U.S. Customs and Border Protection

Slip Op 10–40

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY AND GANG YAN DIAMOND PRODUCTS, INC., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., AND QINGDAO SHINHAN DIAMOND INDUSTRIAL CO. LTD., Defendant-Intervenors.

Before: Musgrave, Senior Judge
Court No. 06–00246

[Denying Plaintiff's motion to lift stay.]

Dated: April 15, 2010

Wiley Rein, LLP, (*Daniel B. Pickard*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Carrie A. Dunsmore*), for the defendant U.S. Department of Commerce.

Barnes, Richardson & Colburn, (*Jeffrey S. Neely*) for the defendant-intervenors Beijing Gang Yan Diamond Products Co. and Gang Yan Diamond Products, Inc.

OPINION AND ORDER

Musgrave, Senior Judge:

Introduction

Plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC") initiated this action in July 2006 to challenge certain aspects of the determination issued by Defendant International Trade Administration, United States Department of Commerce ("Commerce" or "the Department") finding that imports of diamond sawblades from the People's Republic of China are being sold, or likely to be sold, at less-than-fair-value ("LTFV"). *See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 17 Fed. Reg. 29303 (May 22, 2006) ("*Final Results*"). Pursuant to a court order, the proceedings in this matter have been stayed since October 2006; DSMC now moves to lift the stay of proceedings. Defendant United States opposes DSMC's

motion, as do Defendant-Intervenors Beijing Gang Yan Diamond Products Companyand GangYan Diamond Products, Inc. ("Defendant-Intervenors"). For the reasons set forth below, the motion will be denied.

On October 12, 2006, this court granted DSMC's consent motion to stay the proceedings in this action pending the outcome of Court No. 06–00247, a related action in which DSMC challenged the negative-injury determination of the U.S. International Trade Commission ("ITC") in the same antidumping investigation. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731-TA-1092 and 1093 (Final), 71 Fed. Reg. 39128 (ITC July 11, 2006). As noted by DSMC in that motion, a stay was necessary because "a final court decision upholding the ITC's negative determination would affect the justiciability of the instant action by rendering the action, and any decision pursuant thereto, moot." Pl.'s Oct. 4, 2006 Consent Mot. to Stay Proceedings at 1.

The court did not uphold the ITC's negative injury determination, but instead remanded the matter to the ITC for further explanation and for reconsideration of certain issues. *Diamond Sawblades Mfrs.' Coalition v. United States*, Slip Op. 08–18, 2008 WL 576988 (CIT Feb. 6, 2008). On remand, the ITC reversed its position and found that the domestic industry was threatened with material injury by reason of subject imports; the court affirmed the ITC's (now affirmative) remand determination in a final decision dated January 13, 2009. *See Diamond Sawblades Mfrs.' Coalition v. United States*, Slip Op. 09–5, 2009 WL 289606 (CIT January 13, 2009) (*appeal docketed*, Mar. 31, 2009, *argued* Feb. 2, 2010) ("*Diamond Sawblades II*"). In a subsequent decision related to *Diamond Sawblades II*, the court granted DSMC's request for mandamus relief and ordered the Department to "issue and publish antidumping duty orders and order the collection of cash deposits on subject merchandise" in accordance with the ITC's affirmative determination. *Judgment, Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, 650 F. Supp 1331 (2009) (*appeal docketed*, Oct. 15, 2009) ("*Diamond Sawblades mandamus action*"). As the above citations indicate, both *Diamond Sawblades II* and the *Diamond Sawblades mandamus action* are currently pending appeal at the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

A decision having been issued by this court, DSMC now moves to lift the stay, arguing that there is "no reason" to further delay the proceedings in this matter. Although it is not clear, DSMC appears to contend that it is "negatively impacted" by the stay because it delays

the potential relief that would be in order if its challenge to the *Final Results* proves successful. Pl's. Mot. at 3. The government opposes the motion on the ground of judicial economy in light of the pending appeal of *Diamond Sawblades II*, and further notes that the appellate decision in the *Diamond Sawblades mandamus action* may also affect the outcome of this matter. Def's Resp. at 2. Defendant-Intervenors oppose lifting the stay on similar grounds, adding that a stay in this matter would be consistent with the stay applied to the related actions challenging the Department's LTFV determination on imports of diamond sawblades from the Republic of Korea.

Discussion

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). A court may properly determine that "it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California*, 593 F.2d 857, 863–64 (9th Cir. 1979).

However, the party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis*, 299 U.S. at 255. How and when a stay is imposed is left to the court's discretion; in exercising that discretion, a court must "'weigh the competing interests and maintain an even balance,'" giving due consideration to the interests of the litigants, the court, and the public. *Tak Fat Trading Co. v. United States*, 24 CIT 1376, 1377, 2000 WL 1825396 at **1 (CIT 2000) (*quoting Landis, supra*). A stay that fails to properly balance the relevant interests, *e.g.*, a stay "of indefinite duration in the absence of a pressing need," is likely to be deemed an abuse of discretion. *Id. See Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (holding that trial court's stay was an abuse of discretion because pending actions "may take years to complete" and because proceedings on liability could not be justifiably stayed "merely because a precise determination of damages is not possible at this moment . . .").

In this matter, the need for the stay (or, more accurately, the need to continue it) is essentially the same need that compelled DSMC to move for a stay in the first place: Namely, that a pending court

decision (at this point the Federal Circuit's review of *Diamond Sawblades II*) has the potential to render this action and any decision issued thereon a nullity. *See* 19 U.S.C. § 1673d(c). In some respects, this situation is the converse of that presented in *Cherokee Nation*, where the trial court (impermissibly) stayed proceedings "merely because a precise determination of damages" had not yet been determined. *Cherokee Nation*, 124 F.3d at 1416. That is, the current challenges to the estimated dumping margins set forth in *Final Results* are essentially over *rate* of antidumping duties that the importers will ultimately pay, but the suit now awaiting a decision at the Federal Circuit will establish conclusively whether antidumping duties should be *paid at all*. Accordingly, because of the potential impact that the Federal Circuit's decision in *Diamond Sawblades II* may have on this action, the court must conclude there is a "pressing need" to continue the stay.

Hence, if the stayis lifted and the litigation in this matter proceeds, the court and each of the litigants (including DSMC) risk expending substantial resources on litigation that may ultimately prove to be irrelevant. By its motion DSMC has essentially indicated that, in order to obtain more quickly the possible benefits a successful challenge may bring, it is willing to take that risk. Hence, assuming DSMC would prevail on the underlying merits, allowing the stay to remain frustrates DSMC's interests by delaying the potential benefits that may ensue from the higher cash deposits/antidumping duties collected from importers. Unlike DSMC however, the other parties to this action, including the Chinese importers (who, like DSMC, may benefit from proceeding with its own challenge to the *Final Results*) and the Department, indicate that they have a greater interest in avoiding potentially unnecessary litigation. Although the court is neutral, it does have an interest in the efficient use of judicial resources which it is obliged to consider.

On balance, the court finds that the interests favoring the stay outweigh DSMC's interests in having the stay lifted for three reasons. First, the stay is likely to be of limited duration. The Federal Circuit's case disposition statistics indicate a median docketing-to-disposition time of approximately one year for cases from this court, making a ruling on *Diamond Sawblades II* likely in a matter of months. *See Statistics*, http://www.cafc.uscourts.gov/pdf/MedianDispTime(table) 00–09.pdf. (last visited Apr. 15, 2010). Second, although there may be "a fair possibility" that the stay will negatively impact DSMC, the degree and likelihood of the negative impact is speculative. A decision on the merits of this case may indeed result in higher cash deposits, but given the parallel challenges instituted by the importers, it may

also result in lower cash deposits. Finally, the fact that DSMC is a party to the action on appeal mitigates in favor of continuing the stay, as it is not being forced to "wait upon the outcome of a controversy to which [it] is a stranger." *Landis*, 299 U.S. at 255. *See American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) (noting that "[i]n the exercise of a sound discretion [a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same."). Accordingly, the court must conclude that conditions favor continuance of the stay pending a final and conclusive decision by the Federal Circuit in *Diamond Sawblades II*.[1]

Conclusion

In consideration of the foregoing, the court concludes that a proper balance of interests favors continuation of the current stay. Accordingly, this matter will remain stayed pending the issuance of a conclusive decision in *Diamond Sawblades II*. The plaintiff's motion is denied.

SO ORDERED.

Dated: April 15, 2010
New York, New York

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

Slip Op. 10–41

ZHEJIANG DUNAN HETIAN METAL CO., LTD. Plaintiff, v. UNITED STATES, Defendant, - and - PARKER-HANNIFIN CORP., Defendant-Intervenor.

Before: Pogue, Judge
Court No. 09–00217
Public Version

[Plaintiff's motion for judgment upon the administrative record denied.]

Dated: Dated: April 19, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Mark E. Pardo* and *Andrew T. Schutz*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Mischa Preheim* and *Carrie A. Dunsmore*); and, of

[1] Although the Federal Circuit's decision in the *Diamond Sawblades mandamus action* may also affect the outcome of this matter, the court is unconvinced that the potential impact of that case would justify extending the stay beyond what is indicated here.

counsel, *Joanna Theiss*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the Defendant.

Roetzel & Andress, LPA (*Donald R. Dinan* and *Craig A. Koenigs*) for the Defendant-Intervenor.

OPINION AND ORDER

Pogue, Judge:

Introduction

This case involves a challenge to the United States Department of Commerce's ("Commerce" or "the Department") data choices and adjustments in its calculation of an antidumping ("AD") duty on goods produced in a non-market economy ("NME"). Specifically, Plaintiff Zhejiang DunAn Hetian Metal Co., Ltd. ("DunAn") challenges the Department's data selection, use of partial adverse facts available ("AFA"), and scrap offset methodology in Commerce's final affirmative determination AD duty order regarding frontseating service valves ("FSVs") from the People's Republic of China ("China").[1]

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

Currently before the court is DunAn's USCIT R. 56.2 Motion for Judgment Upon the Agency Record.

Standard of Review

The statutory provision which supplies the standard for review for Commerce's final determination requires that the court shall "hold unlawful any [agency] determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Tariff Act of 1930, § 516A(b)(1)(B)(i), 19 U.S.C. § 1516a(b)(1)(B)(i)(2006).[2] *See also* 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II), 1516a(a)(2)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003).

---

[1] *See Frontseating Service Valves From the People's Republic of China*, 74 Fed. Reg. 10,886 (Dep't Commerce Mar. 13, 2009) (final determination of sales at less than fair value and final negative determination of critical circumstances) ("Final Determination"), and accompanying Issues and Decision Memorandum, A-570–933, [period of investigation ("POI")] 7/1/07 - 12/31/07 (Mar. 6, 2009), Admin. R. Pub. Doc. 226, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–5480–1.pdf (last visited Apr. 19, 2010) ("*Decision Mem.*"); *Frontseating Service Valvesfrom the People's Republic of China*, 74 Fed. Reg. 19,196 (Dep't Commerce Apr. 28, 2009) (AD duty order). Commerce selected DunAn, a Chinese producer of FSVs, as a mandatory respondent in this administrative proceeding.

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

Discussion

By its instant motion, DunAn seeks (1) recalculation of the Indian[3] import statistics used to value brass bar[4]; (2) replacement of the labor wage rate — calculated in accordance with the Department's regulatory regression analysis[5] — with an Indian labor rate of $0.21 per hour; (3) reversal of the Department's application of partial AFA to DunAn's December 2007 U.S. sales data and inventory carrying costs ("ICC")[6]; and (4) revision of the Department's methodology for recognizing the value of DunAn's recycled brass scrap.

The court will, in turn, analyze each of these values.

A. Commerce's Selection of a Value for Brass Bar

Commerce's selection of a value for brass bar is governed by 19 U.S.C. § 1677b(c), which requires that Commerce choose data that is the "best available information" on the record.[7] Here, Commerce selected an average unit value ("AUV") derived from the World Trade

---

[3] Plaintiff does not challenge the choice of India as the appropriate country from which to select the relevant data. *See* 19 U.S.C. § 1677b(c)(4) (providing for the valuation of merchandise exported from a nonmarket economy, to "the extent possible," using prices or costs in a comparable market economy country).

[4] DunAn uses brass bar to make FSV valve bodies and valve stems. *See Frontseating Service Valves from the People's Republic of China*, 73 Fed. Reg. 20,250, 20,253 (Dep't Commerce Apr. 15, 2008) (initiation of AD duty investigation).

[5] *See* 19 C.F.R. § 351.408(c)(3)(2009) (providing for the use of "regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries.").

[6] ICC are costs associated with keeping merchandise in inventory before it is sold. *Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 638, 645, 491 F. Supp. 2d 1222, 1230 (2007), *aff'd*, 548 F.3d 1375 (Fed. Cir. 2008). Commerce's authority to account for ICC arises from 19 U.S.C. § 1677a(d). *NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1373 (Fed. Cir. 2004).

[7] Section 1677b(c)(1) provides that Commerce shall determine the normal value of the subject merchandise on the basis of the value of the factors of production ["FOP"] utilized in producing the merchandise . . . . the valuation of the [FOPs] shall be based on the *best available information* regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

19 U.S.C. § 1677b(c)(1)(emphasis added).

As the court has previously noted:

> The term "best available" is one of comparison, *i.e.*, the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. The term "best" means "excelling all others." This "best" choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.

Dorbest Ltd. v. United States ("*Dorbest I*"), 30 CIT 1671, 1675,462 F. Supp. 2d 1262, 1268 (citations omitted).

Atlas ("WTA")[8] Indian import statistics for the POI. DunAn does not challenge Commerce's use of the WTA data set in general or the particular HTS classification used.[9] Rather, DunAn argues that some aspects of the WTA data set are incorrect and should be eliminated. Specifically, DunAn challenges the sufficiency of the evidence to support Commerce's inclusion, in the WTA data, of brass bar values for Indian imports from France, Japan, and the United Arab Emirates ("UAE").[10]

The relevant WTA data for HTS 7407.21.10 "Bars of Brass" are as follows:

Country	Quantity (Kgs)	Value (Rupees)	AUV
Sri Lanka	44,720	7,990,000	178.67
Malaysia	24,262	8,031,000	331.01
UAE	8,000	3,652,000	456.50
Germany	4,526	2,581,000	570.26
Japan	3,911	1,574,000	402.45
United Kingdom	3,380	1,779,000	526.33
Denmark	1,300	541,000	416.15
Netherlands	1,042	501,000	480.81
Singapore	392	487,000	1,242.35
France	261	374,000	1,432.95
United States	90	78,000	866.67
TOTAL	**91,884**	**27,588,000**	**300.25**

[8] Global Trade Information Services, Inc. publishes the WTA, organizing the data using the Indian Harmonized Tariff Schedule ("HTS") classifications. *See* Global Trade Information Services, Inc., World Trade Atlas®, http://www.gtis.com/english/GTIS_WTA.html (last visited Apr. 19,2010). Global Trade Information Services, Inc. obtains the specific import values for India contained in the WTA directly from the Directorate General of Commercial Intelligence and Statistics, Ministry of Commerce of India; the WTA reports the data in rupees. *See Frontseating Service Valves from the People's Republic of China*, 73 Fed. Reg. 62,952, 62,957 (Dep't Commerce Oct. 22, 2008) (preliminary determination of sales at less than fair value, preliminary negative determination of critical circumstances, and postponement of final determination).

[9] Thus the representativeness of the WTA under HTS 7407.21.10 as to the brass bar that DunAn actually uses as an FOP is not at issue before the court. (*Cf.* Pl.'s Rule 56.2 Mot. for J. Upon Agency R. ("Pl.'s Br.") 5, 14–15.)

[10] Denying DunAn's request, Commerce did not, in the underlying investigation, remove UAE, French, or Japanese imports from the AUV calculated from WTA data.

Petitioner's Surrogate Value Comments Regarding Frontseating Service Valves from the People's Republic of China, A-570–933, POI 7/01/07 - 12/31/07 (Sept. 29, 2008), Admin. R. Pub. Doc. 106,[11] at Ex. 1A. *See also* Zhejiang DunAn Heitan's First Surrogate Value Submission, A-570–933, POI 7/01/07 - 12/31/07 (Sept. 29, 2008), Admin. Pub. Doc. 107 ("*DunAn's First Surrogate Value Submission*"), at Ex. 3A. *See also* Antidumping Duty Investigation of Frontseating Service Valves from the People's Republic of China: Factor Valuations for the Final Determination, A-570–933, POI 7/1/07 – 12/31/07 (Mar. 6, 2009), Admin. R. Pub. Doc. 227, at Attach. 3 (providing HTS classification for "Of copper-zinc base alloys (brass) . . . Bars" as HTS 7407.21.10).

Failing to remove imports from France, Japan, and the UAE constituted error, according to DunAn, because other record evidence, *i.e.*, data from Infodrive India,[12] demonstrated that shipments from the above countries did not consist of brass[13] bar, and, thus, that WTA data as to the UAE, France, and Japan were flawed and unreliable.

---

[11] In the record the Department provided to the court, Commerce has organized the documents according to sequence numbers. Administrative record document numbers and sequence numbers may be cross-referenced using court document number 22.

[12] Infodrive India Pvt Ltd., an Indian company, publishes export and import information from India and other countries. Infodrive India, http://www.infodriveindia.com/ (last visited Apr. 19, 2010). Each month, Infodrive India "collects, collates and standardizes," from Indian ports, over two million export shipping bills and import bills of entry. Infodrive India, Benefits of India Export Import Data, http://www.infodriveindia.com/India-Trade-Data/Benefits.aspx (last visited Apr. 19, 2010). Infodrive India then cleans up and stores the data on its server. *Id.* Due to inconsistencies in product information and the fact that, according to Infodrive India, "classification is often wrong," Infodrive India provides, for each import or export, the actual product description as well as the reported HTS Code. *Id.* As recognized in *Dorbest I*,"Infodrive India presents Indian government import data that it receives on a monthly basis from the Indian customs department." *Dorbest I*, 30 CIT at 1697, 462 F. Supp. 2d at 1285. "Infodrive India data appears to be the same data provided [in the WTA] in a desegregated form, providing descriptions of the items that are imported and classified under a particular [HTS] subheading." 30 CIT at 1697, 462 F. Supp. 2d at 1285–86. In essence, Infodrive India is a subset of the WTA, only more detailed. 30 CIT at 1697, 462 F. Supp. 2d at 1286.

