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# Decisions of the United States Court of International Trade

**Slip Op. 07–85**

**GERBER FOOD (YUNNAN) CO., LTD. and GREEN FRESH (ZHANGZHOU) CO., LTD.,** Plaintiffs, v. **UNITED STATES**, Defendant, and **COALITION FOR FAIR PRESERVED MUSHROOM TRADE,** Defendant-Intervenor.

**Before: Timothy C. Stanceu, Judge**
**Court No. 03–00544**

[Remanding for reconsideration the redetermination of the final results of an antidumping administrative review in which the U.S. Department of Commerce applied "facts otherwise available" and "adverse inferences" to certain sales transactions]

Dated: May 24, 2007

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*Collier, Shannon, Scott, PLLC* (*Michael J. Coursey* and *Adam H. Gordon*) for defendant-intervenor.

## *OPINION AND ORDER*

STANCEU, *Judge*: Before the court is the redetermination issued by the International Trade Administration, U.S. Department of Commerce ("Commerce," or the "Department") pursuant to the court's remand order in *Gerber Food (Yunnan) Co. v. United States*, 29 CIT ___ , 387 F. Supp. 2d 1270 (2005) ("*Gerber I*"). In *Gerber I*, the court held that the Department's final results in the third administrative review of an antidumping duty order applying to imports of certain preserved mushrooms from the People's Republic of China ("China" or the "PRC") were not supported by substantial evidence, and were otherwise not in accordance with law, in the application of the "facts otherwise available" and "adverse inferences" pro-

visions of 19 U.S.C. § 1677e (2000). Because the redetermination complies with the remand order in *Gerber I* and with applicable law in some respects but not others, the court remands the redetermination to Commerce for further proceedings consistent with this Opinion and Order.

## *I. BACKGROUND*

Commerce issued the final results of the third administrative review in July 2003 ("Final Results"). *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 Fed. Reg. 41,304 (July 11, 2003) ("*Final Results*"). Plaintiffs Gerber Food (Yunnan) Co., Ltd. ("Gerber"), a Chinese producer of preserved mushrooms, and Green Fresh (Zhangzhou) Co., Ltd. ("Green Fresh"), a Chinese exporter, contested the Final Results in an action brought in the Court of International Trade in August 2003. That action culminated in the court's decision in *Gerber I*, which remanded the matter back to the agency for reconsideration and redetermination. *See Gerber I*, 29 CIT at ___ , 387 F. Supp. 2d at 1291. The court's opinion in *Gerber I* sets forth the procedural background of this proceeding; pertinent details about the procedural background are summarized herein. *See id.*, 29 CIT at ___ , 387 F. Supp. 2d at 1273–78.

Commerce issued an antidumping duty order on certain preserved mushrooms from China in 1999. *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From the People's Republic of China*, 64 Fed. Reg. 8308 (Feb. 19, 1999). Plaintiffs Gerber and Green Fresh participated in the third administrative review of the antidumping duty order, which pertained to entries of subject mushrooms made during the period beginning February 1, 2001 and ending January 31, 2002 (the "period of review" or the "POR"). *Final Results*, 68 Fed. Reg. at 41,305.

In the Final Results, Commerce relied on its authority under 19 U.S.C. § 1677e in assigning to each of the two plaintiffs an antidumping duty assessment rate of 198.63 percent, based on a procedure that Commerce termed "total adverse facts available." *Id.* at 41,306–07. Commerce acted on its findings that Gerber and Green Fresh, during the period of review, had entered into a business relationship to circumvent the antidumping laws by improperly allowing Gerber to take advantage of Green Fresh's comparatively low cash deposit rate. *Id.* According to Commerce, Gerber and Green Fresh misrepresented the nature of their business relationship by setting forth Green Fresh as Gerber's agent for purposes of arranging the export shipments of Gerber's merchandise. *See id.* Commerce concluded that despite the parties having entered into an agreement under which Green Fresh was to provide services in arranging for

export shipments of Gerber's mushrooms, "Gerber in fact arranged shipment of all of its sales of subject merchandise and paid Green Fresh a fee to use Green Fresh's sales invoices for this purpose in order to take advantage of Green Fresh's comparatively low cash deposit rate during the POR. . . ." *Id.* at 41,306. Commerce concluded that as a result of the parties' misrepresentations in their questionnaire responses and the circumvention of cash deposit requirements, all of the information submitted by the two parties during the administrative review that was required for the calculation of individual antidumping duty assessment rates was unreliable and could not be verified. *Id.* at 41,306–07. In addition, Commerce invoked its authority under 19 U.S.C. § 1677e to deter circumvention of the antidumping laws. *Id.* at 41,307. Based on its various findings, Commerce, in the Final Results, assigned both Gerber and Green Fresh the 198.63 percent assessment rate, which corresponded to the highest rate assigned to any party in the third administrative review and the rate that Commerce assigned to parties that had failed to establish independence from control of the government of the PRC. *Id.* at 41,309.

The Final Results departed from the approach Commerce had taken in the preliminary results of the third administrative review, which Commerce had issued in March 2003 ("Preliminary Results"). *See Certain Preserved Mushrooms from the People's Republic of China: Prelim. Results and Partial Rescission of Fourth New Shipper Review and Prelim. Results of Third Antidumping Duty Administrative Review*, 68 Fed. Reg. 10,694, 10,697 (Mar. 6, 2003) ("*Preliminary Results*"). In the Preliminary Results, Commerce discussed disapprovingly the export agency agreement between Gerber and Green Fresh but nevertheless calculated preliminary antidumping duty margins for each respondent that did not involve the use of facts otherwise available or adverse inferences. *Id.* at 10,697, 10,702. Commerce calculated preliminary antidumping duty margins of 1.17 percent for Gerber and 46.41 percent for Green Fresh. *Id.* at 10,702. Commerce acknowledged in the Preliminary Results that Gerber and Green Fresh had revealed their business relationship to Commerce on the record but also concluded that "this relationship resulted in evasion of antidumping cash deposits during the POR." *Id.* at 10,697. At that time, Commerce explained that "[t]he Department has preliminarily calculated an individual margin for each of these respondents based on the data reported by each of them, adjusted to reflect verification findings, which it will also use to calculate importer-specific assessment rates." *Id.* Noting its "concern[ ] that antidumping duty cash deposits may be evaded again in subsequent PORs," Commerce stated its intention to assign to both Gerber and Green Fresh, for purposes of the cash deposit, the higher of the antidumping duty rates calculated in the Preliminary Results for either

respondent, *i.e.*, the 46.41 percent antidumping duty rate calculated for Green Fresh. *Id.*

The court in *Gerber I* held that the Department's application of the 198.63 percent rate to all transactions of Gerber and Green Fresh for the period of review was unsupported by substantial evidence on the record and was otherwise not in accordance with law. *Gerber I*, 29 CIT at ___ , 387 F. Supp. 2d at 1272–73. The court concluded that Commerce did not support with substantial record evidence certain findings of fact and failed to explain its determination adequately. *Id.*, 29 CIT at ___ , 387 F. Supp. 2d at 1278–80. The court concluded that in the absence of such supported findings of fact, Commerce exceeded its authority in applying the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e to reject all the information submitted by the two plaintiffs. *Id.* The court also concluded that the Department's assignment of the 198.63 percent assessment rate to all transactions of the two plaintiffs could not be justified by deference to the agency's construction of 19 U.S.C. § 1677e or by deference to a construction of the antidumping laws in general to allow Commerce to exercise its inherent authority to prevent circumvention of these laws. *Id.*, 29 CIT at ___ , 387 F. Supp. 2d at 1278, 1288–1290. The court further concluded that Commerce was required to calculate individual assessment rates for Gerber and Green Fresh in accordance with applicable statutory requirements and, if resorting to facts otherwise available, to "identify what information needed to calculate those assessment rates is unavailable or is deficient . . . so as to require the use of the 'facts otherwise available' procedure of 19 U.S.C. § 1677e(a)." *Id.*, 29 CIT at ___ , 387 F. Supp. 2d at 1290. The court added that "[i]f Commerce determines that any information that was submitted by either plaintiff and is necessary to the calculation of the individual assessment rates is unverifiable, then it must identify that specific information and provide a reasoned and supported analysis of any decision to deem that specific information unverifiable." *Id.* Finally, the court concluded that if Commerce "uses any inferences adverse to either plaintiff in selecting from among the facts otherwise available, Commerce must explain its conclusion, based on substantial evidence on the record, that the party in question failed to cooperate to the best of its ability in providing information that was needed to calculate the individual assessment rate." *Id.*

In the redetermination that it issued pursuant to the remand in *Gerber I* ("Redetermination"), Commerce calculated individual antidumping duty assessment rates for each of the two plaintiffs. *See Redetermination Pursuant to Ct. Remand* at 6 (Dec. 1, 2005) ("*Redetermination*").[1] As it had in the Final Results, Commerce invoked the

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[1] This Opinion refers to and quotes information contained in the Confidential Adminis-

"facts otherwise available" and "adverse inferences" provisions, but rather than apply these provisions to all information submitted during the review by the two parties, Commerce limited the application to a group of twenty-four individual sales transactions of subject merchandise produced by Gerber that was exported to the United States and entered during the period of review. *Id.* at 49–51. Commerce selected these twenty-four transactions because it concluded that these were the transactions for which Green Fresh was claimed to be the exporter in the documentation that had been submitted to United States Customs and Border Protection ("Customs") at the time of entry. *Id.* at 50. To those twenty-four transactions, Commerce continued to assign the antidumping duty rate of 198.63 percent. *Id.* at 50–51.

To calculate Gerber's assessment rate, Commerce relied on the "facts otherwise available" and "adverse inferences" provisions of § 1677e in assigning the 198.63 percent rate to each of the twenty-four transactions. *Id.* at 6, 49–50. Commerce used pertinent information developed during the review, with certain adjustments, but without resort to the "facts otherwise available" or "adverse inferences" provisions of 19 U.S.C. § 1677e, in performing the antidumping duty calculation for the remaining ten of Gerber's sales transactions of subject merchandise subject to the review.[2] *Id.* at 6, 49–51, 54–56. This method reduced Gerber's overall assessment rate for the third administrative review from the 198.63 percent rate determined in the Final Results to 150.79 percent. *Id.* at 6.

To calculate Green Fresh's assessment rate, Commerce attributed to Green Fresh the twenty-four sales transactions for which it found that the entry documentation submitted to Customs by Gerber identified Green Fresh as the exporter. *Id.* at 50–51. To do so, Commerce invoked its authority under § 1677e. Commerce, however, had found as facts that Gerber was the producer and exporter of the merchandise that was the subject of those twenty-four sales transactions. *Id.* at 29–30, 49–51. In the calculation of Green Fresh's assessment rate, Commerce assigned to those twenty-four transactions the antidump-

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trative Record filed on October 16, 2003. Certain such information was initially designated as proprietary in the administrative proceedings but later was made public in the Redetermination and elsewhere. Because such information is now public, the court has omitted from the text the brackets used in the original documents.

[2] With respect to the assessment rates for Gerber and Green Fresh, Commerce made certain changes from the method it used to calculate normal value for purposes of calculating the preliminary antidumping duty margins in the Preliminary Results. *Redetermination* at 54–55. These changes, which affected the surrogate values, were not opposed by Gerber or Green Fresh in their comments on the Redetermination. Defendant-intervenor provided Commerce with comments in response to the Redetermination in which defendant-intervenor disagreed with the Department's decision not to value laterite as an input. *Id.* at 55–56. In its brief responding to plaintiffs' comments on the Redetermination, defendant-intervenor does not raise this issue and does not disagree with any position taken by Commerce in the Redetermination. *See* Def.-Intervenor's Reply to Pls.' Comments on the U.S. Commerce Department's Remand Determination ("Def.-Intervenor's Reply").

ing duty rate of 198.63 percent. *Id.* at 6. Commerce used pertinent information developed during the review, with certain adjustments, but without resort to "facts otherwise available" or "adverse inferences," in performing the antidumping duty calculation for the 134 sales transactions in which Green Fresh actually exported merchandise that was subject to the administrative review. *Id.* at 6, 18–19, 49–51, 54–56. This merchandise had been produced by Green Fresh's affiliated producer, Lubao. *Id.* at 18. The result of these calculations was to reduce Green Fresh's assessment rate from the 198.63 percent determined in the Final Results to 84.23 percent. *Id.* at 6.

