U.S. Court of International Trade

Slip Op. 15–133

FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, INC., Plaintiffs, HEBEI GOLDEN BIRD TRADING CO. LTD., CHENGWU COUNTY YUANXIANG INDUSTRY & COMMERCE CO., LTD., QINGDAO XINTIANFENG FOODS CO., LTD., SHENZHEN BAINONG CO., LTD., YANTAI JINYAN TRADING, INC., JINING YIFA GARLIC PRODUCE CO., LTD., JINAN FARMLADY TRADING CO., LTD., WEIFANG HONGQIAO INTERNATIONAL LOGISTICS CO., LTD., AND SHIJIAZHUANG GOODMAN TRADING CO., LTD., CONSOLIDATED Plaintiffs, v. UNITED STATES, Defendant, SHENZHEN XINBODA INDUSTRIAL CO., LTD., JINXIANG MERRY VEGETABLE CO., LTD., AND CANGSHAN QINGSHUI VEGETABLE FOODS CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge Consol.
Court No. 14–00180

[Commerce's final results in antidumping duty administrative review sustained in part and remanded in part.]

Dated: November 30, 2015

Michael J. Coursey and *John M. Herrmann, II*, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiffs.

Robert T. Hume, Hume & Associates, LLC, of Ojai, CA, for consolidated plaintiffs Hebei Golden Bird Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Yantai Jinyan Trading, Inc., Jining Yifa Garlic Produce Co., Ltd., Jinan Farmlady Trading Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., and Shijiazhuang Goodman Trading Co., Ltd.

Yingchao Xiao and *Jianquan Wu*, Lee & Xiao, of San Marino, CA, for consolidated plaintiff Chengwu County Yuanxiang Industry & Commerce Co., Ltd.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief were *Justin R. Becker*, Senior Attorney, and *Khalil N. Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenor Shenzhen Xinboda Industrial Co., Ltd.

John J. Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenors Jianxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd

Restani, Judge:

OPINION

This action challenges the Department of Commerce's ("Commerce") final results from the eighteenth administrative review of the antidumping ("AD") duty order on fresh garlic from the People's Republic of China ("PRC"). *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 36,721 (Dep't Commerce Jun. 30, 2014) ("*Final Results*"). Before the court are the motions for judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2 and accompanying memoranda in support of Chinese producers Shijiazhuang Goodman Trading Co., Ltd. ("Goodman"); Jinan Farmlady Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Jining Yifa Garlic Produce Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., Yantai Jinyan Trading, Inc. (collectively, "QXF"); Hebei Golden Bird Trading Co. Ltd. ("Golden Bird"), and Shenzhen Xinboda Industrial Co., Ltd. ("Xinboda"). *See* Mem. in Supp. of the Mot. of Pl. Shijiazhuang Goodman Trading Co., Ltd. for J. on the Agency R., ECF No. 31 ("Goodman Br."); Mem. in Supp. of Mot. for J. on the Agency R. Filed by Qingdao Xintianfeng Foods Co., Ltd., et al., ECF No. 32 ("QXF Br."); Mem. in Supp. of the Mot. of Pl. Hebei Golden Bird Trading Co. Ltd. for J. on the Agency R., ECF No. 43 ("Golden Bird Br."); Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 44 ("Xinboda Br."). Also before the court is a motion filed by the Fresh Garlic Producers' Association and its individual members, Christopher Ranch L.L.C., Valley Garlic, The Garlic Company, and Vessey and Company, Inc. (collectively, "FGPA"). Mem. of Law in Supp. of Pls.' Mot. for J. on the Agency R., DE 41 ("FGPA Br."). For the reasons stated below, Commerce's *Final Results*. are sustained in part and remanded in part

BACKGROUND

In November 1994, Commerce issued an AD duty order covering fresh garlic from the PRC. *Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209, 59,209 (Dep't Commerce Nov. 16, 1994). Following requests from several interested parties, Commerce initiated its eighteenth administrative review of that order on December 31, 2012, with a period of review

("POR") of November 1, 2011, through October 31, 2012.[1] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 77,017, 77,019–22 (Dep't Commerce Dec. 31, 2012) ("*Initiation Notice*"). On April 15, 2013, Commerce selected as mandatory respondents the two largest exporters by volume, Golden Bird and Xinboda. Decision Memorandum for the Preliminary Results of the 2011–2012 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China at 3, A-570–831, (Dec. 16, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–30660–1.pdf (last visited Nov. 18, 2015) ("*Preliminary I&D Memo*"). Commerce issued the preliminary results of its administrative review on December 24, 2013, assigning weighted-average margins (based on dollars per kilogram) of $1.17 for Golden Bird, $1.76 for Xinboda, $1.47 for QXF and other separate rate respondents, and $4.71 for the PRC-wide entity.[2] *Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 78 Fed. Reg. 77,653, 77,654 (Dep't Commerce Dec. 24, 2013) ("*Preliminary Results*").

The PRC is considered by Commerce to be a non-market economy ("NME"). In calculating a dumping margin for products from an NME country, Commerce compares the goods' normal value,[3] derived from factors of production ("FOPs") as valued in a surrogate market economy ("ME") country, to the goods' export price.[4] Commerce must use the "best available information" in selecting surrogate data. 19 U.S.C. § 1677b(c)(1)(B) (2012). The surrogate data must "to the extent possible" be from a market economy country that is "at a level of

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[1] Commerce must annually review and determine the amount of an AD duty if it receives a request to do so. *See* 19 U.S.C. § 1675(a) (2012).

[2] In the non-market economy ("NME") context, Commerce has adopted a rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assessed a single AD duty rate. Decision Memorandum for the Preliminary Results of the 2011–2012 Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China at 5, A-570–831, (Dec. 16, 2013), *available at* http://enforcement.trade.gov/frn/ summary/prc/2013–30660–1.pdf (last visited Nov. 18, 2015) ("*Preliminary I&D Memo*"). Here, because Commerce considers the PRC to be an NME, that rate is the PRC-wide rate.

[3] Normal value is

> the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price,

"at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A),(B)(i).

[4] Export price is "the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States[.]" 19 U.S.C. § 1677a(a).

economic development comparable to that of the nonmarket economy country" and is a "significant producer[] of comparable merchandise." *Id.* at § 1677b(c)(4).

In May 2013, Commerce placed on the record a list of potential surrogate countries based on economic comparability to the PRC, which included Colombia, Costa Rica, Indonesia, the Philippines, South Africa, and Thailand. *Preliminary I&D Memo* at 9. Commerce compiled this list based on World Bank per capita gross national income ("GNI") data. *See id.* at 9–10. Next, Commerce narrowed its list by identifying countries that it considered to be significant producers of fresh garlic. *Id.* at 10. To this end, Commerce eliminated Costa Rica due to its lack of garlic production in 2011 and South Africa because of conflicting data concerning whether or not it had fresh garlic production in 2011. *Id.* at 10–11. Commerce then determined that of the remaining surrogate countries, the Philippines offered the best quality data, and selected it as the surrogate country. *Id.* at 12.

With respect to the calculation of surrogate values, in its preliminary determination, Commerce excluded from the pricing data all imports from NME countries and countries that maintain broadly available, non-industry specific export subsidies. *Id.* at 17. To value the raw garlic bulb input, Commerce relied on farm gate prices,[5] and for labor, Commerce relied on data from the International Labor Organization ("ILO"). *Id.* at 18.

In April 2014, after the *Preliminary Results*, but before the *Final Results*, FGPA alleged that Golden Bird had misreported its fresh garlic sales for the POR. Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2011–2012 Administrative Review at 2, A-570–831, (Jun. 23, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–15279–1.pdf (last visited Nov. 18, 2015) ("*I&D Memo*"). In the *Final Results*, issued on June 30, 2014, Commerce determined that it was within its discretion

[5] In valuing the raw garlic bulb as an input for fresh garlic, Commerce used the intermediate input valuation methodology. *Preliminary I&D Memo* at 18. When using this methodology, Commerce "choos[es] to apply a surrogate value to an intermediate input instead of the individual FOPs used to produce that intermediate input." *Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Preliminary Results of New Shipper Reviews*, 70 Fed. Reg. 69,942, 69,947 (Dep't Commerce Nov. 18, 2005). Here, Commerce calculated normal value by starting with the surrogate value for the raw garlic bulb and "adjusting for yield losses during the processing stages, and adding the respondent's processing costs, which were calculated using its reported usage rate for processing fresh garlic." *Preliminary I&D Memo* at 16–17.

to accept FGPA's untimely allegations. *Id.* at 30–31; *Final Results*, 79 Fed. Reg. at 36,722. After issuing a supplemental questionnaire, which Golden Bird did not complete to Commerce's satisfaction, Commerce selected total adverse facts available ("total AFA")[6] for Golden Bird. *I&D Memo* at 33. Commerce selected the PRC-wide rate of $4.71 as Golden Bird's total AFA rate. *Id.* at 39.

For the *Final Results*, Commerce continued to use the Philippines as the surrogate country. *Id.* at 10. Commerce also continued to exclude NME country and export subsidy country data from the import statistics used to calculate surrogate values. *Id.* at 14–15. Additionally, Commerce continued to rely on ILO data to calculate the labor surrogate value and farm gate prices to calculate the raw garlic bulb surrogate value. *Id.* at 17, 21. Finally, Commerce determined that net weight, as opposed to gross weight, was more accurate for calculating surrogate values for Philippine importers' total input costs for fresh garlic production. *Id.* at 18–19. The *Final Results* assigned dumping margins of $1.82 to Xinboda, QXF, and other separate rate respondents, and $4.71 for the PRC-wide entity, which included Golden Bird. *See Final Results*, 79 Fed. Reg. at 36,723.

With respect to Goodman, in the *Preliminary Results*, Commerce did not consider it for separate rate (non-PRC-wide entity) treatment stating,

> [a]lthough Goodman had shipments during the POR of this administrative review, these shipments are being analyzed in a concurrent new shipper review. Therefore, Goodman will not be analyzed for the purposes of a separate rate in this review but will maintain the rate it received from its new shipper review.

Preliminary I&D Memo at 6 (footnote omitted). In the *Final Results*, Commerce determined that because it had concluded in the contemporaneous new shipper review ("NSR") that Goodman did not have any *bona fide* sales during the POR, it could not qualify for a separate rate in the administrative review. *I&D Memo* at 40–41. Commerce thus rescinded the administrative review for Goodman and ordered that "[a]ny entries entered during this POR shall liquidate as entered." *Id.*

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[6] Although the phrase "total AFA" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e to arrive at a total replacement margin. If Commerce determines

> that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce, Commerce, in calculating a dumping margin], may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

19 U.S.C. § 1677e(b)(1).

The parties challenge several aspects of Commerce's *Final Results*. Golden Bird disputes three of Commerce's decisions. First, Golden Bird challenges Commerce's determination that Golden Bird failed to cooperate to the best of its ability and subsequent selection of total AFA. Golden Bird Br. at 16–20. Second, Golden Bird contests Commerce's selection of the PRC-wide rate as its total AFA rate. *Id.* at 20–28. Third, Golden Bird claims that Commerce's so called "15-day policy"[7] is unlawful. *Id.* at 28–34.

Goodman challenges two of Commerce's determinations. First, Goodman disputes Commerce's rescission of its administrative review, arguing that a lack of *bona fide* sales is an insufficient reason to rescind a review. Goodman Br. at 9–10. Second, and alternatively, Goodman contests Commerce's application and calculation of the PRC-wide rate. *Id.* at 11–15.

QXF and Xinboda each challenge two of Commerce's decisions. First, both parties contest Commerce's selection of the Philippines as the PRC's surrogate country. QXF Br. at 7–10; Xinboda Br. at 3–41. Second, QXF and Xinboda otherwise challenge whether Commerce satisfied its statutory duty to use the best available information to calculate surrogate values for fresh garlic production. QXF Br. at 10–17; Xinboda Br. at 41–45. Finally, FGPA challenges Commerce's use of farm gate prices in calculating the surrogate value of the raw garlic bulb input. FGPA Br. at 17–27.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final results in an administrative review of an AD duty order are upheld 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).

DISCUSSION

I. Golden Bird

A. *Specific Facts*

In the *Preliminary Results*, Commerce determined that Golden Bird was independent of Chinese governmental control, selected it as a mandatory respondent, and assigned it a separate rate of $1.17 per kilogram. *See Preliminary Results*, 78 Fed. Reg. at 77,653–54. On

[7] This refers to Commerce's policy of issuing liquidation instructions to U.S. Customs and Border Protection ("Customs") fifteen days after the publication of its *Final Results*. Golden Bird Br. at 28–29.

April 7, 2014, after the *Preliminary Results* were published, FGPA submitted factual allegations that Golden Bird's Section A responses were incorrect because the volume of shipments included items not reported to Chinese customs. Petitioners' Request for Investigation of Substantial Discrepancies Between Golden Bird's Volume of POR Exports Reported to Commerce/CBP and Chinese Customs Authorities, bar code 3194440 (Apr. 7, 2014) ("Petitioners' Golden Bird Export Volume Request"). Commerce accepted FGPA's untimely[8] request and asked Golden Bird to verify the amount of garlic it exported by producing the China Export Declaration Forms ("CEDFs") for all shipments through a supplemental questionnaire. Suppl. Quest., bar code 3200154–01 (May 7, 2014) ("Golden Bird Suppl. Quest."). Commerce also accepted FGPA's designation of the data underlying FGPA's allegations as business proprietary information ("BPI"). *I&D Memo* at 31. Commerce granted Golden Bird two extensions of time, until May 23, 2014, to submit the information. *See* Resp. to First Ext. Req., PD 335 (May 9, 2014); Resp. to Suppl. Quest. at 1, PD 350 (May 23, 2014). When Golden Bird was unable to produce sufficient evidence to substantiate its reported sales quantity, Commerce determined that Golden Bird had significantly impeded the proceedings and that it could not trust any of Golden Bird's submissions, including its Separate Rate Certification. *I&D Memo* at 33–39. Thus, in its final determination, Commerce determined that Golden Bird had failed to cooperate to the best of its ability, selected total AFA, and assigned Golden Bird the PRC-wide rate of $4.71 per kilogram. *Id.* at 39.