[13] Brass is "[a]n alloy of copper and zinc." *Webster's II New Riverside University Dictionary* 197 (1988). Copper is "[a] ductile, malleable, reddish-brown metallic element that is an excellent conductor of heat and electricity and is used for electrical wiring, water piping, and corrosion-resistant parts," *id.* 310, whereas zinc is "[a] bluish-white, lustrous metallic element used to form a wide variety of alloys including brass [and] bronze . . . ." *Id.* 1339.

The Infodrive India data as to France, Japan, and the UAE[14] are as follows:

HTS Code	Actual Product Description	Origin	Qty (Kgs)	Value (Rupees)	AUV
74072110	Barre B33/25 H Q1.5MM (Copper Bar)	France	12.0	57091.02	4757.59
74072110	Bronze Bars (Aircraft Raw Materials for Defence Use) P.O.NO: 4160375	France	161.0	316566.20	1966.25
74072110	Beryllium Copper Flat Bar (TK46267)	Japan	3589.5	1444719.91	402.49
74072110	Beryllium Copper Round Bar (TK46268)	Japan	322.0	129600.17	402.49
74072110	Cupro Nickel Bar	UAE	8110.0	3652206.74	450500.40

Second Surrogate Value Submission of Zhejiang DunAn Heitan ("DunAn"): Investigation of *Frontseating Service Valves from the People's Republic of China*, A-570–933, POI 7/1/07 - 12/31/07 (Dec. 15, 2008), Admin. R. Pub. Doc. 189 ("*DunAn's Second Surrogate Value Submission* "), at Ex. 2. DunAn stresses that copper bar, bronze[15] bar, beryllium[16] copper bar, and cupronickel[17] bar are distinct from brass bar.[18]

As a result, the dispute between the parties on this issue turns on Commerce's assessment of these Infodrive data. Explaining its decision not to exclude these imports, Commerce stated:

> we find that the Infodrive data contain insufficient product information in the description of the line items to enable the Department to make a definitive determination that these line

[14] Infodrive India reported UAE data in metric tons, which the court translated into kilograms.

[15] Bronze is "[a]n alloy of copper and tin, occas[ionally] with traces of other metals" or "[a]n alloy of copper, with or without tin, and antimony, phosphorus, or other components." *Webster's II New Riverside University Dictionary*, *supra* note 13, at 203.

[16] Beryllium is "[a] high-melting, lightweight, corrosion-resistant, rigid, steel-gray metallic element used as an aerospace structural material, as a moderator and reflector in nuclear reactors, and in a copper alloy used for springs, electrical contacts, and nonsparking tools." *Webster's II New Riverside University Dictionary*, *supra* note 13, at 167.

[17] Cupronickel is "[a] copper-based alloy containing 10–30% nickel." *Webster's II New Riverside University Dictionary*, *supra* note 13, at 336. Nickel is "[a] silvery, hard, ductile, metallicelement used in alloys, in corrosion-resistant surfaces andbatteries, and for electroplating . . . ." *Id*. 794.

[18] Should Commerce exclude import information from the UAE, France, and Japan, the AUV for brass bar would decrease by 8.13%.

> items are misclassified. Specifically, the product description in the Infodrive data are such that, given the dependency upon the chemical make-up of the underlying products, they could be properly classified within the Indian HTS category where they are, or in the category addressed by DunAn. Thus, the Department cannot determine, due to lack of product detail, *i.e.*, chemical properties, the precise chemical make-up of these line items. Accordingly, without clear evidence to the contrary, the Department will not speculate that these materials have been misclassified. Therefore, . . . the Department has determined to include imports from Japan, France, and the UAE in calculating the surrogate value for brass bar in the final determination because the record evidence does not demonstrate that the imports from these countries were misclassified.

Decision Mem. at 21. [19]

DunAn argues that Commerce should have accorded more weight to the Infodrive India data and that Commerce should have, based on these data, eliminated the three countries' data as unreliable. DunAn in addition contends that it is irrelevant which HTS classification applies; "[t]he issue is not whether these shipments have been properly classified within the HTS [but rather] is whether these shipments are representative of the factor input Commerce is attempting to value." (Pl.'s Br. 13.) DunAn offered record evidence to demonstrate that bronze, beryllium copper, and cupronickel have different chemical properties and have different uses than brass. (*See id.* 12–13;) *DunAn's Second Surrogate Value Submission* at Exs. 3A-3E. Therefore, according to DunAn, because the data from these three countries distorted the resulting brass bar surrogate value and because the

[19] Moreover, in its analysis during its preliminary investigation, Commerce concluded that WTA data:

> represent an average of import prices, net of taxes and import duties, and contemporaneous with the POI for the input in question. . . . Our analysis of the WTA datashows that the Infodrive data, analyzed by quantity, only accounts for 26 percent of the WTA data. We derived this figure by dividing the total quantity of the misclassified line items by the total quantity of WTA data. . . .
>
> Furthermore, record evidence indicates that the lineitems that DunAn argues represents materials that aremisclassified [] are, in fact, types of brass, andtherefore these line items are not outside the HTS category.

Antidumping Duty Investigation of Frontseating Service Valves from the People's Republic of China: Factor Valuations for the Preliminary Determination, A-570–933, POI 7/1/07 — 12/31/07 (Oct. 15, 2008), Admin. R. Pub. Doc. 150 ("*Factor Valuations Prelim.Mem.*"), at 7. Because the court affirms Commerce's decision in the Final Determination, the court need not address these additional reasons given for Commerce's determination.

Department's usage of that WTA data is not a selection of the "best available" evidence, Commerce's determination is unsupported by substantial evidence. [20]

The government responds that the complete WTA data set under HTS category 7407.21.10 was the best available information on the record. Commerce chooses surrogate values on a case-by-case basis, and prefers to use "public, country-wide data." (Def.'s Opp'n to Pl.'s Mot. for J. Upon the Agency R. ("Def.'s Br.") 27 (quoting *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1124, 502 F. Supp. 2d 1295, 1298 (2007)).) Consequently, the government argues, Commerce used "the full WTA data set, with the exception of imports from non-market economy countries, countries known to have country-wide export subsidies, or unidentified countries . . . because [the data] are publicly-available, broad-based, product-specific, tax-exclusive and contemporaneous." (*Id.* (citing *Decision Mem.* at 22–23).) In addition, the government points out that Commerce did in fact examine the Infodrive India data, but did not find them definitive, particularly because DunAn failed to "provide any specific evidence that entries containing a certain amount of a chemical were inappropriately considered 'brass bar' such as would be classified under the HTS category for brass bar." (*Id.* 27, 28.)

The government is correct. The problem with DunAn's claim is that it does not focus on the specific information in the administrative record. In scrutinizing the Infodrive India data, Commerce confronted two inconsistent descriptions of the imports from the three countries at issue. Whereas the Infodrive India spreadsheet listed an "actual product description" for France, Japan, and the UAE, specified as copper and bronze, beryllium copper, and cupronickel, respectively, the spreadsheet also categorized the imported metals as "brass" under the HTS Code. Bronze, brass, beryllium copper, and cupronickel are all copper alloys and, although having distinct properties and uses, the types of metals at issue here are relatively similar in chemical makeup. *See supra* notes 13, 15–17. The accuracy of labels assigned to these imports, therefore, depends very much upon the types and percentages of metals contained therein. Commerce did not have this information. Thus, even had Commerce solely relied upon the Infodrive data, Commerce would still have had to choose between the "brass bar" classification listed and the perhaps conflicting product description. It was therefore reasonable for Commerce to rely upon the Infodrive India HTS classifications rather than the

[20] DunAn's argument is that Commerce should have used data from Infodrive India to discredit certain WTA data. This is a factual question. *See Dorbest I*, 30 CIT at 1676, 462 F. Supp. 2d at 1268.

product descriptions, the former being consistent with the WTA data. As the court frequently emphasizes, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent [Commerce's] finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). It is not the court's place to choose between the classification and the description based on this record. *See U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

DunAn cites to opinions of the Court which, according to DunAn, "admonished the Department . . . for failing to accord sufficient weight to Infodrive India data or other trade intelligence data that indicated the Indian import statistics utilized for the surrogate value were not representative of the input being valued." (Pl.'s Br. 9–12 (discussing *Taian Ziyang Food Co. v. United States*, __ CIT __, __, 637 F. Supp. 2d 1093, 1149 (2009); *Zhengzhou Harmoni Spice Co. v. United States*, __ CIT __, __, 617 F. Supp. 2d 1281, 1325, 1327 (2009); *Globe Metallurgical, Inc. v. United States*, No. 07–00386, 2008 WL 4417187, at *5–7 (CIT Oct. 1, 2008); *Longkou Haimeng Mach. Co. v. United States*, __ CIT __, __, 581 F. Supp. 2d 1344, 1363 (2008)).) *See also Dorbest I*, 30 CIT at 1698, 1700, 462 F. Supp. 2d at 1286, 1288.

The case law DunAn cites, however, focuses on Commerce's failure to provide a sufficient reasoned explanation of its chosen data set.[21] In these cases, the Department wholly failed to address "whether or not Infodrive India casts light on potential inaccuracies" in the WTA data. *Dorbest I*, 30 CIT at 1695, 462 F. Supp. 2d at 1284. *See also Zhengzhou*, __ CIT at __, 617 F. Supp. 2d at 1322–23 (rejecting

[21] *See Taian Ziyang*, __ CIT at __, 637 F. Supp. 2d at 1126 (determining that Commerce had not supported its choice of data set with substantial evidence, as it had "failed to establish that its chosen data[]set . . . adequately approximates the respondent's production experience" and "failed to establish that the NDRDF data are sufficiently representative of the garlic seed used by respondents"), 1144, 1156, 1157, 1162; *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Group v. United States* ("*Zhejiang I* "), No. 06–00234, 2008 Ct. Intl. Trade LEXIS 69, at *53 (CIT June 16, 2008) (repudiating Commerce's conclusion that its chosen data are most reliable, to value brokerage and handling, due to the data's "quality and specificity," when Commerce "at no point . . . explain[ed] how the data meets either one of these standards"); *Zhengzhou*, __ CIT at __, 617 F. Supp. 2d at 1297–1303 (holding Commerce's grounds for using Agmarket data "impermissibly speculative"), 1308–12 (noting Commerce's failure to support its use of Maersk data with record evidence), 1321 ("Commerce failed to explain how the seemingly nonrepresentative import data is the best available information when domestic data on the record represent the exact type of product used by the respondents and actual domestic market prices for that input." (citation, quotation marks, emphasis, & alterations omitted)); *Globe Metallurgical*, 2008 WL 4417187, at *7; *Longkou*, __ CIT at __, 581 F. Supp. 2d at 1363; *Allied Pac. Food (Dalian) Co. v. United States* ("*Allied Pac. I* "), 30 CIT 736, 752–68, 435 F. Supp. 2d 1295, 1309–22 (2006).

Commerce's cursory presumption that Infodrive data were unreliable without "even a scintilla of evidence of manipulation or distortion or affiliation"), 1326–27; *Taian Ziyang*, __ CIT at __, 637 F. Supp. 2d at 1156 ("Commerce simply dismissed [respondents'] concerns" in a "terse three sentences" and "failed to directly confront" respondent's claims), 1159–60. Instead, Commerce "conclude[d] that Infodrive data [are] unreliable or contain[ ] misclassifications, while simultaneously claiming that [WTA data are] both reliable and contain[ ] no inaccuracies." *Dorbest I*, 30 CIT at 1697, 462 F. Supp. 2d at 1286.

In the determination at issue in this case, however, the Department directly addressed the relevance of the Infodrive data to the WTA data. Commerce did not merely dismiss the Infodrive India data out of hand, nor did it make a general finding that Infodrive data were unreliable.[22] Rather, Commerce, assuming the Infodrive data were in fact reliable, directly discussed Infodrive India's relevance to the WTA data and found the Infodrive data to be inconclusive.

Further, even if the overall WTA data were being challenged, DunAn did not present Commerce with evidence that HTS 7407.21.10 includes imports that are other than the specific input at issue here. Moreover, DunAn did not provide evidence, other than Infodrive India, to attempt to demonstrate WTA misclassifications. *Compare Dorbest I*, 30 CIT at 1694, 462 F. Supp. 2d at 1283 (noting that respondents provided evidence that Taiwanese export data did not match the WTA-listed Indian imports from Taiwan).[23] *See also Allied Pac. I*, 30 CIT at 754–55, 435 F. Supp. 2d at 1311–12; *Zhengzhou*, __ CIT at __, 617 F. Supp. 2d at 1317 (rejecting Commerce's determination on grounds that plaintiffs provided specific proof that the rel-

[22] In this respect, the issue here differs from that in *Zhengzhou*, where the court rejected the Department's "bare speculation" and unsupported presumptions about the domestic data's reliability. __ CIT at __, 617 F. Supp. 2d at 1317, 1320–21, 1322–23, 1325.

[23] The plaintiff in *Dorbest I* presented evidence that the Indian domestic furniture industry did not utilize some types of mirrors imported under the relevant HTS classification reflected in the WTA. *See Dorbest I*, 30 CIT at 1698–90, 1694, 1697–98 & n.17, 1699, 462 F. Supp. 2d at 1279–80, 1283, 1286 & n.17, 1287. *See also Longkou*, __ CIT at __, 581 F. Supp. 2d at 1361, 1363. These plaintiffs also placed evidence on the record demonstrating that these mirrors were "higher-priced speciality mirrors" and, therefore, these mirrors had "a distortive effect on the valuation of the mirror inputs used in furniture production." *Dorbest I*, 30 CIT at 1694, 462 F. Supp. 2d at 1283. *See also Globe Metallurgical*, 2008 WL 4417187, at *5–6; *Taian Ziyang*,__ CIT at __, 637 F. Supp. at 1149, 1155–56; *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Group v. United States*, No. 06–00234, 2009 Ct. Intl. Trade LEXIS 64, at *18–19 (CIT June 19, 2009); *Zhengzhou*, __ CIT at __, 617 F. Supp. 2d at 1324.DunAn did not present Commerce with similar evidence demonstrating cost of production ("COP") distortion. In fact, the AUV of $300.25 fits well within the range of brass bar prices in India. *Globe Metallurgical, Inc. v. United States*, No. 07–00386, 2009 Ct. Intl. Trade LEXIS 35, at *11 (CIT May 5, 2009) ("The new value selected by Commerce is well within the range of silica fume prices in India.").

evant HTS classification was too broad and "the great majority of entries" covered goods other than the subject merchandise (quotation marks & citation omitted)). In other words, here, both the WTA data and the Infodrive India data are sufficiently product-specific or representative to be considered the "best available" information. As the finder of fact, Commerce therefore had the discretion to choose between these data sets.

The court's duty, in reviewing Commerce's determination as to whether a certain set of data is the "best available information," is "not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006). Thus, "[i]f Commerce's determination of what constitutes the best available information is reasonable, then the [c]ourt must defer to Commerce." *Id. Accord Fujian Lianfu Forestry Co. v. United States*, __ CIT __, __, 638 F. Supp. 2d 1325, 1333 (2009); *Zhejiang I*, 2008 Ct. Intl. Trade LEXIS 69, at *20; *Dorbest I*, 30 CIT at 1676–77, 462 F. Supp. 2d at 1269.

Accordingly, because Commerce's reading of the evidence is reasonable, the court rejects DunAn's challenge to Commerce's selection of WTA data, including data on imports from France, Japan, and the UAE.

B. Commerce's Calculation of Labor Costs

Next, DunAn challenges Commerce's derivation of a wage rate for DunAn's labor using a "regression-based" calculation[24] that included wage rate and income data from countries (a) not economically comparable to China and (b) not significant producers of merchandise comparable to the subject FSV.[25] DunAn instead advocates the use of an Indian wage rate as the surrogate wage rate for DunAn's labor. For the following reasons, the court sustains the Department's use of the labor regression model in this determination.

In its wage rate calculation, Commerce performs a simple regression to estimate the linear relationship between yearly per capita

[24] For an explanation of the use of regression models, *see* Allan G. Bluman, *Elementary Statistics: A Step by Step Approach* 528–30, 544–46 (6th ed. 2007) and Mario F. Triola, *Elementary Statistics* 541–45 (10th ed. 2008).

[25] Plaintiff does not challenge the type of regression used by Commerce, but rather generally challenges, as inconsistent with the statute, the use of a regression model to calculate labor.

gross national income ("GNI/capita")[26] and hourly wage rate ("wage"). To describe this relationship, Commerce uses publicly available GNI/capita and wage data from 61 market economy countries.[27] [28] GNI/capita serves as the independent variable (x) and wage as the dependent variable (y);[29] predictably, these variables have a positive

[26] GNI/capita is equivalent to per capita gross national product, the latter defined as "the dollar value of a country's final output of goods and services in a year divided by its population." *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,723 (Dep't Commerce Oct. 19, 2006) (quotation marks omitted).

[27] The 61 countries plotted on the 2005 regression are: Albania; Argentina; Australia; Austria; Belgium; Botswana; Bulgaria; Canada; Chile; Colombia; Costa Rica; Croatia; Czech Republic; Denmark; Dominican Republic; Ecuador; Egypt; El Salvador; Estonia; Finland; France; Germany; Hong Kong, China; Hungary; Iceland; India; Ireland; Israel; Japan; Jordan; Kazakhstan; Republic of Korea; Latvia; Lithuania; Luxembourg; Former Yugoslav Republic of Macedonia; Madagascar; Malta; Mauritius; Mexico; Mongolia; Netherlands; New Zealand; Nicaragua; Norway; Panama; Poland; Portugal; Romania; Russian Federation; Seychelles; Singapore; Slovakia; Slovenia; Spain; Sri Lanka; Sweden; Switzerland; United Kingdom; United States; and West Bank and Gaza Strip. Import Administration, International Trade Administration, United States Department of Commerce, *Expected Wages of Selected Non-market Economy Countries* (2008), http://ia.ita.doc.gov/wages/05wages/05wages-051608.html#table1 (last visited Apr. 19, 2010).

