Decisions of the United States
Court of International Trade

Slip Op. 07–126

FIROZE A. FAKHRI D.B.A. INTERNATIONAL TRADING CO., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 98–08–02658

PUBLIC VERSION

[Plaintiff's Application For Fees and Other Expenses Pursuant to the Equal Access to Justice Act is DENIED and Plaintiff's Motion to Amend the Pleadings and Fee Application is GRANTED.]

Decided: August 20, 2007

Rode & Qualey (*R. Brian Burke* and *William J. Maloney*), for Plaintiff Firoze A. Fakhri D.B.A. International Trading Co.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); *Edward N. Maurer*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Counsel; and *Dean A. Pinkert*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Firoze A. Fakhri, who does business as "International Trading Company" ("Int'l Trading Co."), an importer of shop towels from Bangladesh, seeks recovery of expenses and fees under the Equal Access To Justice Act ("EAJA")[1] for being forced to relitigate an issue

[1] 28 U.S.C. § 2412(d).

previously decided in a case between the same parties.[2] Defendant United States claims that an EAJA award is unavailable to Plaintiff, arguing its position in the second case was substantially justified, and that Int'l Trading Co. may not recover because this case was filed in his fictitious business name and not in the name of Fakhri's Subchapter S corporation. Although the Government's position in this case was wholely without merit, because Plaintiff has come to the court with unclean hands, his EAJA claim is denied.

II
BACKGROUND

The subject of the civil action for which a fee award is sought[3] is a shipment of shop towels that Fakhri purchased in the name of his unincorporated business, Int'l Trading Co.[4]

In *Int'l Trading II*, the Federal Circuit affirmed this court's judgment in *Int'l Trading I*, holding that where liquidation of entries had been suspended by statute pending completion of an administrative review, "the publication of the final results in the Federal Register constituted notice from Commerce to Customs that the suspension of liquidation on the subject entries had been removed" within the meaning of 19 U.S.C. § 1504(d) (1993). *Int'l Trading II*, 281 F.3d at 1277. The Federal Circuit also stated that § 1504(d) (1993) had thereafter "been amended, but not in ways material to the issue in [that] case." *Id.* at 1271.

Int'l Trading III and *Int'l Trading IV* were similar in all material respects to *Int'l Trading II*, except that the entry of shop towels covered by these cases was made approximately one month after the last entry of merchandise covered by *Int'l Trading II*. Thus, *Int'l Trading III* and *Int'l Trading IV* fall into the subsequent administrative review of the antidumping duty order in place against shop towels from Bangladesh. That last entry was also subject to an amended statute, modified by the passage of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994).[5]

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[2] Int'l Trading Co.'s application is made in connection with earlier decisions in *Int'l Trading Co. v. United States*, 24 CIT 596, 110 F. Supp. 2d 977 (2000) ("*Int'l Trading I*"), *aff'd* 281 F.3d 1268 (Fed. Cir. 2002) ("*Int'l Trading II*"), and *Int'l Trading Co. v. United States*, 306 F. Supp. 2d 1265 (CIT 2004) ("*Int'l Trading III*"), *aff'd*, 412 F.3d 1303 (Fed. Cir. 2005) ("*Int'l Trading IV*").

[3] Because the background and procedural history of the underlying litigation have been articulated in earlier decisions under this case number, both before this court and the Federal Circuit, familiarity with the details is presumed. However, a brief review of the facts is a necessary precursor to a determination of whether the Government's position was substantially justified under the EAJA.

[4] United States Customs Entry No. 774–0295548–6, filed on March 3, 1994.

[5] These amendments added: "[e]xcept as provided in section 1675(a)(3) of this title," to section 1504(d). Section 1675(a)(3) provides, in relevant part, that if Commerce orders the liquidation of entries pursuant to an administrative review, the entries are to be liquidated

The Federal Circuit in *Int'l Trading IV* affirmed *Int'l Trading III*, holding that the period for deemed liquidation pursuant to §1504(d) was triggered when the final results of the administrative review covering the entry were published in the Federal Register on October 30, 1996, and not when Customs finally received liquidation instructions from Commerce on July 1, 1997.

Plaintiff filed a Motion to Amend the Pleadings and Fee Application to Conform to the Evidence and More Fully Identify the Plaintiff, Real Party in Interest ("Plaintiff's Motion") on March 8, 2006. Oral arguments concerning Plaintiff's Motion and the parties' supplemental briefings were held on May 9 and August 23, 2006.

III
STANDARD OF REVIEW

Under EAJA, an application for fees and expenses must be granted when "(1) the claimant is a prevailing party; (2) the government's position during the administrative process or during litigation was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is timely and supported by an itemized fee statement." *Former Employees of Tyco Elecs., Fiber Optics Div. v. United States*, 350 F. Supp. 2d 1075, 1081 (CIT 1994) (citing 28 U.S.C. § 2412(d)(1)(A)–(B)); *see Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003) (citing *INS v. Jean*, 496 U.S. 154, 158, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990)). The EAJA is a waiver of sovereign immunity that "must be strictly construed." *Ardestani v. INS*, 502 U.S. 129, 137, 112 S. Ct. 515, 116 L. Ed. 2d 496 (1991). Once sovereign immunity has been waived, the court may not narrow such a waiver. *United States v. Kubrick*, 444 U.S. 111, 117–18, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

IV
DISCUSSION
A
The Government's Position Lacked Substantial Justification
1
The Government Was Not Substantially Justified in its Earlier Arguments Before This Court and the Federal Circuit

Plaintiff argues that the Government's refusal to stipulate judgment on its entry after the close of *Int'l Trading II* was not substantially justified, entitling Plaintiff to a reimbursement of its costs and expenses enumerated in its Application.

"promptly and, to the greatest extent practicable, within 90 days after the instructions to Commerce are issued."

Defendant offers several arguments in response. The Government argues that it was substantially justified because 1) the 1994 amendments altered Customs' obligations to liquidate in a timely manner and 2) that publication in the Federal Register notice does not constitute notice to Customs. Defendant's Opposition To Plaintiff's Application For Fees And Other Expenses ("Defendant's Opposition") at 11–30. Alternatively, the Government argues that even if the amendments are applicable to the entry at issue, the time periods for liquidation commences on the date Commerce issued instructions to Customs. *Id.* at 30.

a
The 1994 Amendments Were Not Significant Enough to Justify Defendant's Position

Under EAJA, a prevailing party other than the United States, in an action against the United States, shall recover fees and expenses, "unless the court finds that the position of the United States is substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Int'l Trading Co. was unquestionably the prevailing party in all aspects of the litigation, both before this court and the Federal Circuit.

The Supreme Court has interpreted the term "substantially justified" to mean " 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person. . . . To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Pierce v. Underwood*, 487 U.S. 552, 565–66, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1998) (citation omitted). "Substantially justified" requires "that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali & Enzo Pizzi, Inc. v. United States*, 837 F.2d 465, 466 (Fed. Cir. 1988) (quoting *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (*en banc*) (emphasis in original)). In assessing the reasonableness of the Government's overall position, the Federal Circuit has stated "it is for the trial court to weigh each position taken and conclude which way the scale tips." *Chiu v. United States*, 948 F.2d 711, 715 n.4 (Fed. Cir. 1991).

It is the Government's burden to demonstrate it was substantially justified. *See, e.g., Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003).

In making its judgment, the court is guided by certain criteria which can indicate a position's unreasonableness. *Ramon Sepulveda v. INS*, 863 F.2d 1458, 1460 (9th Cir. 1988); *see also Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1988). In particular, inconsistency in the Government's position, either in comparison to its agency's actions or to

the agency's regulations, evidences a lack of substantial justification. *See, e.g., Ramon Sepulveda*, 863 F.2d at 1460; *Nakamura v. Heinrich*, 17 CIT 119, 120 (1993).

Relitigation of a previously decided issue is also a strong factor against a finding of substantial justification. *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984). The Government's argument that the proviso of § 1504(d) excepted entries subject to § 1675(a)(3) from the liquidation time requirement was rejected twice, once in *Int'l Trading III*, and again by the Federal Circuit in *Int'l Trading IV*. The Federal Circuit has clearly stated its position on this issue.

The Government argues that it did not stipulate to *Int'l Trading II* "because it believed that the amendments made to §§ 1504(d) and 1675(a), which were not applicable to the earlier case between the parties but are applicable to this case, have brought about significant changes in the law."[6] Defendant's Opposition at 10–11 (quoting Letter from James A. Curley to R. Brian Burke, dated August 23, 2002, Defendant's Exhibit 4). The Government insists that its argument earlier in the litigation, that the added proviso to the statute meant there was no time limit for Commerce to give notice to Customs to liquidate the entries, had a reasonable basis in law and fact. *See* Defendant's Opposition at 19. This court rejected that argument by granting Summary Judgment to Plaintiff, and that Judgment was affirmed on appeal. *Int'l Trading III* and *Int'l Trading IV*. Rejecting the Government's position, the Federal Circuit stated:

> *We think it unlikely* that Congress would have undone the primary objective of the 1993 amendment to section 1504(d) by removing time limits already present in the law, without any indication in the legislative history that such a substantive change was being made.

Int'l Trading IV, 412 F.3d at 1313 (emphasis added). The purpose of the amendments is also made apparent in its legislative history. H.R. Rep. No. 103–361 pt. I, at 139 (1993); *see also* H.R. Rep. No. 1418, at 9 (1980); H.R. Rep. No. 1434, at 25 (1980) (Conf. Report); S. Rep. No. 253, at 1, 4 (1979).

The Federal Circuit in *Int'l Trading IV* clarified that the amendments did not alter Customs' responsibility to liquidate in the manner prescribed by the statute, citing the rationale in the statute's legislative history. *Int'l Trading IV*, 412 F.3d at 1313; *see* H.R. Rep. No. 103–361 pt. I, at 139 (1993); *see also* H.R. Rep. No. 1418, at 9 (1980); H.R. Rep. No. 1434, at 25 (1980) (Conf. Report); S. Rep. No. 253, at 1, 4 (1979). Section 1504 was originally enacted in 1978 to impose a

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[6] Even though the 1994 amendments were not at issue in *Int'l Trading II*, the Federal Circuit noted that despite the fact that the statute was amended in 1994, it was not "in ways material to the issue in this case." *Int'l Trading II*, 281 F. 3d at 1271.

four-year time limit for liquidation, with the motivation being "to 'increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction.' " *Int'l Trading II*, 281 F.3d at 1272 (quoting *Dal-Tile Corp. v. United States*, 17 CIT 764, 770, 829 F. Supp. 394 (1993)). Referring to amendments to the statute in 1993, the court in *Int'l Trading II* explained that the [G]overnment's position in the case "would undermine one of the principal objectives of the 1993 amendments by giving the Government the unilateral ability to extend the time for liquidating entries indefinitely." *Id.* at 1273.

The Government argues in its opposition that "the position of the Government, therefore, is substantially justified 'even though it is not correct' so long as it 'could satisfy a reasonable person.' " Defendant's Opposition at 10 (quoting *Pierce v. Underwood*, 487 U.S. at 565, 566 n.2). However, the substantial justification standard is not a reasonable justification standard. *See Spencer v. NLRB*, 712 F.2d 539, 558 (1983) (noting that "the Senate Judiciary Committee considered and rejected an amendment to the bill that would have changed the pertinent language from "substantially justified" to "reasonably justified," S. Rep. No. 253, at 1, 8 (1979), suggesting that the test should, in fact, be slightly more stringent than "one of reasonableness").

b
The Government's Notice Argument Had Previously Been Rejected

The Government's second argument concerns whether a Federal Register notice constitutes notice to Customs, and whether an employee of the agency qualifies as a "person" capable of receiving notice under the statute. Defendant's Opposition at 25. The Government has maintained in all preceding litigation that publication in the Federal Register does not constitute notice to Customs, and has alternatively argued that an email message to Customs does and does not constitute notice. *See, e.g., Id.*; *Int'l Trading II*, 281 F.3d at 1274.

The Federal Register Act states that a filing of a document is sufficient to give notice of its contents to a person subject to it, and a federal agency is not included in the definition of "person." 44 U.S.C. § 1501, § 1507; *see* Defendant's Opposition at 25. This issue was raised by the Government and was decided in Plaintiff's favor in *Int'l Trading II, III*, and *IV*.[7]

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[7] The court in *Int'l Trading III* stated:

> This court gathers from the Federal Circuit's reasoning in *Int'l Trading II* and a denial of the Government's petition for rehearing on the very same claim that the Federal Circuit did not want to reach the result that would follow from application of

Even though Customs liquidated Plaintiff's entries more than six months after the Federal Register notice was published, the Government argues that Customs liquidated them within the statutorily prescribed time of 90 days after Commerce issued instructions. Defendant's Opposition at 31; *see* also 19 U.S.C. § 1675(a)(3)(B).[8] Defendant makes that argument in reliance on the notion that Commerce did not give notice until it issued "instructions" to Customs to liquidate.

There is no statutory definition of what constitutes notice in this circumstance, nor particularly whether notice can be fulfilled through an email or publication of a Federal Register notice; however, the Federal Circuit held in *Int'l Trading II*, and reiterated in *Int'l Trading IV*, that "publication of the final results [of an administrative review] in the Federal Register constituted notice from Commerce to Customs" within the meaning of 19 U.S.C. § 1504(d). *Int'l Trading II*, 281 F.3d at 1277; *Int'l Trading IV*, 412 F.3d at 1306. Therefore, based on the Federal Circuit's repeated interpretation of the statute, Customs liquidated Plaintiff's entries after the statutorily allotted time had expired, more than six months after it received notice from Commerce in the Federal Register. The Government's position was not substantially justified.

2
The Special Circumstances Alleged by the Government Do Not Bar Plaintiff From Recovering Under EAJA

The Government also argues that because special circumstances exist in this case, it is impermissible to award fees and expenses under the statute. Defendant's Opposition at 30. The Government alleges that special circumstances are present in this case because the court in *Int'l Trading II* denied without opinion the Government's petition for a panel rehearing, thereby "requir[ing the Government] to relitigate the issue of notice through publication in the Federal Register to obtain judicial review on this point." *Id.*

The purpose of barring a fee award where special circumstances exist has been explained by the courts.

> This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to

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the Government's current interpretation of the statute.

Int'l Trading III, 306 F. Supp. 2d at 1276.

[8] 19 U.S.C. § 1504(d) states that Customs is required to "liquidate the entry . . . within 6 months after receiving notice of the removal [of suspension] . . . ."

19 U.S.C. § 1675(a)(3)(B) states that an entry must be liquidated "within 90 days after the instructions to Customs are issued."

> deny awards where equitable considerations dictate an award should not be made.

Devine v. U.S. Customs Service, 733 F.2d 892, 895–96 (Fed. Cir. 1984) (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990).

Additionally, "special circumstances have been recognized where the government unsuccessfully advanced novel and credible legal theories in good faith. . . ." *Am. Air Parcel Forwarding Co. v. United States*, 12 CIT 850, 853, 697 F. Supp. 505, 507 (1988). Such an analysis does not apply here, since the Government's position was not novel, and was rejected as without merit twice by the Federal Circuit and twice by this court. That the Government chose to relitigate an issue after both this court and the Federal Circuit ruled against its position is not a special circumstance within the meaning of EAJA.[9]

In sum, no special circumstances alleged by the Government exist to trigger the second limit to EAJA recovery.

B
International Trading Co. is an Eligible Party Under 28 U.S.C. § 2412(d)(2)(B)

Defendant argues that Plaintiff is not entitled to an award of fees and expenses under § 2412(d)(2)(B) because it is not an eligible "party," as defined by EAJA. Defendant's Opposition [10] [11]

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[9] Although the particulars of the Government's Federal Register Act argument may not have been discussed by the *Int'l Trading II* court, the court did address the Government's position when it stated "[t]he trial court found no merit in that argument, nor do we." *Int'l Trading II*, 281 F.3d at 1273. In *Int'l Trading IV*, the Government argued that *Int'l Trading II* should be overruled *en banc*. The Federal Circuit rejected the Government's argument, stating that "the issue of notice to Customs is thorough and well-reasoned," and quoted discussion of the issue at length in the opinion. *Int'l Trading IV*, 412 F.3d at 1308. Nonetheless, the Government submitted to this court an additional brief on this subject, again arguing the merits of this issue. Defendant's Motion For Leave to File Response to Points Raised By the Court at Status Conference of February 10, 2006, on EAJA Application For Fees and Expenses (February 23, 2006).

[10] The Government stretches the bounds of logic when it argues that Int'l Trading Co. ". . . is not an individual whose net worth did not exceed $2 million . . . ." and Int'l Trading Co. has not been shown to be "owner of an unincorporated business." Defendant's Opposition at 4. Thus, the Government reasons, since the case caption names Int'l Trading Co. rather than "Firoze A. Fakhri DBA International Trading Co.," this could not possibly be an action by the owner of an unincorporated business. *Id.* at 7.

The jejune nature of the Government's argument is demonstrated by Paragraph 2 of the Complaint in this case. "THAT the plaintiff is the importer of record of the merchandise which is the subject to this action." Defendant answered "Denies; avers that the importer of record is shown on the Entry Summary as Firoze A. Fakhri." Answer ¶ 2. At oral argument the Government was unable to demonstrate no substantive prejudice arising out of suit by Mr. Fakhri in the name of his DBA, and counsel for the Government conceded that in response to his Answer which was filed in August of 2000, Mr, Fakhri's counsel provided the Government a copy of his California fictitious name statement showing he was registered as doing business as Int'l Trading Company.

> An eligible party under EAJA is:
>
> (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) *any owner of unincorporated business*, . . . the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed. . . .

28 U.S.C. § 2412(d)(2)(B) (emphasis added). According to Plaintiff's Affidavit, Int'l Trading Co. is an unincorporated business, with 3 employees of record, and worth $2.5 million at the time the action was originally filed.[12] Firoze A. Fakhri Affidavit ¶¶ 1–2 (February 6, 2006); Firoze A. Fakhri Affidavit ¶¶ 1–2 (January 29, 2004). In the supplemental affidavit of Michael A. Henry, the accountant of Firoze A. Fakhri and Int'l Trading Co. since 1981, Henry avers that the records concerning the net worth of both Fakhri and his unincorporated business, having been "kept in accordance with generally accepted accounting principles". . . and demonstrate the net worth of Int'l Trading Co. on August 10, 1998, was "approximately 2.5 million." Michael A. Henry Affidavit ¶¶ 3–4; *see* Firoze A. Fakhri Affidavit (February 6, 2006). Based on a review of accounting records, Henry estimates that the total personal net worth of Fakhri, including the net worth of Int'l Trading Co., was approximately 4.4 million on that same date. *Id.* ¶ 5.

Because the "party" seeking reimbursement is Firoze Fakhri suing as owner of an unincorporated business, Int'l Trading Co., and not Firoze A. Fakhri suing as an individual, Int'l Trading Co. is an eligible party under prong (ii) of the EAJA. The language of the statute is clear and unambiguous. Defendant's reliance on the first prong of the statute is misplaced.

The California Fictitious Business Name Statute, CA Bus. & Prof. Code § 17900 (2007), under which Firoze Fakhri registered Int'l Trading Co. further solidifies the legal connection between Int'l Trading Co. and Fakhri. Interpreting the statute, the California

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[11] Counsel for Defendant said at oral argument that *Southwest Marine, Inc., on behalf of Universal Painting and Sandblasting Corp. v. United States*, 43 F.3d 420 (9th Cir. 1994), shows that Firoze A. Fakhri is not an eligible party under EAJA. However, the case *sub judice* is distinguishable. While the cited case deals with corporations, Int'l Trading Co. is Fakhri's unincorporated business. Further, both Mr. Fakhri and Int'l Trading Co. had standing to sue in the underlying litigation, unlike the sub-contractor corporation in *Southwest*.

[12] Four affidavits averring Firoze A. Fakhri and Int'l Trading Co.'s net worth have been submitted to the court by Plaintiff's counsel. Firoze A. Fakhri Affidavit (February 6, 2006), Plaintiff's Reply, Exhibit A; Firoze A. Fakhri Affidavit (January 29, 2004), Plaintiff's Application for Fees and Other Expenses Pursuant to EAJA (2004), Exhibit B; Michael A. Henry (March 26, 2006).

Court of Appeal having jurisdiction over the county in which Fakhri registered Int'l Trading Co., noted:

> "[t]he designation [DBA] means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. *Doing business under another name does not create an entity distinct from the person operating the business*." The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner.

Pinkerton's, Inc. v. Superior Court of Orange County, 57 Cal. Rptr. 2d 356, 360 (Cal. Ct. App. 1997) (internal citations omitted) (quoting *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 50 Cal. Rptr. 2d 192, 194 (Cal. Ct. App. 1996)).

Defendant alleges there is prejudice in adding Fakhri as a party at this stage of the litigation; however, when pressed at oral argument, counsel for Defendant was unable to articulate any specific prejudice. Almost six years ago, Plaintiff faxed to Defendant a copy of Fakhri's Ficititious Name Statement that was filed in California. Reply to Defendant's Opposition to Plaintiff's Application for Fees and Other Expenses ("Plaintiff's Reply"), Exhibit A, Fax dated October 5, 2000 from R. Brian Burke to James Curley. Filing of such a statement, and the underlying CA statute was "designed to give public notice of the true names of individuals doing business under a fictitious name." *Hunter v. Croysdill*, 337 P.2d 174, 180 (Cal. Dist. Ct. App. 1959) (interpreting the predecessor Fictitious Business Name statute).

At oral argument, Plaintiff provided uncontradicted evidence that the U.S. Treasury antidumping duty refund check due to Plaintiff Int'l Trading Co. was issued to Firoze A. Fakhri. U.S. Treasury Check, Plaintiff's Exhibit 2 (May 9, 2006). Upon review of the statute "creating" Int'l Trading Co. in 1980, there is no cognizable prejudice to Defendant. Therefore, Firoze Fakhri and Int'l Trading Co. both qualify as a "party" under EAJA.

C
Plaintiff's Motion to Amend the Pleadings to Conform to the Evidence is Granted

Plaintiff seeks the addition of Firoze A. Fakhri as a named party in its Motion to Amend the Pleadings. Plaintiff's Motion at 6. Defendant counters that such an amendment is impermissible because it would unfairly prejudice the United States and such amendments are not permitted post-judgment. *See* Defendant's Opposition to the Plaintiff's Motion to Amend Pleadings and Fee Application, and Brief ("Defendant's Opp. to Amendment") at 2.

USCIT Rule 15(c) provides three requirements for an amendment to relate back to the date of the original pleading. They are 1) the

amended complaint must arise "out of the conduct, transaction or occurrence set forth . . . in the original pleading; 2) there must be a sufficient identity of interest between the new plaintiff, the original plaintiff, and their respective claims so that defendant received fair notice of the latecomer's claim against them; and 3) there is no undue prejudice. *Allied Int'l v. Int'l Longshoremen's Ass'n*, 814 F.2d 32, 35–36 (1st Cir. 1987) (interpreting Fed. R. Civ. P. 15(c)).[13]

Plaintiff meets all three requirements, allowing the relation back of this amendment to the original pleading filed in this case. *See* Plaintiff's Motion at 8. Plaintiff's amended complaint requesting the addition of Firoze A. Fakhri, the owner of Int'l Trading Co., to the caption, apparently arises out of the same "conduct, transaction, or occurrence." *Id.*

The "identity of interest" prong is satisfied because Mr. Fakhri is the owner of Int'l Trading Co., his unincorporated business, "as the two are one and the same." *Id.* Similar amendments to the original pleading have previously been upheld by other courts. In *Reyna v. Flashtax, Inc.*, 162 F.R.D. 530, 534 (S.D. Tex. 1995), the plaintiff was permitted to amend its complaint by adding his own name to the trade name under which he did business. Similarly, an amendment adding the name of a predecessor corporation to the caption was allowed in *Hemphill Contracting Co. v. United States*, 34 Fed. Cl. 82, 87 (1995). Granting the amendment, the court in *Hemphill* stated:

> A little common sense goes a long way to show that the complaint contains a mere misnomer, and that Hemphill Co. and the plaintiff are one and the same. . . . There is a strong judicial policy toward merit-based decisions, and against throwing out claims because of a minor technicality.

