3d at 1032, and therefore declines to endorse PAM's suggested adverse facts available rate of 9.14 percent, calculated as twice the average of PAM's previous dumping margins. On remand, Commerce must select an adverse facts available rate that is corroborated in accordance with the requirements of 19 U.S.C. § 1677e(c).

CONCLUSION

This court affirms in part and remands in part the Final Results. This Court concludes that Commerce's determination that PAM failed to cooperate by acting to the best of its ability to comply with Commerce's request for information is supported by substantial evidence on the record and is otherwise in accordance with law. This Court thereby affirms Commerce's decision to apply adverse facts available to PAM. This Court concludes, however, that the specific adverse facts available rate Commerce selected, 45.49 percent *ad valorem*, is not supported by substantial evidence on the record because Commerce did not corroborate that the rate is a rationally related to PAM's actual dumping activity during the period of review. This Court therefore remands the Final Results for Commerce to explain and recalculate an adverse facts available rate that is corroborated in accordance with 19 U.S.C. § 1677e(c). It is hereby

ORDERED that Plaintiffs' motions for judgment on the agency record are partially granted; it is further

ORDERED that the Final Results of the sixth administrative review of the antidumping duty order on certain pasta from Italy are remanded to Commerce to explain and recalculate the adverse facts available rate for PAM; it is further

ORDERED that Commerce shall assign to PAM an adverse facts available rate that satisfies the requirements of 19 U.S.C. § 1677e as discussed in this Opinion and Order, particularly the corroboration requirement set forth therein; it is further

ORDERED that Commerce shall file with this Court the remand results no later than September 10, 2007; that Plaintiffs may file comments with this Court indicating whether they are satisfied or dissatisfied with the remand results no later than October 9, 2007; and that Defendant and Defendants-Intervenor may file responses to Plaintiffs' comments no later than November 5, 2007.

SO ORDERED.

Slip Op. 07–104

UNITED STATES, Plaintiff, v. UPS CUSTOMHOUSE BROKERAGE, INC., Defendant.

BEFORE: JUDGE GREGORY W. CARMAN
Court No. 04–00650

[Plaintiff's motion for summary judgment is denied.]

July 2, 2007

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Melinda D. Hart and Nancy Kim*); *Edward Greenwald*, of counsel, Department of Homeland Security, U.S. Customs and Border Protection, for Plaintiff.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Lars-Erik A. Hjelm, Thomas J. McCarthy, Lisa W. Ross, and Tamir A. Soliman*), for Defendant.

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Joseph M. Spraragen*), for Amicus (National Customs Brokers & Freight Forwarders Association of America, Inc.).

July 2, 2007

OPINION & ORDER

CARMAN, JUDGE: This matter is before this Court on Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"). Defendant, UPS Customhouse Brokerage, Inc. ("UPS" or "Defendant"), filed a timely response, and Plaintiff, the United States ("Plaintiff" or "Customs"), filed a timely reply. The Court, having considered the parties' submissions and for the reasons that follow, denies Plaintiff's Motion.

BACKGROUND

This Court has twice issued opinions concerning the instant litigation. *See United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT ___ , 442 F. Supp. 2d 1290 (2006) (denying Defendant's motion for partial summary judgment and Plaintiff's motion to strike) ("UPS I"); *United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT ___ , 464 F. Supp. 2d 1364 (2006) (granting Defendant's motion to certify question). This Court presumes familiarity with its earlier opinions but reiterates some facts for reference.

Defendant is an express consignment carrier[1] and a licensed customs broker responsible for preparing and filing customs entry docu-

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[1] Customs regulations define an "express consignment carrier" as

> an entity operating in any mode or intermodally moving cargo by special express commercial service under closely integrated administrative control. Its services are offered to the public under advertised, reliable timely delivery on a door-to-door basis. An express

ments on behalf of its clients. (*See* First Am. Compl. ¶ 3; Answer ¶ 3; Plaintiff's Motion ("Pl.'s Mot.") 3; Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Opp'n") 12.) Some time ago, Customs identified an unacceptably low level of accuracy in customs brokers' use of Heading 8473 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] (Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s Stmt of Facts") ¶ 1; Def.'s Resp. to Pl.'s Statement of Material Facts Not in Dispute ("Def.'s Resp. to Facts") ¶ 1.) Customs was particularly concerned with low compliance rates for subheading 8473.30.9000. (Pl.'s Mot. 3; Def.'s Opp'n 6; Pl.'s Stmt of Facts ¶ 3; Def.'s Resp. to Facts ¶ 3.) Subheading 8473.30.9000 may be used to properly classify goods that are

> Parts and accessories . . . suitable for use solely or principally with machines of headings 8469 to 8472:
>
> Parts and accessories of the machines of heading 8471[3]:
>
> Other [incorporating a cathode ray tube ("CRT")]
>
> Other [than certain specified parts for printers].

HTSUS 8473.30.9000 (2000) (footnote added). To be properly classified in subheading 8473.30.9000, the good must contain a CRT.

In an effort to improve broker compliance in the area of classification, specifically including subheading 8473.30.9000, Customs issued letters to and conducted training sessions for customs brokers, including UPS. (Pl.'s Mot. 4; Def.'s Opp'n 6.) Despite efforts by UPS to improve its compliance rates (Def.'s Opp'n 13–16; Pl.'s Mot. 5–7), Customs identified alleged continuing failures by UPS to properly classify goods in subheading 8473.30.9000. Between 1998 and 2000, Customs issued UPS a number of Notices of Action and warning letters concerning its alleged misuse of the subheading. (First. Am. Compl. ¶ 6; Answer ¶ 6.) Subsequent alleged misclassifications resulted in five penalty notices, non-payment of which is the subject of this litigation. (First. Am. Compl. ¶¶ 8–12.)

On July 11, 2000, Customs issued three pre-penalty notices, and on August 8, 2000, Customs issued two more pre-penalty notices for alleged violations of section 641 of the Tariff Act of 1930, 19 U.S.C. § 1641 (2000)[4] ("the broker statute").[5] *UPS I*, 442 F. Supp. 2d at

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consignment operator assumes liability to Customs for the articles in the same manner as if it is the sole carrier.

19 C.F.R. § 128.1(a) (2006).

[2] Plaintiff alleges that the discovery occurred in 1995. (*See* Pl.'s Statement of Material Facts Not in Dispute ¶ 1.) However, Defendant was not able to affirm this date (*see* Def.'s Resp. to Pl.'s Statement of Material Facts Not in Dispute ¶ 1), though it does recognize that this occurred in the "mid-1990's" (Def.'s Opp'n. 5).

[3] Heading 8471 is for "[a]utomatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included." HTSUS 8471 (2000).

[4] Section 641(b)(4) of the Tariff Act of 1930, 19 U.S.C. § 1641(b)(4), requires a customs

1293. On September 26, 2000, Customs issued three penalty notices to UPS for violations of the broker statute noticed in the July 11, 2000, pre-penalty notices. *Id.* On October 19, 2000, Customs issued an additional two penalty notices to UPS for violations of the broker statute noticed in the August 8, 2000, pre-penalty notices. *Id.* The July 11 and August 8, 2000, pre-penalty notices each alleged violations of the responsible supervision and control provision of the broker statute regarding the erroneous classification of merchandise entered between January 10 and May 10, 2000. *Id.*

UPS failed to remit the $75,000 in penalties imposed by the September 26 and October 19, 2000, penalty notices. On December 17, 2004, Plaintiff filed a timely complaint against UPS seeking to enforce the monetary penalties Customs imposed on Defendant.