[28] Commerce utilizes four data sets to regress wage on GNI/capita: country-specific earnings data from the International Labour Organization's *Yearbook of Labour Specifics*; to account for inflation, country-specific consumer price index data from the International Monetary Fund's ("IMF") *International Financial Statistics*; IMF *International Financial Statistics* exchange rates; and country-specific GNI data from the World Bank's *World Development Indicators*. Commerce uses a "base year" of two years prior to the regression to enter into its calculation. *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. at 61,722; *Expected Non-Market Economy Wages*, 70 Fed. Reg. 37,761, 37,762 (Dep't Commerce June 30, 2005) (request for comment on calculation methodology). The regression was performed in 2008, and, given lag time in availability of data, the base year was 2005. *Factor Valuations Prelim. Mem.* at 8; (Pl.'s Br. 36 n.*.) Commerce used the base year average exchange rates to convert the GNI and earnings data into U.S. Dollars. *Decision Mem*. at 17.

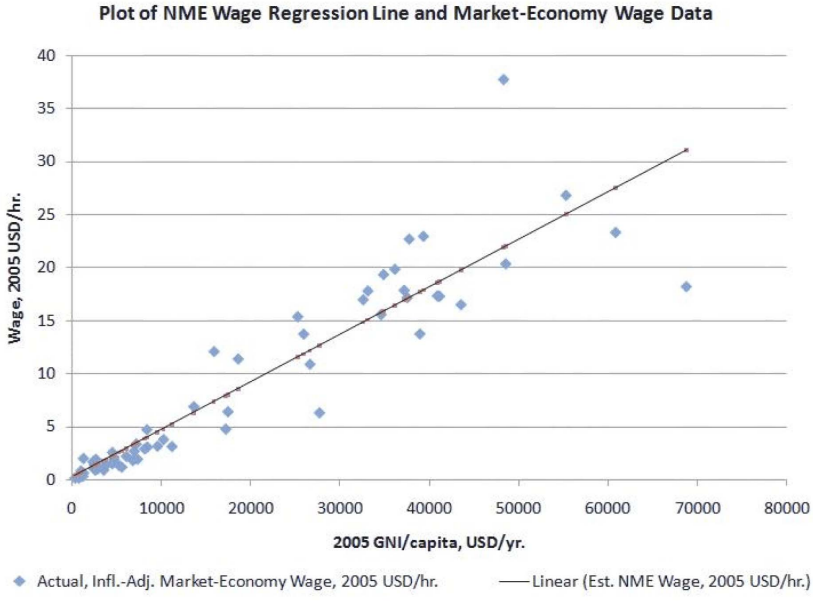
Commerce uses these data sets to obtain a "complete picture of labor in the particular market economy," and, therefore, attempts to use data including coverage of, among other things, all types of industries in the respective country. *Decision Mem.* at 17; *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. at 61,721. In other words, the labor data used is not industry-specific and "the value for labor will be the same in every proceeding [in a given year] involving a given NME." *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. at 61,720.

DunAn has not challenged the use of these data sets in particular, and instead focuses on the overall use of the regression analysis.

[29] The equation is therefore: Wage[predicted] = Y-intercept + slope * GNI/capita[entered]. *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback;and Request for Comments*, 71 Fed. Reg. at 61,723.

linear relationship. Commerce then estimates the wage for an NME country by using the NME GNI/capita.

Accordingly, although Commerce used Indian data for other FOPs, in calculating a 2005 surrogate wage for merchandise from China, Commerce regressed 2005 market economy wages on 2005 GNI/capitas, as follows:



Expected Wages of Selected Non-Market Economy Countries, *supra* note 27. Thus, Commerce created a 2005 NME regression line equation to describe the relationship between the 61 countries' wages and GNI/capita:

Wage[predicted] = 0.257585 + 0.000448 * GNI/capita[entered]

See id. Because Commerce estimates that NME countries's GNI/capita and wages would have the same relationship, Commerce used the same regression line to also describe predicted NME wages:

NME wage[predicted] = 0.257585 + 0.000448 * NME GNI/capita[entered]

See id. That is to say, by entering in an NME's GNI/capita, Commerce could predict the NME's wages.

Using this equation, Commerce then entered China's 2005 GNI/capita — $1,740 — into the above equation and derived a wage of, approximately, $1.04.[30] *Id.* Commerce selected this surrogate wage rate as the labor FOP for the calculation of DunAn's COP. DunAn notes that, had Commerce limited its surrogate values to that of India as it did for other FOPs, DunAn's surrogate wage would have instead amounted to $0.21. (Pl.'s Br. 39;) *Expected Wages of Selected Non-Market Economy Countries*, *supra* note 27.

Like the plaintiff in *Dorbest I* and in the subsequent decision post-remand, *Dorbest Ltd. v. United States* ("*Dorbest II*"), __ CIT __, 547 F. Supp. 2d 1321 (2008), DunAn attacks 19 C.F.R. § 351.408(c)(3) as invalid both facially and as-applied in this case.[31] The court will address each of DunAn's arguments in turn.

1. Facial Challenge

First, DunAn argues that Commerce's regulation is contrary to the statute and, therefore invalid on its face. Following *Dorbest I*, the court rejects DunAn's facial challenge.[32]

> Section 1677b does, of course, require Commerce to utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are —
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4). Commerce's regulation –- providing for the use of "regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries" — is not, on its face, inconsistent with the statutory requirement for use of prices or costs from a market economy country.

[30] *I.e.*, 0.257585 + 0.000448 * 1740 = 1.037105 ≈ 1.04.

[31] *Dorbest I* and *Dorbest II* are on appeal to the Federal Circuit on the issue of the validity of the labor regression regulation. No. 2009–1257 (Fed. Cir. Mar. 18, 2009).

[32] In Dorbest I, plaintiff Dorbest, like DunAn, argued that the statute mandated that Commerce input only countries that fulfilled the economic comparability category. In addressing that challenge, the court assumed, arguendo, that Dorbest's reading of the statute was correct, holding that:

> Although Commerce's regulation does not specifically provide that Commerce must choose comparable market economies, it does not suggest the opposite either. Rather, the regulation is silent as to how Commerce will select market economies for its data set. As such, even if . . . the antidumping statute permits use of data only from comparable market economies, Commerce could conceivably be faithful to both its regulation and [this] interpretation of the antidumping statute by using data from only comparable market economies.

Dorbest I, 30 CIT at 1705, 462 F. Supp. 2d at 1292.

Rather, consistent with the statute, Commerce's regulation derives a wage rate for a "hypothetical" market economy China, that is, a market economy country with China's level of economic development and that produces merchandise comparable to the Chinese merchandise at issue. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (Fed. Cir. 1999)("§ 1677b(c)'s goal [is] constructing a hypothetical 'market value' representative of the foreign producers under investigation"). *See also Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (according Commerce discretion to depart from surrogate country valuation "when there are other methods of determining the 'best available information' regarding values of [FOPs].").

DunAn attempts to distinguish *Dorbest I* on the grounds that *Dorbest I* did not address the substantial producer prong of section 1677b(c). However, the court's reasoning for economic comparability applies equally to the significant producer requirement, as to choice of an underlying data set, should such a requirement indeed exist. Therefore, *Dorbest I* is persuasive here.

DunAn also attacks *Dorbest I* by highlighting an excerpt from the legislative history of section 1677b(c). DunAn cites the Conference Agreement discussion of this provision contained in the Omnibus Trade and Competitiveness Act of 1988: "[t]he [FOPs] would be valued from the best available evidence in a market economy country (or countries) that is at a comparable level of economic development as the country subject to investigation and is a significant producer of the comparable merchandise." H.R. Rep. No. 100–576, at 590 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623. But the language from the Conference Report does not provide any more guidance than the wording of section 1677b(c), nor has DunAn demonstrated that the Report is in any way inconsistent with the court's reading of the statute.

Finally, DunAn points the court to other decisions from this Court that have invalidated 19 C.F.R. § 351.408(c)(3) as an impermissible and unreasonable implementation of section 1677b(c). *See, e.g.*, *Taian Ziyang*, __ CIT at __, 637 F. Supp. 2d at 1136–38; *Allied Pac. Food (Dalian) Co. v. United States* (*"Allied Pac. II"*), __ CIT __, 587 F. Supp. 2d 1330 (2008). These opinions take the position that the regulation is invalid because it precludes Commerce from considering investigation- and product-specific wage data. *See Allied Pac. II*, __ CIT at __, 587 F. Supp. 2d at 1356 ("The regulation requires a single calculated wage rate to be determined annually . . . . [and therefore] [t]he regulation does not permit a surrogate labor rate to be determined for an individual proceeding"), 1358 ("Commerce's response in

the preamble [to the regulation] falls short of a plausible explanation of why Commerce considered it acceptable to foreclose consideration of data specific to the type of labor required to produce comparable merchandise. . . . [Commerce's] rationale [is] insufficient to justify a regulation that disallows the use of data on the cost of a specific type of labor"). But the statute imposes a data selection requirement of country comparability, not merchandise specificity; nor does the statute require the use of data generated for an individual or specific investigation. *See* 19 U.S.C. § 1677b(c)(4) (Commerce "shall utilize . . . the prices or costs of factors of production in one or more market economy countries that are . . . significant producers of comparable merchandise").[33] Consequently, the Department's labor rate regulation is not, on its face, inconsistent with the statute.

2. As-Applied Challenge

Second, DunAn argues that the Department should have used the Indian wage rate in lieu of the number for China's wage rate derived from the regression. In this regard, DunAn does not attack the methodology Commerce used in implementing the regulation and does not, other than challenging the legality of the regression model, explain how the Indian wage rate instead constitutes the "best available information." Rather, DunAn argues that Commerce did not explain how use of global regression-based calculation has produced a wage rate that is more accurate for the valuation of labor in the FSVs industry. (*See* Pl.'s Br. 39–40; Pl.'s Reply Br. 15.)

But Commerce did in fact explain its reasoning on this issue:

> While surrogate values for other FOPs are selected from a single surrogate country, due to the gross variability between wage rates and GNI, we do not find reliance on wage data from a single surrogate country reliable for purposes of valuing the

[33] Moreover, assuming *arguendo* that the statute does not contemplate a hypothetical market economy China, it is far from clear that -- despite the fact that Commerce calculates labor wage rates "each year" -- Commerce cannot limit its data set, through an investigation, to those countries that satisfy the statutory criteria. Whether Commerce should so limit its data set or should instead include a broad set of data such as that used in this case, that is, which set of data qualifies as the "best available information," goes to Commerce's application of section 351.408(c)(3) rather than to the regulation's facial validity. *See Wash. State Grange v. Wash. State Republican Party*,552 U.S. 442, 449 (2008) ("a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the [regulation] would be valid" (citation, quotation marks, & alteration omitted)); *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1311 (Fed. Cir. 2008) ("A facial challenge to a statute or regulation is independent of the individual bringing the complaint and the circumstances surrounding his or her challenge. . . . In contrast, an as-applied challenge is specific to the facts of the particular individual involved in the suit." (citations & quotation marks omitted)).

> labor input. While there is a strong positive correlation between wage rates and GNI, there is also variation in the wage rates of comparable market economies. For example, even for countries that are relatively comparable in terms of GNI for purposes of factor valuation (*e.g.*, where GNI is below US$ 2500), the wage rate spans from US$ 0.21 to US$ 2.06. To further illustrate, DunAn advocates that instead of relying on the regression methodology, the Department should value labor using India's single wage rate. Petitioner contends that should the Department consider valuing labor from a single surrogate, other comparable countries should also be considered, such as [Colombia]. Although both India and [Colombia] have GNIs of under US $2500, India's wage rate is approximately US $0.21, as compared to [Colombia's] observed wage rate of US $1.13. The large variance in these two countries' wages—not to mention the variances which occur when wage rates are considered for other market economy countries of economic comparability—illustrate the arbitrariness of relying on a wage rate from a single country. For these reasons, DunAn's suggestion of using a single surrogate country to value labor does not constitute the best available information.

Decision Mem. at 20 (citations omitted).

Moreover, earlier in its Decision Memo, Commerce explained the benefits of its global regression model: "[t]he Department . . . considers that the regression methodology constitutes the best available information for purposes of valuing labor" as "[t]he Department's methodology avoids extreme variances in labor wage rates that exist across market economies, and instead, accounts for the global relationship between GNI and wages." *Id*. at 17. Further:

> relying only on data from countries that are economically comparable to each NME would undermine, rather than enhance, the accuracy of the Department's regression analysis. The number of "economically comparable" countries would be extremely small. For example, when examining countries with GNIs that range between US $700 and US $2500 (*e.g.*, countries that might be considered economically comparable to [China]), there are just nine countries out of a full data set of 61 countries used in the revised wage calculation in May 2008. A regression based on such a small subset of countries would be highly dependent on each and every data point, and thus, the inclusion or exclusion of any one country could have an extreme effect on the regression results from case-to-case, and from year-to-year. Re-

> lying on a broad data set, as opposed to data from just the economically comparable countries, maximizes the accuracy of the regression results, minimizes the effects of the potential year-to-year variability in the basket, and provides predictability and fairness. . . .
>
> [T]he purpose in using a regression methodology . . . is to provide a more accurate labor value that is stable and predictable across all cases. The regression methodology accomplishes this by providing a variable average that "smoothes out" the variations in the data and permits, in a predictable manner, the estimation of a market economy wage rate relative to a level of GNI that is as accurate as practicable, with the least amount of volatility across cases.

Id. at 19 (citations & footnote omitted).

Considered in light of Commerce's analysis, DunAn did not create a record establishing that the particular Indian surrogate value, $0.21/hour, would somehow be more accurate, and thus better information, than the regression surrogate value derived for China. *Compare Dorbest II*, __ CIT at __, 547 F. Supp. 2d at 1328–30 (analyzing plaintiffs' argument that the regression was heteroscedastic); *Dorbest I*, 30 CIT at 1710–12, 462 F. Supp. 2d at 1296–98 (addressing plaintiffs' arguments that the regression model is distorted given the existence of a non-zero y-intercept). Contrary to DunAn's arguments, Commerce's explanation reasonably supports Commerce's use of the broader global regression methodology and preference for the wage rate selected here when compared to India's surrogate wage rate. *See Dorbest I*, 30 CIT at 1677, 462 F. Supp. 2d at 1269 (Commerce must "justify its selection of data with a reasoned explanation."). There is nothing on the record here that would preclude a reasonable mind from preferring the regression-generated wage rate to the specific India-based $0.21 rate.

Accordingly, the court affirms Commerce's use of the regression model in calculating the FOP for labor in this case.

C. Partial AFA Applied as to DunAn U.S. Sales and ICC

DunAn next challenges, as unsupported by substantial evidence on the record, Commerce's decision to apply partial AFA –- to DunAn's reported U.S. December 2007 sales and to the ICC for the months of October through December 2007 –- because the Department was

unable to verify the data DunAn submitted.[34] As the court will explain, the court also affirms this aspect of the Department's final determination.

1. Commerce's Verification of DunAn's U.S. Sales and ICC

The court begins with a summary of the relevant facts at issue during Commerce's verification of DunAn's POI U.S. sales of FSVs.

During the POI and beyond, Dunan's U.S. subsidiary, DunAn Precision, Inc., and a U.S. customer had a purchasing agreement whereby the customer maintained quantities of imported DunAn FSV inventory in the customer's U.S. warehouse. Each month, the customer withdrew FSVs out of the warehouse as needed, and reported the number of used inventory (or "usage") to DunAn Precision. According to DunAn, DunAn Precision would review these "consumption reports" for accuracy, and, if correct, would invoice the customer for the values on the consumption report each month. (Pl.'s Br. 15–16;) Application of Partial Adverse Facts Available for Zhejiang DunAn Precision Industries Co., Ltd., Zhejiang DunAn Hetian Metal Co., Ltd. and their U.S. Subsidiary DunAn Precision Inc. in the Antidumping Investigation of Frontseating Service Valves ("FSVs") from the People's Republic of China, A–570–933, POI 7/1/07 – 12/31/07 (Mar. 6, 2009), Admin. R. Conf. Doc. 228 ("*Application of AFA Mem.*"), at 2–3. If the consumption reports were inaccurate,[35] DunAn Precision would invoice the customer at the correct value, and "would keep a record of the discrepancy and invoice [the customer] on the corrected quantity." (Pl.'s Br. 16.) *Accord Application of AFA Mem.* at 2, 3. Thereafter, based on the customer's recent consumption and projected upcoming needs, DunAn Precision would issue FSV orders to DunAn. *Application of AFA Mem.* at 3.

During verification, DunAn submitted to Commerce DunAn Precision's invoices and financial statements together with a "Sales Reconciliation" worksheet harmonizing the two. Verification of the U.S. sales questionnaire responses of Zhejiang DunAn Precision Industries Co., Ltd., Zhejiang DunAn Hetian Metal Co., Ltd., and their U.S. subsidiary DunAn Precision Inc. in the Antidumping Investigation of

[34] Commerce is required to verify "all information relied upon" in making its final determination. 19 U.S.C. § 1677m(i)(1).

[35] During the POI, Mr. Shu, the DunAn Precision general manager, verified the accuracy of the consumption report by forwarding the report to Mr. Han, an engineer, who compared the report with the physical FSV inventory in the warehouse. *Application of AFA Mem.* at 2. During Commerce's investigation and verification, DunAn Precision's general manager was Mr. Qi. *Id.*

Frontseating Service Valves ("FSVs") from the People's Republic of China, A-570–933, POI 7/1/07 - 12/31/07 (Jan. 15, 2009), Admin. R. Conf. Doc. 254 ("*Verification Mem.*"), at 7. DunAn noted that payment received from its customer in December 2007 was thirty cents less than the value on its December 2007 invoice, but, at the time, provided no reason for this seemingly minor discrepancy.[36] *Application of AFA Mem.* at 3.

Subsequently, in its investigation into other DunAn Precision sales records, Commerce discovered that, for the month of December 2007, the consumption report and the invoice did not match. Although the total value noted in the invoice deviated by only thirty cents from the consumption report –- consistent with the December 2007 discrepancy between payment and invoice noted above — the quantities in the December 2007 consumption report differed significantly from those in the invoice. *Verification Mem.* at 8; *Application of AFA Mem*. at 3. Specifically, the consumption report quantity for one FSV model vastly exceeded that in the invoice, and, for another FSV model, the invoice quantity vastly exceeded that in the consumption report.[37] *Application of AFA Mem.* at 5; *Decision Mem.* at 49–50.

