U.S. Customs and Border Protection

Slip Op. 12–69

FUWEI FILMS (SHANDONG) CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 11–00061

[Administrative review results remanded.]

Dated: June 1, 2012

David J. Craven, Riggle & Craven, of Chicago, IL, for Plaintiffs Fuwei Films (Shandong) and Shaoxing Xiangyu Green Packing Co., Ltd.

David D'Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Whitney Rolig*, Office of the Chief Counsel for Import Administration, International Trade Administration, Department of Commerce, of Washington, D.C.

Ronald I. Meltzer, *Patrick J. McLain*, *David M. Horn*, and *Jeffrey I. Kessler*, Wilmer, Cutler, Pickering, Hale and Door, LLP, of Washington, DC, for Defendant-Intervenors DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc.

OPINION AND ORDER

Gordon, Judge:

I. Introduction

This consolidated action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering Polyethylene Terephthalate ("PET") Film from the People's Republic of China. *See Polyethylene Terephthalate Film from the People's Republic of China*, 76 Fed. Reg. 9,753 (Dep't of Commerce Feb. 22, 2011) ("*Final Results*") and accompanying Issues and Decision Memorandum, A-570–924 (Feb. 14, 2011), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–3909–1.pdf (last visited June 1, 2012) ("*Decision Memorandum*"). Before the court are motions for judgment on the agency record filed by Fuwei Films (Shandong) Co., Ltd., and Shaoxing Xiangyu Green Packing Co., Ltd. ("Green"), respondents in the administrative proceeding (collectively "Respondents"), and DuPont Teijin Films, Mitsubishi

Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively "DuPont"), petitioners in the administrative proceeding. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

Respondents challenge Commerce's (1) surrogate valuation of labor inputs, (2) alleged clerical errors for Green's packing material and per-unit electricity and water, and (3) surrogate valuation of PET chips.[2] DuPont also challenges the surrogate valuation of Respondents' PET chips. For the reasons set forth below, this matter is remanded to Commerce.

II. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2011). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 West's Fed. Forms, National Courts § 13342 (2d ed. 2010).

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

[2] PET chips are the primary raw material for production of PET film.

III. Discussion

A. Voluntary Remand

Commerce has requested a voluntary remand to (1) address Respondents' arguments regarding the surrogate value for the labor input, and (2) correct a clerical error in Green's per-unit water and electricity costs, which the court will grant. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

B. Green's other Clerical Error Allegation

When calculating Green's packing material expenses for the preliminary results, Commerce included a space between a parenthesis and a slash mark in a line of computer code. Green did not raise this issue in its case brief, nor did Green raise the issue as a clerical error submission following issuance of the *Final Results*. Green has instead raised this issue for the first time in its opening brief in this action, alleging that the extra space caused an error in the conversion (or non-conversion) of units from tons to kilos.

The extra space actually has no effect whatsoever on the calculation. Defendant explains that the software computes each instruction line as a whole. Def.'s Br. at 16 n. 5, Nov. 30, 2011, ECF No. 55 (quoting SAS Institute, Inc., SAS 9.3 Language Reference: Concepts 21 (Cary, NC SAS Institute, Inc. 2011) ("A blank [space] is not treated as a character in a SAS statement unless it is enclosed in quotation marks . . . [t]herefore, you can put multiple blanks any place in a SAS statement where you can put a single blank. It has no effect on the syntax."). In its reply brief, Green raises an entirely new argument about an apparently different clerical error affecting the converted or calculated weight of Green's plastic caps. *See* Respondents' Reply Br. at 11–12, Jan. 4, 2012, ECF No. 58–1 ("Plaintiffs initially believed that this error was reflected in the identified instruction. Apparently it was not."). The time of one's reply brief, however, is not the opportune moment to figure out the specifics of one's argument, and introduce a brand new theory. *See* Scheduling Order at 6, July 14, 2011, ECF No. 36 ("The reply brief may not introduce new arguments."). The court will therefore sustain Commerce's treatment of Green's packing expenses.

C. Surrogate Valuation of PET Chip Inputs

When valuing the factors of production in a non-market economy proceeding, Commerce must use the "best available information" when selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1), (4). Commerce's regulations provide that surrogate values should "normally" be publicly

available and from a single surrogate country. 19 C.F.R. § 351.408(c) (2008). Commerce prefers data that reflects a broad market average, is publicly available, contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports. *Certain Pneumatic Off–the–Road Tires from the People's Republic of China, 73 Fed. Reg. 40,485 (Dep't of Commerce July 15, 2008) and accompanying Issues and Decision Memorandum cmt. 10 at 26, A–570–912 (July 7, 2008), available at http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf (last visited this date).*

"[T]he process of constructing foreign market value for a producer in a nonmarket economy country [using surrogate values] is difficult and necessarily imprecise." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citation omitted) (internal quotation marks omitted). Importantly, Commerce's surrogate value decision or data choice is not rendered unreasonable because an alternative inference or conclusion could be drawn from the administrative record. *Daewoo Elec. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993). Rather, the court will upset Commerce's surrogate valuation only if no "reasonable mind could conclude that Commerce chose the best available information." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)) (internal quotation marks omitted).

In determining the "best available information" to value Respondents' PET film inputs of bright polyester and master batch ("BP&MB") PET chips, Commerce needed to determine which provision of the Harmonized Tariff Schedule ("HTS") of India (the primary surrogate country) best applied to Respondents' BP&MB chips. This was an involved undertaking:

> When selecting surrogate values with which to value the FOPs used to produce subject merchandise, the Department is directed to use the "best available information" on the record. *See* Section 773(c)(1) of the Act. As noted by Petitioners, when selecting surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a range of publicly available, non-export, tax-exclusive, and product-specific prices for the POR, with each of these factors applied non-hierarchically to the particular case-specific facts and with preference to data from a single surrogate country. In the *Preliminary Results*, the Department selected a surrogate value based on an eight-digit basket category that was the most specific on record to the input in question. The Department valued

PET chips with HTS 3907.60.20, "Polyethylene Terephthalate With Intrinsic Viscosity >= 0.64 Dl/G & <=0.72 Dl/G," the HTS subheading applicable to Respondents' FOPs for PET chips with the intrinsic viscosity meeting this description. However, the Department has reviewed the additional factual information placed on the record by Respondents regarding the methodologies employed for measuring intrinsic viscosity and, after further review of the certificates of analysis submitted by Respondents, the Department has determined that there is insufficient evidence on the record to support the selection of HTS 3907.60.20 as the only surrogate value for the inputs that comprise all, or nearly all, of Respondents' direct materials, and the great majority of Respondents' cost of manufacturing. Therefore, for the final results, the Department has determined to use the GTA Indian import data under both HTS subheadings 3907.60.10 and 3907.60.20. Data for both subheadings are publicly available, broad market averages, contemporaneous with the POR, tax-exclusive, and representative of significant quantities of imports, thus satisfying critical elements of the Department's surrogate value test.

Respondents have argued that the customs service of the Indian government uses a different testing methodology for calculating intrinsic viscosity than those used by Respondents in their questionnaire responses. Information on the record regarding testing methods in India, *i.e.*, a letter from an Indian customs official secured by Respondents' counsel during the less than fair value investigation, indicates that to correctly classify merchandise entering India, importers should have intrinsic viscosity details for their product(s) based on ASTM standards. The letter, dated April 7, 2008, was written only six months prior to the beginning of the POR. Further, Respondents have also submitted information regarding intrinsic viscosity testing methods commonly used in the PRC, which are testing methods conforming to those set forth by ISO, but which are not the same as the ASTM testing protocol for measuring PET chip intrinsic viscosity used in India. Finally, the Department has reviewed the submission of the DuPont Group, respondents in the investigation, which Respondents submitted to the record of this review subsequent to the *Preliminary Results*. In the investigation, the DuPont Group submitted to the public record a list of its suppliers, the PET chips that it purchased from each supplier, the PET chip intrinsic viscosity by the suppliers' specification and, finally, conversions of these intrinsic viscosity values to demonstrate

what the values would be using other testing methods. Thus, Respondents' submitted factual information indicates that there are several different testing methods for measuring the intrinsic viscosity of PET chips, which differ based upon the nature and proportion of solvents used in the testing process. The actual testing method used to measure the intrinsic viscosity of PET chips is done at the discretion of the tester. Depending upon the testing method used, the intrinsic viscosity of PET chips could be measured either above or below the 0.64 Dl/G threshold which defines HTS 3907.60.20.

The record evidence in this review supports the Department's use of HTS 3907.60.20 as we concluded in our *Preliminary Results*. Nevertheless, we reviewed again the certificates of analysis that Respondents submitted to the record prior to the *Preliminary Results*, and it appears from the record that the testing method used by Respondents' suppliers to provide the intrinsic viscosity values reported on the certificates is not disclosed. Further, the certificates of analysis for Respondents' PET chips indicates that at least some of Respondents' PET chips have an intrinsic viscosity very near the 0.64 Dl/G threshold which defines the upper limit of HTS 3907.60.10, and the lower limit of HTS 3907.60.20. Due to the absence of record evidence that would provide the Department with information for determining the correct intrinsic viscosity and the most accurate HTS subheading, the Department believes that some of Respondents' PET chips match the description for HTS 3907.60.10. Moreover, as the bright polyester chip FOP and master batch chip FOP make up the vast majority of the cost of manufacturing for Respondents, it is critical in this instance that the Department applies a comprehensive valuation for the inputs at issue.

Respondents and Bemis have noted various PET chip quantity and value examples on the record for other India HTS subheadings, and argued that the quantity in the surrogate value used in the *Preliminary Results* (*i.e.*, HTS 3907.60.20) is lower when compared to these examples. In particular, Respondents have contrasted the quantity of HTS 3907.60.20 with the greater merchandise quantity of HTS 3907.60.10, the HTS subheading used to value DuPont Group's PET chip input in the original investigation. Respondents have presented information showing that the adjacent HTS 3607.60.10 represents a more reliable quantity than the Indian HTS 3907.60.20. Generally, the Department's practice has found that the existence of lower com-

mercial quantities and higher prices alone does not necessarily indicate that price data are distorted or misrepresented and, thus, are not sufficient to exclude particular surrogate values absent specific evidence that the values are otherwise aberrational.

Moreover, as stated in the preceding paragraph, the Department has determined to apply an equal balance of all surrogate values that are, or could potentially be applicable to, Respondents' PET chips. Therefore, due to: (1) the reasonable likelihood that Indian HTS 3907.60.10 may be applicable, at least in part, to Respondents' inputs; and (2) the magnitude of the surrogate value in relation to Respondents' cost of production, the Department has applied the simple-average of the two weighted-average unit values of Indian HTS subheadings 3907.60.10 and 3907.60.20 to calculate the surrogate values for bright polyester chips and master batch chips in order to calculate as accurately as possible Respondents' antidumping margins for the final results. The information on the record supports a finding that both HTS subheadings may be equally applicable to Respondents' inputs. The Department has applied the simple-average of the two weighted-average unit values of the Indian HTS subheadings 3907.60.10 and 3907.60.20, and not a weighted-average unit value of all merchandise under these HTS subheadings, to avoid an imbalanced result due to the greater merchandise quantity of HTS 3907.60.10.

Finally, Respondents have submitted Infodrive India data as a corroborative tool to show that the GTA surrogate value data are distorted. Due to the Department's well-established reservations regarding the use of Infodrive data, either as a corroborative tool or price benchmark, the viability of this particular Infodrive dataset (and, thus, Respondents' claims that the GTA data are distorted) must be analyzed in accordance with Department practice and policy regarding the use of Infodrive data. The Department has stated that it will consider Infodrive data to further evaluate import data, provided: (1) there is direct and substantial evidence from Infodrive reflecting the imports from a particular country; (2) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive India data; and (3) distortions of the surrogate value in question can be demonstrated by the Infodrive data; but that the

Department will not use Infodrive data when they do not account for a significant portion of the imports which fall under a particular HTS subheading.

On point (1), all countries but one that are reported in GTA for HTS 3907.60.10 are reported in the Infodrive data, and the Infodrive data for HTS 3907.60.20 do indicate shipments from Germany to India as shown in GTA. Regarding point (2), we find that the Infodrive India is under-inclusive, representing only 48.44 percent of POR value and 53.05 percent of POR quantity for Indian HTS 3907.60.10, and only 79.16 percent of POR value and 84.72 percent of POR quantity for Indian HTS 3907.60.20, as reported in the official source. Over half of the value in HTS 3907.60.10, and one-fifth of the value in HTS 3907.60.20, based on official Indian import statistics is not accounted for by the Infodrive. Information in this unaccounted for portion of the actual entries may contradict the claim that these HTS numbers produce a distortive average value. In numerous cases, the Department has rejected Infodrive data because they did not account for a significant portion of the overall official import data. If the Department considers that Infodrive information is not conclusive regarding the validity of the surrogate value based on HTS 3907.60.10 and HTS 3907.60.20, the Department may continue to apply the surrogate value. As to point (3), Respondents and Bemis have not provided any benchmarks to show that the AUVs are abnormally high or the quantity is abnormally low. Furthermore, Infodrive India data are collected by a private party that only reviews bills of lading for commercial descriptions. The data in Infodrive may differ from the actual entries of the shipments as recorded in the Indian official import statistics.

In sum, the Department has applied the simple average of the two weighted-average unit values of the Indian HTS subheadings 3907.60.10 and 3907.60.20 to calculate the surrogate values for bright polyester chips and master batch chips for the final results. Further, Respondents' submitted Infodrive India data are not a reliable basis for the Department to abandon the surrogate value calculated by the Department in the *Preliminary Results*, as doing so would require a speculative interpretation of the data, and also because the data are an under-inclusive portion of the officially reported Indian import data. Therefore, because there is insufficient evidence that Indian HTS 3907.60.20 should be used exclusively for valuing Respon-

> dents' PET chips, as mentioned above for the final results, we will value Respondents' PET chip inputs using Indian import statistics HTS subheadings 3907.60.10 and 3907.60.20.
>
> Because the Department has not departed from its selection of India as the surrogate country and has maintained the application of the selected surrogate value from India for PET chips in this AR, the Department need not address Respondents' arguments against the application of surrogate values from Thailand, and surrogate values from other potential surrogate countries that may or may not have been properly translated.

Decision Memorandum at 12–16 (footnotes omitted).

Both Respondents and DuPont challenge Commerce's surrogate valuation of Respondent's PET chips as the "best available information," 19 U.S.C. § 1677b(c)(1). DuPont argues that the administrative record supports HTS 3907.60.20 as the one, true, correct data source for Respondents' PET chips, while Respondents argue that HTS 3907.60.10 is the one, true, correct data source.

During the review Respondents submitted test certificates from their suppliers that showed intrinsic viscosities ("IVs") between 0.64 and 0.72 dl/g, placing them squarely under HTS 3907.60.20 if the testing method (ISO or ASTM) is ignored. The certificates did not identify the testing method used to calculate the IVs. Respondents addressed this problem indirectly by relying on submissions from the investigation that had been provided by the "DuPont Group," which consisted of the participating mandatory respondent, DuPont Teijin Films China Limited, together with DuPont Teijin Hongji Films Ningbo Co., Ltd., and DuPont-Hongji Films Foshan Co., Ltd.—all apparent affiliates of the petitioner here, DuPont Teijin Films. In the investigation the DuPont Group argued, and Commerce agreed, that the correct surrogate value measure was 3907.60.10, *not* 3907.60.20. Issues and Decision Memorandum for Final Determination of Sales at Less than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China at 2–3, A-570–924 (Sept. 17, 2008), *available at* http://ia.ita.doc.gov/frn/summary/prc/E8–22454–1.pdf (last visited this date). The DuPont Group (1) explained and documented that ISO tests produce higher IVs than ASTM tests, and (2) submitted detailed charts recalculating the DuPont Group's IVs under ASTM standards. Commerce, though, did not address these submissions, relying on different reasons to favor HTS 3907.60.10 over 3907.60.20 (import statistics for 3907.60.20 contained an insignificant quantity of imports not representative of the DuPont Group's PET chip purchase volume or consumption experi-

ence). *Id.* With this background in mind, the court first addresses DuPont's arguments, then Respondents'.

1. DuPont's Arguments

At the outset, the court must note that DuPont has assumed a somewhat difficult position by arguing that HTS 3907.60.20 constitutes the only proper dataset (for Respondents PET Chips) shortly after the DuPont Group successfully argued in the investigation that HTS 3907.60.10 is the only proper dataset (for the DuPont Group's PET chips). Here the main thrust of DuPont's argument is that Commerce's decision to include HTS 3907.60.10 in its surrogate valuation is conjectural. *See* DuPont Br. at 5–8, ECF No. 46–2. "Conjecture" though is not really a word that springs to mind after reading Commerce's detailed analysis quoted above, which does not appear to be the product of mere guesswork. DuPont's contention is also a surprising, if unfair, characterization given the position the DuPont Group assumed in the investigation.

DuPont argues that Commerce's conclusion that the ISO standard is "commonly" used in China (and by extension, Respondents) is conjecture. DuPont Br. at 5–7. DuPont builds its argument from a cherry-picked statement in *China Nat'l Machinery Import & Export Corp. v. United States*, 27 CIT 255, 268, 264 F. Supp. 2d 1229, 1240 (2003) ("*CMC I*"), "Conjectures are not facts and cannot constitute substantial evidence." DuPont, however, neglects to cite or discuss the subsequent history of *CMC I*, in which Commerce maintained its *original* position on remand, Court No. 0101114, May 16, 2003, ECF No. 40, which the court then sustained as reasonable despite its earlier (and ultimately unfounded) concerns about potential "conjecture." *See China Nat'l Machinery Import & Export Corp. v. United States*, 27 CIT 1553, 293 F. Supp. 2d 1334 (2003), *aff'd without opinion*, 104 Fed. Appx. 183 (Fed. Cir. 2004). *CMC I*, therefore, has limited persuasive value given its subsequent history.

Here, the question is not whether Commerce engaged in "conjecture" that fails to qualify as "substantial evidence," or that Commerce predicated its decision on mere "suspicion," DuPont Br. at 5–8, (characterizations that are hard to justify given Commerce's detailed analysis above as well as the results of the investigation), but simply whether Commerce's findings and conclusions supporting its ultimate determination to use data from HTS 3907.60.10 are reasonable given the circumstances presented by the record. DuPont argues that Commerce's conclusion that Chinese producers "commonly" use the ISO standard is unreasonable because the administrative record did not contain direct evidence that the ISO standard is universally used

in China. DuPont's insistence upon direct evidence is an unusual stance in a proceeding in which Commerce determines "surrogate" values that substitute for the direct evidence of a respondent's own accounting. It is all the more curious because the statute does not require, nor have the courts imposed, a requirement of evidentiary exactitude for Commerce's surrogate valuations.

If framed in absolutes, DuPont is correct that the administrative record does not establish that *everyone* in China *always* uses the ISO standard. The record also does not establish that the ISO standard is *never* used in China. Judicial review of Commerce's action here does not depend on absolutes like always or never, but instead on whether Commerce's inference about Respondents' ISO utilization is reasonable given the information on the administrative record. It is. As Defendant explains, any lack of documentation explicitly linking Respondents' inputs to the ISO testing method is balanced by the DuPont Group information from the investigation[3] demonstrating that Chinese PET chip producers generally use the ISO method, and have done so for the models of PET chip that Respondents consumed. *Decision Memorandum* at 13.

DuPont also relies on *Peer Bearing Company-Changshan v. United States*, 35 CIT ___, ___, 752 F. Supp. 2d 1353, 1369–71 (2011) to argue that if Commerce was uncertain about which Indian HTS subheading to apply, it was obligated to explain why that data was superior to Thai surrogate value data. *Peer Bearing*, though, is not applicable here. In *Peer Bearing* the court determined Commerce's preference for using data from a single country unreasonable when the data was demonstrably aberrational as compared to certain benchmark prices, and alternative data sources could be better corroborated. The issue here focuses on which HTS category is most appropriate, not whether the values reported for the HTS categories are aberrational.

For the foregoing reasons the court believes DuPont's arguments regarding Commerce's surrogate valuation of Respondents PET chips lack merit. Given the information on the administrative record, it was reasonable for Commerce to include data from HTS 3907.60.10 in its surrogate valuation of Respondents' PET chips. The question remains, though, whether a reasonable mind would conclude on this administrative record that data from HTS 3907.60.10, and that provision alone, is the best available information to value Respondents' PET chips, or, if not, whether a reasonable mind would conclude that Commerce's simple average of the two HTS provisions constitutes the best available information.

[3] Respondents submitted the information from the investigation on the record of the administrative review.

2. Respondents Arguments

Respondents contend that Commerce's use of unconverted IV levels from China for Indian HTS subheadings is unreasonable (unsupported by substantial evidence), as is Commerce's use of an unweighted (simple) average of Indian HTS 3907.60.10 and Indian HTS 3907.60.20 as the basis for the surrogate value. Commerce ultimately determined that a "broader" straddling of import data for HTS 3907.60.10 and HTS 3907.60.20 is the best available information of Respondents' PET chip value, and that reliance upon the data for only one or the other HTS provisions, or a weighted average of both, is not a better surrogate. The court has identified three specific infirmities that challenge the reasonableness of Commerce's determination, each of which requires further explanation or reconsideration by Commerce.

First, Respondents relied on a summary chart prepared by the DuPont Group in the investigation covering the ISO-to-ASTM conversions of the models of PET chips Respondents purchased from certain of the listed suppliers. *See*, *e.g.*, Respondents' Br. at 8–9 (citing PD 137 at Ex. PSV-8, Ex. 6-H (frm 468) and 6-I (frms 470–71)). Considering the record and the arguments, Commerce agreed that Respondents had provided additional information showing that "HTS 3607.60.10 represents a more reliable quantity than the Indian HTS 3907.60.20" and Commerce found a "reasonable likelihood" that Indian HTS 3907.6010 may apply to "some" of Respondents' PET chips. *Decision Memorandum* at 13–14. This requires amplification.

