U.S. Customs and Border Protection

Slip Op. 11–123

FOSHAN SHUNDE YONGJIAN HOUSEWARES & HARDWARE CO. LTD. , AND POLDER, INC., Plaintiffs, v. UNITED STATES, Defendant, and HOME PRODUCTS INTERNATIONAL, INC. Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 10–00059

[Plaintiff's motion for judgment on the agency record granted, in part, and the matter is remanded.]

Dated: October 12, 2011

Dorsey & Whitney LLP (*William E. Perry* and *Elizabeth Crouse*), for plaintiffs Foshan Shunde Yongjian Housewares & Hardware Co., Ltd. and Polder, Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael D. Snyder*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce, *Thomas M. Beline*, of counsel, for defendant.

Blank Rome LLP (*Frederick L. Ikenson*, *Peggy A. Clarke*, and *Larry Hampel*), for defendant intervenor Home Products International, Inc.

OPINION AND ORDER

Eaton, Judge:

Introduction

Before the court is plaintiffs' motion for judgment on the agency record, challenging the Department of Commerce's ("Commerce" or the "Department") final results of the Fourth Administrative Review of the antidumping duty order on Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China, 75 Fed. Reg. 3, 201 (Dep't of Commerce Jan. 20, 2010) (final results of administrative review) and the accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, the "Final Results") for the period of review ("POR") August 1, 2007 through July 31, 2008. *See* Plaintiff's Mem. of Pts. & Auths. in Supp. of Pls.' Mot. J. on the Agency R. ("Pls.' Mem.) 2.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). For the reasons set forth herein, the Final Results are sustained, in part, and this matter is remanded to the Department for further proceedings.

Background

Plaintiff Foshan Shunde Yongjian Housewares & Hardware Co., Ltd. ("Foshan Shunde") is a producer and exporter of ironing boards from the People's Republic of China ("PRC"). Plaintiff Polder, Inc. ("Polder") is a domestic importer of ironing boards from the PRC. Ironing boards exported by Foshan Shunde to the United States, and imported by Polder, are covered by the antidumping order on ironing boards from the PRC. *See* Notice of Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 69 Fed. Reg. 47,868 (Dep't of Commerce Aug. 6, 2004) (amended final determination of sales at less than fair value and antidumping duty order) (the "Order").

On August 1, 2008, Commerce published a notice of opportunity for interested parties to request a fourth administrative review of the Order. On August 29, 2008, pursuant to 19 C.F.R. § 351.213(b)(2) (2011), defendant-intervenor Home Products International, Inc. ("HPI" or "defendant-intervenor") asked for a review of ironing board sales made by Foshan Shunde. On that same date, Foshun Shunde requested a review of its own sales.

The Department issued the preliminary results of its administrative review on September 8, 2009. *See* Floor-Standing, Metal-Top Ironing Tables and Certan Parts Thereof from the PRC, 74 Fed. Reg. 46,083 (Dep't of Commerce Sept. 8, 2009) (preliminary results of antidumping duty administrative review) (the "Preliminary Results"). In the Preliminary Results, the Department found that Foshun Shunde's "unreliable and inconsistent" responses to questionnaires concerning the company's factors of production and sales data warranted the application of adverse facts available ("AFA") to all of the company's questionnaire responses when determining its dumping margin.[1] *Id.* at 46,085; 19 U.S.C. § 1677e(b) (2006).

Commerce further found that Foshan Shunde was not entitled to separate-rate status,[2] concluding that "because the Department de-

[1] The dumping duty margin is "the amount by which the normal price exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). If the price of an item in the home market (normal value) is higher than the price for the same item in the United States (export price), then the dumping margin comparison produces a positive number that indicates dumping has occurred.

[2] Whether Foshan Shunde is entitled to separate-rate status is an issue because the company operates in the PRC, which is a non-market economy country. A non-market

termine[d] that Foshan Shunde's responses [were] unreliable and inconsistent, . . . Foshan Shunde has not demonstrated that it operates free from government control." Preliminary Results, 74 Fed. Reg. at 46,085. As it has done here, Commerce commonly refers to its determination to apply AFA to the totality of a respondent's submissions as "total AFA."[3]

After receiving comments from plaintiffs and defendant-intervenor, the Department issued the Final Results on January 20, 2010. In the Final Results, Commerce made no changes to its Preliminary Results and, thus, applied "total AFA" to Foshan Shunde's questionnaire responses, retained its determination that the company was not entitled to a separate rate, and assigned the PRC-wide antidumping duty margin of 157.68%. *See* Final Order, 75 Fed. Reg. at 3,202; Issues & Dec. Mem. at 23–24.

Plaintiffs, by their motion, challenge two aspects of the Final Results. First, they make a pair of related claims: (1) that the Department's determination to apply AFA to Foshan Shunde's factors of production and sales data was in error; and (2) that, should they fail in their effort to have the AFA determination found unlawful, the Department should be directed to apply only partial AFA. Second, plaintiffs challenge Commerce's denial of separate-rate status to Foshan Shunde, and the resulting assessment of the PRC-wide antidumping rate of 157.68%.