Commerce asked for an explanation of these discrepancies. Mr. Qi responded that he did not have one. *Verification Mem.* at 8. Later, he told Commerce that he "remembered" that "when he first received the December 2007 [ ] monthly consumption report, he noticed an abnormally large withdrawal" of a certain FSV model;[38] after verifying that the amount in the consumption report was inaccurate, he corrected the error with the customer. *Id. Accord Application of AFA Mem.* at 3. However, DunAn did not have *any* record of the discrepancy and correction, despite DunAn Precision and Mr. Qi's policy to maintain such documentation. *Verification Mem.* at 8; *Application of AFA Mem.* at 2, 3. Moreover, Mr. Qi did not explain this deviation from policy and claimed not to know the location of any of Mr. Han's reports. *Application of AFA Mem.* at 3.

The only document DunAn voluntarily produced as to the discrepancy was an e-mail exchange between Mr. Han and an employee of

---

[36] DunAn Precision also informed Commerce of a misclassification, as income, of a $[[ ]] security deposit; Commerce confirmed this misclassification. *Verification Mem.* at 7.

[37] For December 2007, the consumption report indicated a quantity of [[ ]] pieces of FSV model [[ ]] whereas the invoice noted [[ ]] pieces of this model; this is a difference of [[ ]] pieces. *Verification Mem.* at 8. Also for December 2007, the consumption report recorded a quantity of [[ ]] pieces of FSV model [[ ]] as opposed to the invoice number of [[ ]], a difference of [[ ]]. *Application of AFA Mem*. at 3.

[38] Model No. [[ ]]

the U.S. customer, in which the latter sent the consumption report, asking Mr. Han to "[p]lease review this and confirm this payment is accurate." U.S. Sales Verification Ex. 7. Mr. Han responded that "[t]he numbers showing on the report of the month of Dec.[are] right [and] [p]lease go ahead [and] arrange the payment." *Id.* DunAn explained that the e-mail shows an assent to value rather than quantity. *Verification Mem.* at 9; *Application of AFA Mem.* at 4. DunAn also claimed that the U.S. customer likely misreported numbers on its consumption reports for financial reasons.[39] Further, DunAn argued that the consumption report numbers were abnormally large in comparison to other 2007 orders,[40] and, in any event, it would have been impossible for the customer to withdraw so many of the relevant model of FSVs from inventory, as DunAn Precision did not have enough of the model in stock.[41] *Verification Mem.* at 10; *Application of AFA Mem.* at 5.

Confusing matters further, however, Mr. Qi maintained separate "monthly inventory reports" or "MIRs," which Commerce obtained for the months October 2007 through March 2008.[42] [43] Conspicuously, the January 2008 MIR was singularly structured. *Verification Mem.* at 11; *Application of AFA Mem.* at 5–6. Unlike the other MIRs, the January 2008 MIR did not account for the final inventory from the

---

[39] According to DunAn, the U.S. customer [[ ]]. *Verification Mem.* at 10. *Accord Application of AFA Mem.* at 4. In other words, the customer [[ ]]. *Verification Mem.* at 10. *Accord Application of AFA Mem.* at 4. Despite this business tactic, however, DunAn Precision [[ ]]. *Verification Mem.* at 10. *Accord Application of AFA Mem.* at 4. During verification, Commerce confirmed the[[ ]] and the U.S. customer's[[ ]]. *Verification Mem.* at 10; *Application of AFA Mem.* at 5.

[40] DunAn noted that "the consumption alleged for a *single day* in December for [[ ]] was [[ ]] units, whichfar exceeded the daily total for any other day and, in fact,exceeded the entire monthly total for this model in othermonths." (Pl.'s Br. 18.) [[ ]] is twenty times greaterthan the average usage for this model. (*Id.* 25.)

[41] Taking into account consumption reports through November 2007, DunAn Precision usage in 2007, and imports through December 7, 2007, the quantity of the relevant FSV model in warehouse inventory available to the U.S. customer, adjusted by Commerce, totaled [[ ]], which is [[ ]] less than the customer's December 2007 consumption report. *See supra* note 37; *Verification Mem.* at 10–11; U.S. Sales Verification Ex. 7; (Pl.'s Br. 18.)

[42] Significantly, DunAn Precision's outside accountant used the MIRs as the basis for inventory on the balance sheet and for costs of sales calculation in the income statement. *Verification Mem.* at 12–13; *Application of AFA Mem.* at 6.

[43] Mr. Qi also kept a worksheet on his computer allowing him to compare 2007 and 2008 sales in order to project future FSV demand. *Verification Mem.* at 8. The total 2007 quantity differedfrom the total 2007 quantity provided in the monthly invoices. *Id.* Mr. Qi stated that he did not know where the numbers camefrom except that another employee provided them to him. *Id.* The employee had no record of these 2007 numbers, and also could notdetermine the source of the quantity figures contained in Mr.Qi's worksheet. *Id.*

previous month, that is, the report did not account for December 2007 inventory remaining after subtracting out the U.S. customer's purchases that month; the January MIR instead used the U.S. customer's consumption numbers.[44] *Verification Mem.* at 11–12; *Application of AFA Mem.* at 5–6. The remaining 2008 MIRs carried over the sales from December 2007, but the amount carried over still came from the December consumption report, not the December invoice.[45] *Verification Mem.* at 12; *Application of AFA Mem.* at 6. Commerce was concerned that this MIR structure, by eliminating December 2007 net inventory, served to side-step, rather than to reconcile, the very quantity discrepancies at issue. *Verification Mem.* at 12; *Application of AFA Mem.* at 6. At first, Mr. Qi could not provide any explanation for the difference in the January 2008 MIR or how the MIRs resolved the quantity/inventory December 2007 conundrum and could not even remember making the report. *Verification Mem.* at 9, 12. Mr. Qi finally answered that DunAn Precision reported its numbers in that

[44] In describing the MIRs, Commerce explained that:

> each [MIR], other than January 2008, was similarlystructured: the first column is total inventory fromthe previous month, the second column is inventoryreceived during the current month, the third column isthe total of the previous two columns, the fourthcolumn is the usage during the current month, and the fifth column is the total ending inventory (the third column total minus the fourth column usage). This last column is then carried over to the next month's DunAn Precision [MIR] as the first column.

Verification Mem. at 11. But as to the January 2008 MIR:

> the first column . . . is not the same as the last column of the December report, *i.e.*, the ending inventory from December 2007. Rather, the first column of the January 2008 DunAn Precision [MIR] is the same as the third column of the December 2007 DunAn Precision [MIR], *i.e*., the total inventory in December before usage is deducted. Therefore, the last two columns of the December 2007 DunAn Precision [MIR] ,including December usage, which consists of the quantities reported by DunAn in its sales reconciliation, is excluded from the inventory calculation starting in January 2008.
>
> Secondly, the January DunAn Precision [MIR] has an additional column that the other reports do not have: a column for the usage of the previous month: December 2007. We noted that the December 2007 usage column in January 2008 DunAn Precision [MIR] contained the quantity figures from the [U.S. customer] monthly consumer report, not the quantities from the December 2007 sales invoice. Thus, the January 2008 DunAn Precision [MIR] begins with the total inventory of December 2007 (without the deduction of December 2007 usage), and then deducts December 2007 usage based on the [U.S. customer] monthly consumption report figures, and January 2008 usage.

Id. at 11.

[45] Commerce "examined the DunAn Precision [MIRs] for February and March 2008, to *see* if [they] were reconciled to include the allegedly correct quantity figures from the December 2007 DunAn Precision [MIR]." *Verification Mem.* at 12. Commerce "note[d] that [these MIRs] were not [so reconciled], and the December 2007 [U.S. customer] monthly consumption figures were carried forward." *Id.*

way for tax reasons.[46] *Verification Mem*. at 12.

In essence, Mr. Qi admitted that the inventory numbers contained in the October, November, and December 2007 MIRs were incorrect. But while Commerce pointed out that this recordation of inventory indicated that the consumption reports were accurate, Mr. Qi again, without explanation, maintained that the invoice quantities were correct. *Verification Mem.* at 12. Mr. Qi still refused to answer why consumption report numbers, rather than invoice numbers, were used in the MIRs, except to indicate that the U.S. customer [[ ]]. *Application of AFA Mem.* at 6.

As a result of the Commerce's inability to verify DunAn's conflicting sales data for December 2007, and because of DunAn's lack of clarity regarding these data, Commerce applied AFA to DunAn's December 2007 entries at an AD margin of 55.62 — the margin from the initiation and the highest margin calculated for the proceeding. *Decision Mem.* at 52. Moreover, because Mr. Qi provided evidence that inventory numbers were incorrectly reported in the MIRs for the latter three months of 2007, Commerce applied AFA as to the ICC for these months and used the highest ICC expense calculated for any sale during the POI. *Id.*

2. Analysis

a. Application of "Facts Otherwise Available"

The administrative record contains substantial evidence supporting Commerce's application of AFA as to the December 2007 sales. In accordance with 19 U.S.C. § 1677e(a)(2)(D), Commerce noted significant irreconcilable differences, in December sales, verify these sales numbers. [47]

---

[46] As to DunAn Precision's purported tax reasons for the January 2008 MIR, Mr. Qi informed the Department that DunAn Precision [[ ]] although it must, in accordance with its agreement with its U.S. customer "keep four to six weeks of inventory on hand at all times." *Verification Mem.* at 12; *Application of AFA Mem.* at 6. Because DunAn Precision [[ ]] *Verification Mem.* at 12. Thus, DunAn Precision must continue receiving inventory but [[ ]], *Verification Mem.* at 12, that is, it [[ ]]. *Application of AFA Mem.* at 6.

[47] Commerce may use "facts otherwise available" in reaching its determination, specifically where:

> (1) necessary information is not available on therecord, or
> (2) an interested party or any other person–
> (A) withholds information that has been requested by the administering authority or the Commission under this title,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to . . . [other provisions not relevant here],

When a respondent has not provided Commerce with accurate, verifiable record evidence, the statutory provision for application of facts otherwise available is intended to permit Commerce to fill the gap. *Ningbo Dafa Chem. Co. v. United States*, 580 F.3d 1247, 1255 (Fed. Cir. 2009); Statement of Administrative Action, H.R. Rep. No. 103–316, at 869 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198. *See also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003); *Dorbest I*, 30 CIT at 1737, 462 F. Supp. 2d at 1318 ("Section 1677e(a) requires that there be a gap in the record of verifiable information due to a party's failure to supply necessary or reliable information in response to an information request from Commerce" (citing *NTN Bearing Corp.*, 368 F.3d at 1377 ("All that is required is that the necessary information be unavailable on the record."))(other citations omitted)). Accordingly, Commerce's use of facts otherwise available is warranted when Commerce cannot verify the accuracy of respondent's data or cannot reconcile the information produced. 19 U.S.C. § 1677e(a); *Heveafil Sdn. Bhd. v. United States*, 58 F. App'x 843, 847–48 (Fed. Cir. 2003). As to its procedures for verifying information provided in respondent's questionnaire responses, Commerce is accorded broad discretion. *Heveafil*, 58 F. App'x at 847; *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997).[48]

DunAn points to other documents, separately verified by Commerce, such as the invoices and consumption reports through November, that purportedly demonstrate the accuracy of its December invoices. Because of these other invoices and documents, DunAn claims that no "gaps" existed on the record to justify the use of AFA.[49] DunAn contends that *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 435 F. Supp. 2d 1261 (2006) supports the conclusion that, because it provided Commerce with "necessary information," Commerce could not apply facts otherwise available. *Shandong*, 30 CIT at 1301–02, 435 F. Supp. 2d at 1289.

(C) significantly impedes a proceeding underthis title, or

(D) provides such information but theinformation cannot be verified as provided in [19 U.S.C. § 1677m(i)] . . . .

19 U.S.C. § 1677e(a). *Accord* 19 C.F.R. § 351.308(a).

[48] To the extent DunAn rejects Commerce's administration of the verification, DunAn has presented the court with no evidence that Commerce acted arbitrarily in these proceedings.

[49] DunAn also argues that, because Commerce accepted the dateof invoice as the date of sale for its calculations, Commerceshould have accepted the sales listed on the invoice only. The court agrees with the government that the date of sale does notwed Commerce to accepting invoice amounts at face value despite significant discrepancies in the documentation. Nor does the choice of date of sale render the consumption report numbers irrelevant, as it was DunAn Precision's practice to review the consumption reports for accuracy and, after recording inconsistencies, invoice its customer based on these data. Moreover, DunAn Precision's *own* January 2008 accounting records conflicted with the December invoice numbers.

The government responds, however, that, when attempting to verify the accuracy of sales and ICC, Commerce "discovered documents that contradicted those previously provided to it." (Def.'s Br. 17.) Because of these inconsistencies, Commerce was unable to verify the information on the record and could not rely on the accuracy of DunAn's documentation. The government also argues that DunAn's consumption reports prior to December 2007 are not relevant to the question of whether records for December 2007 were accurate, and shipment records only display import numbers and do not account for the debated consumption numbers. (*Id.* 21.) As to DunAn's complaints that Commerce did not utilize the consumption reports instead of the invoices, the government argues that Commerce did not accept the accuracy of the consumption reports, but, rather, determined that the consumption reports indicated contradictions in DunAn Precision's records that prevented Commerce from verifying the December sales numbers. (*Id.* 21–22.)

The government is once again correct. Nothing in *Shandong* indicates that Commerce may not apply facts otherwise available when information is *unverifiable* ; unverifiable "necessary information" creates a "gap" in the administrative record to the same degree as a *complete absence* of "necessary information." *See Heveafil*, 58 F. App'x at 847–48. *See also* SAA at 869, *reprinted in* 1994 U.S.C.C.A.N. at 4198. Such information is still "missing" from the record that would serve to verify the contradictory sales numbers. A respondent's submission of unverifiable evidence, rather than no evidence at all, does not save the respondent from Commerce's reasonable use of facts otherwise available.[50] In any event, the court would direct DunAn to read the clear and unambiguous language of section 1677e(a) that instructs that facts otherwise available are appropriate *either* when "necessary information is not available on the record" *or* when "an interested party or any other person . . . provides such information but the information cannot be verified . . . ." 19 U.S.C. § 1677e(a).

For the same reason, as to ICC, the court cannot mandate that Commerce ignore purportedly unreliable statements made by Mr. Qi in favor of what Commerce has reasonably determined to be unverifiable information.

Finally on this issue, DunAn argues that the inventory reports show that it was impossible to fulfill the consumption reports' requirements, and claims that the December 2007 withdrawal was

[50] As Defendant-Intervenor points out, "[i]f DunAn's argumentwere taken to its illogical conclusion, all a respondent wouldhave to do to overcome application of [AFA] for failing toprovide information, would be to supply any information, even ifit were false and unverifiable." (Def.-Intervenor's Opp'n toPl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Def.-Intervenor's Br.") 14.)

clearly so large as to be aberrational. Commerce replied to DunAn's concerns that "DunAn attempts to demonstrate the accuracy of its records by pointing to the very records that could not be substantiated at verification." *Decision Mem.* at 51.[51]

The court again agrees with the government's position. Given that, for the relevant valves, Commerce could verify neither the exact number of December 2007 sales nor the total inventory in stock between October and December 2007, it is reasonable for Commerce to decline to square alleged December inventory amounts and sales, even in light of DunAn's proffered import data and even assuming, *arguendo*, that this import information is correct. Moreover, because its December 2007 sales were unverifiable and because of Mr. Qi's admission, [52] it was also within Commerce's discretion to refuse to find that anomalies in December sales numbers definitively either verified or discredited the accuracy of various other information on the record.

As such, Commerce's use of facts otherwise available, as to the December 2007 sales and ICC, is sustained.

b. Application of Adverse Inferences

The administrative record also reflects that Commerce supported, with substantial evidence, its decision that DunAn did not act "to the best of its ability" to aid Commerce in resolving record discrepancies. 19 U.S.C. § 1677e(b).[53]

In making its determination whether or not to utilize an adverse inference, Commerce need only make a "factual assessment of the extent to which a respondent keeps and maintains reasonable records and the degree to which the respondent cooperates in investigating those records and in providing Commerce with the requested information." *Nippon*, 337 F.3d at 1383. Moreover, there is no *mens rea* requirement to warrant an adverse inference, and Commerce may use adverse facts regardless of a respondent's motivation or intent.

[51] DunAn also disputes Commerce's finding that "the withdrawals on DunAn's inventory reports cover a broad range of quantity, and while the monthly withdrawal in question is the largest, we do not find that it is so much larger than the others as to be anomalous, and indicate that it is inaccurate." *Decision Mem.* at 51. As the court determines that Commerce's reasoning, regarding problems with verification of December sales, was supported by substantial record evidence, the court need not address this further factual finding.

[52] Mr. Qi admitted that [[ ]]. *See supra*.

[53] Commerce may "use an inference that is adverse to the interests of [the interested party]" if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with [Commerce's] request for information." 19 U.S.C. § 1677e(b). *Accord* 19 C.F.R. §351.308(a). The adverse inference "may include reliance on information" from the petition, a final determination in the same investigation, or "any other information placed on the record." 19 U.S.C. § 1677e(b). *Accord* 19 C.F.R. § 351.308(c).

Id.

The statutory standard does not require perfection; nonetheless, though mistakes may sometimes be discounted, a respondent cannot be "inattentive[ ], careless[ ], or inadequate [in] record keeping." *Id.* at 1382. Commerce may presume that a respondent is familiar with its own records. *Id.* Commerce may also assume that respondents are familiar with rules and regulations that apply to the import activities undertaken. *Id*. As a consequence, in order to avoid an adverse inference, a respondent must:

> (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so.

Id.