Id. at 86. Here, Plaintiff is solely requesting to alter the caption on the pleadings for the sake of clarity and is not seeking the addition of any new parties or claims. Mr. Fakhri is not a stranger to this litigation and has always been the real party in interest with Int'l Trading Co. Plaintiff's sought amendment arises out of the transactions in the original Complaint. *See id.* at 87.

> "A . . . substitution of plaintiffs should be liberally allowed when the change is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants."

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[13] The standard for amendment of an EAJA application is no different than for the amendment of other pleadings. *See Scarborough v. Principi*, 541 U.S. 401, 416 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004); *Townsend v. Commissioner*, 415 F.3d 578, 581–82 (6th Cir. 2005); *United States v. Hristov*, 396 F.3d 1044, 1046–47 (9th Cir. 2004). The Federal Circuit has also held that "the content of the EAJA application should be accorded some flexibility." *Scarborough v. Principi*, 319 F.3d 1346, 1351 (Fed. Cir. 2003) (quoting *Bazalo v. West*, 150 F.3d 1380, 1383 (Fed. Cir. 1998)).

Hilgraeve Corp. v. Symantec Corp., 212 F.R.D. 345 (E.D. Mich. 2003) (quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2d Cir. 1997)).

Plaintiff relies on several cases for support. In *Triangle Distributing, Inc. v. Shafer, Inc.*, No. 90–4042, 1991 U.S. App. LEXIS 20042, at *5–*6 (6th Cir. August 23, 1991), the court allowed a post-judgment amendment to the pleadings in order to correct a misnomer of a party. In *Bazalo v. West*, 150 F.3d 1380, 1382–1384 (1998), the court permitted a party to supplement its EAJA application to establish it was an eligible party under the statute, beyond the thirty-day filing requirement. Defendant argues that *Triangle* is distinguishable from the case at bar because it only involved a change in a name that was not due to "[P]laintiff's own inexcusable neglect", whereas here Plaintiff seeks the addition of a new party. Defendant's Opp. to Amendment at 5; *see Triangle* at *2.

Defendant argues that allowing this amendment will "unfairly prejudice[ ]" it because this issue was never argued in earlier litigation. *See* Defendant's Opp. to Amendment at 2. Plaintiff contends that although it raised this issue in its pleadings, it did not argue this issue because Defendant conceded Plaintiff's standing. Plaintiff's Motion's at 11. Defendant counters that it conceded standing for purposes of trial and not for an award of costs under EAJA. Defendant's Opposition at 15.

It is apparent that from official Customs entry papers for the imported shipments of towels that Mr. Fakhri, using the name of Int'l Trading Co., purchased and imported the shop towels which are the subject of this case. *See* Plaintiff's Motion, Exhibit A (including Commercial Invoice No. SCML/169/94, CF 7501 Customs Entry Summary No. 774–0295548–6, Customs Continuous Bond No. 279217945). The connection between Mr. Fakhri and Int'l Trading Co. is also apparent from the additional documentation submitted to this court and to Customs by Plaintiff. *See, e.g.*, Attachments to Plaintiff's Response to Court's Request for Additional Documentation of Party Status and Supplementation of Record Based on New Information (May 30, 2006) ("Plaintiff's 1st Supp. Briefing"); U.S. Treasury Check, Plaintiff's Exhibit 2 (May 9, 2006). Defendant's arguments contesting the applicability of *Triangle* and *Bazalo* are misguided. Int'l Trading Co.'s recent motion to add Fakhri as a party is not due to "inexcusable neglect"; rather, it was necessitated by Defendant's objections to Int'l Trading Co.'s eligibility as a party under EAJA. The amendment Plaintiff seeks is comparable to *Triangle* because it is essentially an addition of a name relating to the same entity.

It is not necessary to address Defendant's argument that a motion to amend the pleadings is impermissible post-judgment, since Plain

tiff's amendment properly relates back to the time of the filing of its EAJA Application in this round of the litigation.

Thus, Plaintiff's Motion to Amend the Fee Application is Granted.

D
Fakhri's Subchapter S Corporation, Farbe, Inc., Does Not *Per Se* Affect International Trading Co.'s EAJA Eligibility

After the first oral argument on May 9, 2006, the court allowed the parties to submit supplemental briefing bearing on the issue of whether Int'l Trading Co. is an eligible party; Plaintiff submitted a new affidavit by Firoze Fakhri disclosing the existence of a Subchapter S corporation in the name of Farbe, Inc., which does business as Int'l Trading Co. *See* Firoze A. Fakhri Affidavit (May 26, 2006). A second oral argument was held three months later concerning how the existence of the corporation may affect Int'l Trading Co.'s eligibility as a party under EAJA. At that time, the court requested that the parties submit additional briefing on whether the case had to be filed in the name of Farbe, Inc. in order for Plaintiff to be eligible for fees under EAJA, whether the existence of the corporation is relevant to the determination of eligibility, and whether the manner in which Fakhri filed his personal income tax returns affects his eligibility.

In Defendant's Response to Plaintiff's Submission of Additional Documentation of Party Status and Supplementation of Record (June 16, 2006) ("1st Supp. Briefing Response"), Defendant contests Int'l Trading Co.'s eligibility for recovery under EAJA for two reasons. First, the existence of Farbe, a corporation, precludes recovery under 28 U.S.C. § 2412(d)(2)(B), because Int'l Trading Co. is an owner of a corporation. 1st Supp. Briefing Response at 4. Second, Int'l Trading Co.'s fictitious business name statement expired, therefore Fakhri does not have a claim to Farbe, Inc., because the only valid fictitious business name statement links Int'l Trading Co. and Farbe, with no mention of Fakhri. *Id.* at 3–4.

The discovery of the existence of Subchapter S Corporation Farbe, Inc. creates the issue of whether the existence of a corporation affects Plaintiff's eligibility to recover fees and expenses under EAJA. 28 U.S.C. § 2412(d)(2)(B) includes *corporations* in its definition of eligible "party." § 2412(d)(2)(B); *see, e.g., Missouri Pac. Truck Lines v. United States*, 746 F.2d 796, 797–98 (Fed. Cir. 1984); H.R. Rep. No. 1434, 96th Cong., 2d Sess. 26, *reprinted in* 1980 U.S.C.C.A.N. 5003, 5015.

A brief timeline is helpful in understanding the parties' contentions in their post oral argument submissions. In 1980, Fakhri filed a fictitious business statement in California for Int'l Trading Co. D.B.A. as Firoze Fakhri. Firoze A. Fakhri Affidavit (May 26, 2006), Plaintiff's 1st Supp. Briefing. In 2002, Int'l Trading Co. filed a statement doing business as Farbe. Firoze Fakhri was the signatory to

both statements. Farbe had not yet been created at the time of the subject importations in connection with earlier litigation in *Int'l Trading I*, *II*, *III*, and *IV*. Plaintiff's Brief on Issue Raised by Court at Oral Argument on August 23, 2006 ("Plaintiff's 2nd Supp. Briefing") at 2 (citing Articles of Incorporation of Farbe, Inc., attached to Plaintiff's 1st Supp. Briefing).

Eligibility for EAJA recovery is determined at the date of commencement of the litigation, and not at the date of the importation of the subject merchandise. 28 U.S.C. § 2412(d)(2)(B). Equitable defenses to such affirmative relief, however, may be entertained after the commencement of litigation at the trial court's discretion.

The Government did not contest Int'l Trading Co.'s legal capacity to sue in the underlying litigation. The Government was on notice that Int'l Trading Co. was in operation and existence, since it was listed on Customs' documentation, and the Government was served by Int'l Trading Co. at the commencement of this litigation. The Government did not question the legitimacy of Int'l Trading Co.'s existence until its June 2006 brief, submitted after the February 2006 oral argument.[14] This argument was raised only *after* the court, *sua sponte*, raised the issue of California Business law at oral argument. It is only at the fee recovery part of this litigation that Defendant argues that Fakhri and Int'l Trading Co. are not the proper Plaintiffs in this action, now that the existence of Farbe is known. *See* Defendant's Response at 4. Therefore, it would be unfair to entertain the Government's argument at this time that Int'l Trading Co. is not an eligible party under EAJA, when the substantive issues have already been decided. The defense of noncompliance is waived if the defendant fails to raise it. *Bryant v. Wellbanks*, 263 P. 332, 336 (Cal. Dist. Ct. App. 1927). Moreover, the Government has not argued reliance on such fictitious business statements.

The purpose of section 17920 of the California Fictitious Business Name statute is that public notice and record shall be given of the actual parties doing business "with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing or to whom they are giving credit or becoming bound." *Andrews v. Glick*, 272 P. 587, 588 (Cal. 1928). The overall purpose of the statute is to prevent fraud. *Berg Metals Corp. v. Wilson*, 339 P.2d 869, 878 (Cal. Dist. Ct. App. 1959). The Government has not alleged fraud here.

The issue is clarified by *Pinkerton's Inc.*, where the court held that even though Plaintiff could have sued the corporation, by suing and serving it under its fictitious business name, and by the corporation appearing under its fictitious business name in the action, the lawsuit was correct. 57 Cal. Rptr. at 360–61. The appellate court found

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[14] Whether fees and expenses are awarded to Farbe, Inc., Fakhri, or Int'l Trading Co. does not affect the obligations or the liability of the United States.

that the trial court had erred by concluding two separate appearances had to be made by the defendant corporation, one by its true legal name and one under its fictitious business name, and also erred by finding the action could proceed against the fictitious business name after the corporation had been dismissed. *Id.* This case stands for the proposition that doing business under a fictitious business name does not create an entity distinct from the person operating the business. Even though the EAJA statute was not at issue in *Pinkerton's*, the principle in that case is useful here.

Most important is the fact that the original entries of shop towels, for which Plaintiff is seeking recovery of fees and expenses now, were imported by Int'l Trading Co. before the creation of Farbe, Inc.[15] The refund check from Customs was made out to Firoze A. Fakhri, the holder of the fictitious name Int'l Trading Co., whose gains and losses were reported on his tax return. Farbe, Inc. was never involved in the transaction at issue, and did not begin doing business under the name Int'l Trading Co. until 2002, when it filed a new fictitious business name statement registering Int'l Trading Co. as the name under which Farbe was doing business as a corporation. Firoze A. Fakhri Affidavit, ¶ 3–4 (February 8, 2007); Fictitious Business Name Statement Form (April 25, 2002) (Proof of Publication attached to Plaintiff's 1st Supp. Brief). Because Farbe transacts business under the fictitious business name Int'l Trading Co., and at the time of the transaction at issue, Fakhri was transacting business under Int'l Trading Co., the three entities are undoubtedly interconnected, reinforced by the fact that all three names can be found on Fakhri's tax return. *See, e.g.*, *Vernon v. Schuster*, 688 N.E. 2d 1172, 1176–77 (Ill. 1997) (doing business under another name does not create an entity distinct from the person operating the business.); *Meller & Snyder v. R & T Props., Inc.*, 73 Cal. Rptr. 2d 740, 744–45 (Cal. Ct. App. 1998). Thus, Farbe , Inc. is an eligible party under EAJA. However, despite its eligibility, Plaintiff's failure to disclose relevant information to this court bar its claims under applicable equitable doctrines.

E
Special Circumstances Bar the Plaintiff From Recovering Under EAJA

While the Government's arguments concerning special circumstances are meritless, there still exist special circumstances not plead by Defendant that weigh in favor of a denial of fees. The "special circumstances" language in the statute requires the application

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[15] It is not certain that Farbe, Inc. even had standing in the underlying litigation originally commenced in 1998. However, it is unnecessary for the court to undertake such an analysis at this juncture.

of traditional equitable principles in determining whether a prevailing party is entitled to an EAJA award. *See, e.g., Air Transp. Ass'n of Can. v. FAA*, 156 F.3d 1329, 1333 (D.C. Cir. 1998); *Oguachuba v. INS*, 706 F.2d 93 (2d Cir. 1983);

The doctrine of unclean hands is equitable in nature and within the sound discretion of the trial court. *E.g., Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814–15, 65 S. Ct. 993, 89 L. Ed. 1381 (1945); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 64 S. Ct. 622, 88 L. Ed. 814 (1944). The defense need not be raised by a party as the court can invoke it *sua sponte*. *E.g., Devine v. Sutermeister*, 733 F.2d 892, 896 (Fed. Cir. 1984); *Gaudiosi v. Mellon*, 269 F.2d 873 (3d Cir. 1959). The maxim imposes itself on a party seeking affirmative relief, whether a corporation or an individual, requiring they act in good faith and conscience. *Precision Instrument Mfg. Co.*, 324 U.S. at 814–15. The doctrine is invoked to protect the integrity of the court. *Gaudiosi*, 269 F.2d at 881 (citing *Hall v. Wright*, 240 F.2d 787, 795 (9th Cir. 1957)) ("Courts are concerned primarily with their own integrity in the application of the clean hands maxim and even though not raised by the parties the court will of its own motion apply it.").

When seeking affirmative relief under EAJA, equity requires that a party has acted in good faith and fairly and not engaged in conduct "condemned and pronounced wrongful by honest and fair-minded men." 27A Am. Jur. 2d *Equity* § 129 (2007) (citing *N.Y. Football Giants, Inc. v. L.A. Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961)). The moral intent, and not the actual injury incurred, is the fundamental inquiry in determining whether a party has unclean hands. *Bishop v. Bishop*, 257 F.2d 495, 501 (3d Cir. 1958). Here, Int'l Trading Co.'s status as an eligible party directly affects whether it will recover upon its cause of action. Therefore, unclean hands is clearly available to bar any such equitable relief it seeks.

In the EAJA portion of the *Int'l Trading* litigation, the focus of the court's inquiry has centered on whether Int'l Trading Co. is an eligible party to recover costs and attorneys' fees. To that end and at the court's behest, the parties submitted two sets of supplemental briefing on the issue, in addition to Plaintiff's affidavits, federal income tax returns and business documentation associated with his company Int'l Trading Co., attesting to its eligibility as a party to recover under the statute. In its second supplemental briefing, Plaintiff submitted a third affidavit of Mr. Fakhri (dated May 26, 2006), finally disclosing the existence of his corporation, Farbe, Inc. The existence of the corporation is conspicuously absent from the affidavit of Fakhri's accountant, Michael A. Henry (March 26, 2006), or any other documentation provided by Plaintiff. It was only after the court's repeated requests for additional information about Fakhri, Int'l Trading Co., and Farbe to determine whether Plaintiff is an eli-

gible party that this information was disclosed to the court and to Defendant, more than three years after this EAJA litigation was commenced.

Fakhri has made a series of misrepresentations to this court by failing to disclose the existence of its corporation, a piece of information bearing on the central issue in this litigation. Plaintiff's failure to disclose this information cannot have been accidental, in light of the court's searching inquiry into Int'l Trading Co.'s records to determine its eligibility under the statute. The existence of Farbe, Inc. undoubtedly should have been brought to the court's attention earlier, prior to the court's repeated requests for information, to clarify whether Int'l Trading Co. is an eligible party.

In equity, Plaintiff is without clean hands and is thus barred from recovering under the statute.

V
CONCLUSION

For the above stated reasons, the court holds that Plaintiff's Application for Fees under EAJA is denied in its entirety.

FIROZE A. FAKHRI D.B.A. INTERNATIONAL TRADING CO., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 98–08–02658

ORDER AND JUDGMENT

Upon consideration of Plaintiff's Application For Fees and Other Expenses Pursuant to the Equal Access to Justice Act ("Plaintiff's Application"), and Plaintiff's Motion to Amend the Pleadings and Fee Application ("Plaintiff's Motion"); the court having reviewed all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED that Plaintiff's Application is DENIED; and it is further

ORDERED that Plaintiff's Motion is GRANTED; 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, August 31, 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 August 31, 2007.

Slip Op. 07–133

AMES TRUE TEMPER, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 05–00581

[United States Department of Commerce's final results of the thirteenth administrative review of the antidumping duty orders on heavy forged hand tools from the People's Republic of China sustained in part and remanded.]

Dated: August 31, 2007

Wiley Rein, LLP (*Timothy C. Brightbill* and *Charles O. Verrill, Jr.*), for plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Scott McBride*), of counsel, for defendant.

OPINION AND ORDER

Eaton, Judge: This matter is before the court on plaintiff Ames True Temper's ("Ames") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. By its motion, Ames challenges certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results for the thirteenth administrative review of the four antidumping duty orders covering imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC") made between February 1, 2003, and January 30, 2004 ("POR"). *See generally* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem."); *see also* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) ("Final Results").

With the exception of plaintiff's changed circumstances claim, *see infra* Part V., jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii)(2000). For the following reasons, Commerce's Final Results are sustained in part and remanded.

BACKGROUND

Ames is a domestic producer of HFHTs. On March 26, 2004, pursuant to Ames's request, Commerce initiated the thirteenth administrative review of the four antidumping duty orders applicable to imports into the United States of heavy forged bars/wedges, hammers/sledges, picks/mattocks and axes/adzes from the PRC. *See* Initiation of Antidumping and Countervailing Duty Admin. Revs. and Requests for Revocation in Part, 69 Fed. Reg. 15,788, 15,789 (Dep't of Commerce Mar. 26, 2004); *see also* HFHTs, Finished or Unfinished,

With or Without Handles From the PRC, 56 Fed. Reg. 6622 (Dep't of Commerce Feb. 19, 1991). In its review, the Department analyzed the international trade behavior of a number of respondents, including Shandong Huarong Machinery Co., Ltd. ("Huarong") and Tianjin Machinery Import & Export Corp. ("TMC"). *See* HFHTs From the PRC, 69 Fed. Reg. at 15,789–800. On March 10, 2005, Commerce issued its preliminary results rescinding reviews with respect to some companies and finding that others continued to sell their HFHTs in the United States at less than normal value.[1] *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 11,934, 11,935, 11,937 (Dep't of Commerce Mar. 10, 2005) ("Preliminary Results").

Plaintiff and the respondents filed with the Department case briefs contesting the Preliminary Results on June 13, 2005. *See* Pl.'s Mem. 3. The Department, having considered the parties' arguments, published in the Federal Register the Final Results on September 19, 2005. *See* Final Results, 70 Fed. Reg. 54,897. By its Final Results, Commerce: (1) assigned TMC's sales the PRC-wide dumping margins of 174.58 percent for axes/adzes, 139.31 percent for bars/wedges, 45.42 percent for hammers/sledges and 98.77 percent for picks/mattocks; and (2) assigned Huarong'ssales of axes/adzes a margin of 174.58 percent, and its sales of bars/wedges a rate of 139.31 percent. *See id*. at 54,898, 54,899.

STANDARD OF REVIEW

When reviewing a final antidumping determination from Commerce, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). To determine whether substantial evidence exists, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts

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[1] "Normal value" is the price at which the "foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the [U.S. price]." 19 U.S.C. § 1677b(a)(1)(B)(i).

Because China is a nonmarket economy, Commerce generally will calculate the normal value of merchandise produced and sold in that country based on surrogate values "of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings and other expenses." 19 U.S.C. § 1677b(c)(1). The surrogate values "shall be based on the best available information . . . in a market economy country or countries considered to be appropriate by the administering authority." *Id*.

from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

When reviewing the Department's treatment of various factors when calculating normal value, "the proper role of this court, . . . is to determine whether the methodology used by the [agency] is in accordance with law. . . . " *Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1368, 947 F. Supp. 525, 532 (1996) (internal quotation marks & citations omitted; ellipsis & alteration in original). That is, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Id.*, 947 F. Supp. at 532 (internal quotation marks & citations omitted).

DISCUSSION

I. Scrap Offset to Normal Value for Huarong

The Department will grant a requesting respondent an offset to normal value "for sales of the scrap generated during the production of the subject merchandise," Def.'s Resp. Pl.'s Mot. J. Upon Admin. R. ("Def's Resp.") 14 (citing *Shandong Huarong Mach. Co. v. United States*, 29 CIT ___ , ___ , Slip Op. 05–54 at 3–4 (May 2, 2005) (not reported in the Federal Supplement), only if the respondent can demonstrate that the scrap is "either resold or has commercial value and re-enters the respondent's production process." Issues & Decision Mem. for the 13th Administrative Review of HFHTs from the PRC (Dep't of Commerce Sept. 6, 2005) ("Issues & Dec. Mem.") at 30; *see also* 19 U.S.C. § 1677b(c)(1).[2] In the Final Results, the Department concluded that Huarong "[was] entitled to continue to receive an offset for its sales of steel scrap" that was originally granted in the Preliminary Results. Issues & Dec. Mem. at 31.

Commerce accepted Huarong's proffered allocation method for calculating the amount of the offset. *See id.* Under Huarong's formula, the scrap offset was determined by "allocating total scrap sales for the POR divided by total steel input used for the production of both subject and non-subject merchandise and then multiplied by the steel used in production of subject merchandise." *Id.* Using this methodology, "Huarong was able to take the total amount of scrap al-

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[2] That subsection provides, in pertinent part that, when determining the normal value of merchandise produced in a nonmarket economy country, Commerce shall rely on "the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1).

located for axes/adzes during the POR to calculate a per-unit amount of scrap allocated to one kilogram of the finished subject merchandise." *Id*. at 32.

Ames insists that "[t]his scrap offset allowance was erroneously granted . . . because the allocation method used to calculate the value of the scrap offset produces inaccurate results." Pl.'s Mem. 7. Plaintiff raises three related "flaws" in Huarong's allocation formula that it views as fatal to the grant of a scrap offset. First, Ames argues that Huarong's methodology fails to capture accurately Huarong's sales of scrap generated from the production of subject merchandise during the POR, specifically because Huarong "admitted during the administrative review that some of the scrap sold during the POR was generated from both subject and non-subject merchandise produced prior to the POR." Pl.'s Mem. 7. Second, Ames contends that "Huarong has repeatedly conceded that it cannot differentiate whether the scrap sold was produced from the manufacture of subject or non-subject merchandise." Pl.'s Mem. 8. Third, Ames insists that "Huarong has stated that it cannot correlate specific scrap sales to the production of subject merchandise." Pl.'s Mem. 8 (claiming that because Huarong cannot establish that the scrap was produced from subject merchandise and sold during the POR, Commerce lacks factual support for its finding of a " 'sufficient link' between recovery and sale of scrap generated by subject merchandise").

In addition, Ames contends that "[b]y accepting Huarong's method to determine the scrap offset . . . the Department assumes that the production of subject and non-subject merchandise generates the same percentage of scrap from the same amount of steel." Pl.'s Mem. 8–9. For plaintiff, this assumption results in unavoidable inaccuracies "[g]iven the substantial physical differences between the subject and non-subject merchandise that [Huarong] produce[s]. . . . ." Pl.'s Mem. 9.

Finally, Ames maintains that the Department's grant of the scrap offset based on Huarong's allocation method constitutes an unlawful departure from the agency's past practice because it did not accept this same allocation method in the eleventh review. *See* Pl.'s Mem. 7 ("In the Final Results, the Department deviated from its past agency precedent and granted Huarong a scrap offset to normal value."). Ames, therefore, asks the court to remand this case "and direct the Department to deny Huarong's scrap offset." Pl.'s Mem. 9.