Standard Of Review

The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), which provides, in relevant part, that the court "shall hold unlawful

economy country includes "any foreign country that the administering authority [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A); *Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT 1624, 1625 n.1 (2004) (not reported in the Federal Supplement). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i). The PRC has been determined to be a non-market economy country and has been treated as such in all past antidumping investigations. *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 27 CIT 1827, 1834 n.14 (2003) (not reported in the Federal Supplement) (citations omitted).

When an exporter operates in a non-market economy country Commerce presumes it to be part of a country-wide entity controlled by that country's government. If that exporter can establish that it operates free from government control, however, it is entitled to have its own "separate-rate" based on its own factors of production and sales data, or if AFA is applicable, by an acceptable method.

[3] While the phrase "total AFA" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e after rejecting as untrustworthy all information submitted by respondents in this review.

any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law." Accordingly, "Commerce's determinations of fact must be sustained unless unsupported by substantial evidence in the record and its legal conclusions must be sustained unless not in accordance with law." *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1357 (Fed. Cir. 2006).

Discussion

I. Commerce's AFA Determination on Factors of Production and Sales Data

A. Legal Framework for Applying AFA

Commerce is charged with administering the antidumping laws, which includes carrying out the "overriding purpose of . . . calculat-[ing] dumping margins as accurately as possible." *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007). The Department generally makes its antidumping determinations based on the information it solicits and receives from interested parties concerning the normal value and export price of the subject merchandise.

The Department may, however, rest its determinations on "facts otherwise available . . . 'to fill in the gaps' when 'Commerce has received less than the full and complete facts needed to make a determination'" from the respondents. *Gerber Food (Yunnan) Co., Ltd. V. United States*, 29 CIT 753, 767, 387 F. Supp. 2d 1270, 1283 (2005) ("*Gerber I*") (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)). Pursuant to 19 U.S.C. § 1677e(a):

> If-
>
> (1) Necessary information is not available on the record, or
>
> (2) an interested party or any other person–
>
> (A) withholds information that has been requested by the [Department] 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 [19 U.S.C. § 1677m(c)(1) and (e)],
>
> (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,

> the [Department] shall, subject to [19 U.S.C. § 1677m(d)], use the facts otherwise available in reaching the applicable determination . . . .

Pursuant to the language of the statute, Commerce's authority to apply facts otherwise available is circumscribed by § 1677m(d).

Under § 1677m(d), when Commerce "determines that a response to a request for information under this subtitle does not comply with the request," it must "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." If further information is submitted and "(1) [Commerce] finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then [Commerce] may, subject to [section 1677m(e)], disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d).

The Department's use of facts otherwise available, therefore, generally requires that Commerce (1) find that the response to a request for information is deficient; (2) provide, when practicable, an opportunity to the party submitting the information to explain or correct the deficiency; and (3) determine whether such explanation or correction is either unsatisfactory or untimely. Each of these determinations must be supported by substantial evidence on the record. *See Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 931, 491 F. Supp. 2d 1326, 1337 (2007) ("*Gerber II*").

Once Commerce determines that the use of facts otherwise available is warranted, pursuant to § 1677e(b), if the Department further "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). As the Court of Appeals for the Federal Circuit has explained:

> subsection (b) [of § 1677e] permits Commerce to "use an inference that is adverse to the interest of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information.

Nippon Steel, 337 F.3d at 1381. Accordingly, Commerce may only apply AFA if it determines that (1) the use of facts otherwise available is warranted under §§ 1677e(a) and 1677m, and (2) a respondent has failed to cooperate to the best of its ability under § 1677e(b). A respondent fails to act to "the best of its ability" if it fails to "do the maximum it is able to do." *Nippon Steel*, 337 F.3d at 1382. In selecting an AFA rate, the Department may rely on secondary information, including "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 USCS § 1675] or determination under [19 USCS § 1675b], or (4) any other information placed on the record." 19 U.S.C. § 1677e(b).

B. Commerce's Determination to Apply AFA to Foshan Shunde's Factors of Production and Sales Data in the Final Results

According to Commerce, "[t]hroughout this proceeding, the Department has been concerned that Foshen Shunde has failed to provide the most specific calculation of its factors of production permitted by its accounting and production records." Memorandum re Use of Adverse Facts Available, A-570–888 (Dep't of Commerce August 31, 2009) (C.R. Doc. 19) ("AFA Memo") at 2. The Department was particularly concerned that Foshan Shunde was not providing complete answers to the questions relating to the amount of each input used in producing its various models of ironing boards, and that it did not provide specific information regarding its use of hot-rolled and cold-rolled steel inputs. Issues & Dec. Mem. at 19–20.

In response to Commerce's initial questionnaire, Foshan Shunde, as it had done in the First Administrative Review, reported its factors of production inputs using a "weight-based" methodology. The purpose of the "weight-based" allocation methodology was to assign manufacturing costs incurred by Foshan Shunde on a range of subject and non-subject products, including merchandise such as "ashtrays, ladders, trolleys, racks, trash cans, sleeve racks and other ironing board accessories." Issues & Dec. Mem. at 12. Employing this methodology, Foshan Shunde simply divided all of its inputs, including rolled steel, by weight among all of the products it produced, and then multiplied these weights by the cost per kilogram of each input. Thus, this method provided an estimate of its production costs by product line, but provided no specific information for each model of ironing board. Although the Department had accepted this method of calculating input quantity and cost in the First Administrative Review, here, it chose to ask more specific questions. *See* Issues & Dec. Mem. at 12.