Errors resulting in failure to provide information (*e.g.*, computer errors or mistaken advice from an attorney) will not absolve a respondent from a Commerce determination that the respondent has failed to cooperate. *See PAM, S.p.A. v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009). A respondent may not rely on excuses that its employee designated to prepare the response either does not know about the needed records, *Nippon*, 337 F.3d at 1383, or has a lack of familiarity with the respondent's accounting records. *Heveafil*, 58 F. App'x at 849. Nor can the respondent avoid adverse inferences if it finds that records no longer exist or cannot be located. *See id.*

DunAn argues that DunAn Precision merely failed to maintain sufficient records to account for discrepancies between consumption reports and invoices. These failures, however, even if inadvertent, support Commerce's decision to apply an adverse inference. *See Nippon*, 337 F.3d at 1383. Further, Commerce met with Mr. Qi several times and, in some instances, Mr. Qi could not explain the inconsistencies in DunAn Precision's documents. Of those inconsistencies for which he could account, Mr. Qi informed Commerce that DunAn Precision made adjustments in its accounting records — also provided to Commerce — but, at the same time, kept MIRs that conflicted with the invoices. Yet Mr. Qi continued to insist that the invoices were correct. This lack of clarity indicates, at best, negligent record keeping, inadequate knowledge of existing records, insufficient inquiry into these records, and failure to adequately prepare Mr.

Qi for Commerce's investigation. *See id*.; *Heveafil*, 58 F. App'x at 849; *PAM*, 582 F.3d at 1339.

DunAn once again relies on *Shandong*, 30 CIT at 1301–02, 435 F. Supp. 2d at 1288–89, as support for its position.[54] But, consistent with *Shandong*, it is within Commerce's discretion to make factual conclusions based upon the administrative record so long as a reasonable fact finder could make such conclusions. DunAn has not demonstrated to the court that, on this administrative record, a reasonable fact finder could not come to the conclusion that Commerce reached here. *See U.S. Steel Group*, 96 F.3d at 1357–58; *In re Alonso*, 545 F.3d 1015, 1019 (Fed. Cir. 2008).

On the record before the court, it was reasonable for Commerce to find that either DunAn was not completely forthcoming to Commerce or that DunAn Precision was at least negligent with its record keeping. Therefore, the court sustains Commerce's application of an adverse inference against DunAn.

c. Use of AFA Margin of 55.62 percent[55]

DunAn also contests the resulting AFA rate. Commerce applied a 55.62 percent dumping margin to DunAn's December 2007 sales of the two FSV models at issue, as 55.62 percent was the initiation rate and the highest rate in the proceeding. *Application of AFA Mem.* at 9; *Decision Mem.* at 52.[56]

The statute explicitly authorizes Commerce, in determining an appropriate AFA rate, to rely on any information placed on the record, including information derived from the petition. 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.308; *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); SAA at 870, *reprinted in* 1994 U.S.C.C.A.N. at 4199.

That said, Commerce may not "overreach reality" in resorting to an adverse margin. *De Cecco*, 216 F.3d at 1032. *See also PAM*, 582 F.3d at 1340; 19 U.S.C. § 1677e(c). When using "secondary information," such as that from the petition, to create a proxy margin, Commerce must "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c); 19 C.F.R. § 351.308(d). "Commerce evaluates whether secondary information has probative value by assessing its reliability

[54] The *Shandong* court upheld Commerce's decision because, onthe record, it was reasonable for Commerce to refuse to apply AFAin light of its determination that "SMC complied with [theDepartment's] requests for documentary evidence regarding itsocean freight expenses . . . ." *Shandong*, 30 CIT 1301, 435 F.Supp. 2d at 1289 (quotation marks omitted).

[55] DunAn does not challenge the particular AFA rate applied to the ICC.

[56] 55.62 percent happens to also be the China-wide rate. *Frontseating Service Valves from the People's Republic of China*, 74 Fed. Reg. at 19,197.

and relevance." *KYD, Inc. v. United States*, __ CIT __, __, 613 F. Supp. 2d 1371, 1378 (2009) (citation omitted). *See also Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007).

Accordingly, the rate chosen must attempt to be a "reasonably accurate estimate" of respondent's actual rate, "albeit with some built-in increase intended as a deterrent," and must be corroborated with information on the record. *De Cecco*, 216 F.3d at 1032. *See also id.* ("Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin."). Within these constraints, Commerce is entitled to use the highest margin applied to DunAn or any other respondent. *See Heveafil*, 58 F. App'x Court No. 09–00217 Page 48 at 846, 849–50; *De Cecco*, 216 F.3d at 1032.

DunAn first argues that Commerce may not apply the China-wide rate because DunAn is independent from the Chinese government. *See Qingdao Taifa Group Co. v. United States*, __ CIT __, __, 637 F. Supp. 2d 1231, 1240–41 (2009), *aff'd on other grounds*, 581 F.3d 1375 (Fed. Cir. 2009); *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771–72, 387 F. Supp. 2d 1270, 1287 (2005). But the government responds that Commerce utilized the petition rate, rather than purposefully applying the China-wide rate, and claims that Commerce did not specifically group DunAn within the China-wide entity which received the China-wide rate: "Commerce's use of the petition rate as [AFA] for DunAn's December 2007 sales quantity [] cannot be equated to Commerce treating DunAn as part of the China-wide entity." (Def.'s Br. 22.)

Consistent with the government's arguments, in Commerce's determinations it referred to the high margin given to DunAn merely as the rate in the petition, and did not, in using this rate, deny DunAn a separate rate. *Final Determination* at 10,889; *Decision Mem.* at 52; *Frontseating Service Valves from the People's Republic of China*, 73 Fed. Reg. at 62,956; *Application of AFA Mem.* at 9. *Compare Qingdao*, __ CIT at __, 637 F. Supp. 2d at 1240, 1242 (reversing Commerce's decision, when applying AFA, to apply the PRC-wide rate instead of a separate rate). As a consequence, whether or not Commerce can apply the China-wide rate to DunAn is irrelevant here.

Be that as it may, Commerce's use of the petition margin, when based upon secondary information such as the petition rate, still must approximate DunAn's actual rate, and Commerce must corroborate the use of the rate with evidence on the record. *See PAM*, 582 F.3d at 1340; *De Cecco*, 216 F.3d at 1032.

In this regard, DunAn does not argue that Commerce failed to adequately corroborate, as required by 19 U.S.C. § 1677e(c), Commerce's use of the 55.62 percent petition rate. Rather, DunAn argues that the applied rate was not directly related to the unverified information at issue. DunAn complains that, while Commerce found DunAn's sales quantity data to be unverifiable, Commerce, in its calculations, nonetheless used this same quantity data when calculating DunAn's weighted-average dumping margin. To DunAn, this choice was inconsistent.

Yet DunAn's argument is unpersuasive because it "conflate[s] Commerce's determination to reject as unreliable [certain information DunAn] submitted with Commerce's determination to use as AFA 'other' record evidence . . . ." *Wash. Int'l Ins. Co. v. United States*, No. 08–00156, 2010 Ct. Intl. Trade LEXIS 13, at *16–17 (CIT Feb. 9, 2010) (citation omitted). Commerce may, as here, use the quantity information rejected as unverifiable because it is DunAn's own number. DunAn cannot now complain that Commerce used, when applying AFA, the information DunAn itself submitted during the investigation. *See id.*

The court thus sustains Commerce's use of 55.62 percent as DunAn's AFA rate.

D. Offset for Recycled Brass Scrap

The court also rejects DunAn's final ground for remand. In using brass bar to manufacture its FSVs, DunAn produces by-product brass scrap. DunAn sells some of this scrap, but much of the brass scrap is recycled and integrated into later production of other FSVs. Responding to DunAn's case brief in the administrative proceeding below, the Department allowed an offset, in part, for the reduced value of brass scrap, and applied this offset to DunAn's normal value. *See Decision Mem.* at 58–59.

DunAn claims that Commerce's scrap offset methodology is contrary to law. Specifically, DunAn argues that Commerce reduced its calculation of DunAn's COP by the reduced value of brass scrap rather than subtracting the brass bar created from scrap from the total brass bar used. This method of calculating the offset, according to DunAn, leads to significant undervaluation of DunAn's cost savings from the use of recycled brass scrap.[57]

[57] DunAn has not argued or presented the court with evidence that Commerce acts arbitrarily or capriciously in implementing its offset methodology.

Commerce did not address this argument in its Decision Memorandum. Accordingly, DunAn asks that the court direct Commerce to explain its choice of offset calculation.[58]

The court's analysis of this issue begins with the recognition that it is Commerce's consistent practice to grant, from the COP, an offset of the scrap's sales value.[59] In addition, the court sees no conflict between the offset methodology and the governing statutes and regulations, and thus determines the Department's practice to be reasonable and hence in accordance with law.

DunAn cites Commerce decisions to demonstrate that "the Department's practice is not to value by-products reused in production." (Pl.'s Reply Br. 13 (quoting *Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,632 (Dep't Commerce Oct. 25, 2007) (final determination of sales at less than fair value), and accompanying Issues and Decision Memorandum, A-570–906, POI 04/01/06 - 09/30/06 (Oct. 17, 2007), at 36, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7–21041–1.pdf (last visited Apr. 19, 2010)) (quotation marks omitted).) Pursuant to this practice, Commerce will not add the value of the brass scrap as an FOP in calculating the COP, as the scrap came from the already-valued brass FOP.

But this is a different issue. Here, Commerce indeed did not add the sales value of the scrap to DunAn's COP. In fact, Commerce granted DunAn an offset because DunAn used some of the scrap. If DunAn's argument were correct, namely that the values of brass bar and brass bar scrap were equivalent and therefore were completely fungible, then the sales value of the scrap would equal the sales value of the brass bar and the value Commerce applied to the scrap would not be in dispute. Rather, for whatever reason, brass scrap does not equal brass bar, and it was thus reasonable for Commerce to treat these inputs differently based upon the sales value of each.

Moreover, the court does not agree that Commerce's failure to address this one issue constitutes error. Commerce is presumed to

---

[58] Both the government and Parker note that DunAn's position unrealistically treats brass scrap and brass bar as perfectly interchangeable and so fails to take into account costs associated with scrap processing. (Def.'s Br. 36; Def.-Intervenor's Br. 27.)

[59] *See Arch Chems., Inc. v. United States*, No. 08–00040, 2009 Ct. Intl. Trade LEXIS 78, at *5–6 (CIT July 13, 2009); *Ass'n of Am. Sch. Paper Suppliers v. United States*, No. 06–00395, 2008 Ct. Intl. Trade LEXIS 128, at *20 (CIT Nov. 17, 2008); *Ames True Temper v. United States*, 31 CIT 1303, 1317 (2007); *Steel Concrete Reinforcing Bars from the People's Republic of China*, 66 Fed.Reg. 33,522, 33,524 (Dep't Commerce June 22, 2001) (notice of final determination of sales at less than fair value), and accompanying Issues and Decision Memorandum, A-570–860, POI 10/1/99 - 3/30/00 (June 22, 2001), at Comment 5c, *available at* http://ia.ita.doc.gov/frn/summary/prc/01–15652–1.txt (last visited Apr. 19, 2010). (*See also* Pl.'s Br. 32.)

have considered all the record evidence, *see Thomas v. Office of Pers. Mgmt.*, No. 2009–3107, 2010 WL 391327, at *2 (Fed. Cir. Feb. 4, 2010) (per curiam); *Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000); *Nucor Corp. v. United States*, 28 CIT 188, 233, 318 F. Supp. 2d 1207, 1247 (2004), *aff'd*, 414 F.3d 1331 (Fed. Cir. 2005), and need not address every argument raised by a respondent in its briefing. *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354–56 Court No. 09–00217 Page 53 (Fed. Cir. 2005). As has been explained many times before, the court will remand if Commerce "failed to consider an important aspect of the problem . . . ." *Motor Vehicle Mfr. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). By following its reasonable established practice, Commerce has not so failed.

Conclusion

For all of the foregoing reasons, Plaintiff's Motion for Judgment Upon the Agency Record is DENIED. Judgment will be entered for Defendant.

It is SO ORDERED.

Dated: April 19, 2010
New York, New York

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

Slip Op. 10–42

EAST SEA SEAFOODS LLC, Plaintiff, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 10–00102

[Plaintiff's Motion for Judgment on the Agency Record is DENIED IN PART and GRANTED IN PART; the Final Results of the fifth administrative review are REMANDED to Commerce; Commerce is instructed to file remand results and issue new liquidation instructions to Customs no later than April 27, 2010. The remaining component of Plaintiff's Motion for a Preliminary Injunction is denied as moot.]

Dated: April 19, 2010

Arent Fox LLP (*John M. Gurley*, *Diana Dimitriuc-Quaia*, *Matthew L. Kanna*, *Nancy Aileen Noonan*), for Plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Courtney S. McNamara*, *Claudia Burke*); *David W. Richardson*, of counsel, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater*, *Jaehong David Park*, *Jarrod Mark Goldfeder*, *Natalya Daria Dobrowolsky*, *Nicole Marie D'Avanzo*), for Defendant-Intervenor.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

Plaintiff East Sea Seafoods LLC ("ESS LLC" or "Plaintiff") is an importer of frozen fish fillets from the Socialist Republic of Vietnam subject to antidumping duty order A-552–801 (*Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Aug. 12, 2003) ("AD Duty Order")). (Doc. No. 6, Compl. ¶ 6.) ESS LLC contests the final results of the fifth administrative review ("5th AR") of the AD Duty Order. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Review*, 75 Fed. Reg. 12726 (Mar. 17, 2010) (the "Final Results").

Plaintiff filed suit on March 19, 2010, concurrently filing an Application for a Temporary Restraining Order ("TRO") and a Motion for Preliminary Injunction ("PI"). (Doc. No. 8.) The Court denied the TRO application the same day it was filed, and scheduled a hearing on the PI motion for March 25, 2010 ("PI Hearing"). (Doc. No. 15.)

At the PI Hearing, the parties agreed that Plaintiff's motion for preliminary injunction was severable into two components. Defendant and Defendant-Intervenor[1] consented to the first component, an injunction prohibiting the liquidation of ESS LLC's and East Sea Seafoods Joint Venture Company's [ESS JVC] subject entries during the pendency of this action, including all appeals, and the Court granted that component of the motion by an order entered on March 25, 2010. (Doc. No. 30.) The second component of Plaintiff's motion for preliminary injunction requested that United States Customs and Border Protection ("CBP") be ordered "to refrain from collecting antidumping duty cash deposits at the Vietnam-wide entity rate of $2.11 per kilogram on imports" of Plaintiff's product, "and instead collect a cash deposit on such imports at the antidumping duty rate of $0.02 per kilogram, determined for [ESS JVC] in this proceeding." (Doc. No. 16 ("Pl.'s PI Mem.") at 1–2.) ESS LLC claimed a right to this relief on the grounds that Commerce required ESS LLC to pay cash deposits at the Vietnam-wide entity rate, rather than at ESS JVC's rate, after

[1] Catfish Farmers of America ("CFA"), a participant in the initial antidumping investigation and each subsequent administrative review, whose consent motion to intervene was granted by order entered on March 24, 2010. (Doc. No. 24.)

wrongly determining that Plaintiff was not the successor-in-interest to ESS JVC. (Pl.'s PI Mem. at 6–7.) Defendant and Defendant-Intervenor opposed this component of Plaintiff's PI motion. (Doc. No. 29 ("Def.'s PI Opp.").)[2]

The Court took the second component of Plaintiff's PI Motion under advisement and held its decision in abeyance. Meanwhile, in light of ESS LLC's claim of imminent irreparable harm, the Court entered a scheduling order on March 26, 2010 (Doc. No. 33), and an amended scheduling order on March 29, 2010 (Doc. No. 35), in order to directly reach the merits of the action via an expedited USCIT R. 56.2 Motion for Judgment on the Agency Record. Pursuant to those orders, the United States timely filed an index of the administrative record (Doc. No. 37) and Plaintiff filed its R. 56.2 Motion and accompanying brief (Doc. No. 39 ("Pl's 56.2 Mem.")) on April 1, 2010. On April 7, 2010, Commerce filed the official administrative record with the Court (Doc. No. 45) and Defendant and Defendant-Intervenor filed opposition briefs (Doc. Nos. 47 ("Def.'s 56.2 Opp.") and 48 ("Def.-Int.'s 56.2 Opp."), respectively). On April 9, 2010, the Court granted Plaintiff leave to file a reply (Doc. No. 51 ("Pl.'s 56.2 Reply"), and Defendant leave to file a sur-reply (Doc. No. 52 ("Def.'s 56.2 Sur-Reply")).

The Court has considered the administrative record, the positions expressed by the parties, and all relevant provisions of law. The Court affirms the decision of Commerce that ESS LLC is not a successor-in-interest to ESS JVC because that determination was based upon substantial evidence and made in accordance with law. Plaintiff's 56.2 motion is therefore denied as to the successor-in-interest issue.

The Court, however, finds unlawful Commerce's decision to assign ESS LLC the Vietnam-wide entity rate without first considering evidence on the record that specifically addresses the extent to which ESS LLC is *de facto* and *de jure* independent from the control of the government of Vietnam. The Court also finds that the decision of Commerce to order liquidation of entries by ESS JVC at the rate assigned to ESS LLC for all entries made after the effective date of the name change is not supported by substantial evidence in the record or otherwise in accordance with law.

The Court therefore remands this case to Commerce. On remand, Commerce must consider all of the evidence in the administrative record pertaining to ESS LLC's *de jure* and *de facto* independence from the Vietnamese government and make a finding as to whether ESS LLC has rebutted the presumption of government control. Upon

[2] Defendant-Intervenor's opposition was presented orally at the PI Hearing. (Doc. No. 36, Confidential Transcript of PI Hearing.) (As Business Proprietary Information was presented at the hearing, the transcript is confidential.)

a finding that ESS LLC is independent of the control of the Vietnamese government, Commerce must assign a separate cash deposit rate to ESS LLC that is supported by substantial evidence and is otherwise in accordance with law, and shall immediately issue liquidation instructions to CBP adjusting the cash deposit rate for ESS LLC accordingly. Any finding by Commerce that ESS LLC is not independent of the control of the Vietnamese government must explain why the presumption has not been rebutted, and why the evidence found sufficient in the Preliminary Results to establish ESS JVC's independence from the Vietnamese government is insufficient to establish the same for ESS LLC.

Commerce must also provide a reasoned explanation, supported by evidence in the record, for why entries shipped by ESS JVC but entered after the effective date of the name change should be treated as entries made by ESS LLC. If Commerce determines on remand that all entries shipped by ESS JVC should be given the rate assigned to ESS JVC of $0.02 per kilogram, it shall amend the liquidation instructions accordingly.

The results of Commerce's remand determination shall be filed with the Court no later than April 27, 2010.

As the Court has ruled on the merits of Plaintiff's claim, the remaining component of Plaintiff's Motion for Preliminary Injunction is denied as moot.