## *II. Jurisdiction and Standard of Review*

The court exercises jurisdiction in this case pursuant to 28 U.S.C. § 1581(c) (2000). The court must determine whether the Redetermination complies with the remand order in *Gerber I*, sets forth findings of fact that are supported with substantial evidence on the record, and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The court must consider the entire record, including both evidence that supports the decision by the agency and such evidence that "fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). To be affirmed under the substantial evidence standard of review, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). The court, however, will not substitute its judgment for that of the agency when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

## *III. Discussion*

The Redetermination presents the general issue of whether Commerce properly invoked and applied the "facts otherwise available" provision of 19 U.S.C. § 1677e(a) and the "adverse inference" provision of 19 U.S.C. § 1677e(b) in calculating the separate antidumping duty assessment rates of 150.79 percent for Gerber and 84.26 percent for Green Fresh. *Redetermination* at 5–6. To support the application of these two provisions, Commerce, in the Redetermination,

must support with substantial record evidence the findings of fact required by § 1677e and adequately must explain its reasoning.

The court addresses below four issues that arise from the Redetermination: (A) whether Commerce supported with substantial record evidence the factual findings required under subsection (a) of § 1677e in invoking the "facts otherwise available" provision as to each plaintiff; (B) whether Commerce supported with substantial record evidence its findings that each plaintiff failed to cooperate to the best of its ability in responding to an information request from Commerce so as to justify the drawing of "adverse inferences" as to each plaintiff; (C) whether Commerce acted lawfully in imputing to Gerber and also to Green Fresh the twenty-four sales transactions involving merchandise produced by Gerber for which Commerce found as a fact that the entry documentation presented to Customs identified Green Fresh as the exporter; and (D) whether Commerce acted lawfully in applying the 198.63 percent rate to those twenty-four transactions in reliance on § 1677e.

The court concludes that for the purpose of invoking the "facts otherwise available" provision, Commerce supported with substantial record evidence its findings that each respondent withheld requested information and significantly impeded the administrative review proceeding by providing unsatisfactory responses to the Department's requests for information on the issue of the identity of the exporter for certain of the transactions subject to the review. The court also concludes that for the purpose of invoking the "adverse inferences" provision, Commerce supported with substantial record evidence its finding that each plaintiff, in responding to the Department's requests for information, failed to cooperate by not acting to the best of its ability. The court further concludes that Commerce did not explain adequately how its decision to attribute the aforementioned twenty-four transactions both to Gerber and to Green Fresh, on the record facts of this case, comported with 19 U.S.C. § 1677e. Finally, the court concludes that Commerce erred in assigning the 198.63 percent rate; Commerce failed to establish a rational relationship between the 198.63 percent rate and the actual transaction-specific margins of Gerber or Green Fresh.

### *A. The Department's Findings that Both Plaintiffs Withheld Requested Information and Substantially Impeded the Review Proceeding Are Adequately Supported by Record Evidence*

Commerce may invoke its authority to apply facts otherwise available under subsection (a)(1) of § 1677e or any of the four subparagraphs in subsection (a)(2) of § 1677e. Under § 1677e(a)(1), Commerce may invoke facts otherwise available when "necessary information is not available on the record[.]" 19 U.S.C. § 1677e(a). As the court discussed in its opinion in *Gerber I*, Commerce found during the administrative review that it possessed all the informa-

tion it needed to calculate future antidumping duty assessment rates for Gerber and for Green Fresh and used that information in calculating preliminary margins. *Gerber I*, 29 CIT at ___ , 387 F. Supp. 2d at 1279, 1282–83. Commerce specifically found as facts that such information was on the record, that it had verified the information, and that the information was usable for the future calculation of assessment rates. *See id.* As the court observed, "other than the record evidence regarding the export agency agreement, Commerce found few discrepancies with the information that Gerber and Green Fresh provided, and Commerce resolved any inaccuracies found during verification." *Id.*, 29 CIT at ___ , 387 F. Supp. 2d at 1282. In the Redetermination, Commerce does not expressly conclude with respect to § 1677e(a)(1) that the information needed to calculate individual assessment rates for Gerber and Green Fresh is unavailable on the record.

Instead, Commerce claimed in the Redetermination that substantial record evidence supports the application of facts otherwise under subparagraphs (A) through (D) of § 1677e(a)(2) with respect to both plaintiffs, and with respect to the transactions that involved merchandise produced by Gerber and for which the entry documentation submitted to Customs identified Green Fresh as the exporter.[3] *See Redetermination* at 31–33 (citing 19 U.S.C. § 1677e(a)(2)). Commerce concluded that both Gerber and Green Fresh withheld requested information and thereby satisfied the criterion of subparagraph (A) of § 1677e(a)(2). *Id.* at 31–32. Commerce also found that the parties provided new information at verification, thereby satisfying subparagraph (B), under which the facts otherwise available provision may be invoked if information is provided after the applicable deadline. *Id.* Commerce concluded that, for purposes of subparagraph (C), both parties significantly impeded the administrative review proceeding, and that, with respect to subparagraph (D), both provided unverifiable information. *Id.* at 32–33. Much of the discussion that the Redetermination addresses to these various findings is directed, broadly and generally, to the parties' disclosure of information about their commercial relationship as it pertained to their respective roles in the export agency agreement. Not all of this discus-

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[3] Under § 1677e(a)(2), Commerce may invoke "facts otherwise available" in any of the following four situations where a party:

> (A) withholds information that has been requested by the administering authority . . . under this subtitle,
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> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title[.]

19 U.S.C. § 1677e(a)(2).

sion is pertinent to the identification of the specific record information that is needed for the calculation of antidumping duty assessment rates for the two parties, and not all of it is relevant to the narrow question of whether the manner in which the parties disclosed that specific information in response to the Department's requests justified a resort to facts otherwise available under one or more of the four separate criteria of § 1677e(a)(2).

Commerce does not provide adequate reasoning for concluding that subparagraphs (B) and (D) of § 1677e(a)(2) authorize the resort to "facts otherwise available." Although there may be evidentiary support for the Department's findings in the Redetermination that certain information submitted by the parties was provided late or was unverifiable for purposes of subparagraphs (B) and (D) of § 1677e(a)(2), respectively, Commerce does not explain satisfactorily in the Redetermination how those findings invalidate the Department's prior finding in the Preliminary Results that it could calculate importer-specific assessment rates from data the parties submitted and Commerce verified. *See Redetermination* at 32–36; *Preliminary Results*, 68 Fed. Reg. at 10,697, 10,702. Nor does Commerce explain how any late or unverifiable information was related to the execution and reporting of the twenty-four sales transactions at issue. *See Redetermination* at 32–36.

Despite the shortcomings the court finds to exist in the Redetermination, the court concludes that Commerce in the Redetermination made findings of fact, supported by substantial record evidence, sufficient to justify the use of facts otherwise available pursuant to § 1677e(a)(2)(A) and (C), as discussed in this Opinion and Order. *See Redetermination* at 9–15, 17–22, 26–28, 31–37. A factual finding that a party withheld requested information or significantly impeded the administrative review proceeding so as to satisfy subparagraphs (A) or (C) of § 1677e(a)(2), respectively, is sufficient, standing alone, to justify the Department's use of facts otherwise available for specific responses and specific information, provided Commerce adheres to all statutory requirements, particularly those of 19 U.S.C. § 1677m. 19 U.S.C. § 1677e(a).

When a party withholds requested information or significantly impedes a proceeding, Commerce "shall, subject to Section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." *Id.* Under § 1677m(d), after having provided a respondent the opportunity to remedy, to the extent practicable, deficiencies in a response to a request for information, Commerce may disregard all or part of the original response to the request for information, and the responses to the subsequent requests, if it finds that those responses are not satisfactory, unless the information provided satisfies all of the criteria of § 1677m(e). *Id.* § 1677m(d). One of those criteria is that the submitter demonstrate that it acted to the best of its ability in providing the requested infor-

mation. *Id.* § 1677m(e)(4). Because of this requirement in § 1677m(e)(4), the court does not construe § 1677e(a)(2) and (b), and § 1677m(d) and (e), when read together, to preclude Commerce from invoking the facts otherwise available and adverse inference provisions in all instances in which Commerce, despite initially receiving unsatisfactory responses to its information requests, eventually obtains from an interested party, and verifies, the information it requested in conducting an administrative review under 19 U.S.C. § 1675 (2000). If the court were to so construe these related provisions, a participant in the administrative review would incur no adverse consequences for withholding requested information until the later stages of the questionnaire process, or for significantly impeding the review by repeatedly providing questionnaire responses with significant deficiencies, and thereby failing to act to the best of its ability in providing the information requested. The plain meaning of §§ 1677e and 1677m is to the contrary.

Congress did not limit 19 U.S.C. § 1677e(a) to those instances in which information necessary to a determination is unavailable on the record. Although Congress, in subsection (a)(1), authorized the reliance on facts otherwise available in a situation where information was deficient or missing, Congress also provided for the use of facts otherwise available in four other situations specified in subsection (a)(2). *See id.* § 1677e(a). Commerce may apply the facts otherwise available provision in situations in which a party, *inter alia*, withheld requested information or significantly impeded a proceeding, as specified in subparagraphs (A) and (C) thereof. *Id.* § 1677e(a)(2)(A), (C). The inclusion of subparagraphs (A) and (C) signifies that Commerce is not confined, in deciding to resort to facts otherwise available, to instances in which information necessary to the specific determination is missing, submitted late, or unverifiable. For example, a party's response to the Department's request for information could contain the necessary, verifiable information yet still be unsatisfactory in other respects, such as by also including other statements that contradict that information, causing the agency to make further inquiries that otherwise would not have been required. Also, a party's unresponsiveness and failure to cooperate prior to providing the needed and verifiable information might significantly and unnecessarily impede the proceeding and waste the Department's resources.

In 19 U.S.C. § 1677m(d), Congress expressly authorized Commerce to disregard all or part of unsatisfactory responses to its requests for information, subject to two qualifications. First, as mentioned above, Commerce may not disregard deficient responses without first informing the submitter of the deficiency and, to the extent practicable, providing the submitter the opportunity to remedy or explain the deficiency in light of the statutory time limits for completing the review. *Id.* § 1677m(d). Second, under § 1677m(e), Com-

merce may not disregard information necessary to a determination, even if the information does not meet all applicable requirements, if a party demonstrates that it acted to the best of its ability in providing that information and that the information was timely submitted, verifiable, sufficiently complete to serve as a reliable basis for reaching the applicable determination, and usable without undue difficulties. *Id.* § 1677m(e). When construed together, §§ 1677e and 1677m afford Commerce recourse if a party fails to cooperate by filing initial and subsequent questionnaire responses that are so unsatisfactory as to support a finding that the party withheld requested information or significantly impeded the review proceeding by providing those responses. Nevertheless, when invoking facts otherwise available under § 1677e(a)(2)(A) or (C), Commerce must support with substantial record evidence its findings that a party withheld requested information or significantly impeded a proceeding. In addition, Commerce must present adequate reasoning for its conclusions.