To gather this information, the Department issued multiple supplemental questionnaires by which it sought to elicit from Foshan Shunde "information with as much specificity as possible." AFA Memo at 2–3; *see, e.g.,* First Supplemental Questionnaire, A570–888 (Dep't of Commerce Feb. 10, 2009) (C.R. Doc. 5) ("First Supplemental Questionnaire") 2; Second Supplemental Questionnaire, A-570–888 (Dep't of Commerce Apr. 16, 2009) ("Second Supplemental Questionnaire") (C.R. Doc. 8) 1–2. When the answers to the first three supplemental questionnaires did not produce the sought after information, Commerce issued the Fourth Supplemental Questionnaire. Finally, in response to Commerce's Fourth Supplemental Questionnaire, Foshan Shunde produced a sample of its production notes. Response of Foshan Shunde to the Department's Fourth Supplemental Questionnaire, A570–888 (Dep't of Commerce August 10, 2009) (C.R. Doc. 16) ("Fourth Supplemental Questionnaire Response"). Commerce determined that these production notes, at least with respect to the ironing board models for which they were actually supplied, provided a better indication of the quantity of each input actually used in manufacturing Foshan Shunde's merchandise than the weight-based method had. This is because the production notes broke the inputs down by part (e.g., wire mesh, left/right rail) and by material (e.g., plate, tube, wire).

Ultimately, the Department found that full disclosure of the production notes would have cleared up the uncertainty created by the weight-based calculation. Issues & Dec. Mem. at 13 (quoting AFA Memo at 6) ("Foshan Shunde's 'production notes' . . . 'set forth model-specific usage rates for each of Foshan Shunde's material inputs, including the critical inputs of flat-rolled steel. With these production notes, Foshan Shunde could have furnished the Department with more specific costs and factors of production than that which it provided.'"). Because, in its view, Foshan Shunde had not produced the notes in a timely fashion, and had provided only a small sample of its notes in response to the Fourth Supplemental Questionnaire, the Department determined that the company had not acted to the best of its ability in providing this necessary information. AFA Memo at 56; Issues & Dec. Mem. at 20. In reaching this conclusion, Commerce stated:

> The most significant obstacle to accepting Foshan Shunde's non model specific costs are the 'production notes' which Foshan Shunde provided at exhibit 3 of its August 10, 2009 submission [in response to the Fourth Supplemental Questionnaire]. . . . [T]hose production notes set forth model-specific usage rates for each of Foshan Shunde's material inputs, including the critical

> inputs of flat-rolled steel. With these production notes, it is apparent that Foshan Shunde could have furnished the Department with more specific costs and factors of production than what it provided.

AFA Memo at 6. Commerce, thus, concluded that the "existence of such 'production notes' undercut the accuracy and reliability of previous Foshan Shunde submissions," and "Foshan Shunde's partial disclosure of its 'production notes' at a late point in this proceeding constitutes a failure on Foshan Shunde's part to cooperate to the best of its ability and as significantly impeding this proceeding within the meaning of [§ 1677e]." Issues & Dec. Mem. at 13–14. In other words, according to Commerce, the production notes show that Foshan Shunde could have been more specific in its answers to the Department's questionnaire at a much earlier stage in the proceedings, but did not "do the maximum it [was] able to do" to produce them. *Nippon Steel*, 337 F.3d at 1382.

Next, while the failure to provide the production notes is the primary reason for the Department's determination to apply AFA to the factors of production information provided by Foshan Shunde, Commerce had others. In the Final Results, the Department also found that "Foshan Shunde provided incomplete and unreliable information concerning . . . its inputs of hot and cold rolled steel." Issues & Dec. Mem. at 19. In response to Commerce's initial questionnaire, Foshan Shunde claimed to use hot-rolled steel for the legs of the ironing boards and cold-rolled steel for the tops. Because the surrogate value of hot-rolled steel is less than that for cold-rolled steel, according to Commerce, Foshan Shunde had an incentive to report inputs of the former, which would result in a lower normal value calculation. *See* AFA Memo at 2; *see also* 19 U.S.C. § 1677b(c). Petitioner HPI, however, provided evidence, in the form of a 1990 report on carbon and alloy steels in the PRC (the "Steel Report"), that suggested that hot-rolled steel was not available in the PRC in the size and form required to manufacture ironing boards. In addition, HPI provided a metallurgical analysis of an ironing board from the PRC, purchased in the United States (the "Metallurgical Analysis"), which showed that hot-rolled steel was not used in their manufacture. Because the Department found that the Steel Report and the Metallurgical Analysis called the accuracy of Foshan Shunde's original questionnaire responses into question, it requested additional information from the company concerning the types and quantities of steel purchased for its specific ironing board models.

When asked for more detail about the steel it used, however, Foshan Shunde claimed that it could not specify the type and quantity of steel purchased for different models of ironing boards because its "customers decide the thickness and type of steel used." AFA Memo at 6 (quoting Response of Foshan Shunde to the Department's Second Supplemental Questionnaire, A-570–888 (Dep't of Commerce May 1, 2009) ("Second Supplemental Questionnaire Response") 2). While not entirely clear, it appears that the company was claiming that there were no standard ironing board models, and that the quantity and type of materials used for each model of ironing board it produced varied with the specifications of its individual customers. Seemingly, this response was Foshan Shunde's effort to convince Commerce that it was somehow unable to report its own manufacturing inputs because they were dictated by the ironing board purchasers.