Background

I. *Antidumping Duty Order*

The AD Duty Order at issue in this case established a Vietnam-wide entity rate of 63.88%. *See* 68 Fed. Reg. at 47,910. The 63.88% dumping margin was based on Commerce's findings that Vietnam was a non-market economy ("NME") and the application of adverse facts available "consistent with . . . previous cases in which the respondent is considered uncooperative." *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37,116, 37,119–20 (June 23, 2003). Neither ESS JVC nor ESS LLC were parties to the investigation. *See* AD Duty Order. ESS JVC first began exporting subject merchandise during the period of review ("POR") covered by the third annual review of the AD Duty Order, at which time Commerce granted ESS JVC's separate rate application and calculated ESS JVC's individual dumping margin and cash deposit rate as 0.0%. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission*, 73

Fed. Reg. 15,479 (Mar. 24, 2008). The fourth annual review was rescinded as to ESS JVC because it made no entries of the subject merchandise during that POR. *See Frozen Fish Fillets from Vietnam: Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review*, 73 Fed. Reg. 11,391 (Mar. 3, 2008).

II. *Fifth Administrative Review*

At the heart of this case is a great deal of confusion about which East Sea Seafoods company (ESS JVC or ESS LLC) was filing documents with the agency, at what time, and on whose behalf. This portion of the background describes all the relevant filings of ESS JVC and ESS LLC in the 5th AR, with particular attention to those details.

A. Notices of Opportunity to Request and Initiation

On August 1, 2008, Commerce published a notice of the opportunity to request a fifth administrative review of AD Duty Order for the POR covering August 1, 2007 through July 31, 2008. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 Fed. Reg. 44,966 (Aug. 1, 2008) ("5th AR Request Notice"). (PR[3] 1.) Commerce received seven letters requesting administrative review (PR 2–8), including one submitted on August 28, 2008 by counsel for Plaintiff in the current action (PR 3), which requested administrative review "on behalf of East Sea Seafoods Joint Venture Co., Ltd." The August 28, 2008 letter made no mention of or reference to ESS LLC. (PR 3.)

On September 30, 2008, Commerce published a notice of the initiation of the 5th AR of the AD Duty Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 56,795, 56,796 (Sep. 30, 2008) ("Notice of Initiation"). (PR 9, Pl.'s Public 56.2 App.[4] Tab 4.) Under the heading "Socialist Republic of Vietnam: Frozen Fish Fillets, A-552–801," the initiation notice lists 20 companies, including "East Sea Seafoods Joint Venture Co., Ltd." *Id.* The Notice of Initiation contains no reference to ESS LLC. *Id.* A footnote to the heading for Vietnamese frozen fish fillets states:

> If one of the above named companies does not qualify for a separate rate, all other exporters of frozen fish fillets from the

[3] "PR" refers to the public version of the official administrative record; "CR" refers to the confidential version.

[4] The public and confidential appendices accompanying Plaintiff's 56.2 Motion contain the same documents in the same tabs (varying only as to the redaction of business proprietary information) and are collectively referred to as "Pl.'s 56.2 App."

> Socialist Republic of Vietnam who have not qualified for a separate rate are deemed to be covered by this review as part of the single Vietnam entity of which the named exporters are a part.

Id. at 56,797 n.1.

B. Respondent Selection

On October 17, 2008, counsel for Plaintiff in the current action submitted a respondent selection comment letter to Commerce "on behalf of East Sea Seafoods Joint Venture Co., Ltd. and Piazza's Seafood World LLC ('collectively [sic] 'East Sea'), interested parties" in the 5th AR, stating that "as the Department is aware, East Sea sources its product from one of the largest, if not the largest, pangasius processors in the world" and that "[a]s a mandatory respondent, East Sea would be providing the Department with factors of production based on one of the largest production datasets [sic] for pangasius production that is available." (PR 22 at 1–3, CR 2 at 1–3; Pl.'s 56.2 App. Tab 5.)

ESS JVC requested, in the alternative, that if it was not chosen as a mandatory respondent, it be permitted to participate as a voluntary respondent. (PR 22 at 3, CR 2 at 3.) The letter did not mention ESS LLC; the accompanying certification by Jennifer Champagne identified her as "Vice-President of East Sea Seafoods Joint Venture Co., Ltd." and Plaintiff's attorneys signed the letter as "[c]ounsel to East Sea Seafoods Joint Venture Co., Ltd." (PR 22 at 4–5, CR 2 at 4–5.) CFA also submitted a respondent-selection comment letter to Commerce on October 20, 2008, urging that ESS JVC be selected as a mandatory respondent. (PR 25.) CFA made no mention of ESS LLC. (*Id.*)

On October 29, 2008, Commerce issued its respondent selection memorandum. (PR 30, CR 7; Pl.'s 56.2 App. Tab 8 ("Respondent Selection Memo").) Based upon CBP data on entries of subject merchandise during the POR (*see* CR 1, CR 4), Commerce chose to limit the respondents to the two largest exporters of subject imports, QVD

and Vinh Hoan.[5] (*Id.*) ESS JVC was not chosen as a mandatory respondent, and there is no mention of ESS LLC in the Respondent Selection Memo. (*Id.*)

C. ESS LLC Separate Rate Certification

The first time ESS LLC is mentioned in the administrative record is in a filing consisting of a letter and accompanying Separate Rate Certification form, filed on October 31, 2008 (two days after the issuance of Commerce's Respondent Selection Memo). (PR 34, CR 8; Pl.'s 56.2 App. Tab 6.) The letter states that it is being "filed on behalf of East Sea Seafoods Limited Liability Company" by Plaintiff's attorneys, who list themselves as "[c]ounsel to East Sea Seafoods Limited Liability Company." (*Id*. at 1, 4.) ESS LLC attached a completed Separate Rate Certification form ("Separate Rate Certification"), which states in its heading that it is intended for "firms previously awarded separate rate status," and that "[f]irms that do not currently hold a separate rate may ***not*** use this Certification and ***must*** instead submit an Application for separate rate status" available on the Department's website. (Separate Rate Certification at 1 (emphasis in original).) The requester is listed as "East Sea Seafoods Limited Liability Company" (*id*.) and the applicant's name is given as "East Sea Seafoods Limited Liability Company ('East Sea Seafoods')" (*id*. at 3). ESS LLC filled out the section of the form headed "**EXPORT CERTIFICATIONS (check any that apply)** " as follows:

> 7. I certify that during the POR, the firm conducted business under the following (please include a list of all trade names):

---

[5] Commerce limited the mandatory respondents to QVD and Vinh Hoan pursuant to authority purportedly given by Section 777A of the Tariff Act of 1930. (Respondent Selection Memo at 2–5.) Section 777A of the Tariff Act of 1930, as amended, allows Commerce to limit its review to exporters "accounting for the largest volume of the subject merchandise from the exporting country **that can reasonably be examined** " only where "**it is not practicable** to make individual weighted average dumping margin determinations [for each known exporter] **because of the large number of exporters** " involved in the review. 19 U.S.C. § 1677f-1(c)(2) (2006) (emphasis added).

On at least two occasions, The Court of International Trade has held illegal Commerce's examination in an administrative review of only the two largest exporters, holding that circumstances similar to those present here did not meet the statutory prerequisite of a "large number of exporters." *See Carpenter Tech. Corp. v. United States*, 33 CIT ___, 662 F. Supp. 2d 1337, 1341–44 (2009) (holding that agency violated 19 U.S.C. § 1677f-1(c)(2) when failing to consider whether number of exporters at issue was "large" before determining, based on its workload, that it would only examine two out of eight respondents); *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1260, 1263–65 (2009) (holding, in a case involving four respondents, that "in assessing whether the number of exporters" is "large," Commerce "may not rely upon its workload caused by other antidumping proceedings" lest it "rewrite the statute based on its staffing issues."). This issue is not implicated here, as Plaintiff has not challenged Commerce's selection of respondents.

	☒	the same trade names as identified in the segment of investigation or review in which the firm was granted a separate rate ("previous Granting Period").
	❑	the same trade names as identified in the previous Granting Period, as well as new trade names.
	❑	new trade names.
8.	☒	I certify the firm possesses an official government business license/registration documents [sic] for each trade name listed in response to question 7, above, valid during the POR. (*list [sic] each trade name, the corresponding document and its expiration date*) .
9.	☒	I certify the firm exported or sold subject merchandise to the United States during the POR.

(Separate Rate Certification at 4–5. (explanatory footnotes omitted).) In the section of the form certifying absence of *de jure* control, ESS LLC checked off all of the boxes certifying to facts establishing a lack of government control, except for the box indicating that ownership remained the same during the POR; for that box, ESS LLC provided a written explanation of the sale of a minority ownership interest during the POR. (*Id*. at 5.) In the section of the form certifying absence of *de facto* control, ESS LLC checked off all of the boxes certifying to facts establishing a lack of government control. (*Id*. at 5–6.) In the sales and affiliations section of the form, ESS LLC checked off the box certifying that "the firm made at least one export or sale to the United States during the POR" to "affiliated parties only." (*Id*. at 6.) In the section for additional documentation, ESS LLC stated:

> During the POR, based on a law affecting many companies, the Vietnamese government required East Sea Seafoods to change its name from "East Sea Seafoods Joint Venture Co., Ltd." to "East Sea Seafoods Limited Liability Company". [sic] This change had no affect [sic] on East Sea Seafoods operations during the POR.

(*Id*. at 7.) Jennifer Champagne, "Vice President, currently employed by East Sea Seafood [sic]," signed certifications as to the accuracy of the responses, the applicability of the previously-granted separate rate, and the willingness of ESS LLC to cooperate with future document requests from Commerce. (*Id*., Ex. 1.) The record contains no

indication that Commerce rejected ESS LLC's Separate Rate Certification of October 31, 2008 from the official administrative record. [6]

D. ESS LLC Section A Questionnaire Response

On November 25, 2008, ESS LLC, on its own behalf, submitted "as a voluntary respondent" a response to the Department's Section A Questionnaire. (PR 41, CR 10 ("Section A Response"); excerpts at Pl.'s 56.2 App. Tab 3.) Regarding the quantity and value of its sales, ESS LLC attached a quantity and value chart to the response. (*Id.*, Ex. A-1.) That chart does not, however, distinguish between ESS LLC and ESS JVC sales. (*Id.*) ESS LLC stated that "[a]ll reported sales are to the first unaffiliated customer." (*Id.* at 1.) In the instructions for question 2, the Department indicated that "exporters requesting a separate rate [from the NME] must respond to the following questions in order for the Department to consider fully the issue of separate rates." (*Id*. at 2.)

ESS LLC answered all parts of question 2, providing the following information: (a) the identity of the minority owner of the company and information regarding the transfer of that minority share on October 1, 2007 (*id*. at 2, Ex. A-2); (b) the membership of the Management Director Board and Director Board (*id*. at 2–3, Ex. A-3); (c) the ownership makeup of the companies with ownership interests in ESS LLC (*id*. at 3, Ex. A-3); ESS LLC's relationship with other producers of the subject merchandise (*id*. at 3); the memberships of ESS LLC and its owners and affiliates in other entities, business groups, or industry groups during the POR (*id*. at 3–4); that the owners of ESS LLC did not own or control other exporters of subject merchandise (*id*. at 4); that ESS LLC was not owned or controlled by a local or provincial government (*id*.); Vietnamese statutes indicating ESS LLC's legal ability to conduct business outside of government control (*id*. at 4–5, Exs. A-4 through A-7); and copies of ESS LLC's Vietnamese business licenses (*id*. at 5–6, Exs. A-8 through A-14.) ESS LLC explained, in providing its business licenses, that a Vietnamese statute (provided at Ex. A-11) required "the re-registration of foreign owned companies," and that ESS JVC "had to comply with these new laws and this required the new name of the company to become East Sea Seafoods Limited Liability Company." (*Id*. at 5). ESS LLC asserted that "[t]his change had no affect [sic] on the operations of East

[6] Commerce did, however, refer to the October 31, 2008 Separate Rate filing as "no longer valid" in the preliminary results of the 5th AR. *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results of New Shipper Reviews and Fifth Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,805, 45,807 n.5 (Sept. 4, 2008) ("Preliminary Results").

Sea Seafoods," as indicated by investment certificates attached as Exs. A-12 through A-14, which demonstrated that ESS JVC and ESS LLC "are the same company." (*Id*. at 5–6.) ESS LLC pointed out that ESS LLC "retained its tax identification number, all assets and liabilities, and all the legal rights, privileges, and obligations" under Vietnamese law. (*Id*. at 6.) ESS LLC indicated that "the name change and issuance of a new investment certificate was done on June 17, 2008" in order to comply with statutory obligations. (*Id*. at 7.) ESS LLC provided other detailed information in response to question 2, detailing ESS LLC's internal ownership, decision-making process, staffing, financing, profit distribution, etc., with no responses indicating control by the Vietnamese government. (*Id*. at 7–14.) ESS LLC also provided complete answers to the remaining questions, applicable to companies whether or not seeking a separate rate. (*Id*. at 15–26.) Those answers provided, *inter alia*, detailed information regarding ESS LLC's corporate structure, affiliations, facilities, legal structure, ownership, history, sales process, financial and accounting practices, and merchandise. (*Id*.) Regarding the date of sale for sales to the United States, ESS LLC indicated that the "date of sale is the invoice date, as that is the date on which the final terms of sale are ultimately established, including final prices and quantities." (*Id*. at 18.) These sales were all made to the first unaffiliated United States customer "by the sales staff of Piazza's Seafood World working closely with the president and vice-president of East Sea Seafoods." (*Id*. at 19.) Sales documents that ESS LLC submitted with the Section A Response include a single sales invoice bearing a date after June 17, 2008, the date on which the change in name from ESS JVC to ESS LLC went into effect. (CR 10, Section A Response, Ex. A-16 at 2.)

On December 19, 2008, ESS LLC also submitted, "on behalf of East Sea Seafoods Limited Liability Company . . . as a voluntary respondent," copies of financial statements for itself and its affiliates to accompany the Section A Response. (PR 49, CR 13.) The statements contain, among other things, financial data from the beginning of 2008 through the end of September 2008, covering the periods before and after the name change from ESS JVC to ESS LLC on June 17, 2008. (*Id*., Ex. 1.)

The record contains no indication that Commerce rejected ESS LLC's Section A Response or financial statements.

E. ESS LLC Amended Separate Rate Certification

On March 23, 2009, ESS LLC submitted a letter and attached an amended Separate Rate Certification form. (PR 80; Pl.'s 56.2 App. Tab 7 ("Amended Separate Rate Certification").) The letter pointed out

that the Separate Rate Certification filed by ESS LLC on October 31, 2008 had noted "that the name of East Sea Seafoods had slightly changed from East Sea Seafoods Joint Venture Co. Ltd. to East Sea Seafoods Limited Liability Company." (*Id.* at 1.) ESS LLC attached the Amended Separate Rate Certification form, listing the separate rate requester and applicant as "East Sea Seafoods Joint Venture Co., Ltd., now known as East Sea Seafoods Limited Liability Company." (*Id.*, Attach. 1 at 1, 3.) The record contains no indication that Commerce rejected ESS LLC's Amended Separate Rates Certification.

F. Preliminary Results

On September 4, 2009, Commerce published the preliminary results of the 5th AR. (Preliminary Results; *see also* Pl.'s 56.2 App. Tab 9.) The Preliminary Results list seven companies that "remain in this administrative review," including "East Sea Seafoods Joint Venture Co., Ltd. ('East Sea')." *Id.* at 45,806. ESS LLC is not mentioned in the Preliminary Results. *See generally id.*

Regarding the separate rate status, the Preliminary Results noted ESS JVC as one of the companies that submitted a separate rate certification. *Id.* at 45,807. In a footnote, Commerce stated "East Sea [defined earlier in the Preliminary Results as ESS JVC] addressed the separate rates section of the Department's questionnaire in its November 25, 2008, submission[7] as the certification it had submitted was no longer valid given that there had been a change in ownership and in name." *Id.*, n.5. Commerce relied upon the submission of ESS LLC in finding an absence of governmental control over ESS JVC. Commerce specifically found that ESS LLC's Section A Response "support[ed] a finding of a *de jure* absence of government control" over ESS JVC based on '[a]n absence of restrictive stipulations associated with [ESS JVC's] business license" and legal authority "decentralizing control over" ESS JVC. *Id.* Again based on ESS LLC's Section A Response, Commerce also found an absence of *de facto* government control over ESS JVC, making specific findings that ESS JVC "sets its own export prices independent of the government"; "retains the proceeds from its sales" and controls its profits or losses; had management "with the authority to negotiate and bind the company in an agreement"; "the general managers are selected by the board of directors or company employees" and "appoint the . . . manager of each department"; and that "there is no restriction on [ESS JVC's] use of export revenues." *Id.* Consequently, Commerce preliminarily found that ESS JVC had "established *prima facie* that [it] qualif[ies] for [a]

[7] This refers to the Section A Response, which was explicitly filed by and on behalf of ESS LLC, as set forth *supra* at § II.D.

separate rate[.]" *Id.*

As to the separate rate applicable to ESS JVC, Commerce noted that it would ordinarily apply a weighted-average of the margins assigned to the examined companies (excepting zero, *de minimis*, and adverse facts based margins); however, because both examined companies received zero margins, Commerce would instead use the "reasonable method" of "us[ing] the most recent rate calculated for the non-selected company in question unless we calculated in a more recent review a rate for any company that was not zero, *de minimis* or based entirely on facts available." *Id.* Commerce therefore applied a margin of $0.02 per kilogram to ESS JVC, "as it is the assigned rate from the most recently completed segment of the proceeding that is above *de minimis* and not based on adverse facts available." *Id.* A margin of $2.11 per kilogram was assigned as the Vietnam-wide entity rate, and was also set as the cash deposit rate for all companies "which have not been found to be entitled to a separate rate." *Id.* at 45,807–08, 45,811.