PARTIES' CONTENTIONS

I. *Plaintiff's Contentions*

Plaintiff contends that UPS failed to satisfy its obligation to "exercise responsible supervision and control over the customs business that it conducts" by persistently misclassifying imported merchandise in HTSUS subheading 8473.30.9000. (Pl.'s Mot. 14 (*quoting* 19 U.S.C. § 1641(b)(4)).) Plaintiff reminds this Court that "customs business" includes tariff classification. (*Id.* at 13 (*quoting* 19 C.F.R. § 111.1 (2006)).) Despite Customs having provided at least two training courses, instructional materials, informal discussion, consultations, warning letters, and notices of action and despite UPS having represented to Customs that it had corrected the problem, Plaintiff advises that UPS continued to misclassify merchandise in subheading 8473.30.9000. (*Id.* at 14.) Between January 10 and May 10, 2000, Customs identified sixty entries containing imported merchandise allegedly misclassified in subheading 8473.30.9000. (*Id.*) Plaintiff reasons that these alleged misclassifications together with UPS's "failure to promptly and effectively address this problem . . . demonstrates a failure to exercise responsible supervision and control over the Customs [sic] business that it conducts, thus warranting monetary penalties." (*Id.* at 15.)

Plaintiff submits that the declaration of Customs employee Lydia Goldsmith is sufficient to establish that UPS misclassified imported merchandise in subheading 8473.30.9000 on the sixty entries between January 10 and May 10, 2000. (Pl.'s Reply to Def.'s Br. in

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broker to "exercise responsible supervision and control over the customs business that it conducts." Section 641(d)(1)(C) permits Customs to impose a monetary penalty when a broker "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision." 19 U.S.C. § 1641(d)(1)(C).

[5] The broker statute requires that Customs notify a broker prior to enforcing a penalty against it for a violation of the statute. 19 U.S.C. § 1641(d)(2)(A) ("§ 1641(d)(2)(A)").

Opp'n to Pl.'s Mot. for Summ. J. ("Pl.'s Reply") 4–5.) Plaintiff proffers that "Customs determines whether merchandise incorporates a CRT by either physically inspecting the merchandise, its entry documents, or both." (*Id.* at 4.) As such, Plaintiff stresses that the information contained in Ms. Goldsmith's declaration is "neither new nor prejudicial to UPS." (*Id.*)

II. *Defendant's Contentions*

Defendant contends that Plaintiff failed to establish that the allegedly misclassified imported goods were–in fact–misclassified. (Def.'s Opp'n 8.) Defendant contests Plaintiff's use of the Goldsmith declaration as the "sole piece of evidence" supporting the alleged misclassifications because "this 'evidence,' submitted for the first time after the close of discovery, does not establish the absence of a genuine dispute on this issue." (*Id.* at 9.) Defendant predicates that it was denied "the opportunity to test the factual allegations and assertions . . . contained in [the] declaration" during discovery. (*Id.*) Defendant also complains that "several of the Goldsmith allegations are vague and unsupported with respect to the issue of whether the entered merchandise contained cathode ray tubes." (*Id.*) Defendant adds that Plaintiff failed to provide this Court with any evidence "demonstrating whether Customs took any steps to determine whether the merchandise contained a cathode ray tube consistent with subheading 8473.30.9000, whether by physical inspection, seeking confirmation from either the broker, shipper or ultimate consignee, or by any other measures." (*Id.* at 10.) Defendant concludes that "Plaintiff has not even met its burden of demonstrating how the evidence, taken as a whole, demonstrates the absence of a genuine dispute on the issue of whether the entered merchandise was in fact improperly classified as it alleges." (*Id.*)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582(1) (2000).

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). On a motion for summary judgment, the moving party bears the burden of proving that there is no genuine issue of material fact that would preclude judgment in its favor. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). However, the party opposing the motion for summary judgment may not rest on its pleadings. *Ugg Int'l, Inc. v. United States*,

17 CIT 79, 83, 813 F. Supp. 848 (1993). Rather, the nonmovant must present "specific facts" that establish a genuine issue of triable fact. *Id.* (*quoting Pfaff Am. Sales Corp. v. U.S.*, 16 CIT 1073, 1075 (1992)). "[M]ere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987). Further, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), and the court "must resolve all doubt over factual issues in favor of the party opposing summary judgment" *SRI*, 775 F.2d at 1116.

DISCUSSION

The gravamen of this case is whether the allegedly misclassified goods that were the basis for the disputed penalties contained a CRT. For Plaintiff to prevail on its Motion, the goods in question must *not* have contained a CRT and were, therefore, misclassified in HTSUS subheading 8473.30.9000. If the goods were correctly classified, there could be no failure to "exercise responsible supervision and control." 19 U.S.C. § 1641(b)(4). And, without a failure to exercise responsible supervision and control, there could be no penalty.

By its very existence in the HTSUS, this Court can presume that some goods are correctly classifiable in the disputed subheading: 8473.30.9000. Indeed, one Customs official confirms this to be true. (*See* Decl. of Daniel J. Piedmonte ¶ 6, Ex. A to Pl.'s Mot. in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n")) Thus, it would be improper for Customs–without further inquiry–to automatically reject the use of tariff subheading 8473.30.9000 and penalize brokers for applying it. Indeed, Customs admits that "HTSUS subheading 8473.30.9000 was *rarely* applicable from 1996 through 2002 as it required that merchandise incorporate a CRT." (Pl.'s Reply 10.) Rarely is not never.

However, Plaintiff offers little in the way of specific evidence to support its claim that the imported merchandise that gave rise to the penalties did not in fact contain a CRT and was, therefore, misclassified. As Defendant notes, the only support for the misclassification claim is the bare, self-serving Goldsmith declaration.[6] (Pl.'s Mot. Ex. A.) Plaintiff did not provide this Court with samples of the allegedly misclassified merchandise. Neither did Plaintiff furnish this Court with descriptions of the merchandise that UPS allegedly misclassified on sixty entries between January 10 and May 10, 2000.

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[6] This Court is troubled by Plaintiff's failure to disclose Ms. Goldsmith as a material witness prior to the close of discovery in this case. However, there is no motion to strike the Goldsmith declaration before this Court. Accordingly, this Court will consider the Goldsmith declaration and weigh it in the context in which it was presented.

Further, Plaintiff did not submit evidence concerning the methods Customs undertook to verify that the specific merchandise in question did not contain a CRT. Plaintiff's statement that "Customs determines whether merchandise incorporates a CRT by either physically inspecting the merchandise, its entry documents, or both" (Pl.'s Reply 4) is both generic and conclusory and does not inform this Court as to the specific efforts Customs undertook to determine whether the merchandise classified on the sixty disputed entries contained a CRT.[7]

Plaintiff did submit copies of Notices of Action in which Customs notified UPS that it had changed the classification of entered merchandise from subheading 8473.30.9000 to the respective correct classification. (*See* Pl.'s Opp'n Ex. F; Pl.'s Mot. Ex. E.) However, each of these Notices of Action occurred outside the relevant period of January 10 to May 10, 2000. Additionally, Plaintiff proffered several Informed Compliance Notices that Customs sent to UPS advising the broker of classification errors involving tariff subheading 8473.30.9000. (*See* Pl.'s Mot. Ex. E.) These, too, were outside the relevant period. As this Court on summary judgment "must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in its favor," *SRI*, 775 F.2d at 1116, these documents together in and of themselves do not prove the alleged acts of misclassification at issue here.

Defendant, while careful not to assert that the goods contained a CRT and were properly classified, alleges that Plaintiff failed to meet its burden of proof that the goods were misclassified. The correct classification of the sixty disputed entries is a material fact; without misclassification, there can be no penalty. Whether or not the goods contained a CRT is a fact not presently verifiable on the record before this Court and is disputed by Defendant. Therefore, this Court holds that Plaintiff failed to meet its burden on summary judgment to establish that there is no genuine issue of material fact as to whether the allegedly misclassified goods contained a CRT and were, therefore, misclassified. Plaintiff will have the opportunity at trial to prove its case.

While this Court acknowledges Defendant's other challenges to Plaintiff's case, having found at least one genuine issue of material fact in dispute, this Court need not delve further into Defendant's arguments. These issues, likewise, may be taken up at trial.