Golden Bird argues that Commerce's decision to allow FGPA to file new allegations long past the deadline for submitting information was an abuse of discretion, and that Commerce's designation of the data relied on by FGPA in making the untimely allegations as BPI was improper and denied Golden Bird due process. Golden Bird Br. at 16–18. Golden Bird further argues that Commerce improperly selected total AFA because Golden Bird cooperated to the best of its ability and was not given a sufficient amount of time in which to comply with Commerce's request for information.[9] *Id.* at 18–20. In challenging its total AFA rate, Golden Bird argues that Commerce improperly disregarded its Separate Rate Certification and assigned Golden Bird the PRC-wide rate, which is unconnected to commercial

[8] The parties agree FGPA's submission was untimely. Golden Bird Br. at 6; *see* Def.'s Resp. to Pl.'s Mots. for J. upon the Agency R. 15–16, ECF No. 57 ("Gov. Br.").

[9] Golden Bird also argues that the allegations were based on unreliable data. As discussed in the *I&D Memo*, however, Commerce issued the supplemental questionnaire not based on the data alone, but on the documented allegation, irregularities in Golden Bird's reporting, and concerns from Commerce's prior Golden Bird verification. *See I&D Memo* at 31.

reality and uncorroborated. *Id.* at 20–28. Finally, Golden Bird argues that Commerce's 15-day policy is unlawful because it conflicts with the AD statute, Commerce's regulations, and the court's jurisdictional rules. *Id.* at 28–34.

The government responds that Commerce properly allowed FGPA's late allegations, and that the designation of the data as BPI was proper and did not deny Golden Bird its due process rights. Def.'s Resp. to Pl.'s Mots. for J. upon the Agency R. 19–23, ECF No. 57 ("Gov. Br."). The government also argues that Commerce properly selected total AFA, given the significant discrepancies in Golden Bird's submissions and Golden Bird's failure to cooperate to the best of its ability. *Id.* at 23, 26–31. The government further responds that, because none of Golden Bird's submissions could be considered, Commerce properly selected the PRC-wide rate as Golden Bird's total AFA rate. *Id.* at 31. The government also argues that Commerce properly selected and corroborated the PRC-wide rate. *Id.* at 31, 33–37. Finally, the government argues that the court does not have jurisdiction over Golden Bird's 15-day policy challenge, and that even if it did, the policy is lawful. *Id.* at 60–69.

The court holds that Commerce's decision to allow the untimely allegations, designation of the supporting data as BPI, and selection of total AFA are supported by substantial evidence. Commerce's selection of the PRC-wide rate as Golden Bird's total AFA rate because it considered Golden Bird part of the PRC, however, is not supported by substantial evidence and the court remands the calculation of Golden Bird's AFA rate to Commerce for recalculation. The court also holds that it does not have jurisdiction over Golden Bird's 15-day policy challenge.

B. *Acceptance of FGPA Allegations*

1. Untimeliness

Under 19 C.F.R. § 351.301(b)(2) (2011), the deadline for submitting factual allegations is 140 days after the anniversary month of the AD duty order. Commerce has "discretion in setting, extending, and enforcing deadlines" for submissions. *Artisan Mfg. Corp. v. United States*, 978 F. Supp. 2d 1334, 1342 (CIT 2014). Commerce may extend a deadline for "good cause." *See* 19 C.F.R. § 351.302(b) (2011).[10] Though that discretion is not unlimited, where there is evidence of fraud, Commerce should consider the evidence even when submitted

[10] The regulation has since been amended to require a showing of "extraordinary circumstances" for an untimely filed extension request. *See* 19 C.F.R. § 351.302(c) (2014). Because Commerce initiated the administrative review under consideration on December 31, 2012, *Initiation Notice*, 77 Fed. Reg. 77,019–22, the amended regulation, which applies to

late in the proceeding. *See Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1377–78 (Fed. Cir. 2011) (noting that Commerce has the ability to reopen an AD administrative review when fraud allegations arise); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir.2008) ("An agency's power to reconsider is even more fundamental when . . . it is exercised to protect the integrity of its own proceedings from fraud."); *US Magnesium LLC v. United States*, 895 F. Supp. 2d 1319, 1325 (CIT 2013) (holding that Commerce abused its discretion where it failed to address evidence of fraud raised while the record was still open).

Here, Commerce did not abuse its discretion in allowing the late allegations from FGPA. FGPA certified that it did not have the information earlier in the proceeding, and Golden Bird has not provided evidence that FGPA had the information prior to submitting it. More importantly, the allegations raised serious questions about the veracity of Golden Bird's submissions and the possibility that Golden Bird was engaged in fraudulent activity. Namely, if the discrepancy between the volumes of goods reported to Chinese authorities and U.S. Customs and Border Protection ("Customs") was due to the fact that Golden Bird was allowing other Chinese exporters to benefit from its separate rate status, it could indicate a perverse and fraudulent scheme to avoid AD duties. A concern about such a scheme meets the good cause standard for extending a time limit. Additionally, nothing in the regulations precluded Commerce from accepting the late submission. *See* 19 C.F.R. § 351.302(b). Commerce's determination that FGPA presented sufficient good cause to accept the late submission is sustained.

2. Designation of FGPA Submissions as "Business Proprietary Information"

When a party designates information as BPI in a submission, Commerce may not disclose that information without the party's consent. *See* 19 U.S.C. § 1677f(b)(1)(A). "If [Commerce] determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of [the] information as [BPI] is unwarranted," then Commerce may ask the submitting party to explain why the designation is warranted. 19 U.S.C. § 1677f(b)(2). Here, Commerce did not determine that the designation was unwarranted.

FGPA had a legitimate concern that disclosure of the information would harm its competitive position because the identity of the foreign researcher who gathered the information was important to its

segments "initiated on or after October 21, 2013" is not applicable here. *Extension of Time Limit*, 78 Fed. Reg. 57,790, 57,790 (Dep't Commerce Sept. 20, 2013). Golden Bird does not argue that FGPA was required to show extraordinary circumstances.

business. In *Max Fortune Industrial Ltd. v. United States*, the court upheld the treatment of the name of a researcher as BPI because to reveal the name "could prove a danger to the researcher and the researcher's methods of obtaining information in the future." 853 F. Supp. 2d 1258, 1266 (CIT 2012). The court noted that counsel in that case had access to the relevant information under the Administrative Protective Order ("APO") and that the party in that case "was provided with sufficient public information to have notice of, and respond to, the allegations made against it." *Id.* at 1267. The same is true here. Golden Bird's counsel had access to the information under the APO and Golden Bird was provided with the total Chinese shipment information such that it had notice of, and could adequately respond to, the allegation that the Chinese shipment volumes did not match its Section A responses. *See* Golden Bird's Cmts. on Petitioners' Export Volume Request at 2–4, barcode 3196023 (Apr. 16, 2014); Pls.' Reply to the Resps. of Def. and Def.-Intvrs. to Pls.' Rule 56.2 Mots. for J. upon the Agency R. at 8–9, ECF No. 65 ("Golden Bird and Goodman Reply Br."). Disclosure of the researcher's identity could prevent that researcher from assisting FGPA in the future, to the detriment of FGPA's business. Accordingly, Commerce's decision not to challenge FGPA's designation of the information as BPI is supported by substantial evidence.

Additionally, the designation of the information as BPI did not deny Golden Bird due process because Golden Bird had notice of Commerce's decision and an opportunity to respond to the allegations. *See Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1886, 1890, 466 F. Supp. 2d 1323, 1327 (2006) (holding that in order to succeed on a due process claim the party had to show that its opportunity to be heard was "unreasonably curtailed"). The public version of FGPA's submission contained the relevant information, namely the total quantity of fresh garlic reported to Chinese authorities and the amount of the alleged discrepancy between that quantity and the quantity reported to Customs. *See* Petitioners' Golden Bird Export Volume Request at 2. Further, the data concerned Golden Bird's own shipping information, and Golden Bird presumably had access to the same information from internal sources. Thus, Golden Bird had sufficient notice of the information contained in the allegation to rebut it. Golden Bird was also allowed to present arguments against the BPI treatment of the data as well as the underlying factual allegations before Commerce. *See* Golden Bird's Cmts. on Petitioners' Export Volume Request at 5–7. Accordingly, its opportunity to be heard was not unreasonably curtailed. Because Golden Bird had access to the relevant information and had an opportunity to be heard to rebut the

information, there was no due process violation and Commerce's determination is supported by substantial evidence.

C. *Selection of Total Adverse Facts Available*

By statute, Commerce shall use facts otherwise available if a party:

> (A) withholds information that has been requested by [Commerce],
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,
>
> (C) significantly impedes a proceeding . . . , or
>
> (D) provides such information but the information cannot be verified . . . .

19 U.S.C. § 1677e(a)(2). Commerce may apply an adverse inference in selecting from the facts otherwise available if the 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). This is referred to as applying AFA. Commerce has discretion over whether to apply or not apply AFA. *See AK Steel Corp. v. United States*, 28 CIT 1408, 1416–17, 346 F. Supp. 2d 1348, 1355 (2004). The issue of whether a respondent has acted to the best of its ability and whether applying AFA is appropriate "amounts to a line-drawing exercise that is precisely the type of discretion left within the agency's domain." *Ta Chen Stainless Steel Pipe Co. v. United States*, 31 CIT 794, 812 (2007) (quoting *Boading Yude Chem. Indus. Co. v. United States*, 25 CIT 1118, 1126, 170 F. Supp. 2d 1335, 1343 (2001)) (internal quotation marks and brackets omitted).

The Federal Circuit has described the application of AFA as a two part inquiry. First, Commerce must determine whether it has received less than the full and complete facts needed to make a determination because a party has failed to provide requested information within the deadline for submission. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). If so, Commerce must fill gaps in the record with facts otherwise available. *Id.* The focus of this first inquiry is whether a party failed to provide information; a party's reason for that failure is irrelevant. *Id.* Commerce is permitted to draw an adverse inference, however, only if it makes the second, separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." *Id.* Commerce is also required by statute to provide a party with the opportunity to correct deficient responses prior to applying AFA. 19 U.S.C. § 1677m(d).

A respondent fails to cooperate to the best of its ability when it fails "to do the maximum it is able to do." *Nippon Steel*, 337 F.3d at 1382. The standard in 19 U.S.C. § 1677e(b) "does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.* In determining whether a party has failed to do the maximum it is able to do, Commerce employs another two-part test. *Id.* at 1382. First, Commerce "make[s] an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations." *Id.* Second, Commerce

> make[s] a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (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. at 1382–83.

Depending on the severity of a party's failure to respond to a request for information and failure to cooperate to the best of its ability, Commerce may select either partial or total AFA. Generally, the "use of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty." *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1308 (Fed. Cir. 2014). Where there are "pervasive and persistent deficiencies that cut across all aspects of the data," all of the reported information may be unreliable, making total AFA appropriate. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

Commerce's selection of AFA is supported by substantial evidence. First, Commerce's determination that Golden Bird's response to its supplemental questionnaire was deficient is supported by substantial evidence. Golden Bird produced partially completed CEDFs for only a fraction of the sales during the POR. *See* Golden Bird Suppl. Quest. Resp. at 1, barcode 3204165 (May 23, 2014) (indicating that Golden Bird was providing "some" of the requested CEDFs). The documents Golden Bird did produce lacked the official stamps and indicia of authenticity that would allow the documents to be verified. *See id.* at Ex. 3; *see also I&D Memo* at 33. Further, Golden Bird admitted to intentionally reporting false pricing information on the documents submitted. Golden Bird Rebuttal Br. at 7–8, barcode 3208559 (Jun. 12, 2014). Accordingly, it was reasonable for Commerce to determine

that Golden Bird failed to comply with Commerce's request for information, thereby significantly impeding the proceeding.