G. Separate Rate and Successor-in-Interest Issues

1. *Case Brief and Rebuttal*

ESS LLC submitted a case brief responding to the Preliminary Results on October 30, 2009, in which ESS LLC stated that "[i]n the Preliminary Results . . . [Commerce] correctly found that ESS LLC was eligible for separate rate status" due to an absence of *de jure* and *de facto* government control. (PR 159, CR 45 ("Case Brief") at 1.) ESS LLC noted that Commerce had "failed to specifically address whether the Department will treat ESS LLC is [sic] the successor-in-interest to ESS JVC." (*Id.* at 2.) ESS LLC asserted that Commerce should find ESS LLC to be ESS JVC's successor-in-interest based on the evidence in the record showing that ESS LLC kept the same supplier, customer base, operational management, tax identification number, assets, liabilities, legal rights, privileges, and obligations as ESS JVC, with the only differences consisting of "a small change in ownership interest and the legally required minor change in the company's name." (*Id.* at 2–4.)

In a rebuttal brief submitted on November 10, 2009, CFA argued that Commerce should deny ESS LLC's successorship claim and associated claim of entitlement to ESS JVC's separate rate because ESS LLC did not pursue those claims via a changed-circumstances review. (PR 168 ("CFA Rebuttal Brief") at 38.) CFA urged Commerce to collect cash deposits on future entries by ESS LLC at the Vietnam-wide entity rate, absent a changed-circumstances review, and, further-

more, to assess duties on POR entries by ESS LLC at the Vietnam-wide entity rate as "this administrative review covers only ESS JVC, and does not cover ESS LLC." (*Id.* at 39.) CFA also claimed that "although this administrative review covers only ESS JVC, the company filed its separate-rate certification and questionnaire responses on behalf of ESS LLC" and, for that reason, Commerce would have grounds for finding that ESS JVC did not demonstrate entitlement to a separate rate for cash deposit and assessment purposes. (*Id.* n.110.)

Counsel for ESS LLC, by letter dated December 3, 2009, requested a meeting with Commerce officials to discuss unspecified issues raised in the case briefs and rebuttals. (PR 170.) No response from Commerce or notation of the occurrence of such a meeting appears in the administrative record.

2. *Request for Successor-in-Interest Information and Responses*

On January 11, 2010, Commerce sent ESS LLC a letter stating that the 5th AR had been initiated as to ESS JVC, but that due to the name change noted "in your separate rate certification,"[8] Commerce requested that ESS LLC submit comments and supporting documents addressing its management, production facilities, supplier relationships, and customer base both before and after the name change and ownership change "[i]n order for the Department to ensure that the operations of [ESS LLC] did not change significantly from what they had been prior to the change in name and ownership." (PR 173.) ESS LLC responded to Commerce's request on January 20, 2010 (PR 175, CR 47; Pl.'s 56.2 App. Tab 11.) In its response, ESS LLC indicated that, when the Vietnamese law requiring the name change was put in place in September 2006, ESS JVC was a joint venture between "its U.S. investor," Piazza's Seafood World, LLC ("PSW"), and Vietnamese company Toan Nhat Co., Ltd ("Toan Nhat"). (*Id.* at 1.) A change in minority ownership of ESS JVC occurred on October 8, 2007 when Toan Nhat sold its interest to another Vietnamese company, Atlantic Co., Ltd. ("Atlantic," an affiliate of Nam Viet Corp. by virtue of common ownership, management, and the marital relationship of the majority shareholders of the two companies.) (*Id.* at 3–4.) ESS JVC was governed by two boards: a four-member Management Director Board, and a two-member Director Board. (*Id.*, Ex. SA-3–SA-4.) When Atlantic acquired its minority ownership share in ESS JVC, the owner of Atlantic replaced one of the four members of the Management Director Board of ESS JVC. (*Id.*) Both members of the Director Board were also replaced at that time, one by the owner of

[8] The letter did not specify which separate rate certification.

Atlantic.[9] (*Id.* at 4–5, Ex. SA-3–SA-4.) Neither ESS JVC nor ESS LLC owned production facilities before or after the ownership and name changes (*id.* at 2, 5), and both ESS JVC and ESS LLC purchased subject merchandise for export from supplier Atlantic during the POR (*id.* at 3, 5). PSW was the sole customer of both ESS JVC and ESS LLC during the POR, and PSW then made the first sales to unaffiliated United States customers; there was no change in PSW's customer base during the POR. (*Id.* at 3, 5, Ex. SA-2.)

CFA responded to the Supplemental Separate Rate Certification on February 1, 2010, reiterating the arguments made in the November 10, 2009 CFA Rebuttal Brief. (PR 176 at 2–4.) CFA argued, alternatively, that the change in minority ownership was significant because it resulted in a new closeness in relations with Atlantic's affiliate Nam Viet. (*Id.* at 6.) CFA also contended that ESS LLC's supplier base had changed significantly from that of ESS JVC, which was considered a producer of subject merchandise in the third administrative review (the last review conducted as to ESS JVC) due to a tolling relationship with its processor. (*Id.* at 7–8.) CFA also argued that the majority of ESS JVC's management structure changed after the shift of minority ownership, making ESS LLC's successorship claim questionable. (*Id.* at 8–9.) Finally, CFA argued that, if Commerce upheld ESS LLC's successorship claim, ESS LLC should only succeed to ESS JVC's cash deposit rate for exports of which it was "*both* the producer and the exporter," and should otherwise be subject to cash deposit at the Vietnam-wide entity rate. (*Id.* at 10.)

On February 16, 2010, ESS LLC responded, arguing that the percentage ownership of ESS JVC which changed hands was too small to be significant. (PR 180 at 2.) ESS LLC also claimed that its supplier base was essentially unchanged, despite abandonment of ESS JVC's prior tolling relationship with its processor, noting that the factors of production underlying ESS LLC's current production (had they been collected) would have come from the same companies from which factors of production were collected for ESS JVC in the third administrative review. (*Id.*) (However, a file memorandum notes that ESS LLC's counsel confirmed by phone on February 18, 2010 that ESS LLC erred in asserting that the final results of the third administrative review contained "information regarding a relationship between certain Vietnamese companies." (PR 181.)) As to management, ESS LLC stressed that Salvadore Piazza remained in control of the company, both before and after the other changes. (PR 180 at 3.)

[9] One of the members of the Director Board had served concurrently on the Management Director Board prior to the ownership change, and retained that position after losing the spot on the Director Board. (Pl.'s 56.2 App. Tab 11 at 4–5, Exs. SA-3–SA-4.)

III. *Final Results*

On March 10, 2010, Commerce issued a memorandum detailing the issues and decisions of the 5th AR. (PR 185, I*ssues and Decision Memorandum for the Final Results of 5th Administrative Review and 4th New Shipper Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* ("I&D Memo").) Comment 7 of the I&D Memo, headed "Rate for East Sea Seafood [sic] JVC/East Sea Seafood [sic] LLC," describes Commerce's findings and decisions regarding ESS LLC's successorship-in-interest to ESS JVC and the appropriate cash deposit and assessment rates for ESS JVC and ESS LLC. (*Id.* at 35–40.) Commerce stated that it "granted ESS JVC a separate rate" in the Preliminary Results despite "noting that the [October 31, 2008 Separate Rate Certification] was not valid due to the change in ownership and name." (*Id.* at 37.) Commerce stated that it did so by "relying on the ESS LLC's [sic] Section A questionnaire response." (*Id.*) The I&D Memo characterized ESS LLC's successorship claim as follows:

> Essentially, ESS JVC, through its SR certification,[10] and its voluntary response to Section A of the Department's antidumping duty administrative review questionnaire,[11] claimed that ESS JVC's operations remained unaffected such that ESS LLC and ESS JVC are the same company.

(*Id.* at 38.) After summarizing the record, Commerce stated its finding on the successorship issue:

> [W]e find that although ESS JVC/ESS LLC did not undergo changes in the customer base, the changes in ownership, coupled with the changes in management and supplier base, are so significant that we do not find that ESS LLC is the successor-in-interest to ESS JVC.

(*Id.* at 39.) Specifically, Commerce found the following changes significant: (a) the ownership changes, because the new owner's involvement in production of subject merchandise "may potentially affect how the Department would collect factors of production if ESS LLC were to be individually examined"; (b) the management changes, because ESS LLC, unlike ESS JVC, shared board members with companies involved in production or sale of the subject merchandise;

[10] Referring to the October 31, 2008 Separate Rate Certification filed by ESS LCC on its own behalf.

[11] Referring to the November 25, 2008 Section A Response filed by ESS LLC on its own behalf.

and (c) the production/supplier changes, because the shift from producer (ESS JVC) to reseller (ESS LLC) resulted in "vastly different" costs of production. (*Id.* at 39–40.)

After concluding that ESS LLC was not the successor-in-interest to ESS JVC, Commerce made findings regarding the rates for the two companies. Commerce found that, "given the separate rates certification from ESS LLC essentially contained all the necessary information with respect to ESS JVC, . . . ESS JVC should be assigned a separate rate for these final results, but only to the effective date of the name change, June 17, 2008." (*Id.* at 40.) The Department determined that it would "instruct CBP to assess $0.02 per kilogram on all appropriate [ESS JVC] entries . . . made during the POR up to June 17, 2008," and that "[a]ny entries made after June 17, 2008, by ESS JVC will be liquidated at the Vietnam-wide entity rate of $2.11 per kilogram, because this company ceased to exist." (*Id.*) As to ESS LLC, Commerce determined that it "shall instruct CBP to assess $2.11 per kilogram on all appropriate entries . . . made during the POR as it is currently not under administrative review and remains part of the Vietnam–wide entity." (*Id.*)

The Final Results published on March 17, 2010 explicitly incorporated the analysis of all issues discussed in the I&D Memo. *See* Final Results, 75 Fed. Reg. at 12,727. The Final Results chart setting out dumping margins contained a footnote specifying that the Vietnam-wide entity "includes ESS LLC," referencing Comment 7 of the I&D Memo. *Id.* at 12,728. The Final Results restated the I&D Memo determinations regarding the rate instructions that Commerce would issue to CBP regarding assessment of ESS JVC and ESS LLC entries, again referring to Comment 7 of the I&D Memo. *Id.* As to cash deposit rates, the Final Results stated that exporters not currently or previously reviewed, nor supplied by manufacturers currently or previously reviewed, would be the Vietnam-wide entity rate of $2.11. *Id.* ESS JVC's "cash deposit rate for any future entries made under the name of ESS JVC will be $2.11 per kilogram" because Commerce "determined that ESS JVC ceased to exist as of June 17, 2008." *Id.*

Jurisdiction, Standing & Standard of Review

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) which authorizes the court to hear "any civil action commenced under section 516A of the Tariff Act of 1930." 28 U.S.C. § 1581(c) (2006).[12] Section 516A of the Tariff Act of 1930 ("the Act"), codified at 19 U.S.C. § 1516a, permits the court to review, among other things, "a final determination . . . by the administering author-

[12] All citations to the United States Code refer to the 2006 edition.

ity . . . under section 1675 of this title," which includes a final determination in an administrative review. 19 U.S.C. § 1516a(2)(B)(iii); *see also* 19 U.S.C. § 1675(a). A challenge to such a determination may be brought by "an interested party who is a party to the proceeding in connection with which the matter arises." 19 U.S.C. § 1516a(2)(A)(ii). An interested party, as defined for the purposes of the Act, includes "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise." 19 U.S.C. § 1677(9)(A). ESS LLC is an exporter of the subject merchandise, and is therefore an interested party.

The term "party to the proceeding" is not defined in the statute. Commerce has promulgated a set of definitions that, among other things, define "terms that appear in the Act but are not defined in the Act." 19 C.F.R. § 351.102(a)(1) (2009). In these definitions, Commerce has determined "party to the proceeding" to mean "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36). Because ESS LLC participated actively in the proceeding before the agency by submitting both factual information and written argument, ESS LLC is a party to the proceeding of the 5th AR, and has standing to bring this case. *See* 28 U.S.C. § 2631(c) *and* 19 U.S.C. § 1516a(2)(A)(ii).

In reviewing Commerce's final determination in an administrative review, the Court is required to "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 "'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)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted).

Analysis

I. *Commerce's Successor-in-Interest Analysis is In Accordance With Law and Supported by Substantial Evidence on the Record*

A. Positions of the Parties on Successorship

1. *ESS LLC*

ESS LLC's main argument is that the Department's successorship analysis ignored evidence that the company's operations remained unchanged right before and after the name change, and instead improperly connected the change in name from ESS JVC to ESS LLC with (a) alterations in minority ownership and management that occurred months earlier, and (b) the supplier relationships of ESS JVC at the time of the 3rd AR, despite ESS JVC and ESS LLC having shared the same supply arrangements during the entire POR of the 5th AR. (Pl's 56.2 Mem. at 7–8.) Alternatively, ESS LLC argues that, even if Commerce properly compared ESS LLC as of the time of the name change with ESS JVC as it existed as far back as the 3rd AR, those changes were not significant enough to support Commerce's negative successorship finding. (*Id.* at 9–16.) Plaintiff points out that, during the PORs for both the 3rd AR and the 5th AR, PSW owned over 90% of the company, Salvadore Piazza remained president with purchasing and selling control, and similar patterns of supplier affiliation and, as a consequence, the same factors of production, applied. (*Id.*)

2. *The United States and CFA*

The United States argues that Commerce, in conducting the successorship analysis, properly considered all of the changes occurring during the span of time since the 3rd AR, culminating in the name change to ESS LLC, and correctly determined, based on substantial evidence in the record, that the changes were significant enough that ESS LLC was not the successor-in-interest to ESS JVC. (Def.'s 56.2 Opp. at 12–17.) Defendant-Intervenor CFA reiterates these arguments. (Def.-Int.'s 56.2 Opp. at 6–14.) Defendant contends that, if anything, ESS JVC benefitted from this analysis, since Commerce could have found from the evidence that ESS JVC had become a new entity *prior* to the name change, and consequently could have applied the Vietnam-wide entity rate to ESS JVC as of an earlier point in time. (Def.'s 56.2 Opp. at 14.)

B. Analysis

The first issue for the Court to resolve is whether Commerce's determination that ESS LLC is not the successor-in-interest to ESS JVC is supported by substantial evidence in the record and is otherwise in accordance with law. It is.

In an administrative review, Commerce is required to "review, and determine . . . the amount of any antidumping duty" and publish notice of "any duty to be assessed [and] estimated duty to be deposited[.]" 19 U.S.C. § 1675(a)(1). Commerce has explained that the

purpose of conducting a successor-in-interest analysis during an administrative review is to determine "the appropriate rate to be assigned to entities affected by . . . some . . . change which raises the questions of the company's status in the proceeding." *Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 20,460, 20,461 (May 13, 1992).

In this case, the change that precipitated the successor-in-interest determination was the change in name from ESS JVC to ESS LLC. Presumably, once the name had changed, ESS LLC would no longer be able to obtain the cash deposit rate assigned to ESS JVC in the third administrative review, unless explicitly permitted to do so by virtue of a favorable successor-in-interest analysis. Plaintiff has urged that in conducting the successor-in-interest determination, Commerce should have compared the newly formed ESS LLC to ESS JVC as it existed immediately prior to the name change on June 17, 2008. Commerce, however, elected to compare ESS LLC with ESS JVC as it existed the last time it was subject to individual examination by the agency—in the third administrative review. *See* I&D Memo at 37–40. The decision to compare ESS LLC with ESS JVC from the 3rd AR is implicitly evident from the bases upon which Commerce reached a negative determination in the successor-in-interest analysis. In reaching a negative successorship determination on the basis of the changes in ownership, management, and supplier relationship, which all took place prior to the name change, but subsequent to the 3rd AR, Commerce has given a clear indication of the starting place for its comparison. *See id.* at 38–39.

The Court sees no reason why the decision to compare the newly named entity with the entity as it existed when last examined is "otherwise contrary to law." *See* 19 U.S.C. § 1516a(b)(1)(B)(i). The successor-in-interest analysis was not explicitly created by statute or by regulation, but is an agency practice designed to facilitate the proper implementation of the antidumping laws. Because "a company will argue successorship, or lack thereof, depending on the particular consequences of its claim on its antidumping duty deposit rate," Commerce needs to have a reasonable method for conducting the analysis that will lead to a fair result in light of "the totality of circumstances." *Certain Brass Sheet*, 57 Fed. Reg. at 20,461. The question in a successor-in-interest determination is whether an alleged successor should qualify for the cash deposit rate last calculated for the alleged predecessor. The Court finds that the decision to compare ESS LLC with the last version of the alleged predecessor that had been subject to agency review is patently reasonable. Moreover, this Court is obligated to extend "tremendous deference to the

expertise of the Secretary of Commerce in administering the antidumping law," when it comes to Commerce's "identifying, selecting and applying methodologies to implement the dictates set forth in the governing statute." *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (internal quotations omitted). Accordingly, the Court finds this determination to be in accordance with law.

In addition to finding the methodology lawful, the Court also finds that Commerce's particular determination in this successor-in-interest analysis is supported by substantial factual evidence in the record. Plaintiff does not dispute the existence of the changes identified by the agency between ESS JVC as it existed in the third administrative review and ESS LLC. To the contrary, Plaintiff voluntarily supplied Commerce with information regarding each of these changes in its Separate Rate Certification, Section A Response, and Amended Separate Rate Certification, and in its responses to the successor-in-interest query from the agency. Seeing no factual dispute, the Court finds that evidence in the record documenting the change in ownership, the change in management, and the change in supplier arrangement constitutes more than a mere scintilla of evidence in support of the agency's determination that ESS LLC is not a successor-in-interest to ESS JVC as it existed at the time of the third administrative review. *See Altx*, 370 F.3d at 1116.

II. *Commerce's Decision To Assign Plaintiff The Vietnam-Wide Entity Rate Is Not In Accordance With Law*

The second issue for the Court to resolve is whether the agency's decision to assign ESS LLC a cash deposit rate equal to the Vietnam-wide entity rate of $2.11/kg in the Final Results was in accordance with law.