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[7] For instance, it would have been helpful for this Court to have a description of the allegedly misclassified goods and to know whether Customs inspected the goods, issued a Request for Information (Customs and Border Protection Form 28), or issued a notice to redeliver.

CONCLUSION

This Court—having determined that there is a genuine issue of material fact in dispute concerning the correct classification of the subject imported goods—denies Plaintiff's Motion for Summary Judgment.

Slip Op. 07–105

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SHANDONG HUANRI (GROUP) GENERAL CO.; SHANDONG HUANRI GROUP CO., LTD.; and LAIZHOU HUANRI AUTOMOBILE PARTS CO., LTD. Plaintiff, v. UNITED STATES, Defendant THE COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS Defendant-Intervenor.

Court No. 05–00648

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

July 5, 2007

Trade Pacific, PLLC, (Robert G. Gosselink) for Shandong Huanri (Group) General Co.; Shandong Huanri Group Co., Ltd.; and Laizhou Huanri Automobile Parts Co., Ltd., Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Ada E. Bosque*, United States Department of Commerce Office of Chief Counsel for Import Administration, of counsel, for defendant.

Porter, Wright, Morris & Arthur, LLP, (Leslie Alan Glick; Renata Brandao Vasconcellos) for The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers, Defendant-Intervenor.

Tsoucalas, Senior Judge: Before the Court is Plaintiffs' Shandong Huanri (Group) General Co., Shandong Huanri Group Co., Ltd. and Laizhou Huanri Automobile Parts Co., Ltd. (collectively "Plaintiffs" or "Huanri") motion for judgment upon the agency record brought pursuant to USCIT Rule 56.2. Plaintiffs challenge aspects of the United States Department of Commerce's ("Commerce") determination *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 Fed. Reg. 69,937 (Nov. 18, 2005) ("Final Results"). Plaintiffs contend, *inter alia*, that Commerce changed its separate rates methodology, and did so without notice and comment. *See* Pl.'s R. 56.2 Mot. J. Upon

Agency Rec. ("Pl.'s Br.") at 10 ("Commerce abused its discretion when it changed its separate rates practice[.]"). For the following reasons, the Court finds Plaintiffs' contentions to be without merit, and denies their motion.[1]

JURISDICTION & STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). When reviewing the final results in antidumping administrative reviews "[t]he 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). "Substantial evidence is more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co.*, 305 U.S. at 229). In determining the existence of substantial evidence, a reviewing Court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

BACKGROUND

The facts of this case have been fully set forth in the prior decisions of this Court. The facts relevant to the instant inquiry are as follows. Plaintiff Shandong Huanri (Group) General Company ("Huanri")[2] was an exporter of brake rotors ("subject merchandise") subject to the antidumping ("AD") duty order on *Brake Rotors From the People's Republic of China* during the seventh administrative re-

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[1] As a future practice note, the Court directs Plaintiffs' attention to Section 2B of the Court's Chambers Procedures, entitled "Briefs and Appendices." This section instructs that:

> Movant's and respondent's briefs shall not exceed 30 pages in length, except in trade cases which *shall not exceed 40 pages*. Reply briefs in all cases *shall not exceed 15 pages . . . No brief which exceeds these requirements may be filed without prior written approval of the Court*, leave for which will be freely given upon good cause shown.

This rule, and all other Chambers Procedures, are publicly available at http://www.cit.uscourts.gov. In the future, if Plaintiffs' counsel wishes to exceed the prescribed page limits it shall seek the permission of this Court.

[2] The subject merchandise sold by Huanri General to the United States was purchased from, and produced by its subsidiary, Laizhou Huanri Automobile Parts. *See* Pl.s' Br. at 2. Following the period of review, Huanri General was sold to its current successor in interest, Shandong Huanri Group Co., Ltd. *Id.*

view.[3] *See Brake Rotors from the People's Republic of China*, 69 Fed. Reg. 30,282 (Dep't Commerce May 27, 2004) (initiation). Defendant-Intervenor, The Coalition for the Preservation of the American Brake Drum and Rotor Aftermarket Manufacturers ("Coalition"), was a domestic petitioner in the original antidumping investigation that resulted in the AD order, and an interested party in all reviews of the order. *See Brake Rotors From the People's Republic of China*, 62 Fed. Reg. 18,740 (Dep't Commerce Apr. 17, 1997) (antidumping order). In both the preliminary and final results of the seventh administrative review of the AD order, Commerce denied Huanri General a separate rate. *See Brake Rotors From the People's Republic of China: Preliminary Results and Partial Recision of the Seventh Administrative Review and Preliminary Results of the Eleventh New Shipper Review*, 70 Fed. Reg. 24,382, 24,387 (May 9, 2005) ("Preliminary Results"); *Final Results*, 70 Fed. Reg. at 69,939.

Commerce denied Huanri a separate rate, primarily, on the basis that Huanri was controlled by the Panjacun Village Committee. As there was record evidence indicating that the Village Committee operated under the leadership of the Chinese Communist Party, Commerce found that Village Committee was a form of Chinese government. Indeed, in its final results, Commerce explained that Huanri was "controlled by the Panjacun Village Committee, and . . . determined that this entity was subject to central government control." As it did in its preliminary results, Commerce continued "to find that Huanri is not entitled to a separate rate in these final results. Because [Commerce] has determined that Huanri does not qualify for a separate rate, [Commerce] determine[s] that Huanri is part of the PRC-wide entity and will be subject to the PRC-wide rate." Final Results, 70 Fed. Reg. at 69,939 (internal citation omitted).

Such a finding was necessary because of the People's Republic of China's ("PRC") status as a nonmarket economy ("NME") country. As will be discussed *infra*, in a NME country, a presumption of government control for exporters automatically attaches. *See Coal. for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 100, 44 F. Supp. 2d 229, 242 (1999) ("*Coalition I*") (finding that pursuant to "the broad authority delegated to it from Congress, Commerce has employed a presumption of state control for exporters in a nonmarket economy."). Unless this presumption is rebutted, Commerce assigns the exporter the country-wide antidumping duty rate. *Transcom Inc. v. United States*, 182 F.3d 876, 882 (Fed. Cir. 1999). In order to rebut this presumption and qualify for a separate, company-specific rate, an exporter must "affirmatively demonstrate its entitlement to a separate, company-specific margin by showing an absence of central government control, both in

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[3] The period of review for the seventh administrative review is from April 1, 2003 to March 31, 2004.

law and in fact, with respect to exports." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). In the instant matter, Commerce determined that Huanri failed to rebut this presumption with respect to *de facto* government control.

Commerce took the following steps in determining whether Huanri was free from *de facto* government control. In investigating Huanri's eligibility for a separate rate, Commerce issued Huanri a Questionnaire in which it asked the respondents to "describe and explain" who "owns" and "controls" its company, including the "company's relationship with the national, provincial, and local governments, including ministries or offices of those governments." *See* Huanri General's Resp. to the Department's Original Questionnaire in the Seventh Administrative Review. In its questionnaire response, Huanri maintained that it "has no relationship with the national, provincial, and local governments, including ministries or offices of those governments." *Id*. Next, Commerce considered the "Organic Law on the Village Committee of the People's Republic of China of 1999" ("VCL") placed upon the record by the Coalition. Thereafter, Commerce issued a supplemental questionnaire to Huanri, inquiring specifically into whether the Panjacun Village Committee owned and controlled Huanri. *See* Resp. Opposition Pls.' Mot, J. Upon Agency Rec. ("Response") at 2. Therein, Huanri represented that it is "collectively owned" by the villagers of Panjacun Village, and further stated that the Village Committee "has control over the investment of capital raised by the villagers." *See* Shandong Huanri Group General Company Supplemental Questionnaire at 3–4. From March 23–26, 2005, Commerce conducted an onsite verification of Huanri in Panjacun Village, China. During its verification Commerce conducted an onsite inspection of the manufacturers' and exporters' facilities, and examined relevant sales and financial records. *See* Verification of the Response of Shandong Huanri Group General Company ("Verification Report") at 13–17.