In response to Commerce's request for samples of the company's correspondence with these customers, however, "Foshan Shunde provided a single photograph which it represented to be indicative of the correspondence it received from its customers concerning the steel inputs used in the manufacture of subject merchandise." Issues & Dec. Mem. at 13. Upon further inquiry by the Department, Foshan Shunde "provided portions of customer e-mails without explaining why it kept those portions and not those the Department explicitly requested." Issues & Dec. Mem. at 13. Moreover, Foshan Shunde produced some product diagrams, but these omitted information concerning the type of steel used. Nor were these diagrams translated in their entirety, as required by regulation. *See* AFA Memo at 3.[4]

Ultimately, Commerce did not draw any conclusion as to what type of steel Foshan Shunde used. Rather, it determined that, because the company's responses lacked specificity and credibility, they provided additional evidence that Foshan Shunde's factors of production responses should be disregarded and AFA should be employed.

Plaintiffs contend that Commerce based its determination that Foshan Shunde failed to cooperate to the best of its ability by failing to fully report the type of steel it used on the Steel Report and the Metallurgical Analysis provided by HPI. Pls.' Mem. 16. For plaintiffs, these documents fail to demonstrate what type of steel Foshan Shunde used to manufacture ironing boards because the Steel Report did not take into account that the Chinese manufacturing sector "has

[4] Pursuant to 19 C.F.R. § 351.303(e):
A document submitted in a foreign language must be accompanied by an English translation of the entire document or of only pertinent portions, where appropriate, unless the Secretary waives this requirement for an individual document. A party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.

grown and evolved exponentially since 1990," and the Metallurgical Analysis was "conducted on an ironing table which did not identify the ironing table as manufactured by Foshan Shunde and [was] purchased by [HPI] seven months after the end of the review period." Pls.' Mem. 16–17.

Plaintiffs' claim that the Department based its determination on the Steel Report and Metallurgical Analysis, however, is not supported by the record. With regard to Foshan Shunde's questionnaire responses concerning steel inputs, the Department found:

> In analyzing Foshan Shunde's steel inputs, we have focused primarily upon the reliability of the information submitted by Foshan Shunde rather than upon the [Metallurgical Analysis] submitted by Petitioner or other information concerning the overall state of the steel industry in China. Review of record evidence indicates that there are both (1) significant cost differences between the surrogate values of hot and cold rolled steel and (2) *that Foshan Shunde has provided conflicting information concerning the type of steel that it utilizes in production of the subject merchandise.*

Issues & Dec. Mem. at 20 (emphasis added). Thus, while the Metallurgical Analysis and the Steel Report no doubt heightened the Department's awareness of possible problems with Foshan Shunde's questionnaire responses, it is apparent that the responses themselves (i.e., incomplete emails, omitted information concerning steel type, inadequate translation) led to Commerce's determination to disregard the factors of production questionnaire responses. That is, the determination that Foshan Shunde failed to cooperate to the best of its ability was based on the company's failure to provide complete and credible responses to Commerce's questionnaires, and took into consideration the significant cost differences between hot- and cold-rolled steel.

Commerce found further evidence to justify its application of AFA in Foshan Shunde's answers to questions relating to the source of steel wire. In its questionnaire responses, Foshan Shunde represented that the company made steel rod into the wire it used in making its ironing boards, rather than purchasing finished steel wire from outside sources. In the Final Results, Commerce found that there was conflicting evidence as to the source of the steel wire and, thus, "Foshan Shunde also withheld information regarding its source of steel wire, another key input." Issues & Dec. Mem. at 14. Plaintiffs

contend that, contrary to Commerce's findings, "Foshan Shunde's evidence about its wire drawing operations is not contradictory." Pls.' Mem. 19.

Foshan Shunde initially reported that it internally drew steel rod into the wire used in the production of subject merchandise. But, according to Commerce, in the investigation of Kitchen Appliance Shelves and Racks from the PRC (the "KASR Investigation"), in which Foshan Shunde's affiliate Guangdong Wireking was a respondent, Foshan Shunde's personnel reported that it "performed no wire drawing but rather purchased finished wire from an outside supplier." AFA Memo at 4; Wireking Verification Report at Attachment 2 (C.R. Doc. 13).

When this apparent contradiction was brought to the company's attention by the Department, Foshan Shunde claimed, for the first time, that it had sold its wire drawing equipment during the POR. For plaintiffs, the evidence it placed on the record demonstrates that Foshan Shunde must have had its own wire drawing equipment because it purchased wire rod that was larger than the wire used in the manufacture of the subject merchandise. In addition, plaintiffs insist that two Foshan Shunde employees operated the wire drawing machinery, and the company provided tax documents purporting to show that the wire drawing equipment had been sold. Pls.' Mem. 19–22.