Commerce, in the Final Results, relied specifically on findings that the two parties had failed to disclose initially the fact that they did not adhere to the original terms of the export agency agreement and that Green Fresh failed to provide supporting documentation for shipments that Gerber made using Green Fresh's invoices. *Final Results*, 68 Fed. Reg. at 41,306–07; *see Gerber I*, 29 CIT ___ , 387 F. Supp.2d at 1281–82. Commerce did not explain in the Final Results how these findings related to the determination of assessment rates and thereby could justify the Department's particular application of facts otherwise available under 19 U.S.C. § 1677e(a)(2)(A). Commerce instead discussed its findings on the withholding of information in the general context of misrepresentations by Gerber and Green Fresh regarding their relationship and the export agency agreement. *See Final Results*, 68 Fed. Reg. at 41,306–07. Based on such statements, Commerce determined that "the business relationship which existed between Gerber and Green Fresh resulted in evasion of antidumping cash deposits during the POR" and that the parties "actively colluded to circumvent the cash deposit rates in effect during the POR." *Id.* at 41,306. Commerce, however, did not explain how information about alleged evasion or circumvention of cash deposits during the period of review resulted in a factual finding that Gerber or Green Fresh had withheld information material to the determination of assessment rates in the administrative review. Commerce instead stated that Gerber's alleged misrepresentations impugned the veracity of all of Gerber's responses and Commerce therefore excluded all of the information Gerber had submitted. *Id.* at 41,306–07. Concerning the possible impeding of the proceeding for purposes of § 1677e(a)(2)(C), the court concluded in *Gerber I* that Commerce, although invoking § 1677e(a)(2)(C) in the Final Results, did not support or explain its conclusion that Gerber and Green Fresh significantly had impeded the administrative review. *Gerber I*,

29 CIT at ___ , 387 F. Supp. 2d at 1284. "With respect to criterion (C) of § 1677e(a)(2), Commerce did not reveal its reasoning and failed to cite to evidence on the record that could support a finding that the administrative review proceeding was 'significantly impeded' as a result of actions taken by either Gerber or Green Fresh." *Id.*

In the Redetermination, Commerce supports its findings that both respondents, through questionnaire responses addressing the identity of the exporter in specific transactions, withheld requested information necessary to the determination and calculation of assessment rates and significantly impeded the administrative review. As to the information regarding the identity of the exporter, Commerce explains in the Redetermination, and the court agrees, that the identity of the exporter and the reporting of the correct sales transactions are critical to the determination of assessment rates. *See Redetermination* at 33 ("It is entirely reasonable to find that providing confusing, misleading, and often false responses to questions such that the agency is unable to discern who is the exporter that should be reporting the sales and how many sales are affected significantly impedes a review. . . ."); 19 U.S.C. § 1675(a)(2)(A) (requiring Commerce, in an administrative review, to determine "the normal value and export price (or constructed export price) of each entry of the subject merchandise").

Record evidence supports the Department's finding that the questionnaire responses of both plaintiffs on the issue of the identity of the exporter for certain transactions involved in the administrative review were, on the whole, unsatisfactory. Some of the responses were misleading or false in informing Commerce that Gerber was a supplier of subject merchandise to Green Fresh during the period of review and that Green Fresh was the exporter of Gerber-produced merchandise exported to the United States. As Commerce eventually came to understand during the administrative review, all of Green Fresh's export shipments during the period of review involved subject merchandise produced by Lubao, not Gerber; Commerce eventually confirmed that Gerber, not Green Fresh, actually exported all the merchandise involved in the review that Gerber had produced. *See Redetermination* at 15, 18–19. Some responses relevant to the question of the identity of the exporter, although not necessarily false, were confusing and contradictory of other statements by the same respondent. *See Redetermination* at 9–15, 17–22, 26–28.

In the Redetermination, Commerce cites to and quotes from various information requests and various responses of Gerber and Green Fresh. *See id.* Upon review of these information requests and responses, and others on the record, the court concludes that substantial evidence supports the Department's findings that both parties withheld information that was material to the determination and calculation of individual assessment rates for transactions involving

subject merchandise produced by Gerber, and that certain of the responses of each of the plaintiffs were so unresponsive and misleading, and in some instances so inaccurate, that they impeded the review significantly.

With respect to Gerber, some examples from the record will suffice to show the evidentiary support for the Department's findings. In Section A of its questionnaire, Commerce directed every respondent to contact it within two weeks of receiving the questionnaire if the respondent was aware that any of the merchandise that it sold to another company in the respondent's country was ultimately shipped to the United States. Gerber responded, stating that

> Gerber transacted some sales during the period of review through an agent[,] Green Fresh, who was paid a commission for its services. For those sales transacted through Green Fresh, Gerber negotiated the price with the U.S. customer and at all times was aware that the product was destined for the United States. Green Fresh acted as the exporter of record, however.

*Gerber Section A Resp.* at A11–A12 (May 23, 2002) (Confidential Admin. R. Doc. No. 2); *see Redetermination* at 9. Because Green Fresh was not a reseller of Gerber's merchandise, Gerber's response was unnecessary. It was also misleading. Gerber did not sell to Green Fresh any merchandise involved in the review, and during the period of review, Green Fresh performed no function related to the sale of Gerber's merchandise.

In its first supplemental questionnaire to Gerber, Commerce requested that Gerber provide a copy of the export agency agreement and asked, in that context, "[w]hat services did Green Fresh provide?" and "[w]hy was Green Fresh the exporter of record?" *Gerber First Supplemental Questionnaire* at 2 (June 28, 2002) (Confidential Admin. R. Doc. No. 8); *see Redetermination* at 26. In its response, Gerber stated that "Green Fresh exported the product to the United States." *Gerber First Supplemental Resp.* at 3–4 (Aug. 2, 2002) (Confidential Admin. R. Doc. No. 14); *see Redetermination* at 26. This response was so at variance with the actual circumstances of Green Fresh's role that Commerce was justified in considering it false. The record establishes, and neither plaintiff contests, that Green Fresh never took title or possession of any of the Gerber-produced merchandise involved in the review, had no role in the sale of the merchandise, and did not arrange for the transport of the merchandise from China to the United States. The statement by Gerber that Green Fresh exported the product to the United States was not qualified elsewhere in Gerber's first supplemental response. The unqualified statement is perplexing when read together with Gerber's subsequent questionnaire responses.

Commerce again sought clarification in a second supplemental questionnaire: "Please define and discuss the role Green Fresh played when it acted as an agent in the sale of Gerber merchandise. When did Green Fresh begin acting as an agent in the sale of Gerber merchandise?" *Gerber Second Supplemental Questionnaire* at 2 (Aug. 13, 2002) (Confidential Admin. R. Doc. No. 16); *Redetermination* at 11. Gerber's response begins evasively by answering the second question but not the first. Gerber's answer to the second question, "Green Fresh acted as an agent for the sale of Gerber merchandise from Sept[.] 2001 to May 2002[,]" is itself less than satisfactory. *Gerber Second Supplemental Resp.* at 6 (Sept. 11, 2002) (Confidential Admin. R. Doc. No. 30); *Redetermination* at 12. Like Gerber's statement in its first supplemental response, the response to the second supplemental questionnaire suggests, misleadingly, that Green Fresh had performed some function related to the sale of Gerber's merchandise. The answer is evasive in failing to inform Commerce of the actual facts. Commerce, in asking the question, was proceeding upon the reasonable (given Gerber's response to the first supplemental questionnaire), but incorrect, assumption that Green Fresh was a sales agent for Gerber. At the least, Gerber should have informed Commerce that Green Fresh was not a reseller and that its role had nothing to do with the sale of the merchandise. Absent that information, Commerce did not get a straightforward confirmation that Green Fresh's activities were irrelevant to the determination of antidumping duty liability on the affected entries.

In a third supplemental questionnaire, Commerce asked Gerber, once again, to describe the respective roles of Gerber and Green Fresh in sales that involved merchandise made by Gerber but sold by Green Fresh. *Gerber Third Supplemental Questionnaire* at 1–2 (Nov. 22, 2002) (Confidential Admin. R. Doc. No. 37); *Redetermination* at 13. In the first sentence of its response, Gerber stated that twenty-four of its total of thirty-four sales transactions made by Gerber during the review "were made through Green Fresh." *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42); *Redetermination* at 13. This sentence might be characterized merely as vague, but the second sentence was misleading and incorrect: "We have conferred with Green Fresh and learned that they mistakenly did not report all of the sales made by it on our behalf." *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42); *Redetermination* at 14. It is undisputed that Green Fresh made no sales on behalf of Gerber and, accordingly, should not have reported any such sales. The next sentence informed Commerce–misleadingly and, as it turned out, incorrectly–that Green Fresh was amending its sales listing to "reflect a total of 24 sales made on behalf of Gerber in response to their latest questionnaire." *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42); *Redetermination* at

14. The remainder of the response, which states that Green Fresh is a shipping agent for Gerber's exports to the United States and that Green Fresh "had no role at all in choosing customers or establishing price" appears to be inconsistent with the attribution to Green Fresh of sales of Gerber's merchandise in the beginning of the response. *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42); *Redetermination* at 14.

The evidence of record is also sufficient to support the Department's conclusion that Green Fresh withheld some information and impeded the investigation significantly through its misleading and incorrect questionnaire responses. Section A of the Department's questionnaire required Green Fresh to identify unaffiliated companies "that supplied [Green Fresh] with the merchandise under review that [its] company or an affiliate sold to the United States." *Green Fresh Section A Resp.* at 11 (May 23, 2002) (Confidential Admin. R. Doc. No. 1) (quoting *Green Fresh Section A Questionnaire* at A–8 (Apr. 16, 2002)); *Redetermination* at 10. In its response submitted on May 24, 2002, Green Fresh stated, falsely, that Gerber supplied Green Fresh with merchandise to be exported to the United States. *Green Fresh Section A Resp.* at 11 (May 23, 2002) (Confidential Admin. R. Doc. No. 1); *Redetermination* at 10. In the same response, Green Fresh told Commerce that it acted as an agent for sales made by Gerber and that "Gerber had full knowledge at all times that this merchandise was destined for the United States as Gerber negotiated the sale with its customer in the United States." *Green Fresh Section A Resp.* at 11 (May 23, 2002) (Confidential Admin. R. Doc. No. 1); *Redetermination* at 10. In its response to Section C of the Commerce questionnaire, Green Fresh falsely stated that "[t]he subject merchandise sold by Green Fresh was produced by Lubao, [Green Fresh's] affiliated manufacturer, and Gerber, an unaffiliated manufacturer." *Green Fresh Section C and D Resp.* at C26 (June 7, 2002) (Confidential Admin. R. Doc. No. 6); *Redetermination* at 18. Green Fresh then indicated: "We have reported in our sales listing all sales of Lubao's merchandise. The sales of Gerber me[r]chandise are listed in the sales listing submitted as part of Gerber's response and are indicated by all invoices that begin with the prefix LX." *Green Fresh Section C and D Resp.* at C26 (June 7, 2002) (Confidential Admin. R. Doc. No. 6); *Redetermination* at 18.

As it had in requesting information from Gerber, Commerce asked Green Fresh, in a first supplemental questionnaire sent on July 23, 2002, to discuss the function that Green Fresh had performed with respect to Gerber's merchandise. In its response, Green Fresh stated, again falsely, that it had acted as the exporter for sales in which Gerber was the manufacturer. *See Green Fresh First Supplemental Resp.* at 1 (Aug. 19, 2002) (Confidential Admin. R. Doc. No. 21); *Redetermination* at 10. Somewhat inconsistently with this statement, the same response stated that "[t]he subject merchandise pro-

duced by Gerber was not transported to either Green Fresh's or Lubao's premises before being transported to the United States." *Green Fresh First Supplemental Resp.* at 1 (Aug. 19, 2002) (Confidential Admin. R. Doc. No. 21); *Redetermination* at 10. In the supplemental questionnaire, Commerce, noting that Green Fresh had listed only its sales of Lubao's merchandise in an exhibit (Exhibit C–2) to its Section C response listing its sales, asked Green Fresh to "explain why you did not list any sales of Gerber merchandise in Exhibit C–2?" *Green Fresh First Supplemental Questionnaire* at 8 (July 23, 2002) (Confidential Admin. R. Doc. No. 11); *Redetermination* at 18. Green Fresh responded that "[s]ince Gerber is also a respondent in this investigation, we believed that Gerber would report those sales. We have now revised Exhibit C–2 so as to include all the Gerber merchandise as well." *Green Fresh First Supplemental Resp.* at 13 (Aug. 19, 2002) (Confidential Admin. R. Doc. No. 21); *Redetermination* at 18. The question provided Green Fresh the opportunity to provide Commerce the correct answer by stating unequivocally that Green Fresh had made no sales of Gerber's merchandise during the review. Green Fresh did not do so.

Commerce responded with a further inquiry in a second supplemental questionnaire, asking Green Fresh to "[p]lease provide a detailed description of the roles that [Gerber] and Green Fresh played with regard to the sales of subject merchandise manufactured by Gerber but sold by Green Fresh ('sales in question')." *Green Fresh Second Supplemental Questionnaire* at 1 (Nov. 22, 2002) (Confidential Admin. R. Doc. No. 36); *Redetermination* at 12. In its response, Green Fresh stated that "Green Fresh acted as Gerber's shipping agent by providing Gerber with certain export documents (an invoice, Customs and Quarantine inspection form, packing list, VAT refund form, Chinese customs declaration). Gerber was the manufacturer and seller for all these sales, meaning that Gerber sold to its own customers, not Green Fresh's customers, and Gerber negotiated the price." *Green Fresh Second Supplemental Resp.* at 1 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 43); *Redetermination* at 12. In the same questionnaire, Commerce referred to the revised Exhibit C–2 that Green Fresh had provided to Commerce when responding to the previous supplemental questionnaire, noting that Green Fresh had reported eleven sales transactions "which Green Fresh claims to represent sales supplied by Gerber that were sold through Green Fresh to the United States ('Gerber sales')." *Green Fresh Second Supplemental Questionnaire* at 3 (Nov. 22, 2002) (Confidential Admin. R. Doc. No. 36); *Redetermination* at 19. Green Fresh responded that "[w]e reported the 11 sales transactions for which we had the data. Since our role was limited to providing export documents, we were not aware of the details of all of the transactions." *Green Fresh Second Supplemental Resp.* at 3 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 43); *Redetermination* at 19. In contrast to

Green Fresh's earlier questionnaire responses, Green Fresh's December 23, 2002 response finally provided information from which Commerce could conclude that the eleven sales transactions were not, in any respect, sales that belonged to Green Fresh for purposes of the administrative review.

The record evidence summarized above supports the Department's finding that Gerber and Green Fresh withheld information material to the determination and calculation of antidumping duty assessment rates for sales of Gerber's merchandise. In some of the responses to the Department's questionnaires, for example, each party failed to disclose that Gerber, and not Green Fresh, was the actual exporter in all sales transactions involving Gerber's merchandise that were involved in the review. Rather than plainly disclosing that fact, some responses of both parties provided confusing and contradictory information that misled Commerce to believe that Green Fresh had performed some function related to the sale of Gerber's merchandise, when in fact Green Fresh did not. Other responses failed to inform Commerce of the plain fact that Gerber was never a supplier of subject merchandise to Green Fresh during the period of review.

Substantial evidence also supports the Department's finding that each plaintiff significantly impeded the administrative review in providing responses relevant to the issue of the identity of the exporter and seller in certain of the transactions that were involved in the administrative review. Various of those responses were confusing, misleading, and evasive; some of them, as discussed previously, were actually false. Most of the responses at issue were unsatisfactory in one respect or another in providing Commerce with the actual facts concerning the identity of the exporter and seller for certain of the sales transactions of subject merchandise. The Department's questions throughout the series of supplemental questionnaires to both parties indicate that Commerce misinterpreted, quite reasonably, the initial responses of Gerber and Green Fresh so as to presume that Green Fresh actually exported some of the merchandise produced by Gerber and that Green Fresh had some role in the sale of Gerber's merchandise. Neither party confined their inadequate responses to the initial questionnaires. Each party had the opportunity, in responding to the inquiries in the first supplemental questionnaires, to clarify that Gerber never provided Green Fresh with subject merchandise during the review, that Green Fresh did not export any of Gerber's product to the United States, and that Green Fresh never took title to, or had any other role in, the sale of Gerber's merchandise. Neither party did so. Instead, both Gerber and Green Fresh provided confusing and contradictory information in response to the first supplemental questionnaire. The record consisting of the questionnaires and the responses, when viewed as a whole, supports a finding that Commerce was caused by the defi-

cient responses to direct significant time and resources to acquire information that the parties were obligated by statute and regulation to disclose at a much earlier point in the process.

### *B. The Department's Determination that Each Plaintiff Failed to Cooperate by Not Acting to the Best of Its Ability to Comply with a Request for Information Is Adequately Supported by Findings and Record Evidence*

If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[,]" Commerce, "in reaching the applicable determination . . . 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). The statutory obligation to act to the best of its ability in complying with the agency's information request "requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Id.*

Commerce made separate findings that Gerber and Green Fresh, for purposes of 19 U.S.C. § 1677e(b), failed to act to the best of their respective abilities in complying with the Department's requests for information. These findings are supported by substantial evidence and satisfactorily explained in the Redetermination. *See Redetermination* at 37–41. The responses of Gerber and Green Fresh to the Department's information requests fell far short of the standard imposed by § 1677e(b) even after Commerce, as required under § 1677m(d), provided both parties with the opportunity to remedy the deficiencies. Each plaintiff provided some responses that were misleading, evasive, or false with respect to the identity of the exporter and seller for some of the transactions in the review. They had the obligation to act to the best of their respective abilities in informing Commerce of the actual facts pertaining to those transactions. Rather than provide confusing, contradictory, and false responses, the parties should have communicated, clearly and unequivocally, and without delay, the materials facts, *e.g.*, that Gerber did not supply subject merchandise to Green Fresh, that Gerber exported all of its own subject merchandise that was sold in the United States during the period of review, and that Green Fresh had no role in the sale of that merchandise.

Gerber implied or explicitly stated to Commerce that Green Fresh exported Gerber's merchandise and had a role in the sale of that merchandise, even after Commerce provided Gerber with the opportunity, as required under § 1677m(d), to remedy inaccurate, confusing, or otherwise deficient information. While Gerber, in its third

supplemental response, provided a more accurate and comprehensive account regarding the execution of the twenty-four transactions at issue, even that response stated that Green Fresh would "amend[ ] its sales listing to reflect a total of 24 sales made on behalf of Gerber[.]" *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42). Throughout the administrative review, from the initial Section A response to the third supplemental response, Gerber provided confusing, incomplete, and inaccurate responses.

With respect to Green Fresh, substantial record evidence also supports the Department's finding that Green Fresh did not act to the best of its ability to comply with the information requests of Commerce. Throughout the questionnaire responses, Green Fresh continued to provide contradictory information that it was a sales agent for Gerber or an exporter of Gerber's merchandise. Only in its response to the second supplemental questionnaire did Green Fresh provide a detailed response indicating its limited role in providing Gerber with certain export documents. *Green Fresh Second Supplemental Resp.* at 1 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 43); *see Redetermination* at 12. Even in its responses to that questionnaire, however, Green Fresh continued to report eleven transactions that it purportedly made on behalf of Gerber. *Green Fresh Second Supplemental Resp.* at 3 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 43). The record discloses that those transactions involved merchandise produced, sold, and exported by Gerber.

As quoted and cited above in the discussion of the application of the "facts otherwise available" provision, Gerber and Green Fresh placed contradictory and confusing information on the record throughout the investigation. As *Gerber I* explained, the participation of the respondents in the export agency arrangement is not sufficient, by itself, to justify the application of the adverse inference provision in § 1677e(b) with respect to all of the specific information needed to calculate individual assessment rates. *See Gerber I*, 29 CIT at ___ , 387 F. Supp. 2d at 1282–84. Nonetheless, each party was required to act to the best of its ability in supplying Commerce with the facts necessary to the determination and calculation of antidumping duty assessment rates, which includes the pertinent facts underlying the transactions involved in the review. Gerber and Green Fresh had the obligation, and multiple opportunities, to disclose the actual facts about Green Fresh's limited role in certain transactions involving Gerber's merchandise, but they failed to do so.

### *C. The Selection of Facts Otherwise Available and the Application of Adverse Inferences to Twenty-Four Sales Transactions*

Commerce relied on the facts otherwise available and adverse inferences provisions in determining an antidumping duty rate for the

twenty-four transactions for which Commerce determined that Gerber obtained the benefit of Green Fresh's cash deposit rate in entering subject merchandise. Commerce included those twenty-four transactions in its calculation of individual assessment rates both for Gerber and for Green Fresh. Substantial record evidence and a reasoned explanation support the determination by Commerce to attribute those transactions to Gerber. Commerce, however, failed to support with substantial record evidence and also failed to explain adequately its reasoning for attributing to Green Fresh those same twenty-four transactions. As noted previously, Commerce determined Gerber to be the producer, seller, and exporter on those transactions.

In selecting from among facts otherwise available, Commerce may rely on information derived from any information placed on the record of the administrative review. 19 U.S.C. § 1677e(b). The Court of Appeals for the Federal Circuit has noted that "in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). However, as the Court of Appeals signaled in its reference to "a reasonable margin," the Department's discretion to choose from among the facts otherwise available is not unlimited. *Id.* (noting the intention of Congress that Commerce not "overreach reality" in applying § 1677e(a) and (b)).

*1. Commerce Did Not Exceed Its Authority in Applying the Facts Otherwise Available and Adverse Inferences Provisions to Twenty-Four of Gerber's Thirty-Four Sales Transactions*

The record evidence, summarized previously, supports the findings that Gerber withheld information, significantly impeded the review proceeding, and did not act to the best of its ability in responding to the Department's requests for information pertaining to the identity of the exporter and seller on certain transactions. Even in its response to the Department's inquiry in the third, and final, supplemental questionnaire, after multiple opportunities to correct and supplement its responses to the original questionnaire, Gerber's responses to Commerce were not entirely satisfactory. As discussed above, Commerce asked Gerber in the third supplemental questionnaire to describe the respective roles of Gerber and Green Fresh in sales involving merchandise that was produced by Gerber but sold by Green Fresh. *Gerber Third Supplemental Questionnaire* at 2 (Nov. 22, 2002) (Confidential Admin. R. Doc. No. 37); *Redetermination* at 13. Gerber unsatisfactorily responded that twenty-four of its total of thirty-four transactions "were made through Green Fresh"

and that "[w]e have conferred with Green Fresh and learned that they mistakenly did not report all of the sales made by it on our behalf." *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42); *Redetermination* at 13–14. Gerber further misinformed Commerce that Green Fresh was amending its sales listing to "reflect a total of 24 sales made on behalf of Gerber in response to their latest questionnaire." *Gerber Third Supplemental Resp.* at 2 (Dec. 23, 2002) (Confidential Admin. R. Doc. No. 42); *Redetermination* at 13–14. These inaccurate responses demonstrate that Gerber, even at the conclusion of the questionnaire process, was incorrectly indicating to Commerce that the twenty-four transactions in question were, in some respect, Green Fresh's sales transactions.

Commerce invoked the facts otherwise available and adverse inference provisions with respect to those twenty-four sales transactions, assigning the transactions the rate of 198.63 percent; Commerce used the actual, transaction-specific information for the remaining ten transactions. The court concludes that except for the assignment of the 198.63 percent rate, the Department's decision to do so was in accordance with law. Under 19 U.S.C. § 1677m(d), Commerce had the authority to "disregard all or part of the original and subsequent responses" and thereby treat the submitted information about the identity of the exporter and seller for those twenty-four transactions as information subject to the facts otherwise available and adverse inference provisions. Commerce was within its authority in concluding that because Gerber had not acted to the best of its ability in responding to particular information requests involving those twenty-four transactions, Gerber was not entitled to the benefit of § 1677m(e), under which Commerce is precluded from disregarding information that satisfies all criteria of § 1677m(e).

*2. Commerce Has Not Justified the Assignment to Green Fresh of the Twenty-Four Sales Transactions Made by Gerber*

The record evidence summarized previously also supports the findings by Commerce that Green Fresh withheld information, significantly impeded the review proceeding, and did not act to the best of its ability by providing unsatisfactory responses to the Department's information requests pertaining to the identity of the exporter and seller on some transactions involved in the administrative review. Those, however, were Gerber's, not Green Fresh's, transactions. The Redetermination does not present evidentiary support or adequate reasoning for attributing the same twenty-four transactions to two parties, *i.e.*, to both Gerber and to Green Fresh, despite the finding that Gerber was the producer, seller, and exporter of the merchandise involved.

In the Redetermination, Commerce stated the following as reasoning for assigning the twenty-four transactions to Green Fresh:

> [t]he 22 customs entry summaries Green Fresh provided in its August 20, 2002, 1st supplemental response for these 24 transactions (of which Gerber reported all 24 but Green Fresh only reported 11 to the Department) contain a Green Fresh manufacturer identification code (for 12 of them) or a Gerber manufacturer identification code (for the remaining 10). In either case, all 22 customs entry summaries indicate that Green Fresh's cash deposit rate, rather than Gerber's, was used to post the antidumping duties for these sales at issue.

*Redetermination* at 50 (footnotes omitted). The documentation cited by Commerce in the above-quoted segment of the Redetermination does not constitute evidence supporting the Department's finding that it was appropriate to assign all, or any, of the twenty-four transactions to Green Fresh.

As Commerce found according to the record evidence, Gerber was the importer of record for the merchandise on all twenty-four transactions and therefore was responsible for preparing all entry documentation submitted to Customs, including the listing of the manufacturer code. *See id.* at 29–30. The entry documentation prepared by Gerber identifies Green Fresh as the manufacturer for only twelve of the twenty-two entries. *See Green Fresh First Supplemental Resp.*, Ex. AS1 (Aug. 19, 2002) (Confidential Admin. R. Doc. No. 21). The evidence cited by Commerce links to Gerber, the importer of record, the act of setting forth Green Fresh as the exporter for all twenty-two entries, but that same evidence does not support necessarily a finding that Green Fresh participated in, or assisted in, the entry process. Moreover, even if that particular evidence had supported such a finding, the finding is not relevant to the determination and calculation of the assessment rate for Green Fresh's transactions in the administrative review, which solely involved the exportation to the United States of merchandise produced by Lubao. Nor is it dispositive that Green Fresh, upon a request from Commerce in the first supplemental questionnaire, obtained from Gerber the twenty-two entry summaries and submitted them to Commerce as part of Green Fresh's response. *See id.*

The shortcomings in the Department's rationale for attributing, under the authority of 19 U.S.C. § 1677e, the twenty-four transactions to Green Fresh are readily apparent when compared to the application by Commerce of § 1677e in determining an overall assessment rate for Gerber. The record establishes that Gerber withheld information needed to calculate the antidumping duty liability on the entries corresponding to the twenty-four sales transactions. *See Redetermination* at 8–22, 28, 31–32. The record also reveals that Gerber impeded the review proceeding by providing questionnaire responses that were evasive, misleading, and, in some instances, false with respect to those same facts. *See id.* The facts to which the Department's access was impeded were that Gerber never supplied

Green Fresh with subject merchandise during the period of the third administrative review, that Gerber, not Green Fresh, exported the merchandise on the twenty-four sales transactions, and that Green Fresh had no role in conducting those transactions. On those record facts, Commerce had authority under § 1677e to regard the identity of the actual exporter as a factual matter on which it could invoke the facts otherwise available provision. Green Fresh appears to have hindered the Department in determining those same facts; however, those facts did not pertain to the determination of antidumping duty liability for any of Green Fresh's 134 transactions during the administrative review. In this respect, substantial record evidence has not been presented to support a finding that any or all of the twenty-four transactions of Gerber should be attributed to Green Fresh. Although "it is within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative[,]" that discretion, as discussed above, is subject to limitations. *De Cecco*, 216 F.3d at 1032. Commerce must rely on those sources and facts that "assure a reasonable margin[,]" a margin that is "a reasonably accurate estimate of the respondent's actual rate[.]" *Id.* Because the twenty-four transactions involved merchandise produced and exported by Gerber and because Green Fresh had no role in the sale of that merchandise, the overall assessment rate Commerce calculated for Green Fresh in the Redetermination, which was based in part on those twenty-four transactions, does not appear to be "reasonable" or have a "basis in reality." *See id.* at 1034.

As it did in the Final Results, the Department's justification in the Redetermination for invoking facts otherwise available and adverse inferences as to Green Fresh rests principally on disapproval of what Commerce found to be Green Fresh's role in the export agency agreement. *See Redetermination* at 34 (concluding that "Green Fresh's very participation in this 'agent' sales scheme further impeded our ability to conduct this administrative review and 'impose' antidumping duties pursuant to Section 731 of the Act."). The Department invoked its "inherent authority to protect the integrity of its proceedings" and submitted that not invoking 19 U.S.C. § 1677e "would amount to condoning the circumvention of the antidumping duty law in this administrative proceeding." *Id.* at 41. In this respect, the Department's rationale for invoking § 1677e as to Green Fresh essentially amounts to punishment for engaging in the export agency agreement, which Commerce found to have allowed the entry of Gerber's merchandise under an improperly low cash deposit. The authority provided by 19 U.S.C. § 1677e, however, is not properly in-

voked as an alternative to civil penalty authority over acts and omissions arising from the entry process.[4]

*D. Commerce Exceeded Its Authority in Assigning the Assessment Rate of 198.63 Percent to the Twenty-Four Sales Transactions*

Commerce, in the Redetermination, recalculated the assessment rates for Gerber and Green Fresh by taking the weighted average of the 198.63 percent rate applied to the twenty-four transactions at issue and of the duty rate based on the verified information submitted by plaintiffs for the other ten transactions of Gerber and for the 134 transactions that actually were conducted by Green Fresh. *See Redetermination* at 6, 49–50. In *Gerber I*, the court found that Commerce failed to support with substantial record evidence its determination to apply the 198.63 percent rate to Gerber's and Green Fresh's transactions. *See* 29 CIT at ___ , 387 F. Supp. 2d at 1284–88. The court concluded that Commerce failed to explain how the 198.63 percent rate was rationally related to the facts underlying the calculation of either Gerber's or Green Fresh's actual dumping margin. *Id.* Defendant insists that the application of the 198.63 percent rate to these twenty-four transactions, with respect to both Gerber and Green Fresh, bears a rational relationship to the information submitted and is not impermissibly punitive. *See* Def.'s Resp. 24–28. The narrowing by Commerce of the application of the rate from all of Gerber's and Green Fresh's transactions to a portion consisting of twenty-four transactions conducted by Gerber does not establish a rational relationship between the 198.63 percent rate and the transaction-specific margins of Gerber or of Green Fresh.

In selecting from among "facts otherwise available," Commerce may rely on information derived from the following sources: "the petition"; "a final determination in the investigation under this subtitle"; "any previous review under [19 U.S.C. § 1675] or determination under [19 U.S.C. § 1675b]"; or "any other information placed on the record." 19 U.S.C. § 1677e(b). As the court noted in *Gerber I*, "[s]ubsection (b) of § 1677e cannot properly be read in isolation." *Gerber I*, 29 CIT at ___ , 387 F. Supp. 2d at 1284. The court explained that

> an assessment rate, standing alone, is not a "fact" or a set of "facts otherwise available," and under no reasonable construction of the provision could it be so interpreted. The statute does not permit Commerce to choose an antidumping duty assess-

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[4] Without implying any findings of fact or conclusions of law specific to this proceeding, the court observes that if the United States believes it can develop facts demonstrating that any party importing merchandise evaded cash deposit requirements, or facts demonstrating that any party aided and abetted an importer in doing so, civil penalty authority exists under which the United States could pursue the matter. *See* 19 U.S.C. § 1592(a) (2000).

> ment rate as an "adverse inference" without making factual findings, supported by substantial evidence. . . .

*Id.* at 1285.

The statute requires Commerce to select an antidumping duty rate that is "a reasonably accurate estimate of the respondent's actual rate[.]" *De Cecco*, 216 F.3d at 1032. As the Court of Appeals explained, "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *Id.* "Particularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to noncooperation with its investigations and assure a reasonable margin." *Id.* Nonetheless, as discussed in Part C above, the Department's discretion in selecting from among the facts otherwise available is not without limit. *Id.* Congress, in amending § 1677e, did so to "block any temptation by Commerce to overreach reality in seeking to maximize deterrence." *Id.* (explaining that the imposition by Congress of the corroboration requirement in 19 U.S.C. § 1677e(c) indicates the intention of Congress to temper deterrence and ensure that Commerce not "overreach reality" in applying § 1677e(a) and (b)). While Commerce may rely on a "rate with an eye toward deterrence, Commerce acts within its discretion so long as the rate chosen has a relationship to the actual sales information available." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (explaining that Commerce acted within its discretion in selecting a 30.95 percent antidumping duty rate because that rate fell within the range of the respondent's actual sales data). In other words, the statute "requires that an assigned rate relate to the [respondent] to which it is assigned." *Shandong Huarong Gen. Group Corp. v. United States*, 29 CIT at ___ , Slip Op. 05–129 at 11 (Sept. 27, 2005). Commerce, in applying the 198.63 percent rate to Gerber and to Green Fresh in the Redetermination, did not explain adequately the relationship of the 198.63 percent rate to the record evidence pertaining to Gerber and to Green Fresh. To the contrary, the facts Commerce found do not support the application of the 198.63 percent assessment rate, which was calculated based on information in the petition and the presumption of government control of respondents. *See Final Results*, 68 Fed. Reg. at 41,307–08; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China*, 63 Fed. Reg. 72,255, 72,256–57 (Dec. 31, 1998) ("*Final Determination*"); *Initiation of Antidumping Investigations: Certain Preserved Mushrooms From Chile, India, Indonesia, and the People's Republic of China*, 63 Fed. Reg. 5360, 5363 (Feb. 2, 1998) ("*Notice of Initiation*").

Commerce, in the notice of initiation, set forth the petition as the source of the 198.63 percent China-wide rate. *Notice of Initiation*, 63

Fed. Reg. at 5363. Commerce explained that the petitioners selected thirty-six potential exporters and producers from China and calculated an estimated antidumping duty margin ranging from 85.38 to 198.63 percent based on petitioners' estimates of export price and normal value. *Id.* (stating that petitioners calculated export value from average Customs import values and U.S. price quotes, and that they derived the normal value from surrogate values that they based on Indian factors-of-production data). Commerce did not explain the difference between the low end and the high end of the range. Commerce did note, however, that China is considered a nonmarket economy under 19 U.S.C. § 1677(18). *Id.* In the final determination of the investigation, Commerce concluded that because of the discrepancy in quantity and value of mushroom imports reported in U.S. import statistics and those reported by all PRC exporter respondents, Commerce was "applying a single antidumping deposit rate—the PRC-wide rate—to all exporters in the PRC . . . based on [the Department's] presumption that the export activities of the companies that failed to respond to the Department's questionnaire are controlled by the PRC government." *Final Determination*, 63 Fed. Reg. at 72,257 (internal citation omitted). Commerce then selected as the China-wide rate the highest rate in the petition, 198.63 percent, explaining that "[a]s adverse facts available, we are assigning the highest margin in the petition, 198.63 percent, because the margins in the petition (as recalculated by the Department at initiation) were higher than any of the calculated margins." *Id.*

In the Preliminary Results of the administrative review at issue, Commerce affirmed that "[i]n proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty deposit rate (*i.e.*, a PRC-wide rate)." *Preliminary Results*, 68 Fed. Reg. at 10,698. Commerce, however, found that both Gerber and Green Fresh are free of government control. *Preliminary Results*, 68 Fed. Reg. at 10,698–99; *see Final Results*, 68 Fed. Reg. at 41,306–07 & 41,306 n.7; *Redetermination* at 53–54. As the court noted in *Gerber I*, "Commerce acts unlawfully in imposing a rate that presumes government control, such as the PRC-wide rate applied in this case, when a respondent has been found to be independent of government control." *Gerber I*, 29 CIT at ___ , 387 F. Supp. 2d at 1287.

In explaining its continued use of the 198.63 percent antidumping duty rate, Commerce contends that the practice of the Department of assigning the highest rate on record, as the rate most adverse to respondents, is consistent with 19 U.S.C. § 1677e and precedent. *Redetermination* at 51–54. Commerce explains that it selected the 198.63 percent antidumping duty rate based on the information in the petition as permitted under 19 U.S.C. § 1677e(b). *Id.* at 53. Commerce insists that precluding Commerce from using the highest

rate would vitiate the agency's ability to deter circumvention of the antidumping duty law and to induce respondents to cooperate. *Id.* at 51–54. Commerce argues that "[a]pplying the highest rate is consistent with the Department's practice, and ensures that the margin is sufficiently adverse as to effectuate the purpose of the facts available rule to induce a respondent to provide the Department with complete and accurate information in a timely manner." *Id.* at 53 (internal quotation marks and citation omitted). Commerce maintains that "the Court's concerns about Gerber's and Green Fresh's rights to a separate rate are not at issue[,]" explaining that "the Department has determined that Gerber and Green Fresh warrant separate-rate treatment in this case." *Id.* at 54. Defendant-Intervenor adds that "in [non-market economy] cases, the country-wide [antidumping duty] rate is *not* exclusive to government-controlled exporters" and that "[i]t is instead exclusive to all non-cooperative exporters, government-controlled or not." Def.-Intervenor's Reply 13. Defendant-Intervenor characterizes the application of "partial adverse facts available" to the twenty-four transactions of Gerber as "appropriate . . . for any uncooperative exporter . . . regardless of whether or not the exporter is controlled by its government." *Id.* at 13–14. Commerce, however, has not explained adequately, with respect to government control or otherwise, how the highest rate in the petition might bear a rational relationship to the actual margin of Gerber or of Green Fresh. *See De Cecco*, 216 F.3d at 1032 (rejecting the application of the petition rate after "the court found that there was 'nothing to support' an inference that the petition rate might reflect [the respondent's] actual dumping margin." (internal quotation marks and citation omitted)).

The court cannot sustain the application by Commerce of the 198.63 percent rate given the Department's failure to explain how that rate has an actual relationship to the sales information available for either respondent or how that rate is a reasonably accurate estimate of either respondent's actual antidumping duty assessment rate with some built-in increase to deter noncompliance. To the contrary, the record evidence shows that the 198.63 percent rate is unrelated to the factual bases underlying the calculation of assessment rates for the two respondents and is many times higher than each respondent's actual dumping margin. Even accounting for some built-in increase intended as a deterrent to non-compliance, the rate selected by Commerce pursuant to its adverse inference authority is not a reasonably accurate estimate of the respondent's actual rate. *See id.* (rejecting a rate resulting from the application of § 1677e that was many times higher than the actual rate for the respondent, a high-end producer, and explaining that the rate was not relevant given the facts that the applied rate was higher than respondent's actual rate, higher than the rates of other similarly situated high-end producer respondents, and higher than the rates of low-end pro-

ducer respondents). Yet Commerce insists that it can disregard the parties' transaction-specific information and select, as adverse inferences, facts that have no rational relationship to either respondents' sales data. Defendant and defendant-intervenor would have the court ignore binding precedent and affirm Commerce in selecting the highest possible rate to maximize deterrence, regardless of the degree to which that rate "overreach[es] reality." *See id.* The court declines to do so and therefore will not uphold the determination by Commerce to apply the highest possible rate of 198.63 percent to the twenty-four transactions at issue.

Commerce, in the Redetermination, states that "[it] assumes that if respondents had received a rate lower than the highest prior margin, they would not have cooperated, and the Court of Appeals for the Federal Circuit has long recognized that assumption to be reasonable." *Redetermination* at 52. Commerce relies primarily on *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990) to support this assumption. *See id. Rhone Poulenc*, however, involved the application of the "best information available" standard under 19 U.S.C. § 1677e prior to the substantial amendment of that statutory provision by the Uruguay Round Agreements Act, Pub. L. No. 103–465, § 231(c), 108 Stat. 4809, 4896–97 (1994) ("URAA"). *See Rhone Poulenc, Inc.*, 899 F.2d at 1189–91; *see also Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, at 869–70 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4198–99. In the URAA, Congress changed the language from "best information available" to "facts otherwise available" and "adverse inferences" and, most significantly, directed Commerce to make additional findings to justify the application of those new provisions. *Compare* 19 U.S.C. § 1677e(c) (1988) (stating that "[i]n making [its] determinations under [Subtitle IV - Countervailing and Antidumping Duties], the administering authority . . . shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.") *with* 19 U.S.C. § 1677e(a)–(b) (2000) (directing Commerce to make specific factual findings to justify separately the application of facts otherwise available and adverse inferences and subjecting such findings to further requirements set forth in 19 U.S.C. § 1677m(d)–(e) (2000)).

Commerce also cites *Kompass Food Trading International v. United States*, 24 CIT 678 (2000), as support for its use of the 198.63 percent rate. *See Redetermination* at 52. *Kompass Food*, a decision of the Court of International Trade affirming the application of facts otherwise available and adverse inferences, is readily distinguished from the case before the court. In applying the facts otherwise available and adverse inferences provisions under 19 U.S.C. § 1677e, the Court in *Kompass Food* affirmed the Department's determination

because Commerce found that the pro se respondent provided no response to the Department's questionnaires. *Id.* at 680–81. The Court explained that in the absence of any sales information for respondent, Commerce had no facts to indicate respondent's actual margin. *See id.* at 682–84. The Court in *Kompass Food* therefore concluded that "Commerce used a properly calculated margin[,]" explaining that Commerce selected a margin that was calculated for a fully cooperative respondent in the original investigation and that the respondent selected was representative of the domestic industry. *Id.* at 683 n.6. In this case, Commerce had sufficient information to calculate transaction-specific assessment rates. The respondents provided that information, Commerce itself verified the information and concluded it was accurate and adequate for purposes of calculating individual assessment rates for both respondents, and Commerce calculated individual assessment rates for both respondents in the Preliminary Results. *See Preliminary Results*, 68 Fed. Reg. at 10,698–99. Commerce therefore had actual sales information to serve as points of comparison in determining whether the rate selected as an inference adverse to respondents is rationally related to their actual margin. Moreover, in contrast to the factual record in *Kompass Food*, the rate selected in this case was not specific to a respondent in a prior review that was found to be representative of the domestic industry and instead was derived from information set forth in the petition. As stated above, unsupported assertions that the selected rate is probative and corroborated do not suffice.

Defendant also argues that the holding in *Shanghai Taoen International Trading Co. v. United States*, 29 CIT ___ , 360 F. Supp. 2d 1339 (2005), is sufficiently similar to indicate that the application of the 198.63 percent rate to Gerber and to Green Fresh is not impermissibly punitive. Def.'s Resp. 27–28. Defendant explains that the case involved a similar fact pattern, in which "what was reported and verified by Commerce differed from what was reported and relied upon by Customs," and that the Court found that Commerce was correct to apply "adverse facts available" and did not do so in a punitive manner. *Id.* Defendant states that given precedent and the amendment of the statute with the addition of 19 U.S.C. § 1677e(a) and (b), the application of "partial adverse facts available" is not punitive in this case. *Id.* Defendant-intervenor echoes defendant's argument that the court should affirm the Redetermination because the findings of Commerce are similar to the redetermination that was affirmed by the Court in *Shanghai Taoen*, 29 CIT ___ , 360 F. Supp. 2d 1339. Def.-Intervenor's Reply 15–16. Defendant-intervenor also argues that as in *Shanghai Taoen*, Gerber and Green Fresh "attempted to present different facts concerning the same entries to the same two federal agencies - Commerce and Customs" and that "the discovery of the schemes resulted in the respondents' dramatic loss of credibility before Commerce." *Id.* at 16.

The court is unpersuaded by defendant's and defendant-intervenor's arguments. In *Shanghai Taoen*, the Court "sustain[ed] Commerce's determination that [the respondent] failed to provide accurate producer information" throughout the administrative review and held that "Commerce was justified in applying total facts otherwise available under § 1677e." *Shanghai Taoen*, 29 CIT at ___ , 360 F. Supp. 2d at 1345. The Court affirmed the assignment by Commerce of the highest rate determined in the proceedings, which was 223.01 percent, a rate calculated in a prior administrative review for one of the exporter respondents. *Id.* at 1342, 1345. The Court found adequate the Department's explanation "that the rate is relevant because it is 'based on sales and production data of a respondent in a prior review,' it is 'subject to comment from interested parties in the proceeding,' and there is 'no information on the record of this review that demonstrates that this rate is not appropriately used as adverse facts available.' " *Id.* at 1347 (quoting an intra-agency memorandum of Commerce). The Court concluded that the highest rate on the record was "rationally related" to the respondent because "the rate reflect[ed] recent commercial activity by a [respondent] exporter from the PRC," and because the "[respondent's] failure to accurately respond to Commerce's producer questions ha[d] resulted in an egregious lack of evidence on the record to suggest an alternative rate." *Id.* at 1348. In contrast to *Shanghai Taoen*, the 198.63 percent rate selected in this case is the highest rate set forth in the petition and is derived from information provided in the petition. Moreover, the 198.63 percent rate was not calculated by Commerce from an actual respondent's information in an investigation or an administrative review. Beyond the conclusory and unsupported assertions in the Final Results that the rate it chose is corroborated and relevant, Commerce has not explained how the highest rate stated in the petition is probative, and not merely punitive, given the record facts of this case. *See Final Results*, 68 Fed. Reg. at 41,307–08. The facts of this case, while analogous to those in *Shanghai Taoen* in limited respects, differ in that Commerce merely asserted its inherent authority to apply the highest rate to uncooperative respondents without conducting an adequate analysis, or setting forth adequate reasoning, to support a conclusion that the 198.63 percent rate is rationally related to either Gerber's or Green Fresh's sales data. *See Redetermination* at 41–54.

## *IV. CONCLUSION*

The court affirms in part and remands in part the Redetermination for further administrative proceedings consistent with this Opinion and Order. As to Gerber, the court concludes that Commerce supported with substantial record evidence its factual findings that Gerber withheld information, impeded the investigation, and failed to cooperate to the best of its ability in complying with the Depart-

ment's information requests, thereby supporting the Department's decision to invoke the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e as to twenty-four transactions of Gerber. Commerce, however, unlawfully applied § 1677e by applying to those twenty-four transactions the assessment rate of 198.63 percent, a rate that does not bear a rational relationship to the record evidence pertaining to Gerber.

As to Green Fresh, the court concludes that Commerce supported with substantial record evidence its factual findings that Green Fresh withheld information, impeded the investigation, and failed to cooperate to the best of its ability in complying with certain of the Department's information requests. Commerce, however, unlawfully applied § 1677e by attributing to Green Fresh the twenty-four transactions for which it found Gerber to be the producer, seller, and exporter. Commerce failed to support with substantial record evidence, and did not explain adequately, its decision to double-count those transactions. Commerce also unlawfully applied § 1677e by applying to those twenty-four transactions the highest assessment rate of 198.63 percent, a rate that bears no relationship to the record evidence pertaining to Green Fresh.

## *ORDER*

For the reasons stated in this Opinion and Order, the court affirms in part and remands in part the Department's Redetermination Pursuant to Court Remand (Dec. 1, 2005) ("Redetermination"), and it is hereby

**ORDERED** that this matter is remanded for reconsideration and for further administrative proceedings consistent with this Opinion and Order; it is further

**ORDERED** that Commerce shall recalculate the assessment rates applied to Gerber and Green Fresh in the Redetermination; it is further

**ORDERED** that if Commerce, in recalculating the assessment rate for Gerber, chooses to invoke the procedures of 19 U.S.C. § 1677e with respect to the twenty-four transactions of Gerber for which it invoked 19 U.S.C. § 1677e in the Redetermination, Commerce shall use a rate other than the rate of 198.63 percent and shall use a rate that satisfies the requirements of 19 U.S.C. § 1677e as discussed in this Opinion, including the corroboration requirement set forth therein; it is further

**ORDERED** that Commerce, in recalculating the assessment rate for Green Fresh, may not rely on the analysis found to be contrary to law in this Opinion and Order, under which analysis Commerce attributed to Green Fresh the twenty-four transactions on which it invoked 19 U.S.C. § 1677e in the Redetermination, which transactions are shown by record evidence to have involved merchandise produced, sold, and exported by Gerber; and it is further

**ORDERED** that Commerce shall have one hundred twenty (120) days from the date of this order to complete and file its remand determination; plaintiffs shall have forty-five (45) days from that filing to file comments; and defendant and defendant-intervenor shall have thirty (30) days after plaintiffs' comments are filed to file any reply.

Slip Op. 07–86

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE, SKF GmbH and SKF INDUSTRIE S.p.A., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 05–00569
**PUBLIC VERSION**

[Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record is DENIED and the Agency's determination is AFFIRMED.]

**DATED**: May 29, 2007

*Steptoe & Johnson LLP*, (*Herbert C. Shelley*, *Alice A. Kipel*, and *Susan R. Gihring*) for Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France, SKF GmbH, and SKF Industrie S.p.A.

*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke*); and *David W. Richardson*, *Mykhaylo A. Gryzlov*, and *Jennifer J. Johnson*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

*Stewart and Stewart*, (*Terence P. Stewart*, *William A. Fennell*, and *Geert De Prest*) for Defendant-Intervenor Timken U.S. Corporation.

## *OPINION*

**Wallach, Judge:**

### I
### Introduction

Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France, SKF GmbH, and SKF Industrie S.p.A. (collectively "SKF") challenge the United States Department of Commerce's ("Commerce" or "the Department") findings in *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711 (September 16, 2005) ("*Final Results*"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

## II
## Background

On September 15, 2005, the Department published in the Federal Register the Final Results of its Fifteenth Review of ball bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom, covering the period of review ("POR") from May 1, 2003 through April 30, 2004. *Final Results*, 70 Fed. Reg. at 54,711. The review covers ball bearings (other than tapered roller bearings) and parts thereof, specifically antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearings united and parts thereof.[1] *Id.* at 54,712. In the *Final Results*, Commerce found a 8.41% weighted-average dumping margin for SKF France S.A., 16.06% for SKF GmbH, and 2.59% for SKF Industrie S.p.A. *Id.* at 54,713. SKF does not contest the antidumping margins for bearings affected by the *Final Results* from the United Kingdom.

Oral argument was held on January 24, 2007.

## III
## Standard of Review

This court will sustain Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed 126 (1938)). Courts have considered substantial evidence to be something less than the weight of the evidence; the possibility of drawing two inconsistent conclusions from the presented evidence does not necessarily prevent an administrative agency's finding from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citing *Labor Board v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106, 62 S. Ct. 960, 86

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[1] Imports of these products are classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings:

3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.2580, 8482.99.35, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 87083.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

*Final Results*, 70 Fed. Reg. at 54,712.

L. Ed. 1305 (1942); *Keele Hair & Scalp Specialists, Inc. v. Fed. Trade Comm'n*, 275 F.2d 18, 21 (5th Cir. 1960)).

The court must use a two-step analysis when evaluating Commerce's statutory interpretation. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The court examines, first, whether "Congress has directly spoken to the precise question at issue," in which case courts, "must give effect to the unambiguously expressed intent of Congress." *Id.*; *see also Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004). Whenever Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'

*Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965) (quoting *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)).

## IV
## Discussion

### A
### Commerce's Decision to Revise Its Model-Matching Methodology is Supported by Substantial Evidence and is in Accordance with Law

Plaintiffs argue that Commerce's departure from its previous methodology contravenes its long-standing policy to " 'maintain a stable, normal, and predictable approach' with regards to model match, and not to alter that methodology unless compelling reasons exist." Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Plaintiffs' Motion") at 10 (citing *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea; Final Results of Antidumping Duty Administrative Reviews and Notice of Revocation in Part*, 61 Fed. Reg. 35,177, 35,181 (July 5, 1996) ("*Polyethylene*")). Plaintiffs contend that Commerce's decision to change the model match methodology retroactively unfairly deprived Plaintiffs of outcome predictability and that Commerce's justification for changing

the methodology departs from its own criteria that sets out when it is appropriate to change a model match methodology. *Id*.[2]

Specifically, Plaintiffs argue that Commerce created a methodology inconsistent with the principle that model match methodologies reflect market place realities. *Id.* at 12. Plaintiffs claim that Commerce has not gained any additional expertise or knowledge of market demand or market realities and that recognizing differences in types of lubricant reflects a misunderstanding of market realities. *Id.* at 12–13. Plaintiffs also argue that Commerce violated its normal practice of refraining from altering model match criteria absent evidence that the methodology does not properly reflect the product in question, there have been industry changes to the product, or there are other compelling reasons. *Id.* at 11 (citing *Stainless Steel*, 70 Fed. Reg. at 73,731; *Carbon Steel*, 71 Fed. Reg. at 7,514). Plaintiffs assert that there have been no changes to the products or the industry such that the "family" match methodology previously used no longer reflects the subject merchandise and Commerce has failed to articulate any compelling reason for the change. *Id.* at 14. Plaintiffs contend that Commerce's reasons for changing the methodology, technological advancements and increased accuracy, are insufficient and that Commerce has nevertheless failed to show that the new methodology results in increased accuracy. *Id.* at 14, 18.

Defendant concedes that during the Second Administrative Review Commerce decided to continue applying the family method, but notes that it stated it would continue to evaluate the appropriateness of the method and make alterations when compelling reasons exist. Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Response") at 5–6. Timken U.S. Corporation urged Commerce to alter its model match methodology during the Fourteenth Administrative Review and Commere determined at that time that compelling reasons did exist for a modification. *Id.* at 6 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed.

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[2] Commerce has articulated that "[i]t is appropriate to consider changes [to a methodology] when additional expertise and knowledge with regard to the market demands and market realities of the products . . . indicate that such changes allow more accurate comparison of U.S. and normal value products." *Structural Beams from Korea: Notice of Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 6,837, 6,838 (February 9, 2005) ("*Structural Beams*"). Additionally, Commerce's "normal practice is to refrain from revising the model match criteria absent evidence establishing that the model match is not reflective of the merchandise in question, there have been industry changes to the product that merit a modification, or there is some other compelling reason to require a change." *Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 70 Fed. Reg. 73,729, 73,731 (December 13, 2005) ("*Stainless Steel*"); *see also Notice of Final Results of the Eleventh Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 71 Fed. Reg. 7,513 (February 13, 2006) ("*Carbon Steel*").

Reg. 28,360, cmt.1 (June 24, 1992)). "Specifically, Commerce determined that a revised methodology: 1) more accurately reflected the intent of 19 U.S.C. § 1677(16),[3] including the statute's preference for identifying foreign like product by selecting the single most similar product; 2) reflected the statutory preference for using price-to-price comparisons; and 3) enabled Commerce to take advantage of technological developments." *Id*. (citing Memorandum from Jeffrey A. May, Deputy Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, to James J. Jochum, Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, at 4–5 (December 3, 2003) ("Model Match Memo")). Defendant asserts that because there is sufficient evidence to support these findings, the change was reasonable and should be sustained by this court. *Id*. at 16.

Defendant asserts that by using the new method Commerce can identify the single most similar product because "Commerce can now capture *slight* differences in the physical characteristics of the home market and United States model being compared which are still similar enough to be considered for comparison." *Id.* at 18. Defendant also argues that Commerce is not required "to ensure that home market models are technically substitutable, purchased by the same type of customers, or applied to the same end as the U.S. model." *Id.* at 18 (citing Memorandum from Barbara E. Tillman, Acting Deputy Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, to Ronald K. Lorentzen, Acting Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, *Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany etc. for the Period of Review May 1, 2003, through April 30, 2004*, at 24 (September 12, 2005) ("Issues & Decision Memo") (citing *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1210 (Fed. Cir. 1995))). Defendant explains that the new methodology allows for a greater number of price-to-price

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[3] 19 U.S.C. § 1677(16) defines the term "foreign like product" as follows:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
(B) Merchandise–
(i) produced in the same country and by the same person as the subject merchandise,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.
(C) Merchandise–
(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

comparisons because Commerce is now able to use fewer constructed values. *Id.* at 20.

Plaintiffs contend that changes in technology should not be considered because "Commerce never stated it was in some way technologically limited from more accurately calculating similar merchandise" when it created the family method. Plaintiffs' Motion at 16. Defendant counters that technological advancements are merely the means by which Commerce is able to implement a more accurate revised methodology and that as such, Commerce implicitly recognized these limitations in its original methodology. Defendant's Response at 21–22. Plaintiffs also argue that it is not valid to assert that technological constraints prohibited Commerce from selecting the most similar model in prior reviews because Commerce had been making such selections in older cases and because Commerce used a most similar method in the original investigation. Plaintiffs' Motion at 15, 19.

Defendant-Intervenor argues that the new method enhances Commerce's role in model match and data collection. Response of Timken U.S. Corporation to the Rule 56.2 Motion of SKF USA Inc., *et al.* ("Timken's Response") at 19. Timken states that, using the new method, U.S. sales of models that differ only in size or load rating are no longer excluded if the models match on the first four "most fundamental" characteristics. *Id.* at 20. Additionally, when using the family method Commerce was dependent on the family code provided by respondents to match similar products, whereas when using the new method Commerce performs the matching itself using additional data reported by respondents and the program designed by the agency. *Id.* Commerce selects the appropriate comparison products on the basis of physical characteristics, variable costs of manufacturing, and the reported date of sale and level of trade. *Id.* at 9.

The parties disagree as to whether it was proper to apply the new methodology retroactively. Plaintiffs state that a fair administration of antidumping laws has required Commerce, in certain circumstances, to adhere to methodologies it sought to alter.[4] Reply Brief in Support of SKF's Rule 56.2 Motion for Judgment Upon the Agency Record ("Plaintiffs' Reply") at 12–13, (citing *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992)). Plaintiffs state that this court has held that " 'while reliance cannot be presumed,' if a party establishes reliance on a methodology or law in effect at that time, then the retroactive application of a change in methodology or law is unlawful." *Id.* at 13 (citing *Brother Indus., Ltd. v. United States*, 15 CIT 332, 339, 771 F. Supp. 374, 382 (1991); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT

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[4] Plaintiffs do not elaborate on these circumstances.

1150, 1170, 178 F. Supp. 2d 1305, 1327 (2001)). Plaintiffs assert that they relied upon Commerce's long-standing family model match methodology during the period of review and even with advance notice of the possible change they could not anticipate what that change would be and therefore could make no revisions. *Id.* at 13–14.

Defendant asserts that retroactivity is not a basis for challenge and that requiring Commerce to apply changes only to prospective reviews and not to prospective entries "would paralyze Commerce's ability to change its own practices." Defendant's Response at 24. Defendant contends that the antidumping scheme is constructed in such a way as to always apply Commerce's decisions retroactively. *Id.* at 24–25 (citing *Abitibi-Consol. Inc. et al., v. United States*, 437 F. Supp. 2d 1352, 1361 (CIT 2006)). Defendant also asserts that Commerce met the notice requirement in 19 U.S.C. § 1677m(g)[5] by informing the interested parties that it had determined it was appropriate to change the model match methodology, soliciting comments, and providing the parties affected by the change an opportunity to comment before the final determination. *Id.* at 23–24.

The standard by which this court reviews Commerce's decision is whether Commerce reasonably determined that there were compelling reasons to revise the model match methodology. *Hangzhou Spring Washer Co. v. United States*, 387 F. Supp. 2d 1236, 1246 (CIT 2005). The agency must set forth the grounds for change when the court considers the bases of the agency's action and whether it is consistent with the agency's mandate. *Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1333 (CIT 2004); *see NTN Bearing Corp. v. United States*, 295 F.3d 1263, 1269 (CIT 2002).

In *Timken Company v. United States*, 630 F. Supp. 1327, 1337 (CIT 1986), this court recognized that the intent of the applicable statute, 19 U.S.C. § 1677(16)(B), is to compare foreign like product to the single most similar United States model. The new method allows Commerce to select the most similar model by allowing the comparison of models with only slight physical differences that are still similar enough to result in a suitable comparison. *Issues & Decision Memo* at 24. Selection of the single most similar model also allows for a greater number of reasonable price-to-price comparisons,

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[5] 19 U.S.C. § 1677m(g) states:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination under section [ ]1671d, 1673d, 1675, or 1675b of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

as is the statutory preference. 19 U.S.C. § 1677b(a)(1)(A); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 820 (1994), *reprinted in* 1994 U.S.C.A.N.N. 4040, 4161 ( "[T]he preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States."). Under the family methodology Commerce was forced to use constructed value for two-thirds of all models for which there were no contemporaneous sales of the identical model, rather than in a price-to-price analysis. Memorandum from Barbara E. Tillman, Acting Deputy Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, to Joseph A. Spetrini, Acting Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, at 6–7 (May 6, 2005). By contrast, under the new methodology, price-to-price comparisons, rose from 30 to 70 percent, without the need for constructed value. *Id.* at 14.

The new methodology also enables Commerce to take advantage of technological advancements. When the family method was developed over sixteen years ago technological resources were far less powerful than they are today. *See* Model Match Memo at 3. Commerce used an offsite mainframe computer that was significantly slower and much more expensive than desktop computers in use today. *Id.* Running the program for just one of the large bearing companies often required three to four hours of processing time and in the first several reviews analysts had to use special terminals just to access the mainframe computer. *Id*. Few terminals were available, they were expensive to use, and the cost was a function of the amount of central processing time used. *Id*. Had Commerce employed a more complex model match methodology to identify the single most similar model, "it would have been prohibitively expensive and time consuming." *Id*. Today, much more powerful personal computers are used by Commerce to run all new margin-calculation programs. *Id*. at 4. All analysts can work simultaneously on their own computers without processing charges. *Id*. These technological advancements are the means by which Commerce is able to implement a more accurate model match methodology. Plaintiffs are incorrect in their assertion that Commerce did not consider technological constraints when the family method was created. Technological constraints were strongly implied when Commerce explained that it was creating a family methodology to "minimize the necessity for comparisons among an exceptionally large number of bearing models." Letter from Bernard T. Carreau, Div. Dir., Office of Antidumping Compliance, U.S. Dep't of Commerce (July 13, 1990). Because these constraints have been lifted, Commerce is free to develop a more accurate methodology so long as that methodology is reasonable.

Moreover, because technological constraints made it difficult for Commerce to select the most similar model in prior reviews, it is within Commerce's expertise and discretion to update its methodol-

ogy for both increased accuracy and ease of use. *See S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1357 (Fed. Cir. 2000) ("Deference is particularly appropriate when the agency is applying its regulations to a complex or changing circumstance, thus requiring the agency to bring to bear its unique expertise and policy-making prerogatives."). The fact that the model matching task in the original investigation was assigned to the respondents, and not performed by Commerce, supports Commerce's stance that it did not have the technological resources to employ a most similar model matching method when the family method was created. *Preliminary Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 53 Fed. Reg. 45,353, 45,355–45,356 (November 9, 1988).

In assessing the reasonableness of its decision, the court observes that Commerce made the changes only after providing the parties with an opportunity to submit comments and after they received reasonable notice of the implementation of the revised methodology, as required by statute. Model Match Memo at 6–7. Indeed, Commerce extended the comment period and made modifications to its methodology based on the parties' comments and continued to employ the old methodology for the calculation of weighted-average margins. Letter from Laurie Parkhill, Dir., Office 3, AD/CVD Enforcement Group, Dep't of Commerce, to All Interested Parties (January 9, 2004); Issues & Decision Memo at 30–31. The new model match methodology rests on the same eight characteristics used in the family averaging methodology, but instead of requiring all eight physical characteristics to match, redefines the "family" to represent those bearings with the physical characteristics of bearing design, load direction, number of rows, and precision grade. Memorandum from Mark Ross, Acting Office Dir., AD/CVD Enforcement, U.S. Dep't of Commerce, to Jeffrey May, Deputy Assistant Sec'y for Import Admin., Group 1, U.S. Dep't of Commerce, at 7 (July 7, 2004) ("Notice of Revised Methodology").

While Plaintiffs' assert that Commerce informed the parties on July 7, 2004 that precision grade would be a defining characteristic in its new methodology, in fact, Commerce had stated it would consider precision grade, if appropriate, on a case by case basis. *See* Plaintiffs' Motion at 6; Notice of Revised Methodology at 7.

In addition, Commerce's decision to consider lubricant type in its new methodology, based on its observation that differences in lubricants had a significant effect on cost, is within its discretion to make a modification. *See S. Cal. Edison Co.*, 226 F.3d at 1357; Issues & Decision Memo at 37. Though Plaintiffs argue that Commerce should have treated certain "standard" lubricants as equivalent, they failed to raise this issue during the open comment period prior

to publication of the final determination. Issues & Decision Memo at 37.

Commerce does indeed express its preference for maintaining a stable methodology across reviews *unless* compelling reasons exist. *Polyethylene*, 61 Fed. Reg. at 35,181. It is also Commerce's policy to make changes where compelling reasons exist and this court will review Commerce's decision for reasonableness. *Hangzhou Spring Washer*, 387 F. Supp. at 1246. Here, Commerce has provided a reasonable basis for its changes. This court has previously noted that "the absence of certainty regarding the dumping margins and final assessment of antidumping duties is a characteristic of the retrospective system of administrative reviews designed by Congress," and to require all changes be applied only prospectively would hamper Commerce's ability to change its own practices. *Abitibi-Consol.*, 437 F. Supp. 2d at 1361.

Plaintiffs cite *Shikoku Chems.* as requiring Commerce to adhere to a methodology on the basis of fairness. In *Shikoku Chems.*, the court determined that Commerce had "abused its discretion in adopting a slightly improved allocation methodology in the face of years of acceptance of the prior approach." *Shikoku Chems.*, 795 F. Supp at 420–21. In explaining its decision, the court noted that "Commerce does not argue that key facts changed. Such changes could warrant a new approach. Nor was there a breakthrough in methodology which would reveal significant and heretofore undiscovered dumping." *Id.* *Shikoku Chems.* is distinguishable from the case *sub judice* precisely because Commerce's position is that technological advancements have allowed for a more accurate methodology, which in this case do "warrant a new approach." *Id.* at 421.

In sum, Commerce acted within its own discretion and in accordance with law. Substantial evidence exists to support a finding that Commerce acted reasonably. Accordingly, Commerce's determination is sustained.

### B
### Commerce's Use of its Zeroing Methodology is Supported by Substantial Evidence and in Accordance with Law

SKF argues that Commerce's practice of assigning a zero margin to export price ("EP") or constructed export price ("CEP") sales made above normal value ("NV") is a violation of the plain language of the statute and international agreements, is unsupported by an agency explanation, and is unjustified as a measure to combat masked dumping. Plaintiffs' Reply at 14. SKF further argues that *stare decisis* is inapplicable here because different statutory provisions were at issue in previous challenges to zeroing that were struck down by the Federal Circuit. Plaintiffs' Motion at 22; *see also Corus Staal, BV v. United States*, 395 F.3d 1343, 1346 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004). Because

the issue was not explicitly ruled on, SKF claims those decisions do not have the effect of *stare decisis*. Plaintiffs' Motion at 21–22. Alternatively, SKF argues that even if the court finds *stare decisis* applicable to this case, it may "exercise its discretion to not follow the Federal Circuit's decisions in *Timken* and *Corus Staal*[ ]." *Id.* at 22. SKF also asserts that because the plain language of the dumping statute is clear, the inquiry under *Chevron* ends at the first prong, and therefore deference should not be paid to Commerce. *Id*. at 25.

Defendant counters that Commerce's treatment of nondumped sales has been repeatedly sustained by this court and the Federal Circuit. Defendant's Response at 26.

Plaintiff notes that "*stare decisis* is not 'an inexorable command; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' " Plaintiffs' Motion at 22–23 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)). However, Plaintiff's interpretation of the doctrine of *stare decisis* as applied to this case is wholly incorrect. Following Federal Circuit precedent here is not merely blind adherence or an automatic application by this court, as SKF asserts. Neither can the Federal Circuit's discussion of zeroing be described as "merely lurk-[ing] in the record, neither brought to the attention of the court nor ruled upon." *Id.* at 21 (quoting *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925)). To the contrary, the practice of zeroing was squarely addressed by *Timken* and *Corus Staal. Timken*, 354 F.3d 1334; *Corus Staal*, 395 F.3d 1343. The fact that the underlying calculations in *Corus Staal* involved a different subsection of the statute than the statute at issue in the case *sub judice* does not render *stare decisis* inapplicable.[6] *Stafford*, 444 U.S. at 535 (interpreting a statutory clause, a court considers the entire provision and purpose). As Timken aptly points out, "SKF's assertions constitute new argument only, and new argument does not avoid the precedent." Timken's Response at 27. Further, a lower court may not ordinarily disregard its reviewing court's precedent. *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005).

Although the Federal Circuit in *Corus Staal* did not hold that the statute "unambiguously requires providing for zeroing negative margin transactions," as Plaintiff argues, such a directive is not necessary for Commerce's interpretation to be upheld. *See* Plaintiffs' Mo-

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[6] Plaintiff further argues that Commerce's use of zeroing in a review conflicts with 19 U.S.C. §§ 1677(35)(A), 1675(a)(2), and 1673e(c)(3). Plaintiffs' Motion at 29–30. In sustaining Commerce's treatment of nondumped sales, the Federal Circuit in both *Timken* and *Corus Staal* expressly addressed 19 U.S.C. § 1675(a)(2) and § 1677(35)(A) and presumably considered the entire statute. *Timken*, 354 F.3d at 1338 ("Finally, Commerce uses this weighted-average dumping to calculate the duties owed on an entry-by-entry basis. 19 U.S.C. § 1675(a)(2)."); *Corus Staal*, 395 F.3d at 1347 n.3 (quoting § 1675(a)(2)(A)); *see also Stafford v. Briggs*, 444 U.S. 527, 535, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980) (statutory provision should be considered in light of the entire statute and purpose)

tion at 25 (quoting *Timken*, 354 F.3d at 1341; *Corus Staal*, 395 F.3d 1343). Pursuant to this court's firmly established review standard, this court need only find that Commerce's interpretation was a reasonable one. *Udall v. Tallman* 380 U.S. at 16; *Consolo*, 383 U.S. at 619–20.

Plaintiff also proposes that the Federal Circuit cases which upheld the practice of zeroing should have curtailed their analysis at step one of the *Chevron* inquiry because the plain language of the statute is clear and because "Congress has spoken directly to the question at issue and its intent that Commece use both negative and positive values is clear. . . ." Plaintiffs' Motion at 25, 27. SKF also argues that because the Government states its zeroing methodology is "not mandated by statute or regulation," any deference is unwarranted. *Id*. at 26. Absent any new information which shows circumstances have changed, or some reason for a different *Chevron* analysis, there is no need to re-examine zeroing at this time. *See Paul Muller Industrie GmbH v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (sustaining zeroing in the 14th review); *NSK Ltd. v. United States*, 416 F. Supp. 2d 1334, 1338 (CIT 2006) (sustaining zeroing in the 13th review).

Because zeroing has been affirmed and settled by the Federal Circuit in *Corus Staal* and *Timken*, there is no reason to overturn Commerce's zeroing practice based upon a ruling by the WTO "unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Paul Muller*, 435 F. Supp. 2d at 1245; *See Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1284 (Fed Cir. 2006) (stating that no person other than the United States "may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with [the Uruguay Round Agreements].") (quoting 19 U.S.C. § 3512(c)(1)(B)); *Corus Staal*, 395 F.3d at 1348. Because no such ruling has been adopted in this case,[7] there is no reason to re-examine

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[7] On October 31, 2005, a World Trade Organization ("WTO") Panel found, *inter alia*, that Commerce's practice of zeroing when calculating dumping margins using average-to-average comparisons in investigations was inconsistent with U.S. obligations under the WTO Antidumping Agreement. Panel Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins, ¶¶ 7.32, 7.1, WT/DS294/R (October 31, 2005) ("U.S. - Zeroing Panel Report"). The United States did not appeal the Report and in March 2006 started to implement the WTO's findings by initiating a proceeding under Section 123(g) of the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. § 3533(g) ("Section 123"), in which it stated that it "will abandon" the use of zeroing in average-to-average computations and that it would change its margin computation methodology to bring certain challenged reviews into compliance with the WTO's findings. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006). On December 27, 2006, Commerce published in the Federal Register its final Section 123 determination, ending the practice of zeroing in antidumping investigations using average-to-average comparisons, and scheduling the effective date for adoption of the new policy for January 16, 2007. *See Antidumping Proceed-*

the issue of zeroing at this juncture.

## V
## Conclusion

For the above stated reasons, Commerce's determination in *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711 (September 16, 2005) is sustained.

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SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE, SKF GmbH and SKF INDUSTRIE S.p.A., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 05–00569

*ORDER AND JUDGMENT*

This case having come before the court upon the Rule 56.2 Motion for Judgment Upon the Agency Record filed by SKF USA Inc., SKF France S.A., SKF Aerospace France, SKF GmbH and SKF Industrie S.p.A.; the court having reviewed all pleadings and papers on file herein, having heard oral argument, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiff's Motion is DENIED; and it is further

ORDERED ADJUDGED AND DECREED that the decision of the U.S. Department of Commerce ("Commerce") in *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore and the United Kingdom: Final Results of Antidumping Duty Adminis-*

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*ings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006). On April 9, 2007, Commerce issued its final Section 129 Determination, implementing the U.S.-Zeroing Panel Report as to the challenged antidumping investigations. *See* Memorandum from Stephen Claeys, Deputy Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, to David Spooner, Assistant Sec'y for Import Admin., U.S. Dep't of Commerce, *Issues and Decision Memorandum for the Final Results of the Section 129 Determinations* (April 9, 2007), *available at* http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf. On April 23, 2007, the U.S. Trade Representative instructed Commerce to implement its findings under section 129 of the URAA. *See Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 (May 4, 2007).

*trative Reviews*, 70 Fed. Reg. 54,711 (September 16, 2005) is hereby SUSTAINED; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Friday, June 8, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before June 8, 2007.