Second, Commerce provided Golden Bird with an adequate opportunity to cure its deficient response. Golden Bird acknowledged in its Supplemental Questionnaire Response that it was not providing Commerce with all of the requested documentation, attempted to justify its deficient response, and argued that it would have been able to provide a more adequate response had it been given more time. Golden Bird Suppl. Quest. Resp. at 4–5. Commerce determined that Golden Bird's justifications were unsubstantiated and unsatisfactory, and hence, that no additional time to respond was warranted. *I&D Memo* at 34–38. Commerce's rejection of Golden Bird's explanations was reasonable. Golden Bird claimed that the CEDFs could not be recovered in the amount of time allotted because they were retained by the numerous export agents Golden Bird used but, provided no evidence that it used numerous export agents, or that it had attempted to contact such agents to obtain the CEDFs. Golden Bird Suppl. Quest. Resp. at 3–4; *I&D Memo* at 35. Golden Bird also claimed that it did not retain the CEDFs because of office space concerns, despite the fact that the documents could have been stored electronically, and were required to be maintained under Chinese regulations. *See id.* at 36–37. Additionally, Golden Bird acknowledges that the forms it did provide contained intentional inaccuracies. *See* Golden Bird Rebuttal Br. at 7–8. Further, Golden Bird's alternative method of verifying its reported volume was insufficient, as it failed to account for over half of Golden Bird's reported sales. *See* Golden Bird Suppl. Quest. Resp. at 4–5; Golden Bird and Goodman Reply at 10. With respect to the amount of time Golden Bird had to respond, not only did Golden Bird receive two time extensions, but it received double the amount of time parties typically have to prepare for verification. *I&D Memo* at 34. Verification is a far more intensive review process, and Commerce routinely requests export licenses similar to the CEDFs requested in the Supplemental Questionnaire during verification. *Id.* Golden Bird thus had the opportunity to explain its failure to comply with the information request in the Supplemental Questionnaire, and Commerce acted reasonably in determining that its explanations were lacking.[11]

[11] The court notes that although Commerce specifically noted that Golden Bird's response to its Supplemental Questionnaire was deficient, in determining whether Golden Bird was provided with notice and given an adequate opportunity to correct its deficient response, Commerce stated that it "allowed Golden Bird to provide documentation to support what appeared to be a deficient section A response." *I&D Memo* at 34. Thus, it is not abundantly clear whether Commerce is resting its determination on the deficient nature of Golden

Third, Commerce's determination that Golden Bird failed to cooperate to the best of its ability is supported by substantial evidence. As discussed above, Golden Bird's explanations for failing to file all of the requested CEDFs are unsubstantiated and unreasonable. *See I&D Memo* at 35–37; Golden Bird Suppl. Quest. Resp. at 3–4 (indicating that if any export agent was used, the same export agent was used for each shipment and failing to explain why documents could not have been stored electronically). As the CEDFs that Golden Bird failed to produce are required to be maintained for three years by Chinese customs regulations, Golden Bird's failure to maintain them is evidence of its failure to cooperate to the best of its ability. *I&D Memo* at 38–39. Golden Bird maintains that it acted to the best of its ability because it provided alternative evidence that it was the exporter of the quantity of fresh garlic reported. Golden Bird Br. at 19. This alternate evidence, however, only accounted for a portion of the alleged Golden Bird sales. Accordingly, the alternative evidence did nothing to cure the deficient response.[12] Golden Bird did not explain why it did not supply alternative evidence for all of its alleged shipments. The acknowledged price discrepancies between the evidence Golden Bird submitted in its Supplemental Questionnaire Response and reported to Customs further indicate that Golden Bird was not completely candid with Commerce, and are additional evidence of Golden Bird's failure to cooperate to the best of its ability. Thus, none of Golden Bird's arguments attempting to rationalize or explain its failure to provide the requested documents are persuasive; accordingly, Commerce's decision to select AFA is supported by substantial evidence.

Given the severity of Golden Bird's failure to cooperate and the centrality of the deficient response to the calculation of a dumping

Bird's Section A Response or Supplemental Questionnaire Response. Such lack of clarity, however, does not render Commerce's determination unsupported by substantial evidence.

Golden Bird does not argue that Commerce failed to follow 19 U.S.C. § 1677m(d) in selecting total AFA. If Golden Bird's deficient response was its Section A Response, the Supplemental Questionnaire provided a sufficient opportunity for Golden Bird to remedy or explain the deficiency. If the deficient response was the Supplemental Questionnaire Response, Golden Bird likely still received an adequate opportunity to remedy or explain the deficiency, given the time constraints Commerce was operating under, the late nature of the allegations, the two time extensions granted, and the fact that Golden Bird acknowledged its response was deficient and attempted to justify such deficiency in the Supplemental Questionnaire Response.

[12] Golden Bird attempts to argue that the Chinese customs data is inaccurate and is responsible for the discrepancies between the reported volumes. Golden Bird Br. at 19. In fact, the amount reported in the Supplemental Questionnaire Response is closer to the amount reported to Chinese customs than it is to the amount reported to Customs and listed in Golden Bird's Section A Response. *I&D Memo* at 27.

margin, Commerce properly selected total AFA. Golden Bird's sales volume is fundamental to the AD analysis, and was a critical component in Golden Bird's selection as a mandatory respondent. *I&D Memo* at 38–39. It is thus akin to the failure to provide product-specific sales and cost data, which the Federal Circuit determined was sufficient to select total AFA in *Mukand, Ltd. v. United States*, 767 F.3d at 1307. Because the sales data concerned the entire POR, this case is also distinguishable from *Zhejiang DunAn Hetian Metal Co. v. United States*, where Commerce selected partial AFA to account for discrepancies in sales volume for one month of the period of investigation. 652 F.3d at 1345–46, 1348 (reversing selection of partial AFA on other grounds). Further, Golden Bird's argument that it substantially complied with Commerce's document request is meritless; Golden Bird acknowledges that the documents submitted account for less than half of its reported sales volume. Golden Bird and Goodman Reply at 10. Additionally, the fact that Golden Bird intentionally submitted false pricing information also supports Commerce's determination that all of Golden Bird's sales information was unreliable. *See Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, Slip Op. 11–123, 2011 WL 4829947, at *14 (CIT Oct. 12, 2011) (holding that total AFA was appropriate where deficient responses concerned a substantial portion of a party's production inputs); *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 199 n.13, 360 F. Supp. 2d 1339, 1348 n.13 (2005) (upholding selection of total AFA where inconsistencies concerned the identity of a party's suppliers). Thus, Commerce's decision to select total AFA is supported by substantial evidence.

D. *Selection of the PRC-Wide Rate*

As discussed above, Commerce's selection of total AFA is supported by substantial evidence; Commerce's further selection of the PRC-wide rate, however, is not. Commerce improperly ignored Golden Bird's Separate Rate Certification in selecting the PRC-wide rate as Golden Bird's total AFA rate.

1. Commerce's Calculation

In an AD review of products from an NME country, Commerce employs a presumption of state control. *See Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1372 (Fed. Cir. 2003). Unless a party rebuts the presumption by establishing *de jure* and *de facto* independence from the NME country's government, that party is assigned a country-wide AD duty rate. *Sigma Corp. v. United States*,

117 F.3d 1401, 1405 (Fed. Cir. 1997); *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1309, 587 F. Supp. 2d 1319, 1324 (2008). Once a party has demonstrated its independence and been granted a separate rate in one segment of the proceeding, it can demonstrate its separate rate status eligibility by filing a separate rate certification stating that it continues to meet the criteria for obtaining a separate rate. *See Initiation Notice*, 77 Fed. Reg. at 77,018–19.

Golden Bird filed a separate rate certification, which Commerce determined was sufficient in the *Preliminary Results*. *See Preliminary I&D Memo* at 6, 8. Commerce thus had previously determined that Golden Bird was entitled to a separate rate and preliminarily determined that Golden Bird continued to meet the criteria for obtaining a separate rate. *See id.* at 6. The government argues that because of the pervasive nature of Golden Bird's failure to act to the best of its ability, Commerce could not rely on the information in Golden Bird's Separate Rate Certification in the *Final Results*. Gov. Br. at 31. According to Commerce's logic, because the only information on the record in the administrative review of Golden Bird's independence from government control was contained in the Separate Rate Certification that Commerce disregarded, Golden Bird failed to rebut the presumption of government control and was properly assigned the PRC-wide rate. *See id.* The government's argument improperly conflates the separate rate analysis with the selection of an AFA rate.

The court has held that the separate rate analysis is separate and distinct from the selection of an AFA rate. *Yantai Xinke Steel Structure Co. v. United States*, Slip Op. 12–95, 2012 WL 2930182, at *14 (CIT July 18, 2012) ("This Court has consistently held that it is unreasonable for Commerce to impute the unreliability of a company's questionnaire responses and submissions concerning its factors of production and/or U.S. sales to its separate rate responses when there is no evidence on the record indicating that the latter were false, incomplete, or otherwise deficient."). Commerce cannot ignore a party's separate rate information solely because it selects total AFA, due to defects related to sales data. *Foshan Shunde*, 2011 WL 4829947 at *16; *Since Hardware (Guangzhou) Co. v. United States*, Slip Op. 10–108, 2010 WL 3982277, *5–6 (CIT Sept. 27, 2010); *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1098, 637 F. Supp. 2d 1231, 1240–41 (2009); *Shandong Huarong Gen. Grp. Corp. v. United States*, 27 CIT 1568, 1595–96 (2003). Commerce's determination that a party is not entitled to a separate rate because its separate rate information is unreliable must be based on substantial evidence. *See Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 772, 387 F. Supp. 2d 1270, 1287 (2005). When Commerce fails to make

findings that a respondent's separate rate responses were inaccurate or deficient, its denial of a separate rate is unsupported by substantial evidence. *Yantai Xinke*, 2012 WL 2930182 at *14.

Here, Commerce, having found the Separate Rate Certification sufficient, failed to make a new finding that Golden Bird's Separate Rate Certification was deficient in any respect. In fact, Commerce's determination to disregard Golden Bird's Separate Rate Certification was limited to two sentences in the *I&D Memo*. *I&D Memo* at 39 ("Because we determine that the entirety of Golden Bird's information is unusable, including its separate rate information, we find that Golden Bird has not demonstrated its eligibility for separate rate status. As a result, for purposes of these final results, we are treating Golden Bird as part of the PRC-wide entity."). Thus, Commerce's rejection of Golden Bird's separate rate status is based solely on the discrepancies in its questionnaire responses and supplemental questionnaire responses related to sales volume, neither of which concerned Golden Bird's independence from government control. To suddenly decide that Golden Bird, which has long been considered to be independent, *see, e.g.*, *Fresh Garlic Producers Ass'n v. United States*, 83 F. Supp. 3d 1330, 1332 (CIT 2015), is part of the Chinese government because of sales data defects smacks of punishment. The general presumption of state control is tenuous at best and rejecting Golden Bird's rebuttal evidence on the discrete point of government control is not reasonable. Remand is thus appropriate in this case, as Commerce's determination is not based on record evidence specific to the question of whether Golden Bird is subject to state control. *See Gerber Food*, 29 CIT at 772, 387 F. Supp. 2d at 1287.

2. Applicable Law

The parties do not agree as to the applicable law for selecting a separate rate for Golden Bird. On June 29, 2015, President Obama signed the Trade Preferences Extension Act of 2015 ("the Act"). Pub. L. No. 114–27, 129 Stat. 362 (2015). Section 502 of the Act ("§ 502" or "Section 502") amends 19 U.S.C. § 1677e, which sets the standard by which Commerce may select AFA rates. *Id.* § 502, 129 Stat. at 383–84. Namely, § 502 significantly reduces the burden for corroborating an AFA rate, as Commerce does not have to corroborate an AD duty rate that has been applied in a separate segment of the same proceeding. Commerce is also no longer required to tie an AD duty margin to the "commercial reality" of the interested party. *Compare id.* § 502(d)(3), 129 Stat. at 384 ("If [Commerce] uses an adverse inference . . . [Commerce] is not required . . . to demonstrate that the . . . dumping margin used by [Commerce] reflects an alleged commercial reality of

the interested party."), *with Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) ("Although Commerce has discretion in choosing from a list of secondary information to support its adverse inferences, Commerce must select secondary information that has some grounding in commercial reality.").

Given the significant changes to the statute outlined in § 502, whether the Act applies to the court's remand affects whether Commerce is required to corroborate Golden Bird's AFA rate and link it to Golden Bird's commercial reality and whether separate rate status has any practical significance in a total AFA situation. For example, in *Qingdao Taifa Group Co. v. United States*, the court held that Commerce could not select a PRC-wide rate as an AFA rate when the party had established its independence from government control, even where the selection of AFA was appropriate in other respects. 33 CIT at 1098–99, 637 F. Supp. 2d at 1240–42. The court stated, "[b]ecause an AFA rate must bear some relationship to the respondent's actual dumping margin, Commerce's ability to apply the PRC-wide rate as respondent's AFA rate is limited." *Id.* at 1098, 637 F. Supp. 2d at 1240.

Under *Bradley v. School Board of City of Richmond*, courts are instructed "to apply the law in effect at the time it renders its decision." 416 U.S. 696, 711 (1974). A statute will not be given retroactive effect, however, unless there is clear congressional intent, effectively creating a presumption against retroactivity. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). When a statute does not have express retroactive language, the court determines whether applying the statute to the case at hand would allow the statute to have retroactive effect. *Id.* at 280. Retroactive effect is determined by looking at whether applying the statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* In *Republic of Austria v. Altmann*, the Supreme Court described this inquiry as whether the relevant activity that the statute regulates occurred after the effective date of the statute. 541 U.S. 677, 697 n.17 (2004) (quoting *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring)). In *Fernandez-Vargas v. Gonzales*, the court stated that a retroactive consequence of applying a statute would "affect[] substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." 548 U.S. 30, 37 (2006) (quoting *Landgraf*, 511 U.S. at 278) (internal brackets omitted).

The parties agree that § 502 does not apply to the court's present review of the *Final Results*. Cmts. on Ct.'s Letter of July 30, 2015 5–7, ECF No. 78 (Sept. 3, 2015) ("Golden Bird, Goodman, and QXF Suppl. Br."); Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Suppl. Br. in Resp. to Ct.'s Questions 2–3, ECF No. 79 (Sept. 3, 2015) ("Xinboda Suppl. Br."); Domestic Indus.'s Resp. to the Ct.'s July 30, 2015 Letter Requesting Suppl. Briefing 3–4, ECF No. 80 (Sept. 3, 2015) ("FGPA Suppl. Br."); Def.'s Resp. to the Ct.'s July 30, 2015 Order Requesting Suppl. Briefing 3, ECF No. 81 (Sept. 3, 2015) ("Gov. Suppl. Br."). The parties disagree, however, as to whether § 502 will apply to a remand determination. The government concedes that the relevant portions of the Act do not have any retroactive language and are not intended to apply retroactively. Gov. Suppl. Br. at 4–5. Instead, the government argues that because a remand determination is a new action by Commerce, as opposed to an action by a party, the application of § 502 to a remand determination is not retroactive. *Id.* FGPA agrees with the government that Commerce may apply the Act on remand without retroactive effect. FGPA Suppl. Br. at 4–5. Golden Bird argues that applying § 502 on remand would improperly convert the Act from being remedial to punitive, and would be a retroactive application. Golden Bird, Goodman, and QXF Suppl. Br. at 5–7.

Section 502 does not have an express effective date. Commerce issued an interpretive rule indicating that the Act is to have prospective effect only, and that § 502 will apply to determinations made by Commerce on or after August 6, 2015. *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015) ("*Interpretive Rule*"). The Federal Circuit recently held that § 502 has prospective effect and does not apply to "final administrative determinations that remain subject to judicial review." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1350 (Fed. Cir. 2015) ("*Ad Hoc Shrimp*"). Accordingly, as the *Final Results* are a "final administrative determination" currently subject to judicial review, and predate the enactment of the Act, the court did not apply § 502 in reviewing the *Final Results*.

Although the Federal Circuit did not directly address whether § 502 applies to remand determinations in *Ad Hoc Shrimp*, the analysis the court conducted in holding that § 502 does not apply to determinations currently subject to judicial review is instructive. *Id.* at 1351 n.12. In holding that § 502 operates prospectively, the court noted that "[a] statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary impli-

cation." *Id.* at 1349 (quoting *Fernandez-Vargas*, 548 U.S. at 37). The court then looked to the text of § 502, which contains no express effective date or language concerning the section's temporal reach. *Id.* at 1350–51. Next, the court relied on the normal rules of statutory construction and held that those rules precluded the application of § 502 to the appeal before the court. The court noted that when the normal rules of statutory construction do not dictate a statute's proper reach, the court "ask[s] whether applying the statute . . . would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." *Id.* at 1350 (quoting *Fernandez-Vargas*, 548 U.S. at 37) (internal quotation marks omitted).

Neither § 502's text nor its legislative history expressly states that § 502 is retroactive or applies to remand determinations of cases that were subject to judicial review at the time of its enactment. *See* S. Rep. No. 114–45, at 37 (2015) (discussing § 501, ultimately enacted as § 502). Based on the normal rules of statutory construction, § 502 is not intended to apply retroactively. Congress provided explicit effective dates for other provisions in the Act, both preceding and following the date of enactment, indicating that had Congress intended the Act to have retroactive effect, it would have said so. *Ad Hoc Shrimp*, 802 F.3d at 1350–51 (discussing the statutory principle allowing a presumption of intent when Congress includes language in one statutory provision that is excluded from another provision). This is particularly relevant given the simultaneous enactment of the provisions with specified effective dates and § 502. *See id.* at 1351 ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects.") (quoting *Field v. Mans*, 516 U.S. 59, 75 (1995)). Because § 502 is not intended to have retroactive effect, the next question is whether applying § 502 to a remand determination will result in the retroactive application of § 502.

In *Landgraf v. USI Film Products*, the Supreme Court reasoned that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." 511 U.S. at 269. Rather, the court determined that it must evaluate "familiar considerations of fair notice, reasonable reliance, and settled expectations" to determine whether applying the statute would have retroactive effect. *Id* at 270. The court explained the rationale for this rule:

> Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for

> the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

Id. at 272–73.

The government and FGPA make much of the fact that § 502 regulates Commerce's conduct in administrative proceedings, and that because a remand determination is a new administrative proceeding, applying § 502 would not be retroactive. They also make much of the fact that trade remedies laws, including AD laws, are inherently retroactive and that no party has a right to a certain rate of duty. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Suppl. Br. in Resp. to Court's Questions Ex. 2, ECF No. 79 (Gov. Suppl. Br. at 2, ECF No. 85, *Ad Hoc Shrimp*, No. 2014–1647 (Aug. 27, 2015) (citing *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1380–81 (Fed. Cir. 2008); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 897 (Fed. Cir. 1989)). As support for this in its supplemental brief filed before the Federal Circuit in *Ad Hoc Shrimp*, the government cited *SKF USA, Inc. v. United States*, where the Federal Circuit relied on the retrospective nature of duties and held that a change in Commerce's methodologies between administrative reviews was acceptable. *Id.* ; *see* 537 F.3d at 1380–81. As this case concerns a change between an original determination and a remand determination rather than between separate administrative reviews, it is readily distinguishable. The government and FGPA, thus, have misunderstood the critical conduct at issue. The relevant decision does not concern entitlement to a particular rate of duty or the retrospective nature of the trade laws. Rather, it concerns the decision Commerce made when it selected total AFA for Golden Bird. The date Commerce made that determination is controlling, as it is the date on which the decision was made that affected Golden Bird's rights. *See Martin v. Hadix*, 527 U.S. 343, 357–58 (1999) ("The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.") (quoting *Landgraf*, 511 U.S. at 270) (internal quotation marks omitted).

In *Travenol Laboratories, Inc. v. United States*, the Federal Circuit held that applying a statutory provision, which was amended after final judgment was awarded by the CIT, but prior to certain entries' re-liquidation, would not result in the retroactive application of that

provision. 118 F.3d 749, 752–54 (Fed. Cir. 1997). Central to the court's holding was that the provision concerned the calculation of interest, which was not determined until the entries were re-liquidated. *Id.* at 753. In reaching that conclusion, the court stated that the retroactivity analysis "focuse[s] on the interrelationship between the new law and past conduct . . . [and] depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." *Id.* at 752 (internal quotation marks and citation omitted). Thus, this case is distinguishable, as the crucial moment for retroactivity in this case is not liquidation, but rather, Commerce's determination that Golden Bird failed to cooperate to the best of its ability and selected total AFA. Because Commerce's decision to select total AFA occurred prior to § 502's enactment, applying § 502 on remand would be an impermissible retroactive application.

To apply § 502 on remand would be in effect to apply the law retroactively by applying it to a determination that occurred before the new law became effective. It would also serve to treat parties differently merely because Commerce made an error in one case and not in another decided at the same time. Additionally, the court rejects the argument that the Act is merely a restatement of the law and does not change the standard by which it selects an AFA rate. The Federal Circuit interpreted the AFA provisions of the old law as requiring corroboration of the rate so that there was some basis in the commercial reality of a respondent. *See, e.g.*, *Gallant Ocean*, 602 F.3d at 1324. In contrast, the Act permits Commerce to select a rate that is unconnected to such commercial reality. Section 502 thus clearly diverges from the prior statutory AFA standard as interpreted by binding Federal Circuit precedent such that application of the new standard would be an impermissible retroactive application.

The government's reliance on *Potomac Electrical Power Co. v. United States*, as support for applying § 502 on remand is also misplaced. 584 F.2d 1058 (D.C. Cir. 1978). Although that case did order an agency to apply a new law on remand after finding that the agency's determination did not satisfy the previously-applicable legal standard, *Potomac* is a pre-*Landgraf* case, and the court applied a different, now-inapplicable standard. *Id.* at 1066–67. Specifically, the court determined that the agency should apply the law in effect at the time of a decision unless it would be manifestly unjust to do so. *Id.* at 1066. This is in stark contrast to *Landgraf*'s presumption against retroactivity. *See Landgraf*, 511 U.S. at 265, 270.

Accordingly, § 502 of the Act does not apply to the remand determination ordered in this case and Commerce is instructed not to apply the standards contained in § 502 on remand.

E. *Fifteen-Day Liquidation Policy*

Golden Bird next challenges Commerce's 15-day liquidation policy. Golden Bird Br. at 28–34. Golden Bird argues that Commerce's policy ignores 19 U.S.C. § 1516a and CIT Rule 3(a)(2)'s 30-day time limit for filing cases before the CIT, Commerce's own timeline for filing ministerial error allegations (within 30 days) under 19 C.F.R. § 351.224, and 19 U.S.C. § 1675(a)(3)(B), which provides "[l]iquidation shall be made . . . to the greatest extent practicable, within 90 days after the instructions to Customs are issued." Golden Bird Br. at 29–31. The government responds that the court lacks jurisdiction under 28 U.S.C. § 1581(c) to hear this claim, and that Golden Bird has not been harmed by this policy as its entries have not yet been liquidated. Gov. Br. at 60–63. The government further argues that even if the court does have jurisdiction, Commerce's policy permissibly fills a statutory gap. *Id.* at 60, 63.

Although Golden Bird brought its claim under § 1581(c) jurisdiction, and filed its summons and complaint separately, it asks the court to consider its argument under either § 1581(c) or § 1581(i) jurisdiction. Golden Bird and Goodman Reply at 18–19; Summons at 3, *Hebei Golden Bird Trading Co. v. United States*, No. 14–00163 (July 7, 2014), ECF No. 1; Compl. at 2, *Hebei Golden Bird Trading Co. v. United States*, No. 14–00163 (July 7, 2014), ECF No. 7. Golden Bird claims the liquidation instructions are an integral part of the *Final Results* and are thus reviewable under § 1581(c), and alternatively, that given the similarity between § 1581(c) and § 1581(i) jurisdiction, the court should analyze the issue even if they are not an integral part of the *Final Results*. Golden Bird and Goodman Reply at 18–19. Golden Bird's arguments are without merit.

As regards Golden Bird individually, there has been no showing of injury that the court can address as its entries have not been liquidated and will not be liquidated until this litigation is complete. That is, it moved swiftly and obtained injunctive relief before liquidation instructions were acted upon. *See* Statutory Inj., *Hebei Golden Bird Trading Co. v. United States*, No. 1400163 (July 17, 2014), ECF No. 9. Additionally, because other cases have addressed Commerce's 15-day liquidation policy, the issue has not evaded judicial review, at least to the extent of the granting of declaratory relief. *See, e.g.*, *NTN Bearing Corp. of America v. United States*, 46 F. Supp. 3d 1375, 1380–81, 1383–88 (2015) (exercising § 1581(i) jurisdiction in § 1581(c) case over 15-day policy challenge where parties properly followed procedures for filing a § 1581(i) case); *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 736–38, 491 F. Supp. 2d 1273, 1280–82 (2007) (addressing 15-day policy in a § 1581(c) case where Commerce directly addressed

the policy in the issues and decision memorandum and where the parties did not challenge the court's jurisdiction). Although there is a serious issue as to whether Commerce acts lawfully when it forces a party into court before the statutory time for commencing suits, if Golden Bird seeks a remedy on this issue going forward it needs to properly file a case under § 1581(i) seeking broader injunctive relief. There is no remedy that the court can give in this case on this complaint that will ameliorate this situation.

II. Goodman

A. *Specific Facts*

Goodman requested both an NSR and an administrative review on November 27, 2012. *Fresh Garlic from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review; 2011–2012*, 78 Fed. Reg. 88, 89 (Dep't Commerce Jan. 2, 2013); Goodman's Req. for Administrative Review, bar code 3107472 (Nov. 27, 2012). Goodman requested that Commerce accept its Section A Questionnaire Response filed in its NSR in lieu of a separate rate application in the administrative review proceeding on February 15, 2013. Goodman's Request for Department to Accept SAQR Resp. in Lieu of Separate Rate Application, bar code 3119618–01 (Feb. 15, 2013). In its *Preliminary Results*, Commerce did not consider Goodman for a separate rate because Goodman had filed a concurrent NSR and Commerce stated that Goodman would receive the rate determined in the NSR. *Preliminary I&D Memo* at 6. Goodman's NSR was rescinded on April 21, 2014, because Commerce concluded that Goodman did not have any *bona fide* sales during the POR. *Fresh Garlic from the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.*, 79 Fed. Reg. 22,098, 22,098–99 (Dep't Commerce Apr. 21, 2014). Thereafter, Commerce rescinded Goodman's administrative review because, based on the results of the NSR, Goodman did not have any reviewable sales during the POR. *I&D Memo* at 40–41. In effect, Goodman was subject to the PRC-wide rate.

Goodman alleges that Commerce improperly excluded it from the eighteenth administrative review because Goodman is *de facto* and *de jure* independent from the Chinese government and is thus entitled to a separate rate. Goodman Br. at 10. Specifically, Goodman argues that a lack of *bona fide* sales is an improper basis on which to rescind an administrative review, and that Commerce's action was arbitrary and capricious because Commerce did not examine the *bona fides* of

any other respondents' sales. *Id.* Goodman further contends that because it is independent of government control, Commerce's failure to assign it a separate rate was a failure to perform a ministerial act. *Id.* at 11. Finally, Goodman challenges the validity of the PRC-wide rate, arguing that it is punitive and invalid, as it is out of date and divorced from commercial reality. *Id.* at 11–15.

The government responds that because Goodman's sales during the POR were not commercially reasonable, there were no reviewable sales during the POR. Gov. Br. at 11. Accordingly, Commerce properly rescinded the administrative review. *Id.* Additionally, the government and FGPA argue that it was not arbitrary or capricious to examine only Goodman's *bona fides* because none of the other separate rate respondents filed an NSR. *Id.* at 12; Domestic Indus.'s Resp. in Opp'n to Foreign Exps.' Mots. for J. on the Agency R. at 39–40, ECF No. 58 ("FGPA Resp."). Although the rescission of the administrative review resulted in the application of the PRC-wide rate, FGPA argues that the rate was not applied in the administrative review, but rather, Commerce's action allowed the determination made during the NSR to stand. FGPA Resp. at 40–41. The government argues that the PRC-wide rate should be challenged in the NSR review. *See* Gov. Br. at 12. Thus, neither the government nor the FGPA believe it is proper to address Goodman's PRC-wide rate challenge in this case, and the court agrees.

B. *Application of the PRC-Wide Rate*

Under 19 U.S.C. § 1675(a)(2), in an administrative review, Commerce is instructed to evaluate each entry. Under 19 C.F.R. § 351.213(d)(3), Commerce "may rescind an administrative review . . . if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise." Here, Commerce relied on its determination in the NSR and rescinded the administrative review because Goodman did not have any *bona fide* sales during the POR, and there were no non-related entries at issue.[13] Golden Bird, Goodman, and QXF Suppl. Br. at 1–2; Gov. Suppl. Br. at 2.

In evaluating the *bona fides* of entries, Commerce is permitted to exclude certain sales when they are unrepresentative or extremely distortive. *See Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 224, 193 F. Supp. 2d 1303, 1307 (2002); *FAG U.K., Ltd. v. United States*, 20 CIT 1277, 1281–82, 945 F. Supp. 260, 265 (1996). "Given Commerce's discretion in employing a methodology to exclude

[13] The court uses sales and entries interchangeably because the distinction has no import on these facts.

sales . . . that are unrepresentative or distortive, that is, non-bona fide ones, the Court must determine whether Commerce's actions in this case were reasonable." *Windmill*, 26 CIT at 230, 193 F. Supp. 2d at 1312. Here, Commerce's actions were reasonable as it cannot evaluate a company for application of a separate rate to its sales when there are no sales that are not unrepresentative or distortive. As there were no reviewable entries, Commerce properly rescinded the review. Because all of the sales were not *bona fide*, there were no sales within the POR for which Commerce could grant Goodman a separate rate.

Goodman argues that it was arbitrary and capricious of Commerce to examine the *bona fides* of its sales when it did not examine the *bona fides* of any other separate rate respondents' sales. Goodman, however, ignores the fact that no other separate rate respondent filed an NSR, and, accordingly, Commerce had a reasonable explanation for why it treated Goodman differently. When Goodman filed the NSR hoping for expedited review, it became subject to the potential negative impact of that review on the administrative review. *See* 19 C.F.R. §§ 351.214(i) (indicating that an NSR decision is to be issued no later than 450 days after its initiation), 351.213(h) (indicating than an administrative review decision is to be issued no later than 545 days after the last day of the anniversary month). Additionally, once Commerce had the information concerning the non-*bona fides* of Goodman's sales it could not ignore that relevant information. *Floral Trade Council of Davis v. United States*, 13 CIT 242, 242, 709 F. Supp. 229, 230 (1989). Finally, because Commerce properly rescinded the administrative review, refusing to grant Goodman a separate rate was not a failure to perform a ministerial act.

Neither party has presented persuasive argument or binding case law concerning Commerce's proper actions where a company may be independent of government control, but has no reviewable entries. At the present time, it appears that Commerce simply assumes that there are not entries of real sales of an independent company. Although the court again notes its skepticism as to the factual basis underlying the presumption of state control, at least for some sectors of the Chinese economy, Goodman has not challenged that presumption and the court will not make such an argument on its behalf. *See Henderson ex rel. Henderson v. Shineski*, 562 U.S. 428, 434 (2011) ("Under [the adversarial] system, Courts are generally limited to addressing the claims and arguments advanced by the parties."); *see also Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for

advancing the facts and arguments entitling them to relief."). Thus, Commerce's refusal to conduct an administrative review and the resulting subsequent application of the PRC-wide rate is supported by substantial evidence. Any challenge to the PRC rate as applied to Goodman may only proceed in the challenge to the NSR results and not here.

III. Surrogate Country Selection

Xinboda and QXF challenge Commerce's selection of the Philippines as the primary surrogate country. Xinboda Br. at 3; QXF Br. at 7. Specifically, Xinboda contends that Commerce erred when it treated economic comparability as a "threshold" test for surrogate country selection. Xinboda Br. at 13. Xinboda argues that instead, economic comparability should have been concurrently weighed against the other factors impacting Commerce's selection of a surrogate country—significance of production, merchandise comparability, and data quality. *Id.* at 14. Xinboda argues that had Commerce considered these factors simultaneously, it would have selected India, or alternatively, Thailand, as its primary surrogate country. *Id.* at 13, 18. Conversely, the government asserts that economic comparability is indeed a "threshold" test for surrogate country selection and cites the language of 19 U.S.C. § 1677b(c)(4) as support. Gov. Br. at 46–48.

Both Xinboda and QXF challenge Commerce's determination that the Philippines is a significant producer of fresh garlic. Xinboda Br. at 22–24; QXF Br. at 8–10. These respondents contend that a country must produce a comparatively large quantity of merchandise to be designated a significant producer. Xinboda Br. at 24–25; QXF Br. at 8–9. Arguing that the quantity of production is not the sole determiner of significant producer status, the government dismisses their contention. Gov. Br. at 51.

Finally, Xinboda argues that India and Thailand offered better quality data than the Philippines. Xinboda Br. at 26–32, 34–36. The government responds that the Philippines offered the best available information because it was the only economically comparable country that offered tax and duty-free data that were linked to a governmental source. Gov. Br. at 45, 53.

As discussed in further detail below, the court holds that although it may have been permissible for Commerce to start its analysis by looking at economic comparability, its ultimate selection of the Philippines is not supported by substantial evidence because that country is not a significant producer of fresh garlic under any reasonable criterion selected to date.

A. *Surrogate Country Selection Process*

To calculate the normal value of merchandise exported from NME countries, Commerce uses surrogate values—the costs of producing comparable merchandise in economically comparable ME countries. 19 U.S.C. § 1677b(c)(4). Prior to calculating surrogate values, however, Commerce must select a country from which to derive these surrogate values. This requires Commerce to engage in a multi-part process, which in an ordinary case should result in a usable surrogate country. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1679, 462 F. Supp. 2d 1262, 1271 (2006); *see also* Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), *available at* http://enforcement.trade.gov/ policy/bull04–1.html (last visited Nov. 20, 2015) ("Policy Bulletin 04.1").[14] Initially, Commerce compiles a list of ME countries that are economically comparable to the NME country. Policy Bulletin 04.1. Commerce then identifies which of the listed countries produces comparable merchandise. *Id.* Next, Commerce identifies the countries on the list that are significant producers of the subject merchandise. *Id.* Commerce selects from the remaining countries the one that provides the best available and highest quality data as the primary surrogate country. *Id.*

1. Economic Comparability

Commerce is to value the FOPs from an ME country which is "at a level of economic development comparable" to the NME country. 19 U.S.C. § 1677b(c)(4)(A). Although the statute does not define comparable economic development,[15] because per capita GNI is a "consistent, transparent, and objective measure to determine economic comparability," courts have concluded that Commerce's use of this information is a reasonable interpretation of its statutory duty. *See Jiaxing Brother Fastener Co. v. United States*, 961 F. Supp. 2d 1323,

[14] This bulletin is a compilation of the International Trade Administration's guidelines for antidumping administrative reviews. Though not binding authority, courts, including this one, view this bulletin as indicative of Commerce's best practices and statutory interpretations for reviews of AD duty orders. *See, e.g.*, *DuPont Teijin Films v. United States*, 997 F. Supp. 2d 1338, 1342–45 (CIT 2014); *Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 896 F. Supp. 2d 1313, 1320–23 (CIT 2013).

[15] When Commerce interprets the AD statutes to which it must adhere in conducting an administrative review of an AD duty order, the court conducts a two-part test, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether that interpretation is entitled to deference. Where Congress has spoken directly to the question at issue, Commerce must give effect to the unambiguously expressed intent of Congress. *Id.* at 842–43. If, however, the statute is vague or silent on an issue, the court upholds Commerce's interpretation so long as the interpretation is reasonable. *See id.* at 843; *DuPont Teijin Films USA, LP v. United States*, 27 CIT 962, 965–66, 273 F. Supp. 2d 1347, 1351 (2003).

1328, 1330 (CIT 2014) (noting that GNI is both similar to, and more accurate than, Gross Domestic Product ("GDP"), which 19 C.F.R. § 351.408(b) indicates is proper for Commerce to use); *see also Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1077, 638 F. Supp. 2d 1325, 1349 (2009) (explaining that per capita GNI data provide Commerce with a broad sense of countries' varying levels of economic development).

Once countries are placed on Commerce's list of economically comparable ME countries, Commerce does not evaluate how closely each country's per capita GNI reflects that of the NME country at issue. *See Tehnoimportexport v. United States*, 15 CIT 250, 255–56, 766 F. Supp. 1169, 1175 (1991) (explaining that the statutory mandate is simply to ensure that the surrogate country is *a* comparable economy, not the *most comparable* economy). Instead, Commerce considers each of these listed countries to be equally economically comparable to the NME country. Policy Bulletin 04.1; *see Tehnoimportexport*, 15 CIT at 255, 766 F. Supp. at 1175.

Xinboda contends that Commerce should have selected Thailand as the primary surrogate country, because its per capita GNI for the relevant period was closest to that of the PRC. Xinboda Br. at 32. As the court has held before, however, "the law does not require [Commerce] to choose the *most* comparable economy, but rather *a* comparable economy." *Tehnoimportexport*, 15 CIT at 256, 766 F. Supp. at 1175. Because with regard to economic comparability both Thailand and the Philippines "reasonably could have been selected as surrogates," the court will not disturb Commerce's selection of the Philippines merely because Thailand's per capita GNI was closer to that of the PRC. *Id.* Other problems remain, however.

2. Significant Producer[16]

Next, Xinboda and QXF contend that the Philippines is not a significant fresh garlic producer, because it produces considerably less than either India or Thailand. Xinboda Br. at 22; QXF Br. at 8–9. Arguing that "significant producer" is not necessarily synonymous with "largest producer," the government defends Commerce's selection of the Philippines as the PRC's surrogate country. Gov. Br. at 51. The government further argues that Philippine production only appears to be *de minimis* when compared to that of the PRC, the world's largest fresh garlic producer. *Id.*The court, however, is not convinced by the government's arguments, and concludes that Commerce's determination is not supported by substantial evidence.

[16] No parties contest Commerce's determination in the surrogate country selection process that the countries on the list produce comparable merchandise.

When selecting a surrogate country, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). There is no statutory definition of "significant producer"; however, the International Trade Administration ("ITA") offers some guidance on how to interpret the term. Policy Bulletin 04.1. The ITA explains that Commerce should not compare production levels in the NME country and the potential surrogate countries in order to identify significant producers. *Id.* Instead, Commerce should define "significant producer" in relation to world production and trade. *Id.* ; *see DuPont Teijin Films v. United States*, 997 F. Supp. 2d 1338, 1342 (CIT 2014).

Because the court has previously held, and it adheres to that view, that significant producer "is not statutorily defined, and is inherently ambiguous," the only question to be answered is whether Commerce's definition of significant producer is "based on a permissible construction of the statute." *Shandong Rongxin Imp. & Exp. Co. v. United States*, 774 F. Supp. 2d 1307, 1316 (CIT 2011) (quoting *Chevron*, 467 U.S. at 843).

The court has suggested that an interpretation of "significant producer" countries as those whose domestic production could influence or affect world trade would be a permissible construction of the statute. *Id.* This follows from the plain meaning of the word "significant" as something "having or likely to have influence or effect." *Significant*, *Webster's Third New International Dictionary*, (1981). This definition, however, necessarily requires comparing potential surrogate countries' production to world production of the subject merchandise. Upon doing so, it becomes clear that the Philippines is not a significant producer of garlic under Commerce's normal definition of the term. Worldwide production of fresh garlic in 2011 was over 23 million metric tons. *See* Golden Bird's Submission of Surrogate Country Selection Cmts. and Surrogate Value Info. at Ex. 1, PD 110–15 (June 26, 2013). That same year, Philippine production totaled 9,056 metric tons, or less than 0.04% of the worldwide total. *Id*. It cannot be plausibly maintained that the Philippines' miniscule garlic production had any meaningful effect on world trade.

Commerce nonetheless argues that this case required a different approach because the output of the PRC—far and away the world's largest—causes all other countries' production to appear minimal by comparison. Gov. Br. at 51. Therefore, the court must determine whether it was permissible for Commerce to identify as significant producers those countries whose production has no meaningful effect on the world garlic trade, but whose production quantity Commerce

determined was significant. It is difficult to determine whether Commerce's alternate methodology rested on a permissible construction of the statute, because Commerce has not explained the criteria upon which it relied in concluding that the Philippines was a significant producer of fresh garlic. The court concludes that although Commerce analyzed the significance of the quantity of fresh garlic production, in reality, it improperly determined that a country was a significant producer if it had "any commercially meaningful production."

A deviation from Commerce's normal approach is reasonable in situations where there are only a handful of producers of comparable merchandise in the entire world. *See* Policy Bulletin 04.1 (giving the example of a situation where only three countries produce the goods in question). This, however, is not a situation in which there are so few producers of fresh garlic that "any commercially meaningful production is significant." *Id.* In fact, the U.N. lists over ninety-six countries as producers of fresh garlic. Golden Bird's Submission of Surrogate Country Selection Cmts. and Surrogate Value Info. at Ex. 1. Although not all of these countries are significant producers, this suggests that there was no need for Commerce to deviate from its usual interpretation of significant producer, as there are a multitude of countries engaged in the production of fresh garlic. Still, Commerce is free to depart from its prior practice in evaluating whether a country is a significant producer, so long as that evaluation rests on a reasonable interpretation of the statutory language.

In its *I&D Memo*, Commerce notes that a country's production in comparison to the worldwide total "is but one lens that [Commerce] utilizes" in making its determination. *I&D Memo* at 7. "Here," Commerce continues, "[we] relie[d] on a different lens" to conclude that "the quantity [of garlic] produced in the Philippines surely qualifies as significant." *Id.* at 8. The problem is that Commerce never specifies what this "different lens" was. Commerce was equally conclusory in its *Preliminary I&D Memo*, where it produced a table of the garlic production of six countries economically comparable to the PRC, stating—without elaboration— that "[t]his production data indicates that [five of the countries, including the Philippines] are significant producers of comparable merchandise." *Preliminary I&D Memo* at 10. The production of the five "significant" countries ranged from 1,500 to almost 76,000 metric tons, meaning that the production of countries deemed significant varied by a factor of fifty. *See id.* On the other hand, the sixth country considered—and the only one deemed non-significant—had no garlic production whatsoever. *Id.*Where more than a mere handful of garlic-producing countries compete on the global market, there is little justification for interpreting significant

production to mean simply "non-zero" production. *See Dorbest Ltd. v. United States*, 789 F. Supp. 2d 1364, 1371 (CIT 2011) (concluding that Commerce erred when it identified Equatorial Guinea as a significant producer of wooden bedroom furniture despite the fact that the country's exports were *de minimis*).

What is clear from Commerce's actions, however, is that its interpretation of significant producer involved no comparative analysis. By removing the comparative aspect of the significant producer analysis, and not specifying the criteria on which it relied to determine that the quantity of production was significant, Commerce erred and its determination is not supported by substantial evidence. The court is therefore unpersuaded that Commerce's identification of the Philippines as a significant producer of fresh garlic was based on a reasonable interpretation of the statute. Thus, the court remands this issue to Commerce for reconsideration.[17]

3. Data Quality

Finally, both Xinboda and QXF contend that there were potential surrogate countries, specifically India and Thailand, which offered better quality data than the Philippines. Xinboda at 26–36; QXF Br. at 9. Commerce did not evaluate the Indian data's quality because India was not economically comparable to the PRC. *See I&D Memo* at 10. Commerce concluded that the Thai data were of lesser quality than the Philippine data because Commerce was unable to confirm that the former were duty-exclusive, tax-exclusive, and linked to a governmental source.[18] *Id.*

Because there is not substantial evidence to support Commerce's selection of the Philippines as the PRC's surrogate country, the court need not determine whether the Philippines provided the best quality data.

B. *Exclusion of India*

Xinboda also challenges Commerce's use of economic comparability as a "threshold" test for surrogate country selection. Xinboda argues

[17] Upon remand, Commerce can decide to compile a second list of potential surrogate countries. *DuPont Teijin Films v. United States*, 896 F. Supp. 2d 1302, 1306–07 (CIT 2013). To do so, Commerce must redo its multi-part surrogate country selection process. Policy Bulletin 04.1. If Commerce does not identify significant producers on this second list, "[Commerce] may find it is appropriate to rely on data from other countries," potentially including India. Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Certain Steel Threaded Rod from the People's Republic of China, A-570–932, at 4 (Nov. 5, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–27438–1.pdf (last visited Nov. 20, 2015).

[18] The court is unclear about whether a "governmental source" implies reliability versus particular private sources.

that if Commerce had instead weighed all of the surrogate country selection criteria simultaneously, Commerce would have placed India on its list of potential surrogate countries. Xinboda Br. at 13. In addition, Xinboda argues that because there were no economically comparable significant producers of fresh garlic with quality data, India should have been considered as a surrogate country, notwithstanding its exclusion from Commerce's initial list. *Id.* at 14, 17. Although in this case Commerce likely did not err in initially excluding India from its list of comparable countries, the court agrees with Xinboda that India may have to be considered as a potential surrogate country on remand.

In compiling its initial list of potential surrogate countries, Commerce typically treats economic comparability as a first step. *See* Policy Bulletin 04.1 at n.2 (explicitly rejecting an alternative method whereby the statutory factors are considered simultaneously and weighed against one another). By restricting its list of potential surrogate countries to those that are economically comparable to the NME country in a normal case, Commerce can better ensure that its normal value calculation accurately reflects the cost of producing the subject merchandise in a hypothetical ME country.

There are cases where Commerce recognizes that economic comparability should not be considered as a first step. *See* Policy Bulletin 04.1. Generally this is when the subject merchandise is "unusual or unique," often because only a few countries produce it, or because "major inputs are not widely traded internationally." *Id.* Therefore, Commerce almost always compiles its initial list of potential surrogate countries exclusively on the basis of economic comparability. *Id.* There are two situations in which it is appropriate for Commerce to select a surrogate country that is not on this initial list: (1) when Commerce is unable to identify a significant producer among the potential surrogate countries on its list; and (2) when Commerce is unable to obtain data of a sufficiently high quality from any of the potential surrogate countries on its list. *Id.*

Xinboda argues that India, as "the *only* country that can truly be considered a significant garlic producer after China," should have been selected as the primary surrogate country. Xinboda Br. at 23. Xinboda also notes that India "had been used as a surrogate country in all reviews of fresh garlic from China" in the past, up through the sixteenth administrative review. *Id.* at 22. Although this latter observation is true, by the eighteenth administrative review, Commerce determined—and Xinboda conceded—that India was no longer

economically comparable to the PRC on the basis of per capita GNI.[19] *I&D Memo* at 6; Xinboda Br. at 16; *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1366, 1372 n.9, 1374–76 (CIT 2012) (remanding Commerce's selection of India as the PRC's surrogate country, in part, because Commerce paid little attention to the fact that India's 2008 per capita GNI was approximately one-third of the PRC's for that same year). Fresh garlic is neither unique nor unusual merchandise,[20] and there is no indication that key inputs are not widely traded. Thus, Commerce likely did not err in employing its usual practice of treating economic comparability as a first step.

Nonetheless, here, Commerce might have to consider India as a potential surrogate country. The government argues that the exceptions to the normal rule do not apply here, as Commerce determined that there was an economically comparable significant producer with quality data on its initial list, namely the Philippines. *I&D Memo* at 5–10. As discussed above, however, this determination was not supported by substantial evidence. If, on remand, Commerce can identify on its list at least one economically comparable significant producer which has reliable data, then its decision to exclude India will remain supported by substantial Consol. Court No. 14–00180 Page 49 evidence. *See DuPont Teijin Films v. United States*, 896 F. Supp. 2d 1302, 1306–07 (CIT 2013). Otherwise, Commerce may have to expand its surrogate country list to include other ME countries, possibly including India.[21]

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[19] The World Bank reports that India's 2011 per capita GNI was $1,410—less than a third of the PRC's per capita GNI ($5,000) for the same year. *GNI per capita, Atlas Method (Current US$)*, The World Bank, *available at* http://data.worldbank.org/indicator/NY.GNP.PCAP.CD/countries (last visited Nov. 20, 2015).

[20] The court points to the Philippines' ranking as the forty-fourth world producer of fresh garlic as evidence that too many countries produce fresh garlic for it to be considered unique or unusual merchandise. *See* Xinboda Br. at 22–24 (citing 2011 statistics that the Food and Agricultural Organization of the United Nations collected about worldwide fresh garlic production). *But see Crawfish Processors Alliance v. United States*, 28 CIT 646, 654, 343 F. Supp. 2d 1242, 1250–51 (2004) (concluding that Commerce's failure to apply economic comparability as a threshold test and subsequent selection of Australia, an ME country, that was not economically comparable to the PRC, the NME country, was supported by substantial evidence because Australia was the only ME country that was also a significant live crawfish producer), *rev'd on other grounds*, 477 F.3d 1375 (Fed. Cir. 2007).

[21] There is no need to address specific surrogate value issues as there may be a new principal surrogate country selected. The court suggests, however, that if the same surrogate data is used Commerce take a fresh look at its use of net weights and adjustments to import statistics and provide clear explanations for its decisions.

CONCLUSION

For the foregoing reasons, the *Final Results* are sustained in part and remanded in part. On remand, Commerce is to consider evidence on the record concerning Golden Bird's independence from government control to determine whether the company is entitled to separate rate status based solely on that evidence. If, upon remand, Commerce determines that Golden Bird is entitled to separate rate status, it is to determine an appropriate AD margin specific to Golden Bird, taking into consideration Commerce's determination, sustained here, to select total AFA and applying the law extant at the time of the *Final Results*. Finally, Commerce is to reconsider its surrogate country selection in the light of the court's ruling concerning its interpretation of "significant producer." Commerce shall have until January 29, 2016, to file its remand results. The parties shall have until February 29, 2016, to file objections, and the government shall have until March 14, 2016, to file its response.

Dated: November 30, 2015
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
Judge

Slip Op. 15–134

ETHAN ALLEN OPERATIONS, INC., Plaintiff, ASHLEY FURNITURE INDUSTRIES, INC., HOME MERIDIAN INTERNATIONAL, INC., CITY FURNITURE, INC., HOOKER FURNITURE CORPORATION, AND STEIN WORLD OPERATING COMPANY, Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 14–00147

[Commerce's scope determination and remand results are remanded.]

Dated: December 1, 2015

Yohai Baisburd, Dentons US LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Daniel Morris*, Dentons US LLP, of Washington, DC, and *Gregory J. Spak*, White & Case, LLP, of Washington, DC.

Kristin H. Mowry, *Daniel R. Wilson*, *Jeffrey S. Grimson*, *Jill A. Cramer*, and *Sarah M.* Wyss, Mowry & Grimson, PLLC, of Washington, DC for plaintiff-intervenors.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant. With him on the

brief were *Benjamin C. Mizer*, Principal Deputy Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Michael Taylor, King & Spalding, LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief were *Joseph W. Dorn* and *Daniel L. Schneiderman*.

Restani, Judge:

OPINION

This matter is before the court on plaintiff Ethan Allen Operations, Inc.'s ("Ethan Allen") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. *See* Mem. of P. & A. in Supp. of Pl. Ethan Allen Operations, Inc.'s CIT Rule 56.2 Mot. for J. on the Agency R., ECF No. 29–2 ("Ethan Allen Br."). Ethan Allen challenges the United States Department of Commerce's ("Commerce") determination that certain chests imported by Ethan Allen fall within the antidumping duty order covering certain wooden bedroom furniture ("WBF") from the People's Republic of China ("PRC"). *Id.* at 11; *see* Commerce's Scope Ruling on Ethan Allen Operations Inc.'s Chests, PD 14 (May 27, 2014) ("*Scope Ruling*"); Final Results of Voluntary Redetermination Pursuant to Court Order, ECF No. 24 ("*Remand Results*"). Ethan Allen additionally challenges Commerce's instructions to U.S. Customs and Border Protection ("Customs") to "continue" to suspend liquidation of entries of the four chests. Ethan Allen Br. at 11–12. For the reasons stated below, Commerce's *Scope Ruling* and *Remand Results* are remanded.

BACKGROUND

Commerce issued an antidumping duty order on certain WBF from the PRC in January 2005. *See 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) ("*WBF Order*"). The scope of the order described the covered merchandise as follows:

> The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products ....

Id. at 332. The *WBF Order* stated that the subject merchandise included 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, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

Id. (footnotes omitted). The *WBF Order* defined a "chest of drawers" as "typically a case containing drawers for storing clothing." *Id.* at 332 n.4. The *WBF Order*also contained a lengthy list of items that were specifically excluded from the scope of the order, including "other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, *Id.* at 332–33.

On February 19, 2014, Ethan Allen filed a scope ruling request, asking that Commerce determine that four models of wooden chests imported by Ethan Allen from the PRC are outside the scope of the *WBF Order*. Scope Ruling Request at 1, PD 1 (Feb. 19, 2014). Ethan Allen described the four models as follows:

- **Vivica Chest.** The Vivica Chest is designed, manufactured and marketed for use in a living room or hallway setting, and is part of a three piece living room group consisting of a coffee table . . . and a sofa table ... all of which share common design elements, such as antiquated mirrored glass surfaces, angled framing and wood molded top frames with distinctive mitered molding surrounding the top....
- **The Nadine Chest.** The Nadine Chest is a "stand alone" accent piece, designed and marketed by Ethan Allen for use in a living room or hallway setting, and predominantly marketed in such settings....
- **The Marlene Chest.** The Marlene Chest is a "stand alone" accent piece, designed and marketed for use in a living room, hallway or dining room setting....

> • **The Serpentine Chest.** The Serpentine Chest is a "stand alone" accent piece, designed and marketed for use in a living room, hallway or dining room setting rather than in a bedroom. . . .

Id. at 2–3. Ethan Allen further explained that none of the chests "is of the same style, material and/or finish as any coordinated bedroom group designed, manufactured or offered for sale by Ethan Allen." *Id.* at 3. Ethan Allen argued that the chests were outside of the order because they were not designed, manufactured, or offered for sale in coordinated bedroom sets in which all of the individual pieces of furniture are approximately the same style, finish, and/or material. *See id.* at 3–6. On March 11, 2014, defendant-intervenors American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively "AFMC") filed a letter with Commerce stating that they had no objection to Commerce finding the four chests to be outside of the scope of the *WBF Order*. AFMC's Comments on Ethan Allen's Scope Ruling Request at 1, PD 5 (Mar. 11, 2014).

On April 15, 2014, Commerce placed on the record pictures from Ethan Allen's website that displayed the Vivica sofa table—one piece from the three-part Vivica coordinated living room set that includes the Vivica chest—in a bedroom setting. Information from Ethan Allen's Website at Attach. 1, PD 9 (Apr. 15, 2014). Ethan Allen responded that that particular picture came from Ethan Allen's New Eclecticism campaign, in which the company promotes the versatility of furniture and encourages consumers to use pieces of furniture in different rooms from the rooms for which the piece was originally designed. Letter Re: Ethan Allen's Chests at 2–4, PD 10 (Apr. 17, 2014).

In its *Scope Ruling*, Commerce determined that for all four chests "the fundamental elements of their design and dimensions . . . is entirely consistent with chests of drawers subject to the *WBF Order*." *Scope Ruling* at 6. In making this determination, Commerce analyzed the Marlene, Nadine, and Serpentine chests separately from the Vivica chest. *Id.* at 7. Commerce did so because Ethan Allen supposedly had argued that the first three chests had wooden finishes similar to that of bedroom furniture, but were sold as stand-alone accent pieces, whereas the Vivica chest had a mirrored surface and was marketed as part of a coordinated living room group. *Id.* Commerce concluded that these distinctions were relevant under the text of the *WBF Order* and warranted a separate analysis of the Vivica chest. *Id.*

Commerce concluded that the Marlene, Nadine, and Serpentine chests were covered by the *WBF Order* after analyzing the criteria listed in 19 C.F.R. § 351.225(k)(1) (2014) ("(k)(1) factors"). *Id.* at 8–9. Commerce reasoned that although the chests contained certain decorative aspects, they were made substantially of wood and that "the fundamental elements of their design and dimensions—three or four parallel horizontal drawers stacked one above another in a frame, providing,... adequate storage space for clothing—is entirely consistent with chests of drawers subject to the *WBF Order*." *Scope Ruling* at 6. Commerce explained that because of the "generally, but not exclusively" language of the scope and as evidenced by prior scope rulings, the chests did not have to be designed, manufactured, and sold as part of a coordinated bedroom in order to be covered by the order. *Id.* at 7–8. Commerce noted that the scope specifically identified wooden chests and chests of drawers as within the scope of the order, and that the Marlene, Nadine, and Serpentine chests were "physically consistent with chests of drawers and similar items of wooden bedroom furniture identified in the scope." *Id.* at 8.

Commerce concluded that the Vivica chest was covered by the order after analyzing the criteria listed in 19 C.F.R. § 351.225(k)(2) ("(k)(2) factors"). Commerce concluded that an analysis of the (k)(2) factors was necessary because the sources listed in the (k)(1) factors, specifically the International Trade Commission's ("Commission") investigation and Commerce's prior scope determinations, "do not contain sufficient information to determine whether a chest designed, manufactured, and marketed as part of a living room set . . . should be considered subject to the *WBF Order*." *Id.* at 10. Commerce ultimately concluded, under the (k)(2) factors, that the physical characteristics, ultimate use, and customer expectations weighed in favor of the Vivica chest falling within the scope of the *WBF Order*, and determined that the channels of trade and advertising factors did not point strongly one way or the other. *See id.* at 10–14. Commerce therefore determined that, based on the weight of the evidence, the Vivica chest was within the scope of the order. *Id.*

On June 5, 2014, Commerce instructed Customs to continue to suspend liquidation of entries of the four chests. Customs Instructions Message No. 4156302, ECF No. 46. Ethan Allen subsequently filed a complaint, challenging Commerce's ruling that the four chests fall within the scope of the *WBF Order*, Commerce's reliance on the (k)(2) factors in deciding whether the Vivica chest is within the scope of the *WBF Order* without initiating a proper scope inquiry, and Commerce's instructions to Customs to "continue" to suspend liquidation. Compl., ECF No. 8. Shortly thereafter, the court granted

defendant the United States's ("the government") consent motion for a remand so that Commerce could perform a scope inquiry regarding the Vivica chest in accordance with the procedures established by Commerce's regulations for conducting an analysis pursuant to 19 C.F.R. § 351.225(k)(2). *See* Order on Consent Mot. to Remand, ECF No. 22; *see also* 19 C.F.R. § 351.225(e)–(f).

During the remand proceedings, Commerce placed five images taken from Ethan Allen's Facebook page showing the Vivica chest in three bedroom settings on the record. *Remand Results* at 3. No party commented on this evidence. *Id.* Commerce issued its *Remand Results* on November 26, 2014, again determining that the Vivica chest was within the scope of the *WBF Order*, indicating that all five (k)(2) factors weighed in favor of including the Vivica chest within the scope. *See id.* at 26–27. Commerce again determined that the Vivica chest "is a chest of drawers and has a design consistent with bedroom chests that serve as storage for clothing." *Id.* at 10. Commerce cited the images from the Facebook page as supporting its conclusion, explaining that the images were relevant to the marketing and advertising of the Vivica chest, as well as customer expectations and ultimate use. *See id.*at 22–26. Commerce also rejected arguments that it had violated its regulations by retroactively suspending liquidation of the four chests when it instructed Customs to "continue" suspending liquidation of entries of the chests. *See id.* at 15–19.

Before the court, Ethan Allen challenges Commerce's determinations pursuant to the (k)(1) factors that the Marlene, Nadine, and Serpentine chests are covered by the *WBF Order*, Commerce's determination pursuant to the (k)(2) factors that the Vivica chest is covered by the *WBF Order*, and Commerce's instructions to Customs to "continue" to suspend liquidation of entries of the four chests.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Ethan Allen's challenge regarding the merits of the *Scope Ruling* and *Remand Results* pursuant to 28 U.S.C. § 1581(c) (2012). In ruling on these challenges, "[t]he court shall hold unlawful any determination, finding, or conclusion found... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law...." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Background

In determining whether a particular product falls within the scope of an antidumping duty order, Commerce employs a sequential analysis. At the outset, Commerce analyzes the language of the order

itself. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013). The regulations recognize that the language of an order may be ambiguous because "the description of subject merchandise contained in [the scope of an antidumping duty order] must be written in general terms." 19 C.F.R. § 351.225(a). If the language of the order is ambiguous with regard to the particular product at issue, then Commerce considers the (k)(1) factors, which include "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission." *Id.*§ 351.225(k)(1). "When the above criteria are not dispositive," only then will Commerce consider the (k)(2) factors, which are "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." *Id.*§ 351.225(k)(2).

In reviewing Commerce's scope determinations, "the court will not re-weigh the evidence presented to Commerce" and will uphold decisions by Commerce when the agency "chooses from among the range of possible reasonable conclusions based on the record." *OTR Wheel Eng'g v. United States*, 901 F. Supp. 2d 1375, 1380 (CIT 2013). Although the court grants significant deference to Commerce's interpretation of its own orders, Commerce "cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *See Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010) (quoting *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002)).

II. The Marlene, Nadine, and Serpentine Chests

Ethan Allen argues that none of the three chests satisfies the supposed threshold requirements for WBF, namely that they be (1) designed, (2) manufactured, and (3) offered for sale in coordinated bedroom groups. Ethan Allen Br. at 16–20. Ethan Allen contends the three chests are non-subject merchandise because only furniture pieces that are "intrinsically and immutably bedroom furniture," such as beds, can be within the scope of the *WBF Order* when designed, manufactured, or offered for sale as a stand-alone piece. *See id.* at 17–18. Ethan Allen also argues that Commerce misstated record evidence when it determined that the Marlene, Nadine, and Serpentine chests should be treated differently from the Vivica Chest and that Commerce failed to consider record evidence that the three chests were not of the same style, material, and/or finish as any of

Ethan Allen's coordinated bedroom groups.[1] *Id.* at 15–16. Finally, Ethan Allen argues that Commerce unlawfully evaluated a (k)(2) factor—the ultimate use of the product—when conducting a (k)(1) analysis. *Id.* at 20–22.[2]

In response, the government argues that Commerce properly concluded that the Marlene, Nadine, and Serpentine chests are within the scope of the *WBF Order* pursuant to the (k)(1) factors. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 11–19, ECF No. 35 ("Gov. Br."). The government contends that Commerce reasonably interpreted the scope of the *WBF Order* to include stand-alone pieces, even if they are not "intrinsically" bedroom furniture. *Id.* at 13–19. The government also points to language within the *WBF Order* describing covered "chests of drawers" and "chests" as pieces "for storing clothing" and asserts that Commerce's analysis of the dimensions of the drawers and whether they were adequate for storing clothing was consistent with this language. *Id.* at 11–12. The government further emphasizes that the Marlene, Nadine, and Serpentine do not have any unique physical or decorative features that distinguish them from subject bedroom chests. *Id.* at 16–17.

AFMC agrees with the government that stand-alone chests may be included within the scope of the *WBF Order*. *See* AFMC's Resp. in Opp'n to Ethan Allen's Rule 56.2 Mot. for J. on the Agency R. 8–13, ECF No. 37 ("AFMC Br."). AFMC also argues that although the ability to hold clothing is a relevant factor (and not a dispositive factor) in Commerce's analysis, the proper inquiry should be the intended function of the product. *Id.* at 13–14.

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[1] The court agrees with Ethan Allen that Commerce misstated certain pieces of record evidence. Commerce's decision to evaluate the Vivica chest separately, however, was reasonable because the Vivica chest is part of a coordinated living room set. Accordingly, the court continues to analyze the Vivica chest separately.

[2] In response to Ethan Allen's argument, the government contends that Commerce's inquiry into whether the chests could store clothing was based on the plain language of the order, not a consideration of any (k)(2) factor. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 12–13, ECF No. 35 ("Gov. Br."). AFMC understands Commerce to have considered the chests' suitability for storing clothing as part of a broader analysis under (k)(1) instead of treating it as a dispositive factor, *see* AFMC's Resp. in Opp'n to Ethan Allen's Rule 56.2 Mot. for J. on the Agency R. 13, ECF No. 37 ("AFMC Br."), but recognizes that whether some chests are designed for the purposes of storing clothing may require an additional analysis of the (k)(2) factors, *see id.* at 14. Ethan Allen is correct that Commerce improperly considered a (k)(2) factor in its (k)(1) analysis. The court, when analyzing the *WBF Order*, has previously determined that "purpose or use cannot be the test when conducting a § 351.225(k)(1) determination, as for [WBF], they are factors relevant only to a § 351.225(k)(2) inquiry." *Toys "R" Us, Inc. v. United States*, 32 CIT 814, 819 (2008). Therefore, although a broad purpose when it is an essential part of the scope definition (e.g., for use in a bedroom) may be considered, here Commerce should have avoided considering purpose and use when re-conducting its (k)(1) analysis.

The *WBF Order* does not exclude stand-alone pieces from the scope of the order. The court has previously recognized that stand-alone pieces of furniture may be included in the scope of the *WBF Order* because the order explicitly indicates that the furniture is "generally, *but not exclusively*, . . . offered for sale in coordinated groups." *WBF Order*, 70 Fed. Reg. at 332 (emphasis added); *see, e.g.*, *Acme Furniture Indus., Inc. v. United States*, 825 F. Supp. 2d 1353, 1356 (CIT 2012). Ethan Allen's argument improperly conflates two separate issues: whether a stand-alone piece may be included in the *WBF Order* and whether the merchandise at issue must be *bedroom* furniture to be included in the scope of the *WBF Order*. *See* Ethan Allen Br. at 17. The answer to both questions is yes. The text of the *WBF Order* does not bear any requirement that stand-alone pieces of furniture may be included within the order only if they are "intrinsically and immutably bedroom furniture." *See* Ethan Allen Br. at 17. Under that interpretation, many pieces of stand-alone furniture (e.g., chests, desks, book cases, armoires) could never be included in the scope of the *WBF Order* because, as a stand-alone piece of furniture, these pieces are not "intrinsically" or "immutably" bedroom furniture. Instead, the *WBF Order* can only include *bedroom* furniture, regardless of whether the item is stand-alone or sold in a coordinated set. As discussed below, however, the "generally, but not exclusively" exception language is to be construed narrowly.

In looking to the language of the *WBF Order* itself, Commerce's determination that the (k)(1) factors are dispositive and that the three chests are within the scope of the *WBF Order* is not supported by substantial record evidence. Commerce relies on the claim "that the Marlene, Nadine, and Serpentine chests have wooden finishes similar to that of bedroom furniture" to evaluate these three accent chests separately from the Vivica chest, but this statement is incorrect. *See Scope Ruling* at 7. Although Commerce alleges that Ethan Allen made this argument, *id.*, Ethan Allen made precisely the opposite argument, *see* Scope Ruling Request at 7. As discussed below, all three of the chests have unique, decorative features, and there is no evidence on the record that these decorative features match that of other bedroom furniture sold by Ethan Allen. *Id.* at Ex.1 (providing the declaration of Corey Whitely, which describes the unique decorative features of each chest). Commerce's misstatement of the record was central to its analysis and provides a sufficient reason to remand this decision to the agency for reconsideration.