Despite plaintiffs' disclosure, the Department asserts that it did not err in using Foshan Shunde's responses as evidence supporting the application of AFA. Issues & Dec. Mem. at 14 ("Foshan Shunde did not report the sale of production equipment relating to its wire drawing operation until August 13, 2009 and only then did so after repeated requests from the Department. Further, on August 27, 2009, at a point still later in the proceeding, Foshan Shunde provided other supporting documentation concerning the production and source of its long-wire products. . . . Foshan Shunde's failure to disclose this information earlier in the proceeding has significantly impeded the Department's analysis of Foshan Shunde's long-wire inputs . . . ."); AFA Memo at 7 ("[I]n its August 10, 2009 submission, Foshan Shunde offered no documentation of the sale or to whom the equipment was sold. Moreover, there is no mention of the sale of Foshan Shunde's wire drawing operation in the KASR verification report. Based on the foregoing, we preliminarily find Foshan Shunde's narrative concerning its [wire drawing] operation to lack credibility.").

In addition to asserting that the inadequacy of Foshan Shunde's factors of production responses supported the use of AFA, Commerce determined that the sales data provided by Foshan Shunde was also

unreliable. On November 18, 2008, in response to Commerce's initial questionnaire, Foshan Shunde indicated that it "was not affiliated with any producers or exporters of the subject merchandise during the POR." *See* AFA Memo at 7 (citations omitted). The Department required the disclosure of information relating to the other companies in order to identify all relevant sales by Foshan Shunde, and to allow the agency to accurately calculate the U.S. export price of the ironing boards. Issues & Dec. Mem. 14; *see also* 19 U.S.C. § 1677a(a) (defining export price). In the Final Results, however, Commerce determined that Foshan Shunde provided conflicting information concerning its affiliation with another company, Shunde Junbang.

The Department found that "the statements made by Foshan Shunde in this review are inconsistent with the statements made by Foshan Shunde personnel in the [KASR Investigation]. During the course of the KASR investigation, [which was virtually simultaneous with this investigation,] Shunde Junbang indicated that it listed ironing boards on its website and forwarded customer inquiries to Foshan Shunde." Issues & Dec. Mem. at 21 (quoting AFA Memo at 7) (citations omitted). In addition, Commerce found that the product codes for ironing boards listed on Foshan Shunde's and Shunde Junbang's respective web sites were similar. Accordingly, the Department determined that "the commonality of product codes between the merchandise sold by Foshan Shunde and the merchandise sold by Shunde Junbang indicates the latter may have in fact sold Foshan Shunde merchandise." Issues & Dec. Mem. at 21.

Commerce found Foshan Shunde's explanations of these findings unconvincing. For example, the company attributed the similarity in the product codes of its products and those listed by Shunde Junbang to a uniform similarity in product codes across the ironing board industry. *See* AFA Memo at 7 (citing Letter from Foshan Shunde, dated August 10, 2009 at 3). The Department, however, found that, based on evidence submitted by defendant-intervenor, only Foshan Shunde's and Shunde Junbang's web sites bore similar product codes. AFA Memo at 7. In other words, Commerce determined that the similarity in the product codes for ironing boards sold on Foshan Shunde's and Shunde Junbang's respective web sites indicated that Shunde Junbang was, in fact, selling subject merchandise on behalf of Foshan Shunde.

Based on these findings, the Department concluded that "[d]espite the opportunities afforded to the company to clarify the conflicting accounts played by Shunde Junbang in the sale of the subject merchandise, significant discrepancies remain between the account that Foshan Shunde rendered of Shunde Junbang activities in this pro-

ceeding and the account that Foshan Shunde offered in the [KASR] investigation." Issues & Dec. Mem. at 21. Accordingly, Commerce found that Foshan Shunde's questionnaire responses concerning its affiliation with Shunde Junbang were unreliable and, therefore, constituted substantial evidence supporting the application of AFA to Foshan Shunde's sales data.

Plaintiffs do not contest the Department's determination to apply AFA to its sales data. Rather, they object that, even if Foshan Shunde's failure to explain its relationship with Shunde Junbang "rises to the level of misconduct, the Department is still not empowered to use total adverse facts available for an entire investigation on that basis alone." Pls.' Mem. 35. As discussed *infra*, the Department's determination to apply AFA to all of Foshan Shunde's factors of production and sales data was reasonable on the record before it.

C. Commerce's Determination to Apply AFA to Foshan Shunde's Factors of Production and Sales Data is Sustained

Commerce has some discretion to decide what information it needs to accurately calculate a respondent's dumping margin. *See Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 85, 96, 414 F. Supp. 2d 1300, 1310 (2006) ("Commerce is given wide discretion in the selection of data sources for use in administrative review."). The Department makes its decision as to the information it needs and implements it by requesting such information through its questionnaires. Respondents have an obligation to act to the best of their ability to provide the requested information. *See* 19 U.S.C. 1677e(b).

In this case, Commerce reasonably determined that the record was incomplete because Foshan Shunde did not provide adequate information concerning the quantity of materials and the nature of the steel actually used in producing the subject merchandise. Additionally, the company did not timely produce information relating to the source of its steel wire inputs. This information was necessary to determine the surrogate values of these materials in order to calculate the normal value of Foshan Shunde's merchandise. Accordingly, the absence of this information created a gap in the record that warranted the use of facts otherwise available under 19 U.S.C. § 1677e(a).