Following its investigation, Commerce issued its Preliminary Results, denying Huanri a separate rate. *See* Preliminary Results, 70 Fed. Reg. at 28,387. Therein, Commerce preliminarily found "that Huanri General, by virtue of the applicability of . . . other PRC laws . . . , has demonstrated an absence of *de jure* central government control." *Id*. at 24,388. This notwithstanding, Commerce preliminarily denied Huanri a separate rate because Huanri had not demonstrated an absence of *de facto* control. *Id*. at 24,388–89. Only the absence of *de facto* control is at issue in the instant matter. Together with the issuance of the Preliminary Results, Commerce also invited special comments and additional supporting information concerning this issue. *Id*. at 24,389; *see also* Department's Letter of June 6, 2005.

On November 18, 2005, Commerce issued its final results. *See* Final Results, 70 Fed. Reg. at 69,939; *see also Issues and Decision*

Memorandum for the Final Results in the 2003/2004 Administrative Review of Brake Rotors from the People's Republic of China (Nov. 7, 2005) ("Issues & Dec. Mem."). Consistent with its Preliminary Results, therein, Commerce denied Huanri a separate rate because it concluded that the Panjacun Village Committee is "a form of government in the PRC." Issues & Dec. Mem. at 18. Commerce explained that "record evidence includ[ing] various provisions of the Village Committee Law, the petitioners' analysis thereof, and references to academic publications . . . indicate . . . that these Village Committees are, in fact, government entities." *Id*. Moreover, it found that "Huanri had not demonstrated a *de facto* absence of government control with respect to making its own decisions in key personnel selections, the use of its profits from the proceeds of export sales, and the authority to negotiate and sign contracts and other agreements." *Id*. at 20 (finding that the Village Committee is "inextricably involved in . . . decisions at Huanri.").

This finding by Commerce represents a departure from that of the fifth and sixth administrative reviews. *See Brake Rotors from the People's Republic of China*, 68 Fed. Reg. 25,861, 25,863 (Dep't Commerce May 14, 2003) (final results); *Brake Rotors from the People's Republic of China*, 69 Fed. Reg. 42,039, 42,040 (Dep't Commerce July 13, 2004) (final results). Commerce explained its departure in the seventh administrative review by noting that there was "even more indicia of government control, specifically the Huanri Verification Report and the Village Committee Law, . . . than in the prior Huanri review. . . . [As a result,] the Department . . . reached a different conclusion in this review than in prior reviews after learning of the extent of the decision-making role of the Village Committee and after analyzing the *Village Committee Law*, which was not analyzed in prior segments." Issues & Dec. Mem. at 20.

In both the fifth and sixth administrative reviews, Commerce found that Huanri met the criteria for the application of a separate rate and in both reviews, it granted a separate rate of 0.00 percent. *See id*. The Coalition appealed Commerce's decision to grant Huanri a separate rate in the fifth administrative review. *See Coal. for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 28 CIT ___, ___ 318 F. Supp. 2d 1305 (2004) ("*Coalition II*") *dismissed on other grounds*; *Coal. for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, Slip Op. 01–00825 (June 21, 2005) (not published in the Federal Supplement) (dismissing the action because the subject merchandise had been liquidated). In that case, the Court remanded the matter to Commerce to reconsider granting Huanri "a separate AD duty rate in the absence of the company's production of the PRC's Organic Law of the Village Committee[.]" *See Coalition*, 28 CIT at ___, 318 F.

Supp. 2d at 1314. but the substantive law remains persuasive, and relevant to this action. *See* Jilin Henghe Pharm. Co. v. United States, 123 F. App'x 402, 403 (Fed. Cir. 2005) (not published in the Federal Reporter).

On November 28, 2005, Plaintiffs commenced this action. In their brief, Plaintiffs characterize the central issue as several sub-issues. This matter, however, is properly understood as one issue. As such, the Court shall not address Plaintiffs' ancillary arguments and will reflect only those pertinent to the Court's disposition of this matter[5]. The issue here is properly viewed as whether Commerce's determination of government control at the village-level is a change in its methodology. Related to this, although not fully briefed by Plaintiffs, is whether this finding is supported by substantial evidence. The Court will also briefly address Plaintiffs' claim-in-the-alternative that it should be granted a village-wide rather than the PRC-wide rate, which the Court also considers to be related to the methodology issue.

ANALYSIS

A. Commerce's Finding of *De Facto* Control at the Village Level is Not a Change in Methodology.

Pursuant to the broad authority delegated to it by Congress, Commerce employs "a presumption of state control for exporters in a non-market economy." *See Sigma*, 117 F.3d at 1405.[6] Under this presumption, exporters in an NME receive the country-wide rate, unless the exporter can rebut this presumption by "affirmatively demonstrat[ing] its entitlement to a separate, company-specific margin by showing an 'absence of government control, both in law and in fact, with respect to exports.' " *Id*. (citation omitted); *see also Transcom Inc., v. United States*, 5 F. Supp. 2d 984, 989 (1998). "Absence of *de facto* government control can be established by evidence that each exporter sets its prices independently of the government and of other exporters, and that each exporter keeps the proceeds of

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[4] The case was later dismissed on jurisdictional grounds, but the substantive law remains persuasive, and relevant to this action. *See Jilin Henghe Pharm. Co. v. United States*, 123 F. App'x 402, 403 (Fed. Cir. 2005) (not published in the Federal Reporter).

[5] For example, Plaintiffs argued that Commerce "should not have adopted a new approach for determining whether Huanri was eligible for a separate rate because Huanri had relied on the Commerce Department's previous methodology in deciding to sell subject merchandise to the United States." Pls.' Br. at 11. *Contra*, Def.'s Br. at 18 ("Commerce uses a 'retrospective' assessment system where final liability for antidumping duties is determined after the imports have entered the United States."). The Court finds this, and the other ancillary arguments unconvincing. *See e.g.*, Pls' Br. at 42 ("Commerce unfairly punished Huanri General[.]").

[6] Commerce has treated the PRC as an NME in all past AD investigations and continues to deem the PRC an NME within the meaning of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316(b), 102 Stat. 1107, 1187, 19 U.S.C. § 1677(18).

its sales." *Sigma*, 117 F.3d at 1405. Indeed, in determining whether *de facto* government control exists, Commerce examines evidence of whether: (1) the exporter sets its own export prices independent of the government and other exporters; (2) each exporter retains the proceeds of its sales; (3) the respondent has the authority to negotiate and sign contracts and other agreements; and (4) the respondent has autonomy from the government in making decisions regarding the selection of its management ("*Sparklers* test"). *See Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) (final determination); *Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Dep't Commerce May 2, 1994) (final determination); *see also Coalition I*, 23 CIT at 101, 44 F. Supp. 2d at 243. If an exporter/respondent fails to demonstrate a single factor, Commerce will not assign a separate rate. *See e.g., Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 7,475, 7,478 (Dep't Commerce Feb. 14, 2005). Instead, where the company fails to rebut the presumption of state control, Commerce assigns the NME-wide rate. *See Sigma*, 117 F.3d at 1405.

For the following reasons, the Court finds that Commerce's determination of *de facto* state control at the village-level is not a change in its methodology. The Court further finds that Plaintiffs' claim that it should be granted what it calls a "village-wide rate" rather than the PRC-wide rate lacks merit.

a. Commerce Did Not Change its Methodology in Reaching its Determination of *De Facto* State Control.

In reaching its conclusion of *de facto* state control, Commerce did not change its separate rates methodology but applied it to the specific facts and record evidence present in the instant matter; some of which was not on the record in previous reviews covering the subject merchandise. *Accord* Resp. Opposition Pls.' M. J. Agency Record ("Def.'s Resp.") at 6 ("Commerce did not changeits methodology with respect to Huanri.); Def.-Int. Resp. Opposition Pls.' M. J. Agency Rec. ("Def.-Int. Resp.") at 10. ("[T]he agency simply addressed record evidence in this segment of proceedings that was not upon the record in earlier segments."). Indeed, the Court finds that Commerce employed the methodology consistently applied in past reviews but reached a conclusion different from its past reviews based on information not previously on the record, i.e., "The Organic Law on the Village Committee of the People's Republic of China" and data contained in Commerce's Verification Report. *See generally* The Organic Law on the Village Committee of the People's Republic of China,("VCL") Pet.'s Submission of Sept. 15, 2004 (document issued by the Carter Center); Verification Report, at 5–12.