Commerce asserts that it was justified in granting the scrap offset even though it acknowledges that Huarong "could not differentiate between scrap generated from production of subject and non-subject merchandise since scrap was collected for sale from all of its workshops." Issues & Dec. Mem. at 31. For the Department, this inability to differentiate did not preclude the grant of the scrap offset because Huarong established an adequate connection between the scrap re-

sulting from its manufacture of axes/adzes and the scrap sold. *See id*. ("[W]hile the Department determined that Huarong's accounting records cannot differentiate scrap sales generated by subject and non-subject merchandise, the Department finds that the scrap offset should not be denied because there was a sufficient link between the recovery and sale of scrap generated by subject merchandise.").

In addition, Commerce argues that it properly relied on the data contained in Huarong's books and records as support for its decision to grant the scrap offset. The Department observes that when making its calculations, it "usually utilizes company records so long as they are maintained in accordance with the exporting country's [generally accepted accounting principles] and reasonably reflect actual costs." Def.'s Resp. 14 (citing 19 U.S.C. § 1677b(f)(1)).[3] For Commerce, "[r]ather than penalize Huarong because its records are not exactly tailored to antidumping calculations, the agency permissibly relied upon Huarong's existing record keeping system and allocation." Def.'s Resp. 15.

As to the methodology used to calculate the amount of the offset, Commerce insists that its decision to accept Huarong's method was reasonable. The Department points out that the antidumping statute does not prescribe a method for calculating scrap offsets but rather leaves the decision to Commerce's discretion. *See* Def.'s Resp. 15. Thus, while conceding that "it is preferable for costs to be tied as closely as possible to subject merchandise," the Department urges that it "may consider allocations between subject and non-subject merchandise, so long as the agency is satisfied that the allocation method used does not cause inaccuracies or distortions." Def.'s Resp. 15 citing 19 C.F.R. § 351.401(g)(4) (2005)) ("The Secretary will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made with respect to sales of merchandise that does not constitute subject merchandise. . . .").

Ames's claim presents both a legal and a factual question: (1) whether the Department acted in accordance with law when itaccepted Huarong's allocation methodology and granted Huarong the scrap offset (a challenge to the methodology); and (2) whether Commerce supported with substantial evidence its decision to grant Huarong the offset. With respect to the legal aspect of Ames's claim, the court notes that the antidumping statute is silent as to how Commerce is to determine whether a respondent is entitled to a scrap offset to normal value and, if so entitled, how to calculate the amount of the offset. Under such circumstances, "the court does not

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[3] Subsection 1677b(f)(1) codifies the intent expressed in the Statement of Administrative Action ("SAA") that "[c]osts shall be allocated using a method that reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review." SAA, Uruguay Round Agreements Act, accompanying H.R. Rep. No. 103–316, 656, 835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4172.

simply impose its own construction on the statute . . . [but] [r]ather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The Department, while not choosing to fill in the statutory gap with a regulation, has understood the antidumping statute to allow for the "offset [of] production costs with the sales revenue only if the byproduct is either resold or has commercial value and re-enters the respondent's production process." Issues & Dec. Mem. at 30; *see also Guangdong Chem. Imp. & Exp. Corp. v. United States*, 30 CIT ___, ___, 460 F. Supp. 2d 1365, 1373 (2006) ("19 U.S.C. § 1677b(c) does not mention the treatment of by-products, nonetheless, Commerce sometimes grants a respondent a credit for a by-product generated in the manufacturing process that is either reintroduced into production or sold for revenue.") (internal quotation marks, citation & alterations omitted).

The court finds that the Department acted in accordance with law in granting Huarong the scrap offset. It is clear from the record that Commerce reasonably based its decision to grant Huarong the offset on the information contained in the company's accounting books and records demonstrating that the scrap was sold. "As a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation, or reject the records if accepting them would distort the company's true costs." *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999). Here, the Department accepted Huarong's books after verification and found that the company sold a quantifiable amount of scrap during the POR.

Commerce also verified: (1) the amount of scrap generated during the POR from the production of subject and non-subject merchandise; and (2) the total amount of steel used to produce both kinds of merchandise. Using these two numbers, Commerce calculated a scrap percentage. This percentage applied to the verified amount of steel used in the manufacture of the axes/adzes. While this calculation does assume that both subject and non-subject merchandise produce comparable amounts of scrap, there is nothing on the record indicating that this assumption is not reasonable. *See* Issues & Dec. Mem. at 31 (acknowledging that Huarong cannot differentiate between subject and non-subject scrap sales, but granting the offset "because there was a sufficient link between the recovery and sale of scrap generated by subject merchandise").

Thus, although it would be possible to make a more accurate adjustment were there more facts on the record, it cannot be said that Commerce's methodology is unreasonable. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chev-*

ron."). The court, therefore, concludes that Commerce was justified in granting Huarong a scrap offset.

As to Ames's claim that Commerce violated its past practice in granting the offset, the Department insists:

> Although [Ames] is correct that in a past administrative review of this order the Department denied Huarong the scrap offset, the Department finds that the facts of this review regarding Huarong's offset are distinguishable. First, while the Department determined that Huarong's accounting records cannot differentiate scrap sales generated by subject and non-subject merchandise, the Department finds that the scrap offset should not be denied because there was a sufficient link between the recovery and sale of scrap generated by subject merchandise. This is contrary to the facts of the [eleventh review], where the Department denied Huarong the offset because there was an insufficient link between the recovery and sale of subject merchandise.

Issues & Dec. Mem. at 31 (internal citations omitted).

The court finds that Commerce has not violated its past practice. While it is true that Commerce initially denied Huarong a scrap offset in the eleventh administrative review, on remand from this Court, the Department reopened the record, considered the additional evidence regarding Huarong's sales of scrap during the period of review and granted the offset. *See Shandong Huarong Mach. Co.*, 29 CIT at ____, Slip Op. 05–54 at 8. That determination was sustained by this Court. Thus, the past practice on which plaintiff relies was not sustained by this Court, while the practice to which it objects was. *See Shandong Huarong Mach. Co. v. United States*, 31 CIT ____, ____, Slip Op. 07–3 at 9 (Jan. 9, 2007) (not reported in the Federal Supplement).

Because the court finds that Commerce properly based its decision to grant Huarong the steel scrap offset on the company's financial books and records, applied a reasonable methodology, supported its conclusion with substantial evidence and did not violate past agency practice, the court sustains Commerce's grant of the offset.

II. Surrogate Value for Brokerage and Handling Expenses

Plaintiff next insists that Commerce erred in using the data contained in Certain Hot-Rolled Carbon Steel Flat Products from India, 66 Fed. Reg. 50,406 (Dep't of Commerce Oct. 3, 2001) ("HR from India"), as a surrogate value for brokerage and handling expenses. *See* Pl.'s Mem. 9–10. Commerce maintains that it relied on the value in HR from India because it was reliable and because it was "the only [brokerage and handling] value on the record of this review. . . . " Issues & Dec. Mem. at 34.

In support of its position, Ames urges that prior to the publication of the Final Results, it placed on the record the brokerage and handling value contained in Certain Stainless Steel Wire Rod from India, 63 Fed. Reg. 48,184 (Dep't of Commerce Sept. 9, 1998) ("SSWR"). *See* Pl.'s Mem. 10. Thus, Ames insists that "[t]he Department erroneously found that the surrogate value from HR from India was the only [brokerage and handling] value on the record." Pl.'s Mem. 10.

According to Ames, it placed the SSWR brokerage and handling data on the record on two different occasions, both taking place before Commerce reached its final determination. Plaintiff claims that it first notified Commerce of the alternate surrogate value nine months prior to the Final Results in a letter to the Department. *See* Pl.'s Mem. 10. In its letter, plaintiff stated:

> For purposes of valuing [r]espondents' brokerage and handling expenses, the Department should continue to utilize the public version questionnaire response placed on the record in Stainless Steel Wire Rod from India, 63 Fed. Reg. 48,184 (Sept. 9, 1998) (admin. rev., final). This surrogate has been consistently used by the Department in this and in dozens of other recent administrative proceedings.

Letter from Wiley Rein LLP to The Honorable Donald L. Evans, re: HFHTs From the PRC: Publicly Available Information on Factor Values (Dec. 28, 2004) (quoted in Pl.'s Mem. 10).

Ames also asserts that it put the SSWR brokerage and handling value on the record through its case brief in response to Commerce's Preliminary Results filed on June 13, 2005. *See* Pl.'s Mem. 10. In its case brief, Ames stated that it had placed the SSWR value on the record by way of its December 28, 2004, letter. *See* Case Br. of Ames True Temper (June 13, 2005) 8–9.

Plaintiff further argues that Commerce was on notice that the SSWR data existed because "[i]n the Preliminary Results, the Department stated that it had used the rates reported in SSWR to value the [brokerage and handling] costs." Pl.'s Mem. 11 (citing Preliminary Results, 70 Fed. Reg. at 11,941). While the Preliminary Results do contain this statement, Commerce, in fact, used the HR from India data. Nonetheless, for plaintiff, Commerce's indication in the Preliminary Results that it determined the value of brokerage and handling costs using the SSWR data precluded the Department from claiming that the data was on the record.

Finally, plaintiff claims that Commerce violated its past practice of valuing brokerage and handling using the value in SSWR. *See* Pl.'s Mem. 13 ("Although the Department may deviate from its past practice, it must provide an explanation for its departure."). As plaintiff states:

> The Department has used the SSWR surrogate in many other administrative proceedings, including several prior administra-

> tive reviews of this antidumping order. For example, in the eleventh review of this order, the Department determined that SSWR was the most appropriate surrogate value. . . .
>
> The Department has failed to provide any reasons for its departure from its prior practice. Furthermore, nothing has changed in the review under appeal that would alter the Department's prior holding and findings.

Pl.'s Mem. 12, 13 (internal citations omitted).

Commerce counters by first pointing out that plaintiff at no point contests the reasonableness of the HR from India data. *See* Def.'s Resp. 17 ("Ames maintains that Commerce should have used the surrogate value used in the prior review, i.e., the calculations from SSWR — without ever maintaining that the surrogate value used is unreasonable.").

Next, Commerce insists that Ames never put its preferred data on the record:

> [Ames] argues that, for the final results, the Department should value [brokerage and handling] using a value from SSWR [new shipper reviews]. However, the only [brokerage and handling] value on the record of this review is the one used in the preliminary results. [Title 19 C.F.R. §] 351.301(c)(3)(ii) of the Department's regulations allows interested parties to submit factor information up to 20 days after the preliminary results. Consequently, we note that after the preliminary results, [Ames] had an opportunity to place the SSWR . . . [brokerage and handling] value on the record, but did not. The Department cannot use information not on the record of this review for purposes of valuing [brokerage and handling] in these final results and, therefore, will continue to use the [brokerage and handling] surrogate value from HR from India. We note that the brokerage and handling value in HR from India is generally contemporaneous with the POR and, thus, is an appropriate surrogate.

Issues & Dec. Mem. at 34. Thus, it is the Department's position that merely referencing the SSWR data was not enough; if Ames wanted the value considered, it should have placed it on the record.

In addition, the Department insists that its reference to the SSWR data in the Preliminary Results was a mistake. *See* Def.'s Resp. 18. Commerce states that "[t]his inadvertency does not change the information upon the record. As the underlying calculations show, Commerce used the calculations from [HR from India] in the Preliminary Results." Def.'s Resp. 18 (citation omitted).

Finally, in response to Ames's claim that the use of the HR from India value constituted an unlawful deviation from its past practice, Commerce notes that "what represents the best available informa-

tion may vary on a case-by-case basis." Def.'s Resp. 19 (internal quotation marks omitted). Thus, the Department maintains that it was not bound to use information that was not on the record simply because it had previously used that information in earlier reviews.

Where the subject merchandise is exported from a nonmarket economy country, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise. . . . " 19 U.S.C. § 1677b(c)(1). The statute further directs Commerce to value the factors of production "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]." *Id.*

As the Court of Appeals for the Federal Circuit has held, " 'the process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise.' " *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997)). Notably, Ames does not take issue with the reasonableness of the HR from India data but rather bases its demand for a remand solely on its argument that, because the Department used the SSWR data as a surrogate value for brokerage and handling costs in prior reviews, it had to explain why it did not rely on that data when making the same valuation in this review.

For Commerce, the HR from India value for brokerage and handling was the best information available because: (1) it was "generally contemporaneous with the POR"; and (2) it was the "only [brokerage and handling] value on the record of this review. . . . " Issues & Dec. Mem. at 34.

The court sustains Commerce's determination. First, despite plaintiff's claim to the contrary, at no point in any of its filings did Ames place the SSRW brokerage and handling value on the record. Instead, plaintiff merely made mention of the SSWR source. Next, Ames's insistence that Commerce's previous use of the data and, in this case, mistaken reference to the SSWR source in the Preliminary Results created an obligation to use the SSWR brokerage and handling value overstates the case. As has been previously noted, plaintiff knew that the SSWR data was not used by Commerce in the Preliminary Results. If Ames wished Commerce to employ the brokerage and handling surrogate value from SSWR in its calculation of the normal value of Huarong's axes/adzes, it should have made both its position and the actual value amount known to the Department within twenty days after publication of the Preliminary Results. *See* 19 C.F.R. § 351.301(c)(3)(ii) (permitting an interested party to submit data to be used for valuing factors of production in the final results 20 days after publication of the preliminary results).

Most importantly, the failure to use a particular data set from a previous investigation does not constitute a past practice. It is well

settled that what is the best available information may change from one investigation to the next. *See Nation Ford Chem. Co.*, 166 F.3d at 1377 ("Whether . . . analogous information from the surrogate country is 'best' will necessarily depend on the circumstances. . . . "). At no point does Ames claim that the HR from India data is unreliable, nor does it contend that the SSWR data is superior to that used by Commerce.

Thus, the court sustains Commerce's use of the HR from India surrogate value for brokerage and handling.

III. Huarong's Production of Metal Pallets

Ames further asserts that the Department unreasonably denied its request that Commerce "reopen the administrative record and require the respondents to report the associated factors used in producing metal pallets." Pl.'s Mem. 13. In particular, Ames argues that Commerce had to account for the cost of "oxygen, acetylene, and welding solder or rods" or other materials used for welding steel together to construct the metal pallets even though Commerce insists that there was no evidence on the record that such materials were employed in the pallet-production process. Pl.'s Mem. 13, 14. That is, given: (1) that Huarong made its pallets using a welding process; and (2) that the record contained no values for inputs necessary to weld the pallets together, Commerce should have conducted a more detailed investigation.

To support its position, Ames relies on this Court's finding in *Shandong Huarong Mach. Co. v. United States*, 29 CIT ___, Slip Op. 05–54 (May 2, 2005). In remanding that case, the Court held that "it is not sufficient for Commerce to simply rely on the absence of evidence to reach its decision; rather, Commerce must provide findings and analysis justifying its determination." *Id.*, Slip Op. 05–54 at 23. For Ames, the Court's decision in *Shandong* applies here and requires remand of the Final Results with instructions for Commerce to reopen the record and collect more evidence concerning Huarong's construction of metal pallets. Specifically, Ames asserts that remand is necessary because the Department "supported its decision . . . by explaining that 'there is no evidence on the record to indicate that Huarong has used solder, welding rods or inert gases in the manufacture of pallets.' " Pl.'s Mem. 15 (quoting Issues & Dec. Mem. at 36).

In addition, Ames contends that Commerce's conclusion that the verification report showed that there was no welding rod, solder or inert gases at Huarong's packing facility, is erroneous. *See* Pl.'s Mem. 15. According to Ames:

> Contrary to the Department's claim, the verification report did not include an affirmative finding that Huarong did not use or have any of the listed associated factors. Rather, the verification report simply did not mention or include observations re-

> garding any inputs associated with the production of steel pallets, other than metal.

Pl.'s Mem. 15 (emphasis & citation omitted).

The Department maintains that it reasonably declined to reopen the record. For Commerce:

> Huarong reported all labor, electricity and steel used in the production of pallets and . . . the Department verified these usage factors. A careful review of Huarong's verification report reveals that the Department noted no solder, welding rods, gas tanks or inert gases in Huarong's packing facility. In addition, there is no evidence on the record to indicate that Huarong has used solder, welding rods or inert gases in the manufacture of pallets.

Issues & Dec. Mem. at 36.

The Department does not view this conclusion as one based on the absence of evidence. *See* Def.'s Resp. 20. It is Commerce's position that "[a]bsent evidence that a company actually utilizes a particular input, there is no basis to value that input." Def.'s Resp. 19. Commerce further emphasizes that it verified Huarong's reported factors of production relating to metal pallets at Huarong's packing facility and did not find any evidence that welding rods, solder or inert gases were used. *See* Def.'s Resp. 19 ("Because Huarong's verified factors of production do not include rivets, welding flux, welding solder, acetylene, and oxygen, it is entirely lawful to decline to value these items.") (emphasis omitted)). In other words, "Commerce does not assume that a company utilizes a particular input. Rather, [it] values the factors of production actually used." Def.'s Resp. 20.

Ames does not ask Commerce to assume the use of a particular input but rather points out that some input must have been used to construct the pallets. *See* Pl.'s Reply 7 ("Although the factors of production for metal pallets may include labor, electricity and steel, common sense dictates that other unreported factors had to be used to produce the pallets. . . . [I]t is inexplicable how the respondent could have manufactured the pallets without utilizing any other inputs."). This proposition seems irrefutable. Therefore, despite Commerce's having verified Huarong's responses, it is apparent that something held the pallets together and therefore something has been overlooked. Commerce is instructed to reopen the record and obtain additional evidence regarding Huarong's production of metal pallets.

IV. Commerce's Application of By-Product Credit and Packing Materials Cost Directly to Normal Value

Next, Ames urges the court to find unlawful Commerce's decision to apply the credit for Huarong's by-product sales and add the value of Huarong's packing material costs directly to normal value. Ames

contends that "[t]he Department erred in directly adding the packing material costs to and subtracting the byproduct offset from [normal value]. Instead, the Department should have added the cost of packing materials to the total cost of manufacturing ("TOTCOM"), and deducted the byproduct offset from [cost of manufacturing], before applying the financial ratios to them." Pl.'s Mem. 17. For its part, the Department maintains that its methodology is consistent with its current practice of applying the by-product offset and cost of packing materials directly to normal value where the surrogate financial statement does not specifically account for those items. *See* Def.'s Resp. 21.

As noted, when constructing the normal value of merchandise exported from a nonmarket economy country, Congress has provided that Commerce base its determination on "the value of the factors of production utilized in producing the merchandise. . . . " 19 U.S.C. § 1677b(c)(1). In doing so, the Department typically relies on factor of production data from a surrogate country, i.e., a "market economy countr[y] that [is] at a level of economic development comparable to that of the nonmarket economy country. . . . " 19 U.S.C. § 1677b(c)(4); *see Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001). Once Commerce has determined the value of the factors of production, the statute mandates that it add to that value "an amount for general expenses and profit plus . . . other expenses." 19 U.S.C. § 1677b(c)(1); *see also Guandong Chem. Imp. & Exp. Corp.*, 30 CIT at ___ , 460 F. Supp. 2d at 1373. In calculating the amount of these expenses, Commerce generally applies financial ratios derived from a surrogate company's (1) overhead; (2) selling, general and administrative ("SG&A") expenses; and (3) profit to the surrogate factors of production values.

Here, Commerce used as its surrogate source financial data reported by 2,031 Public Limited Companies in India for the period 2002–2003 contained in the August 2004 Reserve Bank of India Bulletin ("RBI Bulletin") to construct the overhead and SG&A surrogate financial ratios. *See* Preliminary Results, 70 Fed. Reg. at 11,942. Because it could find no evidence of how by-product sales or packing materials were treated in the RBI Bulletin, Commerce applied the amounts associated with these items directly to normal value. *See* Issues & Dec. Mem. at 38.

Ames's primary argument is that Commerce unreasonably concluded that the surrogate companies' financial statements in the RBI Bulletin did not account for the by-product offset or packing material costs simply because the statements did not list those values. *See* Pl.'s Mem. 17. For plaintiff, "[r]egardless of whether costs and materials are individually identified in a surrogate company's financial statements, it can be assumed that all of the costs involved in producing merchandise, such as direct materials, scrap offsets, and

packing materials, will be included in the financial statements." Pl.'s Mem. 17 (citing Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the PRC, 69 Fed. Reg. 35,296 (Dep't of Commerce June 24, 2004) (final determination)).

In support of its position, Ames argues:

> In order to calculate an accurate normal value, the Department must apply the overhead and SG&A ratios on an apples-to-apples basis. This can only be accomplished by including the same costs that were used to derive the overhead and SG&A ratios in the production costs in the calculation of [cost of manufacture] and TOTCOM. Thus, the Department should have deducted the respondent's byproduct offset from [cost of manufacturing] before applying the overhead ratio, which was devised from financial data that accounted for byproduct offset. Similarly, the Department should have added packing material costs to TOTCOM before applying the SG&A ratio, in which packing material costs were accounted for.

Pl.'s Mem. 18–19.

As previously mentioned, "as long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Shieldalloy Metallurgical Corp.*, 20 CIT at 1368, 947 F. Supp. at 532 (internal quotation marks & citations omitted). The court finds that Commerce has supported with substantial evidence its practice of directly adding the packing material costs to – and subtracting the by-product offset from – normal value when such values are not specifically accounted for in the surrogate financial statements upon which the surrogate financial ratios are based.

First, the court observes that both Ames's preferred methodology and that of Commerce require the making of assumptions. While Ames does not dispute Commerce's conclusion that the financial statements found in the RBI Bulletin do not mention either by-product credits or packing material costs, it insists that Commerce must assume that those surrogate companies' financial statements took the unlisted values into account. Commerce, on the other hand, assumes that the absence of specific values for by-product sales and packing material costs from the surrogate financial statements means that they were not taken into account.

The court cannot agree with Ames. In using its preferred methodology, Commerce followed its reasoning in Fresh Garlic From the PRC, 69 Fed. Reg. 33,626 (Dep't of Commerce June 16, 2004) at cmt. 6. *See* Issues & Dec. Mem. at 38.

> Where the Department cannot ascertain from the surrogate financial information whether packing expenses are in the surro-

> gate financial ratio calculations, such as in the denominator, it is not necessarily appropriate to include packing expenses in the production costs to which the surrogate financial ratios are applied. If packing expenses are not in the denominator of surrogate financial ratio calculations or, as here, we cannot identify where and to what extent such expenses are in the ratio calculation, and we apply the ratios to production costs that include amounts for packing materials and labor, we may distort the amount of overhead, SG&A, and profit that we calculate for the cost of production. Accordingly, for the final results of these reviews, in calculating the amount of overhead, SG&A, and profit included in the cost of production, we have determined not to apply the surrogate financial ratios to production costs that include packing expenses (i.e., we have removed packing expenses from the production-cost build-up to which we apply the surrogate ratios).

Fresh Garlic From the PRC, 69 Fed. Reg. 33,626 at cmt. 6. In like manner, "Commerce developed a practice that provided for the application of a by-product credit to normal value when financial statements used as a surrogate do not expressly address the treatment of by-products." Def.'s Resp. 21.

Even though Commerce's methodology requires the making of an assumption, i.e., that the RBI Bulletin financials do not capture by-product sales or packing material costs, the court cannot say that its assumption is unreasonable. As the *Guandong* Court noted, "[e]ven if Guandong's alternative approach to implementation of the statute were reasonable, the court could not substitute its own view of the statute for Commerce's reasonable interpretation or implementation." *Guandong Chem. Imp. & Exp. Corp.*, 30 CIT at ___, 460 F. Supp. 2d at 1376 (citing *Chevron U.S.A. Inc.*, 467 U.S. at 844).