Commerce's statement could be construed as a distinction between Respondents' BP&MB and PETG chip model purchases, but the test report for the latter shows an IV level far in excess of even the upper limit of HTS 3907.60.20, implying that HTS 3907.60.90 (without regard to the product's IV level) would be the correct classification for that model. Commerce's stated focus for purposes of valuing Respondents' factors of production, of course, is the IV levels of Respondents' BP&MB chips. Each of the test reports for the BP&MB chips declares a single IV level, without indication of uncertainty or standard deviation. If one accepts the logic that the proper classification of Respondents' BP&MB chips in India requires conversion from ISO (China) to ASTM (India), then why are only "some" and not all of those chips considered within HTS 3907.60.10? And why does that logic also not undermine the reasonableness of any continued reliance upon the "stated" facial declarations of the IV levels on the BP&MB chip test reports?

The second matter requiring clarification is Commerce's consideration of the record data for HTS 3907.60.20, and specifically Com-

merce's finding on the unreliability of Infodrive data to corroborate that data. As a matter of practice, Commerce may consider Infodrive data as a corroborative tool when (1) there is direct and substantial evidence from Infodrive reflecting the imports from a particular country; (2) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive data; and (3) distortions of the surrogate value in question can be demonstrated by the Infodrive data. *Decision Memorandum* at 15 (citing *Lightweight Thermal Paper from the People's Republic of China*, 73 Fed. Reg. 57,329 (Dep't of Commerce Oct. 2, 2008) (final LTFV determination) and accompanying Issues and Decision Memorandum at cmt. 9, A-570–920 (Sept. 25, 2008), *available at* http://ia.ita.doc.gov/frn/summary/prc/E8–23271–1.pdf (last visited this date)). Applying that framework here, Commerce concluded that the Infodrive data satisfied the first prong, but not the second. Commerce, therefore, declined to consider the Infodrive data. *Decision Memorandum* at 16. More specifically, Commerce found the Infodrive data for HTS 3907.60.10 under-inclusive as it represented only 48.44 percent of period of review by value and 53.05 percent of period of review by quantity as compared with GTA data. This finding was reasonable under Commerce's framework. However, Commerce's finding that the Infodrive data for HTS 3907.60.20 could also not be used as a corroborative tool requires further clarification for two reasons.

First, Commerce concluded the data under-inclusive because they represented "only" 79.16 percent by value and 84.72 percent by quantity for HTS 3907.60.20. *Id.* at 15. As support, Commerce cited *Lightweight Thermal Paper*. In *Lightweight Thermal Paper*, however, Commerce accepted Infodrive data that represented 88 percent of the quantity of country-specific imports. Why does Commerce consider import quantity data covering slightly less than 85 percent unreliable, but 88 percent reliable?

Second, Respondents explained that (1) all of the Infodrive data for HTS 3907.60.20 for this period of review consisted of non-PET product exported from Germany (Respondents' Br. at 12–13), (2) there is no evidence in the record of what product the "missing" data pertained to (15.28 percent by quantity), (3) the quantity represented by the "missing" data would be consistent with less than one full shipment, (4) the Infodrive data from the investigation showed that the imports were of the same non-PET material, and (5) even if all of the unidentified material in HTS 3907.60.20 (totaled over a 12-month period) were PET chips, the most that such quantity could be is 8.20 metric tons, or nearly half of the quantity (totaled over a six-month period) that Commerce rejected in the original investigation as insig-

nificant. These appear to be sound arguments testing the reasonableness of Commerce's unwillingness to consider as corroboration, the Infodrive data for HRS 3907.60.20. Commerce needs to provide an explanation that takes these considerations into account.

These arguments, in turn, also lead to the third and final matter requiring further explanation: Commerce's use of a simple (as opposed to weighted) average of the two HTS data sets. Because Commerce applied the simple average for the first time in the *Final Results*, Respondents did not have the opportunity to challenge that decision during the administrative review. In their briefs before the court, Respondents have raised legitimate concerns that test the reasonableness of Commerce's use of a simple average, which according to Respondents, gives "inordinate weight to a provision [HTS 3907.60.20] with very small quantities [that] also does not consist of the kind of goods [that] comprise the factor of production." Respondents' Reply Br. at 8. Commerce needs to address the arguments raised by Respondents, *see* Respondents' Br. at 1417; Respondents' Reply Br. at 8.

IV. Conclusion

Accordingly, it is hereby

ORDERED that this action is remanded to Commerce to address Respondents' submissions regarding the surrogate valuation of its labor inputs, as well as the inadvertent transposition of Green's per-unit consumption levels for water and electricity; it is further

ORDERED that the *Final Results* are sustained with respect to Commerce's calculation of Green's packing material expenses; it is further

ORDERED that Commerce on remand clarify or reconsider, as appropriate, the issues the court identified regarding Commerce's surrogate valuation of Respondents' PET chips; it is further

ORDERED that Commerce shall file its remand results on or before August 1, 2012; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: June 1, 2012
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 12–70

RACK ROOM SHOES, SKIZ IMPORTS LLC, AND FOREVER 21, INCORPORATED, Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Chief Judge
Jane A. Restani, Judge
Judith M. Barzilay, Sr. Judge.
Consol. Court No. 07–00404

[Plaintiff's motion for reconsideration is denied.]

Dated: June 1, 2012

John M. Peterson, *George W. Thompson*, *Maria E. Celis*, *Russell A. Semmel*, and *Richard F. O'Neill*, Neville Peterson LLP, of New York, NY, for the Plaintiff, Rack Room Shoes.

Michael T. Cone, McCullough Ginsberg Montano & Partners LLP, of New York, NY, for the Plaintiff, SKIZ Imports LLC.

Damon V. Pike, The Pike Law Firm P.C., of Decatur, GA, for the Plaintiff, Forever 21, Inc.

Tony West, Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for the Defendant. With him on the briefs were *Jeanne E. Davidson*, Director; *Reginald T. Blades, Jr.*, Assistant Director, and *Aimee Lee*, Trial Attorney. Of counsel on the briefs were, *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, and *Leigh Bacon*, Office of the General Counsel, United States Trade Representative.

MEMORANDUM AND ORDER

Pogue, Chief Judge:

INTRODUCTION

In this action, Plaintiff Rack Room Shoes, Inc. ("Rack Room"), together with other United States importers, allege, in their Amended Complaints, that certain glove, footwear and apparel tariff classifications violate the Equal Protection Clause of the Constitution. U.S. Const. amend. XIV, § 1, cl. 2. The court dismissed the complaints in *Rack Room Shoes v. United States*, 36 CIT __, 821 F. Supp. 2d 1341 (2012)(dismissing for failure to state a plausible claim of intent to discriminate).[1]

Rack Room, pursuant to USCIT Rule 59, now seeks reconsideration of the court's dismissal.[2] Rack Room asserts that there was legal error in the court's 1) failure to make necessary findings of fact, and 2) failure to articulate the applicable pleading standard or reconcile such a standard with USCIT Rule 9(b).

[1] Familiarity with the court's earlier opinion is presumed.

[2] USCIT Rule 59 provides that a "court may . . . grant a . . . rehearing for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court."

Because Rack Room's assertions are incorrect, as explained below, its motion for rehearing is denied.

STANDARD OF REVIEW

The court will grant a rehearing when there has been: "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case." *See, e.g.*, *Target Stores v. United States*, 31 CIT 154, 156, 471 F. Supp. 2d 1344, 1347 (2007). However, the court does not grant a motion for rehearing merely to permit the losing party another chance to relitigate the case. *USEC, Inc. v. United States*, 25 CIT 229, 230, 138 F. Supp. 2d 1335, 1336 (2001). Rather, the moving party must show that the court committed a "fundamental or significant flaw" in the original proceeding. *Id.*

DISCUSSION

Rack Room first asserts that the court failed to make necessary findings of fact with regard to each provision of the Harmonized Tariff Schedule of the United States ("HTSUS") challenged in the prior proceeding. Specifically, Rack Room claims that the court failed to find that each challenged provision was not facially discriminatory before proceeding to dismiss the case.[3]

But classification is an inherent part of the HTSUS and therefore a claim of facial discrimination in the HTSUS, specifically in classifications that include only a reference to age or gender, will be unavailing. *Leathers v. Medlock*, 499 U.S. 439, 451 (1991) ("Inherent in the power to tax is the power to discriminate in taxation."); *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1357, 1359 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 92 (2010), ("[W]e . . . cannot assume that this differential treatment of different goods is invidious.")(Proust, J., concurring)(noting also that gender- or age-based tariff classifications which impose burdens on importers rather than "gender- or age-based classes of people" are not facially discriminatory). Thus, no separate fact-finding step is necessary, with regards to each individual HTSUS subheading that the Plaintiff challenges, because the

[3] Plaintiffs have repeatedly, and incorrectly, conflated neutral classifications present throughout the HTSUS with the type of facial discrimination, arising from invidious intent, that is necessary to a finding of facial discrimination.

gender- and age-based classifications at issue, regardless of which specific subheading is referred to, are not facially discriminatory.[4]

Moreover, there is no difference in the form of the multiple classifications that Plaintiffs challenge. Compare subheadings 4203.29.30 (men's gloves) and 4203.29.40 (gloves for "other persons"), which were challenged in *Totes-Isotoner Corp. v. United States*, 32 CIT 739, 569 F. Supp. 2d 1315 (2008), with 6403.99.60 (footwear for men, youths, and boys) and 6403.99.90 (footwear for women), which are among the many tariff subheadings challenged by the Plaintiffs. With regards to both classifications, the first heading makes reference to the gender or age of the intended user, then the classification further distinguishes items by characteristics such as the presence of lining, material, or simply states the name of the item.[5] The facial form of all challenged headings is the same. *See Appendix A* (listing all headings challenged by Plaintiffs).

Plaintiff's second alleged basis for reconsideration asserts that the court overlooked USCIT Rule 9(b) when ruling that Plaintiffs must plead sufficient facts to plausibly show that Congress had an invidious intent to discriminate in adopting the challenged HTSUS provisions.[6] This claim also fails.

USCIT Rule 9(b) states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." USCIT R. 9(b). It follows, certainly, that intent may be alleged generally. Nonetheless, Plaintiffs must also allege facts sufficient to raise a plausible claim. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Totes-Isotoner*, 594 F.3d at 1358 (holding that plaintiffs claiming discrimination are "required to allege facts sufficient to establish a governmental purpose to discriminate"). Rather than being mutually exclusive, as Plaintiffs seem to suggest, the now-familiar *Twombly* standard, with its threshold plausibility requirement, is supplemental to, and informs the application of, Rule 9(b). Accord-

[4] Furthermore, as the government correctly notes, Plaintiffs overlook that this case was dismissed pursuant to USCIT Rule 12(b)(5). Therefore, Plaintiffs' argument that we failed to make the necessary findings of fact under USCIT Rule 52(a)(1) must fail.

[5] If anything, close examination of the subheadings reveals that the intended user's gender and/or age is but one of many factors taken into consideration when classifying imports. Most often, the provisions are concerned with the materials of which the goods are made or the manufacturing process of the item, e.g., knitted. Moreover, these are not actual use provisions so they create no requirement that the goods be used by purchasers of a particular sex or age. Accordingly, the reference to the intended user's gender and age cannot be considered invidious intent to discriminate.

[6] Plaintiff also claims, oddly, that the court failed to articulate the pleading standard on which its prior decision was based. But our prior opinion states quite clearly that Plaintiffs were required to allege sufficient facts to make out a plausible claim of invidious intent to discriminate. *Rack Room Shoes*, 36 CIT at __, 821 F. Supp. 2d at 1346. This claim, therefore, is also unavailing.

ingly, our dismissal of Plaintiffs' Amended Complaints for failure to state a plausible claim is not inconsistent with USCIT Rule 9(b).

CONCLUSION

For the forgoing reasons, Plaintiff's motion for rehearing is denied.
So Ordered.

Dated: June 1, 2012
New York, New York

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

Slip Op. 12–72

JTEKT CORPORATION and KOYO CORPORATION OF U.S.A., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol Court No. 06–00250

[Granting motion for stay of proceedings pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: June 4, 2012

Neil R. Ellis and *Jill Caiazzo*, Sidley Austin, LLP, of Washington, DC, for plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A..

Kevin M. O'Brien, *Kevin J. Sullivan*, *Christine M. Streatfeild*, and *Sonal Majmudar*, Baker & McKenzie, LLP, of Washington, DC, and *Diane A. MacDonald*, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd..

Alexander H. Schaefer and *Robert A. Lipstein*, Crowell & Moring, LLP, of Washington, DC, for plaintiffs NSK Corporation, NSK Ltd., and NSK Precision America, Inc..

Kevin M. O'Brien, *Christine M. Streatfeild*, and *Diane A. MacDonald*, Baker & McKenzie, LLP, of Washington, DC, and Chicago, IL, for plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation.

Nausheen Hassan and *Greyson L. Bryan*, O'Melveny & Myers, LLP, of Washington, DC, for plaintiffs Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc..

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Deborah R. King*, Office of the Chief Counsel for Import Administration, Department of Commerce.

Geert M. De Prest, *Terence P. Stewart*, and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor the Timken Company.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

In this consolidated action, plaintiffs JTEKT Corporation[1] and Koyo Corporation of U.S.A. (collectively, "JTEKT"), FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"), NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"), American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"), Nachi Technology, Inc., Nachi-Fujikoshi Corporation and Nachi America, Inc. (collectively, "Nachi"), and The Timken Company ("Timken"), which is both a plaintiff and the defendant-intervenor, contest an antidumping determination ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). Specifically, they challenge certain aspects of the final determination that Commerce issued to conclude the sixteenth administrative reviews of antidumping duty orders covering ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom made during the period of May 1, 2004 through April 30, 2005. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 40,064 (July 14, 2006) ("*Final Results*"). Four plaintiffs–JTEKT, NPB, NTN, and Nachi–asserted claims challenging the application of Commerce's "zeroing" methodology to calculate the dumping margin in the review of the order pertaining to Japan.[2] The plaintiffs challenging zeroing claim the Department's use of the zeroing methodology for non-dumped sales violates the U.S. antidumping laws and is inconsistent with international obligations of the United States.

The court's previous opinion in this action, issued on July 29, 2011, addressed the Department's first remand redetermination. In light of

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[1] JTEKT Corporation is the successor-in-interest to Koyo Seiko Company, Ltd.. *Notice of Final Results of Antidumping Duty Changed-Circumstances Review: Ball Bearings & Parts Thereof from Japan*, 71 Fed. Reg. 26,452, 26,452–53 (May 5, 2006).

[2] The U.S. Department of Commerce ("Commerce" or the "Department") applied its "zeroing" methodology in the sixteenth administrative reviews, under which it assigned to U.S. sales made above normal value a dumping margin of zero, instead of a negative margin, when calculating weighted-average dumping margins. *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005*, at 11–12 (July 14, 2006).

two intervening decisions of the Court of Appeals for the Federal Circuit ("Court of Appeals"),[3] the court ordered Commerce to reconsider the decision to apply the zeroing methodology in determining the margins for the plaintiffs challenging zeroing, and to either alter that decision or provide an explanation of how the language of 19 U.S.C. § 1677(35) permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews. *JTEKT Corp. v. U.S.*, 35 CIT __, __, 780 F. Supp. 2d 1357, 1371 (2011).[4] Both the Government and Timken seek reconsideration of or relief from this remand order with respect to zeroing and ask the court to uphold Commerce's use of zeroing in the sixteenth administrative review of the antidumping duty order on ball bearings from Japan. The Timken Co.'s Mot. for Reconsideration or Relief from J. 5 (Aug. 10, 2011), ECF No. 171; Def.'s Mot. for Expedited Reconsideration or Relief from J. 7 (Aug. 12, 2011), ECF No. 173. Further, the Government requests an extension of time to file the second remand determination until 60 days after the court decides the motions for reconsideration or relief. Def.'s Mot. for Enlargement of Time to File Remand Redetermination (Sept. 21, 2011), ECF No. 177.

Also before the court is a joint motion of plaintiffs JTEKT, NTN, NPB, and NSK to stay this case pending the final disposition of *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012) ("*Union Steel* "). Joint Mot. for Stay of Proceedings Pending Appeal in *Union Steel v. United States* (May 4, 2012), ECF No. 182 ("Joint Mot. for Stay"). *Union Steel* involves the question of the legality of the Department's zeroing methodology as applied to an administrative review of an antidumping duty order. *Union Steel*, 36 CIT __, __, Slip Op. 12–24, at 2. The judgment entered by the Court of International Trade in that case affirming the use of zeroing in the subject administrative review is now on appeal before the Court of Appeals.[5] Joint

[3] In *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) and *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371–73 (Fed. Cir. 2011), the Court of Appeals for the Federal Circuit ("Court of Appeals") held that the final results of an administrative review in which zeroing was used must be remanded for an explanation of the Department's interpreting the language of 19 U.S.C. § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews.

[4] The court's second remand order also instructed the Department to reconsider the proposal of American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN") to incorporate additional design-type categories in the Department's model match methodology. *JTEKT Corp. v. U.S.*, 35 CIT __, __, 780 F. Supp. 2d 1357, 1371–72 (2011).

[5] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

Mot. for Stay 3. Nachi consented to the joint motion. *Id*. at 6. Defendant and defendant-intervenor oppose the proposed stay. Def.'s Opp'n to Pls.' Mot. to Stay (May 23, 2012), ECF No. 183 ("Def.'s Opp'n"); The Timken Co.'s Resp. in Opp'n to JTEKT, NTN, NPB, and NSK's Joint Mot. to Stay Proceedings (May 23, 2012), ECF No. 184 ("Def.-intervenor's Opp'n").

For the reasons discussed herein, the court will grant the motion for a stay and will hold in abeyance any ruling on the motions for reconsideration or relief. The pending litigation in the Court of Appeals is likely to affect the court's disposition of the claim of the plaintiffs challenging the Department's zeroing practice in the subject review. Although the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel*, both cases raise the same general issue, *i.e.*, the permissibility under current law of the Department's application of the zeroing methodology in an administrative review. A stay at this juncture, therefore, will serve the interest of judicial economy and conserve the resources of the parties. Moreover, defendant and defendant-intervenor have failed to show, or even allege, that the proposed stay would cause harm.

"[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). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

In opposing the motion for a stay, defendant and defendant-intervenor argue that the zeroing issue being examined in *Union Steel* is different than the claim in this case. They assert that at the time of the administrative review underlying this case, Commerce did not yet have different interpretations of 19 U.S.C. 1677(35) in investigations using average-to-average comparisons and administrative reviews using average-to-transaction comparisons.[6] Def.'s Opp'n 1–2;

[6] After a World Trade Organization ("WTO") decision holding that zeroing in antidumping investigations was contrary to U.S. international obligations, Commerce abandoned zeroing in such proceedings, effective February 22, 2007. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Jan. 26, 2007). The final results of the appealed annual review in this consolidated action were issued on July 14, 2006.

Def.-intervenor's Opp'n 3–4. As such, at the time of the final results, defendant-intervenor argues, Commerce could not have provided an explanation for differing interpretations of the statutory provision. Def-intervenor's Opp'n 4. The court is not persuaded by this argument. It is undisputed that Commerce used its zeroing methodology in the subject review. *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005*, at 11–12 (July 14, 2006). Because the zeroing issue raised by this case involves the statutory interpretation of the U.S. antidumping laws, *Union Steel* is likely to be pertinent to the court's disposition of the zeroing issue in this case and, in turn, to the court's ruling on defendant and defendant-intervenor's motions for reconsideration or relief.

Although acknowledging that ordering a stay is a matter for the court's exercise of discretion, Def.'s Opp'n 2, defendant also argues that the "plaintiffs are not entitled to a stay because they have not satisfied their burden" nor will a stay "benefit the public interest." *Id*. The Government submits that the movants "have neither established–nor, in fact, even alleged–a 'clear case of hardship or inequity in being required to go forward' with the litigation." *Id*. at 4 (citing *Landis*, 299 U.S. at 255). Defendant misconstrues the applicable standard. A 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 (emphasis added). However, the court fails to *see* what harm would accrue to defendant should the stay be ordered, and defendant, in opposing the motion, does not identify any such harm, *see* Def.'s Opp'n 3–4. Defendant-intervenor does not argue that a stay will cause it harm, and the court perceives no harm that would accrue to defendant-intervenor should the stay be ordered.

Defendant argues, further, that a stay is inappropriate because this case involves another issue, NTN's proposal for Commerce to incorporate additional design-type categories into its model-match methodology, that has no connection to the Department's use of the zeroing methodology. *Id*. at 5. Defendant contrasts the current action with that of *SKF v. United States*, Court No. 11–0343, which was stayed pending appeal in *Union Steel*, but whose "other issue besides zeroing . . . a challenge to Commerce's policy of issuing liquidating instructions 15 days after publication of a final results of review . . . cannot

result in relief other than an advisory opinion." *Id*. Defendant, however, fails to identify any harm that will result to it from a delay in the adjudication of the model-match issue.

In conclusion, *Union Steel* is likely to affect the court's disposition of the challenge to the Department's zeroing methodology and the pending motions for reconsideration or relief. The stay sought by the plaintiffs challenging zeroing is warranted, as it will serve the dual interests of judicial economy and conservation of the parties' resources. No showing of harm resulting from the proposed stay has been made. The court, therefore, will grant the joint motion for stay while holding in abeyance the other motions currently before the court.

ORDER

Upon consideration of the Joint Motion for Stay of Proceedings Pending Appeal in *Union Steel v. United States* ("Joint Motion for Stay"), as filed on May 4, 2012 by plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"), NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, NTN-Bower Corporation, and NTN Driveshaft, Inc. (collectively, "NTN"), FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"), and NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"), the motions in opposition filed by the United States and defendant-intervenor The Timken Company ("Timken"), and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Joint Motion for Stay be, and hereby is, GRANTED; and it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: June 4, 2012
New York, New York

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

Slip Op. 12–73

JTEKT CORPORATION and KOYO CORPORATION OF U.S.A., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol Court No. 07–00377

[Granting motion for stay of proceedings pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: June 4, 2012

Neil R. Ellis and *Jill Caiazzo*, Sidley Austin, LLP, of Washington, DC, for plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A..

Kevin M. O'Brien and *Christine M. Streatfeild*, Baker & McKenzie, LLP, of Washington, DC, and *Diane A. MacDonald*, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs NTN Bower Corporation, NTN Corporation, NTN Bearing Corporation of America, NTN-BCA Corporation, NTN Driveshaft, Inc., and American NTN Bearing Manufacturing Corp..

David A. Riggle, Riggle and Craven, of Chicago, IL, for plaintiff Asahi Seiko Co., Ltd..

Kevin M. O'Brien and *Kevin J. Sullivan*, Baker & McKenzie, LLP, of Washington, DC, for plaintiffs Nippon Pillow Block Company Ltd. and FYH Bearing Units USA, Inc..

Alexander H. Schaefer, Crowell & Moring, LLP, of Washington, DC, for plaintiffs NSK Ltd., NSK Corporation, and NSK Precision America.

Nausheen Hassan and *Greyson L. Bryan*, O'Melveny & Myers, LLP, of Washington, DC, for plaintiffs Nachi America, Inc., Nachi Fujikoshi Corporation, and Nachi Technology, Inc..

Alexander H. Schaefer and *Daniel J. Cannistra,* Crowell & Moring, LLP, of Washington, DC, for plaintiffs Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc..

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Deborah R. King*, Office of the Chief Counsel for Import Administration, Department of Commerce.

Geert M. De Prest, *Lane S. Hurewitz*, *Terence P. Stewart*, and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor the Timken Company.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

In this consolidated action, plaintiffs JTEKT Corporation[1] and Koyo Corporation of U.S.A. (collectively, "JTEKT"), Asahi Seiko Co.,

[1] JTEKT Corporation is the successor-in-interest to Koyo Seiko Company, Ltd.. *Notice of Final Results of Antidumping Duty Changed-Circumstances Review: Ball Bearings & Parts Thereof from Japan*, 71 Fed. Reg. 26,452, 26,452–53 (May 5, 2006).

Ltd. ("Asahi"), Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc. (collectively, "Aisin"), Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc. (collectively, "Nachi"), FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"), American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"), and NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"), contest an antidumping determination ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). Specifically, they challenge certain aspects of the final determination that Commerce issued to conclude the seventeenth administrative reviews of antidumping duty orders covering ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom made during the period of May 1, 2005 through April 30, 2006. *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053 (Oct. 12, 2007) ("*Final Results*"). Five plaintiffs –JTEKT, NPB, NTN, Aisin, and Nachi–asserted claims challenging the application of Commerce's "zeroing"[2] methodology to calculate the dumping margin in the review of the order pertaining to Japan. The plaintiffs challenging zeroing claim the Department's use of the zeroing methodology in an administrative review violates the U.S. antidumping laws and is inconsistent with international obligations of the United States.

In response to the claims of the plaintiffs challenging zeroing, the court ordered Commerce on remand to alter the decision to apply its zeroing methodology or to set forth an explanation[3] of how the language of 19 U.S.C. § 1677(35) as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and

[2] The U.S. Department of Commerce ("Commerce" or the "Department") applied its "zeroing" methodology in the seventeenth administrative reviews, under which it assigned to U.S. sales made above normal value a dumping margin of zero, instead of a negative margin, when calculating weighted-average dumping margins. *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom for the Period of Review May 1, 2005, through April 30, 2006*, at 8 (Oct. 4, 2007).

[3] In *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) and *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371–73 (Fed. Cir. 2011), the Court of Appeals for the Federal Circuit ("Court of Appeals") held that the final results of an administrative review in which zeroing was used must be remanded for an explanation of the Department's interpreting the language of 19 U.S.C. § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews.

the opposite way with respect to administrative reviews. *JTEKT Corp. v. United States*, 35 CIT __, 768 F. Supp. 2d 1333, 1364 (2011).[4]

Before the court is a joint motion of plaintiffs JTEKT, NTN, NPB, and NSK to stay this case pending the final disposition of *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012) ("*Union Steel*"). Joint Mot. for Stay of Proceedings Pending Appeal in *Union Steel v. United States* (May 4, 2012), ECF No. 168 ("Joint Mot. for Stay"). *Union Steel* involves the question of the legality of the Department's zeroing methodology as applied to an administrative review of an antidumping duty order. *Union Steel*, 36 CIT __, __, Slip Op. 12–24, at 2. The judgment entered by the Court of International Trade in that case affirming the use of zeroing is now on appeal before the Court of Appeals.[5] Joint Mot. for Stay 3. Nachi has consented to the proposed stay. *Id*. at 6. Defendant and defendant-intervenor oppose it. Def.'s Opp'n to Pls.' Mot. to Stay (May 23, 2012), ECF No. 169 ("Def.'s Opp'n"); The Timken Co.'s Resp. in Opp'n to JTEKT, NTN, NPB, and NSK's Joint Mot. to Stay Proceedings (May 23, 2012), ECF No. 170 ("Def.-intervenor's Opp'n").

For the reasons discussed herein, the court will grant the motion for a stay. The pending litigation in the Court of Appeals is likely to affect the court's disposition of the claims of the plaintiffs challenging the Department's zeroing practice. While the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel*, both cases raise the same general issue, *i.e.*, the permissibility under current law of the Department's application of the zeroing methodology in an administrative review. A stay at this juncture, therefore, will serve the interest of judicial economy and conserve the resources of the parties. Moreover, defendant and defendant-intervenor have failed to show, or even allege, that the proposed stay would cause harm.

"[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 liti-

[4] The court's remand order also instructed the Department to reconsider its model-match methodology with respect to the challenge of JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") to the third contested match, the proposal by FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB") to include additional physical characteristics, and the proposal by American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN") to incorporate additional design-type categories and explain the rejection of that proposal with respect to individual bearings described in more than one design type. *JTEKT Corp. v. U.S.*, 35 CIT __, __, 768 F. Supp. 2d 1333, 1364 (2011).

[5] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

gants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

Although acknowledging that ordering a stay is a matter for the court's exercise of discretion, Def.'s Opp'n 2, defendant argues that "plaintiffs are not entitled to a stay because they have not satisfied their burden to show that they will suffer clear hardship by proceeding with the litigation." *Id*. Defendant submits that "[p]laintiffs shift the legal standard by suggesting that a stay would not harm the defendant or defendant-intervenor" when it is the movants who must show that they "will suffer hardship–economic harm, legal prejudice, or inequality–by proceeding with litigation." *Id*. at 4. Defendant misconstrues the applicable standard. A 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 (emphasis added). However, the court fails to *see* what harm would accrue to defendant should the stay be ordered, and defendant, in opposing the motion, does not identify any such harm, *see* Def.'s Opp'n 4–5.

Defendant also argues that a stay is inappropriate because "in addition to Commerce's zeroing practice, the Court must resolve a number of other issues" relating to the Department's model-match methodology, whereas in other cases cited by the movants that have been stayed, such as *SKF v. United States*, Court No. 11–0343, "the only other issue besides zeroing is a challenge to Commerce's policy of issuing liquidating instructions 15 days after publication of [the] final results of a review, an issue that cannot result in actual relief other than an advisory opinion." *Id*. at 4–5. Defendant, however, fails to identify any harm that will result to it from a delay in the court's adjudication of the other issues.

Defendant-intervenor makes the argument that unlike other cases stayed by this court pending the resolution of *Union Steel*, here "the parties have completed briefing, have commented on the [first] remand results,[6] and are awaiting judgment of the court only." Def-intervenors' Opp'n 3. The stage of this litigation does not preclude a stay, given that defendant-intervenor has also failed to identify any

[6] Commerce's First Remand Redetermination resulted from its voluntary remand of an issue affecting the constructed export price ("CEP") for certain U.S. sales of merchandise by Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc. (collectively, "Aisin"). *JTEKT Corp.*, 35 CIT at __, 768 F. Supp. 2d at 1362–63.

harm that would accrue from a delay in the court's judgment. As the court's disposition of the statutory challenge to the Department's zeroing practice is likely to be affected by *Union Steel*, it is in all parties' best interest if the court does not undertake further adjudication before the final resolution of that case.

In conclusion, the stay sought by the plaintiffs challenging zeroing serves the interests of judicial economy and conservation of the parties' resources. No showing of harm resulting from the proposed stay has been made. The court, therefore, will grant the pending motion.

ORDER

Upon consideration of the Joint Motion for Stay of Proceedings Pending Appeal in *Union Steel v. United States* ("Joint Motion for Stay"), as filed on May 4, 2012 by plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"), NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, NTN-Bower Corporation, and NTN Driveshaft, Inc. (collectively, "NTN"), FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"), and NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"), the motions in opposition filed by the United States and defendant-intervenor The Timken Company ("Timken"), and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Joint Motion for Stay be, and hereby is, GRANTED; and it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: June 4, 2012
New York, New York

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

Slip Op. 12–74

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF INDUSTRIE S.P.A., SOMECAT S.P.A., SKF (U.K.) LIMITED, and SKF GMBH, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00284

[Granting motion for stay of proceedings pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: June 4, 2012

Alice A. Kipel, *Herbert C. Shelley*, and *Laura R. Ardito*, Steptoe & Johnson LLP, of Washington, DC, for plaintiffs.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, Department of Commerce.

Geert M. De Prest, *Lane S. Hurewitz*, *Terence P. Stewart*, and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF Industrie S.p.A., Somecat S.p.A., SKF (U.K.) Limited, and SKF GmbH (collectively, "SKF") contest an antidumping determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). Specifically, they challenge certain aspects of the final determination that Commerce issued to conclude the twentieth administrative reviews of antidumping orders on imports of ball bearings and parts thereof (the "subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom for the period May 1, 2008 through April 30, 2009. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("*Final Results*"). Plaintiffs challenge, *inter alia*, the Department's use of

"zeroing" in the reviews.[1] Compl. ¶¶ 33–34 (Feb. 1, 2011), ECF No. 66.[2] They claim that "Commerce erred by setting to zero, all 'negative margins,' prior to calculating the weighted-average margins for SKF" and that Commerce "failed to demonstrate that [this] is a reasonable interpretation of the statute." *Id*. ¶ 33. Plaintiffs also allege that the Department erred "by not interpreting the U.S. statute in a manner consistent with U.S. international obligations under the World Trade Organization ('WTO') Antidumping Agreement." *Id*.

Before the court is plaintiffs' motion to stay this case pending the final disposition of *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012) ("*Union Steel* "). Mot. to Stay Proceedings (Mar. 22, 2012), ECF No. 61 ("Mot. to Stay"). *Union Steel* involves the question of the legality of the Department's zeroing methodology as applied to an administrative review of an antidumping duty order. *Union Steel*, 36 CIT __, __, Slip Op. 12–24, at 2. The judgment entered by the Court of International Trade in that case is now on appeal before the United States Court of Appeals for the Federal Circuit ("Court of Appeals").[3] Defendant United States and defendant-intervenor the Timken Company ("Timken") oppose the proposed stay. Def.'s Opp'n to Pls.' Mot. to Stay (Mar. 29, 2012), ECF No. 62 ("Def.'s Opp'n"); The Timken Co.'s Resp. in Opp'n to SKF's Mot. to Stay Proceedings (Mar. 29, 2012), ECF No. 63 ("Def-intervenor's Opp'n").

For the reasons discussed herein, the court will grant the motion to stay. In summary, the pending litigation in the Court of Appeals is likely to affect the disposition of plaintiffs' claim challenging the Department's zeroing practice. Although the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel*, both cases raise the same general issue, *i.e.*, whether the Department's application of the zeroing methodology in an administrative review of an antidumping duty order is permissible under the antidumping law. A stay, therefore, will serve the interest of judicial economy and conserve the resources of the parties. More-

[1] As defined by the Court of Appeals for the Federal Circuit in *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) and in a previous decision, *Dongbu Steel Co. Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011), "zeroing is the practice whereby the values of positive dumping margins are used in calculating the overall margin, but negative dumping margins are included in the sum of margins as zeroes." *JTEKT Corp.*, 642 F.3d. at 1383–85 (citing *Dongbu*, 635 F.3d at 1366).

[2] Plaintiffs also challenge the policy of the U.S. Department of Commerce ("Commerce" or the "Department") of issuing liquidating instructions 15 days after the publication of the notice of final results. Compl. ¶¶ 14–18 (Feb. 1, 2011), ECF No. 66.

[3] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

over, defendant and defendant-intervenor have failed to show, or even allege, that the proposed stay would cause harm.

"[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). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

Defendant and defendant-intervenor argue that a stay is not warranted because the zeroing issues in this case do not match and will not be resolved by *Union Steel*. Def's Opp'n 3; Def-intervenors' Opp'n 3–4. They characterize the pending issue related to zeroing as a question of whether the plaintiffs exhausted their administrative remedies before the agency, not whether Commerce's interpretation of the statute is reasonable. *Id*. The record reveals that SKF raised an issue pertaining to zeroing in its case brief before the Department. SKF General Issues Case Brief, A-100–001, at 8–20 (Jun. 3, 2010) (Admin R. Doc. No. 26) (asserting that "[i]n the Preliminary Results, Commerce acted contrary to law in employing the methodology known as 'zeroing.'"). Defendant and defendant-intervenor argue that SKF, in challenging zeroing before the agency, did not raise the statutory construction issue that is before the Court of Appeals, which defendant submits is the "conflict in Commerce's interpretations of 19 U.S.C. § 1677(35) in the contexts of administrative reviews and investigations." Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. 15 (Dec. 6, 2011), ECF No. 54. *See also* Resp. Br. of the Timken Co. Opposing the R. 56 Mot. of SKF USA, Inc. et al. 6 (Dec. 6, 2011), ECF No. 55 (stating that "[i]n [the case] brief, SKF did not argue that Commerce should explain the difference between its interpretation of the statute in investigations (modified in response to adverse WTO decisions) and its interpretation of the statute in reviews."). Defendant-intervenor submits that "the Court could thus dispose of SKF's zeroing argument without addressing the need for additional explanations." Def-intervenors' Opp'n 4.

The Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). The Court of International Trade has discretion with respect to whether to require exhaustion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir.2007) (stating that "applying

exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade"). The exhaustion requirement has several recognized exceptions. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___, ___, 601 F. Supp. 2d 1370, 1377 (2009) (indicating situations where waiver of the exhaustion requirement has been recognized as appropriate). The court does not consider it a prudent use of the parties' and its own resources to decide, at this time, the exhaustion issues raised by the defendant and defendant-intervenor. It is possible that the outcome of the *Union Steel* litigation will make it unnecessary to reach those issues. Therefore, the court does not consider the exhaustion issues presented by this case to be a sufficient ground upon which to deny the pending motion to stay.

Although acknowledging that ordering a stay is a matter for the court's exercise of discretion, Def.'s Opp'n 2, defendant also argues that SKF fails to "satisf[y] its burden to show that it will suffer clear hardship by proceeding with the litigation." *Id*. According to defendant, "SKF shifts the legal standard by suggesting that a stay would not harm the defendant or defendant-intervenor." *Id*. at 3. Defendant submits that it is the movant who must show that "it will suffer hardship–economic harm, legal prejudice or inequity–by proceeding with litigation." *Id*. Defendant misconstrues the applicable standard. A 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 (emphasis added). The court fails to *see* what harm would accrue to defendant should the stay be ordered. In opposing the motion, defendant fails to identify any such harm. *See* Def.'s Opp'n 4–5. Nor does the court *see* any prospect that defendant-intervenor would be harmed by the proposed stay.

Finally, defendant argues that a stay is inappropriate because this case involves a second issue, plaintiffs' challenge to Commerce's 15-day liquidation policy, on which the court is briefed and the outcome of which is "not dependent on . . . *Union Steel*." Def.'s Opp'n 4. Defendant, however, fails to identify any particular harm that will result to it from a delay in the court's adjudication of this claim.

In conclusion, the stay sought by plaintiffs will serve the interests of judicial economy and conservation of the parties' resources. No showing of harm resulting from the proposed stay has been made by defendant or defendant-intervenor. The court, therefore, will grant the pending motion.

ORDER

Upon consideration of the Motion to Stay Proceedings ("Motion to Stay"), as filed March 22, 2012 by SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF Industrie S.p.A., Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited (collectively, "SKF"), the motions in opposition filed by the United States and defendant-intervenor The Timken Company ("Timken"), and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Motion to Stay be, and hereby is, GRANTED; and it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: June 4, 2012
New York, New York

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

Slip Op. 12–75

NTN BEARING CORPORATION OF AMERICA, NTN CORPORATION, NTN BOWER CORPORATION, AMERICAN NTN BEARING MANUFACTURING CORP., NTN-BCA CORPORATION, and NTN DRIVESHAFT, INC., Plaintiffs, and JTEKT CORPORATION, AND KOYO CORPORATION OF U.S.A., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00286

[Granting motion for stay of proceedings pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: June 4, 2012

Kevin M. O'Brien and *Christine M. Streatfeild*, Baker & McKenzie, LLP, of Washington, DC, and *Diane A. MacDonald*, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs.

Neil R. Ellis and *Jill Caiazzo*, Sidley Austin, LLP, of Washington, DC, for plaintiff-intervenors.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Deborah R. King*, Office of the Chief Counsel for Import Administration, Department of Commerce.

Geert M. De Prest, *Terence P. Stewart*, *Lane S. Hurewitz* and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

Plaintiffs NTN Corporation, NTN Bearing Corporation of America, NTN-Bower Corporation, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, and NTN Driveshaft, Inc. (collectively, "NTN" or "plaintiffs") contest an antidumping determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). Specifically, they challenge certain aspects of the final determination that Commerce issued to conclude the twentieth administrative review of antidumping duty orders covering ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom. *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010). Joined by plaintiff-intervenors JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT" or "plaintiff-intervenors"),[1] plaintiffs challenge, *inter alia*, Commerce's use of "zeroing"[2] to calculate the dumping margin for U.S. sales of the subject merchandise from Japan. Pls.' Am. Compl. ¶¶ 19–26 (Feb. 1, 2011), ECF No. 66.[3] Citing determinations of the World Trade Organization ("WTO"), plaintiffs claim that "the Department's [zeroing] methodology fails to comply with U.S. law and U.S. obligations under international law." *Id*.

Before the court is the motion of plaintiffs and plaintiff-intervenors to stay this case pending the final disposition of *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012) ("*Union Steel* "). Pls.' & Pl.-Intervenors' Partial Consent Mot. for Stay of Proceedings Pend-

[1] On October 12, 2010, the court granted the consent motion of JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") to intervene in this action as a matter of right. Order (Oct. 12, 2010), ECF No. 34.

[2] As defined by the Court of Appeals for the Federal Circuit in *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) and in a previous decision, *Dongbu Steel Co. Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011), "zeroing is the practice whereby the values of positive dumping margins are used in calculating the overall margin, but negative dumping margins are included in the sum of margins as zeroes." *JTEKT Corp.*, 642 F.3d. at 1383–85 (citing *Dongbu*, 635 F.3d at 1366).

[3] Plaintiffs bring two other claims in this action. They contest the application in the review of a U.S. Department of Commerce policy of issuing duty assessment and liquidation instructions to U.S. Customs and Border Protection ("Customs" or "CBP") fifteen days after the publication of the final results of the administrative reviews. Pls.' Am. Compl. (Feb. 1, 2011), ECF No. 66 ¶¶ 27–32. Joined by plaintiff-intervenors, they also seek correction of what they claim is a ministerial error affecting the calculation of their credit expenses. *Id*. ¶¶ 33–35.

ing Appeal in *Union Steel v. United States* (Apr. 17, 2012), ECF No. 81 ("Pls.' & Pl.-Intervenors' Partial Consent Mot."). *Union Steel* involves the question of the legality of the Department's zeroing methodology as applied to an administrative review of an antidumping duty order. *Union Steel*, 36 CIT __, __, Slip Op. 12–24, at 2. The judgment the Court of International Trade entered in that case is now on appeal before the United States Court of Appeals for the Federal Circuit ("Court of Appeals").[4] Defendant-intervenor the Timken Company ("Timken") consents to the motion. Pls.' & Pl.-Intervenors' Partial Consent Mot. 6. Defendant United States opposes the proposed stay. Def.'s Opp'n to Pls.' & Pl.-Intervenors' Mot. for Stay of Proceedings Pending Appeal in *Union Steel v. United States* (May 1, 2012), ECF No. 83 ("Def.'s Opp'n").

For the reasons discussed herein, the court will grant the motion for a stay. In summary, the pending litigation in the Court of Appeals is likely to affect the disposition of plaintiffs' claim challenging the Department's zeroing practice. Although the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel*, both cases raise the same general issue, *i.e.*, whether the Department's application of the zeroing methodology in an administrative review of an antidumping duty order is permissible under the antidumping law. A stay, therefore, will serve the interest of judicial economy and conserve the resources of the parties. Moreover, defendant has failed to show, or even allege, that the proposed stay would cause it harm.

"[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). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). Although acknowledging that ordering a stay is a matter for the court's exercise of discretion, Def.'s Opp'n 2, defendant raises three arguments in opposing the motion for a stay.

Defendant argues, first, that the movants fail to "satisf[y] their burden to show that they will suffer clear hardship by proceeding with the litigation." *Id*.. According to defendant, "NTN and JTEKT shift the legal standard by suggesting that a stay would not harm the

[4] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

defendant or defendant intervenor"; defendant submits that, instead, it is the movants who must show "they will suffer hardship–economic harm, legal prejudice or inequity–by proceeding with litigation." *Id*. at 3. But it is defendant who misconstrues the standard. Although a 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, the court fails to *see* what harm would accrue to defendant should the stay be ordered. In opposing the motion, defendant fails to identify any such harm. *See* Def.'s Opp'n 3–4. As defendant-intervenor has consented to the motion, Pls.' & Pl.-Intervenors' Partial Consent Mot. 6, the court sees no prospect that any party will be harmed by the proposed stay.

Second, defendant argues that "the pending issues in this case do not match and will not be resolved by the litigation in *Union Steel* " because "the pending issue that is relevant to zeroing is whether NTN and JTEKT exhausted their administrative remedies before the agency." Def.'s Opp'n 4. The record reveals that NTN raised an issue pertaining to zeroing in its case brief before the Department. Case Brief of NTN: Japan-specific Segment 5, A-588–804, at 5 (Jun. 1, 2007) (Admin R. Doc. No. 492). It also reveals that JTEKT did not file an administrative case brief. As to NTN's obligation to exhaust administrative remedies, defendant argues that NTN, in challenging zeroing below, did not raise the statutory construction issue now before the Court of Appeals, which defendant characterizes as "whether Commerce may interpret 19 U.S.C. § 1677(35) to allow the use of zeroing in the underlying administrative review involving average-to-transaction comparisons while Commerce is not using zeroing in original investigations involving an average-to-average comparison methodology." Def.'s Opp'n to Pls.' and Pl.-Intervenors' Mots. for J. on the Agency R. 2 (Mar. 16, 2012), ECF No. 76.

The Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). The Court of International Trade has discretion with respect to whether to require exhaustion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir.2007) (stating that "applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade"). The exhaustion requirement has several recognized exceptions. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___, ___, 601 F. Supp. 2d 1370, 1377 (2009) (indicating situations where waiver of the exhaustion requirement has been recognized as appropriate). The court does not con-

sider it a prudent use of the parties' resources and its own resources to decide, at this time, the exhaustion issues raised by defendant. It is possible that the outcome of the *Union Steel* litigation will make it unnecessary to reach those issues. Therefore, the court does not consider the exhaustion issues presented by this case to be a sufficient ground upon which to deny the pending motion for a stay.

Finally, defendant argues that a stay is inappropriate because this case involves claims other than those pertaining to the Department's use of the zeroing methodology. Def.'s Opp'n 5. Defendant, however, fails to identify any harm that will result to it from a delay in the court's adjudication of those other claims.

In conclusion, the stay sought by plaintiffs and plaintiff-intervenors will serve the interests of judicial economy and conservation of the parties' resources. No showing of harm resulting from the proposed stay has been made. The court, therefore, will grant the pending motion.

ORDER

Upon consideration of the Partial Consent Motion for Stay of Proceedings Pending Appeal in *Union Steel v. United States* ("Motion for Stay"), as filed April 17, 2012 by NTN Corporation, NTN Bearing Corporation of America, NTN-Bower Corporation, American NTN Bearing Manufacturing Corporation, NTN-BCA Corporation, and NTN Driveshaft, Inc. (collectively, "NTN") and JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"), the motion in opposition filed by the United States, the consent of defendant-intervenor, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Motion for Stay be, and hereby is, GRANTED; and it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: June 4, 2012
New York, New York

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

Slip Op. 12–76

NSK CORPORATION, NSK PRECISION AMERICA, INC., and NSK LTD., Plaintiffs, and JTEKT CORPORATION AND KOYO CORPORATION OF U.S.A., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00288

[Granting motion for stay of proceedings pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: June 4, 2012

Alexander H. Schaefer and *Robert A. Lipstein*, Crowell & Moring, LLP, of Washington, DC, for plaintiffs.

Neil R. Ellis and *Jill Caiazzo*, Sidley Austin, LLP, of Washington, DC, for plaintiff-intervenors.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Deborah R. King*, Office of the Chief Counsel for Import Administration, Department of Commerce.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Deborah R. King*, Office of the Chief Counsel for Import Administration, Department of Commerce.

Geert M. De Prest, *Terence P. Stewart*, *Lane S. Hurewitz* and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

Plaintiffs NSK Corporation, NSK Precision America, Inc., and NSK Ltd. (collectively, "NSK" or "plaintiffs") contest an antidumping determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"). Specifically, they challenge certain aspects of the final determination that Commerce issued to conclude the twentieth administrative review of antidumping duty orders covering ball bearings and parts thereof (the "subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010). Joined by plaintiff-intervenors JTEKT

Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT" or "plaintiff-intervenors"),[1] plaintiffs bring a single claim challenging as unlawful the Department's use of "zeroing" to calculate a weighted-average dumping margin, under which U.S. sales of subject merchandise from Japan at prices above normal value are deemed to have individual dumping margins of zero rather than negative margins. Compl. ¶¶ 10–12 (Sept. 23, 2010), ECF No. 7. NSK argues that zeroing in an administrative review violates the U.S. antidumping laws and is inconsistent with international obligations of the United States. *Id*. ¶ 13.

Before the court is plaintiffs' and plaintiff-intervenors' joint motion to stay this case pending the final disposition of *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012) ("*Union Steel* "). Pls.' Joint Mot. for Stay of Proceedings Pending Appeal in *Union Steel v. United States* (May 2, 2012), ECF No. 54 ("Pls.' Joint Mot."). *Union Steel* involves the question of the legality of the Department's zeroing methodology as applied to an administrative review of an antidumping duty order. *Union Steel*, 36 CIT __, __, Slip Op. 12–24, at 2. The judgment entered by the Court of International Trade in that case is now on appeal before the United States Court of Appeals for the Federal Circuit ("Court of Appeals").[2] Defendant United States and defendant-intervenor the Timken Company ("Timken") oppose the proposed stay. Def.'s Opp'n to Pls.' and Pl.-Intervenors' Mot. to Stay (May 21, 2012), ECF No. 55 ("Def.'s Opp'n"); The Timken Co.'s Resp. in Opp'n to NSK and JTEKT's Joint Mot. to Stay Proceedings (May 21, 2012), ECF No. 56 ("Def-Intervenor's Opp'n").

For the reasons discussed herein, the court will grant the motion for a stay. In summary, the pending litigation in the Court of Appeals is likely to affect the disposition of plaintiffs' claim challenging the Department's zeroing practice. While the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel*, both cases raise the same general issue of whether the Department's application of the zeroing methodology in an administrative review of an antidumping duty order is lawful. A stay, therefore, will serve the interest of judicial economy and conserve the resources of the parties. Moreover, defendant and defendant-intervenor have failed to show, or even allege, that the proposed stay would cause them harm.

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[1] On November 30, 2010, the court granted the motion of JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") to intervene in this action as a matter of right. Order (Nov. 30, 2010), ECF No. 32.

[2] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

"[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). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

In opposing the motion for a stay, defendant and defendant-intervenor argue that the issue before the court is whether NSK exhausted its administrative remedies before the agency, not whether Commerce reasonably interpreted the antidumping law to permit zeroing in the twentieth administrative review. Def.'s Opp'n 3–4; Def-Intervenor's Opp'n 4. The record reveals that NSK raised an issue pertaining to zeroing in its case brief before the Department. Case Brief of NSK, A-100–001, at 1–5 (Jun. 3, 2010) (Admin R. Doc. No. 28). As to NSK's obligation to exhaust administrative remedies, defendant and defendant-intervenor argue that NSK, in challenging zeroing before the agency, did not raise the statutory interpretation issue now before the Court of Appeals which they characterize as an inconsistent interpretation of 19 U.S.C. § 1677(35) in investigations and administrative reviews. Def.'s Opp'n to Pls.' and Pl-Intervenors' Mots. for J. upon the Agency R. 8–9 (Nov. 1, 2011), ECF No. 46; Resp. Br. of the Timken Co. Opposing the R. 56.2 Mots. of NSK Ltd., et. al., and JTEKT Corporation, et. al. 6–7 (Nov. 7, 2011), ECF No. 47.

The Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). In trade cases, the court has discretion with respect to whether to require exhaustion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir.2007) (stating that "applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade"). The exhaustion requirement has several recognized exceptions. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___, ___, 601 F. Supp. 2d 1370, 1377 (2009) (indicating situations where waiver of the exhaustion requirement has been recognized as appropriate). Because it is possible that the outcome of the *Union Steel* litigation will make reaching the exhaustion issues raised by defendant and defendant-intervenor unnecessary, the court does not consider it a prudent use of the parties' resources and its own resources to decide the exhaustion issues at this time. These issues, therefore, are an insufficient basis upon which to deny the pending motion for a stay.

Although acknowledging that ordering a stay is a matter for the court's exercise of discretion, Def.'s Opp'n 2, defendant argues that "NSK and JTEKT are not enntitled to a stay because they have not satisfied their burden to show that they will suffer clear hardship by proceeding with the litigation." *Id*. at 1–2. The Government submits that "NSK and JTEKT shift the legal standard by suggesting that a stay would not harm the defendant or defendant intervenor" when it is the movants who must show that "they will suffer hardship--economic harm, legal prejudice or inequity--by proceeding with litigation." *Id*. at 3. Defendant misconstrues the standard. A 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. However, the court fails to *see* what harm would accrue to defendant should the stay be ordered, and defendant, in opposing the motion, does not identify any such harm, *see* Def.'s Opp'n 3–4.

Defendant-intervenor makes the argument that unlike other cases stayed by this court pending the resolution of *Union Steel*, this case is under submission and awaiting the court's judgment. The advanced stage of this litigation does not preclude a stay, and defendant-intervenor has failed to identify any harm that a stay would cause.

In conclusion, the stay sought by plaintiffs and plaintiff-intervenors serves the interests of judicial economy and conservation of the parties' resources. No showing of harm resulting from the proposed stay has been made by defendant or defendant-intervenor. The court, therefore, will grant the pending motion.

ORDER

Upon consideration of Plaintiffs' Joint Motion for Stay of Proceedings Pending Appeal in *Union Steel v. United States* ("Motion for Stay"), as filed on May 2, 2012 by NSK Corporation, NSK Precision America, Inc., and NSK Ltd. (collectively, "NSK") and JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT"), the motions in opposition filed by the United States and defendant-intervenor the Timken Company, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Motion for Stay be, and hereby is, GRANTED; and it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: June 4, 2012
New York, New York

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

Slip Op. 12–77

NSK BEARINGS EUROPE LTD., NSK EUROPE LTD., and NSK CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 10–00289

[Granting motion for stay of proceedings pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: June 4, 2012

Alexander H. Schaefer and *Robert A. Lipstein*, Crowell & Moring, LLP, of Washington, DC, for plaintiffs.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Claudia Burke*, Assistant Director. Of counsel on the briefs was *Shana Hofstetter*, Office of the Chief Counsel for Import Administration, Department of Commerce.

Geert M. De Prest, *Terence P. Stewart*, *Lane S. Hurewitz* and *William A. Fennell*, Stewart and Stewart, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

INTRODUCTION

Plaintiffs NSK Bearings Europe, Ltd., NSK Europe LTD., and NSK Corporation (collectively, "NSK" or "plaintiffs") contest an antidumping determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") that the Department issued to conclude the twentieth administrative review of antidumping duty orders covering ball bearings and parts thereof (the "subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010). Plaintiffs' complaint contains a single claim challenging Commerce's use of "zeroing" in the review of the order, whereby U.S. sales of subject merchandise from the United

Kingdom above normal value are assigned a dumping margin of zero, instead of a negative margin, in the calculation of the weighted-average dumping margins. Compl. ¶ 10 (Sept. 23, 2010), ECF No. 6. NSK argues that zeroing in an administrative review violates the U.S. antidumping laws and is inconsistent with international obligations of the United States. *Id*. ¶¶ 11–13.

Before the court is plaintiffs' motion to stay this case pending the final disposition of *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012) ("*Union Steel* "). Pls.' Mot. for Stay of Proceedings Pending Appeal in *Union Steel v. United States* (May 2, 2012), ECF No. 45 ("Pls.' Mot."). *Union Steel* involves the question of the legality of the Department's zeroing methodology as applied to an administrative review of an antidumping duty order. *Union Steel*, 36 CIT __, __, Slip Op. 12–24, at 2. The judgment entered by the Court of International Trade in that case is now on appeal before the United States Court of Appeals for the Federal Circuit ("Court of Appeals").[1] Defendant United States and defendant-intervenor the Timken Company ("Timken") oppose the proposed stay. Def.'s Opp'n to Pls.' Mot. to Stay (May 21, 2012), ECF No. 46 ("Def.'s Opp'n"); The Timken Co.'s Resp. in Opp'n to NSK's Mot. to Stay Proceedings (May 21, 2012), ECF No. 47 ("Def-Intervenor's Opp'n").

For the reasons discussed herein, the court will grant the motion for a stay. In summary, the pending litigation in the Court of Appeals is likely to affect the disposition of plaintiffs' claim challenging the Department's zeroing practice. While the case at bar concerns a different antidumping duty order and administrative review than are involved in *Union Steel*, both cases raise the same general issue of whether the Department's application of the zeroing methodology in an administrative review of an antidumping duty order is lawful. A stay, therefore, will serve the interest of judicial economy and conserve the resources of the parties. Moreover, defendant and defendant-intervenor have failed to show, or even allege, that the proposed stay would cause them harm.

"[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). The decision when and how to stay a proceeding rests "within the sound

[1] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

In opposing the motion for a stay, defendant and defendant-intervenor argue that the issue before the court is whether NSK exhausted its administrative remedies before the agency, not whether Commerce reasonably interpreted the antidumping law to permit zeroing in the twentieth administrative review. Def.'s Opp'n 3–4; Def-Intervenor's Opp'n 4. The record reveals that NSK raised an issue pertaining to zeroing in its case brief before the Department. Case Brief of NSK, A-100–001, at 1–5 (Jun. 3, 2010) (Admin R. Doc. No. 28). As to NSK's obligation to exhaust administrative remedies, defendant and defendant-intervenor argue that NSK, in challenging zeroing before the agency, did not raise the statutory interpretation issue now before the Court of Appeals which they characterize as an inconsistent interpretation of 19 U.S.C. § 1677(35) in investigations and in administrative reviews. Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. 8 (Nov. 1, 2011), ECF No. 38; Resp. Br. of the Timken Co. Opposing the R. 56.2 Mot. of NSK Bearings Europe, Ltd., et. al. 6–7 (Nov. 7, 2011), ECF No. 39.

The Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). In trade cases, the court has discretion with respect to whether to require exhaustion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir.2007) (stating that "applying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade"). The exhaustion requirement has several recognized exceptions. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___, ___, 601 F. Supp. 2d 1370, 1377 (2009) (indicating situations where waiver of the exhaustion requirement has been recognized as appropriate). Because it is possible that the outcome of the *Union Steel* litigation will make reaching the exhaustion issues raised by defendant and defendant-intervenor unnecessary, the court does not consider it a prudent use of the parties' resources and its own resources to decide the exhaustion issues at this time. These issues, therefore, are an insufficient basis upon which to deny the pending motion for a stay.

Defendant argues that "NSK is not entitled to a stay because it has not satisfied its burden to show that it will suffer clear hardship by proceeding with the litigation." Def.'s Opp'n 1. The Government submits that "NSK shifts the legal standard by suggesting that a stay

would not harm the defendant or defendant intervenor" when it is the movant who must show that "it will suffer hardship--economic harm, legal prejudice or inequity--by proceeding with litigation." *Id*. at 3. Defendant misconstrues the standard. A 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. However, the court fails to *see* what harm would accrue to defendant should the stay be ordered, and defendant, in opposing the motion, does not identify any such harm, *see* Def.'s Opp'n 3–4.

Defendant-intervenor makes the argument that unlike other cases stayed by this court pending the resolution of *Union Steel*, this case is under submission and awaiting the court's judgment. The advanced stage of this litigation does not preclude a stay, and defendant-intervenor has failed to identify any harm that a stay would cause.

In conclusion, the stay sought by plaintiffs serves the interests of judicial economy and conservation of the parties' resources. No showing of harm resulting from the proposed stay has been made by defendant or defendant-intervenor. The court, therefore, will grant the pending motion.

ORDER

Upon consideration of Plaintiffs' Motion for Stay of Proceedings Pending Appeal in *Union Steel v. United States* ("Motion for Stay"), as filed on May 2, 2012 by NSK Bearings Europe, Ltd., NSK Europe Ltd., and NSK Corporation (collectively, "NSK"), the motions in opposition filed by the United States and defendant-intervenor the Timken Company, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Motion for Stay be, and hereby is, GRANTED; and it is further

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: June 4, 2012
New York, New York

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

Slip Op. 12–78

JINAN YIPIN CORPORATION, LTD. and SHANDONG HEZE INTERNATIONAL TRADE AND DEVELOPING COMPANY, Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 04–00240

[Sustaining a remand redetermination in an administrative review of an antidumping duty order]

Dated: June 5, 2012

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for plaintiff Jinan Yipin Corporation, Ltd.

Richard P. Schroeder, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *George Kivork*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

OPINION

Stanceu, Judge:

I. INTRODUCTION

This case arose from the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude an administrative review of an antidumping duty order on fresh garlic from the People's Republic of China. *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Admin. Review & New Shipper Reviews*, 69 Fed. Reg. 33,626 (June 16, 2004) ("*Final Results* "). Before the court is the Department's third redetermination ("Third Remand Redetermination"). *Final Results of Third Redetermination Pursuant to Remand* (Sept. 7, 2011), ECF No. 125. In the Third Remand Redetermination, Commerce redetermined a surrogate value for the labor expenses of plaintiff Jinan Yipin Corporation, Ltd. ("Jinan Yipin"), a Chinese garlic producer and exporter, following a decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") holding contrary to law the regulation, 19 C.F.R. § 351.408(c)(3) (2004), upon which the Department determined a surrogate value for Jinan Yipin's labor cost in the Final Results. *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010). Plaintiff concurs in the redetermined surrogate value. The court sustains the Third Remand Redetermination and will enter judgment concluding this case.

II. BACKGROUND

The background of this litigation is discussed in the court's prior opinions. Additional background is presented briefly below.

Commerce issued the Final Results on June 16, 2004, *Final Results*, 69 Fed. Reg. at 33,626, in which, applying 19 C.F.R. § 351.408(c)(3), it determined a surrogate value of $0.90 per hour for Jinan Yipin's labor cost. *Third Remand Redetermination* 1. The complaint filed by Jinan Yipin did not challenge the surrogate value for labor cost. Compl. (July 19, 2004), ECF No. 9.

On June 30, 2010, plaintiff moved for leave to amend its complaint to add a claim that the surrogate value for labor determined in the Final Results was contrary to law. Jinan Yipin's Partial Consent Mot. for Leave to File an Amended Compl. (June 30, 2010), ECF No. 112. The court granted this motion on July 20, 2010. Order (July 20, 2010), ECF No. 115; Amended Compl. (July 20, 2010), ECF No. 116. At that point, Commerce had filed the second remand redetermination ("Second Remand Redetermination"). *Final Results of Redetermination Pursuant to Ct. Remand Order* (Feb. 25, 2010), ECF No. 103 ("*Second Remand Redetermination*"). On August 6, 2010, defendant requested a voluntary remand to allow Commerce to redetermine a surrogate value for Jinan Yipin's labor expenses. Def.'s Resp. to Jinan Yipin's Remand Comments 16–17 (Aug. 6, 2010), ECF No. 117. On April 12, 2011, the court granted that request and affirmed all other aspects of the Second Remand Redetermination. *Jinan Yipin Corp. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1238, 1250 (2011).

On September 7, 2011, Commerce filed the Third Remand Redetermination. On October 12, 2011, plaintiff informed the court that it did not object to the Department's redetermined surrogate value for labor. Jinan Yipin's Comments Regarding the Department's Third Remand Redetermination (Oct. 12, 2011), ECF No. 128.

III. DISCUSSION

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006). The court must hold unlawful any 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 ("Tariff Act"), § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

For a Chinese producer such as Jinan Yipin, Commerce values labor expenses as a factor of production according to section 773 of the Tariff Act, 19 U.S.C. § 1677b(c)(3). Commerce must value factors of production using, "to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . .

at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). For the Final Results, Commerce determined a surrogate value for Jinan Yipin's labor expenses according to the then-governing regulation, 19 C.F.R. § 351.408(c)(3), which required Commerce to use "regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." *Id.*; *Third Remand Redetermination* 1–2. *Dorbest* concluded that this regulation was inconsistent with the requirement in § 1677b(c)(4) that surrogate values be based, to the extent possible, on data from countries that are at a level of economic development comparable to that of the non-market economy country and that are significant producers of comparable merchandise. *Dorbest*, 604 F.3d at 1371–72.

The Third Remand Redetermination abandoned the regression-based methodology and valued Jinan Yipin's labor expenses using certain "industry-specific labor cost data from India that was available during the conduct of the underlying administrative review . . . ." *Third Remand Redetermination* 5. These data, which Commerce added to the administrative record, consisted of "Chapter 6A" industry-specific data produced by the International Labour Organization for 2002 that pertain to the labor costs associated with the processing of fruits and vegetables. *Id.* at 5–7. Using these data, the Third Remand Redetermination redetermined a dumping margin of 1.77% for Jinan Yipin. *Id.* at 10.

IV. CONCLUSION

After considering all submissions in this case and upon due deliberation, the court sustains the Third Remand Redetermination. Judgment will enter accordingly.

Dated: June 5, 2012
New York, New York

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

Slip Op. 12–79

DONGGUAN SUNRISE FURNITURE CO., LTD., TAICANG SUNRISE WOOD INDUSTRY CO., LTD., TAICANG FAIRMONT DESIGNS FURNITURE CO., LTD., and MEIZHOU SUNRISE FURNITURE CO., LTD., Plaintiffs, LONGRANGE FURNITURE CO., LTD., Consolidated Plaintiff, COASTER COMPANY OF AMERICA, COE LTD., LANGFANG TIANCHENG FURNITURE CO., LTD., and TRADE MASTERS OF TEXAS, INC., Intervenor Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, and VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Jane A. Restani, Judge
Consol. Court No. 10–00254
Public Version

[In anti-dumping duty matter plaintiffs' motion for judgment on the agency record granted in part and denied in part. Intervenor Plaintiffs' motion for judgment on the agency record granted in part and denied in part. Intervenor Defendants' motion for judgment on the agency record granted in part and denied in part.]

Dated: June 6, 2012

Peter J. Koenig, Squire, Sanders & Dempsey, LLP, of Washington, DC, argued for plaintiffs. With him on the brief was *Christine Juliet Sohar Henter*.

Sarah M. Wyss, Mowry & Grimson, PLLC, of Washington, DC, argued for intervenor plaintiffs. With her on the brief were *Susan L. Brooks*, *Jill A. Cramer*, *Jeffrey S. Grimson*, *Keith F. Huffman*, and *Kristin H. Mowry*.

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP, of Washington, DC, represented consolidated plaintiff.[1]

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

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

OPINION AND ORDER

Restani, Judge:

INTRODUCTION

This action challenges the Department of Commerce's ("Commerce") final results rendered in the fourth antidumping ("AD") duty review of certain wooden bedroom furniture ("WBF") from the Peo-

[1] Consolidated Plaintiff Longrange Furniture Co., Ltd. did not file briefs or participate in oral argument in this case.

ple's Republic of China ("PRC"). *See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 Fed. Reg. 50,992, 50,992 (Dep't Commerce Aug. 18, 2010) ("*Final Results*"). Plaintiffs Dongguan Sunrise Furniture Co., Ltd., Taicang Sunrise Wood Industry Co., Ltd., Taicang Fairmont Designs Furniture Co., Ltd., and Meizhou Sunrise Furniture Co., Ltd. (collectively "Fairmont") moved for judgment on the agency record. *See* Mem. of Points and Auths. in Support of Rule 56.2 Mot. for J. Upon the Agency R. by Pl. Fairmont Designs et. al. ("Fairmont Br."). Intervenor Plaintiffs Coaster Company of America, COE Ltd., Langfang Taincheng Furniture Co., Ltd. and Trade Masters of Texas, Inc. (collectively "Coaster") moved for judgment on the agency record.[2] Mot. for J. Upon the Agency R. Pursuant to Rule 56.2 by Consolidated Pls. Coaster Co. of Am., COE Ltd., Langfang Tiancheng Furniture Co., Ltd. and Trade Masters of Texas, Inc. ("Coaster Br."). Intervenor Defendants American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc., ("AFMC") also moved for judgment on the agency record. The AFMC's Rule 56.2 Brief in Support of its Mot. for J. on the Agency R. ("AFMC Br."). For the reasons stated below, the court remands in part and sustains in part the *Final Results*. The Government's request for a remand on the issue or zeroing is granted.[3] *See* Def.'s Resp. to Pls.' Rule 56.2 Mots. ("Def.'s Br.").

BACKGROUND

In January 2005, Commerce published an AD duty order on WBF from the PRC. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329, 329 (Dep't Commerce Jan. 4, 2005). In January 2009, AFMC and others requested an administrative review of certain companies exporting WBF to the United States between January 1, 2008 and December 31, 2008, thereby triggering the fourth administrative re-

[2] Fairmont adopted the arguments made by Coaster and Coaster adopted the arguments made by Fairmont. Fairmont Br. 36; Coaster Br. 16–17.

[3] The government requested remand on the issue of zeroing in order for Commerce to provide the explanation requested by the Federal Circuit in JTEKT Corp. v. United States, 642 F.3d 1378, 1384–85 (Fed. Cir. 2011). Because both judicial and agency developments have occurred since the Final Results and because Commerce did not provide the explanation here that was sustained by the court in Union Steel v. United States, 823 F. Supp. 2d 1346, 1347–48 (CIT 2012), the court grants the request.

view of WBF. [4] *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 75 Fed. Reg. 5952, 5952–53 (Dep't Commerce Feb. 5, 2010) ("*Preliminary Results*"). After publishing a notice of initiation and receiving questionnaire responses and comments, Commerce selected three mandatory respondents: Dalian Huafeng Furniture Co., Ltd. ("Huafeng"), Guangdong Yihua Timber Industry Co., Ltd. ("Yihua"), and Shanghai Aosen Furniture Co., Ltd ("Aosen"). *Preliminary Results*, 75 Fed. Reg. at 5953.

On April 20 and 21, 2009, Commerce issued the antidumping questionnaire to the three mandatory respondents and made it available to voluntary respondents, including Fairmont. *Id.* During April and May 2009, AFMC and all other interested parties withdrew their request for review for two of the mandatory respondents, Huafeng and Yihua, and several other companies. *Id.* As a result, Commerce named Fairmont as an additional mandatory respondent on May 29, 2009. *Id.* Aosen withdrew from participation in the review, leaving Fairmont as the only cooperating mandatory respondent. *Id.* Fairmont responded to Commerce's questionnaires and supplemental questionnaires between April 2009 and January 2010. *Id.* ; Fairmont Br. 44 n.155. In October and November 2009, Commerce verified Fairmont's responses and found that Fairmont had failed to report sales of more than twenty in-scope product models. *Id.* at 5954; *Preliminary Analysis Memorandum* (Feb. 1, 2010), C.R. 356 at 30–32.

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[4] The subject merchandise includes the following items:

(1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests, highboys, lowboys, chests of drawers, chests, door chests, chiffoniers, hutches, and armoires; (6) desks, computer stands, filing cabinets, bookcases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the order excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, bookcases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate; (9) jewelry armoires; (10) cheval mirrors; (11) certain metal parts; (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; (13) upholstered beds and (14) toy boxes.

Final Results, 75 Fed. Reg. at 50,994–95 (footnotes containing definitions omitted).

In the February 2010 *Preliminary Results*, Commerce calculated the wage rate using the now invalidated regression based methodology. *Preliminary Results*, 75 Fed. Reg. at 5962; *see* 19 C.F.R. § 351.408(c)(3), *abrogated by Dorbest Ltd. v. United States*, 604 F.3d 1363, 1377 (Fed. Cir. 2010) ("*Dorbest IV* "). In response to *Dorbest IV*, Commerce, in this proceeding, placed additional labor data on the record and requested comments from interested parties. *Labor Wage Rate* (July 14, 2010), P.R. 916 at 1. AFMC, Coaster, and Fairmont submitted timely comments. *See* P.R. 919, 920, 921, 925, 926.

In the *Final Results*, Commerce revised the surrogate wage rate, the brokerage and handling surrogate value, and used the financial statements of various Philippine companies to calculate surrogate values. *Final Results*, 75 Fed. Reg. at 50,993–94; Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China, A-570–890, POR 1/1/08–12/31/08, at 72 (Aug. 11, 2010) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2010–20499–1.pdf (last visited June 5, 2012). Commerce assigned Fairmont a separate rate of 43.23%, which included the rate of 216.01% applicable to the PRC-wide entity for the unreported sales as adverse facts available ("AFA"). *Final Results*, 75 Fed. Reg. at 50,998.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold Commerce's final determination in an AD review if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Partial Adverse Facts Available

Fairmont argues its partial AFA rate is contrary to law because six products are not subject merchandise, Fairmont acted to the best of its ability, and the AFA rate applied is aberrational and not a reasonably accurate estimate of Fairmont's actual dumping margin. Fairmont Br. 36–58.

A. Subject merchandise

Fairmont argues that six of the twenty-three products are not subject merchandise and thus, Commerce never requested informa-

tion relating to these products and the information cannot be considered missing from the record.[5] Fairmont Br. 36–43. Fairmont's argument lacks merit.

Commerce may use facts otherwise available if "an interested party . . . withholds information that has been requested by the administering authority or the Commission under this subtitle . . . ." 19 U.S.C. § 1677e(a)(2). Commerce's Section C Questionnaire requested Fairmont to report sales data for all of its subject merchandise. *Questionnaire Resp.* (June 15, 2009), Confidential App. to Def.'s Resp. to Pls. Rule 56.2 Mots. ("Def.'s Confidential App.") Tab 2 at 2. Thus, whether Fairmont withheld or failed to provide requested information relating to these six products depends on whether the products are subject merchandise.

1. The dresser and custom cabinet products

Fairmont argues the dresser and custom cabinet products[6] are not subject merchandise because they are multifunction combination units designed for the living room of a hotel suite. Fairmont Br. 37, 40. Fairmont does not dispute that the dresser products contain a dresser, but argues the products are not subject merchandise because the dresser and custom cabinets are combined with a minibar and a TV panel and such combination units are not included in the scope language. *Id.* at 37–40.

Commerce found the products were subject merchandise because the customer expectations, end-uses, and manner of display were consistent with WBF. *Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China: Whether Certain Unreported Sales Determined to be Subject Merchandise in the Preliminary Results are Subject Merchandise*, A-570–890, POR: 1/1/08–12/31/08, at 4–5 (Aug. 11, 2010), C.R. 388 ("*Confidential Issues and Decision Memorandum*"). Commerce relied on the products' size, functionality, Fairmont's descriptions of the products, Fairmont's invoices, photographs of the products in hotel suites, and the

[5] Fairmont challenges Commerce's determination that these products are in scope for six of the twenty-three products. Thus, for the remaining seventeen products, the issue of whether Commerce may apply facts available is not before the court.

[6] The four products are [[ ]], [[ ]], [[ ]], and [[ ]]. *Preliminary Analysis Memorandum*, C.R. 356 at 30–32. Although only two of the products contain a TV panel, the court analyzes the four products together because the analysis of the scope language relating to combination units is equally applicable.

fact that a hotel was the exclusive purchaser of the products. *Id.* Commerce also relied on the scope definition relating to combination units, and concluded the scope included items not specifically mentioned if the items were consistent with the scope language. *Id.*

Here, the shape and functionality of the products suggests that they are dressers.[7] *Exhibit 13: FDUSA Unreported Sales Product Information* (Dec. 10, 2009), C.R. 430 ("*Exhibit 13*") at 47, 50, 66, 71 (diagrams showing dimensions of products). The products are combined either with a minibar or with a minibar and a TV panel, which does not fit within the scope language referring to combination units of desks and computer stands. *See Final Results*, 75 Fed. Reg. at 50,994–95 (stating the scope includes "desks, computer stands, filing cabinets, bookcases, or writing tables that are attached to or incorporated in the subject merchandise") ("section 6"). The products also do not fit the "typical" definition of a door chest[8] or armoire[9] which are the two types of WBF the scope specifically mentions may be combined with a TV or other electronics. *Id.* at 50,994. Thus, a narrow reading of the scope definition suggests the products are not subject merchandise. The scope definition, however, provides only the "typical" physical descriptions of subject WBF. Moreover, the scope states that it includes "other bedroom furniture consistent with the above list," *id.* at 50,995 ("section 7"), which suggests a product need not exactly match the listed products in order to be subject merchandise.

Fairmont argues that interpreting the scope language to include any subject merchandise that is combined with non-subject merchandise elements improperly expands the scope. Pl. Fairmont Reply Brief ("Fairmont Reply") 26–27. Fairmont argues section 6 of the scope should be read as the exclusive type of combination units and that if section 7 is interpreted to include any combination unit as long as some part is subject merchandise, then section 6 has no meaning. *Id.* at 27. Defendants argue that section 7 includes combination dresser units, even if they are not specified in the scope, as long as the combination units are otherwise consistent with the scope language. Def.'s Br. 15–16; The AFMC's Resp. in Opp'n to Resp'ts' 56.2 Mots. for J. on the Agency R. 5–6 ("AFMC's Opp. Br.").

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[7] All four products [[
]]. *Exhibit 13*, C.R. 430 at 47, 50, 66, 71.

[8] "A door chest, which is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics." *Final Results*, 75 Fed. Reg. at 50,994 n.22.

[9] "An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers . . . , shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems." *Final Results*, 75 Fed. Reg. at 50,994 n.25.

Commerce's finding that the products are subject merchandise is supported by substantial evidence on the record. The scope's reliance on "typical" descriptions of products and the inclusion of any WBF consistent with the scope language demonstrates that a product may be subject merchandise even if it does not match the listed scope items. *Final Results*, 75 Fed. Reg. at 50,955 (including within the scope "other bedroom furniture consistent with the above list"). Thus, Commerce has not impermissibly expanded the scope merely by recognizing that not every type of WBF will exactly match the physical description of the listed products. Commerce's interpretation does not render section 6 meaningless because only combination units consistent with the scope language, including section 6, could be considered subject merchandise under section 7. Inclusion of dresser space for a minibar is not very different from including space for a desk, bookcase, electronics, or filing cabinets, all of which are covered by scope language relating to combination units. Because it is undisputed that the products include characteristics consistent with scope merchandise and because the scope includes products consistent with the scope language, Commerce's finding is supported by the record.

2. Nightstand back panel[10]

Fairmont argues the nightstand back panel is an unfinished back panel that is excluded from the scope because it is a part that lacks the essential character of WBF. Fairmont Br. 41–43.

Commerce's decision that the back panel is subject merchandise is supported by substantial evidence. Although Fairmont argues the back panel is a separate product that can be used for a variety of furniture pieces, there is no evidence on the record to show that the back panel was used as anything other than part of a nightstand.[11] Thus, it was reasonable for Commerce to find that the back panel and other portion of the nightstand were two pieces of an unassembled nightstand.

Even if Fairmont is correct that the back panel should be considered a spare part (and not a component), the back panel would be subject merchandise. Parts are included in the scope if they "possess the essential character of wooden bedroom furniture in an unas-

[10] This is product [[ ]]. *Preliminary Analysis Memorandum*, C.R. 356 at 30–32.

[11] The record shows that [[ ]]. *Exhibit 13*, C.R. 430 at 60. Fairmont has not cited to evidence on the record to show that the back panel was ever [[ ]]. *Id.*; *Confidential Issues and Decision Memorandum* 8.

sembled, incomplete, or unfinished form."[12] *Final Results*, 75 Fed. Reg. at 50,995 n.29. Even if the back panel itself lacks the essential character of WBF, it does possess the essential character of WBF in an "unassembled, incomplete, or unfinished form" because it can be combined with another part to create a nightstand. Thus, Commerce's finding that the back panel was one half of a two-piece nightstand that was sold unassembled, and thus, was a component of a nightstand, is supported by substantial evidence on the record.

3. Wall-Mounted Product[13]

Fairmont argues the wall-mounted product lacks the essential character of WBF because it is mounted to the wall and does not stand with any legs, and therefore, cannot be a night "stand." Fairmont Br. 43. Fairmont argues the product is excluded under the scope language excluding "end tables, occasional tables, [and] wall systems" because it is a wall system. *Id.* at 43 & n.151 (quoting *Final Results*, 75 Fed. Reg. at 50,995). Commerce found there was no reason to treat a table mounted to the wall differently from a table with legs. *Confidential Issues and Decision Memorandum* 10.

Commerce's finding that the product is consistent with a nightstand is supported by substantial evidence. The scope includes "night tables, night stands" and "other bedroom furniture consistent with the above list." *Final Results*, 75 Fed. Reg. at 50,994–95. Although it lacks legs, the product is consistent with the description and use of a bedside table.[14] Thus, all of the disputed products were properly found to be subject merchandise.

B. Fairmont failed to act to the best of its ability

Fairmont disputes that it failed to act to the best of its ability when responding to Commerce's questionnaires and supplemental questionnaires. Fairmont Br. 44–45. Commerce found Fairmont failed to act to the best of its ability because it failed to report all of its sales and insisted that certain sales were out of scope, as discussed above, despite repeated questions from Commerce. *Preliminary Results*, 75 Fed. Reg. at 5960; Issues and Decision Memorandum 123–25. Fairmont's argument lacks merit.

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[12] The scope does not include "unfinished furniture parts made of wood products . . . that are not otherwise specifically named in this scope . . . and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form." *Final Results*, 75 Fed. Reg. at 50,995 n.29.

[13] This is product [[ ]]. *Preliminary Analysis Memorandum*, C.R. 356 at 30–32.

[14] Fairmont's diagrams describe the item as a [[ ]]. *Exhibit 13*, C.R. 430 at 78 (diagram of product).

Commerce is permitted to use adverse inferences when selecting from among the facts available if it finds that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . ." 19 U.S.C. § 1677e(b). Commerce must do more than merely find the party has failed to provide the information. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce must make an objective finding that a reasonable importer would have known the requested information should be in its records. *Id.* at 1382–83. Commerce must also make a subjective finding that the lack of cooperation is a result of "(a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* Moreover,

> [I]t is presumed that respondents are familiar with their own records. It is not an excuse that the employee assigned to prepare a response does not know what files exist, or where they are kept, or did not think - through inadvertence, neglect, or otherwise to look beyond the files immediately available.

Id. at 1383.

Here, Commerce found that given the explicit instructions of the Section C Questionnaire, Fairmont should have been aware of the need to provide a complete sales listing of its subject merchandise. *Issues and Decision Memorandum* 122. The Section C Questionnaire notified Fairmont that other companies had failed to report all sales of subject merchandise and asked Fairmont to confirm that it properly reported all of its sales of subject merchandise. *Questionnaire Resp.*, Def.'s Confidential App. Tab 2 at 2. Fairmont confirmed that it had reported all sales of subject merchandise. *Id.* Thus, Fairmont knew that it should keep records of its sales and report all of its sales of subject merchandise.

Commerce's subjective finding that Fairmont failed to put forth its maximum effort because it performed a perfunctory identification of in-scope sales is also supported by the record. Fairmont does not dispute that it directed an individual clerk to identify all in-scope sales. This clerk identified subject merchandise by searching for the terms "night tables" and "night stands" but did not look for similar words like "bedside tables." *Issues and Decision Memorandum* 123; *Fairmont Cmts.* (Nov. 23, 2009), P.R. 749 at 5–6. Similar to the hypothetical in *Nippon*, it is not an excuse that an employee did not know how to identify in-scope merchandise. *See Nippon*, 337 F.3d at 1383. Many of the unreported products are easily identifiable as

subject merchandise from the product descriptions.[15] *Preliminary Analysis Memorandum*, C.R. 356 at 30–32. And, for the majority of the products, Fairmont did not challenge Commerce's finding that the in-scope merchandise were easily identified as subject merchandise from Fairmont's sales listing. *Issues and Decision Memorandum* 123. Thus, had Fairmont properly instructed its employee, it could have readily identified all of the unreported subject merchandise sales. Because Fairmont performed a perfunctory evaluation of its own records and a reasonable amount of effort would have uncovered the disputed sales, Commerce did not err in finding that Fairmont failed to put forth its maximum effort in investigating its records.

Moreover, there was nothing unusual or truncated about the review process that could excuse Fairmont's failure to accurately report its sales. Fairmont asked to be reviewed and had access to Commerce's antidumping questionnaire on April 21, 2009. *Preliminary Results*, 75 Fed. Reg. at 5,953. Fairmont requested and received an extension to file its Section C/D questionnaire response and filed its response on June 15, 2009, two months after the questionnaire was issued. *Issues and Decision Memorandum* 122; *see Questionnaire Resp.*, Def.'s Confidential App. Tab 2 at 1. Commerce then extended the deadline for the *Preliminary Results* from October 5, 2009 to February 1, 2010. *Wooden Bedroom Furniture from the People's Republic of China: Extension of the Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 74 Fed. Reg. 47,919, 47,919 (Dep't Commerce Sept. 18, 2009). Commerce conducted verification between October 26, 2009 and November 11, 2009, approximately six months after Fairmont first received the antidumping questionnaires. *Preliminary Results*, 75 Fed. Reg. at 5954. Fairmont never informed Commerce that it had difficultly responding to the questionnaires and Fairmont, particularly as a volunteer, should have been prepared to provide a full sales listing on June 15, 2009. At this time, Fairmont had only received one supplemental questionnaire on June 10, 2009. See Fairmont Br. 44 n.155 (listing all supplemental questionnaires and number of questions). Thus, the multiple supplemental questionnaires and questions facing Fairmont in June through October can-

[15] Some of the unreported products are described in Fairmont's records as [[ ]], [[ ]], and [[ ]]. *Questionnaire Resp.*, Def.'s Confidential App. Tab 2; *Preliminary Analysis Memorandum*, C.R. 356 at 30–32.

not excuse its failure to provide an accurate sales listing on June 15.[16] Commerce therefore, did not err in finding that Fairmont had failed to act to the best of its ability.[17]

C. 19 U.S.C. § 1677m(d)

Fairmont argues that even if it did not act to the best of its ability, Commerce can not apply adverse inferences because Commerce did not identify the deficiency in its response or give Fairmont an opportunity to remedy it. Fairmont Br. 47–48. Defendant argues that Commerce notified Fairmont of the deficiency in the June 26 and July 30 supplemental questionnaires. Def.'s Br. 22–25. Fairmont's argument lacks merit.

If Commerce determines that a response to a request for information does not comply with the request, Commerce "shall promptly inform the person submitting the response of the nature of the deficiency . . . ." 19 U.S.C. § 1677m(d). Once Commerce identifies a deficient submission, it must, "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle." *Id.*

Here, the record shows that Commerce did not identify the deficiencies in Fairmont's sales list until verification. In the June 26 supplemental questionnaire, Commerce simply stated that the products "may" be in scope. *Questionnaire Resp. Letter*, Def.'s Confidential App. Tab 3 at 2. Commerce did not identify the thirteen products not listed either by product code or description in the June 26 or July 30 supplemental questionnaires. Moreover, the July 30 supplemental questionnaire merely requested a clarification of a prior response by Fairmont, and did not suggest that Fairmont's response was faulty. *Supplemental Questionnaire Resp.*, Def.'s Confidential App. Tab 6 at 2 ¶ 94. Because the evidence does not suggest that Commerce was aware of specific deficiencies earlier, the court analyzes whether Commerce was required to provide Fairmont an opportunity to remedy the deficient submissions found at verification.

Commerce is required to provide an importer the opportunity to remedy a deficient submission only "to the extent practicable" in light

[16] Fairmont argues the unreported sales were inadvertent reporting from being overwhelmed. Fairmont Br. 48. As noted above, Fairmont cannot claim to be overwhelmed by multiple supplemental questionnaires when it submitted its sales list of subject merchandise. Moreover, failure to report between two and three percent of sales by value is not so de minimis that it was in error for Commerce to find that the unreported sales cannot be disregarded.

[17] Commerce also relies on its post-June 15 correspondence with Fairmont as reason to impose a partial AFA rate. *Issues and Decision Memorandum* 122–23. Commerce's characterization of the communications is not persuasive and the court does not rely on it.

of the time limits for reviews. 19 U.S.C. § 1677m(d). If the submission is not received within the applicable time limits, Commerce may disregard the submission if the information cannot be verified or the party has not acted to the best of its ability in providing the information. *Id.* § 1677m(d)(2).

Here, in response to the deficiencies found at verification, Fairmont offered to submit the missing sales and FOP information relating to the unreported products. *Fairmont Cmts.* (Nov. 23, 2009), P.R. 749 at 9. Commerce declined to accept this information, stating that it lacked time to consider the information, issue any supplemental questions, and verify the information. *Issues and Decision Memorandum* 115. Commerce also noted that allowing a party to wait until Commerce discovers an omission would allow the party to game the system. *Id.*

Fairmont argues Commerce's reason for declining to consider information relating to the unreported sales is unsupported by substantial evidence because Commerce continued to accept new information, issue supplemental questionnaires, and conduct verification with another respondent through March 2010 and accepted new information. Fairmont Br. 50–51. The other respondent to which Fairmont refers, Nanjing Nanmu Furniture Co., Ltd. ("Nanjing Nanmu"), did not participate in the fourth administrative review. *Preliminary Results*, 75 Fed. Reg. at 5957. Instead, Nanjing Nanmu reported that it did not have any sales of subject merchandise during the period of review. *Id.* at 5958–57. In the *Preliminary Results*, Commerce stated that it lacked the information necessary to confirm the lack of Nanjing Nanmu shipments and stated it would continue to investigate. *Id.* at 5955. On March 1, 2010, Commerce issued a supplemental questionnaire to Nanjing Nanmu requesting information on its third-party relationships and sales. *Supplemental Questionnaire* (March 1, 2010), P.R. 825. Also in March 2010, Commerce provided a verification agenda to Nanjing Nanmu and placed the verification report on the record. *Verification Agenda* (March 4, 2010), P.R. 829; *Verification of the Questionnaire Resp. of Nanjing Nanmu* (March 31, 2010), P.R. 878. Fairmont cites to this supplemental questionnaire and verification as evidence that Commerce continued to issue supplemental questionnaires, conduct verification, and place additional evidence on the record through March 2010.[18] Whether Nanjing Nanmu accurately reported its sales determined whether it would receive a PRC-

[18] Fairmont also cites to a June 30, 2010 memorandum from Commerce that placed on the record a letter from the Chinese government expressing concern with Commerce's actions in relation to Fairmont as well as Commerce's reply. *Memorandum to File* (June 30, 2010), P.R. 914. Although new to the record, this information is not new factual information relating to the calculation of dumping margins and did not need to be verified.

wide rate or its own rate. In contrast, Fairmont's information, as the only cooperating mandatory respondent, determined the rate applied to all respondents qualifying for a rate separate from that of the PRC-wide entity. Thus, Commerce's adherence to its deadlines during Fairmont's verification, in order to issue the *Preliminary Results* on time, while delaying investigation of Nanjing Nanmu's sales is not arbitrary. Although Commerce could have allowed the submission of the data, it was not required to do so.

D. Reasonableness of the AFA rate selected

Fairmont argues the partial AFA rate of 216.01% is not a reasonably accurate estimate of Fairmont's actual dumping margin, albeit with a built in increase, because the selected AFA rate (1) is aberrational and (2) was not adjusted based on verified record evidence. Fairmont Br. 52–56. Fairmont also challenges the rate on procedural grounds, arguing that using a rate calculated from a different respondent, as opposed to Fairmont's own data, was a change of policy without justification and Fairmont did not have an opportunity to comment on whether the other respondent was similar to Fairmont. *Id.* at 57. Defendants argue the AFA rate is reasonable and Fairmont had notice of the 216.01% rate and the opportunity to raise concerns in its case brief. Def.'s Br. 32; AFMC Opp. Br. 25–26. Fairmont's argument has merit.

When Commerce applies an AFA rate that was calculated for a different respondent in a prior review, as it did here, Commerce must corroborate that rate with secondary information. *See* 19 U.S.C. § 1677e(c). The corroboration requirement tempers Commerce's otherwise wide discretion in selecting AFA rates by "block[ing] any temptation by Commerce to overreach reality in seeking to maximize deterrence." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Corroboration requires that Commerce use reliable facts to tie the AFA rate to the commercial reality of a particular respondent under review. *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323–24 (Fed. Cir. 2010) (finding an AFA rate must be both reliable and relevant to the particular respondent at issue). The goal is to calculate a reasonably accurate estimate of respondent's rate, albeit with a built-in increase, as a deterrent for non-compliance. *F.lli De Cecco*, 216 F.3d at 1032 (invalidating the 46.67% AFA rate imposed by Commerce because, inter alia, it "was many times higher than [respondent's] actual dumping margin").

Here, Commerce found the selected partial AFA rate was reliable because it is a company-specific rate calculated in the 2004–2005 new shipper review of Shenyang Kunyu Wood Industry Co., Ltd. ("Kunyu") for WBF. *Issues and Decision Memorandum* 130; *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of 2004-2005 Semi-Annual New Shipper Reviews and Notice of Final Rescission of One New Shipper Review*, 71 Fed. Reg. 38,373, 38,378 (Dep't Commerce July 6, 2006). Commerce must do more however, than merely proceed with the assumption that prior calculated margins are ipso facto reliable. *See Lifestyle Enter v. United States*, Slip Op. 12–45, 2012 WL 1059409, at *2, n.5 (CIT 2012) (citing *Ferro Union, Inc. v. United States*, 23 CIT 178, 203, 44 F. Supp. 2d 1310, 1334 (1999)).[19] Instead, Commerce must provide some justification for finding that the 2004–2005 rate for a relatively small shipper is relevant and reliable for this respondent in this time period. Commerce has failed to do so here.

Commerce found the Kunyu rate was relevant to Fairmont because a percentage of Fairmont's sales were dumped at margins above 216%.[20] *Issues and Decision Memorandum* 129; Fairmont Br. 53 n.191 (calculating that 1.21% of sales by value were dumped at margins above 216%). While the use of a respondent's own sales data for corroboration may mollify commercial reality concerns, it is not necessarily sufficient in every case, especially in light of conflicting record evidence. *See Lifestyle Enter*, Slip Op. 12–45, 2012 WL 1059409, at *8.[21] Here, Commerce has not explained why a small percentage of Fairmont's sales can be considered relevant and reliable for Fairmont's unreported sales. *See Gallant Ocean*, 602 F.3d at 1324 (finding transaction-specific margins insufficient for corroboration where "Commerce did not identify any relationship between the small number of unusually high dumping transactions with [respon-

[19] Commerce also justified its decision by stating it has used the same AFA rate in every segment of the current proceeding since the new shipper review and has not received any information that it is not appropriate. *Issues and Decision Memorandum* 130. This is no longer the case because the court found in *Lifestyle Enterprise* that the 216.01% rate is an outlier when compared to the rates applied in previous WBF reviews. Slip Op. 12–45, 2012 WL 1059409, at *3 & n.11.

[20] Commerce found that [[ ]]. *Proprietary Memorandum Regarding Corroboration* (Aug. 11, 2010), C.R. 387 at 2. [[ ]]. *Id.* at 6–7. Fairmont calculated that 1.21% of sales by value were dumped at rates above 216%. Fairmont Br. 53. AFMC does not dispute the 1.21% calculation but notes that [[ ]] of Fairmont's sales by quantity were dumped at rates above 216%. AFMC's Opp. Br. 22.

[21] That *Lifestyle Enterprise* involved corroboration with another company's data does not change the essential fact that Kunyu bears little relation to a company like Fairmont or to the mass of data that is available for Fairmont.

dent's] actual rate"). Moreover, Commerce found that because the variety and amount of Fairmont's sales and product line are so divergent, it was too difficult to use Fairmont's own sales data to calculate a partial AFA rate. If this is the case, further doubt is cast on the use of a small percentage of sales for corroboration that the rate represents Fairmont's commercial reality as a whole. Rather, the large diversity in Fairmont's sales suggests using some broader base to derive a partial AFA rate or to corroborate it.

This is not a total AFA case where the record is devoid of all sales data, making it difficult for Commerce to determine a relevant and reliable rate for a respondent. Nor is it a case where the record contains demonstrably untrustworthy information. In these types of cases, Commerce has greater discretion in attempting to determine a relevant and reliable rate. *See* 19 U.S.C. § 1677e(c) (requiring Commerce to corroborate "to the extent practicable"). Here, Commerce has obtained and verified approximately 97% of Fairmont's sales data and found a rate for these sales which was in the range of 34%. Commerce has not provided record evidence to justify the difference between the rate for the reported sales and 216.01% for the unreported sales. Fairmont placed a great deal of relevant information on the record and there is no evidence that it omitted the relatively small amount of sales data for strategic reasons.[22] Commerce is directed to calculate a new partial AFA rate which is corroborated or exercise its discretion to permit late filing of more data from Fairmont.[23]

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[22] Fairmont suggests that the margin for the unreported sales would actually be lower and it asserts that it was not permitted to demonstrate that Kunyu was not an acceptable source for a corroborating rate. As the court rejects Commerce's rate on other grounds, it is not necessary to decide if the record was unreasonably restricted or what the actual rate might be.

[23] This is not to say that Commerce must make adjustments to an AFA rate based on the respondent's own information. Commerce's refusal to adjust its AFA rate based on Fairmont's own indirect selling and international freight expenses or an ex-factory value is justified. Fairmont does not, after Commerce selects an AFA rate, get the opportunity to adjust that rate to its exact commercial reality. This does not, however, permit Commerce to select a rate that is not grounded in commercial reality in the first place.

II. Surrogate Value for Labor [24]

Coaster argues Commerce erred in not using wage data exclusively from the Philippines, as opposed to multiple countries, or if multiple country data are used, that Commerce erred in not using industry-specific data as opposed to economy-wide (i.e. manufacturing-sector) data.[25] Coaster Br. 7–10. AFMC argues Commerce erred in selecting the range of economically comparable countries based on absolute differences, instead of relative differences, in gross national income ("GNI") and that Commerce should not have relied on data from India. AFMC Br. 24–30. Defendant argues Commerce applied an interim wage rate methodology previously approved by the court that is consistent with *Dorbest IV* and the statute. Def.'s Br. 58–61.

A. Country-specific data

Coaster argues that Commerce should have used labor data from the primary surrogate country,[26] the Phillippines, and did not adequately explain why Philippine labor data were not the best available information compared to multi-country labor data. Coaster Br. 7–9. Coaster's argument lacks merit.

In determining normal value for non-market economies, Commerce must use "the best available information regarding the values of such factors in a market economy country *or countries* considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1)(B) (emphasis added). When valuing the factors of production, Commerce "shall utilize, to the extent possible, the prices or

[24] A dumping margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). For merchandise exported from a non-market economy, such as the PRC, Commerce calculates NV "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). The factors of production include, but are not limited to, labor hours, raw materials, energy and other utilities, and representative capital cost, including depreciation. *Id.* § 1677b(c)(3). Surrogate values from market economy countries are used as a measure of these costs. *See id.* § 1677b(c)(1),(4); *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1347 (CIT 2010), *aff'd*, 666 F.3d 732 (Fed. Cir. 2011).

[25] The rate has been described as an economy-wide rate but the parties seem to agree it is a manufacturing-sector rate.

[26] The court notes that for future reviews, Commerce intends to calculate the wage rate using data from the surrogate country only. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,092–93 (Dep't Commerce June 21, 2011). This change in policy is not retroactive and did not apply to this case.

costs of factors of production *in one or more market economy countries* . . . ." 19 U.S.C. § 1677b(c)(4) (emphasis added). Thus, the statute permits the use of multi-country data if Commerce finds this is possible and appropriate.

In determining that multi-country data were preferable to data from a single country, Commerce found that because there is significant variation among the wage rates of comparable market economies, reliance on wage data from a single country was unreliable and arbitrary. *Issues and Decision Memorandum* 152. Commerce explained that "[t]here are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries." *Id.* at 153.[27] In order to minimize the effects of these variations, Commerce used data from multiple countries. *Id.* Because the statute permits Commerce to use data from multiple countries and because it provided a reasonable explanation as to why it is preferable to do so, the court concludes that Commerce's selection of multi-country data as the best available data is consistent with the governing statute.

B. Industry-specific data

Coaster argues Commerce erred in using aggregated manufacturing sector data, instead of data from a category more specific to the furniture industry.[28] Coaster Br. 10–11. Specifically, Coaster argues that Commerce should have relied on the International Labor Organization ("ILO") classification 36 "manufacture of furniture; manufacture [not elsewhere classified]" submitted by Fairmont on July 19, 2010. Coaster Br. 10–12; *Fairmont's Wage Rate Cmts.* (July 19, 2010), P.R. 921 at Ex. 2. Coaster's argument has merit.

[27] In making its finding, Commerce did not specifically mention the data from the Phillippines. Coaster argues Commerce's explanation as to multiple versus single country data does not adequately explain why the data from the Phillippines were not the best available information. Coaster Br. 8–9. This argument lacks merit. The Philippines is a single country and therefore, presents the same problems cited by Commerce that apply for using data from a single country, even if Commerce did not specifically name the Philippines. The court is informed however, that for future reviews Commerce did use data limited to the Philippines.

[28] Coaster also argues the court has previously found multi-industry, country-wide labor data to be unlawful. Coaster Br. 13–14 (citing *Allied Pac. Food (Dalian) Co. v. United States*, 32 CIT 1328, 1358–59, 587 F. Supp. 2d 1330, 1357 (2008)). This argument lacks merit. Allied Food invalidated Commerce's regression based methodology and did not specifically rule on manufacturing sector data versus industry-specific data because industry-specific data were lacking. See Allied Pac. Food, 32 CIT at 1361–65, 587 F. Supp. 2d. at 1357–59, 1361.

The statute requires that Commerce value the factors of production, to the extent possible, by using data from economically comparable countries that are significant producers of comparable merchandise. *See* 19 U.S.C. § 1677b(c)(4). The statute is silent as to how the wage rate should be calculated, but Commerce must be reasonable in calculating the wage rate from the best available information under the framework of the statute. *See id.* § 1677b(c)(1).

In response to multiple remands during the *Dorbest* litigation, Commerce developed a multi-step process to calculate the wage rate. The first three steps of the *Dorbest* methodology do not differ from the procedures Commerce used in the instant proceedings.[29]Commerce here, however, did not take the additional step of determining whether there is available industry-specific earnings data. Here, Commerce used economy-wide data even when industry-specific earnings or wage data was available for the same year. *See Fairmont's Wage Rate Cmts.*, P.R. 921 at 57–87. Thus, unlike the process described in the 2010 and 2011 *Dorbest* Remand Results, Commerce used economy-wide earnings data instead of further narrowing the data to industry-specific data. Commerce cannot, therefore, argue that Commerce has merely applied the interim methodology that it developed following *Dorbest IV* and which the court ultimately sustained. *See* Def.'s Br 65.

Commerce attempted to justify its use of economy-wide data by stating it did not have time to adequately research this data. Coaster submitted industry-specific wage data from the Phillippines in January 2010, seven months before the *Final Results*, and Coaster submitted industry-specific Phillippines and multi-country wage data on July 19, 2010, which was the deadline set by Commerce for comments on its interim methodology. *Fairmont Cmts.* (Jan. 25, 2010), P.R. 803 at Ex. 14; *Coaster Wage Rate Cmts.* (July 19, 2010), P.R. 919 at Attach.

[29] The *Dorbest* methodology is as follows. First, Commerce creates a list of economically comparable countries based on gross national income. Second, based on this list, Commerce then identifies which countries had exports of comparable merchandise during the period of review. Third, Commerce identifies which of these countries reported wage data during an applicable five-year period. Fourth, Commerce determines which countries reported industry-specific data. Finally, Commerce calculates an average wage rate from those countries found to be economically comparable that have exporters of comparable merchandise and which reported the appropriate data. In calculating the average wage rate, Commerce uses the three-digit sub-classification data when available. *Dorbest Ltd. v. United States*, 755 F. Supp. 2d 1291, 1295–96 (CIT 2011) ("*Dorbest V*") (describing methodology used in the 2010 *Dorbest* Remand Results); *see also Dorbest Ltd. v. United States*, 789 F. Supp. 2d 1364, 1369 (CIT 2011) ("*Dorbest VI* ") (describing methodology used in the 2011 *Dorbest* Remand Results to include a determination as to which countries reported industry-specific wage data).

1; *Fairmont's Wage Rate Cmts.*, P.R. 921 at 67–87. Commerce's argument that it did not have time to research the industry-specific data is unpersuasive because it received the information within its own deadline.

Commerce also identified several distortions in the data submitted by Fairmont. These distortions, however, do not adequately explain why Fairmont's data were not the best available information because similar distortions exist in the data used by Commerce and industry-specific data were far closer to the "comparable merchandise" data required by the statute. *See* 19 U.S.C. § 1677b(c)(4)(b).[30] For example, Commerce noted that the industry-specific ILO category included the manufacturing of furniture as well as other "not elsewhere classified" industries. *Issues and Decision Memorandum* 157. Commerce noted this would present a distortion because the furniture wages could not be separated from those of other industries and because each country may have a different definition of the furniture industry that would result in variations among countries. *Id.* at 157–58. Commerce's data include all the manufacturing industries of a country. *See id.* at 158. Thus, Commerce's data were already distorted to a greater degree because the wages relating to furniture cannot be separated from the other manufacturing industries. It is also unclear from Commerce's data how each industry is weighted when calculating a manufacturing-wide wage rate and how differences in industry definitions among countries may affect how the various industry rates are averaged together to create a manufacturing sector rate. Thus, Commerce has not provided a sufficient explanation as to why economy-wide data are preferable to industry-specific data, even if the more specific data include some distortions.

Finally, Commerce found that the use of industry-specific data would result in narrowing the number of countries with available information from twenty-two to thirteen and that more data were preferable to less. *Id.* Although the number of countries is a relevant consideration, Commerce has not adequately explained why the decrease in countries trumps the advantages of using industry-specific data, especially in view of its shift to single country data. In the 2010

[30] The Government suggested at oral argument that 19 U.S.C. § 1677b(c)(4) concerning the valuation of factors of production (including labor) addresses the selection of surrogate countries and does not direct Commerce to use wage data for production of "comparable merchandise." This is clearly incorrect. The factors of production are those used in "producing the merchandise" and the valuation of those factors "shall be based on the best available information regarding the values of such factors in a market economy country or countries . . . ." 19 U.S.C. § 1677b(c)(1)(B). One cannot divorce the valuation process from the factors of production for the comparable merchandise. The statute makes no sense if once Commerce selects proper countries it can look to uninformative information from such countries.

and 2011 *Dorbest* Remand Results Commerce relied on data from three and five countries respectively, which suggests data from thirteen countries is not too small a data set from which to calculate an accurate wage rate. Thus, the court remands for Commerce to calculate a wage rate using industry-specific data, or provide substantial evidence for why manufacturing data is preferable to a more industry-specific category, given the statutory requirement to value the factors of production based on data related to comparable merchandise.

C. Selection of bookend countries[31]

AFMC argues that Commerce should have used relative differences in GNI when selecting the range of countries considered to be economically comparable to China and that by using absolute differences, Commerce's selection is biased towards low-income countries. AFMC Br. 25–26. AFMC requests that Commerce recalculate the wage rate with a top bookend country that has a GNI 2.48 times greater than China's GNI, which equals the relative difference between China's GNI and the lowest bookend country.[32] AFMC Br. 26–28. AFMC's argument lacks merit.

In calculating the wage rate, Commerce must use data from countries "at a level of economic development comparable to that of the nonmarket economy country . . . ." 19 U.S.C. § 1677b(c)(4)(A). It is Commerce's practice to rely on GNI when determining whether a country is economically comparable. *See Dorbest V*, 755 F. Supp. 2d at 1295.[33] AFMC does not challenge Commerce's reliance on GNI, but only the range of GNI that should be considered economically comparable to China's.

Here, Commerce selected bookend countries that were evenly distributed around China's GNI, with twenty-seven countries below China's GNI and twenty-five countries above China's GNI. *Labor Wage Rate*, P.R. 916 at 4. Although AFMC has pointed out an alter-

[31] When determining which countries are economically similar to China, Commerce uses per-capita GNI to identify countries at roughly the same level of economic development as China. Here, those countries were India, the Philippines, Indonesia, Colombia, Thailand, and Peru. *Issues and Decision Memorandum* 153. Of these countries, Commerce selects the highest and lowest GNIs, which were India at $950 and Colombia at $4,100. *Id.* ; *see Labor Wage Rate*, P.R. 916 at 4. Commerce then considers all market economy countries with a GNI that falls between India and Colombia, which resulted in fifty-two countries. *Labor Wage Rate*, P.R. 916 at 4. India and Colombia are referred to as the "bookend" countries.

[32] AFMC would have Commerce select an upper bookend country with a GNI of $5,852 instead of $4,100. *See* AFMC Br. 26.

[33] In *Dorbest V*, the court invalidated the selection of bookends when the lowest and highest bookend countries had GNIs below that of China. 755 F. Supp. 2d at 1298. That is not the case here because Colombia and twenty-four other countries had GNIs above China.

native method for determining which countries are economically comparable that would result in a more preferable rate for AFMC, it has not shown that Commerce's methodology or the use of absolute differences is unreasonable or unsupported.

D. India data[34]

AFMC argues Commerce should not have used data from India in calculating the surrogate value for labor because the Indian data are distorted. AFMC Br. 28. Specifically, AFMC argues the data reported by India to the ILO include only those workers earning less than 1,600 rupees per month, or 6,500 rupees per month after 2005, as required by the Indian Payment of Wages Act. *Id.* at 28–29. AFMC argues that the data points that exceeded the reporting cap may be errors, or may include wages plus gratuities and bonuses, and that there is no explanation for why reported Indian wages nearly tripled from 2005 to 2006 other than the change in the cap in 2005. *Id.* at 29.

Commerce found the record evidence was insufficient to establish that the survey data were distorted by the wage cap. *Issues and Decision Memorandum* 159. Commerce noted that for some years before 2005, India reported a national average wage rate for manufacturing or an industry-specific wage rate that was above the cap. *Id.* (citing a 2006 industry specific wage of 6,678 rupees per month when the cap was 6,500 rupees per month and a 2004 national wage of 1,732 rupees per month when the cap was 1,600 rupees per month). Commerce noted that the notes to the Indian data cited by AFMC had not been updated since 1995 and that the ILO had expressed concern over relying on the methodology notes. *AFMC Wage Rate Cmts.* (July 19, 2010), P.R. 920 at Ex. 7 ("[T]his methodological description was made available to us in 1995 and no update has been received from India, nor effected by the ILO Dpt. of Statistics hence care should be exercised when using the information."). Finally, Commerce speculated that it may be that the majority of wage earners make below the cap and thus, would be included in the survey even if there were no cap. *Issues and Decision Memorandum* 159.

Commerce's explanations are speculative and not persuasive. India information is used in numerous cases and Commerce should be able to determine if actual wage data are being reported or whether the data are artificially capped. A statute that requires a cap would taint the data. Commerce should explain whether there is such a statute

[34] If AFMC were to prevail on this issue and India data were excluded from Commerce's calculations, the surrogate value wage rate would increase from $1.47 per hour to approximately $1.51 per hour. *See Surrogate Values Memorandum* (Aug. 11, 2010), P.R. 937 at Attach. IX.

and what effect it has and make a judgment accordingly without guessing as to what might explain the discrepancies.

III. Other Normal Value Issues[35]

Fairmont argues Commerce improperly relied on certain financial statements and double counted items when calculating financial ratios. Fairmont Br. 2–13. Fairmont's argument lacks merit.

A. Financial statement selections

Fairmont argues that Commerce should not rely on the financial statements of Diretso Design Furnitures, Inc. ("Diretso"), APY Cane, Inc. ("APY Cane"), and Interior Crafts of the Islands, Inc. ("Interior Crafts") because they are not producers of comparable merchandise.[36] Fairmont Br. 2–12. Fairmont also argues Commerce erred in excluding the financial statement of Tequesta International, Inc. ("Tequesta"). *Id.* at 12. AFMC argues Commerce should not have relied on the financial statements of Insular Rattan and Native Products Corp. ("Insular Rattan") because it does not include a line item for taxes, which is necessary to determine whether the company received tax subsidies. AFMC Br. 11–14. AFMC's argument has merit although Fairmont's arguments do not.

In valuing the factors of production, Commerce must rely on the best available information from the surrogate country. 19 U.S.C. § 1677b(c)(1)(B). Commerce stated that in selecting the best available information, it uses data based on the "specificity, contemporaneity, and quality of the data." *Issues and Decision Memorandum* 72. Commerce selected financial statements based on whether the company:

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[35] As stated above, when determining NV in an NME, Commerce determines values for general expenses and profit plus the cost of containers, coverings, and other expenses. 19 U.S.C. § 1677b(c)(1). *Supra* n.21. Commerce usually calculates separate values for selling, general and administrative ("SG&A") expenses, manufacturing or factory overhead, and profit using ratios derived from financial statements of one or more companies that produce identical or comparable merchandise in the surrogate country. *See, e.g.*, *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004); U.S. Dep't of Commerce, 2009 Antidumping Manual, ch. 10, 17–18 (2009), *available at* http://ia.ita.doc.gov/admanual/index.html (last visited June 5, 2012). To calculate the SG&A ratio, Commerce typically divides a surrogate company's SG&A costs by its total cost of manufacturing. *Shanghai Foreign Trade*, 28 CIT at 482, 318 F. Supp. 2d at 1341. For the manufacturing overhead ratio, Commerce divides total manufacturing overhead of the surrogate producer by the total materials, labor, and energy costs of the surrogate producer. *Id.* Finally, to determine a surrogate ratio for profit, Commerce divides before-tax profit of the surrogate producer by the sum of direct expenses, manufacturing overhead, and SG&A expenses of the surrogate producer. *Id.* These ratios are converted to percentages ("rates") and multiplied by the surrogate values assigned by Commerce for the direct expenses, manufacturing overhead, and SG&A expenses of the exporter-respondent. *Id.*

[36] At oral argument, Fairmont abandoned its argument that Berbenwood Industries, Inc. is not a manufacturer of the subject merchandise.

(1) manufactured wooden bedroom furniture; (2) had contemporaneous financial statements on the record; (3) received no subsidies found by the Department to be countervailable; (4) did not maintain significant retail operations outside the factory; (5) provided sufficient data for the Department to calculate surrogate factory overhead, SG&A and profit ratios; and (6) had an operating profit in 2008.

Id. at 83–84.

1. Diretso

Fairmont argues that Diretso is an interior design contractor and not a furniture producer. Fairmont Br. 7. Fairmont argues Diretso's production machinery and equipment costs are too small for a furniture producer, that the 98% depreciation of machinery and equipment is too high for an operating manufacturer, and that 70% of labor costs are devoted to design services.[37] *Id.* at 7–8. Defendant argues Fairmont did not raise some of these issues before the agency and thus, the court should not consider them.[38] Def.'s Br. 34–35.

Commerce found Diretso was a producer of WBF because its website advertises "what appear to be wooden beds and bedside tables" and described the company as a manufacturer. *Issues and Decision Memorandum* 95.

Commerce's finding is supported by substantial evidence on the record. Although Fairmont notes that Diretso's promotional materials state that it furnishes the houses of upper class society, Fairmont ignores the preceding statement that Diretos's "principal activity is to manufacturing [sic] furniture and furniture accessories." *AFMC Cmts.* (Sept. 11, 2009), P.R. 677 at Attach. 13 at 135. Additionally, although Fairmont notes that promotional materials state that "Direstso's new take in home furnishings made them a popular name in the interior design industry," Fairmont does not define "take in home"

[37] Fairmont compared the line item "Cost of Service" to the line item "Direct Labor" and found the "Cost of Service" line represented 70% of the total "Direct Labor" line. Fairmont Reply 9. There is no explanation of why "Cost of Service" equates to design services.

[38] Although Fairmont argued before the agency that Diretso was not a furniture producer, Fairmont did not raise below its specific arguments relating to equipment costs, depreciation, or labor. *See Fairmont Case Brief*, P.R. 904, Vol. 1 at 7. The court is reluctant to consider in the first instance inferences derived from the interpretation of specific items on financial statements, such as the depreciation and equipment costs. *See Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1206 (2004) (noting exhaustion requirement ensures agency can use its expertise and develop the factual record). Nevertheless, here, the ability to draw the opposite inference from these particular lines in the financial statement does not defeat the otherwise substantial evidence supporting Commerce's determination, such as the promotions materials and website that describe Diretso as a wooden bedroom furniture manufacturer.

or show why this would prove Diretso does not make the furniture that is being used by the interior design industry or other customers. *Fairmont Rebuttal Submission* (March 15, 2010), P.R. 848 at Ex. 1 at 5. Fairmont also ignores other sections of Diretso's promotional materials, which refer to Diretso as "[m]akers of quality furniture." *Id.* at Ex. 1 at 4. Thus, Fairmont's arguments have not cast significant doubt on Commerce's conclusion that Diretso is a furniture producer.

2. APY Cane

Fairmont argues APY Cane is not a furniture producer because its raw material costs were under 10% of its sales income and its work-in-process and finished goods inventories had virtually no movement in 2008. Fairmont Br. 8. Fairmont also argues APY Cane was in financial collapse during 2008, demonstrated by a 55% drop in sales, and should therefore not be used. *Id.* at 8–9.

Commerce's conclusion to use APY Cane's financial statement is supported by substantial evidence on the record**.** APY Cane's financial statement describes its primary current business operation as manufacturing and exporting furniture and accessories. *AFMC Surrogate Value Submission* (March 4, 2010), P.R. 826 at 90. Commerce found that APY Cane had the type of costs indicative of a manufacturer, such as work-in-process and finished goods balances, raw materials costs, depreciation costs only for machinery and transportation, and no depreciation for an office building. *Issues and Decision Memorandum* 100–01. Although there was a 55% drop in sales in 2008, Commerce explained this should be viewed in the context of the international recession, and despite the drop, APY Cane had a profit in 2008. *Id.* at 100. Although APY Cane's statements showed low raw material costs and little movement of work-in-process and finished goods, there is an expense line for freight and handling. *AFMC Surrogate Value Submission*, P.R. 826 at Attach. 5-A at 97. Thus, there is not sufficient contrary evidence here to render Commerce's selection unsupported by substantial evidence.

3. Interior Crafts

Fairmont argues that Interior Crafts is a retailer and not a producer. Fairmont Br. 10. Fairmont relies on a statement in Interior Crafts' financial statement that states its "primary purpose is to engage in manufacturing, selling of furniture & fixtures to distribute whether *wholesale* or *retail* household furniture made of wood." *Id.* (emphasis in original) (quoting Interior Crafts' financial statement, P.R. 826 at 230). Fairmont argues this statement should be inter-

preted to mean Interior Crafts is a retailer. *Id.* Fairmont also argues that Interior Crafts cannot be a manufacturer because its assets are largely comprised of "Leasehold Improvements," which Fairmont states are not related to production activities. *Id.* at 10–11 & n.40.

Although ambiguous, it was reasonable for Commerce to interpret the above sentence in Interior Crafts' financial statement as demonstrating that it is a manufacturer of furniture and that it distributes to both wholesalers and retailers. Commerce also relied on Interior Crafts' financial statement, its website, its product line of bedroom furniture, and its brochures to support its finding that Interior Crafts is a manufacturer. *Issues and Decision Memorandum* 108–09. Commerce also noted that Interior Crafts' financial statement included beginning and ending work-in-process balances and that the depreciation of machinery and tools were 60% of total depreciation costs. *Id.* at 109. Fairmont has not disputed this evidence and thus, there is substantial evidence on the record to support Commerce's finding. Furthermore, even if Fairmont's argument and inferences relating to leaseholds are correct, this single line-item does not cast significant doubt on the substantial evidence supporting Commerce's finding that Interior Crafts is a manufacturer.

4. Tequesta

Fairmont argues Commerce should have included Tequesta's financial statement in its calculation of surrogate financial ratios. Fairmont Br. 12. Commerce excluded Tequesta's statement because of the fifty-five manifests of shipments to the United States, only fourteen identify the Philippines as the country of origin and thus, Commerce found that Tequesta is primarily a reseller. *Issues and Decision Memorandum* 86. Fairmont argues the country of origin is irrelevant because it is not known what percentage of sales are represented by these fifty-five manifests, Tequesta's financial statements say they are a manufacturer, and because some of the entries have a different country of origin but are marked "Made in Philippines." Fairmont Br. 13. Because only some of the shipments are made in the Philippines or designate the Philippines as the country of origin, Commerce was justified in excluding Tequesta's financial statement.[39]

[39] Commerce also rejected Tequesta's financial statement because it did not separately distinguish between purchased raw materials and purchased finished goods. *Issues and Decision Memorandum* 84 n.379. Fairmont argues Commerce has no evidence to support its assumption that Tequesta purchased any finished goods, and thus, there is no reason for the financial statement to have distinguished between purchases of raw materials and purchases of finished goods. Fairmont Br. 12–13 & n.44. Commerce's finding is supported by the record. Tequesta imports products that do not have a Philippine country of origin and

5. Insular Rattan

AFMC argues that the financial statement of Insular Rattan should not have been used because it is missing a line item for income taxes and because the auditor was the same auditor on a financial statement that Commerce rejected in the third administrative review. AFMC Br. 5–6, 11–14. Defendant argues that it is Commerce's policy to reject incomplete financial statements only when the statement is missing critical information. Def.'s Br. 37–38.

Here, Commerce stated that it does not rely on taxes in calculating financial ratios and thus, the lack of a tax line alone does not render the statement unreliable. *Issues and Decision Memorandum* 88. Commerce also concluded that the lack of a tax line did not prevent it from finding that there were no subsidies because "[t]here is a large amount of information on the record regarding Insular Rattan and Petitioners have not cited to any evidence of subsidies received by Insular Rattan." *Id.*

The court agrees with AFMC that the missing tax line is a relevant consideration that must be explained by Commerce. Although Commerce does not use taxes directly when calculating surrogate values, Commerce sometimes relies on notes to the tax line to determine whether the entity received disqualifying subsidies. *See id.* at 83–84 (selecting financial statements based on whether company receives subsidies). Commerce also requires complete financial statements for general reliability reasons and improper omission of a tax line may mean that other items Commerce does use, such as profit, are not usable.[40] Commerce's explanation that there may have been a tax holiday or some other explanation for the lack of tax line is speculation and cannot serve as substantial evidence. Without further information, the court cannot determine whether Commerce has decided unreasonably to use a dubious financial statement. Thus, the court remands for an explanation as to why Commerce finds that Insular Rattan's financial statement is generally reliable and also unaffected by subsidies.

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are not marked as "Made in the Phillippines." *AFMC Cmts.* (Sept. 28, 2009), P.R. 698 at 11. Because the record shows that Tequesta sells some products that it does not make but the financial statement only refers to purchases of raw materials and does not include a line item for purchased finished goods, Commerce's concern that using Tequesta's statement may result in a distortion is supported by substantial evidence on the record.

[40] Commerce previously rejected Insular Rattan's financial statement for defects not found here but the same kind of problem seems to continue. *See* Issues and Decision Memorandum for the Final Results of the 2007 Antidumping Duty Administrative and New Shipper Reviews, A-570–890, AR/NSR: 1/1/07–12/31/07, at 35 (Aug. 10, 2009), available at http://ia.ita.doc.gov/frn/summary/PRC/E9–19666–1.pdf (last visited June 5, 2012), aff'd Lifestyle Enter., Inc. v. United States, 768 F. Supp. 2d 1286, 1311 (CIT 2011).

B. Double counting

1. Indirect Materials/Factory Overhead

Fairmont argues that four companies' financial statements should not be used (Las Palmas Furniture, Inc. ("Las Palmas"), Clear Export, Heritage Muebles Mirabile Export Inc. ("Heritage"), and Interior Crafts) because these companies include certain raw materials in their factory supplies or indirect material line items, which Commerce improperly classifies as overhead, resulting in double counting.[41] Fairmont Br. 2–4, 6–10. Specifically, Fairmont argues FOP items including "glue, nails, paints, dowels, rivets, tacks, hardware, sandpaper, paper, oil, fasteners (*e.g.* steel screws, nut steel, bolt steel, washer steel, hinge steel, pin steel, steel hook, steel bar, screw/bolt pack, steel nails, etc.)" were included as "factory supplies" or "indirect materials" in the financial statements of these surrogates, resulting in double counting for these items. Fairmont Br. 2–4. In support, Fairmont cites the financial statements of two companies, Celloom Furniture Corporation and Bodega Arts & Designs, Inc. *Id.* at 3 n.6.

The court finds Fairmont's evidence insufficient to establish that any of the listed items are included both in FOP and overhead. First, the financial statements cited are not for the same companies used by Commerce, and thus, cannot establish double counting.[42] Second, the financial statements do not explain in sufficient detail what is included in each line item, and thus, cannot establish that the listed items are included. For example, the Bodega Arts & Designs statement refers only to "pre-fabricated materials" and "supplies." *Fairmont Rebuttal Cmts.*, P.R. 848 at 535. The Celloom Furniture statement merely refers to "supplies and packing materials." *Id.* at 522. No explanation is given as to what these line items refer, and thus, they cannot provide evidence of double counting. Thus, Commerce's finding that Fairmont had failed to demonstrate double counting actually occurred is supported by substantial evidence.

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[41] Fairmont also argues that the indirect materials line must include these raw materials because the ratio of factory supplies to indirect materials is so high. Fairmont Br. 4–5. Commerce properly rejected this argument, *Issues and Decision Memorandum* 74, because the mere fact that a company has high overhead expenses does not necessarily demonstrate that certain raw materials must have been included in the overhead calculations.

[42] Fairmont's reliance on an affidavit from a Philippine financial officer is not substantial evidence because it does not relate to any of the financial statements used by Commerce and only provides generalized statements about the Philippine economy.

2. Berbenwood third-party services

Fairmont argues Commerce double counted by including third-party services received by Fairmont, such as subcontractor's materials, labor, and energy, in factory overhead. Fairmont Br. 6. Defendant argues Commerce merely followed its practice and there is no evidence that the third party expenses included subcontractor costs. Def.'s Br. 46.

Commerce's decision to classify "Third Party Services" as factory overhead is reasonable and supported by the evidence. Commerce stated that, consistent with its practice, because Berbenwood's financial statements account for direct labor, materials, and energy as separate line items, the third-party expenses are classified as overhead costs. *Issues and Decision Memorandum* 92. There is no explanation on Berbenwood's financial statement to demonstrate what is included in the "Third Party services" line and Fairmont presents no evidence to suggest that this line item includes labor costs. *AFMC Rebuttal Cmts.* (Jan. 14, 2010), P.R. 793 at 28. Thus, Fairmont has not shown that third-party costs are double counted.

3. Selling Costs

Fairmont argues that because it did not incur any selling costs when selling to its non-Chinese affiliate, the line items relating to selling costs should be excluded from the financial statements of Diretso, APY Cane, Heritage, Interior Crafts, Clear Export, and Coast Pacific Manufacturing Corp. ("Coast Pacific"). Fairmont Br. 5.

Commerce stated it did not exclude selling costs because it is Commerce's long-standing practice to not attempt to adjust financial statements on a line-by-line basis, as this may lead to unintended distortions in the data rather than achieving greater accuracy. *Issues and Decision Memorandum* 77. Fairmont has not demonstrated that Commerce's policy is unlawful. Thus, it was reasonable for Commerce to decline to adjust the financial statements to match the exact expenses of Fairmont. *See Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999) (noting statutory mandate directing Commerce to use "to the extent possible" prices in comparable market economies did not require an item-by-item accounting in calculating factory overhead).

4. Clear Export's Import and Export Expenses

Fairmont argues Clear Export's "Import and Export Expenses," "Insurance" and "Fumigation" line items should not be classified as SG&A because these costs are already counted elsewhere in Commerce's calculations. Fairmont Br. 10. Commerce found there was

nothing on the record to show that the "import and export expenses" had already been included elsewhere in the normal value calculation, and thus, classified this line item as overhead. *Issues and Decision Memorandum* 104. Fairmont does not provide any citation to demonstrate how these particular line items are already included in Commerce's calculations as either freight costs or brokerage and handling expenses. Thus, Fairmont has not provided sufficient evidence to show that Commerce has double counted in its calculations.[43]

IV. Brokerage and Handling

Fairmont argues that Commerce's use of data from the World Bank's *Doing Business in the Philippines: Trading Across Borders* ("World Bank report") to calculate a surrogate value for brokerage and handling is contrary to law.[44] Fairmont Br. 14. Specifically, Fairmont argues (1) the report uses price quotes, and not actual prices, (2) Commerce, in a different proceeding, found a similar World Bank report to be unreliable, (3) the report includes costs not incurred by Fairmont, and (4) the report uses costs for a 20-foot container, while Fairmont uses a 40-foot container, and Commerce's assumption that the per-cubic foot costs are the same for both sizes of containers is unsupported by the record. Fairmont Br. 14–19. Fairmont argues that Commerce should have considered data from the Philippine

[43] Fairmont argues that APY Cane's import and export shipping costs and Heritage's export expenses should be excluded from SG&A. Fairmont Br. 9. The court rejects this argument for the same reasons as those stated in regard to Clear Export.

Fairmont also argues that several other line items from several financial statements should be excluded from SG&A either because of double counting or because Fairmont does not incur the same expenses, including APY Cane's fumigation, Clear Export's fumigation and insurance, Interior Crafts' documentation, and Las Palmas' delivery expenses, importation fees, and insurance. Defendant argues the court should not address these arguments because they were not brought before the agency. Def.'s Br. 48. In relation to other line items, Commerce stated that its policy is "to not make adjustments to the financial statements data, as doing so may introduce unintended distortions into the data rather than achieving greater accuracy. . . . In calculating overhead and SG&A, it is the Department's practice to accept data from the surrogate producer's financial statements *in toto*, rather than performing a line-by-line analysis of the types of expenses included in each category." *Issues and Decision Memorandum* 75 (quoting previous reviews). Commerce is not required to do a line-by-line analysis in calculating factory overhead. *Magnesium Corp. of Am.*, 166 F.3d at 1372. Thus, the court finds Commerce did not err in including these particular line items, as exclusion may have resulted in even greater distortions in the data.

[44] Commerce is to subtract from its calculations of normal value "costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser . . . ." 19 U.S.C. § 1677b(a)(6)(B)(ii). These costs are generally called movement expenses. The subtraction of these costs from a respondent's normal value is intended to allow a fair comparison to net (or ex-factory) prices, which are not affected by the extra costs experienced by an exporter in shipping products around the world. Movement expenses include, inter alia, brokerage and handling and freight costs. In non-market economies, Commerce calculates a surrogate value for brokerage and handling.

Ports Authority to value brokerage fees and data from three Philippine brokerage companies, including two price quotes and one invoice, to value handling. Fairmont Br. 19; *Fairmont Surrogate Value Cmts.* (March 5, 2010), C.R. 362 at Ex. 6A–6G. Fairmont's argument lacks merit.

Here, Commerce considered the deficiencies in the data, as raised by Fairmont, and reasonably concluded that the deficiencies did not outweigh the benefits of relying on the World Bank data. *See Issues and Decision Memorandum* 48, 50. Commerce found the World Bank data were reliable because the data were published publicly, the data were based on six sources, instead of the three sources proposed by Fairmont, the World Bank is a reputable source of data, and the data were contemporaneous, specific to the costs in question, and tax exclusive. *Issues and Decision Memorandum* 47–52. In contrast, the data proposed by Fairmont to calculate brokerage costs were not published publicly, included one invoice and two price quotes,[45] the data did not represent a wider range of data than the World Bank report, and Commerce could not tell how the quotes were solicited or whether they were self-selected from a broader range of quotes. *Id.* at 51. Given the benefits found by Commerce of using the World Bank data versus the difficulties and unreliability of using the data supplied by Fairmont, the court concludes that the decision to use World Bank data is supported by substantial evidence.

Additionally, the flaws raised by Fairmont relating to the World Bank data are not sufficient to render the data unreliable. Fairmont argues the World Bank report is unreliable because in a different proceeding, Commerce found that the verified rates of three Indian companies were far lower than the rates reported in the World Bank data for India. Fairmont Br. 14 & n.57. Fairmont argues that because the same methodology is used in all World Bank Doing Business reports, the court should conclude that the methodology of the World Bank Doing Business in the Philippines report is invalid. *Id.* at 14–15. The fact that three Indian companies report different data than the World Bank report, which aggregates data from multiple companies, does not cast significant doubt on the World Bank report's methodology.[46] Moreover, Commerce has consistently found the

[45] Fairmont argues that because the World Bank report relied on price quotes from lawyers and business consultants, as opposed to actual customer and supplier data, the data are not reliable, as anonymous price quotes will be overstated. Fairmont Br. 14, 16. Because the alternative evidence submitted by Fairmont would also require reliance on price quotes, the possible use of price quotes in the World Bank data does not subtract from the substantial evidence supporting Commerce's finding.

[46] Fairmont argues that Commerce did not explain why the brokerage and handling expenses of a particular company would differ significantly from the expenses in a broad-based survey of market participants. Fairmont Reply 21. Although Fairmont argued the

World Bank to be a reliable source for data. *Issues and Decision Memorandum* 47 & n.218.

Fairmont also argues that the surrogate value here differs substantially from surrogate values calculated for other Chinese companies. As a result, Fairmont argues that Commerce's calculation is unlawful because it is inconsistent and unpredictable. Fairmont notes that Commerce has previously calculated surrogate brokerage and handling values for Chinese companies of $0.0083/kg, $0.0039/kg, and $0.0074/kg, as opposed to Fairmont's value of $0.0297/kg.[47] Fairmont Br. 15. None of these other reviews involved WBF or covered the same period of review at issue here. *See id.* 15 nn.58–60; *Fairmont Final Cmts.* (Dec. 10, 2009), P.R. 757 at Ex. 1 at 5; App. To Memorandum of Points and Auths. in Support of R. 56.2 Mot. for J. upon the Agency R. by Pl. Fairmont Designs Furniture Co., Ltd. ("Pl. Fairmont App.") Tab 74 at 17, Tab 76 at 10. These other reviews also used a simple average of three companies, instead of aggregated data from the entire country. Pl. Fairmont App. Tab 74 at 17, Tab 76 at 10. Surrogate values calculated with a different methodology for a different period of review do not render Commerce's calculations invalid. Additionally, the record shows that the surrogate value calculated here is not aberrational. Commerce compared the surrogate value to data on the record. This comparison showed that the per-volume cost of brokerage and handling in the World Bank report was less than in the World Bank India report, suggesting that the data here are not unreasonably high. *Issues and Decision Memorandum* 48–49; *Fairmont Surrogate Value Cmts*, C.R. 362 at Ex. 6A. And, the price was in line with the only data on the record for the same period of review.[48] *Issues and Decision Memorandum* 48–49. Based on these comparisons, the court cannot find that the World Bank Philippine data are unusually high.

World Bank data were aberrational compared to the Indian companies, Fairmont did not argue before the agency that the difference in rates rendered the World Bank's methodology inaccurate, see Fairmont Case Brief (April 13, 2010), P.R. 379 at vol. II at 44–48; Issues and Decision Memorandum 44–47, and thus, Commerce could not address it. This is not a grounds for finding error.

[47] Before Commerce, all the parties agreed that the surrogate value used in the *Preliminary Results* was flawed because the data used did not include handling expenses. *Issues and Decision Memorandum* 47. In the Final Results, Commerce calculated a surrogate value of $0.5520 per cubic foot, Surrogate Value Memorandum, P.R. 937 at Attach. 5, or $1,297.30 per container, *Fairmont Surrogate Value Comments* (March 5, 2010), P.R. 830 at 533. Fairmont proposed a value of $107.03 per container (brokerage) plus $158.60 per container (handling) for a total of $265.63 per container. *Fairmont Surrogate Value Comments*, P.R. 830 at 533.

[48] The only data on record for the same period of review were from an Indian company, Navneet Publications (India) Ltd. ("Navneet"). Fairmont calculated a brokerage and handling expense of $0.020, which is similar to the World Bank's calculation of $0.029. *Issues and* Decision Memorandum 48 n.229.

This is true, even if in other proceedings, with different records, Commerce calculated different surrogate values for different Chinese companies.

Fairmont also argues the World Bank data include costs that are not incurred by Fairmont, and thus, it would be contrary to law to apply those costs to Fairmont. Fairmont Br. 16–17. Fairmont notes that it had lower costs related to obtaining letters of credit and document services than the costs used in the World Bank report. *Id.* This argument is unavailing as Fairmont did not raise this argument before the agency. *See Issues and Decision Memorandum* 44–47. Regardless, the court does not find this sufficient to require a remand or recalculation because Commerce is not required to calculate an exact surrogate value for each respondent. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (surrogate value process is "difficult and necessarily imprecise") (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997)). Instead, Commerce must use the best available information to estimate what a Chinese company's costs would be in a market economy. Fairmont's argument that it, as a non-market participant, did not incur some costs included in the World Bank report does not suggest that the World Bank report is not the best available information.

Finally, Fairmont argues that the surrogate value is not accurate because, even though it is a per-cubic foot value, it was calculated using a twenty-foot container and then applied to Fairmont's forty-foot containers. Fairmont Br. 17–18. Fairmont argues that Commerce's assumption that the per-cubic costs do not change depending on the size of the container is erroneous because the predominate portion of brokerage and handling is professional services, which will not change based on the size of the container. *Id.* at 18. Fairmont argues that converting the total cost of a twenty-foot container into a per-cubic foot ratio creates a distorted value because brokerage costs are based on value, not volume, and thus, do not increase proportionally with the number of cubic feet. *Id.* at 18–19. This argument fails because Fairmont has not presented evidence that brokerage costs are based on value, not volume, and do not increase proportionally with the number of cubic feet.

Thus, although World Bank Doing Business in Philippines data may not be perfect, Fairmont has not shown that the World Bank data are not the best available information when compared to Fairmont's price quote, invoice, and Philippine Ports Authority data.

V. Freight Revenue

A. 19 U.S.C. § 1677a

Fairmont argues that Commerce erred by treating freight revenue as an offset to freight expenses, capping freight revenue at freight expenses.[49] Fairmont Br. 20. Fairmont argues that freight revenue is part of the price of the subject merchandise under 19 U.S.C. § 1677a(a) and (b) and should not be treated as an adjustment under § 1677a(c)(2)(A). *Id.* at 20–23. Fairmont's arguments lack merit.

In calculating export price and constructed export price ("U.S. price"), Commerce, consistent with § 1677a(c)(2)(A), deducts respondent's freight expenses from that price. 19 U.S.C. § 1677a(c)(2)(A).[50] Although § 1677a(c)(2) does not expressly address freight revenue, Commerce then offsets respondent's freight expenses with related freight revenues, resulting in a net freight expense. *Issues and Decision Memorandum* 67, 68. An example may help clarify this methodology: An exporter sells subject merchandise to an unaffiliated purchaser in the United States for a price of "X" dollars (United States price). It costs the exporter "Y" dollars (freight expenses) to ship the merchandise to the place of delivery in the United States. The unaffiliated purchaser pays the exporter "Z" dollars (freight revenue) to provide the necessary shipping. Under these circumstances, Commerce makes the following adjustment: Export Price = X - (Y - Z). "Z," however, is capped at "Y" so that any freight revenue that is in excess of freight expenses is not equated for.[51]

Commerce's approach is reasonable under the statute. It accords with the statutory language, allows Commerce to accurately account for freight expenses that a respondent actually incurred, and ensures that a respondent's U.S. price is not overstated by profit earned from freight services.

Section 1677a(c)(2)(A) does not specify whether the "costs, charges, or expenses" incident to moving the subject merchandise should be calculated based on net or gross expenses. Given the silent statute, Commerce may apply its own reasonable methodology. *United States*

[49] "Freight revenue" is the amount that a purchaser pays an exporter to ship the subject merchandise to the United States or, put differently, it is the amount of revenue an exporter generates by providing shipping services. "Freight expenses" are the costs incurred by an exporter, which are incident to bringing the subject merchandise to the United States.

[50] Export price and constructed export price shall be reduced by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses . . . , which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . . ." 19 U.S.C. § 1677a(c)(2)(A).

[51] Under the same circumstances, Fairmont proposes the following equation: Export Price = (X + Z) - Y. Fairmont argues that "Z" should not be subject to any cap.

v. Eurodif S.A., 555 U.S. 305, 316 (2009); *see Fla. Citrus Mut. v. United States*, 550 F.3d 1105, 1110 (Fed. Cir. 2008) (applying the same reasoning to the term "import duties," which is also found in § 1677a(c)(2)(A)). Commerce has elected to adjust for net expenses. *Issues and Decision Memorandum* 69 ("[T]he Department now consistently applies a policy of treating freight revenue as an offset to freight costs and capping freight revenue by the amount of corresponding freight costs."). Commerce's net revenue methodology is reasonable because it more accurately reflects the actual costs incurred by Fairmont in moving its subject merchandise and prevents Fairmont from inflating its export price with freight revenues. The plain language of § 1677a(c)(2) deals exclusively with downward adjustments to U.S. price. 19 U.S.C. § 1677a(c) ("The price used to establish export price and constructed export price shall be . . . reduced by . . . ."). If Commerce were to alter its methodology as Fairmont proposes and not cap freight-related revenue by the amount of related freight expenses, adjustments under § 1677a(c)(2) could potentially increase the export price or constructed export price (i.e. Commerce would "reduce" export price by subtracting a negative number). This would contradict the plain import of the statute.

Fairmont also takes issue with Commerce's more general statutory construction, contending that because freight revenue is integral to the price of its subject merchandise, it should be included in U.S. price under § 1677a(a) or (b) rather than accounted for as an adjustment under § 1677a(c)(2)(A). Fairmont Br. 20. This argument overlooks the statutory requirement to adjust export price or constructed export price to permit an "apples-to-apples" comparison. In determining export or constructed export price, 19 U.S.C. § 1677a requires Commerce to make adjustments in order to properly assess the amount by which normal value exceeds the United States price. 19 U.S.C. §§ 1673, 1677a(c)–(d). Adjustments are necessary because the reported prices "represent prices in different markets affected by a variety of differences in the chain of commerce" and must be adjusted to "reconstruct the price at a specific, 'common' point . . . , so that value can be fairly compared on an equivalent basis." *SKF USA Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d 1370, 1373 (Fed. Cir. 1999) (quoting *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1572–73 (Fed. Cir. 1983)). Thus, it was reasonable for Commerce not to consider freight revenue as part of the price of the subject merchandise.

The record also casts doubt on Fairmont's claim that freight revenue is inherently part of the price at which the subject merchandise is sold. The record shows that Fairmont charges separately for freight

and classifies freight revenue under its own accounting code. *Exhibit 6*, C.R. 423 at Ex. 6 at 2, 4 ("Inland Freight" charged separately from price of merchandise on invoice); *Verification Report of Fairmont Designs* (Jan. 4, 2010), P.R. 773 at 6 (listing Fairmont's accounting code for "freight revenue"). Fairmont further argues that with regard to its hospitality sales, merchandise price and freight revenue are intertwined because Fairmont is able to adjust the price of the goods and freight revenue based on the customer's need. Fairmont Br. 26–27. Record evidence indicates that Fairmont rarely made this type of adjustment and that when Fairmont calculated the amount to charge for freight, it was largely concerned with freight costs. *Verification Report of Fairmont Designs*, P.R. 773 at 17.[52] Although Fairmont has put forth evidence to suggest that the freight revenue it generated was more than a simple reimbursement for freight expenses, a proper "apples-to-apples" comparison should not include profit earned from the sale of a service (freight) as opposed to profit earned from the sale of the subject merchandise (furniture).

B. 19 C.F.R. § 351.401(c)

Fairmont argues that freight payments are "reasonably attributable" to the subject merchandise and thus should be considered adjustments to U.S. price under 19 C.F.R. § 351.401(c). Fairmont Br. 24; Fairmont Reply 16. This claim lacks merit.

Section 351.401(c) directs Commerce to use a price in the calculation of export or constructed export price which is "net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise." 19 C.F.R. § 351.401(c). Price adjustments are defined as "any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38). Although the definition contains the phrase "such as" and is therefore illustrative, the purpose of the price adjustment provision is to account for any changes to the actual starting price of the subject merchandise and not to reflect any related expenses. *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 770, 347 F. Supp. 2d 1326, 1360 (2004). Thus, it was reasonable

[52] Commerce's verification report stated:
We asked company officials if freight revenue was ever based on non-freight concerns . . . . The Hospitality division sales manager explained that for Hospitality division sales, in very rare situations, the customer may ask that adjustments to the purchase price be reflected in freight charges rather than in the selling price. The Home division sales manager said that to his knowledge FDUSA [Fairmont's U.S. subsidiary] bases all calculations of freight revenue on Home division sales on freight cost considerations and on nothing else.
Verification Report of Fairmont Designs, P.R. 773 at 17.

for Commerce to interpret the definition of price adjustment to not include the related freight expense.

C. Capping freight revenue versus capping other values

Fairmont argues that its freight revenue is the same as selling products with cost and freight ("C&F") or delivered term sales.[53] Fairmont Reply 17. Because Commerce treats the price of C&F or delivered term sales as an integrated price, Fairmont insists that it is inconsistent and unlawful for Commerce to treat Fairmont's pricing scheme differently. *Id.* This claim lacks merit.

Section 1677a(c)(1) lists the upward adjustments that are to be added to export price when not included in that price. This list does not include freight revenue. 19 U.S.C. § 1677a(c)(1). Thus, it is reasonable for Commerce to read the list of upward adjustments in § 1677a(c)(1) as an exclusive list that does not include freight revenue.

Further, as discussed above, record evidence indicates that Fairmont's freight revenue is separate and unique from the revenue generated from the sale of its goods. Fairmont's approach of charging separately for freight demonstrates separate strategies for collecting payment for freight and the goods sold. Unlike Fairmont's separate treatment of freight revenue, C&F prices are designed to link transportation costs with the price of the subject merchandise. *Issues and Decision Memorandum* 70. The purchaser makes a single payment and the exporter pays all expenses incurred in transporting the subject merchandise to the United States. The distinction between the two methods of pricing is sufficient to warrant different treatment by Commerce. If Commerce were to ignore this distinction and integrate freight revenue into U.S. price, Fairmont would be able to use profits from the sale of a freight service to increase the export price and thereby decrease the amount of antidumping duties imposed on the subject merchandise.

D. Inland freight offset

In the *Preliminary Results*, because Fairmont stated that freight revenue was provided based on the amount of U.S. inland freight only, Commerce capped freight revenue by the amount of U.S. inland transportation costs. *Issues and Decision Memorandum* 69. Fairmont argues that if Commerce continues to find that freight revenue should be capped at freight expense, then for those Hospitality Division sales for which Fairmont reported U.S. inland freight expenses in the

[53] C&F is a term of sale signifying that the price invoiced or quoted by a seller for a shipment does not include insurance charges, but does include all expenses related to freight up to a named destination.

ocean freight field, Commerce should include an estimate of the amount of the purported imbedded inland freight expenses. Fairmont Br. 30. This claim lacks merit.

Fairmont alleges that its motivation for imbedding inland freight expenses in the ocean freight field, and reporting zero in the U.S. inland freight column, was a Commerce questionnaire instruction that stated:

> [I]t is not uncommon for certain of these transport expenses to be combined in a single fee paid [to] a transport company (*e.g.*, combined ocean transport and U.S. internal transport to the customer's place of delivery). If amounts are combined, do not attempt to separate them but report them in a single field and explain in your narrative response.

Antidumping Questionnaire (April 21, 2009), P.R. 445 at C-21.

Fairmont argues that by doing as Commerce requested, it has been left with an erroneous freight expense cap of zero for certain hospitality sales in which it incurred inland freight costs. Fairmont Br. 32. Although, Fairmont has put forth two methods for estimating the U.S. land freight expenses reported in the ocean freight field, Fairmont's methodology requires Commerce to estimate U.S. land freight. *Id.* at 32. Fairmont has failed to show that any information exists on the record to accurately disaggregate U.S. inland freight amounts from ocean freight amounts and thus, it was reasonable for Commerce to decline to make such an estimation. *See* 19 C.F.R. § 351.401(b)(1) ("The interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment . . . .").

E. Procedural errors

Fairmont asserts that Commerce failed to provide an opportunity to comment upon the decision to cap the reported freight revenue because Commerce did not specifically notify Fairmont of the issue until the *Preliminary Results* and because Commerce rejected factual information submitted by Fairmont. Fairmont Br. 32–33. This claim lacks merit.

Commerce has established department precedent for its practice of capping freight revenue. *Issues and Decision Memorandum* 68; *see Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from the People's Republic of China*, A-570–886, AR: 8/01/06–07/31/07, at 12–14 (Feb. 4,

2009), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–2930–1.pdf (last visited June 5, 2012). It was foreseeable that Commerce would continue to follow this practice in the present case.

Fairmont's rebuttal information was untimely new factual information. Pursuant to 19 C.F.R. § 351.301(b)(2), Commerce established a regulatory deadline for the submission of new factual information. *See Letter Regarding New Factual Information* (Mar. 25, 2010), P.R. 866 at 1. Fairmont's rebuttal information was submitted beyond this deadline. *Id.* Although 19 C.F.R. § 351.301(c)(1) allows a party to submit certain rebuttal evidence in response to new evidence placed on the record by interested parties, it does not permit parties to submit new factual information in response to administrative determinations. *Id.* § 351.301(c)(1). While strict adherence to this provision might result in an unfair procedure in some cases, based on Commerce's prior practice of capping freight revenue, Fairmont should have expected Commerce to continue this practice in the present case. In fact, Fairmont commented on the practice in its administrative case brief to Commerce. *Fairmont Case Brief*, P.R. 892, Vol. I at 24–34. Thus, there is no procedural defect to correct here.

V. Combination Rates

AFMC argues that Commerce abused its discretion by refusing to develop the record with necessary information from respondents and by requiring AFMC to supply conclusive proof of circumvention. AFMC Br. 16, 24. AFMC relies on the increase in shipments by Aosen,[54] the similarity of invoices by Nanjing Nanmu and other

[54] AFMC argues that because Aosen's shipments increased from 300 containers to 2222 containers after receiving a zero cash deposits rate and Aosen refused to cooperate in the present review, Commerce should have concluded that Aosen was participating in a circumvention scheme. AFMC Br. 17–19.

companies,[55] and an article from *Furniture Today* that found circumvention was occurring to argue that Commerce cannot decline to investigate in light of such prima facie evidence of circumvention.[56] AFMC Br. 14, 17, 19.

The application of combination rates is left to the discretion of Commerce. *See* 19 C.F.R. § 351.107(b)(1) (Commerce "may establish" combination cash deposit rates for exporters and its supplying producers); *see also Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1381 (Fed. Cir. 2004) (affirming Commerce's decision to apply combination rates in light of Commerce's discretion). An agency's failure to collect pertinent data, however, in some situations may constitute an abuse of discretion. *See U.S. Steel Grp. v. United States*, 18 CIT 1190, 1202, 873 F. Supp. 673, 687 (1994), *aff'd* 96 F.3d 1352 (Fed. Cir. 1996) (holding failure to investigate not an abuse of discretion when evidence of production capability did not prove company produced a certain product).

Commerce examined and verified the sales of Nanjing Nanmu and determined that the sales were actually from Nanjing Nanmu. *Issues and Decision Memorandum* 37. Commerce found the increase in Aosen's shipments and other shipments from producers through lower-rate companies may be explained by legitimate business reasons, such as not having an export license and thus, did not mandate further investigation. *Id.* Although the inference could be drawn that circumvention did occur because shipments through other companies occurred, AFMC's evidence does not show that the shipments through other companies were unlawful. *See U.S. Steel Grp.*, 18 CIT at 1202, 873 F. Supp. at 687 (finding no abuse of discretion when inference could be drawn from evidence but evidence was not definitive). Moreover, Commerce applied the 216.01% PRC-wide rate to both Aosen and Nanjing Nanmu, which should prevent any circumvention by these companies.

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[55] AFMC argues [[ ]], who had a 216.01% rate, was using the names of exporters with lower rates when creating its invoices. AFMC Br. 19–20. For example, one invoice supposedly from Nanjing Nanmu reflects [[ ]]. According to AFMC, [[ ]]. *Id.* Commerce found the Nanjing Nanmu invoices had been verified as actually from Nanjing Nanmu and that AFMC had not supported its assertions relating to [[ ]] with factual evidence. *Issues and Decision Memorandum* 37. Commerce further found that even if there are shipments through lower-rate companies, the shipments likely can be explained by legitimate commercial reasons. *Id.*

[56] In the Third Administrative review of WBF, the court rejected the *Furniture Today* article as insufficient proof to require Commerce to apply combination rates. *Lifestyle Enter.*, 768 F. Supp. 2d. at 1313–14.

The broader issue is whether Commerce should in its short form questionnaire, which focuses on whether a respondent is to get a rate other than that of the PRC-entity, ask about shipments of subject merchandise for or by another company. Apparently this type of inquiry was included previously. The court is concerned that Commerce's answer that it cannot act because it has no circumvention data and the fact that it does not ask for the data creates a familiar geometric object. The court declines to order a new investigation here because AFMC's evidence of circumvention is largely based on its own client's general statements to a magazine. This is a troubling area, however, and Commerce should be prepared to alter its investigation techniques or explain its actions carefully in the future. It is also not a satisfactory answer that Commerce does attend to these problems in new shipper reviews.

VI. Separate Rates of Other Respondents

AFMC argues that if Fairmont's separate-rate dumping margin of 43.23% is increased, Commerce should adjust the weighted-average separate-rate of the other respondents, which were calculated based on Fairmont's rate. AFMC Br. 30. Defendant argues only those respondents subject to an injunction of liquidation (Fairmont, Coaster, and Longrange) may have their rates adjusted based on any changes to Fairmont's rates. Def.'s Br. 72. Defendant's argument has merit. Domestic parties may have liquidation of entries enjoined. Zenith Radio Corp. v. United States, 710 F.2d 806, 811–12 (Fed. Cir. 1983). Thus, AFMC could have preserved this relief. Further new deposit rates have already been set for the future in other reviews. In this circumstance, the court will not change rates for entries that have already been liquidated.

CONCLUSION

For the foregoing reasons, the court remands the matter for Commerce to redetermine Fairmont's AFA rate if an AFA rate is used, redetermine Fairmont's separate rate using industry-specific wage data or provide substantial evidence as to why manufacturing sector data is preferable, explain whether the Indian wage data are distorted by a reporting cap, explain why Insular Rattan's financial statement is generally reliable and usable, and provide an explanation of its zeroing practice. If Commerce calculates a different separate rate for Fairmont, Commerce shall make appropriate adjustments to the separate rates of the parties before the court in this litigation. Commerce's determination is sustained in all other respects.

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

Dated: This 6th day of June, 2012
New York, New York

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