This Court has repeatedly affirmed Commerce's application of the *Sparklers* test in determining whether there was an absence of *de*

facto government control. *See e.g., Sigma Corp.*, 117 F.3d at 1405–07; *Coalition I*, 23 CIT at 100–01, 44 F. Supp. 2d at 242–43. Here, Commerce addresses each of the factors of this four-prong test in its Issues and Decision Memorandum. *See* Issues & Dec. Mem. at 18–23. Commerce's analysis of these four factors is heavily reliant upon the VCL and Verification Report, evidence critical, yet missing from the prior administrative review records. *See Coalition II*, 381 F. Supp. 2d at 1314; Issues & Dec. Mem. at 20 ("[T]here are even more indicia of government control, specifically the Huanri Verification Report and the Village Committee Law, on the record of this review than in the prior Huanri review[.]"). As an initial matter, Commerce found that "Huanri had not demonstrated a *de facto* absence of government control with respect to making its own decisions in key personnel selections, the use of its profits from the proceeds of export sales, and the authority to negotiate and sign contracts and other agreements." *See* Issues & Dec. Mem. at 19. Because Commerce determined that Huanri was not able to affirmatively demonstrate its entitlement to a separate rate, the presumption that exporters in an NME receive the country- wide rate attached. *See Sigma Corp. v. United States*, 117 F.3d at 1405.

Despite the presumption of PRC-wide control attaching, in its Issues and Decision Memorandum Commerce engaged in a factor-by-factor analysis of the *Sparklers* test. *See Sparklers*, 56 Fed. Reg. at 20,589. First, with respect to factor one, the authority to negotiate and sign contracts and other agreements, Commerce set forth the following which it found demonstrated that Huanri lacked the ability to negotiate and sign contracts independently.

> The village representatives (serving in the capacity of Huanri General's shareholder representatives) decided during 2003 to acquire the funds necessary for establishing a tire production plant as part of Huanri General's operations, consistent with Article 19 of the Village Committee Law. However, to pursue this objective (which required a significant amount of capital), the village representatives had to obtain the entire capital investment amount from the Panjacun Village Committee which subsequently furnished it to Huanri General by obtaining a bank loan (using the villagers' households as collateral) and by providing a portion of its rental income received from land lease agreements (*see* pages 5–6 and 10–12 of the Verification Report). Therefore, we conclude that Huanri General does not have the ability to obtain its own loans. Rather, the evidence on the record of this review indicates that the local government's assistance was required for this purpose.

Issues & Dec. Mem. at 20. With respect to factor two, the selection of management, Commerce determined that the "Panjacun Village Committee is so intertwined in personnel, and involved in key fi-

nancing operations with Huanri General with respect to export activities, that there can be no meaningful consideration of separateness between the local PRC government and Huanri General." *Id*. at 19. Next, regarding the fourth *Sparklers* factor, Commerce found that the government, rather than Huanri, retained the proceeds of its export sales and did not make independent decisions regarding the disposition of profits or financing of losses. It explained that:

> Our verification findings further note that the 41 village representatives (serving in the capacity of Huanri General's shareholder representatives) have also been directly involved in profit distribution decisions made at Huanri General as evidenced by shareholder meeting minutes examined at verification. (*See* Verification Report at 12.) Therefore, based on the facts mentioned above, we cannot conclude that Huanri General makes its own profit decisions. Rather, the evidence on the record of this review indicates that the same individuals who appointed the village committee members also decided how Huanri General's profits are distributed, consistent with Article 19 of the Village Committee Law.

Id. Commerce further found that "[d]ata contained in [the Verification Report] indicates that the *village committee* decided not to distribute Huanri General's profits to the shareholders after Huanri General's first full year of operation (i.e. 2000)." Verification Report at 12 (emphasis added). Moreover, "the shareholder representatives [some of whom are Village Committee Members] verbally informed the villagers of the decision to reinvest Huanri General's profits in the company rather than distribute the profits to them." Verification Report at 12. Lastly, although not providing specific facts as to the Village Committee's control over export prices, Commerce concluded that it "continue[s] to find, in this review, that the Village Committee is a level of the PRC government and that the Committee was inextricably involved in export-related decisions at Huanri." Issues & Dec. Mem. at 20. As such, Commerce examined and supported its finding in applying the *Sparklers* test.

In reaching its decision, Commerce specifically stated that it reached a different conclusion in this review (that of *de facto* government control) "than in prior reviews after learning of the extent of the decision-making role of the Village Committee and after analyzing the Village Committee Law, which was not analyzed in prior segments." *Id*. at 20. Commerce explained that its determination "reflects the case facts and the new information concerning the level of government control, specifically, the text of the Village Committee Law, which provides for higher-level government control, and the

fact pattern which emerged in the 2003–2004 POR. . . . "[7] *Id*. at 21. (citing Verification Report, at 10–12; Preliminary Results, 70 Fed. Reg. at 24,387, 24,388).

A close examination of several provisions of the VCL supports Commerce's conclusion of *de facto* state control. Indeed, the VCL itself was "[a]pproved by the Fifth Session of the Standing Committee of the Ninth National People's Congress." VCL at 1. Further indicia of state government control and endorsement of these laws is found in the Articles of the VCL. Commerce made the following findings regarding the Articles of the VCL: (1) Article 1 states that it "is formulated in line with the relevant requirements of [t]he Constitution of the People's Republic of China;" (2) Article 2 directs the Village Committee to "develop public services, manage public affairs, mediate civil disputes, help maintain social stability and *report to the people's government* villagers' opinions, requests and suggestions;" (3) Article 5 includes provisions that assign to village committees certain economic responsibilities, such as coordinating village production and promoting the "development of rural socialist production and a socialist market economy;" (4) Article 19 allows village committees to "manage land and other properties of the village that are collectively owned by all villagers," use income collected from village collective companies, and initiate development of new village collective economies; and (5) Article 29 indicates that "the standing committees of the People's Congress of provinces, autonomous regions and centrally-administered municipalities" exerts control by implementing this law in accordance with regional conditions. *See* VCL at 1–5; Preliminary Results, 70 Fed. Reg. at 24,387. Based on the VCL, inter *alia*, Commerce concluded that the "party branch is in effect the core of the village power structure." Issues & Dec. Mem. at 18.

In *Coalition II*, a case involving Huanri and the subject merchandise in an earlier review, this Court endorsed Commerce's examination of control at the village level, and commented on the necessity of analyzing the VCL. It found that "given the broad statutory and concomitant administrative caution about a nonmarket economy and the longstanding emphasis of the Communist Party on the 'grass roots' of China . . . the agency's separate-rate test should not be limited to proving absence of national-government ownership but

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[7] Further indicia of government control may be found in the Verification Report. Such information includes the facts that: (1) the "Panjacun village committee (i.e., local government entity) established Huanri General . . . and provided this company with additional investment capital during the POR[.]" *Verification Report* at 4; (2) "Company officials stated that prior to January 2004, Huanri Auto had an informal agreement with the village committee that it would not have to pay land-use rights as long as it hired local villagers." *Id*. at 5; (3) "Data . . . indicates that four of the five village committee members were shareholders in Huanri General during the POR." *Id*. at 6; and (4) [T]wo of the shareholder representatives that elected Huanri General's board of directors were also village committee members." *Id*. at 11.