Therefore, because Commerce has adequately explained its decision to apply the by-product offset and packing material costs directly to normal value, the court upholds the Department's methodology.

V. Changed Circumstances Review

Finally, Ames asserts that, because Commerce applied adverse facts available ("AFA") to Huarong's and TMC's sales of bars/wedges in the ninth, twelfth and thirteenth reviews based on their participation in the agency sales invoicing scheme, the Department should have granted Ames's request that it initiate a changed circumstances review for the tenth and eleventh reviews pursuant to 19 U.S.C. § 1675(b)[4] and 19 C.F.R. § 351.216.[5] *See* Pl.'s Mem. 19; Pl.'s Supplemental Br. 1–4; *see also Shandong Huarong Mach. Co. v.*

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[4] Subsection 1675(b) provides, in pertinent part:

United States, 30 CIT ___, ___, 435 F. Supp. 2d 1261, 1270 (2006) (finding that respondents' failure to provide relevant information about their agency sales invoicing scheme justified Commerce's application of AFA). By its request, Ames had hoped to demonstrate that the agency sales invoicing scheme was present during the period of investigation for each of those reviews too. In the tenth and eleventh reviews, Commerce did not apply AFA to respondents' bars/wedges sales.

Commerce maintains that its "refusal to reopen closed cases remains squarely within [its] discretion," and is not reviewable by this Court. Def.'s Resp. 24 (citing *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534–35 (1946)). For the Department, "an agency's refusal to reopen a closed case is generally committed to agency discretion by law and therefore exempt from judicial review." Def.'s Resp. 24 (internal quotation marks & citation omitted).

With respect to Commerce's insistence that its denial of plaintiff's request is immune from judicial review, the court finds that Commerce overstates its claim that an appeal of a denial of a request for a changed circumstances review cannot be heard. This Court has recently held otherwise. *See Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 30 CIT ___, ___, 464 F. Supp. 2d 1350, 1355–56 (2006) (finding jurisdiction under subsection 1581(i) to hear an appeal of Commerce's determination denying a request for a changed circumstances review). Nonetheless, the court finds that, here, Ames has asserted no valid basis for jurisdiction. Ames claims that the court has jurisdiction to hear its appeal under 28 U.S.C. § 1581(c). Compl. ¶ 1. Subsection (c) provides this Court with jurisdiction to hear appeals of those determinations listed in 19 U.S.C. § 1516a. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004) ("Section 1581(c) provides the court with exclusive jurisdiction over actions commenced under section 516A of the Tariff Act [19 U.S.C. § 1516a]."). A determination by Commerce (as

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> Whenever the administering authority . . . receives information concerning, or a request from an interested party for a review of—
>
> (A) a final affirmative determination that resulted in an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or in a countervailing duty order under this subtitle or section 1303 of this title, . . .
>
> which shows changed circumstances sufficient to warrant a review of such determination or agreement, the administering authority . . . shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

19 U.S.C. § 1675(b)(1).

[5] The regulations permit the Department to conduct a changed circumstances review either on request from an interested party or on its own initiative. *See* 19 C.F.R. § 351.216(b), (d).

distinct from the United States International Trade Commission) denying a request for a changed circumstances review is not among the listed determinations that can be reviewed pursuant to section 1516a. *See AOC Int'l v. United States*, 17 CIT 1412, 1414–15 (1993) (not reported in the Federal Supplement); *Trs. in Bankr. of N. Am. Rubber Thread Co.*, 30 CIT at ___, 464 F. Supp. 2d at 1355–56. Thus, despite Ames's claims to the contrary, the court has no jurisdiction under 28 U.S.C. § 1581(c) to hear its appeal regarding Commerce's denialof a request to initiate a changed circumstances review.

CONCLUSION

Based on the foregoing, the court sustains in part and remands Commerce's Final Results. On remand, Commerce is instructed to render a determination in accordance with this opinion. Remand results are due on December 3, 2007. Comments on the remand results are due on January 2, 2008. Any replies to such comments are due on January 14, 2008.

Slip Op. 07–134

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

DRYGEL, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No.: 03–00832

Held: Plaintiff's motion for summary judgment denied. Summary judgment is granted in favor of the Defendant.

Dated: September 4, 2007

Neville Peterson, LLP, (*John M. Peterson*, *Curtis W. Knauss* and *Maria E. Celis*) for Drygel, Inc. Plaintiff.

Peter D. Keisler, Assistant Attorney General. *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, *Bruce N. Stratvert*, Civil Division, Commercial Litigation Branch, United States Department of Justice, Defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff Drygel Inc. ("Plaintiff" or "Drygel") challenges the classification of Gel-A-Mint® MagikStrips® ("MagikStrips®") by the United States Bureau of Customs and Border Protection[1] ("Defendant" or "Customs") under Sub-

[1] The Bureau of Customs and Border Protection was renamed United States Customs

heading 2106.90.99 of the Harmonized Tariff Schedule of the United States ("HTSUS") covering "[f]ood preparations not elsewhere specified or included[.]" Plaintiff maintains that the merchandise at issue is properly classified under Subheading 3306.90.00, HTSUS, as "preparation for oral or dental hygiene." This matter is before the court on cross-motions for summary judgment pursuant to USCIT R. 56.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581 (2000).

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id*. Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Background

MagikStrips® are thin, sugar-free breath strips that dissolve when placed on the tongue, releasing their ingredients. *See* Mem. Supp. Pl.'s Mot. Sum. J. ("Drygel's Brief") at 1–2; Pl.'s Statement Material Facts Not Dispute ("Drygel's Facts") ¶ 2. Magikstrips® are manufactured in Japan and are packaged in small plastic containers for individual sale at retail stores. *See* Drygel's Brief at 2; Drygel's Facts ¶¶ 1, 8; Def.'s Resp. Pl.'s Statement of Material Facts Not Dispute ("Customs' Facts") ¶¶ 1, 8.

Plaintiff Drygel imported MagikStrips® are Subheading 3306.90.00, HTSUS.[2] *See* Drygel's Facts ¶ 2; Customs' Facts ¶ 2. Customs liquidated the subject merchandise under Subheading

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and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed. Reg. 20,131 (April 23, 2007).

[2] Heading 3306, HTSUS, provides:

"[p]reparation for oral or dental hygiene, including denture fixative pastes and pow-

2106.90.99, HTSUS.[3] *See* Drygel's Facts ¶ 2; Custom's Facts ¶ 2. Plaintiff timely filed protests claiming that the correct classification of the subject merchandise is under Subheading 3306.90.00, HTSUS, contesting Customs' classification under Subheading 2106.90.99, HTSUS. *See* Drygel's Facts ¶ Customs' Facts ¶ 3. Plaintiff timely commenced the instant action. *See* Drygel's Facts ¶ 3; Custom's Facts ¶ 4. All liquidated damages, charges and exactions with respect to the subject entries were paid prior to the commencement of this action. *See* Drygel's Facts ¶ 5; Customs' Facts ¶ 5.

II. Parties' Contentions

A. Plaintiff's Contentions

Plaintiff maintains that Customs erred when it classified MagikStrips® under Heading 2106, HTSUS, because MagikStrips® are specifically provided for in Heading 3306, HTSUS. *See* Drygel's Brief at 7–13. According to Plaintiff, Customs failed to follow the General Rules of Interpretation of the HTSUS ("GRIs") and failed to employ the common commercial meaning of the tariff terms when classifying MagikStrips.® *See* Drygel's Brief at 7–9. Plaintiff submits that the term hygiene encompasses health and cleanliness and concludes that "reduction of volatile compounds in the mouth" and the "masking of malodor or perfuming of the mouth" would promote oral hygiene. Drygel's Brief at 8.

Plaintiff claims that menthol represents 5% of MagikStrips'® dry weight with an error margin of 3%.[4] *See* Drygel's Brief at 8; Affirmation Issac Zaksenberg Supp. Pl.'s Mot. Sum. J. ("Zaksenberg I Affir-

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ders; yarn used to clean between the teeth (dental floss), in individual retail packages[.]"

Subheading 3306.90.00, provides: "[o]ther[.]"

[3] Heading 2106, HTSUS, provides:
"[f]ood preparations not elsewhere specified or included[.]"

Subheading 2106.90, provides: "[o]ther[.]"

Subheading 2106.90.99, provides: "[o]ther[.]"

[4] In its motion, Plaintiff initially claimed that MagikStrips® contain menthol at the concentration of 15% of their dry weight. *See* Drygel's Brief at 2; Zaksenberg I Affirmation ¶ 5. Plaintiff further claimed that MagikStrips® contain citric acid, which "promote[s] the production of saliva which acts to cleanse the mouth through the reduction of the amount of bacteria." Zaksenberg I Affirmation ¶ 6. However, Customs' laboratory analysis of MagikStrips® revealed that they consist of only 5% percent menthol with an error margin of 3%. *See* Customs' Brief, Exhibit 2. The laboratory test did not detect any citric acid in MagikStrips.® *See id*.

At the oral argument held before this court on July 10, 2007, Plaintiff changed its position arguing that menthol at the concentration of 5%, plus or minus 3%, was sufficient to impart antimicrobial properties and to perfume the mouth. Also at the oral argument, Plaintiff argued that MagikStrips® are classifiable under Heading 3306 solely based on their menthol content. Notably, Plaintiff did not dispute the results of Customs' laboratory test.

mation") ¶ 5. According to Plaintiff, menthol at this concentration has antimicrobial properties and acts as a deodorizer that perfumes the mouth. *See id.* Plaintiff also claims that MagikStrips® contain sucrose palmitate or sucrose esters of fatty acid, which also has antimicrobial properties. *See* Pl.'s Resp. Def.'s Rule 56 Statement ¶ 1; Second Affirmation Issac Zaksenberg Supp. Pl.'s Mot. Sum. J. ("Zaksenberg II Affirmation") ¶ 5.

In support of its claim, Plaintiff cites the patent for a similar competing product named Listerine® "fast dissolving orally consumable films" ("Listerine® Patent"). *See* Drygel's Brief at 8–9, Exhibit C. The Listerine® Patent provides, *inter alia*, that Listerine® "achieves its antimicrobial effect through a combination of essential oils that penetrate and kill the microorganisms." Drygel's Brief, Exhibit C. Plaintiff notes that menthol is one of the essential oils listed in the Listerine® Patent. *See* Drygel's Brief at 8. Arguing that MagikStrips® contain a high concentration of menthol, Plaintiff concludes that MagikStrips® have antimicrobial properties and promote oral hygiene. *See id.* Plaintiff also relies on several websites to support its proposition that MagikStrips'® ingredients, menthol and sucrose palmitate or sucrose esters of fatty acid, have antimicrobial properties. *See* Drygel's Brief at 9, Exhibits D, E; Pl.'s Resp. Def.'s Mot. Sum. J. ("Drygel's Response") at 4; Zaksenberg II Affirmation ¶ 5.

In addition, Plaintiff contends that the Explanatory Notes ("ENs") specifying mouth washes and oral perfumes provide strong support for classifying MagikStrips® under Heading 3306, HTSUS. *See* Drygel's Brief at 9–10. Plaintiff states that MagikStrips® perform the same function as a traditional mouth wash by reducing the number of bacteria and volatile compounds. *See id.* at 10. Plaintiff also states that, by stimulating saliva production in the mouth, MagikStrips® act as an effective oral perfume that masks malodor and imparts mint fragrance. *See id.* Plaintiff thus concludes that MagikStrips® are an effective mouth wash and oral perfume as contemplated in the ENs for Heading 3306, and argues that MagikStrips® should be classified under that heading. *See id.* at 3, 10–11.

Plaintiff argues that the United States Court of Appeals for the Federal Circuit ("CAFC") would, pursuant to its decision in *Warner-Lambert Co. v. United States* ("*Warner-Lambert CAFC*"), 407 F.3d 1207 (Fed. Cir. 2005), classify MagikStrips® under Heading 3306, HTSUS. *See* Drygel's Brief at 11. Plaintiff contends that Customs, when citing to *Warner-Lambert CAFC* for the proposition that Heading 3306 requires "breakdown and absorption of unwanted substances in the mouth" and "a cleansing effect by purging activity," mischaracterizes the CAFC's holding. Drygel's Response at 1–4. According to Plaintiff, *Warner Lambert CAFC* stands for the proposition that a product may be properly classified under Heading 3306 if:

(1) it is an oral perfume; (2) it breaks down or removes volatile compounds in the mouth; or (3) it mechanically purges odor-causing compound in the mouth. *See* Drygel's Brief at 12. Plaintiff argues that MagikStrips® meet the criteria set forth in *Warner-Lambert CAFC* because menthol and sucrose palmitate remove bacteria and perfume the mouth. *See* Drygel's Brief at 12–13; Drygel's Response at 4.

In response to Customs' assertion, discussed *supra*, that Heading 3306 is a "use provision" requiring determination of the principal use of the "class or kind" of goods to which MagikStrips® belong, Plaintiff argues that Customs' analysis is flawed due to its erroneous interpretation of *Warner-Lambert CAFC*. Drygel's Response at 8–9. Plaintiff contends that Customs' "class or kind" analysis is too narrow and contrary to the holding in *Warner-Lambert CAFC*. *See id*.

With respect to classification of MagikStrips® under Heading 2106, HTSUS, as urged by Customs, Plaintiff responds that the terms of the Heading, when read in accordance with GRI 1, excludes products that are covered under other headings in the tariff schedule. *See* Drygel's Brief at 13–14. Since Heading 2106 covers "food preparations not elsewhere specified or included," Plaintiff argues that the Heading specifically excludes MagikStrips® which are classifiable under Heading 3306. *See id*. at 14. In the event that MagikStrips® are classifiable under both Headings 2106 and 3306, Plaintiff argues that, pursuant to GRI 3, Heading 3306 is the proper classification because it provides a more specific description in comparison to Heading 2106, a catch-all provision. *See id*.

Based on the foregoing arguments, Plaintiff seeks a judgement in its favor and an order directing the Port Director of Customs at the Port of Entry to reliquidate the subject entries under HTSUS subheading 3306.90.00, duty free, and refunding to Plaintiff all excess duties, plus interest as provided by law.

B. Custom's Contentions

Customs contends that MagikStrips® are properly classified under subheading 2106.90.99, HTSUS, the provision for "[f]ood preparations not elsewhere specified or included[.]" *See* Def.'s Mem. Supp. Mot. Summ. J. and Opp. Pl.'s Mot. Summ. J. ("Customs' Brief") at 2.

Customs argues that the applicable portion of Heading 3306, "preparation for oral and dental hygiene," is controlled by use, and thus, is a "use provision." *Id*. at 5–6. Accordingly, Customs states that the terms of the heading must read to mean "preparation for use in oral and dental hygiene." *Id*. at 6. In addition, Customs argues that GRI 1 must be applied together with rule 1(a) of the Additional U.S. Rules of Interpretation[5] ("ARIs"), which govern tariff classifica-

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[5] ARI 1(a), provides,:

tion of imported merchandise under "use provisions." *See id.* According to Customs, proper application of ARI 1(a) requires determination of "the class kind to which the imported goods belong" and the "principal use of that class or kind of goods at, or immediately prior to the date of importation." *Id.* at 6–7. Customs explains that, pursuant to *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976), the relevant factors to consider in making such determinations are: (1) the general physical characteristics of the merchandise, (2) the expectation of the ultimate purchasers, (3) the channels, class of kind of trade in which the merchandise moves, (4) the environment of the sale, (5) the use, if any, in the same manner as merchandise which defines the class, (6) the economic practicality of so using the import, and (7) the recognition in the trade of this use. *See id.* at 7. Based upon an analysis of these factors, Customs concludes that MagikStrips® are in the same "class or kind" as chewing gums and mints rather than preparations for oral and dental hygiene, and as such, Customs argues that MagikStrips® are not classifiable under Heading 3306. *See id.* at 18.

According to Customs, *Warner-Lambert CAFC* did not address the "class or kind" of goods classifiable under Heading 3306, HTSUS, but held that "good classified in that heading as 'preparations for oral or dental hygiene' must be able to achieve the breakdown and absorption of unwanted substances in the mouth and provide a cleansing effect by purging activity[.]" *Id.* at 7. Customs claims that MagikStrips® do not satisfy the criteria set forth in *Warner-Lambert CAFC* "inasmuch as they do not have any ingredients that are capable of breakdown, absorption, or facilitation of the purging activity" and concludes that MagikStrips® cannot not be classified under HTSUS Heading 3306 as "preparations for oral or dental hygiene." *Id.*

In support of its position, Customs argues that Plaintiff relies on unreliable websites in an attempt to establish the antimicrobial properties of menthol. *See id.* at 10. Customs further argues that proof put forth by Plaintiff to establish the alleged antimicrobial properties of sucrose palmitate or sucrose esters of fatty acid merely states that the ingredient may be used as "bacteriocidal agents for canned coffee" and does not support the conclusion that MagikStrips® have antimicrobial properties. Def.'s Reply Br. Supp. Mot. Summ. J. and Opp'n Pl.'s Resp. ("Customs' Reply") at 2. While conceding that menthol in combination with other ingredients may be effective as an antimicrobial agent, Customs contends that Plaintiff failed to put forth any evidence that menthol by itself has antimi-

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[A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use in principal use[.]

crobial properties. *See* Customs' Brief at 11. Customs counters that menthol is best known as a mild topical anesthetic and mint flavoring. *See* Customs' Brief at 11. Customs notes that even Plaintiff's own documents confirm that menthol is "only used as flavor" and sucrose palmitate is used as an "emulsifier." Customs' Brief at 11, Exhibit 3; Customs' Reply at 3.

Moreover, Customs maintains that Plaintiff's reliance on *Warner-Lambert CAFC* for the proposition that MagikStrips® are classifiable under Heading 3306 as a mouth wash or oral perfume is misplaced. *See* Customs' Brief at 8–9. Customs suggests that, since the terms "mouth washes" and "oral perfumes" appear in the ENs only and are not expressly provided for in either Heading 3306 of the subheadings thereto, they are not legally binding. *See id*. at 9. Customs concludes that MagikStrips® therefore do not satisfy the criteria set forth in *Warner-Lambert CAFC* and argues that they cannot be classified under Heading 3306, HTSUS, as "preparations for oral or dental hygiene." *See id*. at 7. Instead, Customs urges the Court to find that MagikStrips® are properly classified under Heading 2106, HTSUS. *See id*. at 18–19.

III. Discussion

A. Introduction

The question presented in the instant matter is whether, within the meaning of the tariff provisions, the imported merchandise is dutiable as "food preparation not elsewhere specified or included" under Heading 2106 as classified by Customs, or as "preparation for oral or dental hygiene" under Heading 3306 as claimed by Plaintiff.

Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Sabritas, S.A. de C.V. v. United States*, 22 CIT 59, 61, 998 F. Supp. 1123, 1126 (1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). Second, whether the imported merchandise falls within the scope of such term, as properly construed, must be determined. *See id*. The first step is a question of law and the second is a question of fact. *See id*.; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Where, as in the instant case, there is no disputed material issue of fact to be resolved by trial, disposition by summary judgment is appropriate.

Pursuant to 28 U.S.C. § 2639(a)(1) (1994), Customs' classification is presumed correct and the party challenging the classification bears the burden of proving otherwise. *See Universal Elec.*, 112 F.3d at 491. This presumption, however, applies only to Customs' factual findings, such as whether the subject merchandise falls within the scope of the tariff provision, and not to questions of the law, such as

Customs' interpretation of a particular tariff provision. *See Sabritas*, 22 CIT at 61, 998 F. Supp. at 1126; *see also Univeral Elecs.*, 112 F.3d at 492; *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). When there are no material issues of fact in dispute, as is admitted by both parties in the present case, the statutory presumption of correctness is irrelevant. *Goodman Mfg.*, 69 F.3d at 508.

Pursuant to 28 U.S.C. § 2640(a) (1994), Customs' classification decision is subject to *de novo* review based upon the record before the Court. Accordingly, the Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

B. Classification Under Heading 3306

Applied in numerical order, the proper classification of merchandise entering the United States is directed by the GRIs and the ARIs. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Gen. R. Interp. 1, HTSUS; *see also Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126–27. Only after comparing headings, if a question persists, may the Court look to the subheadings for the correct classification. *See Orlando Food*, 140 F.3d at 1440.

When a tariff term is not clearly defined in either the HTSUS or its legislative history, the correct meaning of the term is generally resolved by ascertaining its common and commercial meaning. *See W.Y. Moberly, Inc. v. United States*, 924 F.2d 232, 235 (Fed. Cir. 1991). In order to determine the common meaning of a tariff term, the court may rely on its own understanding of the term, as well as consult dictionaries, lexicons and scientific authorities. *See Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 943 (1988).

Heading 3306, HTSUS, provides for "preparations for oral or dental hygiene[.]" The parties do not dispute that these terms are not specifically defined in the HTSUS or in relevant legislative history. *See* Drygel's Brief at 8; Customs' Brief at 5. This court and the CAFC have previously considered the tariff terms "preparations for oral or dental hygiene." In *Warner-Lambert Co. v. United States* ("*Warner-Lambert CIT*"), 28 CIT ___ , 343 F. Supp. 2d 1315, (2004), the Court of International Trade ("CIT") considered classification of Certs® Powerful Mints under Heading 3306 as "preparation for oral or dental hygiene." *Warner-Lambert CIT*, 28 CIT at ___ , 343 F. Supp. 2d at 1319–21. The CIT determined that: (1) the term "preparation" is defined as "a medicine made ready for use," *see Dorland's Illustrated Medical Dictionary* 1351 (27th ed. 1988); *Stedman's Medical Dictionary* 1215 (12th ed. 1961); *The Macmillan Medical Dictionary* 348

(2d ed. 1953); (2) the term "oral" pertains to the mouth; and (3) the term "hygiene" relates to the preservation of health, *see Webster's II New Riverside University Dictionary* 826 (1988). *See Warner-Lambert CIT*, 28 CIT at ___, 343 F. Supp. 2d at 1319–20. The CIT thus concluded that "preparations for oral hygiene" are "medicines made ready for the practice of preserving the health of the mouth or oral cavity." *Warner-Lambert CIT*, 28 CIT at ___, 343 F. Supp. 2d at 1320. Relying on a monogram issued by the United States Food and Drug Administration, 47 Fed. Reg. 22,760 (May 25, 1982), stating that "[o]nly antimicrobial measures, such as using a germ killing mouth wash 'intended to treat or prevent disease' aide in the preservation of oral health," the CIT found that a product must have antimicrobial properties to be properly classified under Heading 3306. *Warner-Lambert CIT*, 28 CIT at ___, 343 F. Supp. 2d at 1320. Finding that Certs® Powerful Mints do not have such antimicrobial properties, the CIT held that they are not properly classified under Heading 3306, HTSUS. *Warner-Lambert CIT*, 28 CIT at ___, 343 F. Supp. 2d at 1320.

The CAFC overturned *Warner-Lambert CIT* and held that Certs® Powerful Mints do fall under Heading 3306. *See Warner-Lambert CAFC*, 407 F.3d 1207 (Fed. Cir. 2005). The CAFC concluded that the term "hygiene" in Heading 3306 does not require an antimicrobial agent and determined that the CIT improperly connected "health" with "hygiene." *See Warner-Lambert CAFC*, 407 F.3d at 1210. In reaching that conclusion, the CAFC relied on the Chapter Notes stating that "the products of Heading 3306 need not contain subsidiary pharmaceutical or disinfectant constituents nor be held out as having therapeutic or prophylactic value." *Id.* In addition, the CAFC noted that the ENs specify mouth washes and oral perfumes. *Id.* However, in denying Customs' alternative classification under Heading 2106 and finding that Certs® Powerful Mints are properly calssified under Heading 3306, the CAFC specifically referred to and relied on the cleansing action of Certs® Powerful Mints. *Id.*

Warner-Lambert CAFC thus instructs that the term "hygiene" requires a cleansing action such as the "breakdown and absorption function" and "cleaning effect of the purging activity" of Certs® Powerful Mints. Because MagikStrips® do not have the requisite cleansing properites as set forth in *Warner-Lambert CAFC*, they are not properly classifiable under Heading 3306. The ENs specify oral perfumes and mouth washes, but the ENs are non-binding interpretive guide. *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994).