Moreover, Commerce's determination that Foshan Shunde's failure to provide this information in a timely fashion supported the application of AFA was reasonable. First, by withholding the production notes, Foshan Shunde did not cooperate to the best of its ability in responding to Commerce's questionnaires seeking the specifics of its

manufacturing inputs. That is, while it may have been reasonable for Foshan Shunde to reply to the initial questionnaire using the same methodology it used in the First Review, it was not reasonable for the company to fail to produce the production notes in response to the supplemental questionnaires. *See, e.g.,* First Supplemental Questionnaire, Sec. D(1) ("For each model of the subject merchandise, separately detail the grade of steel and dimensions (length, width and thickness) of every hot-rolled or cold-rolled coil used in the production process . . . ."); Second Supplemental Questionnaire, Sec. D(7)(a) ("Provide the source documentation for models 1454TC2–25 and 1454TC1–28 which support the listed standard weights."); Third Supplemental Questionnaire, A-570–888 (Dep't of Commerce July 27, 2009) (C.R. Doc. 11) Sec. D(4) ("[P]rovide any and all accounting and production records . . . that establish the claimed amount of production material for each of the following inputs for . . . [list of cold- and hot-rolled inputs of various thicknesses]."). Accordingly, the Department did not err in concluding that "Foshan Shunde's partial disclosure of its 'production notes' at a late point in this proceeding constitutes a failure on Foshan Shunde's part to cooperate to the best of its ability and as significantly impeding this proceeding." *See* Issues & Dec. Mem. at 14.

This conclusion is further supported by Foshan Shunde's failure to provide adequate responses to Commerce's questions concerning the type of steel used in making the ironing boards. As noted *supra*, Commerce consistently asked questions about the use of hot-rolled and cold-rolled steel in its supplemental questionnaires. Foshan Shunde insisted that this information was unavailable because its customers directed the type of steel used in a particular ironing board model. The company, however, did not produce any credible evidence to support this claim. AFA Memo at 6 ("Foshan Shunde failed to provide any correspondence from its customers to demonstrate that the customer, in fact, specifie[d] the type of thickness of steel materials used. Also, in responding to the Department's [] request for supplemental information, Foshan Shunde provided no documentation to suggest that customer correspondence governed its acquisition of steel inputs."); *see Quingdao Taifa Group Co. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1231, 1239 (2009) ("A reasonable and responsible foreign producer would have known that it must keep and maintain documents such as factory-out slips, production notices, and production subledgers, and [respondent's] officials' efforts to avoid producing the requested documents demonstrates that Taifa failed to put forth maximum efforts to investigate and obtain the documents."). Based on the record, Commerce has supported with sub-

stantial evidence its finding that Foshan Shunde did not cooperate to the best of its ability to produce evidence demonstrating the type of steel used to make subject merchandise.

Although not as substantial as the evidence relating to the production notes and the type of steel used to make the ironing boards, Foshan Shunde's problematic questionnaire responses concerning its source of steel wire also supports the application of AFA. As an initial matter, Commerce found that purchased wire was significantly more costly than drawn wire. Next, despite the company's representation that it made its own steel wire from steel rod, evidence from the parallel KASR Investigation indicated that the wire had been purchased. During verification in the KASR Investigation, the Department confirmed that Foshan Shunde had no wire drawing equipment.

The Department, was correct in finding that the company did not provide a timely explanation for these apparent inconsistencies. As defendant notes,

> Foshan Shunde did not report the sale of production equipment relating to its wire drawing operation until August 13, 2009 [*i.e.*, in response to the Fourth Supplemental Questionnaire] and only then after repeated requests from the Department. Further, on August 27, 2009, at a point still later in the proceeding, Foshan Shunde provided other supporting documentation concerning the production and source of its long-wire production.

Issues & Dec. Mem. at 14.

Thus, the evidence plaintiffs now point to was not supplied until after the Department questioned the accuracy of Foshan Shunde's questionnaire responses, following the contradictory statements that its employees made during the KASR Investigation. *See* Issues & Dec. Mem. at 21 ("Foshan Shunde's tardiness in providing documentation concerning the disposition of the wire production equipment precluded any analysis that the Department might have undertaken in the *Preliminary Results*"); AFA Memo at 7 ("As in past submissions, Foshan Shunde indicated in its August 10, 2009 letter that it drew wire during the POR. Yet, when the Department questioned Foshan Shunde about the observations of the [KASR Investigation] verification team, Foshan Shunde indicated that it sold its wire drawing operation in February 2009. Notwithstanding that it was given four previous opportunities to describe its production process, Foshan Shunde's August 10, 2009 submission was the first mention . . . of the sale of its wire drawing operation.").

As a result, the Department found that "Foshan Shunde's narrative concerning its wire drawing operation [lacked] credibility." AFA

Memo at 7; Issues & Dec. Mem. at 20–21. When confronted with this inconsistency, Foshan Shunde ultimately claimed that it had sold its wire drawing equipment in February 2009. This claim, however, was first advanced on August 10, 2009, after the Department was well along in drafting the Preliminary Results issued on September 8, 2009. Based on the sequence of events, and Foshan Shunde's incentive to report that it made the wire itself, it was reasonable for Commerce to conclude that Foshan Shunde's questionnaire responses were untimely and lacked credibility.