A. Positions of the Parties on Proper Dumping Rate for ESS LLC

1. *ESS LLC*

ESS LLC argues that Commerce's determination to assign it the Vietnam-wide entity rate as a cash deposit rate was not in accordance with law because the Vietnam-wide entity rate was based on adverse facts available ("AFA"); but ESS LCC did not fail to cooperate with Commerce. (Pl.'s 56.2 Mem. at 17–18.) ESS LLC asserts that pursuant to 19 U.S.C. § 1677e(b), Commerce must find that a party failed to cooperate before an AFA rate may be applied to that party. (*Id.*) ESS LLC also contends that Commerce's assignment of the Vietnam-wide entity rate to ESS LLC was not supported by substantial evi-

dence, since Commerce accepted and relied upon evidence submitted by—and equally applicable to—ESS LLC when it found that ESS JVC was not under *de jure* or *de facto* government control, but ignored the effect of that evidence as to ESS LLC. (*Id.* at 18–20.) ESS LLC also argues that it was properly subject to the 5th AR, and was not required to submit two requests for review (one under the name ESS JVC and one under the name ESS LLC) in response to the Notice of Initiation. (Pl.'s Reply at 4–5.) ESS LLC points out that Commerce accepted and relied upon submissions from ESS LLC throughout the review, and claims that Commerce "is thus estopped from arguing now that all such submissions were invalid or that [ESS LLC] was not under review." (*Id.* at 5.)

2. *United States and CFA*

Defendant and CFA argue that Commerce's application of the Vietnam-wide entity rate to ESS LLC upon its negative successorship determination was not an application of AFA, but was instead the operation of a presumption of government control that applies to all NME companies that do not rebut that presumption by requesting review and providing evidence of a lack of government control. (Def.'s 56.2 Opp. at 17–20 (*citing Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002) and *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997); Def.-Int.'s 56.2 Opp. at 15–20.) Furthermore, both Defendant and CFA assert that ESS LLC's failure to file its own request for review (in addition to the request filed by ESS JVC) meant that ESS LLC was no longer subject to the review once Commerce determined that it was not the successor-in-interest to ESS JVC. (Def.'s 56.2 Opp. at 18–20; Def.-Int.'s 56.2 Opp. at 15–19.) The government and CFA both state that Commerce "had no choice but to apply" the Vietnam-wide entity rate to ESS LLC—a company that had not requested review and did not inherit ESS JVC's separate rate through succession. (Def.'s 56.2 Opp. at 19; Def.-Int.'s 56.2 Opp. at 17.) The government characterizes this treatment as "a determination that the company has not met its burden of demonstrating that it is separate from the government entity," and maintains that Commerce was not obligated to treat ESS LLC as if it had applied for a separate rate by accepting its Section A Response. (Def.'s 56.2 Opp. at 19–20.)

B. Analysis

For the reasons set forth below, the Court finds unlawful Commerce's decision to assign ESS LLC the Vietnam-wide entity rate without first considering evidence on the record that specifically

addresses the extent to which ESS LLC is *de facto* and *de jure* independent from the control of the government of Vietnam.

The normal consequence of a negative determination in a successor-in-interest analysis is that the entity found not to be the successor-in-interest may not post cash deposits at the rate calculated for the alleged predecessor. In the case of an antidumping duty order imposed on goods from a market economy, Commerce generally applies the "all others rate" to the non-succeeding entity by default.[13] In the case of a nonmarket economy, Commerce typically applies the country-wide antidumping rate as a default rate.[14] In this case, for example, where Commerce found alleged successor ESS LLC not to qualify for the rate previously assigned to alleged predecessor ESS JVC, Defendant argues that Commerce had "no choice" but to apply the Vietnam-wide entity rate, as this was the "only possible option" available. (Def.'s 56.2 Opp. at 19.)

The application of a NME antidumping rate (such as the Vietnam-wide entity rate in the current proceeding) to a particular exporter is premised on the "rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assessed a single antidumping duty rate." Preliminary Results, 74 Fed. Reg. at 45,806. The Court of Appeals for the Federal Circuit ("CAFC") has, to some extent, sanctioned the use of this rebuttable presumption.[15] *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) ("[I]t was within Commerce's authority to employ a

[13] *See, e.g., Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review: Polychloroprene Rubber from Japan*, 69 Fed. Reg. 61,796, 61,798 (Oct. 21, 2004) (preliminarily finding that SDK was not the successor-in-interest to SDEM/DDE, and that "SDK should not be given the same antidumping duty treatment as [SDEM/DDE]," and that SDK, as a new entity, "should continue to be assigned as its cash deposit rate the 'all others' rate").

[14] *See, e.g., Frozen Warmwater Shrimp From Vietnam: Notice of Preliminary Results of Antidumping Duty Changed Circumstances Reviews*, 74 Fed. Reg. 31,698, 31,700 (July 2, 2009) (preliminarily finding that CAFISH was not the successor-in-interest to CATACO, and thus "should not receive CATACO's current separate rate and that the cash deposit rate for . . . CAFISH should continue to be the current Vietnam-wide rate") (unchanged in final results, *see* 74 Fed. Reg. 42,050, 42,051); *Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Changed Circumstances Review*, 72 Fed. Reg. 41,492, 41,495 (July 30, 2007) (preliminarily finding that Tradewinds International is not the successor-in-interest to Fortune Glory, "and, therefore, should not be given the same antidumping duty treatment as Fortune Glory") (unchanged in final results, *see* 72 Fed. Reg. 60,812, 60,813–14.).

[15] The Court notes that in most, if not all, cases involving a country-wide NME antidumping duty rate, the country-wide margin has been calculated using adverse inferences. *See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission*, 73 Fed. Reg. 15,479, 15,480 (Mar. 24, 2008) ("the Department assigned a rate based on the use of total adverse facts available ('AFA') to the Vietnam-Wide Entity"). The Court does not believe that either the

presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control.") The CAFC later construed its holding in *Sigma* by emphasizing the rebuttability of the presumption:

> Although in *Sigma* we upheld Commerce's presumption of state control, which shifted the burden to the companies under review to demonstrate that they were independent from the state-controlled entity, we recognized that the presumption is rebuttable, and that **a party that is subject to the presumption has a right to attempt to rebut it.**

Transcom, Inc. v. United States, 182 F.3d 876, 883 (Fed. Cir. 1999) (emphasis added). The issue raised in this case, therefore, is whether the application of the Vietnam-wide entity rate to ESS LLC without considering ESS LLC's evidence attempting to rebut the presumption of state control was appropriate. It was not.

In *Transcom*, the CAFC held that parties not named in the notice of initiation of an administrative review could not be subjected to the presumption that they were under state control as a result of the administrative review, because those parties did not have notice that they would be subjected to the presumption, and therefore, could not have attempted to rebut it. *Transcom*, 182 F.3d at 883–84. In light of *Sigma* and *Transcom*, it would appear that whenever a company from a non-market economy is seeking a successor-in-interest analysis, the alleged successor must have an opportunity to rebut the presumption of state control, because the alleged successor faces the prospect of being subjected to the presumption that it is controlled by the state entity if it is found not to be the successor-in-interest, and receives the NME country-wide cash deposit rate. This would seem to be the case regardless of whether the successor-in-interest analysis is sought in a changed circumstances review or in an administrative review.

Under the facts of this case, however, the question of whether Commerce should give an alleged successor the opportunity demonstrate independence from the state entity is not hypothetical. In-

CAFC or the CIT have ever considered the extent to which the application of the rebuttable presumption, described herein, may conflict with 19 U.S.C. § 1677e(b). This statute states that "if [Commerce] ***finds*** that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b) (emphasis added).

It seems that the application of an antidumping duty rate that has been based on AFA to certain companies by the operation of a "rebuttable presumption" of government control, without the finding of failure to cooperate required by 1677e(b), may be *ultra vires*. The Court need not reach this question in the case before it and declines to do so.

stead, Commerce refused to consider the effect on ESS LLC of abundant evidence in the administrative record which would tend to support ESS LLC's attempts to rebut that presumption. This refusal is inexcusable. The evidence appears in the form of (a) the Separate Rate Certification submitted by ESS LLC on October 31, 2008 (PR 34, CR 8), (b) the separate rates portion of the Section A Response submitted by ESS LLC on November 25, 2008 (PR 41, CR 10), (c) ESS LLC's financial statements, submitted on December 19, 2008 (PR 49, CR 13), and (d) the Amended Separate Rate Certification submitted on be half of ESS LLC and ESS JVC on March 23, 2009 (PR 80), and is unquestionably part of the administrative record. Moreover, the agency relied upon this very evidence, submitted by ESS LLC, in finding in the Preliminary Results that ESS JVC was *de jure* and *de facto* independent of the Vietnamese government during the 5th POR. Commerce's application of the presumption of state control, without considering abundant record evidence rebutting that very presumption, pushed legal fiction into the realm of legal fantasy. Doing so was not in accordance with law.

Remarkably, Defendant takes the position that there was *nothing* ESS LLC could have done to rebut the presumption in this case. Defendant claims that ESS LLC could not have requested a separate rate, presumably via a separate rate application, "because it never requested to be reviewed" in the 5th AR. (Def.'s 56.2 Opp. at 19–20.) Defendant states that it would not consider the separate rates portion of ESS LLC's Section A Response to evaluate government control, because after reaching the negative successor-in-interest determination, ESS LLC "was no longer properly part of the review." (*Id.* at 20.) Defendant offers no explanation why it did not consider the Separate Rate Certification submitted by ESS LLC, or the Amended Separate Rate Certification, submitted by both ESS LLC and ESS JVC. Ostensibly, though, Commerce will not accept a separate rate certification from an entity that has not previously received a separate rate. Commerce's obstinance left Plaintiff in a situation where the presumption was irrefutable rather than rebuttable.

When a successor-in-interest analysis has been sought in the course of an administrative review, such a review has typically, if not universally, been conducted when both the alleged predecessor and the alleged successor have been named in the notice of initiation for that administrative review.[16] When asked by ESS LLC, an alleged successor that was not named in the notice of initiation, to conduct a

[16] *See Chlorinated Isocyanurates from Spain: Preliminary Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. at 37,191 (July 9, 2007) (finding in preliminary results of administrative review that Aragonesas Industrias y Energía S.A. "Aragoneses" was the

successor-in-interest analysis in this administrative review, Commerce might have declined, but it did not. Rather than informing ESS LLC that it would need to separately request a changed circumstances review because it was not named in the notice of initiation, and therefore not properly under administrative review, Commerce agreed to determine whether ESS LLC was the successor-in-interest to ESS JVC. Commerce accepted into the record repeated submissions from ESS LLC containing both factual information and legal argument, conferring "party to the proceeding" status to ESS LLC. Commerce specifically solicited additional information from ESS LLC (and the petitioners) pertaining to the successorship question, and set forth a reasoned explanation of the results of its analysis in the I&D Memo. After permitting and soliciting the participation of ESS LLC in this administrative proceeding for more than 15 months, Commerce cannot now act as if ESS LLC is a total stranger.

Furthermore, Commerce explicitly found in the Preliminary Results that ESS JVC, as it existed in the 5th POR, was not under *de jure* or *de facto* control of the Vietnamese government. While the changes in supplier relationship, ownership and management affected the successor-in-interest determination, these changes were irrelevant to the agency's decision to grant ESS JVC a separate rate in this administrative review. The Court has not seen any evidence in the record, or heard any argument from the parties, suggesting that, attendant with the name change on June 17, 2008, ESS LLC fell under government control. To the contrary, the evidence suggests that the name change on June 17, 2008 was not, itself, associated with any change in the extent of government control over ESS JVC's, or ESS LLC's, operations. For the foregoing reasons, then, the Court finds that Commerce's decision not to determine whether ESS LLC had made a showing that it was entitled to a separate rate is not in accordance with law.

---

successor-in-interest to Aragonesas Delsa S.A. ("Delsa")), *and Initiation of Antidumping And Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 71 Fed. Reg. 42,626, 42,627 (July 27, 2006) (initiating said administrative review as to both Aragoneses and Delsa); *see also Stainless Steel Bar From Italy: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Rescission of Review*, 70 Fed. Reg. 17,656, 17,657 (April 7, 2005) (finding UGITECH S.A. ("Ugitech") the successor-in-interest to Ugine-Savoie Imphy S.A. ((Ugine-Savoie")), *and Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 Fed. Reg. 30,282 (May 27, 2004) (initiating said administrative review as to both Ugine-Savoie and Ugitech); *see also Purified Carboxymethylcellulose from Finland; Notice of Preliminary Determination of Antidumping Duty Administrative Review*, 72 Fed. Reg. 44,106, 44,107–08 (Aug. 7, 2007) (finding CP Kelco OY the successor-in-interest to Noviant OY), *and Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 71 Fed. Reg. 51,573, 51,574 (Aug. 30, 2006) (initiating administrative review as to both Noviant Oy and CP Kelco Oy).

III. *Liquidation of ESS JVC Entries After June 17, 2008 at ESS LLC Rate Was Unlawful*

The final issue for the Court to resolve is whether Commerce's decision to order liquidation of entries by ESS JVC at the rate assigned to ESS LLC for entries made after the effective date of the name change is supported by substantial evidence in the record and otherwise in accordance with law.

A. Positions of the Parties on ESS JVC Liquidation Rate

1. *ESS LLC*

ESS LLC contends that Commerce wrongly determined to instruct CBP to assess the Vietnam-wide entity rate on entries made by ESS JVC retroactive to the date of the name change. (Pl.'s 56.2 Mem. at 20.) ESS LLC points out that shipments exported by ESS JVC up to the date of the name change would have entered the United States weeks later, and contends that ESS JVC's $0.02 rate should apply to all ESS JVC entries shipped from Vietnam on or before June 17, 2008. (*Id.*)

2. *United States and CFA*

Defendant did not address this argument. CFA opposes ESS LLC's position on the grounds that the argument was not raised before the agency, and that ESS LLC did not cite record evidence regarding the dates on which ESS LLC exports first entered the United States for consumption. (Def.-Int.'s 56.2 Opp. at 20.)

B. Analysis

The Court finds that the decision of Commerce to order liquidation of entries by ESS JVC at the rate assigned to ESS LLC for all entries made after the effective date of the name change is not supported by substantial evidence in the record or otherwise in accordance with law.

In the Final Results, Commerce stated that "[a]ny entries made after June 17, 2008, by ESS JVC will be assessed at the Vietnam-wide entity rate of $2.11 per kilogram." *Final Results*, 75 Fed. Reg. at 12,728. In the I&D Memo, Commerce explains that it reached this decision because, after this date, ESS JVC "ceased to exist." I&D Memo at 40. The Court does not find any evidence in the record to support Commerce's decision to treat entries made by ESS JVC, after the date of the name change, as somehow not the province of ESS JVC. (*See generally* CR 1, 4.) Without a more reasoned explanation as to why entries made by ESS JVC should be treated as if made by ESS

LLC, the Court cannot sustain this aspect of the Final Results, as it is not supported by substantial evidence and is not otherwise in accordance with law.

IV. *Remand*

On remand, the agency need not tamper with the successor-in-interest analysis, which has been sustained. It must, however, consider all of the evidence in the administrative record pertaining to ESS LLC's *de jure* and *de facto* independence from the Vietnamese government, as detailed by the Court above, and make a finding as to whether ESS LLC has rebutted the presumption of government control. Upon a finding that ESS LLC is independent of the control of the Vietnamese government, Commerce must assign a separate cash deposit rate to ESS LLC that is supported by substantial evidence and is otherwise in accordance with law, and shall immediately issue liquidation instructions to CBP adjusting the cash deposit rate for ESS LLC accordingly. Any finding by Commerce that ESS LLC is not independent of the control of the Vietnamese government must explain why the presumption has not been rebutted, and why the evidence found sufficient in the Preliminary Results to establish ESS JVC's independence from the Vietnamese government, which was submitted by ESS LLC, is insufficient to establish the same for ESS LLC. Additionally, Commerce must provide a reasoned explanation, supported by evidence in the record, for why entries shipped by ESS JVC but entered after the effective date of the name change should be treated as entries made by ESS LLC. If Commerce determines on remand that all entries shipped by ESS JVC should be given the rate assigned to ESS JVC, it shall amend the liquidation instructions accordingly. Because the unlawful Final Results appear to have placed Plaintiff in imminent danger of suffering severe economic harm, Commerce is instructed to file its remand results no later than April 27, 2010.

Conclusion

For the reasons given above, upon consideration of Plaintiff's Motion for Judgment on the Agency Record, Defendant's and Defendant-Intervenor's responses thereto, Plaintiff's reply, and Defendant's Surreply, and upon careful consideration of the administrative record, this Court affirms in part and remands in part the Final Results. It is hereby

ORDERED that Plaintiff's Motion for Judgment on the Agency Record is PARTIALLY GRANTED and PARTIALLY DENIED; and it is further

ORDERED that Commerce's determination in the Final Results of the fifth administrative review of the antidumping duty order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam that ESS LLC is not the successor-in-interest to ESS JVC is AFFIRMED, and it is further

ORDERED that the Final Results are REMANDED to Commerce; and it is further

ORDERED that Commerce must consider all evidence in the administrative record pertaining to ESS LLC's *de jure* and *de facto* independence from the Vietnamese government, and make a finding as to whether ESS LLC has rebutted the presumption of government control; and it is further

ORDERED that if Commerce finds that ESS LLC is independent of the control of the Vietnamese government, it must assign to ESS LLC a cash deposit rate separate from the Vietnam-wide entity rate that is supported by substantial evidence and is otherwise in accordance with law; and it is further

ORDERED that if Commerce finds that ESS LLC is not independent of the control of the Vietnamese government based on the evidence in the record, it must explain why the presumption has not been rebutted, and it must explain why the evidence cited in the Preliminary Results that was sufficient to establish ESS JVC's independence from the Vietnamese government is insufficient to establish that ESS LLC is independent of the Vietnamese government; and it is further

ORDERED that Commerce must either provide a reasoned explanation, supported by evidence in the record, for why it should treat entries made by ESS JVC, after the effective date of the name change, as entries made by ESS LLC, or alternatively shall find that all entries made by ESS JVC are given the rate of $0.02 per kilogram assigned to ESS JVC in the Final Results; and it is further

ORDERED that Commerce shall file with this Court the remand results no later than **Tuesday April 27, 2010** ; and it is further

ORDERED that Commerce shall issue new liquidation instructions to U.S. Customs and Border Protection in accordance with the remand results no later than **Tuesday, April 27, 2010** ; and it is further

ORDERED that Plaintiff may file comments with this Court indicating whether they are satisfied or dissatisfied with the remand results no later than **Friday, April 30, 2010** ; and that Defendant and Defendant-Intervenor may file responses to Plaintiffs' comments no later than **Wednesday, May 5, 2010** ; and it is further

ORDERED that the remaining component of Plaintiff's Motion for Preliminary Injunction is denied as moot.

Dated: April 19, 2010
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE