# U.S. Customs and Border Protection

Slip Op. 12–130

ZHAOQING NEW ZHONGYA ALUMINUM CO., LTD; ZHONGYA SHAPED ALUMINUM; AND GUANG YA ALUMINUM INDUSTRIES, CO. LTD, Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 11–00178 [1]

[Commerce's final determination is AFFIRMED.]

Dated: October 11, 2012

*Peter J. Koenig*, Squire Sanders LLP, of Washington, DC, for the Plaintiffs Zhaoqing New Zhongya Aluminum Co., Ltd., Zhongya Shaped Aluminum (HK) Holding, Ltd., and Karlton Aluminum Company Ltd.

*Mark D. Davis*, Davis & Leiman P.C., of Washington, DC, for the Plaintiffs Guang Ya Aluminum Industries Co., Ltd., and Guang Ya Aluminum Industries (Hong Kong) Ltd.

*Tara K. Hogan*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were *Stuart E. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Rebecca Canto*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

*Stephen A. Jones* and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for the Defendant-Intervenors, the Aluminum Extrusions Fair Trade Committee.

## *OPINION*

**Pogue, Chief Judge:**

In this action, Plaintiffs, who are Chinese producers of extruded aluminum, seek review of certain findings in the United States Department of Commerce's ("Commerce" or "the Department") antidumping investigation of extruded aluminum from the People's Republic of China ("China").[2] Specifically, Plaintiffs allege that Commerce erred in collapsing into a single entity three affiliated

[1] This case is consolidated with Court No. 11–00196.

[2] Commerce published its preliminary determination in an antidumping investigation into certain aluminum extrusions from China on November 12, 2010. It published an Amended Preliminary Determination on January 4, 2011, and a Final Determination on April 4, 2011. *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,524 (Dep't

exporter/producers, the Guang Ya group, New Zhongya, and Xinya, and improperly applied adverse facts available ("AFA") to this collapsed entity when calculating antidumping duty rates. As explained below, Commerce's final determination is supported by a reasonable reading of the record.

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

## STANDARD OF REVIEW

Under this court's familiar standard of review, Commerce's determination will be affirmed unless 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). Substantial evidence means "more than a mere scintilla" of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). To determine if substantial evidence exists, the court reviews the record as a whole, including whatever "fairly detracts from [the conclusion's] weight." *Id.* at 488. It is also relevant here that the possibility of drawing two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record. *Id.* ("[A] court may [not] displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.").

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Commerce Apr. 4, 2011) (final determination of sales at less than fair value) ("*Final Determination*"), and accompanying Issues & Decision Memorandum, A-570–967 (Apr. 4, 2011), Admin. R. Pub. Doc. 513 *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–7927–1.pdf (last visited Oct. 10, 2012) ("*I & D Memo*") (adopted in *Final Determination*, 76 Fed. Reg. at 18,525).

The period of investigation was July 1, 2009 – December 31, 2009. The investigation covers extruded aluminum shapes and forms made with aluminum alloys containing metallic elements which correspond to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or other certifying body equivalents). The final determination further describes the chemical composition of each of these numerical designations. *Final Determination*, 76 Fed. Reg. at 18,525. Aluminum extrusions are produced and imported in a wide variety of shapes, forms, and finishes and may be described as parts for finished products that are assembled after importation, including, *inter alia*, window and door frames, solar panels, or furniture. *Id.* at 18,525–26 (listing products included and excluded from the order).

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

## BACKGROUND

In its antidumping investigation, as is relevant here, Commerce initially found that the Plaintiffs were separate from the China-wide entity. It then determined that the Guang Ya group ("Guang Ya"), New Zhongya ("Zhongya"), and Xinya met the statutory and regulatory requirements for collapsing affiliated companies. Specifically, the relevant statute directs Commerce to consider as affiliated any "members of a family." 19 U.S.C. § 1677(33)(A). The applicable regulation calls for collapsing affiliated companies where: 1) a shift in production between factories would not require "substantial retooling" of either facility and 2) there is a "significant potential for the manipulation of price or production." *I & D Memo* at 31; 19 C.F.R. § 351.401(f). When evaluating potential for manipulation, Commerce considers relevant factors, including but not limited to: 1) the level of common ownership, 2) the extent to which managers and board members sit on the board of directors of an affiliated firm, and 3) whether operations are intertwined. 19 C.F.R. § 351.401(f)(2).

As an initial matter, Commerce determined that the companies were affiliated and that a shift in production between them would not require significant retooling of facilities.[4] *I & D Memo*, Comment 4 at 32. Commerce then turned to the relevant factors identified by the regulations for assessing potential for manipulation. *Id.*

With regards to the first factor, common ownership, Commerce found that the owners of these companies constituted a family grouping, pursuant to 19 U.S.C. § 1677(33)(A), and that this grouping satisfied the criteria for common control under 19 U.S.C. § 1677(33)(F) because members of the Kuang family grouping owned a substantial portion, if not all, of each of the three companies. *Final Determination*, 76 Fed. Reg. at 18,527. While Commerce initially stated that it did not know the exact ownership of Xinya,[5] it later gathered evidence, all of which indicated that a member of the Kuang family owned Xinya, even though that evidence could interpreted in a manner that leads to inconsistent conclusions. *I & D Memo*, Comment 4 at 34–35. Specifically, in this antidumping investigation, Guang Ya claimed a Kuang sibling was a Xinya shareholder, whereas Zhongya stated on the public record of an accompanying countervailing duty investigation that the same Kuang sibling owned Xinya.

[4] No party challenged these findings.

[5] *Aluminum Extrusions from the People's Republic of China*,75 Fed. Reg. 69,403, 69,407 (Dep't Commerce Nov. 12, 2010) (notice of preliminary determination of sales at less than fair value and preliminary determination of targeted dumping) ("*Preliminary Determination*").

*Preliminary Determination*, 75 Fed. Reg. at 69,407. Commerce attempted to ascertain who owned Xinya during the verification stage of this antidumping investigation, but Xinya refused to cooperate. *I & D Memo*, Comment 4 at 34–35. Commerce did, however, find undisputed record evidence that a Kuang brother in-law was the general manager of Xinya. *Id.* at 32. Because none of the parties recanted earlier statements that the owner or shareholder of Xinya was a Kuang sibling, and because there was no evidence on the record to suggest that anyone other than a Kuang sibling controlled Xinya, Commerce concluded that the earlier evidence showing familial affiliation was credible and considered Xinya to be owned by the Kuang family grouping. Def.'s Opp'n to Pls.' Rule 56.2 M. For J. upon the Agency R., ECF No. 31 at 9 ("Def.'s Br.").

While Commerce did not find any common board members or management between the companies, it concluded that such a finding was unnecessary because the family grouping constituted a single unit, and Kuang family members managed or directed each of the three companies. Def.'s Br. at 14. Furthermore, Commerce found other factors supported a finding of potential for price manipulation. Specifically, not only did the Kuang family hold senior leadership positions in each company, but the record showed money transfers from Xinya to Zhongya which Commerce took as indicia that the companies were intertwined.[6] During verification, Zhongya offered two inconsistent explanations for the money transfers. *Final Collapsing Memo* at 4. Because the verification process acts as a spot check and is not designed to be exhaustive, Commerce concluded that "the fact [we] did not uncover additional evidence of intertwined transactions during the course of these verifications is not telling" and that the relationship between the three companies "poses a significant potential for the manipulation of price or production." *Id.* at 10. It therefore collapsed Guangya, Zhongya, and Xinya into a single entity when calculating AD duties.[7] *Final Determination*, 76 Fed. Reg. at 18,527.

[6] The presence of one or two payments on Zhongya's books appears to have been discovered between the preliminary and final determinations. *Final Affiliation/Collapsing Mem.*, A-570–967, ARP 09 (Mar. 28, 2011), Admin. R. Con. Doc. 190 [Pub. Doc. 515] at 4 ("*Final Collapsing Memo*"). Commerce in its preliminary collapsing memo concedes that at the time nothing on the record indicated the three companies' operations were intertwined. *Prelim. Affiliation/Collapsing Mem.*, A-570–967, ARP 09 (Oct. 27,2010), Admin. R. Con. Doc. 142 [Pub Doc. 356] at 9 ("*Preliminary Collapsing Memo*"). Nonetheless, Commerce went on to find that "the relationship between the Guang Ya Group, New Zhongya and Xinya poses a significant potential for the manipulation of price or production." *Id.*

[7] During the course of the investigation, Commerce earlier identified another producer/importer company, Da Yang Aluminum Co., as potentially affiliated with the three

When calculating the applicable dumping margin for the collapsed entity, Commerce relied on adverse facts available, pursuant to 19 U.S.C. § 1677e(b), because each of the three companies that makes up the collapsed entity failed to cooperate. *Id.* at 18,528–29. According to Commerce, the resulting record was filled with "such extensive omissions and inaccuracies that a reasonably accurate, reliable dumping margin could not be calculated." Def.'s Br. at 15. First, Guang Ya possessed information concerning aluminum billet consumption, and knew that Commerce required this data, but, without explanation, removed the data from its database. *I & D Memo*, Comment 5 at 52. Even after Commerce requested the information in a supplemental questionnaire, Guang Ya did not produce it. *Id.* Guang Ya later submitted aluminum billet consumption data that was inconsistent with data that had already been verified. *Id.* Second, Zhongya failed to provide complete and accurate U.S. sales data upon Commerce's request. *Id.* Finally, Xinya was not responsive in any appreciable way to Commerce's multiple antidumping questionnaires, and during verification did not provide requested documents or make personnel available who could accurately answer Commerce's questions. *Id.*

Accordingly, using adverse inferences, Commerce calculated a final rate of 33.28% for the Guang Ya/Zhongya/Xinya entity. *Final Determination*, 76 Fed. Reg. at 18,530. Plaintiffs challenge this rate.

## DISCUSSION

Plaintiffs claim both that the record cannot support a finding that the three companies are affiliated and that it does not support Commerce's decision to collapse the corporations into one entity. Plaintiffs also challenge Commerce's decision to impose an AFA rate. Each challenge is considered in turn.

### *I. Affiliation*

Plaintiffs first argue that it was improper for Commerce to find that Xinya was affiliated with Zhongya and Guang Ya where Commerce was unable to verify who owned Xinya. Plaintiffs also claim that a mere finding of familial affiliation does not support a finding that the family's respective companies are also affiliated. These arguments fail.

Under the applicable statute, Commerce may find that "members of a family" are affiliated. 19 U.S.C. § 1677(33)(A). Prior decisions have approved a finding of company affiliation on the basis of ownership by

at hand because it too was owned by the Kuang family. *Preliminary Determination*, 75 Fed. Reg. at 69,408. Da Yang, however, failed to respond to the initial quantity and value questionnaire sent by Commerce, so Commerce treated it as part of the China-wide entity and, therefore, not eligible for a separate rate. *Id.*

a single family. *Ferro Union, Inc. v. United States*, 23 CIT 178, 193–95, 44 F. Supp. 2d 1310, 1325–26 (1999). In such cases, Commerce makes the legitimate choice to treat the family grouping as a "person" under the statute. *Id.* at 194–96, 1326–27.

Commerce properly found that Xinya is owned by a Kuang sibling, that all three companies are controlled by the Kuang family, and therefore that the companies are affiliated. While the record does contain potentially conflicting information as to who owns Xinya, Commerce could not verify this information because Xinya refused to cooperate. *I & D Memo*, Comment 4 at 34–35. This forced Commerce to resort to the information that Guang Ya and Zhongya earlier placed on the record, evidence indicating that a Kuang sibling owns Xinya. Because neither Guang Ya nor Zhongya recanted their earlier statements with regard to Xinya's ownership, Commerce treated the evidence as reliable. Def.'s Br. at 9.

Plaintiffs mistakenly rely on *Hontex Enterprises v. United States*, 28 CIT 1000, 1012, 342 F. Supp. 2d 1225, 1235 (2004), for the proposition that Commerce cannot find that companies are affiliated based solely on their failure to undergo verification. This argument misses the point. Commerce did not base its decision to find affiliation solely on Xinya's failure to undergo verification. Rather, when Xinya was uncooperative during verification, Commerce turned to evidence previously on the public record — statements that Zhongya and Guang Ya made on the public record of this AD investigation and the accompanying CVD investigation. While these statements are not perfectly consistent, they were not recanted and both implicated a Kuang sibling in the ownership or control of Xinya. Commerce had no reason to believe that someone other than a Kuang sibling owned or controlled Xinya.[8] In addition, Commerce also found undisputed evidence on the record that the general manager of Xinya was a Kuang brother-in-law. Def.'s Br. at 8. Therefore, Commerce reasonably determined that the record supported a finding that Xinya was owned by a Kuang sibling.[9]

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[8] Xinya did not respond to Commerce's initial AD questionnaire but rather provided documentation purporting to show it was owned by Xinya Holdings. However, Commerce stated that Xinya's documentation failed to demonstrate it was not affiliated with Guang Ya and Zhongya, and sent both a supplemental questionnaire and another request to Xinya for the information sought in the initial AD questionnaire. I & D Memo, Comment 5 at 41–42. Xinya responded to the supplemental questionnaire, but stated that it was responding only to the supplemental questionnaire, not to the remainder of Commerce's request. *Id.* at 42.

[9] Plaintiffs also assert incorrectly that even if all three companies were owned by members of the same family, Commerce failed to find that there was some measure of control between the companies and therefore erred in finding they were affiliated. This argument fails because the statute is disjunctive and Commerce need only find that persons are members of the same family *or* are under common control in order to be considered affiliated. 19 U.S.C. § 1677(33)(A) & (F).

Commerce's attempts to verify Xinya's ownership failed because Xinya created a situation where Commerce was unable to obtain necessary data, leaving Commerce to rely on earlier record evidence. Even without Xinya's refusal to cooperate, however, there was still sufficient evidence on the record to support Commerce's conclusion that Xinya is owned by a Kuang sibling. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (internal quotation marks omitted)); *Universal Camera Corp.*, 340 U.S. at 488 (a court may not displace an agency's choice between two conflicting views, so long as its choice is supported by substantial evidence). Therefore, because Commerce's finding of affiliation was supported by substantial evidence, it will be affirmed.

*II. Potential for Price or Production Manipulation*

Plaintiffs next challenge Commerce's decision to collapse the three entities, arguing that Commerce could not establish a "significant potential for the manipulation of price or production." *I & D Memo*, Comment 4 at 31; 19 C.F.R. § 351.401(f).

As noted above, when evaluating potential for manipulation, Commerce considers relevant factors that are primarily, but not limited to: 1) the level of common ownership, 2) the extent to which managers and board members sit on the board of directors of an affiliated firm, and 3) whether operations are intertwined. 19 C.F.R. § 351.401(f)(2). Commerce also looks for "relatively unusual situations, where the type and degree of relationship is so significant that [it] finds there is a strong possibility of price manipulation." *Nihon Cement Co. v. United States*, 17 CIT 400, 426 (1993) (citation omitted). None of these factors alone are dispositive, and when Commerce evaluates them, it looks for actual price manipulation in the past and the possibility of future manipulation. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,346 (May 19, 1997) ("[A] standard based on the potential for manipulation focuses on what may transpire in the future."). Commerce considers these factors "in light of the totality of the circumstances," when deciding whether collapsing is appropriate. *Koyo Seiko Co. v. United States*, 31 CIT 1512, 1535, 516 F. Supp. 2d 1323, 1346 (2007). When companies are deemed affiliated based on common family ownership, the court has recognized that "the existence of the family group, and the significant controlling ownership by the family members, reasonably supports Commerce's collapsing decision." *Catfish Farmers of Am. v. United States*, 33 CIT __, 641 F. Supp. 2d 1362, 1371 (2009).

Addressing the first factor that Commerce considers when evaluating potential for manipulation of price or production, Plaintiffs assert incorrectly that there is no common ownership between the companies and that even if there were common ownership, Commerce's reasons for collapsing are flawed because Commerce conflates family affiliation with risk of manipulation. These arguments are unavailing because, for the purposes of the investigation, Commerce treated the Kuang family as a unit when looking for common ownership, and the Kuang family "essentially [holds] full ownership" of Guangya, Zhongya, and Xinya. *Final Determination*, 76 Fed. Reg. at 18,527; *I & D Memo*, Comment 4 at 32 ("It is undisputed that this family is virtually the sole owner of the Guang Ya Group and New Zhongya, and the information on the record indicates that Xinya is also owned by the Kuang family."). Plaintiffs concede that if Commerce treats the family as a unit, then there is indeed common ownership. Pls.' Rule 56.2 Mem., ECF No. 27, at 9 ("Pls.' Br.") ("There are no common owners, unless one constructs a family group and says that it owns each company."). Pursuant to 19 C.F.R. § 351.401(f)(2)(i), Commerce is to examine the "level of common ownership" and here Commerce has found not only common ownership, but virtually sole ownership.[10]

With regards to the next § 351.401(f)(2) factor, Plaintiffs argue that because there is no overlap between the three companies' managerial employees or board members, Commerce erred in finding that potential for manipulation exists. This argument, however, again fails to recognize that Commerce is permitted to treat the Kuang family as a single unit. Because Commerce found that Kuang family members sit on the boards of directors and hold management positions in Guang Ya and Zhongya, *Final Determination*, 76 Fed. Reg. at 18,527, there is, therefore, overlap between management and boards of directors. *Catfish Farmers*, 33 CIT at __, 641 F. Supp. 2d at 1371–72.

Plaintiffs finally challenge Commerce's finding with regards to the third § 351.401(f)(2) factor: intertwined operations between the companies. They assert that the financial transactions at issue were one-time, personal transactions that were not between the companies and therefore not business related.

Plaintiffs are correct that the only evidence on the record to support Commerce's finding that the companies are intertwined is financial

[10] Plaintiffs assert that common family ownership is not a sufficient, sole indicator of price manipulation, Pls.' Br. at 10, but Commerce does not rely on this reasoning. Rather, as discussed in the remainder of this section, Commerce went on to analyze the rest of the § 351.401(f)(2) factors and, taking the record as a whole, concluded that there existed strong potential for manipulation.

transfers that were discovered during Zhongya's verification. *Final Collapsing Memo* at 10. But when Commerce inquired as to the nature of these transactions, it received two different explanations that were inconsistent with Zhongya's accounting books. *Id.* Because verification is not exhaustive and Commerce was denied access to Xinya's documentation, Commerce could not determine the exact nature of these transactions and therefore decided that, given the record as a whole, these transactions support the conclusion that the companies were intertwined. *Id.* While Plaintiffs strenuously disagree with Commerce's characterization of these transactions, they have not placed on the record any evidence to support the assertion that the transactions were of a personal nature. Without such evidence, the court cannot give weight to Plaintiffs' claim. *Pure Gold, Inc. v. Syntex*, 739 F.2d 624, 627 (Fed. Cir. 1984) ("Mere conclusory assertions do not raise a genuine issue of fact." (emphasis omitted)). Therefore, on this record, Commerce's decision to collapse the affiliated companies, Guang Ya, Zhongya, and Xinya, is supported by substantial evidence that there was potential for manipulation of price or production.[11]

*III. Imposition of AFA Rate*

Finally, challenging Commerce's decision to apply AFA to the entire collapsed entity, Plaintiffs claim that Guang Ya's reported consumption of aluminum billets was complete and accurate, that any "inadvertent omissions" were rectified, and that Commerce unreasonably refused to use the corrected data. These arguments also miss the point.

When Commerce finds both that a respondent's submissions may be replaced with facts otherwise available ("FA"), because the respondent withheld information, and that the respondent has failed to cooperate to "the best of its ability," the Department may draw adverse inferences when selecting from the FA to calculate a dumping margin, also known as adverse facts available ("AFA"). 19 U.S.C. §

[11] Plaintiffs also assert that because Xinya, like Da Yang, failed to respond to Commerce's questionnaires and does not export the subject merchandise, it should be part of the China-wide entity rather than collapsed with Guang Ya and Zhongya. However, as Commerce explains, it sent Da Yang a quantity and value questionnaire but not Xinya because Xinya was not initially identified as a potential producer/exporter by the Petitioners.*I & D Memo*, Comment 5 at 52. Based on the lack of response to the quantity and value questionnaire, Commerce inferred that DaYang exported subject merchandise to the United States and therefore assigned it the China-wide rate. *Id.* Xinya, on the other hand, was identified by both Guang Ya and Zhongya as a "potential sibling" company only after the deadline for quantity and value questionnaires had passed. *Id.* Because both Guang Ya and Zhongya provided statements which implicated a Kuang sibling as either owning or controlling Xinya, as discussed *supra*, Commerce therefore properly collapsed Xinya with Guang Ya and Zhongya.

1677e(a)–(b). Commerce looks to *see* if a respondent has "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce may conclude that an AFA rate is warranted when: 1) a reasonable and responsible party would have known that requested information was required to be kept and maintained and 2) it failed to promptly produce the requested information because it failed to put forth its maximum efforts. *Id.* at 1382–83.

When calculating a rate for a collapsed entity, Commerce's practice is to apply AFA to the entire entity when one producer within it fails to cooperate. *See Bicycles from the People's Republic of China*, 61 Fed. Reg. 19,026, Comment 8 at 19,036 (Dep't Commerce Apr. 30, 1996) (final determination) ("If any company fails to respond, the entire entity receives a rate based on facts available."); *Light-Walled Rectangular Pipe and Tube from Turkey*, 69 Fed. Reg. 53,675, 53,677 (Dep't Commerce Sept. 2, 2004) (final determination).

Plaintiffs do not challenge Commerce's established practice of applying AFA to the entire collapsed entity when one company within it has met the statutory requirements for warranting an AFA rate. Nor do they challenge Commerce's finding that Xinya was not responsive to Commerce's AD questionnaires.[12] Because Xinya was properly collapsed with Guang Ya and Zhongya and failed to provide any reliable information for Commerce to use when calculating a margin, it was therefore proper for Commerce to apply AFA to the entire collapsed entity.

## CONCLUSION

Because Commerce's decision to collapse the three affiliated exporter/producers is supported by substantial evidence, and because Commerce's application of AFA was also supported by a reasonable reading of the record, Commerce's final determination is AFFIRMED in all respects. Judgment will be entered accordingly.

Dated: October 11, 2012
New York, NY

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

[12] Plaintiffs do assert, however, that the Guang Ya group is entitled to its own rate separate from that of the collapsed entity because it fully cooperated and provided corrected information after verification. Even if Plaintiffs were able to cite to authority supporting this position, their argument ignores the fact that Guang Ya unilaterally, without explanation, removed required data regarding aluminum billet consumption from its records after submitting its questionnaire response and later provided data that was inconsistent and could not be verified, leaving Commerce with more than four different sets of data, none of which could be verified. *I & D Memo*, Comment 5 at 48, 50–51; Def.'s Br. at 20.

Slip Op. 12–131

DEL MONTE CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 07–00109

[Upon classification and valuation of pouched tunafish products, summary judgment for the defendant.]

Dated: October 12, 2012

*Baker & McKenzie LLP* (*William D. Outman, II*) for the plaintiff.

*Stuart F. Delery*, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Alexander Vanderweide*); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Yelena Slepak*), of counsel, for the defendant.

## *OPINION & ORDER*

**AQUILINO, Senior Judge:**

Plaintiff's two-count complaint contests classification by U.S. Customs and Border Protection ("CBP") of fillets or strips of tunafish handpacked in Thailand in microwaveable pouches to which "flavorant media or 'sauces'" were added before sealing for export to the United States *sub nom. Albacore Lemon & Cracked Pepper*, *Yellowfin Lightly Seasoned*, and *Teriyaki*. The second count complains that CBP incorrectly valued the entries underlying this action.

### I

Defendant's answer, while admitting the court's subject-matter jurisdiction pursuant to 28 U.S.C. §1581(a), takes issue as to each count. Indeed, the defendant has now interposed a motion for summary judgment on both. And, consistent with the mandate of USCIT Rule 56(h)(1), annexed to its motion is a separate, short and concise statement of the material facts as to which it contends there is no genuine issue to be tried, to wit:

> 1. The imported merchandise . . . is identified on the invoices as "light meat tuna fillets - lightly seasoned (pouch) 'Starkist' brand" (lightly seasoned tuna pouch) and "albacore tuna fillets - lemon & cracked pepper (pouch) 'Starkist' brand" (lemon and pepper tuna pouch). . . .
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> 2. The albacore lemon and pepper tuna pouch "consists of large strips or fillets of tuna in a yellow-colored sauce consisting of water, sunflower oil, distilled white vinegar, modified food

starch, sugar, salt, citric acid, guar gum, cracked black pepper and flavorants including lemon pepper seasoning and lemon flavor." . . .

3. The yellowfin lightly seasoned tuna pouch "consists of tuna strips or fillets in a sauce consisting of water, sunflower oil, fresh garlic, salt, xantham gum, vegetable broth and parsley." . . .

4. In the lemon and pepper tuna pouch, the albacore tuna accounts for 80% of the weight of the pouch contents, the sunflower oil 2.48% of the weight. In the lightly seasoned tuna pouch, the yellowfin tuna accounts for 80% of the weight of the pouch contents, the sunflower oil .62% of the weight. . . .

5. In the lemon and pepper tuna pouch, the sunflower oil acts as a dispersant for the lemon flavoring, so that the flavoring is filtered evenly throughout the pouch. In the lightly seasoned tuna pouch, the sunflower oil acts as an emulsification, a flavor-enhancer, and as mouth-feel or coating. . . .

6. In both tuna pouch varieties, the tuna is placed in the pouch, then the sauce is added. The tuna is not prepared or cooked in oil, but is processed separately from the sauce. Only the sauce contains oil.. . .

7. Prior to importation, Del Monte Foods Corp. (Del Monte) and Chotiwat Manufacturing Co. Ltd. (Chotiwat), the manufacturer and packer of the tuna pouches, agreed upon the following terms: (1) $1.67 conversion cost per case of the finished product and (2) Chotiwat would recover 40% of the total tuna for use. . . .

8. Between March and June, 2005, Chotiwat submitted invoices to Del Monte, unilaterally changing the agreed-upon terms to the following: (1) approximately $3-$3.50 conversion cost per case and (2) Chotiwat could only recover 10% of the total tuna for use. . . .

9. After importation and following nearly ten (10) months of negotiations with Chotiwat over the conversion cost price and tuna recovery percentage, Del Monte and Chotiwat agreed to the following terms: (1) approximately $1.85 or $1.87 conversion cost per case and (2) 40% recovery of the amount of the tuna. . . .

10. Chotiwat reimbursed Del Monte approximately $1.5 million.

Citations omitted.

Plaintiff's response to this statement admits paragraphs 1, 2, 3, and 6. It further:

> 4. Admits, but wishes to clarify that the Lemon and Pepper pouches include a sauce or marinade that is 64.7% water and 2.48% sunflower oil and the Lightly Seasoned Tuna Fillets™ pouches include a sauce or marinade that is 90.6% water and 0.62% sunflower oil.
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> 5. Admits, but avers that the primary purpose for the addition of sunflower oil to the water-based sauces or marinades included in both varieties of Tuna Fillets™ is to serve as a dispersant.
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> * * *
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> 7. Admits in part, but disagrees with the defendant's characterization that the plaintiff and Chotiwat . . . agreed on specific "terms," and avers that (i) the plaintiff and Chotiwat agreed to utilize Cost Sheets that included all elements to be factored into the establishment of transaction values for the Tuna Fillets™; (ii) the $1.67 conversion cost represented Chotiwat's estimate of the per case Processing Fee to be incurred by plaintiff; (iii) the parties jointly agreed that Chotiwat would be able to recover 40% of purchased tuna, either in the production of the Tuna Fillets™ or otherwise; and (iv) in submitting commercial invoices to plaintiff, Chotiwat unilaterally increased the estimated processing fees above actual costs and allocated all fish costs to the Tuna Fillets™ project rather than charging for fish recovery actually used, both actions being contrary to those required under the Cost Sheets. . . .
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> 8. Denies, based on deposition testimony . . .that Chotiwat's unilateral action changed what the defendant has characterized as the "agreed-upon terms" but, rather, grossly inflated its estimated Processing Fee and incorrectly computed the estimated fish costs allocable to the Tuna Fillets™ in issue.
>
> 9. Denies that Chotiwat unilaterally changed the "agreed-upon terms" . . . and avers that, after importation and following nearly ten (10) months of negotiations, Chotiwat acknowledged that it (i) had grossly overstated its estimated Processing Costs, as based on the Cost Sheets; (ii) had thus overcharged the plaintiff in contravention of the Cost Sheets; and (iii) was contractually obligated to make restitution to the plaintiff of the monies incorrectly assessed in contravention of the Cost Sheets.

> 10. Admits that Chotiwat restored . . . the $1,544,104.17 in monies it had overcharged plaintiff through its incorrect and highly inflated use of fish cost estimates, denies that this was a "reimbursement" since this restitution was in no sense of the term a "repayment for expense or loss incurred" by the plaintiff and avers . . . that the actions taken by Chotiwat were in complete derogation of the Cost Sheets and a flagrant attempt to restructure the underlying transactions contrary to the Cost[] Sheets which had been agreed upon as controlling and were in effect prior to exportation.

Citations omitted.

**A**

If the foregoing are the salient facts of this matter, after due deliberation engendered by the parties' papers filed in support of and opposition to its disposition via summary judgment, this court cannot and therefore does not conclude that a trial within the meaning of USCIT Rule 56 and teaching of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986), and their progeny is necessary. The evidence already part of the record herein is sufficient basis to resolve the two counts of plaintiff's complaint as a matter of law. With regard to classification, its counsel state that the

> packing medium in the . . . Tuna Fillets™ is predominately *water*. The sole question before the Court is whether the addition of any amount of oil to water in the formulation of an added sauce or flavoring mandates that the product be classified in oil. The addition of sunflower oil, broth and flavorings to water serves a utilitarian function unrelated to packing. Thus, it is a stretch beyond reason to treat the Tuna Fillets™ as though "packed in oil." When properly understood, the U.S. Note should not be interpreted as transforming the Tuna Fillets™ products in issue into a fish packed "in oil."

Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, pp. 10–11 (emphasis in original).

As for its second count, the plaintiff represents that

> understanding the Cost Sheet is the key to understanding how and why value is an issue in this case. In this regard, the Court need only focus on the two line items on the Cost Sheet that represented the parties' best "estimates" as to likely cost.

*Id*. at 27. And the plaintiff confirms that much of what it would establish through the testimony of three witnesses in open court is already part of defendant's motion via transcripts of their depositions labelled exhibits C, J, and K. *See id*. at 20.

**II**

Also attached to that motion as exhibit F is a copy of CBP ruling letter HQ 967515 (March 21, 2005), which issued in response to a request that plaintiff's merchandise be classified under subheading 1604.14.22 of the Harmonized Tariff Schedule of the United States ("HTSUS") ("Tunas . . . In airtight containers: . . . Not in oil: . . . 6%") or subheading 1604.14.30 ("Tunas . . . In airtight containers . . . Not in oil . . . Other . . . 12.5%").

To the extent plaintiff's pouches contain any oil, CBP denied its request.[1] The ruling recited Additional U.S. Note 1 to HTSUS Chapter 16:

> . . . [T]he term "*in oil*" means packed in oil or fat, or in added oil or fat and other substances, whether such oil or fat was introduced at the time of packing or prior thereto.

Underscoring in original. And it gave heed to the decision of the U.S. Court of Customs Appeals in *Strohmeyer & Arpe Co. v. United States*, 5 Ct.Cust.App. 527 (1915), T.D. 35175, affirming the Board of U.S. General Appraisers with regard to fish prepared by boiling in oil, after which the oil was drained off before packing with tomato sauce in tin cans. Governing paragraph 216 of the Tariff Act of 1913 referred to "Fish . . . packed in oil or in oil and other substances", with the evidence in that matter showing some 5.7 percent residual oil in the sealed sauce. Whereupon the Board held it

> immaterial how the vegetable oil became present in the tins; that if, as a matter of fact, the substance in which the fish were found in the tins as packed consisted of oil and other substances, this is sufficient to bring it within the first provision of the paragraph.

5 Ct.Cust.App. at 528. In affirming, the court of appeals stated that the tariff was not directed at the method of application of the oil, rather at "any case in which oil is part of the substance in which the

[1] The agency did rule that, since plaintiff's packing of its *Teriyaki* tunafish contains no oil, those pouches could enter at the preferred *ad valorem* duty rate(s), the statutory difference depending upon fulfillment of the applicable tariff rate quota. *See* Defendant's Exhibit F, p. 4.

fish is found packed when offered for importation." *Id*. While recognizing that the percentages of oil in the goods now at bar are less than that in *Strohmeyer*, CBP does not find that case distinguishable:

> . . . [I]t is not relevant whether the oil is added solely for packing purposes or added for flavoring purposes. The presence of oil in the medium in which the fish is found packed[] is sufficient to describe the fish as "packed in oil."

Defendant's Exhibit F, p. 3.

Not satisfied with this ruling, the importer requested and received CBP reconsideration. *See* Defendant's Exhibit G (HQ 967742 (Nov. 22, 2005)). Specified as reasons therefor were that (1) CBP's interpretation of Additional U.S. Note 1 to HTSUS Chapter 16 failed to consider the legislative history involved, (2) HQ 967515 disregarded regulations of the U.S. Food and Drug Administration ("USFDA"), and (3) HQ 967515 is "wholly lacking in meaningful purpose". *Id*. at 2. None of these arguments caused Headquarters to reverse or revise that ruling letter.

With regard to the first point, the agency considers the language of Additional U.S. Note 1, *supra*, to be clear, thereby forestalling any resort to legislative history, citing *C.J. Tower & Sons v. United States*, 41 CCPA 195, C.A.D. 550 (1954), and *Continental Mfg. Co. v. United States*, 82 Cust.Ct. 187 (1979). *See id*. at 2–3. Secondly, HQ 967742 cites the opinion of this court in *Bestfoods v. United States*, 28 CIT 1053, 1058, 342 F.Supp.2d 1312, 1316 (2004), to the effect that USFDA standards of identity are not controlling for tariff classification purposes and also points out that the arguably apposite regulations of that agency developed well after the tariff standard controlling herein. *See id*. at 4. Finally, that ruling letter of reconsideration states that the importer's concerns regarding "meaningful purpose"

> are best remedied through legislation. CBP is not empowered to set duty rates, only to apply them according to the law.

*Id*. HQ 967515 was thereupon affirmed.

**A**

Of course, the posture of the court is no different than that of CBP *vis-à-vis* an act of Congress. When legislation is clear on its face, neither an administrative agency nor the judiciary is at liberty to rewrite it, or to construe it in a manner arguably more desirable.

The nature of the merchandise at bar is evident: none of plaintiff's tunafish is genuinely packed in oil as a matter of either simple sense or scientific analysis. Indeed, the defendant admits as much with

regard to the *Teriyaki* pouches. But the other brands do contain some oil, and the defendant points to a century of tariff enforcement to the effect that "in oil" signifies any amount of such substance. And no amount of cogent, contrary reasoning of the kind plaintiff's counsel now present[2] dispells this phenomenon judicially. While the quantum of residual "visible" oil apparently found in *Strohmeyer* (5.7 percent) was greater than in any of plaintiff's goods herein, there is no indication that particular amount was of moment to any of the three U.S. General Appraisers or to any of the five judges revisiting the matter in the court of appeals. Nor do plaintiff's papers point to a contrary case in court since then.

With regard to regulations of the USFDA, this court is not persuaded to digress now from its opinion in *Bestfoods v. United States*, *supra*, and the cases relied on therein. Ergo, CBP's classification of certain of plaintiff's pouches of tunafish under HTSUS subheading 1604.14.10 (2005) at a duty rate of 35 percent *ad valorem* should stand.[3]

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[2] The plaintiff has interposed a motion for leave to file a sur-reply in this action that can be, and it hereby is, granted.

[3] Counsel for the plaintiff have attached to their thorough papers in opposition to defendant's motion for summary judgment a copy of U.S. Customs Service ruling letter NY H88884 (March 26,2002) that four pouched *Tuna Creations* would be classified upon entry under either HTSUS subheading 1604.14.2040 or subheading 1604.14.3040. According to that letter, plaintiff's exhibit 15, absorbed within the tuna flesh in two of the pouches was 5 percent sunflower oil, with that in a third possessed of 2 percent of that substance. The letter proceeded to state:

> . . . Samples of these products were found to consist of small chunks and flakes of flavored tuna fish meat. The pouches contained only tuna meat pieces, colored slightly by the marinade, but with no apparent packing medium, — i.e., the pouches contained only pieces of tuna, which had absorbed any marinade, and which were not packed in any accompanying medium, such as, for example, in water, in oil or in sauce.

Plaintiff's Exhibit 15, first page.

Even if this court were to accept plaintiff's premise that NY H88884 is at odds with HQ 967515 now at issue herein, it could not and therefore would not conclude that the first ruling trumps the latter. Moreover, as just recited, the former did not find its fish "packed in" any medium.

As for the argument posited at page 12 of plaintiff's brief in opposition to summary judgment that,

> [i]nasmuch as the sunflower oil included in the StarKist® Tuna Creations™ pouched tuna serves the same purpose as, albeit in greater quantities than, the sunflower oil present in any of the Tuna Fillets™ products, it is important that the Court hear first hand from the Customs attorneys involved in the issuance of the Rulings involving the Tuna Fillets™ products before the Court on exactly how this strange result can occur[,]

the court hardly requires a trial for such purpose.

## III

The Tariff Act of 1930, as amended, 19 U.S.C. §1401a (b)(1), provides that the transaction value of imported merchandise is the price actually paid or payable when sold for exportation to the United States. The statute further provides:

> Any rebate of, or other decrease in, the price actually paid or payable that is made or otherwise effected between the buyer and seller after the date of the importation of the merchandise into the United States shall be disregarded in determining the transaction value under paragraph (1).

19 U.S.C. §1401a(b)(4)(B).

The plaintiff would have CBP (and now the court) ignore this mandate based upon the *post*-importation dealings between it and Chotiwat Manufacturing Co. Ltd. outlined above.[4] Suffice it to state that the papers filed herein adequately describe those dealings, but they do not cite a single court opinion that would persuade the undersigned to conclude that CBP acted contrary to the foregoing statute in this matter of valuation.

## IV

In view of the foregoing, defendant's motion must be granted, with summary judgment entered accordingly.

So ordered.

Dated: New York, New York
October 12, 2012

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

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Slip Op. 12–132

UNITED STATES COURT OF INTERNATIONAL TRADE ESSAR STEEL LIMITED, Plaintiff, v. UNITED STATES Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Court No. 09–00197

[Commerce's AFA rate calculation is remanded for further explanation.]

Dated: October 15, 2012

[4] Part of plaintiff's opposition to summary judgment as a matter of procedure is that its three putative witnesses to those dealings could at trial somehow add to that already part of the papers before the court via defendant's deposition transcripts labelled exhibits C, J, and K and pages 19–30 of discussion thereon in plaintiff's brief.

*Arent Fox LLP* (*Mark P. Lunn and Diana Dimitriuc Quaia*) for Plaintiff Essar Steel Limited.

*Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*) for Defendant United States; *Deborah King*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

*Skadden Arps Slate Meagher & Flom, LLP* (*Robert E. Lighthizer, Jeffrey D. Gerrish, Stephen J. Narkin,* and *Nathaniel B. Bolin*) for Defendant-Intervenor United States Steel Corporation.

## *OPINION*

**BARZILAY, Senior Judge:**

This matter returns to the court following a decision by the Court of Appeals for the Federal Circuit affirming in part and reversing in part this court's decision in *Essar Steel Ltd. v. United States*, 2011 WL 238657 (Jan. 25, 2011). *See Essar Steel Ltd. v. United States*, 678 F.3d 1268 (Fed. Cir. 2012) ("*Essar*"). After the Federal Circuit issued its mandate, Plaintiff Essar Steel Limited ("Essar") contacted the court for guidance with regard to two issues it believed were unresolved: (1) whether Commerce corroborated the adverse facts available ("AFA") rate assigned to Essar for its participation in the State Government of Chhattisgarh Industrial Policy ("CIP")[1]; and (2) whether that rate was punitive. Although the parties argued these issues in their briefs before the Court of International Trade, the court did not reach them in its initial decision remanding the case back to Commerce. *See Essar Steel Ltd.v. United States*, 34 CIT __, __, 721 F. Supp. 2d 1285, 1300 (2010). The court then sustained the remand results without deciding the issues discussed above. *See Essar Steel Ltd.*, 2011 WL 238657. The parties appealed that decision. Accordingly, the issues of corroboration and whether the AFA rate is punitive were not before the Federal Circuit.

The Federal Circuit, however, in its decision affirming Commerce's application of AFA, observed that "the countervailing duty imposed for Essar's participation in the CIP *was on par with similar subsidy programs and therefore not punitive*. Commerce did not err in its application of adverse facts, and no party argues that the application of adverse facts based on the record before the remand was punitive."

[1] The CIP provides incentives to accelerate the process of industrialization in the state. It is a subsidy that Commerce has deemed countervailable. *See Certain Hot-Rolled Carbon Steel Flat Products from India*, 74 Fed. Reg. 20,923 (Dep't Commerce May 6, 2009) (final results CVD review) ("*Final Results*"); *see also Issues and Decision Memorandum: Final Results and Partial Rescission of Countervailing Duty Administrative Review, Certain Hot-Rolled Carbon Steel Flat Products from India* at 3–4, 22 (Apr. 29, 2009) ("*Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/INDIA/E9–10496–1.pdf.

*Essar*, 678 F.3d at 1276 (emphasis added). Although this language could be construed as having decided the issues presented here, the parties concede, and the court agrees, that it did not. *See* Letter from David F. D'Alessandris, Trial Attorney, U.S. Department of Justice, to Judith M. Barzilay, Senior Judge, U.S. Court of International Trade, Docket Entry No. 93 (Sept. 11, 2012); Letter from Mark P. Lunn, Attorney, Arent Fox LLP, to Judith M. Barzilay, Senior Judge, U.S. Court of International Trade, Docket Entry No. 94 (Sept. 14, 2012). The question before the Federal Circuit was limited to whether it was appropriate for Commerce to apply AFA to Essar for its participation in the CIP programs. That court decided it was. *See Essar*, 678 F.3d at 1279. Whether the specific AFA rate was uncorroborated or perhaps even punitive has not been decided by this court or the Federal Circuit. Therefore, this court must consider these issues to bring this case to a close. The court, though, must first determine whether a remand is necessary for Commerce to consider the issue of corroboration in the first instance. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

## I. STANDARD OF REVIEW

When reviewing Commerce's countervailing duty determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is "reasonable and supported by the record as a whole." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotations and citation omitted). 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).

## II. DISCUSSION

This case involves an administrative review of a countervailing duty order covering Certain Hot-Rolled Carbon Flat Products from

India. *See Final Result*, 74 Fed. Reg. 20,923. In the *Final Results*, Commerce found that Essar had failed to cooperate by not acting to the best of its ability to comply with a request for information about its participation in the CIP programs, justifying application of adverse facts available. *See Decision Memorandum* at 6. Although Commerce attempted to calculate an individual rate for Essar based on the benefit received from the CIP programs, it was unable gather the necessary information from respondents, and therefore relied on secondary information to derive a rate. *See id*. Specifically, Commerce used the highest above *de minimis* subsidy rate calculated for similar programs (from prior proceedings) involving grants, the provision of goods for less than adequate remuneration (LTAR), and indirect taxes. *See id.* at 22–26. Commerce explained its methodology for calculating the AFA rate assigned to Essar for its participation in the CIP programs but did not discuss the specific issue of corroboration. *See id.* at 3, 6, 22–26.

Essar claims that Commerce failed to corroborate the AFA rate that it calculated for Essar's participation in the CIP programs. Pl. Br. 33; Pl. Reply 10. Specifically, Essar argues that Commerce failed to establish the relevance of the rate assigned to Essar as a reasonably accurate estimate of its actual rate. Pl. Br. 36–37 (citing *Fujian Lianfu Forestry Co. v. United States*, 33 CIT __, __, 638 F. Supp. 2d 1325, 1336 (2009)). Essar also argues that Commerce cannot assume that the highest rate from a prior proceeding is reliable and relevant. Pl. Br. 37. The crux of Essar's claim is that the AFA rate for the CIP programs is unreasonable because Commerce did not tie the selected rate to Essar.

In *Fujian Lianfu Forestry Co., Ltd. v. United States*, 33 CIT __, __, 638 F. Supp. 2d 1325, 1334 (2009) ("*Fujian*"), the court summarized the corroboration requirement:

> When applying a total AFA rate, Commerce shall, "to the extent practicable," corroborate that rate "from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). The statute does not prescribe any methodology for corroborating a total facts available rate, but the regulations state that corroborate "means that the Secretary will examine whether the secondary information to be used has probative value." 19 C.F.R. § 351.308(d) (parroting Uruguay Round Agreements Act Statement of Administrative Action, H.R.Rep. No. 103–316, vol. 1 at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 4199). A total facts available proxy rate should therefore have probative value of a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase in-

> tended as a deterrent to noncompliance." *De Cecco*, 216 F.3d at 1032. As a general matter, Commerce assesses the probative value of secondary information by examining its reliability and relevance. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed.Reg. 54, 711, 54,712–13 (Sept. 16, 2005) (final results). For specific secondary information like a total facts available proxy, the corroboration analysis therefore depends on whether the proxy is a reliable and relevant indicator that satisfies the *De Cecco* standard.

*Id.* The *Fujian* court, albeit in the context of an antidumping proceeding, issued a remand because Commerce's "attempted corroboration never explains whether the selected proxy is a reliable and relevant indicator of a 'reasonably accurate estimate of [respondent's] actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.' In short Commerce never ties the rate to [respondent]." *Id.* at 1336 (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*").

Although this action involves a CVD proceeding, the corroboration requirement applies equally to both, *see* 19 U.S.C. 1677e(c). When Commerce resorts to secondary information (in either a CVD or antidumping proceeding), Commerce must corroborate that information, or explain why such corroboration is not practicable. *See id*. Here, although Commerce used secondary information to calculate Essar's AFA rate, Commerce did not discuss corroboration. *See Decision Memorandum* at 3, 6, 22–26. Counsel for Defendant provides some explanation as to why Commerce's AFA calculation was properly corroborated, Def. Br. 27–33, but these are *post hoc* rationalizations of agency counsel to which the court may not defer. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept . . . counsel's *post hoc* rationalizations for agency action."). The court must therefore remand this issue to Commerce to consider the issue in the first instance.

For over a decade the court has applied the *De Cecco* standard to review the reasonableness of Commerce's AFA rate choices in antidumping proceedings. Under that standard the court reviews whether Commerce chose a reasonably accurate estimate of the respondent's actual dumping rate with some built-in increase to deter non-compliance. *See DeCecco*, 216 F.3d at 1032. The *DeCecco* standard would seem to apply in the CVD context as well. If Commerce believes otherwise, it can explain its inapplicability on remand. Ab-

sent a reason to apply a different standard, the court stands ready to review whether the facts and circumstances of the administrative record support Commerce's AFA CVD rate as a reasonably accurate estimate of the respondent's actual benefit (under the CIP programs) plus some built in increase to deter non-compliance, with due account for the practicability of corroboration.

Bear in mind that the court is not rejecting the notion that Commerce may have selected a reasonable AFA rate, but to sustain such a rate the court needs Commerce to explain (1) how it corroborated the AFA rate assigned to Essar, *or* (2) why corroboration is not practicable. *See* 19 U.S.C. § 1677e(c); *see also Sodium Nitrite From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 Fed. Reg. 38,981, 38,983 (Dep't Commerce 2008) ("Unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.")

Essar also challenges Commerce's AFA rate calculation as punitive. Pl. Br. 39. The court, however, does not believe this issue has merit. Essar specifically argues that the AFA rate is punitive "considering that in past reviews Commerce never found Essar to have used the [CIP] program at issue." Pl. Br. 39 (citing *Am. Silicon Tech. v. United States*, 26 CIT 1216, 240 F. Supp. 2d 1306 (2002) ("*American Silicon*")). This therefore appears to be an argument about the sufficiency of Commerce's corroboration, not whether the selected rate is punitive. If the latter, the court would have expected far more developed argumentation and analysis of the other available rates and an explanation why the selected rate represents an unreasonable choice. *See, e.g., American Silicon*, 240 F. Supp. 2d at 1312–1313 (concluding that AFA rate was punitive by comparing assigned rate to other calculated rates from prior reviews). Essar never provides such an analysis, leaving the court to develop its own theory of why the selected rate may be punitive, effectively litigating the issue for Essar. This the court will not do. *See Home Prods. Int., Inc. v. United States*, 36 CIT __, __, 837 F. Supp. 2d 1294, 1301 (2012) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.")).

Again, the central issue here is corroboration. Commerce must corroborate Essar's AFA rate or explain why corroboration is not practicable. *See* 19 U.S.C. § 1677e(c).

## III. CONCLUSION

The court cannot sustain Commerce's AFA rate calculation in its current posture. Accordingly, the court remands to Commerce to address the corroboration requirement under 19 U.S.C. § 1677e(c). It is hereby

**ORDERED** that this action is remanded to Commerce to address the issue of corroboration; it is further

**ORDERED** that Commerce is to file its remand results on or before December 14, 2012; and it is further

**ORDERED** that the parties are to file their comments (limited to 10 pages), if necessary, no later than 45 days after Commerce files its remand results with the court.

Dated: October 15, 2012
New York, New York

*/s/ Judith M. Barzilay*
JUDITH M. BARZILAY, SENIOR JUDGE