Although Heading 3306 does not require an antimicrobial agent, the parties agree that a product containing an antimicrobial agent capable of reducing the number of bacteria in the mouth is properly classifiable under Heading 3306. *See* Drygel's Brief at 7–9; Customs' Brief at 12. Plaintiff, however, has failed to establish that

MagikStrips® have any antimicrobial properties. The bare allegation contained in a self-serving affidavit submitted by the President of Drygel stating that MagikStrips® reduce the number of bacteria in the mouth is unconvincing. *See* Zaksenberg I Affirmation ¶ 5; Zaksenberg II Affirmation ¶ 5.

Moreover, Plaintiff's reliance on the Listerine® Patent is misplaced. The Listerine® Patent provides, *inter alia*, that the product "achieves its antimicrobial effect through *a combination of esssetial oils* that penetrate and kill the microorganisms." (emphasis added). Drygel's Brief, Exhibit C. The fact that menthol is one of several ingredients that work in combination to impart its antimicrobial effect does not support the contention that menthol by itself would have the same effect.

The websites to which Plaintiff cites contain only conclusory statements and are devoid of factual support for the contention that MagikStrips'® ingredients at their particular concentrations have antimicrobial properties. Indeed, it appears that Plaintiff's claim of MagikStrips'® antimicrobial properties is an afterthought. Even Plaintiff's own internal documents, packaging and marketing materials make no mention of MagikStrips'® alleged antimicrobial properties. *See* Drygel's Brief Exhibits A, B; Customs' Brief, Exhibits 3, 4, 5, 11. Those materials confirm that menthol is "only used as flavor" and that sucrose palmitate or sucrose esters of fatty acid is used as an emulsifier. *Id*.

Based on the foregoing, MagikStrips® are not specifically provided in Heading 3306. Accordingly, it is unnecessary for the court to determine whether the term "preparation for oral or dental hygiene" in Heading 3306 is a "use provision" or to undertake an analysis of Heading 3306 as a "use provision" as argued by Customs.

C. Classification Under Heading 2106

Heading 2106, HTSUS, covers "[f]lood preparations not elsewhere specified or included[.]" The term "preparation" is defined as "a substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences." 12 *The Oxford English Dictionary* 374 (2d. ed. 1989). The term "food" is defined as "[w]hat is taken into the system to maintain life and growth, and to supply the waste of tissue; aliment, nourishment, provisions, victuals." 6 *The Oxford English Dictionary* 8 (2d. ed. 1989). The ENs for this Heading clarify that "this heading covers: (1) preparations for . . . human consumption." Therefore, "food preparations" are substances prepared for human consumption.

Customs correctly determined that MagikStrips® are properly classified under Heading 2106, HTSUS. They are "food preparations" and not elsewhere specified or included. This determination is further supported by the ENs, which state that this Heading includes, *inter alia*, "[e]dible tablits with a basis of natural or artificial

perfumes (e.g. vanillin)" and "[s]weets, gums and the like (for diabetics, in particular) contianing synthetic sweetening agents (e.g., sorbitol), instead of sugar[.]" MagikStrips® are consumed for their sweet taste and mint flavor much like mints, sweets or gums. *See* Zaksenberg I Affirmation ¶¶ 5,7. Plaintiff suggests that MagikStrips® are not edible because they "were designed and manufactured to dissolve very quickly in the mouth[.]" Zaksenberg I Affirmation ¶ 10. Regardless of how quickly MagikStrips® dissolve in the mouth, they are nevertheless ingested and consumed.

Plaintiff also argues that Heading 2106 specifically excludes products specified under other headings and claims that MagikStrips® are specifially excluded because they are classifiable under Heading 3306. *See* Drygel's Brief at 13–14. This court rejects Plaintiff's argument having already determined that MagikStrip® are not specifically provided for under Heading 3306, HTSUS. Thus, consistent with the common commerical meaning of the term "food preparation" and based on the ENs, MagikStrips® are properly classifiable under Heading 2106.

A review of the subheadings of Heading 2106 indicate that no other subheading covers the merchandise more specifically than the "catch-all" provision under Subheading 2106.90.99 covering "[o]ther[.]" *See EM Indus. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473, 1480 (1998); *Orlando Food*, 140 F.3d at 1442. Based on the foregoing, the court concludes that Customs correctly classified the subject merchandise under Subheading 2106.90.99, HTSUS.

Conclusion

For the foregoing reasons, the Court holds that Customs correctly classifed MagikStrips® under subheading 2106.90.99, HTSUS. Accordingly, Plaintiff's motion for summary judgment is denied. Summary judgment is granted in favor or the United States.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

DYRGEL, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No.: 03–00832

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED, ADJUDGED and DECREED that the United Stated Bureau of Customs and Border Protection correctly classified the subject merchandise under Subheading 2106.90.99 of the Har-

monized Tariff Schedule of the United States; and it is further

ORDERED that the United States' cross-motion for summary judgment pursuant to USCIT R. 56 is granted; and it is further

ORDERED that Drygel's motion for summary judgment pursuant to USCIT R. 56 is denied; and it is further

ORDERED that this case is dismissed.

Slip Op. 07–135

CHINA KINGDOM IMPORT & EXPORT CO., LTD.; YANCHENG YAOU SEAFOOD CO., LTD.; and QINGDAO ZHENGRI SEAFOOD CO., LTD., Plaintiffs, v. **UNITED STATES**, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 03–00302

[Granting in part and denying in part plaintiffs' motion for judgment upon the agency record contesting the application of facts otherwise available and adverse inferences to all entries of merchandise of plaintiffs China Kingdom Import & Export Co., Ltd. and Yancheng Yaou Seafood Co., Ltd. that were subject to the final results of an antidumping duty administrative review]

Dated: September 4, 2007

Garvey Schubert Barer (*William E. Perry*, *Lizbeth R. Levinson*, and *Ronald M. Wisla*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); *Marisa B. Goldstein*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge: Plaintiffs China Kingdom Import & Export Co., Ltd. ("China Kingdom"), Yancheng Yaou Seafood Co., Ltd. ("Yancheng"), and Qingdao Zhengri Seafood Co., Ltd. ("Qingdao") (collectively "plaintiffs") contest the April 2003 final results of an administrative review of a 1997 antidumping duty order on imported freshwater crawfish tail meat ("Final Results"). *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 19,504 (Apr. 21, 2003) ("*Final Results*"). The Final Results, issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), pertain to freshwater crawfish tail meat imported from the People's Republic of China ("China" or the "PRC") that was subject to the antidumping duty order (the "subject merchandise") and entered for consumption

during the period of September 1, 2000 through August 31, 2001 (the "period of review" or "POR"). *Id.* at 19,504–05.

Plaintiffs argue that Commerce exceeded its authority, and failed to support its decision with substantial record evidence, when it applied the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e(a) and (b), respectively, in determining an antidumping duty assessment rate of 223.01 percent for China Kingdom and in subjecting Yancheng to the "PRC-wide" rate, which also is 223.01 percent.[1] *See* Am. Br. in Supp. of Pls.' 1 Rule 56.2 Mot. for J. Upon the Agency R. 2–5 ("Pls.' Am. Br."). Invoking these provisions, Commerce rejected all data that China Kingdom and Yancheng had submitted during the administrative review in response to the Department's information requests. *See Final Results*, 68 Fed. Reg. at 19,506; 19 U.S.C. §§ 1677e(a)–(b), 1677m(d)–(e) (2000).

Commerce applied facts otherwise available and adverse inferences in determining the antidumping duty assessment rate for China Kingdom based on its finding that China Kingdom erroneously submitted, in its response to the Department's questionnaire, certain information provided to it by its crawfish tail meat producer that did not pertain to the period of review but instead pertained to a prior time period. The data affected by the error were data used in calculating the normal value of the merchandise according to procedures set forth in 19 U.S.C. § 1677b(c) (2000), which are applicable to merchandise produced in nonmarket economy countries. Specifically, the affected data were data on the producer's total production of crawfish tail meat and data pertaining to eight of the eleven factors of production. *Final Results*, 68 Fed. Reg. at 19,506; *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: September 1, 2000 through August 31, 2001* at 22–25 (Apr. 14, 2003) (Public Admin. R. Doc. No. 259) ("*Decision Mem.*"). When China Kingdom attempted to remedy the deficiency by providing Commerce a submission with corrected data at the outset of the phase of the verification occurring at the location of its producer, Chaohu Daxin Foodstuff Co., Ltd. ("Daxin"), Commerce terminated the verification. *Decision Mem.* at 20, 22–25. Commerce rejected the substitute data, considering it to be new information that was unacceptable if submitted after the deadline set forth in its regulations. *Id.* Commerce found, for purposes of 19 U.S.C. § 1677e(b), that China Kingdom did not act "to the best of its abil-

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[1] Commerce uses the term "total adverse facts available" to refer to the application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e in determining the antidumping duty assessment rate for all of a respondent's entries upon rejection of all information submitted by the respondent during an investigation or review. *See Final Results*, 68 Fed. Reg. at 19,506.

ity" in providing the requested information. *Id*. On this basis, Commerce declined to use any of the information submitted by China Kingdom relevant to the antidumping duty assessment rate and, as an adverse inference, assigned to China Kingdom the assessment rate of 223.01 percent, which was the highest rate determined for any respondent in the administrative review. *Final Results*, 68 Fed. Reg. at 19,506; *see* 19 U.S.C. § 1677e(b).

The court concludes, for the reasons discussed herein, that Commerce failed to make and support with substantial evidence findings on which to base its decision to resort to facts otherwise available under 19 U.S.C. § 1677e(a)(2) and that Commerce exceeded its authority when it rejected all data submitted by China Kingdom that were relevant to the calculation of an antidumping duty assessment rate. The court concludes that Commerce also acted contrary to law in assigning to China Kingdom, as an adverse inference pursuant to 19 U.S.C. § 1677e(b), an antidumping duty assessment rate of 223.01 percent.

Commerce also applied facts otherwise available and adverse inferences in subjecting Yancheng to the 223.01 percent rate assigned to respondents who failed to establish independence from control of the government of the PRC (the "PRC-wide rate") determined in the administrative review. *Final Results*, 68 Fed. Reg. at 19,506. Commerce based its determination principally on its conclusion that Yancheng and its corporate affiliate, Qingdao, should be treated as a single entity for purposes of the review and its finding that Qingdao had failed to cooperate to the best of its ability when it refused to allow the Department to conduct a verification of its submitted information. *Decision Mem*. at 16–17. Although Yancheng consented to verification, Commerce refused to conduct a verification only of Yancheng, reasoning that under those circumstances Commerce was precluded from accomplishing a satisfactory verification of the single entity comprised of Yancheng and Qingdao. *Id*. at 17–18. In the absence of sufficient verified information, Commerce concluded that the Yancheng-Qingdao entity had not been shown to be free of control by the government of the PRC, that Commerce could not calculate for that entity a separate antidumping duty assessment rate and, accordingly, that the entries of Yancheng's subject merchandise should be subjected to the PRCwide rate. *See id*. 16–20.

For the reasons discussed herein, the court concludes that Commerce acted in accordance with law in refusing to subject to the verification procedure the information submitted by Yancheng after Qingdao notified Commerce that Qingdao would not participate in verification. Yancheng and Qingdao did not contest, either in the administrative review or before the court, the Department's decision to treat them as a single entity. In the absence of verification of the business records of Qingdao, the Department's finding that it was unable to accomplish a satisfactory verification of the single entity

Yancheng-Qingdao was supported by substantial evidence. *Decision Mem.* at 17–18. Lacking sufficient verified information pertaining to the single entity, Commerce acted in accordance with law in concluding that it was unable to determine for that single entity a separate antidumping duty assessment rate. The court, therefore, affirms the Department's determination to include Yancheng in the 223.01 percent PRC-wide rate determined for the review.

The court remands this matter to Commerce with instructions to redetermine the antidumping duty assessment rate for China Kingdom in conformity with this Opinion and Order.

I. BACKGROUND

Commerce issued its antidumping duty order on freshwater crawfish tail meat from China in 1997. *See Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 48,218 (Sept. 15, 1997) ("*Order*"). Approximately four years later, Commerce announced the opportunity to request the administrative review at issue in this case. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 66 Fed. Reg. 46,257 (Sept. 4, 2001). China Kingdom and Qingdao, exporters of freshwater crawfish tail meat to the United States, timely requested an administrative review. *Letter from Garvey Schubert Barer to Sec'y of Commerce* (Sept. 28, 2001) (Public Admin. R. Doc. No. 2). Domestic interested parties also timely requested an administrative review of Yancheng and certain other producers and exporters of freshwater crawfish tail meat from China. *Letter from Adduci, Mastriani & Schaumberg, L.L.P. to Sec'y of Commerce* (Sept. 28, 2001) (Public Admin. R. Doc. No. 3). In response to the requests, Commerce initiated the administrative review at issue.[2] *See Initiation of Antidumping and 2 Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 66 Fed. Reg. 54,195 (Oct. 26, 2001).

In the preliminary results of the administrative review ("Preliminary Results"), and again in the Final Results, Commerce invoked facts otherwise available and adverse inferences in assigning China Kingdom an antidumping duty assessment rate of 223.01 percent.

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[2] Subsequently, domestic interested parties timely withdrew their requests for a review of Yancheng and China Kingdom but clarified that the respondents still subject to review included Qingdao. *Mem. from Case Analyst to Director, Office of AD/CVD Enforcement VII* at 1–2 (June 3, 2002) (Public Admin. R. Doc. No. 109). As China Kingdom submitted its own request for review, Commerce did not rescind that administrative review. *Id.* at 2. Commerce did not rescind the review of Yancheng, explaining that it treated Yancheng and Qingdao as a single entity and that the review of Qingdao was requested by domestic interested parties and Qingdao itself. *Id.* Plaintiffs do not challenge the Department's action of continuing the review of Yancheng.

Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review, 67 Fed. Reg. 63,877, 63,880 (Oct. 16, 2002) ("*Preliminary Results*"); *Final Results*, 68 Fed. Reg. at 19,506. As a result of the Department's conclusion that Yancheng did not qualify for a separate rate, Yancheng, in the Preliminary and the Final Results, was subjected to the 223.01 percent rate as the PRC-wide rate. *Preliminary Results*, 67 Fed. Reg. at 63,880; *Final Results*, 68 Fed. Reg. at 19,506.

A. The Inclusion of Incorrect Producer's Data in China Kingdom's Questionnaire Response

In its questionnaire response, China Kingdom submitted to Commerce certain data provided to it by its producer, Daxin, that pertained, at least in part, to a time period prior to the period of review. *Letter from Office of AD/CVD Enforcement VII, Import Admin., Dep't of Commerce to Garvey Schubert Barer* at 1 (Aug. 28, 2002) (Public Admin. R. Doc. No. 169) ("*Letter Rejecting Information as Untimely*"); *see also Letter from Garvey Schubert Barer to Sec'y of Commerce*, Section D (Feb. 27, 2002) (Confidential Admin. R. Doc. No. 9); *Letter from Garvey Schubert Barer to Sec'y of Commerce*, Section D (Feb. 28, 2002) (Public Admin. R. Doc. No. 52) ("*China Kingdom Questionnaire Resp.*"). The data were required for the calculation of normal value of the subject merchandise according to the procedures of 19 U.S.C. § 1677b(c), under which Commerce determines normal value for goods produced in nonmarket economy countries. *See* 19 U.S.C. § 1677b(c). The calculation of normal value is based, in part, on the value of factors of production, including labor, raw materials, utilities, and representative capital cost, utilized in producing the subject merchandise. *Id.* § 1677b(c)(3). Commerce values the factors of production according to prices and costs of factors of production in a market economy country at a level of development comparable to the nonmarket economy country. *Id.* § 1677b(c)(4).

Upon discovering the error at the beginning of the phase of the verification process that was conducted at the site of China Kingdom's producer, Daxin, China Kingdom attempted to file a submission with substitute data, which it described as pertaining to the period of review. The substitute data pertained to the calculation of normal value with respect to eight of the eleven factors of production used to produce the subject merchandise and also supplied a new figure for Daxin's total production of the subject merchandise during the period of review.[3] *Letter from 3 Garvey Schubert Barer to Sec'y of Commerce* at 1–2 (Aug. 13, 2002) (Confidential Admin. R. Doc. No.

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[3] The eight factors of production affected by the erroneous data were whole crawfish, scrap by-product, direct labor, indirect labor, packing labor, electricity, coal, and water. Un-

49) (placing on the record the exhibits containing the substitute information and requesting public comment); *Letter from Garvey Schubert Barer to Sec'y of Commerce* at 1–2 (Aug. 14, 2002) (Public Admin. R. Doc. No. 165) (placing on the record the public version of the August 13, 2002 letter and exhibits of substitute information) ("*Letter With Corrected Exhibits*"); *see also Letter from Garvey Schubert Barer to Sec'y of Commerce* (Aug. 14, 2002) (Public Admin. R. Doc. No. 166) (explaining that "7 of a total 13 containers of subject merchandise shipped by China Kingdom were in fact produced by Daxin in 2000" and that "[t]his formed the basis for reporting 2000 data in Daxin's section D questionnaire response.") ("*Letter Explaining Deficiency in Prod. Data*").

When China Kingdom notified the Department's verification team of the error affecting Daxin's production-related data, the verification team stopped the verification and contacted Commerce officials in Washington. *Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: Verification Report for China Kingdom Import & Export Co., Ltd.* at 10 (Sept. 16, 2002) (Public Admin. R. Doc. No. 173) ("*China Kingdom Verification Report*"). Commerce officials instructed the verification team to terminate the verification of China Kingdom, return the exhibits pertaining to the Daxin segment of the verification, and collect documentation sufficient to demonstrate that China Kingdom had submitted data on total crawfish tail meat production, and data on eight of the eleven factors of production, that pertained to a period prior to the period of review. *Id.* Commerce refused to accept the substitute submission, considering it an untimely filing of new factual information. *Id.* at 1, 10; *Letter Rejecting Information as Untimely* at 1; *see also Preliminary Results*, 67 Fed. Reg. at 63,879.

In the Preliminary Results, on the basis of facts otherwise available and adverse inferences, Commerce preliminarily assigned an antidumping duty assessment rate of 223.01 percent to China Kingdom, which was the highest rate assigned to any producer or exporter in both the contested and previous administrative review and was equivalent to the PRC-wide rate. *See Preliminary Results*, 67 Fed. Reg. at 63,879–80, 63,885. After considering comments submitted in response to the Preliminary Results, Commerce, in the Final Results, affirmed its findings that China Kingdom did not timely file certain information related to factors of production and failed to act to the best of its ability to comply with the Department's requests for information. *Final Results*, 68 Fed. Reg. at 19,506; *see also Decision Mem.* at 22–25. Commerce also affirmed its determination that the

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affected were the data for the factors of production consisting of tape, boxes, and bags. *Decision Mem.* at 23–24.

application of facts otherwise available and adverse inferences was appropriate. *Final Results*, 68 Fed. Reg. at 19,506. Commerce again assigned to China Kingdom's entries a rate of 223.01 percent. *Id*.

B. The Department's Treatment of Yancheng and Qingdao as a Single Entity and the Refusal by Qingdao to Participate in the Verification Process

During the review of Yancheng, Yancheng and Qingdao disclosed, in their consolidated responses to the Department's questionnaires, that they "are related through a Hong Kong company that owns significant shares in both companies." *See Preliminary Results*, 67 Fed. Reg. at 63,878; *see also Letter from Garvey Schubert Barer to Sec'y of Commerce*, Section A Resp. at 1 (Mar. 12, 2002) (Public Admin. R. Doc. No. 56); *Letter from Garvey Schubert Barer to Sec'y of Commerce*, Section A at 1 (Mar. 12, 2002) (Public Admin. R. Doc. No. 57). Yancheng and Qingdao also furnished consolidated responses to three supplemental questionnaires. *See Letter from Garvey Schubert Barer to Sec'y of Commerce* (May 15, 2002) (Public Admin. R. Doc. No. 88); *Letter from Garvey Schubert Barer to Sec'y of Commerce* (June 5, 2002) (Public Admin. R. Doc. No. 112); *Letter from Garvey Schubert Barer to Sec'y of Commerce* (July 3, 2002) (Public Admin. R. Doc. No. 131).

Prior to the verification process, Yancheng and Qingdao notified Commerce that Qingdao would not take part in the verification process due to financial difficulties. *See Letter from Garvey Schubert Barer to Sec'y of Commerce* (June 4, 2002) (Public Admin. R. Doc. No. 111). In the same letter, Yancheng and Qingdao informed Commerce that Yancheng "is willing to participate in verification and welcomes the Department to their facilities to verify their questionnaire responses." *Id*. Commerce responded on August 2, 2002 that because Qindao and Yancheng's responses to sections A, C, and D of the questionnaires had been consolidated, nonparticipation of Qingdao in verification would preclude the Department from verifying any of Yancheng's information in the consolidated submissions. *Letter from Sec'y of Commerce to Garvey Schubert Barer* (Aug. 2, 2002) (Public Admin. R. Doc. No. 153) ("*Commerce Resp. to Qingdao Non Participation*").

Commerce notified Yancheng and Qingdao that it would treat Yancheng and Qingdao as a single entity in the administrative review. *Id*.; *see* 19 C.F.R. § 351.401(f)(1) (2002) (setting forth the regulation on "affiliated producers"). Commerce based its decision on a Hong Kong company's common interest in both Yancheng and Qingdao, on record information establishing the consolidation by that Hong Kong company of the selling activities of Yancheng and Qingdao, and on the consolidation of Yancheng's and Qingdao's ques-

tionnaire responses.[4] *Freshwater Crawfish Tail Meat from the People's Republic of China (PRC): Application of Total Adverse Facts Available for Qingdao Zhengri Seafood Co., Ltd. and Yancheng Yaou Seafood Co., Ltd. in the Preliminary Results of the Admin. Review for the Period Sept. 1, 2000 through Aug. 31, 2001* at 1 (Sept. 30, 2002) (Public Admin. R. Doc. No. 180); *see Preliminary Results*, 67 Fed. Reg. at 63,878.

In the Preliminary Results, Commerce assigned to the entity Yancheng-Qingdao the 223.01 percent PRC-wide rate, reasoning that the application of adverse facts available was warranted because part of the single entity, Qingdao, "failed to cooperate to the best of its ability" by refusing to participate in verification and thereby preventing the verification of record information of the single entity. *Preliminary Results*, 67 Fed. Reg. at 63,880. Commerce stated that 19 U.S.C. § 1677e(a)(2)(D) "warrants the use of facts otherwise available in reaching a determination when information is provided, but cannot be verified." *Id.* Commerce reasoned that because the single entity "did not allow on-site verification of its responses at [Qingdao], none of the information submitted regarding [Qingdao] could be verified, including its separate rate information." *Id.*

In the Final Results, Commerce affirmed its findings that Yancheng and Qingdao should be treated as a single entity and that Qingdao failed to act to the best of its ability to comply with the Department's requests for information. *Final Results*, 68 Fed. Reg. at 19,506. On the basis of those findings, Commerce applied facts otherwise available and adverse inferences with respect to the subject entries of Yancheng. *Id.* Commerce explained that it could not verify the information submitted by Yancheng as a result of the refusal by Qingdao to fully cooperate in verification and the submission by Yancheng of improper certifications and contradictory record data.[5] *Id.* Based on its conclusion that it was unable to determine a separate antidumping duty 5 assessment rate for the single entity Yancheng-Qingdao, Commerce subjected all entries of Yancheng's subject merchandise for the period of review to the PRC-wide rate of 223.01 percent. *Id.*

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[4] Relying on similar grounds, Commerce treated Yancheng and Qingdao as one entity in the prior administrative review, which covered entries of freshwater crawfish tail meat from the PRC entered for consumption from September 1, 1999 through August 31, 2000. *See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Recision of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19,546, 19,548 (Apr. 22, 2002) ("*1999/2000 POR Final Results*").

[5] In the *Preliminary Results*, Commerce concluded that the certifications pertaining to Qingdao submitted by the single entity "did not comply with the requirements of . . . the Department's regulations" and that contradictory information was placed on the record regarding whether Qingdao made any sales of the subject merchandise during the period of review. *Preliminary Results*, 67 Fed. Reg. at 63,880.

In this action, plaintiffs move for judgment upon the agency record pursuant to USCIT Rule 56.2. Plaintiffs seek a court-ordered remand to Commerce for correction of the errors plaintiffs identify in the Final Results.

II. JURISDICTION, STANDING, AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(A) (2000) and 28 U.S.C. § 1581(c) (2000). Having participated as respondents in the administrative review proceeding culminating in the contested determination, China Kingdom, Yancheng, and Qingdao are "interested parties" within the meaning of 19 U.S.C. § 1677(9)(A) (2000) and, therefore, have standing, pursuant to 28 U.S.C. § 2631(c) (2000), to challenge the Department's determination. Under the applicable standard of review, the court must hold unlawful any determination, finding, or conclusion that it finds to be unsupported by substantial evidence on the record or to be otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

III. DISCUSSION

With respect to China Kingdom, the court examines whether Commerce supported its findings with substantial record evidence and acted in accordance with law in applying facts otherwise available and adverse inferences to assign a 223.01 percent assessment rate to entries of China Kingdom's subject merchandise for the period of review. As noted above, Commerce refused at the verification of China Kingdom's producer to accept China Kingdom's attempted submission of production-related data that China Kingdom described as pertaining to the correct period of review. Commerce terminated the verification of China Kingdom's producer. Commerce rejected as untimely China Kingdom's submission of the substitute data.

With respect to Yancheng, the court analyzes whether Commerce supported with substantial record evidence its findings and acted in accordance with law in applying facts otherwise available and adverse inferences in subjecting entries of Yancheng's subject merchandise to the 223.01 percent PRC-wide rate. Commerce made findings, which plaintiffs do not contest, supporting a conclusion that Yancheng and Qingdao should be treated as a single entity. Commerce further found that Qingdao refused to participate in verification and that Qingdao's refusal to participate rendered unverifiable the information pertaining to Yancheng.

A. Commerce Erred in Applying a 223.01 Percent Assessment Rate to China Kingdom

In their Rule 56.2 motion, plaintiffs argue with respect to China Kingdom that in refusing the corrected data pertaining to Daxin's

production and in terminating verification, the Department failed to fulfill its obligation under 19 U.S.C. § 1677b(c) to calculate "the most accurate and representative dumping margin possible." Pls.' Am. Br. at 20–21 (citing *Shandong Huarong General Corp. v. United States*, 25 CIT 834, 838, 159 F. Supp. 2d 714, 719 (2001)). According to plaintiffs, Commerce did not support with substantial record evidence its findings that China Kingdom did not timely submit its responses, did not provide verifiable data, and did not act to the best of its ability to comply with the Department's request for information. *Id*. at 4–5, 19–24. They argue that, accordingly, the Department's application of facts otherwise available and adverse inferences, and the assignment of the 223.01 percent assessment rate to entries of China Kingdom's subject merchandise for the period of review, were not supported by substantial record evidence and were not in accordance with law. *See id*. at 5, 24–25. In the alternative, plaintiffs argue that if the record warrants the application of facts otherwise available and adverse inferences, Commerce should have used secondary information to calculate an individual rate for China Kingdom instead of applying the 223.01 percent PRC-wide rate. *Id*. at 26–29.

For the reasons discussed below, the court concludes with respect to China Kingdom that Commerce did not act in accordance with law when invoking facts otherwise available under subsection (a) of 19 U.S.C. § 1677e and when using adverse inferences under subsection (b) of that section. Therefore, the court is unable to sustain the Final Results in assigning to China Kingdom the resulting 223.01 percent antidumping duty assessment rate. The court concludes, in addition, that the 223.01 percent rate is not a reasonably accurate estimate of an actual rate with respect to entries of China Kingdom's merchandise subject to the review.

1. Commerce Committed Errors In Invoking Facts Otherwise Available under Paragraphs (A) and (B) of 19 U.S.C. § 1677e(a)(2)

Under subsection (a)(1) of § 1677e, the use of facts otherwise available potentially will occur when "necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1). In addition, facts otherwise available potentially will be used in the circumstances identified in any of the four subparagraphs of subsection (a)(2) of the section, which apply when an interested party or any other person

> (A) withholds information that has been requested by the administering authority . . . under this subtitle,
>
> (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.

Id. § 1677e(a)(2). If subsection (a)(1) applies, or if one of the four provisions of subsection (a)(2) applies, "the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." *Id*. § 1677e(a).

In the Final Results, Commerce based its resort to facts otherwise available on the same analysis that it included in the Preliminary Results, stating that "[i]n the *Preliminary Results*, we applied facts available to China Kingdom pursuant to [19 U.S.C. § 1677e(a)(2)(A) and (B)] because it failed to provide total production and factors of production for the relevant POR in a timely manner." *Final Results*, 68 Fed. Reg. at 19,506. The Final Results refer to the discussion at Comment 7 of the April 14, 2003 decision memorandum ("Decision Memorandum"), which the Final Results incorporate by reference. *Id*. at 19,50506; *see also Decision Mem*. at 22–27. The Final Results also refer the reader, for further details, to an internal memorandum discussing the application to China Kingdom of facts otherwise available and adverse inferences. *See Final Results*, 68 Fed. Reg. at 19,506; *Freshwater Crawfish Tail Meat from the People's Republic of China (PRC): Application of Total Adverse Facts Available for China Kingdom Import & Export Co., Ltd. in the Preliminary Results of the Administrative Review for the Period 9/1/00 – 8/31/01* (Sept. 30, 2002) (Public Admin. R. Doc. No. 182) ("*China Kingdom Adverse Facts Available Mem*.").

a. Commerce Failed to Make the Requisite Finding In Resorting to Facts Otherwise Available under 19 U.S.C. § 1677e(a)(2)(A)

The court cannot sustain the Department's attempt to base its use of facts otherwise available on § 1677e(a)(2)(A). Because that provision applies only if "an interested party or any other person—(A) withholds information that has been requested by the administering authority . . . under this subtitle," Commerce was required to find that some specifically identified party, *i.e.*, China Kingdom or some other person, *e.g.*, Daxin, withheld the requested information. Commerce does not discuss any such finding in the Preliminary Results, the Decision Memorandum, or the Final Results.[6] Commerce provides no pertinent explanation of what record evidence would sup-

[6] Although directing the reader to the *China Kingdom Adverse Facts Available Mem*. for further discussion, the Final Results do not incorporate the *China Kingdom Adverse Facts Available Mem*. by reference. Therefore, any discussion of the needed finding and explanation that may be present in the *China Kingdom Adverse Facts Available Mem*. would not be sufficient. The court notes, however, that the *China Kingdom Adverse Facts Available Mem*.

port such a finding and no other explanation of how the requirements of § 1677e(a)(2)(A) were satisfied in this case.

The Final Results, while citing the Preliminary Results and incorporating the Decision Memorandum, contain no analysis with respect to § 1677e(a)(2)(A). The Preliminary Results explain, in a discussion of § 1677e(a)(2)(A) and (B), that "China Kingdom failed to provide total production and factors of production for the relevant POR in a timely manner." *Preliminary Results*, 67 Fed. Reg. at 63,879. This statement does not constitute a finding that China Kingdom withheld information. Commerce did not make a finding that China Kingdom, for example, possessed the substitute Daxin information long before providing it to Commerce on August 8, 2002. Nor is there any finding or discussion of § 1677e(a)(2)(A) as it may have pertained to Daxin. In the Decision Memorandum, Commerce identified a finding that China Kingdom "failed to provide verifiable factors of production."[7] *Decision Mem.* at 22. This statement also fails as a finding that any person withheld information within the meaningof § 1677e(a)(2)(A).

b. Commerce Erred in Relying on 19 C.F.R. § 351.301(b)(2) for its Resort to Facts Otherwise Available under 19 U.S.C. § 1677e(a)(2)(B)

Commerce expressly invoked 19 C.F.R. § 351.301(b) in finding the substitute information untimely. The regulation, 19 C.F.R. § 351.301(b), establishes, as a due date for a submission of factual information "[f]or the final results of an administrative review, 140 days after the last day of the anniversary month, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed." 19 C.F.R. § 351.301(b)(2) (2002).

In its letter of August 28, 2002 to counsel for China Kingdom, Commerce characterized the submission of the substitute Daxin data and counsel's August 14, 2002 follow-up letter as containing "unsolicited new factual information." *Letter Rejecting Information*

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does not discuss such a finding and therefore would not suffice for this purpose even if it had been incorporated by reference.

[7] Despite the reference to verifiability contained in this sentence, Commerce did not find that the substitute Daxin information was unverifiable for purposes of 19 U.S.C. § 1677e(a)(2)(D). Moreover, any such finding would not have been supported by substantial record evidence. The only pertinent evidence of record demonstrates that the Commerce verification team in China made no attempt to subject to a verification process the submission containing the substitute data that China Kingdom described as corresponding to the period of review. *See China Kingdom Verification Report* at 10. Instead, the Department's verification team, on the instructions of Commerce officials in Washington, terminated the entire verification of China Kingdom. *Id.* A deliberate refusal to subject certain factual information to a verification procedure is not the equivalent of a valid finding that, for purposes of § 1677e(a)(2)(D), such information "cannot be verified."

as Untimely at 1. In the Decision Memorandum, Commerce explained that "in accordance with section 19 CFR 351.301(b)(2) of the Department's regulations, any submission of factual information is due no later than 140 days after the last day of the anniversary month–in this case, January 18, 2002–unless specifically requested by the Department." *Decision Mem.* at 25. Thus, Commerce concluded that the substitute Daxin information constituted new factual information for purposes of the review and further concluded that this information, having been submitted on August 8, 2002, was untimely given the January 18, 2002 due date set for submissions of such new factual information. *Id.*

The court is not persuaded that the substitute Daxin information constituted what Commerce characterized as "unsolicited new factual information" to render appropriate the application of 19 C.F.R. § 351.301(b)(2). *See Letter Rejecting Information as Untimely* at 1. Commerce requested the original Daxin production-related information in section D of its questionnaire. *See China Kingdom Questionnaire Resp.*, Section D (setting forth the questions asked in the original questionnaire issued by Commerce). In the Decision Memorandum, Commerce itself described the January 18, 2002 due date as inapplicable where a submission of factual information is "specifically requested by the Department." *Decision Mem.* at 25. The record shows that the information that China Kingdom offered to the Commerce verification team on August 8, 2002 consisted of factual information, and calculations based on factual information, that were needed for the determination of normal value according to 19 U.S.C. § 1677b(c) and that were submitted by China Kingdom solely to correct its earlier response to the Department's questionnaire. *See Letter Rejecting Information as Untimely* at 1. The record contains no evidence establishing or suggesting that China Kingdom submitted the substitute Daxin information for any purpose *other* than to correct the error that occurred when it submitted the incorrect information.

China Kingdom submitted the original Daxin production-related information, which pertained to the incorrect time period, on February 27, 2002 as part of its response to section D of the Department's questionnaire. *China Kingdom Questionnaire Resp.*, Section D. Commerce had approved that date as an extended due date for China Kingdom's questionnaire response. *Letter from Sec'y of Commerce to Garvey Schubert Barer* (Feb. 7, 2002) (Public Admin. R. Doc. No. 47). Commerce, in the Decision Memorandum, appears to adopt the paradoxical position that China Kingdom's submission attempting to correct the February 27, 2002 questionnaire response would not have been timely unless made by January 18, 2002, *i.e.*, more than a month *before* the original information was timely submitted. Under that reasoning, China Kingdom could never correct the error in its

February 27, 2002 questionnaire response, even if it had discovered the error and attempted to correct it immediately.

As discussed later in this Opinion, Commerce appears to have offered contradictory grounds for its conclusion of untimeliness by stating in the Decision Memorandum that "China Kingdom had numerous opportunities to submit the requested information subsequent to the January 18, 2002 regulatory deadline by virtue of the Department's three supplemental questionnaires (issued May 8, June 18, and July 24, 2002), but failed to do so." *Decision Mem.* at 25. The Decision Memorandum does not expressly state that, under this alternate explanation, 19 C.F.R. § 351.301(b)(2) does not apply. However, the Decision Memorandum can be read to indicate that, despite 19 C.F.R. § 351.301(b)(2), the corrected information would have considered to be timely filed had it been submitted with the response to any of the supplemental questionnaires, including the response to the July 24, 2002 supplemental questionnaire, which was due and submitted on July 31, 2002. *Letter from Garvey Schubert Barer to Sec'y of Commerce* (July 31, 2002) (Public Admin. R. Doc. No. 151).

In summary, the court is unable to sustain the Department's reliance on 19 C.F.R. § 351.301(b)(2) as grounds for rejecting as untimely the substitute Daxin information and invoking facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B). Although the court accords substantial deference to the Department's interpretation and application of its own regulations, *see Torrington Co. v. United States*, 156 F.3d 1361, 1363 (Fed. Cir. 1998), the court on the record facts of this case cannot sustain the Department's application of 19 C.F.R. § 351.301(b)(2), in which Commerce mischaracterized the substitute Daxin information as "unsolicited new factual information" and invoked the January 18, 2002 due date established under § 351.301(b)(2) while inconsistently acknowledging subsequent due dates found nowhere in § 351.301(b)(2).

c. Because the Substitute Daxin Information Was Submitted After the Questionnaire Phase of the Review, Commerce Did Not Err in Considering the Information Untimely for Purposes of 19 U.S.C. § 1677e(a)(2)(B)

The court next considers whether the Department's finding that China Kingdom's submission of the substitute Daxin information was untimely, although not supported by its reliance on 19 C.F.R. § 351.301(b)(2), is supported by its statement in the Decision Memorandum that "China Kingdom had numerous opportunities to submit the requested information subsequent to the January 18, 2002 regulatory deadline by virtue of the Department's three supplemental questionnaires (issued May 8, June 18, and July 24, 2002), but failed to do so." *Decision Mem.* at 25. Although the Decision Memorandum expressly discusses 19 C.F.R. § 351.301(b)(2), the court in-

terprets the further discussion in the Decision Memorandum to indicate that Commerce intended the above-quoted statement referring to supplemental questionnaires as a separate reason for its finding that the substitute Daxin information was untimely for purposes of 19 U.S.C. § 1677e(a)(2)(B).

The Department's regulations state generally that Commerce will specify certain information when making a written request to an interested party for a response to a questionnaire:

> *(2) Questionnaire responses and other submissions on request.* . . . (ii) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified may result in use of facts available under [19 U.S.C. § 1677e] and [19 C.F.R.] § 351.308.

19 C.F.R. § 351.301(c)(2)(ii); *see* 19 C.F.R. § 351.301(c)(2)(iii) (providing that interested parties will be allowed at least 30 days from the date of receipt to respond to the full initial questionnaire). Commerce did not expressly rely on § 351.301(c)(2) in the Decision Memorandum, and instead, as discussed above, relied principally, and erroneously, on § 351.301(b)(2).

The initial questionnaire sent to China Kingdom is not included in the record of this proceeding, but the inclusion of a questionnaire sent to another party, which includes form language satisfying the notification requirement of § 351.301(c)(2)(ii), suggests that China Kingdom's questionnaire also included the form language. *Letter from Office of AD/CVD Enforcement VII, Import Admin., Dep't of Commerce to Garvey Schubert Barer* at App. I–3, I–4 (Jan. 18, 2002) (Public Admin. R. Doc. No. 37) (setting forth the definition of "Facts Available" and describing the findings required for the application of facts otherwise available and adverse inferences). Moreover, China Kingdom does not raise in this litigation a procedural defect pertaining to the questionnaire. The record contains a letter, dated February 7, 2002, by which Commerce approved China Kingdom's request to extend to February 27, 2002 the February 13, 2002 due date for China Kingdom's response to sections A, C and D of the questionnaire.[8] Based on the record evidence, the court has no basis to conclude that Commerce failed to satisfy the requirements of § 351.301(c)(2)(ii) to establish an extended due date of February 27,

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[8] Commerce also established due dates and issued extensions for the supplemental questionnaires sent to China Kingdom.

2002 for the response to that questionnaire and to place China Kingdom on notice that its failure to supply the requested information by the due date for the questionnaire "may result in use of facts available" under 19 U.S.C. § 1677e. Commerce unquestionably had discretion to extend the due date for the questionnaire response. *See* 19 C.F.R. § 351.302(b) (2002). Therefore, Commerce acted within its discretion in determining in the Decision Memorandum that the final, extended due date by which China Kingdom timely could have submitted the substitute Daxin information was in a response to one of the supplemental questionnaires, the last of which, issued on July 24, 2002, had a due date of July 31, 2002. Because the substitute Daxin information was submitted on August 8, 2002, Commerce did not err in treating the submission of the substitute Daxin information as untimely for purposes of 19 U.S.C. § 1677e(a)(2)(B).

d. Commerce Erred in Concluding that 19 U.S.C. § 1677m(d) Did Not Apply Because China Kingdom, Not Commerce, Discovered the Error in the Originally-Submitted Daxin Information

The valid determination by Commerce that China Kingdom's August 8, 2002 submission of the substitute Daxin information was untimely for purposes of 19 U.S.C. § 1677e(a)(2)(B) does not resolve fully the question of whether Commerce acted in accordance with law in disregarding that information in favor of facts otherwise available. In the instance of a determination under § 1677e(a)(2)(B), the use of facts otherwise available as a substitute for the untimely submitted information is expressly qualified by § 1677m(d). *See* 19 U.S.C. § 1677e(a) (stating that " . . . the administering authority . . . shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in reaching the applicable determination under this subtitle") (emphasis added). Section 1677m(d) addresses the situation confronting Commerce at the time China Kingdom attempted to submit the substitute data. In pertinent part, the section provides that

> [i]f the administering authority . . . determines that a response to a request for information under this subtitle does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of . . . reviews under this subtitle.

19 U.S.C. § 1677m(d). The section goes on to provide that if the party submits further information in response to the deficiency, Commerce may disregard that further submission if it first finds that "such response is not satisfactory" or that "such response is not submitted within the applicable time limits." 19 U.S.C. § 1677m(d)(1)–(2).

There can be no dispute that, for purposes of § 1677m(d), a "deficiency" existed with respect to the originally-submitted figure for Daxin's total crawfish tail meat production and with respect to the originally-submitted calculations for eight of the eleven factors of production that were affected by the error. It is also apparent from the record—and defendant does not contest–that China Kingdom submitted "further information in response to such deficiency." 19 U.S.C. § 1677m(d). The question before the court, then, is whether Commerce, in failing to address the conditions imposed by § 1677m(d), had the authority to "disregard all . . . of the . . . subsequent responses" in favor of the use of facts otherwise available. *Id.*

During the administrative review, Commerce concluded that it had such authority, stating that "[b]ecause the Department was unaware of any deficiencies in [China Kingdom's] production and factors of production information, [§ 1677m(d)] does not apply." *China Kingdom Adverse Facts Available Mem.* at 4. In the Preliminary Results, Commerce again concluded that it had no obligation under § 1677m(d) to provide China Kingdom an opportunity to remedy or explain the deficiency. Commerce reasoned that § 1677m(d) did not apply because "[p]rior to the verification, the Department had no means of determining whether the data came from the relevant POR, and therefore could not inform the respondent that its response was deficient." *Preliminary Results*, 67 Fed. Reg. at 63,879. Before the court, defendant argues that § 1677m(d) "limits the opportunity to remedy or explain deficiencies to those which Commerce identifies and [of which it] informs the interested party." Def.'s Resp. to the Court's Mar. 20, 2006 Questions 9. According to defendant, "the opportunity to remedy or explain a deficiency described in section 1677m(d) of the statute does not apply to the situation where a respondent, months after making the submission, identifies a deficiency in its submission." *Id.*

The court finds no merit in the Department's conclusion of law that § 1677m(d) did not apply because Commerce, until being informed of the problem by China Kingdom, was unaware of the deficiency in the originally-submitted total production information and the calculated information pertaining to eight of the eleven factors of production. Nor is there merit in the parallel argument that defendant makes before the court, *i.e.*, that Commerce was correct in concluding that § 1677m(d) of the statute does not apply if a respondent discloses the factual basis for a finding that its own submission has a deficiency. The procedure set forth in § 1677m(d) applies "[i]f the administering authority . . . determines that a response to a request for information . . . does not comply with the request . . . ." 19 U.S.C. § 1677m(d). Commerce, in the course of the administrative review, made exactly that determination with respect to the originally-submitted Daxin information. That Commerce made the determination of deficiency only after China Kingdom brought the problem to

the Department's attention does not support the Department's conclusion that § 1677m(d) was inapplicable. The fact that Commerce was not the first to discover the error is irrelevant to the Department's obligations under that statutory provision. Section 1677m(d) does not condition those obligations on the manner in which Commerce discovered facts causing it to draw the conclusion of deficiency. Nor does anything in the statute provide that § 1677m(d) is inapplicable if Commerce is unable to discover the deficiency prior to verification.

The court accords deference to the Department's formal statutory constructions. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). Here, however, the court finds no ambiguity or silence in § 1677m(d) that would justify resort to the second step in a *Chevron* analysis. *See Chevron*, 467 U.S. at 842–43 (stating that "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). A construction of § 1677m(d) that renders it inapplicable if the Department was unaware of the deficiency prior to verification cannot be reconciled with the unambiguous legislative intent expressed in the plain language of that provision. Nor does § 1677m(d) excuse Commerce from its obligations if the submitting party, not Commerce, is the first to discover and disclose the facts leading to the Department's determination of deficiency.

e. Commerce Erred In Failing to Make and Support a Finding under 19 U.S.C. § 1677m(d) that Allowing the Opportunity to Remedy or Explain the Deficiency Would Be Impracticable In Light of the Time Limits for Completing the Administrative Review

Under 19 U.S.C. § 1677m(d), Commerce was required "to the extent practicable" to provide China Kingdom the opportunity to remedy or explain the deficiency "in light of the time limits established for the completion of . . . reviews under this subtitle." 19 U.S.C. § 1677m(d). However, by deciding, based on a misreading of the statute and flawed reasoning, that § 1677m(d) did not apply, Commerce deprived itself of the opportunity to make the finding that § 1677m(d) required. Specifically, that finding was whether it was "practicable" to allow China Kingdom the opportunity to remedy or explain the deficiency "in light of the time limits established for the completion of . . . reviews . . . ." *Id.* The court discerns no finding, and no discussion, on this critical question in the Final Results, which adopt without elaboration the approach announced in the Preliminary Results. As does the Decision Memorandum, the latter fail to reach the practicability issue because the Department incorrectly

concluded that § 1677m(d) had no applicability in the circumstances presented.

The Final Results refer to the analysis in the Decision Memorandum. *Final Results*, 68 Fed. Reg. at 19,506. Accordingly, the court considers whether the requisite finding on impracticability is stated in the Decision Memorandum. The Decision Memorandum contains the following sentence: "Since the information was submitted during verification, instead of in a response to one of the several questionnaires issued to China Kingdom, the Department did not have an opportunity to analyze the information in the context of this review." *Decision Mem.* at 25. This sentence is not reasonably construed as an explicit finding that it was impracticable for Commerce to provide China Kingdom the opportunity to remedy or explain the deficiency. Even were it deemed to be such a finding, it would not withstand judicial review because it is entirely conclusory. Commerce cited no record evidence, and provided no reasoning, that could have supported the missing finding.

Had Commerce addressed whether it was practicable to allow China Kingdom to remedy or explain the deficiency "in light of the time limits established for the completion of . . . reviews under this subtitle," it would have considered the time remaining according to 19 U.S.C. § 1675(a)(3)(A). 19 U.S.C. § 1677m(d); *see* 19 U.S.C. § 1675(a)(3)(A) (2000). The statute directs Commerce to issue preliminary results within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order for which the review was requested ("anniversary month"), and final results within 120 days after publication of the preliminary results, with an exception under which Commerce may extend the time periods if meeting these time limits is not practicable. 19 U.S.C. § 1675(a)(3)(A). Under the exception, Commerce may extend the 245–day period to 365 days and the 120–day period to 180 days. *Id.* If the time for issuing the preliminary determination is not extended, the statute allows final results to be issued within 300 days after publication of the preliminary results. *Id.* For this review, the last day of the anniversary month was September 30, 2001. The statute, therefore, established an extended due date of September 30, 2002 for the Department's preliminary results; the Preliminary Results, as published on October 16, 2002, in fact show a date of decision of September 30, 2002.[9] Similarly, the Commerce determination

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[9] The Department extended the deadlines pursuant to its statutory authority. *Notice of Extension of Time Limit of Preliminary Results of Antidumping Duty Administrative Review: Freshwater Crawfish Tail Meat From the People's Republic of China*, 67 Fed. Reg. 36,856 (May 28, 2002) (extending until September 30, 2002 the deadline for issuance of the preliminary results); *Freshwater Crawfish Tail Meat From the People's Republic of China: Extension of Time Limit for Final Results of Administrative Antidumping Review*, 68 Fed. Reg. 7345 (Feb. 13, 2003) (extending until April 14, 2003 the deadline for issuance of the final results).

comprising the Final Results was dated April 14, 2003, which was the 180th day following publication of the Preliminary Results on October 16, 2002.

The record establishes that the substitute information was provided to Commerce on August 8, 2002, the first day of verification taking place at the Daxin facility. Because 53 days remained before the Preliminary Results were due and more than eight months remained before the Final Results were due, no reason is apparent why affording China Kingdom, at the least, the opportunity to explain the deficiency would have been impracticable. Instead of inviting China Kingdom to make a submission explaining the deficiency, as 19 U.S.C. § 1677m(d) required if doing so was practicable, Commerce did the opposite. Commerce rejected and returned to China Kingdom's counsel an unsolicited letter that counsel for China Kingdom submitted on August 14, 2002. *Letter Explaining Deficiency in Prod. Data.* Commerce deemed the letter unacceptable as "unsolicited new factual information" under 19 C.F.R. § 351.301(b)(2). *See Letter Rejecting Information as Untimely* at 1–2. That letter constituted part of China Kingdom's attempted explanation of the deficiency itself. The substance of the letter is contained in three sentences, as follows:

> On behalf of China Kingdom Import & Export Co., Ltd. ("China Kingdom"), we are filing this letter as a follow up to our letter dated August 13, 2002 regarding materials associated with the verification of Chaohu Daxin Foodstuff Co., Ltd. ("Daxin"). We wish to state for the record that 7 of a total of 13 containers of subject merchandise shipped by China Kingdom were in fact produced by Daxin in 2000. This formed the basis for reporting 2000 data in Daxin's section D questionnaire response.

Letter Explaining Deficiency in Prod. Data. The rejected letter provided information pertinent to the nature of the deficiency and how it occurred, which information Commerce appears to have declined to consider. The rejected information appears relevant to the circumstances of the deficiency because four of the months of the period of review, which was September 1, 2000 through August 31, 2001, occurred in 2000.

Having concluded that 19 U.S.C. § 1677m(d) did not apply, Commerce also avoided making a determination on whether it was practicable, in light of the time remaining before September 30, 2002, to allow China Kingdom the opportunity to remedy or to remedy to some extent, as opposed to the opportunity only to explain, the deficiency. The record indicates that the Commerce verification team was prepared to conduct a verification of the originally-submitted Daxin information on August 8, 2002. *See China Kingdom Verification Report* at 10. From the record and from the Department's stated

reasons for discontinuing the entire verification procedure, it is not apparent that a choice to subject the substitute numerical Daxin information to verification, instead of the originally-submitted Daxin information, would have consumed significant additional time. Because the substitute information concerned numerical calculations used in determining normal value based on Daxin's production data, verification and use of that information would not have required Commerce to re-examine all the other information compiled during the review for the determination of China Kingdom's assessment rate. Thus, the Decision Memorandum is unconvincing in its claimed lack of "an opportunity to analyze the information in the context of this review." *See Decision Mem.* at 25. According to the Department's own analysis, the substitute Daxin information would have been considered timely if filed by July 31, 2002 but was untimely as submitted on August 8, 2002. *Id.* Because of the lack of the requisite finding and a lack of explanation, it is not apparent why a delay of eight days rendered use of the substitute information impracticable when viewed in the context of a due date of September 30, 2002 for the Preliminary Results and April 14, 2003 for the Final Results.

Before the court, defendant argues that "spending additional time at the verification of China Kingdom . . . would have been at least 'inconvenient' " and that "[a]llowing large new submissions which change critical portions of a response and requiring that they be evaluated in a short time span while officials are at verification would make the conduct of verification extremely burdensome." Def.'s Resp. to the Court's Mar. 20, 2006 Questions 15–16. This post hoc justification about inconvenience and "large new submissions" does not explain why subjecting to verification the substitute Daxin information instead of the originally-submitted Daxin information would have been so burdensome as to make use of the substitute information impracticable. The proffered corrections involved one figure for total production and eight calculated figures for various factors of production. Although alluding vaguely to difficulties arising because verification occurred after the questionnaire phase and remotely from the Department's headquarters, defendant does not explain satisfactorily in its arguments to the court how the corrections would "make the conduct of verification extremely burdensome." *Id.* Moreover, to conclude that verification of the substitute information would have been "extremely Court No. 03–00302 Page 32 burdensome" begs the question why Commerce did not make a finding of impracticability under § 1677m(d).

Commerce must support with specific factual findings the required determination of practicability under § 1677m(d). Remedying any deficiency in a questionnaire response typically will require submission of new information. A mere finding that the remedy would require Commerce to consider new information is not commensurate with a finding that allowing the interested party to effect the remedy

would be impracticable under the circumstances, given the statutory time limits. And it is obvious that Commerce may not avoid conducting the review in full compliance with the statute simply because in some instances it may be inconvenient to do so.

Defendant also argues to the court that verifying and using the substitute information "would be unfair to the petitioners and other interested parties in the proceeding by depriving them of an opportunity to meaningfully comment on China Kingdom's information and preventing Commerce from allocating its resources in a way to ensure the timely completion of the administrative review." Def.'s Resp. to the Court's Mar. 20, 2006 Questions 16. Defendant's argument is unconvincing. As the record shows, the substitute information was offered at the outset of the phase of the China Kingdom verification that was being conducted at Daxin's facility. Again, no reason is apparent from the record why the verification team could not have subjected the substitute information to a verification procedure had it not been ordered to refrain from doing so. When viewed in the context of the time then remaining for completion of the administrative review and the opportunities to comment that remained for the other parties participating in the review, defendant's argument is unpersuasive.[10]

Defendant also points to decisions of the Court of International Trade, which it interprets as upholding the Department's practice of accepting information at verification only if that information relates to minor adjustments to, or corroboration or clarification of, information already on the record. Def.'s Resp. to the Court's Mar. 20, 2006 Questions 6–7 (citing *Chia Far Industrial Factory Co. v. United States*, 28 CIT ___ , 343 F. Supp. 2d 1344 (2004); *Maui Pineapple Co. v. United States*, 27 CIT 580, 595, 264 F. Supp. 2d 1244, 1257 (2003); *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT 549, 558–60, 206 F. Supp. 2d 1323, 1333–34 (2002); and *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs v. United States*, 23 CIT 88, 94–95, 44 F. Supp. 2d 229, 237 (1999)). Commerce, in its letter to China Kingdom in preparation for verification, stated:

> Please note that *verification is not intended to be an opportunity for submitting new factual information*. New information will be accepted at verification only when (1) the need for that information was not evident previously, (2) the information

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[10] The Department's regulations provide a ten-day period in which other parties may rebut, clarify, or correct information submitted by another party. *See* 19 C.F.R. § 351.301(c). China Kingdom promptly served the substitute information on counsel for the other parties according to the procedures governing confidential submissions. *See Letter With Corrected Exhibits* (requesting that Commerce place on the record the exhibits containing the corrected information and requesting public comment); *Letter Explaining Deficiency in Prod. Data* (explaining the reason producer Daxin provided data for the incorrect time period); *see also* 19 U.S.C. § 1677m(g) (requiring Commerce to provide parties a final opportunity to comment on information on which parties did not have a previous opportunity to comment).

> makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record. Please provide a list of any corrections to your responses to the verifiers at the beginning of verification. Please note that any such submissions must be filed with the Department, and appropriate copies served on interested parties, within two business days of the commencement of verification.

Letter from Office of AD/CVD Enforcement VII, Import Admin., Dep't of Commerce to Garvey Schubert Barer at 2 (July 26, 2002) (Public Admin. R. Doc. No. 150); *see also Letter Rejecting Information as Untimely* at 2. In this case, it is not necessary for the court to reach the issue of whether the policy or practice as stated in the letter is consistent with the statute, including in particular 19 U.S.C. § 1677m(d). The narrow issue presented is whether the Department's practice, as stated in the letter and as applied in the subject review, sufficed to excuse Commerce from making the various individual determinations required by 19 U.S.C. § 1677m(d). The court concludes that it does not. Even had the practice been promulgated as a regulation–which it was not–it could not correctly be construed to nullify the procedural requirement unequivocally stated in § 1677m(d): an interested party situated as was China Kingdom must receive the opportunity to remedy or explain the deficiency if allowing that opportunity is practicable in light of the statutory time limits for completing the review. The mere existence of the practice was not a substitute for the Department's complying with the statute and is not a basis on which Commerce correctly could have concluded, as it did during the review, that § 1677m(d) had no applicability.[11] Because this case presents a situation in which Commerce committed specific errors in applying 19 U.S.C. §§ 1677e(a) and 1677m(d), it presents issues not discussed in the opinions of the Court of International Trade that defendant cited. *See* Def.'s Resp. to the Court's Mar. 20, 2006 Questions 6–7.

For the reasons discussed above, the court concludes that Commerce committed legal error in using facts otherwise available without first finding, pursuant to § 1677m(d), that it would be, or would

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[11] Concerning procedural fairness, the court observes that the practice was not formally communicated to China Kingdom until China Kingdom's receipt of the July 26, 2002 letter. *See Letter from Office of AD/CVD Enforcement VII, Import Admin., Dep't of Commerce to Garvey Schubert Barer* at 2 (July 26, 2002) (Public Admin. R. Doc. No. 150). The record does not indicate when the letter was received by China Kingdom and does not allow the court to conclude that it was received when China Kingdom still had a meaningful opportunity to attempt to correct the deficiency during the questionnaire phase of the review. Had Commerce promulgated the practice as a regulation, China Kingdom at least would have been placed on formal notice of the practice before and during the questionnaire phase of the proceeding.

not be, practicable to permit China Kingdom to remedy or explain the deficiency given the time limits for completion of the review.

f. Commerce Erred In Failing to Make a Finding under 19 U.S.C. § 1677m(d)(1) or (2)

Because Commerce considered 19 U.S.C. § 1677m(d) inapplicable, Commerce did not make a determination under § 1677m(d)(1) or (2). Commerce did not determine whether the substitute Daxin information was unsatisfactory under § 1677m(d)(1). Having refused to subject this information to the verification process, Commerce had no basis on which to make this determination. Commerce never made a determination under § 1677m(d)(2), *i.e.*, whether the further information submitted in response to such deficiency was "submitted within the applicable time limits." Having never made a determination whether allowing China Kingdom the opportunity to remedy the deficiency would or would not be practicable, Commerce never made a determination as to when such a remedy must be accomplished. Because a determination under § 1677m(d)(2) was never made, the court will not presume that Commerce would have made, or permissibly could have made on the specific facts of this case, the same determination that it appears to have made under § 1677e(a)(2)(B), *i.e.*, that the substitute Daxin information was untimely because it was submitted after the close of the questionnaire phase of the review.

The Court of Appeals for the Federal Circuit has emphasized, albeit in a procedural context different from this case, the importance of the Department's allowing the correction of errors where it is feasible to do so at the preliminary results stage of an administrative review. *See Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006) (stating that "[t]his court . . . has never discouraged the correction of errors at the preliminary result stage; we have only balanced the desire for accuracy in antidumping duty determinations with the need for finality at the final results stage."). In *Timken U.S. Corp.*, the Court of Appeals for the Federal Circuit also noted the importance of performing a verification, and even a second verification, of information offered as a correction of record information in an administrative review. *See id.* at 1354 (commenting disapprovingly on the Department's rejection of information as unverified when Commerce could have, but did not, subject that information to verification).

2. The Court Must Order a Redetermination upon Remand Even Though Commerce, In Using Adverse Inferences, Supported With Substantial Record Evidence Its Finding That China Kingdom Did Not Act to the Best of Its Ability

Defendant argues that the court must sustain the Final Results with respect to China Kingdom because Commerce correctly found

that China Kingdom did not act to the best of its ability in responding to the Department's questionnaires and, therefore, did not satisfy the standard of 19 U.S.C. § 1677e(b). Defendant argues that Commerce was justified in concluding that China Kingdom failed to exercise the degree of diligence that § 1677e(b) requires of an interested party. According to this argument, China Kingdom should have discovered promptly that the total production and factor of production information supplied to it by Daxin pertained to the wrong time period and should have corrected the problem long before verification. *See Decision Mem.* at 23–25. Commerce, in the Decision Memorandum, explained that

> China Kingdom should have been able to comply with the Department's requests for information in an accurate and timely manner. Furthermore, in light of China Kingdom's failure to provide accurate figures for total production and eight of eleven factors of production, and considering the ease with which the failure likely could have been detected, we find that China Kingdom paid insufficient attention to its statutory duty to comply with the Department's requests for information, as did Daxin.

Id. at 25. Defendant argues that the court must sustain the Department's application of § 1677e(b) to reject, as an adverse inference, all of China Kingdom's submitted information. Defendant directs the court's attention to the decision of the Court of Appeals for the Federal Circuit in *Nippon Steel Corp. v. United States*, 337 F. 3d 1373 (Fed. Cir. 2003).

China Kingdom asserts that it acted in good faith, arguing that in submitting the incorrect data, "China Kingdom and its producer had no intent to deceive the Department–rather, the data from the incorrect period of review was simply provided in error." Reply Br. in Supp. of Pls.' Rule 56.2 Mot. for J. Upon the Agency R. 5 ("Pls.' Reply"). China Kingdom further argues that it acted to the best of its ability to provide Commerce with the requested information immediately upon discovery of the deficiency. *Id.* China Kingdom contends that Commerce, therefore, did not support with substantial record evidence its finding that China Kingdom failed to act to the best of its ability in responding to the Department's request for information. *Id.* 3–4.

The absence of an intent to deceive Commerce, and China Kingdom's claimed efforts to remedy the deficiency by all means upon discovering it, do not resolve the question of whether China Kingdom acted to the best of its ability in reviewing, and then submitting to Commerce during the questionnaire phase of the review, Daxin's production-related information. In *Nippon Steel Corp.*, the Court of Appeals for the Federal Circuit upheld the Department's use of adverse inferences where the plaintiff Nippon Steel Corporation

("NSC") initially informed Commerce in an antidumping investigation that certain data on NSC's sales of subject steel products that Commerce requested ("conversion factor data") were unavailable but then provided the requested information three days after the publication of the Department's preliminary less-than-fair-value determination. 337 F.3d at 1377–78. Describing the standard required of an interested party by 19 U.S.C. § 1677e(b), the Court of Appeals for the Federal Circuit stated that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Id.* at 1382.

Were 19 U.S.C. § 1677e(b) properly applied in the Final Results, the court would sustain under the standard set forth in *Nippon Steel Corp.* the Department's finding that China Kingdom did not act to the best of its ability in responding to the Department's request for total production and factor-of-production data pertaining to its producer. *See id.* It does not appear to the court that China Kingdom disputed the Department's finding that China Kingdom readily could have discovered and corrected the error during the questionnaire phase, nor do plaintiffs argue before the court that the deficiency affecting the originally-submitted Daxin information would not have been apparent upon a closer examination of that information. Commerce reasonably could expect China Kingdom to review information provided to it by its producer so as to discover a facially-apparent deficiency before submitting it during the questionnaire phase of the review. The finding that China Kingdom did not act to the best of its ability for purposes of § 1677e(b), however, does not justify the Department's use of adverse inferences in the Final Results because Commerce did not properly invoke its authority to use facts otherwise available according to § 1677e(a).

Under § 1677e(b), Commerce may use an inference adverse to the party failing to cooperate to the best of its ability with an information request "in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The problem posed by this case is that Commerce committed legal errors in resorting to facts otherwise available under § 1677e(a). The Department's use of an inference adverse to China Kingdom in selecting from the facts otherwise available under § 1677e(b) cannot be viewed in isolation but must be considered in the context of those legal errors.

As described later in this opinion, Commerce erred further in using facts otherwise available as a substitute for information on the record that was unaffected by the submission of the wrong production-related Daxin information and that was, therefore, in no way disallowed by § 1677e(a). These various errors undermined the two bases, *i.e.*, paragraphs (A) and (B) of § 1677e(a)(2), upon which Commerce invoked facts otherwise available. Therefore, they cannot be considered to be harmless errors such that the court could sustain the Final Results as to China Kingdom. In summary, although the

circumstance leading to China Kingdom's challenge to the Final Results arose initially from China Kingdom's error in failing to act to the best of its ability in responding to the Department's information request, the problem posed by this case also resulted in part from the Department's own errors in applying § 1677e(a). For this reason, the court must remand the Final Results to Commerce for a redetermination of the assessment rate to be applied to the entries of China Kingdom's merchandise subject to the administrative review.

3. Commerce Acted Contrary to Law in Assigning to China Kingdom a 223.01 Percent Assessment Rate

In addition to the Department's failure to comply with § 1677m(d), as it relates to § 1677e(a), in the Final Results, Commerce acted contrary to law in assigning to China Kingdom a 223.01 percent assessment rate. Congress, in amending § 1677e, intended to "block any temptation by Commerce to overreach reality in seeking to maximize deterrence." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (reasoning that the corroboration requirement in subsection (c) of 19 U.S.C. § 1677e indicates the intent of Congress to temper the Department's use of punitive margins and to ensure that Commerce not "overreach reality" in applying subsections (a) and (b) of § 1677e); *see Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (stating that "Commerce acts within its discretion so long as the rate chosen has a relationship to the actual sales information available.").

In the Final Results, Commerce did not confine its use of facts otherwise available and adverse inferences to fill gaps in the information needed to conduct the administrative review. Instead, the 223.01 percent rate resulted from the Department's unwarranted refusal to use any of the information China Kingdom submitted during the administrative review, including information unrelated to the error affecting the Daxin information. Such an overly broad method of applying facts otherwise available and adverse inferences far exceeded the scope of information subject to valid findings under § 1677e and was therefore contrary to law. *See Gerber Food (Yunnan) Co. v. United States*, 29 CIT ___, ___, 387 F. Supp. 2d 1270, 1284–88 (2005) (disallowing the Department's blanket refusal to use any information submitted by respondents, including information unrelated to the deficiency identified under 19 U.S.C. § 1677e(a)).

The derivation of the 223.01 percent rate illustrates that it bears no relationship to the facts pertaining to China Kingdom's sales of subject merchandise. China Kingdom first participated in the antidumping duty proceeding in a new shipper review. In that review, Commerce determined that China Kingdom was independent of government control and calculated an antidumping duty rate of 57.87 percent for the new shipper period of review, September 1, 1999

through March 31, 2000. *Freshwater Crawfish Tail Meat From the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews*, 66 Fed. Reg. 45,002, 45,004 (Aug. 27, 2001). Commerce, upon correction of ministerial errors, revised that rate to 77.30 percent in the amended final results of that review. *Freshwater Crawfish Tail Meat From the People's Republic of China: Amended Final Results of Antidumping Duty New Shipper Reviews*, 66 Fed. Reg. 49,343, 49,344 (Sept. 27, 2001). In the administrative review prior to the subject review, from which Commerce obtained the 223.01 percent rate, almost all individual respondents' rates were much lower than 223.01 percent. The margins ranged from one respondent at approximately ten percent, three respondents in the fortieth percentile, two respondents in the sixtieth percentile, one respondent at approximately 175 percent, and one respondent at 223.01 percent. *1999/2000 POR Final Results*, 67 Fed. Reg. at 19,549. Such a distribution results in a mean and median rate significantly below one hundred percent and much less than the highest margin of 223.01 percent. The Department's applied rate of 223.01 percent is several times higher than respondent's prior rate and several times higher than the rates assigned to almost all other individual respondents.

4. In Its Remand Redetermination, Commerce Must Make Determinations It Failed to Make and May Use Facts Otherwise Available and Adverse Inferences Only to a Limited Extent

Commerce, to the extent possible now that the administrative review is completed, must correct on remand the error it made when it failed to provide China Kingdom the opportunity under 19 U.S.C. § 1677m(d) to remedy or explain the deficiency that occurred upon submission of the incorrect Daxin information. Because the record establishes that affording China Kingdom an opportunity to submit an explanation would not have delayed the review, Commerce, at the least, must afford China Kingdom the opportunity to provide such an explanation during the remand proceeding and must consider that explanation in fashioning its remand redetermination. Additionally, because China Kingdom submitted the substitute Daxin information for the specific purpose of remedying the deficiency resulting from the original submission of incorrect Daxin information, Commerce, on remand, must make the determinations that are required by 19 U.S.C. § 1677m(d)(1) or (2), or both, and may reopen the record as necessary for this purpose.[12]

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[12] Under its regulations, 19 C.F.R. §§ 351.104(a)(2) and 351.302(d) (2002), Commerce does not use in a determination information that it has returned to a submitter as untimely, which information is retained on the record for limited purposes. The court is allowing Commerce to reopen the record to admit information to the record as necessary to comply with this Opinion and Order.

If it is necessary to do so, Commerce on remand may use facts otherwise available for the limited purposes of determining a total amount of Daxin's production during the period of review and recalculating the eight affected factors of production. For these purposes, Commerce may use, as facts otherwise available, facts already on the record; such facts could include the Daxin information originally submitted with the questionnaire response, even though that information pertained in part to the wrong time period. Commerce may reopen the record to admit additional information or to use, as facts otherwise available, some or all of the substitute Daxin information as facts otherwise available, even if a verification, or some other demonstration of the reliability of that information, is not practicable during the remand phase of this proceeding. To whatever extent Commerce relies on secondary information, it must, in compliance with 19 U.S.C. § 1677e(c), corroborate that information from independent sources reasonably at its disposal.