should be applied to whatever level of governmental control is implicated." *Coalition II*, 318 F. Supp. 2d at 1312–13. In speaking on Huanri General, the Court observed that this "collectively-owned enterprise thus may be a most-perfect form of *communism* in action. As such, there would be little room to differentiate between the business of Huanri General and that of the village and governing village committee." *Id*. at 1313 (emphasis in original). The Court continued, however, that "the linchpin to this thesis is missing, namely, the village committee law, which may or may not be a promulgation of the central government and which may or may not provide that government or a subordinate, even grass-roots village, government with ultimate nonmarket control." *Id*. at 1314. Indeed, "without the content of that law and the ITA's analysis of the meaning thereof on the record herein, this court is unable to affirm the foregoing *de facto* reasoning." *Id*. ("[N]one of the prior cases . . . ha[ve] considered the nature and impact of that particular law under the U.S. statute that requires the ITA to take the extent of home- market government ownership or control carefully into account."). Due to the "absence of the company's production of the PRC's Organic Law of the Village Committee and any agency analysis thereof" the *Coalition II* Court remanded the matter to the ITA with the option to reopen the record for submission of the VCL. *Id*. Indeed, the Court's emphasis on the VCL and its ultimate decision to remand due to the absence thereof, signifies the importance of the VCL in making a determination of *de facto* control. Moreover, that this evidence was deemed necessary for the Court to assess Commerce's finding of control provides additional support that analysis at the village level is not a change in methodology. The critical difference between *Coaltion II* and the instant matter is that the missing "linchpin" to the Court's analysis, the VCL, is now present on the record.

For the foregoing reasons, the Court finds that Commerce did not change its methodology in determining whether Huanri was subject to *de facto* government control. Indeed, as demonstrated in the Final Results, Verification Report, Issues and Decision Memorandum and accompanying record information, Commerce reasonably determined that Huanri did not meet its burden of demonstrating the absence of *de facto* control by the Chinese government necessary for the granting of a separate rate. Because the Court finds that Commerce did not change its methodology there was no need for the notice and comment that is precipitated by a change in methodology.

b. Plaintiffs May Not Receive a "Village-Wide" Rather Than the PRC-Wide Rate Because if the Presumption of State Control is Not Rebutted, Only the PRC-Wide Rate is Available.

Anticipating that this Court might find that Commerce's *de facto* control analysis was not a change in methodology, Plaintiffs argued

in the alternative that it should receive what it calls a "village-wide" rather than the PRC-wide rate. *See* Pl.'s Mem. at 35–39. This argument is devoid of support in both fact and law. As such, the Court finds that Commerce correctly assigned Huanri the PRC-wide rate because it did not demonstrate an absence of *de facto* government control.

It is Commerce's long-standing practice to calculate a single NME-wide rate for those companies that do not qualify for a separate rate. *See e.g.*, *Shandong Huarong v. United States*, 27 CIT 1568, 1592, Slip Op. 03–135 at 38 (Oct. 22, 2003) (not published in the Federal Supplement) ("[W]here an NME exporter fails to either: (1) rebut the nonmarket economy presumption of state control, or (2) otherwise cooperate with the investigation by failing to respond to Commerce's questionnaire for that review, Commerce may then apply the *NME-wide* antidumping duty margin to such exporter's merchandise.") (emphasis added) (internal quotation omitted); *Tapered Roller Bearings and Parts Therof, Finished and Unfinished, from the People's Republic of China*, 62 Fed. Reg. 61,276 (Dep't Commerce Nov. 17, 1997) (final results); Def.'s Br. at 20. Indeed, the "term nonmarket economy country means any foreign *country* that the administering authority 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). The statute, however, does not speak to a market economy village or sub-national form of government. Accordingly, because Huanri failed to rebut the nonmarket economy presumption of state control, Commerce correctly applied the only other rate lawfully available, the PRC-wide antidumping duty margin.

B. Commerce's Determination of *De Facto* State Control is Supported By Substantial Evidence and Otherwise in Accordance with Law.

Although briefly mentioning the phrase "substantial evidence" the Plaintiffs do not put forth any argument claiming that Commerce's determination itself was not supported by substantial evidence. *See* Pl.s' Mem. at 2 ("[T]he Commerce Department's determination in the Final Results constitutes an abuse of discretion and is not supported by substantial evidence on the record.") *Contra* Def.'s Resp. at 8 ("Commerce's determination is supported by substantial evidence and consistent with the agency's long-standing appellate court-approved separate rates methodology."). Rather, their argument primarily centers upon whether there was a change in methodology - an argument the Court has addressed *supra*. Because Plaintiffs sporadically include the phrase "substantial evidence" in their briefs, the Court summarily addresses the issue. As demonstrated *supra*, Commerce pointed to substantial record evidence and explained its decision not to grant Huanri a separate rate. Accordingly, the Court

finds that the determination of *de facto* state control is supported by substantial evidence and otherwise in accordance with law.

CONCLUSION

Based on the foregoing, the Court finds that Commerce properly applied its long-standing methodology in concluding that Huanri was not free from *de facto* state control. The Court further finds that Commerce's determination that Huanri did not rebut the presumption of state control and therefore received the PRC-wide antidumping duty rate was reasonable, supported by substantial evidence and otherwise in accordance with law. Accordingly, Commerce's final determination is affirmed, and Plaintiffs' motion for judgment on the agency record is denied. Judgment shall enter accordingly.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SHANDONG HUANRI (GROUP) GENERAL CO.; SHANDONG HUANRI GROUP CO., LTD.; and LAIZHOU HUANRI AUTOMOBILE PARTS CO., LTD. Plaintiff, v. UNITED STATES, Defendant THE COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS Defendant-Intervenor.

July 5, 2007

JUDGMENT

Upon consideration of the United States Department of Commerce's *Brake Rotors from the People's Republic of China; Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 Fed. Reg. 69,937 (Nov. 18, 2005) ("Final Results"), all other papers filed and proceedings herein, in conformity with the Court's opinion in this matter, it is hereby:

ORDERED that the Final Results are affirmed; and it is further

ORDERED that this action is dismissed.

Slip Op. 07–106

MITTAL STEEL POINT LISAS LIMITED, Plaintiff, v. UNITED STATES, -and- Defendant, GERDAU AMERISTEEL CORP. *et al*., Intervenor-Defendants.

Court No. 02–00756

[Results of remand to International Trade Commission pursuant to mandate of Court of Appeals for the Federal Circuit affirmed.]

Decided: July 6, 2007

Steptoe & Johnson LLP (*Mark A. Moran*, *Matthew S. Yeo* and *Evangeline D. Keenan*) for the plaintiff.

James M. Lyons, General Counsel, *Andrea C. Casson*, Assistant General Counsel, and *Jonathon J. Englar*, U.S. International Trade Commission, for the defendant.

Kelley Drye Collier Shannon (*Paul C. Rosenthal*, *Kathleen W. Cannon* and *R. Alan Luberda*) for the intervenor-defendants.

Memorandum

AQUILINO, Senior Judge: Before this court are the January 16, 2007 Views of the U.S. International Trade Commission ("ITC")[1] issued pursuant to the order of remand filed herein, 30 CIT ___ , Slip Op. 06–151 (Oct. 13, 2006), in conformity with the mandate of the U.S. Court of Appeals for the Federal Circuit ("CAFC") that the commissioners

> "make a specific causation determination and in that connection . . . directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers."

Caribbean Ispat Ltd. v. United States, 450 F.3d 1336, 1341 (Fed.Cir. 2006), quoting from *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1375 (Fed.Cir. 2006). These Views report that,

> [u]pon consideration of the court's remand instructions, we determine . . . that an industry in the United States is not materially injured or threatened with material injury by reason of imports of certain wire rod from Trinidad and Tobago that is sold in the United States at less than fair value ("LTFV").[2]

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[1] These Views will be cited hereinafter as "Remand Results".

[2] Commissioners Stephen Koplan and Charlotte R. Lane dissent, but join in Sections I, II and III of these remand views. As further set forth in their *Separate and Dissenting Views*, they find that an industry in the United States is materially injured by reason of subject imports from Trinidad and Tobago.