D. The Department's Rejection of the Weight-Based Methodology Was Proper

In addition to their objections to Commerce's findings with respect to Foshan Shunde's questionnaire response, plaintiffs insist that Commerce acted unlawfully by refusing to accept the weighted average calculation used by Foshan Shunde in the First Administrative Review. For plaintiffs, "this method was good enough for the Department in [the First Administrative Review] in which Foshan Shunde participated, . . . [and] Foshan Shunde's method of production had not materially changed since [the First Review] . . . ." Pls.' Mem. 31. Plainitff, therefore, insists that "the Department should use the data which Foshan Shunde calculated using the same method and timely provided to the Department." Pls.' Mem. 31. It is, however, clear that Commerce had the authority to ask more specific questions about the inputs that went into manufacturing Foshan Shunde's ironing boards.

When the Department changes its methodology it "need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology." *Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009). Here, in order to calculate a more accurate margin, Commerce requested input information specific to the subject merchandise to obtain a more accurate valuation of Foshan Shunde's input costs. *See Id.* at 1355 ("Improving accuracy is generally a good reason for a change in methodology."). Thus, the Department has supplied a good reason for changing its methodology, and plaintiffs make no claim that the more specific questions were not permissible under the statute.

Morever, Commerce's decision to apply AFA was based on Foshan Shunde's failure to provide information it had in its possession, i.e., the production notes, the correspondence with customers, the sale of the wire drawing equipment. Accordingly, even if Foshan Shunde did have some reasonable expectation that it was not obligated to maintain specific kinds of input data, here, Commerce's decision was based

on Foshan Shunde's failure to timely and fully produce records the company actually had. Foshan Shunde's failure to produce this information in the Supplemental Questionnaires, therefore, could not be attributable to reliance on Commerce's prior use of a different methodology. Thus, even though the weight based method may have been "good enough" for the First Administrative Review, Commerce was not prohibited from attempting to calculate a more accurate dumping margin by making more specific inquiries.[5]

E. Commerce's Decision to Apply AFA to All of Foshan Shunde's Factors of Production and Sales Responses was Supported by Substantial Evidence and Otherwise in Accordance with Law.

In the event that the Department's decision to apply AFA to certain of Foshan Shunde's questionnaire responses is sustained by the court, plaintiffs argue that Commerce should have applied AFA to only that portion of its questionnaire responses that were found wanting. Therefore, plaintiffs challenge the Department's determination to reject Foshan Shunde's factors of production and sales databases in their entirety in determining the dumping margin. According to plaintiffs:

> [T]he statute does not authorize the Department to use total adverse facts available based solely on its finding that Foshan Shunde submitted unreliable and incomplete documentation in support of its purchases and use of steel inputs, wire-drawing operation, an done disputed affiliation. . . . Under the circumstances of this case, the statute and judicial precedent require that the Department apply partial adverse facts available, if anything, and thereby limit the application of adverse facts available only to information submitted by Foshan Shunde that is missing or otherwise incomplete. It may not reject Foshan Shunde's factors of production and U.S. sales databases *in toto*.

Pls.' Mem. 9.

In other words, for plaintiff, even if Commerce's determination to apply AFA was lawful with regard to certain information, the application of AFA should have been limited to the specific missing information rather than the totality of Foshan Shunde's factors of production and sales information.

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[5] As noted, under 19 U.S.C. § 1677m(d), Commerce must afford a respondent whose questionnaire responses are deemed deficient an opportunity to explain and/or correct the deficiencies before it can apply AFA. Here, the Supplemental Questionnaires afforded Foshan Shunde that opportunity and, therefore, Commerce complied with its obligation under § 1677m(d).

In defending its decision, defendant argues that:

> Commerce reasonably concluded that significant deficiencies and inconsistencies existed in Foshan Shunde's responses regarding inputs (specifically, the types and amount of steel used in producing ironing tables, and the source of the drawn wire used), as well as the role of an affiliate in the sales of the subject merchandise. The proper valuation of inputs and the accuracy of information regarding sales of the subject merchandise are core issues in determining an antidumping duty, and given the general problematic nature of Foshan Shunde's submissions during the review period, it was well within Commerce's discretion to determine that partial facts could not be substituted.

Def.'s Mem. 19.

The court finds that the application of AFA to all of Foshan Shunde's factors of production and sales information is supported by substantial evidence and otherwise in accordance with law. *See Gerber II*, 31 CIT at 930–931, 491 F. Supp. 2d at 1337 ("When construed together, §§ 1677e and 1677m afford Commerce recourse if a party fails to cooperate by filing initial and subsequent questionnaire responses that are so unsatisfactory as to support a finding that the party withheld requested information or significantly impeded the review proceeding by providing those responses. Nevertheless, when invoking facts otherwise available under § 1677e(a)(2)(A) or (C), Commerce must support with substantial record evidence its findings that a party withheld requested information or significantly impeded a proceeding.").

As set forth above, Commerce found that Foshan Shunde failed to adequately respond to requests for information concerning its factors of production. Specifically, plaintiff failed to supply the production notes until it responded to the Fourth Supplemental Questionnaire, supplied insufficient information as to the type of steel used, and gave contradictory accounts regarding its source of steel wire. In addition to its findings that Foshan Shunde's factors of production questionnaire responses were deficient, Commerce also found that Foshan Shunde did not act to the best of its ability in providing information regarding the company's sales data. Specifically, Commerce found wanting its answers with respect to its affiliation with Shunde Junbang.