The question that remains is whether, and to what extent, Commerce, in developing its remand redetermination, may use inferences adverse to the interests of China Kingdom in selecting from among the facts otherwise available. Under the statute, Commerce is authorized to do so where, as here, an interested party fails to cooperate to the best of its ability in responding to one of its requests for information and, as a result, the necessary information is not available on the record, § 1677e(a)(1), or is affected by one of the four conditions set forth in 19 U.S.C. § 1677e(a)(2), subparagraphs (A) through (D). As discussed previously, Commerce attempted to invoke subparagraphs (A) and (B) but did not do so lawfully. For purposes of the remand proceeding, the necessary information does not now exist on the record in a form in which it is readily usable by Commerce, *i.e.*, such information has not been subjected to the ordinary verification process and has not otherwise been shown to be reliable. In this respect, the court is confronted with an unusual situation. The unsatisfactory state of the record arose because of the failure of China Kingdom to act to the best of its ability in providing the correct Daxin production-related data in response to the Department's questionnaire. At the same time, the record might not be in the current unsatisfactory state had Commerce complied with § 1677m(d) and thus satisfied the requirements that § 1677e(a) imposes on the use of facts otherwise available.

In misapplying § 1677e(a) and, therefore, also misapplying § 1677e(b), Commerce did not fulfill its responsibility to ensure the accuracy of the determination of the antidumping duty assessment rate while inducing compliance. *See Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004) (stating that "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result" and citing *De Cecco*, 216 F.3d at 1032); *Shakeproof Assembly*

Components, Div. of Ill. Tool Works, Inc. v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), in stating that "[i]t is the duty of [Commerce] to determine dumping margins 'as accurately as possible,' " and that "the antidumping laws are remedial not punitive."); *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Rhone Poulenc*, 899 F.2d at 1191, in stating that "[t]he Act sets forth procedures in an effort to determine margins 'as accurately as possible.' "). In its haste to apply what it terms "total adverse facts available," Commerce must not ignore this responsibility.

The court concludes that in this unusual circumstance Commerce, to a very limited extent, may draw adverse inferences in selecting from among the facts otherwise available if it is necessary to use facts otherwise available. On the subject of the application of adverse inferences, the Court of Appeals for the Federal Circuit has explained that "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *De Cecco*, 216 F.3d at 1032. The antidumping duty rate determined by Commerce must be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *Id*. Commerce must confine its selection from among the facts otherwise available, and accordingly also must confine its limited drawing of any adverse inferences, to the deficiency in information resulting from the error occurring upon submission of the Daxin production-related information for the incorrect time period. On remand, Commerce may not fail to use, in calculating an antidumping duty assessment rate for China Kingdom, the information that China Kingdom submitted that was not affected by the error occurring upon submission of the Daxin productionrelated information for the incorrect time period.[13] For the information it chooses to use, as facts otherwise available, in place of the information affected by China Kingdom's error, Commerce must adhere to its obligation, when choosing from among the facts otherwise available under 19 U.S.C. § 1677e(b), to determine the antidumping duty assessment rate with reasonable accuracy. The use of adverse inferences should suffice to ensure that China Kingdom does not benefit from its own failure to cooperate to the best of its ability, *i.e.*, China Kingdom

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[13] The record does not indicate, but does not rule out, the possibility that Commerce refused to verify some information submitted by China Kingdom that was unaffected by the error occurring on the submission of the incorrect Daxin information. If that occurred, Commerce may not refuse to use that information in the remand redetermination on the ground that it is unverified. *See Timken U.S. Corp.*, 434 F.3d at 1354. Any failure by Commerce to subject that information to verification was entirely unrelated to the error committed by China Kingdom.

should not benefit from the use, as facts otherwise available, of information that is more beneficial to it than would have been the use of the actual, albeit unverified, Daxin production-related information. "Commerce's discretion in these matters, however, is not unbounded." *Id.* Therefore, if Commerce is confronted on remand with a situation in which use of any adverse inferences is appropriate, Commerce must act reasonably. In crafting a remand redetermination, Commerce must be mindful of the principles underlying *De Cecco* and also, as a matter of fairness, be mindful that the problems that now must be resolved upon remand resulted in part from its own errors. Commerce in good faith must ensure that its determination of an assessment rate for China Kingdom is in no respect "punitive, aberrational, or uncorroborated." *Id.*

B. Commerce Acted According to Law in Subjecting Yancheng's Entries to the PRC-Wide Rate

In their motion for judgment on the agency record, plaintiffs argue generally that Commerce erred in refusing to verify Yancheng's questionnaire responses, erred in finding that Yancheng failed to comply to the best of its ability in responding to the Department's information requests, and therefore also erred in using adverse inferences. Plaintiffs further argue that Commerce acted contrary to law in subjecting Yancheng to the PRC-wide rate instead of determining a separate rate. For the reasons discussed below, the court does not find merit in plaintiffs' arguments with respect to Yancheng.

1. Commerce Acted Lawfully in Refusing to Verify Yancheng's Questionnaire Responses

Regarding the Department's refusal to verify Yancheng's information, plaintiffs argue that Commerce, during an administrative review, is obligated by law to fulfill the underlying objective of 19 U.S.C. § 1677b(c) to calculate for each respondent the most accurate antidumping margin possible and that failure to verify Yancheng's response is an abdication of that obligation. Pls.' Am. Br. at 13. According to plaintiffs,

> [t]his arbitrary abdication of its responsibilities to investigate responses from a willing respondent, and the failure to explain precisely why it was not able to verify Yancheng Yaou's portions of the responses, particularly with respect to Yancheng Yaou's Section A response, which established that it was not controlled by the Chinese government and was entitled to a rate other [than] the PRC-wide rate, do not comport with the law, which requires the Department to fulfill the underlying objective of 19 U.S.C. § 1677b(c) – that is, it must seek to obtain the most accurate dumping margins possible.

Id.

Defendant responds that the record supports the treatment of Yancheng and Qingdao as a single entity, that Yancheng was the

only willing participant in verification, and that Commerce therefore could not calculate a separate dumping margin for a portion of the single entity's sales. Def.'s Resp. in Opp'n to Pl.'s Mot. for J. Upon the Agency R. 14, 17–24. During the review, Commerce concluded that Qingdao's decision not to participate in verification "precludes the Department from conducting a complete verification of the consolidated questionnaire responses. . . . Since it is not possible for the Department to verify only part of the consolidated response, [Commerce] must consider the entire response unverifiable." *See Commerce Resp. to Qingdao Non Participation* at 1.

In the Preliminary Results, Commerce determined that Yancheng and Qingdao "should be treated as a single entity for purposes of [the] administrative review" and cited several reasons as support for this determination.[14] *See Preliminary Results*, 67 Fed. Reg. at 63,878. First, Commerce cited the relationship between Yancheng and Qingdao through "a Hong Kong company that owns significant shares in both companies." *Id.* Second, Commerce noted in the Preliminary Results that the Hong Kong owner consolidated the selling activities of Qingdao with those of Yancheng in January 2000. *See id.* In further support of its decision to treat Yancheng and Qingdao as a single entity, Commerce referenced Yancheng and Qingdao's submission of "three consolidated supplemental responses to sections A, C, and D of the Department's questionnaire." *Id.* Commerce continued to treat the two plaintiffs as a single entity in the Final Results. *See Final Results*, 68 Fed. Reg. at 19,506.

Plaintiffs' various arguments concerning the Department's refusal to conduct a verification of Yancheng's information ignore the significance of the Department's determination that, for purposes of the administrative review, Yancheng and Qingdao were to be treated as a single entity.[15] One consequence of that determination was that Yancheng could not receive a rate in the administrative review that was separate from any rate determined for Qingdao. A second consequence was that Qingdao's refusal to allow verification precluded the Department from verifying information sufficient to enable it to determine that the single entity was free of government control. Com-

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[14] Commerce also treated Yancheng and Qingdao as a single entity in the prior administrative review. *1999/2000 POR Final Results*, 67 Fed. Reg. at 19,548.

[15] The Department's treating of multiple entities as a single entity, sometimes referred to as "collapsing," has been upheld as a "reasonable interpretation of its statutory mandate." *See, e.g., AK Steel Corp. v. United States*, 22 CIT 1070, 1079–80, 34 F. Supp. 2d 756, 764–65 (1998), *rev'd in part on other grounds*, 226 F.3d 1361 (Fed. Cir. 2000). The purpose of collapsing is to prevent producers from circumventing lawful antidumping duties by channeling production through affiliates to whom Commerce may have assigned a lower antidumping duty rate. *Slater Steels Corp. v. United States*, 27 CIT 1255, 1261, 279 F. Supp. 2d 1370, 1376 (2003). Commerce addresses this concern by assigning a single rate for antidumping duty purposes to those affiliated producers which Commerce determines should be treated as a single entity. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,345–46 (May 19, 1997).

merce may well have been able to verify Yancheng's information, including the information in Yancheng's section A response relevant to the issue of whether Yancheng was independent of government control, but doing so would have been pointless. Once Qingdao had notified Commerce that it would not participate in verification, Commerce justifiably concluded that a satisfactory verification directed to the Yancheng-Qingdao entity was impossible. Absent Qingdao's permission, Commerce had no authority to conduct a verification of the questionnaire information Qingdao submitted or the portion of the jointly-submitted information that required examination of Qingdao's business records. In particular, Commerce lacked any permission to undertake to verify the portion of Qingdao's information needed for a determination of whether Qingdao was free of government control. Therefore, Commerce would have lacked verified information upon which it could find the Yancheng-Qingdao entity to be free of government control, regardless of the outcome of any verification that Commerce could have conducted on Yancheng's section A response.

Moreover, during the administrative review, plaintiffs did not challenge the Department's determination to treat Yancheng and Qingdao as a single entity and did not challenge any one of the separate findings of fact supporting that determination. In contesting the Final Results before the court, plaintiffs do not argue in their brief supporting their Rule 56.2 motion that Commerce acted contrary to law in its determination to treat Yancheng and Qingdao as a single entity for purposes of the administrative review. Plaintiffs' brief does not provide a basis from which the court could infer such an argument. Even were there such a basis, the court would be unable to find an exception to the doctrine of exhaustion of administrative remedies that conceivably could support a decision by the court to entertain a judicial challenge to the determination to treat Yancheng and Qingdao as a single entity.[16] *See* Pls.' Am. Br. 12–19; Oral Argument Tr., Oct. 21, 2004.

In summary, because the Department's decision to treat Yancheng and Qingdao as a single entity is not challenged in this case, and because that decision rendered meaningless any partial verification of that entity that Commerce was authorized by Yancheng to conduct, the court must reject plaintiffs' argument that Commerce erred in refusing to conduct a verification of Yancheng's responses.

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[16] To satisfy the doctrine of exhaustion of administrative remedies, a plaintiff seeking to bring a judicial challenge to an administrative action must show that it either raised an objection to an administrative action during the administrative process or that it qualifies for an exception to the exhaustion principle. *See* 28 U.S.C. §2637(d) (2000) (stating that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

2. The Department's Decisions to Resort to Facts Otherwise Available and to Use Adverse Inferences as to the Yancheng-Qingdao Entity Were in Accordance with Law

Plaintiffs argue that the Department's application of adverse inferences in the determination of the assessment rate for entries of Yancheng's subject merchandise was not supported by substantial record evidence. *See* Pls.'s Am. Br. 12–18. Plaintiffs maintain that Commerce must determine that a respondent "failed to cooperate by not acting to the best of its ability to comply with a request for information" pursuant to § 1677e(b) and argue that

> a respondent is deemed to have failed to act to [the] best of its ability for purposes of drawing adverse inferences under section 1677e(b) only when it either willfully refuses to comply with Department requests or when it does not "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation."

Id. at 13–14 (quoting *Nippon Steel Corp.*, 337 F.3d at 1382). According to plaintiffs, Commerce "has not alleged that [Yancheng] willfully withheld information or that its questionnaire responses were willfully incorrect." *Id*. at 14. Plaintiffs argue that although Yancheng and Qingdao are sibling companies as a result of a Hong Kong company's common minority interest, Yancheng had no control over Qingdao and could not order Qingdao to participate in verification. *Id*. at 13–15. Based on this reasoning, plaintiffs complain that Commerce committed reversible error by holding Yancheng responsible for the non participation of Qingdao in verification.

Plaintiffs' arguments are misguided. Commerce did not find as a fact, and need not have found, that Yancheng itself failed to cooperate to the best of its ability for purposes of the adverse inference provision of 19 U.S.C. § 1677e(b). Based on its determination to treat Yancheng and Qingdao as a single entity–a determination that is, for the reasons discussed previously, unchallenged in this case–Commerce correctly framed the issues for decision as whether there was a basis to invoke the facts available procedure of § 1677e(a) and whether, for purposes of § 1677e(b), the single entity cooperated to the best of its ability in responding to the Department's request for information. In accordance with § 1677e(a)(2)(D), Commerce concluded that information necessary to the administrative review had been submitted but could not be verified. This conclusion undoubtedly was correct: questionnaire information pertaining in whole or in part to Qingdao could not be verified for the simple reason that Qingdao denied Commerce permission to do so. Commerce, therefore, had sufficient grounds under § 1677e(a)(2)(D) to invoke the facts otherwise available procedure with respect to the unverifiable information. The Department's finding that the single entity comprised of Yancheng and Qingdao did not cooperate to the best of its

ability is supported by the uncontested fact that Qingdao refused to participate in the verification process.[17]

3. Commerce Acted in Accordance with Law in Subjecting Yancheng's Entries to the 223.01 Percent PRC-Wide Rate Instead of Determining a Separate Rate

In the subject administrative review, Commerce, as it had in previous reviews involving exports from the PRC, determined a "PRC-wide" rate to serve as the rate that it would apply to the entity comprised of the government of the PRC and all respondents that did not qualify for a separate rate because they failed to demonstrate that they were independent of the control of the PRC government. In this review, Commerce assigned such respondents, as an application of facts otherwise available and adverse inferences, the rate of 223.01 percent, which it characterized as "the highest rate from any segment of this administrative proceeding, which is a rate calculated in the 1999–2000 review." *Final Results*, 68 Fed. Reg. at 19,508. Regarding the determination of the PRC-wide rate, to fulfill the corroboration requirement of § 1677e(c), Commerce stated that "[t]he information used in calculating this margin was based on sales and production data of a respondent in a prior review, together with the most appropriate surrogate value information available to the Department, chosen from submissions by the parties in that review, as well as gathered by the Department itself." *Id.*

In challenging the Department's application of the PRC-wide rate to Yancheng as an exercise of authority under 19 U.S.C. § 1677e, plaintiffs, in support of their Rule 56.2 motion, do not raise arguments specifically challenging the manner in which Commerce determined that the 223.01 percent rate was appropriate for assignment to the PRC-wide entity. Instead, plaintiffs argue that even if Commerce is authorized to invoke its authority to use facts otherwise available and adverse inferences as to Yancheng, Yancheng is entitled to its own separate rate and that "[t]he punitive PRC-wide rate certainly is not representative of [Yancheng's] subject sales." Pls.' Am. Br. 18. Plaintiffs cite *De Cecco*, 216 F.3d at 1032, for the principle that Commerce may not select an unreasonably high rate with no relationship to a respondent's actual dumping margin. *Id.* at 18–19. Plaintiffs submit that the Department was required to craft a duty rate for Yancheng that reflects as precisely as possible Yancheng's actual margin. *Id.* at 18. They argue that Yancheng's un-

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[17] Because of the significance of the refusal of Qingdao to participate in verification as a basis for a finding of a failure to cooperate for purposes of § 1677e(b), the court need not reach the issues of whether the allegedly invalid certifications of questionnaire responses, or the allegedly contradictory responses on whether Qingdao made any sales of the subject merchandise during the period of review, provide an additional justification for the Department's drawing adverse inferences in choosing from among the facts otherwise available. *See* Pls.'s Am. Br. 15–16.

verified "responses provide a reasonable basis on which to calculate a dumping margin that more realistically reflects [Yancheng's] circumstances and operations than the PRC country-wide rate." *Id.* at 19.

However, the Department was well within its authority in refusing to determine an actual assessment rate for Yancheng absent the opportunity to verify Qingdao's information. Yancheng's "circumstances and operations" could not be considered apart from those of Qingdao on the administrative record of this case. The findings of fact on which Commerce relied in treating the two entities as one for purposes of the review, which findings plaintiffs do not contest, support the Department's conclusion that it could not analyze Yancheng's sales operations separately from Qingdao's. In relying on *De Cecco*, 216 F.3d at 1032, to argue that Commerce may not select for Yancheng an unreasonably high rate with no relationship to a respondent's actual dumping margin, plaintiffs fail to explain how the concept of an "actual dumping margin" has meaning given the absence of verified information on the administrative record of this case from which Commerce could have calculated a separate rate for the Yancheng-Qingdao entity. In this respect, the arguments that plaintiffs advance against the assignment to Yancheng of the PRC-wide rate suffer from the same flaw as their other arguments on behalf of Yancheng; *i.e.*, plaintiffs fail to address the full consequences of the Department's decision to treat Yancheng and Qingdao as a single entity. Not only did the record lack verified information from which an actual assessment rate could have been determined for this entity, it lacked verified information upon which it could be concluded that the Yancheng-Qingdao entity was free of government control.

Moreover, with respect to the assignment of the 223.01 percent PRC-wide rate to entries of Yancheng's subject merchandise as an application of facts otherwise available and adverse inferences, the court notes that Commerce has not assigned to an entity comprised of Yancheng and Qingdao an individual assessment rate in any previous investigation or review.[18] Yancheng and Qingdao were first

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[18] In the antidumping investigation, Yancheng Baolong Aquatic Foods Co., Ltd. ("Yancheng Baolong Aquatic"), which later became known as Yancheng, obtained a separate rate of 122.92 percent. *Order*, 62 Fed. Reg. at 48,219. In the administrative review for the period of March 26, 1997 through August 31, 1998, Yancheng Baolong Aquatic was included in the PRC-wide rate of 201.63 percent. *Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Administrative Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review*, 65 Fed. Reg. 20,948, 20,949 (Apr. 19, 2000). In the administrative review for the period September 1, 1998 through August 31, 1999, Yancheng Baolong Aquatic did not respond to the Department's questionnaire and again was treated as a government-controlled enterprise subject to the PRC-wide rate of 201.63 percent. *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg.

treated as a single entity in the prior administrative review, for which the period of review was September 1, 1999 through August 31, 2000, and in which the single entity Yancheng-Qingdao was assigned the PRC-wide rate of 223.01 percent. *1999/2000 POR Final Results*, 67 Fed. Reg. at 19,548–49. Upon a judicial challenge to the final results of that previous review, the Court of International Trade affirmed the Department's treatment of Yancheng and Qingdao as a single entity and the inclusion of the Yancheng-Qingdao entity in the PRC-wide rate for that administrative review. *Crawfish Processors Alliance v. United States*, 28 CIT ___, ___, 343 F. Supp. 2d 1242, 1269–70 (2004), *rev'd on other grounds*, 477 F.3d 1375 (Fed. Cir. 2007). Thus, in applying facts otherwise available and using adverse inferences, Commerce was faced with a situation in which the Yancheng-Qingdao entity had not received, in any prior phase of the antidumping proceedings, a separate rate that could serve even as a comparison.

In summary, plaintiffs do not specifically challenge the methodology Commerce applied in selecting the 223.01 percent rate as the PRC-wide rate, nor do they challenge the decision to treat Yancheng and Qingdao as a single entity or the findings of fact on the basis of which Commerce did so. The court concludes that Commerce acted according to law in declining to assign a separate rate to the Yancheng-Qingdao entity, which had failed to establish its independence from government control, and for which no verified record information existed from which a separate rate could have been calculated.

IV. CONCLUSION AND ORDER

The court concludes that the Department's determination in the Final Results to assign to China Kingdom the antidumping duty assessment rate of 223.01 percent is not in accordance with law because (1) Commerce failed to make a finding that any specific person withheld requested information for purposes of 19 U.S.C. § 1677e(a)(2)(A); (2) Commerce failed to make and support with substantial record evidence necessary findings under 19 U.S.C. § 1677e(a)(2)(B) and did not afford China Kingdom the opportunity to remedy or explain the deficiency occurring upon the submission of corrective information; (3) Commerce erred in relying on 19 C.F.R.

20,634, 20,634–35 (Apr. 24, 2001) ("*1998/1999 POR Final Results*"); *Notice of Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews, Partial Rescission of the Antidumping Duty Administrative Review, and Rescission of a New Shipper Review: Freshwater Crawfish Tail Meat From the People's Republic of China*, 65 Fed. Reg. 60,399, 60,401 (Oct. 11, 2000) ("*1998/1999 POR Preliminary Results*"). For the same period of review, September 1, 1998 through August 31, 1999, Commerce conducted a new shipper review for Qingdao, determined that Qingdao was independent of government control, and calculated a separate rate of 0.00 percent. *1998/1999 POR Final Results*, 66 Fed. Reg. at 20,635; *1998/1999 POR Preliminary Results*, 65 Fed. Reg. at 60,399, 60,402–03.

§ 351.301(b)(2) when invoking authority to use facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B); (4) Commerce erred in disregarding certain information submitted by China Kingdom that was not deficient under 19 U.S.C. § 1677e(a); and (5) Commerce did not act in accordance with law in assigning to China Kingdom an assessment rate that was not reasonably related to an actual assessment rate relevant to the entries of China Kingdom.

The court concludes that the Department's determination in the Final Results to subject the entries of Yancheng to the 223.01 percent PRC-wide rate is supported by substantial evidence and is otherwise in accordance with law.

For the reasons stated in this Opinion and Order, plaintiff's motion for judgment on the agency record is granted in part and denied in part, and it is hereby

ORDERED that this matter is remanded to the United States Department of Commerce for further administrative proceedings consistent with this Opinion and Order; it is further

ORDERED that Commerce, on remand, issue a remand redetermination that calculates and assigns to China Kingdom a new antidumping duty assessment rate that is in full compliance with all directives in this Opinion and Order; it is further

ORDERED that Commerce, in the remand redetermination ordered hereunder, support all findings with substantial record evidence and include a reasoned explanation for its determinations; it is further

ORDERED that Commerce, in developing the remand redetermination required hereunder, make the determination as to practicability that is required by 19 U.S.C. § 1677m(d) to the extent possible now that the review is completed and, in so doing, specifically must afford China Kingdom a reasonable opportunity to explain the deficiency affecting the information on Daxin's total production during the period of review and the calculated data for eight of the eleven factors of production, as submitted in the February 27, 2002 questionnaire response, and may reopen the administrative record as necessary to comply with these directives; it is further

ORDERED that Commerce, in developing the remand redetermination required hereunder, make the specific determinations required by 19 U.S.C. § 1677m(d)(1) or (2), or both, with respect to the substitute Daxin information that China Kingdom submitted for the specific purpose of remedying the deficiency existing as a result of the original submission of incorrect Daxin information, and may reopen the administrative record as necessary to comply with these directives; it is further

ORDERED that Commerce, in developing the remand redetermination required hereunder, may use facts otherwise available solely to determine the total amount of Daxin's production of subject merchandise during the period of review and to calculate and to deter-

mine the eight of the eleven factors of production affected by the error occurring upon the reporting of the originally-submitted Daxin information and, in so doing, may reopen the administrative record as necessary to comply with these directives; it is further

ORDERED that Commerce, in developing the remand redetermination required hereunder, in selecting from among facts otherwise available may use adverse inferences only to the limited extent authorized in this Opinion and Order and in its remand redetermination must state to the court, and must demonstrate with substantial record evidence and reasoned explanation, that its limited use of adverse inferences is not punitive, aberrational, or uncorroborated; and it is further

ORDERED that Commerce complete and file its remand redetermination on or before January 4, 2008; plaintiffs shall have thirty (30) days from that filing to file comments; and Commerce shall have twenty (20) days after plaintiffs' comments are filed to file any reply.