* * *

Counsel for the U.S. domestic industry respond herein to these Views, in part, as follows:

> In sum, the Commission has clearly indicated its belief that the appellate court's holdings in both *Bratsk* and *Caribbean Ispat* are contrary to law, a conclusion with which the domestic producers concur. Despite or perhaps because of this disagreement, the Commission has adopted an extreme interpretation of the Court's holding, including reliance on a commodity-product finding the appellate court did not make, reliance on a rebuttable presumption the appellate court did not require, cumulation of all imports in its replacement analysis, a presumption that replacement of imports automatically negated benefits, and finally extension of the replacement/benefit test to the threat context. The result of this extreme interpretation of the *Bratsk* decision was to deprive the domestic industry of an antidumping duty order against Trinidad that the Commission believes should lawfully remain in effect.

Defendants-Intervenors' Comments, p. 26.

This court accepts this response as a plea for relief from the above-quoted controlling viewpoint, but its consideration thereof is circumscribed by the CAFC's specific mandate. *See*, *e.g.*, *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948), citing *Himley v. Rose*, 9 U.S. (5 Cranch) 313 (1809).

I

The ITC is required to make a final determination of whether a domestic industry is materially injured, or is threatened with material injury, by reason of imports, or sales (or likelihood of sales) for importation. 19 U.S.C. § 1673d(b)(1). It is well-established that an affirmative determination entails two elements: present material injury, or threat thereof, and a finding that that material injury is "by reason of" subject imports. *See*, *e.g.*, *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed.Cir. 1997); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1104 (Fed.Cir. 1990); *American Spring Wire Corp. v. United States*, 8 CIT 20, 22–23, 590 F.Supp. 1273, 1276 (1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed.Cir. 1985).[2] In making such determinations, the Commission is required by 19 U.S.C. § 1677(7)(B)(i) to consider

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[2] This matter focuses at this time on the second element, *i.e.*, whether the domestic producers' present material injury has been "by reason of" subject imports from the Republic of Trinidad and Tobago ("RTT").

(I) the volume of imports of the subject merchandise,
(II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
(III) the impact of imports of such merchandise on domestic producers of domestic like products. . . .

Additionally, it "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

The subject imports at issue in this case are steel wire rods produced in RTT, a designated beneficiary country under the Caribbean Basin Economic Recovery Act ("CBERA"). That act, the purpose of which is to "promote economic revitalization and facilitate expansion of economic opportunities in the Caribbean Basin region," Pub. L. No. 98–67, 97 Stat. 384 (Aug. 5, 1983), modifies otherwise applicable 19 U.S.C. §1677(7)(G)(i), which requires the ITC to "cumulatively assess the volume and effect of imports of the subject merchandise from all countries" with respect to which petitions were filed or investigations initiated on the same day and such imports compete with each other and with domestic like products in the U.S. market. In making an injury determination with regard to imports from a CBERA designated nation, however, the Commission may assess the volume and effect of imports cumulated only with imports of the subject merchandise from other such designated beneficiary countries. *See* 19 U.S.C. §1677(7)(G)(ii)(III).

A

In its original motion for judgment upon the agency record, the plaintiff claimed that the ITC majority failed to "ensure that imports from Trinidad and Tobago *by themselves* made a material contribution to any injury to the domestic industry" and that the Commission "failed to explain how it ensured that it was not attributing . . . injury from th[o]se other known and potential sources of injury (*e.g.*, other subject and non-subject imports)". The plaintiff proposed that this court order the defendant to

> provide an adequate explanation as to how it ensured that it did not attribute the effects of other subject and non-subject imports to imports from the Republic of Trinidad and Tobago[.]

According to the Uruguay Round Agreements Act *Statement of Administrative Action* ("URAA-SAA"), in performing its "by reason of" analysis, the ITC should

> examine all relevant evidence, including any known factors, other than dumped [or subsidized] subject imports which at the same time are injuring the domestic industry[.]

Caribbean Ispat Ltd. v. United States, 29 CIT ___, ___, 366 F.Supp.2d 1300, 1305 (2005), quoting Defendant's Opposition Brief, p. 11, quoting H.R. Doc. No. 103–316, vol. 1, p. 851 (1994)(brackets in original). On plaintiff's subsequent appeal, however, the CAFC opined that reliance on this text read

> too much into the URAASAA's brief discussion of causation. First, the passage does not speak to the unique circumstances of CBERA or other non-cumulation provisions. Second, we do not regard the above-quoted passage as Congress's comprehensive and exclusive interpretation of section 1677(7)(B)(ii). The passage does not specifically reference that statute, and the plain language of section 1677(7)(B)(ii) suggests abroad grant of discretion in materiality determinations that allows the Commission to "consider such other economic factors as are relevant." . . . In the present case, the Commission had authority to treat LTFV imports from non-CBERA countries as an "other economic factor," just as the Commission ordinarily treats fairly traded imports as an "other economic factor" in dumping investigations that do not involve CBERA countries.

Caribbean Ispat Ltd. v. United States, 450 F.3d at 1339. Next, the CAFC addressed a contention by the plaintiff/appellant that legal error was committed by the ITC because it did not evaluate the effect of RTT's imports in light of other LTFV imports, and its findings did not discuss the effect of fairly-traded imports. The CAFC concurred with the contention – in the light of its then – recent decision in *Bratsk Aluminum Smelter v. United States*, *supra*, which explained that,

> [w]here commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers.

450 F.3d at 1341, quoting 444 F.3d at 1373. Whereupon the CAFC's above-quoted mandate to this court and the Commission issued.

II

On remand, the ITC again finds that the "volume of subject imports . . . is significant"[3]; that

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[3] Remand Results, p. 13.

> there has been significant price underselling by subject imports from Trinidad and Tobago as compared with the price of domestic like product, and that the effect of the subject imports was to prevent price increases which otherwise would have occurred, to a significant degree[;][4]

that the subject imports from RTT "alone were having a significant adverse impact on the domestic industry"[5]; and that there was "a likelihood of continued imminent injury to the domestic industry from subject imports from Trinidad and Tobago"[6]. Nonetheless, two commissioners arrived at a negative determination "*solely* as a consequence of [their] application of the additional 'replacement/benefit' analysis set forth by the [CAFC]".[7]

A

In applying the *Bratsk* analysis as laid out by the CAFC, at least those two commissioners take the language "the Commission must explain why the elimination of subject imports would benefit the domestic industry" to be the court's "creation of a presumption in favor of finding replacement", to wit:

> . . . The effect of the replacement/benefit test mandated by the Federal Circuit's decision seems to require the agency to render a negative determination, if the triggering factors are satisfied, unless the record contains substantial evidence that either nonsubject imports would not replace the subject imports or that such replacement would nonetheless benefit the domestic industry. This, in effect, requires proving the negative. Put otherwise, it creates a rebuttable presumption that replacement will occur.

Remand Results, p. 30. They go on to point out that the data needed to rebut such a presumption would need to be obtained from countries not under investigation, producers with no incentive to provide the data needed. Indeed, such producers would have incentive to withhold information as an antidumping-duty order against the sub-

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[4] *Id.* at 18.

[5] *Id.* at 21.

[6] *Id.* at 25.

[7] *Id.* at 5 (emphasis added). Chairman Pearson did not participate in the remand determination. Commissioner Okun's negative determination continues to be based on failure to find significant volume or price effects from RTT subject imports. *See id*. at 2 n. 3.

> As recited above, Commissioners Koplan and Lane dissented, finding that the first triggering factor for the *Bratsk* "replacement/benefits" analysis is not present in this remand determination. Therefore, they dissent from any further analysis of *Bratsk* in this remand determination.