Furthermore, the description in the petition does not support Commerce's conclusion that the (k)(1) factors are dispositive. The petition recognizes a difference between wooden bedroom chests and wooden

living room chests, noting that "[l]iving room chests are usually much more decorative . . . and are typically not as deep as bedroom chests (because the primary purpose of bedroom chests, unlike living room chests, is for storage)." AFMC's Resp. to Ct.'s Req. 5, ECF No. 50 (hereinafter "WBF" Petition" at 21). Commerce ultimately concluded, without providing explanation, that the three chests "do not have any unique physical or decorative characteristics that distinguish them from subject bedroom chests." *Scope Ruling* at 8; *see also* Gov. Br. at 16–17. Commerce's analysis, which ultimately focuses on the petition's language regarding a *Legacy Classic Furniture, Inc. v. United States*, Commerce's reasoning, which inexplicably places more emphasis on the storage ability rather than the decorative aspects of the three chests, "could be employed to opposite effect." *See* 807 F. Supp. 2d 1353, 1359 (CIT 2011) (finding that Commerce unlawfully determined that a storage bench was more similar to an in-scope bedroom chest than an out-of-scope bench, even though the storage bench had key features of both).

The court also agrees with AFMC's argument that the ability to hold clothing is a relevant factor for Commerce to consider, but should not be the dispositive factor. *See* AFMC Br. at 13–14. For example, simply because a wooden basket shoved under a bed is capable of storing clothing, this fact alone does not make the basket subject WBF. Instead, as AFMC notes, the proper inquiry should focus on the intended function of the product, i.e., whether it was intended and designed for use in the bedroom,[3] as opposed to whether it is theoretically capable of storing clothing. *See id.* at 14. Because the Marlene, Nadine, and Serpentine chests have qualities of both a wooden bedroom chest (ability to store clothing) and of a wooden living room chest (decorative), Commerce failed to account for record evidence that weighed against its conclusion. On remand, because the (k)(1) factors are non-dispositive, Commerce should evaluate the (k)(2) factors consistent with this decision.

III. The Vivica Chest

Regarding the Vivica chest, Ethan Allen again argues that it does not meet the threshold requirements for WBF, as it was not designed, manufactured, or offered for sale as part of a coordinated bedroom group. Ethan Allen Br. at 23. Ethan Allen urges that the record evidence shows that it was actually designed, manufactured, and offered for sale as part of a three-piece living room group. *Id.* Moreover, Ethan Allen argues that the *WBF Order*'s "generally, but not

[3] In this respect, Commerce might consider the shape and dimensions of the drawers.

exclusively" language "does not act to make the general requirements for 'wooden bedroom furniture' superfluous." *Id.* at 18.

The government makes the same argument regarding the "threshold" features of WBF, asserting that Commerce reasonably interpreted the scope of the *WBF Order* to include pieces that are not part of a coordinated bedroom group. *See* Gov. Br. at 15–18. Commerce based its determination that the (k)(1) factors alone were not dispositive on its analysis that the Vivica chest "is a chest of drawers [that] has a design consistent with bedroom chests that serve as storage for clothing . . . [and is] designed with a mirrored surface and features which it shared with other furniture in [a] living room set." *Remand Results* at 10.

Commerce improperly determined that the (k)(1) factors are non-dispositive because the (k)(1) factors show that Ethan Allen's Vivica chest is non-bedroom furniture. Admittedly, the *WBF Order* defines an in-scope chest of drawers as "typically a case containing drawers for storing clothing." *WBF Order* at 332 n.4. The sources in the (k)(1) factors also explain that "wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish." *Id.* at 332. They also provide that WBF "are, *overwhelmingly*, designed, manufactured, and sold as suites . . . the ultimate consumer typically sees these products as integrally-related products to be put to integrally-related uses." WBF Petition at 21 (emphasis added). Although the order's "generally, but not exclusively" language creates an exception that includes within the scope some standalone furniture, the petition makes clear that this exception is narrow. Not only is the Vivica chest not a part of a coordinated bedroom set, it is, in fact, part of a coordinated living room (i.e., non-bedroom) set and shares "antiquated mirrored glass surfaces, angled framing and wood molded top frames with distinctive mitered molding surrounding the top" with a coffee table and a sofa table. Scope Ruling Request at 2–3.

Commerce, instead, improperly relied on the Vivica chest's potential ability to store clothing. The *WBF Order* specifically excludes "other non-bedroom furniture," *WBF Order* at 332–33, and the petition provides living room chests as an example of such non-bedroom furniture, WBF Petition at 21 (noting that living room chests "are usually much more decorative . . . and are typically not as deep as bedroom chests (because the primary purpose of bedroom chests, unlike living room chests, is for storage)"). Commerce attempts to discredit the petition's language when it states that it did "not believe

the Petitioner's description of living room chests in the Petition provided useful criteria for distinguishing living room chests from bedroom chests such that the Petitioner's description is dispositive of the matter." *Remand Results* at 9. Even if Commerce's rejection of the petition language and Ethan Allen's arguments about the decorative aspects of the Vivica chest are proper, Commerce still fails to consider that the Vivica chest is part of a coordinated living room set, which is designed for use in the living room.[4] Indeed, the petition itself defines bedroom furniture with reference to its "intended use in a bedroom." WBF Petition at 20. The Vivica chest's coordinated design in a living room set indicates that its intended use is in a living room, not a bedroom. Moreover, as the court has recognized, "[u]nequivocal exclusions are not loopholes; they are argued for and intentionally omitted from the scope." *Legacy Classic Furniture, Inc. v. United States*, 867 F. Supp. 2d 1321, 1330 (CIT 2012) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998)). The exclusion of "other non-bedroom furniture" from the scope of the *WBF Order* makes clear the order's intent to omit from the scope other non-bedroom furniture, such as living room furniture. It is inconsistent with the *WBF Order* to read the narrow exception found in the "generally, but not exclusively" language to be so broad as to include coordinated living room furniture. Thus, because the (k)(1) factors are dispositive as to the Vivica chest and demonstrate that the Vivica chest is not within the scope of the *WBF Order*, the court does not proceed to an analysis of the (k)(2) factors and remands to Commerce to issue a ruling consistent with this opinion.

[4] Fleeting advertisements suggesting a dual use are insufficient to make a decorative chest that is part of a living room set bedroom furniture.

IV. Suspension of Liquidation[5]

Ethan Allen also contests Commerce's liquidation instructions to Customs as impermissibly having retroactive effect. Ethan Allen Br. at 27–34. To arrive at this conclusion, Ethan Allen argues that the scope of the *WBF Order* is unclear and Commerce's *Scope Ruling* required an analysis of the (k)(1) and (k)(2) factors to clarify the scope. *Id.* at 29–34; *see* Reply in Supp. of Pl. Ethan Allen Operations, Inc.'s Rule 56.2 Mot. for J. on the Agency R. 7–11, ECF No. 41 ("Ethan Allen Reply") (arguing that "the retroactivity issue is triggered" whenever Commerce conducts a (k)(1) or (k)(2) analysis). Ethan Allen also argues that its accent chests were not previously subject to suspension of liquidation under the allegedly unclear scope contained in the *WBF Order*.[6] Ethan Allen Br. at 29, 34; Ethan Allen Reply at 5–6. As a result, Ethan Allen believes that Commerce's liquidation instructions to assess duties on in-scopemerchandise from a time prior to the commencement of the scope inquiry were not permissible under 19 C.F.R. § 351.225(l)(1).[7] Ethan Allen Br. at 34–36.

The government responds that Commerce's liquidation instructions were lawful. Gov. Br. at 25–33. The government argues that Ethan

[5] At the outset, the court notes that none of the parties in their briefs raised the question of whether the court has jurisdiction over this claim. Nevertheless, "a court has an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Ford Motor Co. v. United States*, 992 F. Supp. 2d 1346, 1354 (CIT 2014) (internal quotations omitted) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). Ethan Allen asserts that the court has jurisdiction over the entire appeal under 28 U.S.C. § 1581(c). Ethan Allen Br. at 12. Although jurisdiction over a party's challenge to Commerce's liquidation instructions may sometimes be proper under 28 U.S.C. § 1581(i), jurisdiction under § 1581(i) is residual and may only be employed where a party has no remedies under subsections (a) through (h) of that section. *Duferco Steel, Inc. v. United States*, 29 CIT 1249, 1253, 403 F. Supp. 2d 1281, 1285 (2005). Instead, Ethan Allen's challenge to Commerce's liquidation instructions directly stem from Ethan Allen's claim that the *Scope Ruling* and *Remand Results* were unlawful. And, Commerce's *Remand Results* specifically address the issue of suspension of liquidation, indicating that a § 1581(c) challenge may be the proper method to challenge not only the *Scope Ruling* and *Remand Results*, but also the liquidation instructions deriving there from. Accordingly, the court has, at least, a colorable claim of jurisdiction under § 1581(c).

[6] The parties could not clarify at oral argument whether suspension and collection of duty deposits actually occurred and for which set of entries. If the liquidation was not suspended, it was likely because Ethan Allen did not declare the chests to be bedroom furniture subject to an antidumping duty order.

[7] The regulation provides:

> When [Commerce] conducts a scope inquiry under paragraph (b) or (e) of this section, and the product in question *is already subject to suspension of liquidation*, that suspension of liquidation will be continued, pending a preliminary or a final scope ruling, at the cash deposit rate that would apply if the product were ruled to be included within the scope of the order.

19 C.F.R. § 351.225(l)(1) (emphasis added).

Allen improperly relies on the Federal Circuit's holding in *AMS Assocs., Inc. v. United States*, 737 F.3d 1338 (Fed. Cir. 2013), arguing instead that the scope of the *WBF Order* was sufficiently clear. Gov. Br. at 28–33. The government also disagrees with Ethan Allen's argument that Commerce's *Scope Ruling* constituted a "clarification" which expanded the scope of the *WBF Order*. *Id.* at 31. Instead, the government argues Commerce simply confirmed that Ethan Allen's chests were subject to the *WBF Order*. *Id.* at 31–33.

AFMC asserts that "bedroom chests are unambiguously included in the scope of the Order," but acknowledges that whether particular chest should be classified as bedroom furniture or living room furniture will require an analysis "of the purpose and use of the chest." AFMC Br. at 18. It contends that any importer of chests designed, marketed, and offered for sale might try to argue that an ambiguity exists as to the purpose and use of such chests to avoid duties, which is not the result intended by the Federal Circuit in *AMS*. *Id.*

When Commerce issues a preliminary scope ruling determining "that the product in question is included within the scope of the order, [then] any suspension of liquidation . . . will continue." 19 C.F.R. § 351.225(l)(2). "If liquidation [for the product in question] has not been suspended," however, Commerce may only suspend liquidation and collect cash deposits from "on or after the date of initiation of the scope inquiry." *Id.* The same rules apply to the final scope ruling at issue here. 19 C.F.R. § 351.225(l)(3).

In interpreting the lawfulness of Commerce's liquidation instructions, both parties cite to *AMS*, and *Ugine & ALZ Belgium v. United States*, 551 F.3d 1339 (Fed. Cir. 2009).[8] In *AMS*, the laminated woven sacks ("LWS") at issue were not already subject to suspension of liquidation because of a prior Customs country of origin ruling, which found that sacks made of non-Chinese-origin fabric were not Chinese. 737 F.3d at 1340. There, Commerce expanded the scope from the previous understanding by ruling that under the substantial transformation test, LWS made from non-Chinese-origin fabric are considered Chinese for scope purposes. *Id.* at 1340–41, 1344. Thus, a conscious change in governmental decisions applicable to the antidumping duty order occurred. *AMS* and 19 C.F.R. § 351.225 on their face, however, indicate without limitation that if there was not an actual suspension of liquidation in place and Commerce determines pursuant to a formal scope proceeding under that section to include certain merchandise in the scope of the order, the suspension

[8] Whether the court directly confronted the retroactivity issue in *Ugine* is not clear as the court ultimately disagreed with Commerce on the merits and found the merchandise outside the scope of the order.

and collection of duty deposits will be retroactive only to the commencement of the scope proceeding.

Whatever occurred in this case, it is fair to say there is a genuine dispute as to whether the four chests at issue are within the scope of the order. It is possible that the retroactivity issue will be mooted, that is, all the chests may be found to be outside the scope. Thus, the court need not finally resolve this, but it will require further facts, including information about Customs' treatment of Ethan Allen's chests subsequent to entry, before it decides whether relief is warranted.

Accordingly, Ethan Allen shall complete the record by establishing what Customs did upon receipt of Commerce's original instruction with respect to the merchandise. Ethan Allen, in particular, should submit information to Commerce as to whether or not there are live entries within a period in which there was no actual suspension of liquidation by Customs. On remand, Commerce should consider this newly submitted entry information to help evaluate whether Commerce's post-scope inquiry liquidation instructions were proper.

CONCLUSION

For the foregoing reasons, Commerce's *Scope Ruling* and *Remand Results* are remanded for Commerce to reconsider its decision regarding Ethan Allen's Marlene, Nadine, and Serpentine chests pursuant to the (k)(2) factors, and for Commerce to issue a determination consistent with this opinion regarding the Vivica chest. Commerce should reconsider its liquidation instructions as necessary. Commerce shall have until February 1, 2016, to file its remand results. The parties shall have until March 2, 2016, to file objections, and the government shall have until March 16, 2016, to file its response.

Dated: December 1, 2015
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
Judge