Id. at 5 n. 11.

ject producers could be to their economic advantage. *See id*. at 30–31. As for the intervenor-defendants, they address this issue in the following manner:

> Application of a rebuttable presumption against the domestic industry, parties clearly not in possession of information on foreign capacity, pricing, etc., is unlawful. Longstanding case law establishes that the "burden of production {belongs} to the party in possession of the necessary information." *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993). *See also Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1166 (Fed.Cir. 1996) ("The burden of production is appropriately placed on the party deemed to control the information."). Further, the Commission is prohibited from drawing adverse inferences – which it effectively has done here against the U.S. producers – where parties have not been shown to have failed to cooperate to the best of their ability. *See Shandong Huarong Machinery Co., Ltd. v. United States*, 435 F.Supp. 2d 1261, 1272 (Ct. Int'l Trade 2006).

Defendants-Intervenors' Comments, pp. 13–14.

Whatever the effect of compliance with the CAFC's mandate, this court cannot conclude that the commissioners failed to address the question(s)[8] imposed by it. But they do clearly state that the *Bratsk* test is "**Unclear**"[9] and engenders

> ambiguities [that] arise in large part because the requirement imposed by the *Bratsk* panel . . . is not among the statutory factors Congress has required the Commission to consider. Indeed, such a test misconstrues the purpose of the statute, which is

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[8] As explained by the CAFC herein, a factor that triggers *Bratsk* analysis is where "commodity products are at issue". 450 F.3d at 1341, quoting 444 F.3d at 1373. What seemingly triggered the mandate of such analysis now is that court's recitation of the ITC's finding of a

> "high level of fungibility between subject imports from Trinidad and Tobago and the domestic product, and between subject imports from Trinidad and Tobago and imports from each of the other subject countries."

450 F.3d at 1341.

Whereupon two commissioners in the majority report that they "feel constrained to interpret the Court's ruling broadly for purposes of satisfying the Court's remand in this case" and thus "conclude that this 'antidumping investigation is centered on a commodity product' that is 'generally interchangeable regardless of its source.' " Remand Results, p. 36 (footnote omitted). The dissenting opinion of two other commissioners states, on the other hand, that

> the domestic like product, subject imports, non-Trinidadian subject imports, and non-subject imports of wire rod are not "generally interchangeable regardless of its source" and consequently are not commodity products for purposes of the Bratsk analysis. [He]nce this threshold Bratsk triggering factor is not met[.]

Id. at 50. *See also* footnote 7, *supra.*

[9] *Id.* at 27 (boldface in original).

> not to bar subject imports from the U.S. market or award subject import market share to U.S. producers, but is meant instead to "level[ ] competitive conditions" by imposing a duty on subject imports and thus enabling the industry to compete against fairly traded imports. The statutory scheme in fact contemplates that subject imports may remain in the U.S. market after an order is imposed and even that the industry afterwards may continue to suffer material injury. Indeed, the dumping of subject imports may have no impact on respective market shares, but may affect the domestic industry's selling price and profitability alone. Therefore, the Commission is required under *Bratsk* to determine whether non-subject imports would fill the void created by the "elimination" of subject imports despite the fact that there may be no such void created by an order.

Remand Results, pp. 28–29 (footnotes omitted). Nonetheless, they report, in pertinent part, as follows:

> During the period of investigation, from 1999 to 2001, steel wire rod was produced in 41 countries. With respect to non-Trinidadian subject imports, the record indicates that producers in the six countries collectively had sufficient excess capacity in 2001 . . . to more than replace Trinidadian exports to the United States of 355,089 short tons.
>
> . . . The main non-subject sources of wire rod in the U.S. market over the period of investigation are Turkey, Japan, and Germany. Turkey's production capacity in 2000 . . . [was not fully utilized]. Japan was the world's third largest non-Trinidadian producer of wire rod in 2000, producing approximately 7.9 million short tons, of which 16 percent was exported worldwide during 1999 and 2000 combined, years for which data were available. Japanese exports to the United States decreased by 15.0 percent during the period of investigation, and appear to have been concentrated in the higher-end wire rod products. Germany was the world's fourth-largest non-Trinidadian producer of wire rod in 2000, exporting very large quantities of wire rod to many countries during the period of investigation, with exports accounting for 43.4 percent of domestic production in 2000. Public data show German production of about 6.8 million tons in 2000, and the Commission's data show excess capacity . . . in 2001. China was the world's largest producer of wire rod in 2000, with production of 29 million short tons, although a relatively small exporter of wire rod to the United States during the POI. There is some evidence that China would have had the ability to export additional wire rod products to the United States during the period of investigation, given planned increases in its domestic production capacity

during the period and the rapid trajectory of its growth in wire rod exports to the United States from 1999 to 2001. This is consistent with the existence of unused non-subject capacity to supply the U.S. market. . . .

Taken together, the record with respect to production, unused production capacity, and export orientation of the producers in the aggregate in the non-Trinidadian countries provides ample evidence that such producers *could* have, if so inclined, exported sufficient volumes to the United States during the POI to fully replace subject imports from Trinidad. Absent any evidence that these producers would not have acted in such a manner, we are unable to find that imports from such producers would not have replaced subject imports from Trinidad and Tobago in the U.S. market, either by using unutilized capacity or by diverting exports from other markets. . . .

Regarding the benefit to the domestic industry, we note that we lack the type of pricing data for many non-subject products that we would normally use to analyze this factor, and are forced to rely partially on average unit values as a consistent unit of measurement. The situation with respect to pricing is mixed. For the foreign sources for which we have product-specific pricing data . . . the pricing data show numerous instances in which other imports oversold imports from Trinidad and Tobago, but also numerous instances in which other imports undersold imports from Trinidad and Tobago. . . .

The underselling and low average unit values for many non-Trinidadian imports, considered in light of the apparent ability of numerous subject and non-subject wire rod producers to divert additional wire rod to the U.S. market, and the large number of foreign producers producing the [type of] wire rod in which Trinidadian shipments were concentrated, leaves us unable to conclude that non-subject and non-Trinidadian subject imports would not have replaced imports from Trinidad and Tobago in the U.S. market during the period of investigation, had Trinidad and Tobago been excluded from the market. Given the low prices or average unit values at which many of these imports entered the United States, we cannot conclude that non-subject and non-Trinidadian subject imports would not have replaced imports from Trinidad and Tobago and negated the benefit to the domestic industry of the exclusion from the market of an AD order on the subject imports.

Id. at 37–42 (footnotes omitted; emphasis in original).

III

In view of the foregoing, it cannot be said that the defendant has not carried out the CAFC mandate to

> make a specific causation determination and in that connection . . . directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers.

Nor can this court conclude that the agency record, such as it still is, does not support the above-quoted specific causation determination. Ergo, defendant's Remand Results should be affirmed, with an amended judgment entered accordingly.

AMEMDED JUDGEMENT

Thomas J. Aquilino, Jr., Senior Judge

MITTAL STEEL POINT LISAS LIMITED, Plaintiff, v. UNITED STATES, -and- Defendant.

Court No. 02–00756

This court having entered a judgment of dismissal of this action pursuant to slip opinion 05–37, 29 CIT ___ , 366 F.Supp.2d 1300 (2005); and the plaintiff having prosecuted an appeal therefrom; and the U.S. Court of Appeals for the Federal Circuit ("CAFC") having decided *sub nom. Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (2006), to vacate that judgment of dismissal and remand this matter; and this court in slip opinion 06–151, 30 CIT ___ (Oct. 13, 2006), having read the mandate of the CAFC to require remand to the U.S. International Trade Commission ("ITC") to

> "make a specific causation determination and in that connection . . . directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers",

quoting 450 F.3d at 1341, quoting from *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1375 (Fed.Cir. 2006); and the defendant having filed the Views of the Commission (Jan. 16, 2007) pursuant thereto; and this court, after due deliberation, having rendered a decision thereon; Now therefore, in conformity with said decision, it is

ORDERED, ADJUDGED and DECREED that the view of certain members of the ITC that determines that an industry in

> the United States is not materially injured or threatened with material injury by reason of imports of certain wire rod from Trinidad and Tobago that is sold in the United States at less than fair value

be, and it hereby is, affirmed.