Based on this history, Commerce determined that "[t]hese deficiencies render the entirety of Foshan Shunde's questionnaire responses an unsuitable basis for calculating a margin." Issues & Dec. Mem. at 12. The Department, thus, found that "Foshan Shunde has withheld

information requested by the Department and has significantly impeded the conduct of this proceeding" and, therefore, it decided to apply AFA to Foshan Shunde's entire factors of production and sales databases. *See* Issues & Dec. Mem. at 11.

This is not a case where the responses were deficient with respect to a discrete category of information, such that partial AFA would be required. *See, e.g., Krupp Thyssen Nirosta GMBH v. United States*, 24 CIT 666, 672–673 (2000) (not reported in Federal Supplement) ("Commerce may find on remand that it is appropriate to apply partial facts available to fill any gaps in the sales data it could not successfully verify, but it may not disregard the sales data absent evidence in the record that the sales data was fatally tainted by the errors in the computer program."). Rather, in light of the "pervasiveness of the inaccuracies" in Foshan Shunde's questionnaire responses, and because "[s]uch information is core, not tangential," Commerce acted reasonably in determining that the deficiencies in Foshan Shunde's responses were so great that it could not rely on any of the company's factors of production or sales information. *Since Hardware,* 34 CIT at __, Slip Op. 10–108, at 22; *Shanghai Taoen Int'l Trading Co. v. United States,* 29 CIT 189, 199 n.13, 360 F. Supp. 2d 1339, 1348 n.13 (2005) ("This is not a case of partial gaps in the record. Commerce determined that Taoen failed to provide a credible explanation for the inconsistencies between Customs' entry documents and Taoen's questionnaire responses which concerned the identity of suppliers. Such information is core, not tangential, and there is little room for substitution of partial facts. Total facts available is therefore appropriate because Commerce has no reliable factors of production information with which to calculate Taoen's antidumping margin."); *see also Qingdao Taifa*, 33 CIT at __, 637 F. Supp. 2d at 1239–40.

Here, it is apparent that Foshan Shunde's inadequate and misleading responses involved a substantial portion of the inputs that went into making the ironing boards. In addition, Foshan Shunde's problematic responses concerning its affiliation with a related company undermined the reliability of its sales data. That is, it is clear that Commerce was not in a position to determine if Foshan Shunde reported all of its sales. As this Court has previously held, when Commerce determines that deficiencies and inconsistencies call into question the credibility of the entirety of a respondent's questionnaire responses with regard to its factors of production and sales, Commerce acts reasonably in applying AFA to the totality of those responses and determining a rate without regard to the information

contained in the responses. *See Since Hardware*, 34 CIT at __, Slip Op. 10–108 at 22. Accordingly, the Department's application of AFA to all of Foshan Shunde's factors of production and sales submissions is sustained.

II. Commerce's Denial of Separate-Rate Status to Foshan Shunde

A. Legal Framework

Where, as here, Commerce conducts an antidumping investigation or review of products from a non-market economy country ("NME") such as the PRC, the Department employs a presumption of state control. *See Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1372 (Fed. Cir. 2003) ("The Department [has] adopted . . . a presumption that the PRC [i]s a nonmarket economy ("NME") country pursuant to 19 U.S.C. § 1677(18)(A), requiring companies desiring an individualized antidumping duty margin to so request and to demonstrate an absence of state control."). Based on this presumption, all producers from the PRC are deemed to be part of one, state-wide entity and, therefore, unless the presumption is rebutted, they are all assigned a country-wide antidumping duty rate.

A producer may rebut this presumption by "affirmatively demonstrat[ing] its entitlement to a separate, company specific margin." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (citation and quotation omitted). If the presumption is successfully rebutted, the Department will determine a company-specific antidumping duty rate.

To demonstrate its entitlement to a separate rate, a producer must establish that it is independent from the countrywide entity by demonstrating the absence of both de jure and de facto government control over its activities. *See Peer Bearing Co.-Changshan v. United States,* 32 CIT __, __, 587 F. Supp. 2d 1319, 1324 (2008); *see also Sparklers from the PRC*, 56 Fed. Reg. 20,588, 20,589 (Dep't of Commerce May 6, 1991). If a producer fails to rebut the presumption, Commerce will apply the PRC-wide rate. *See Sigma*, 117 F.3d at 1405.

B. Commerce's Denial of Separate-Rate Status to Foshan Shunde is Contrary to Law and Unsupported by Substantial Evidence.

Plaintiffs argue that Commerce erred in applying AFA to deny Foshan Shunde separate-rate status because "the Department's findings as to the need to resort to facts available and the application of adverse inferences were made with respect to Foshan Shunde's fac-

tors of production and sales data and *not* its responses to inquiries establishing its entitlement to a separate rate." Pls.' Mem. 46. The court agrees.

According to the Department, it denied Foshan Shunde separate-rate status because

> when a respondent in an NME proceeding has failed to cooperate to the best of its ability with respect to all requests for information and has been assigned a margin based on total AFA, established Department practice is to determine that the respondent has failed to demonstrate that it operates free from government control.

Issues & Dec. Mem. at 5. In other words, Commerce relied upon its past practice to determine that Foshan Shunde's failure to cooperate in responding to questionnaires regarding factors of production and sales necessarily meant that it had failed to rebut the presumption of government control. Issues & Dec. Mem. at 5 ("Foshan Shunde's conduct in this review has changed its status from that of a cooperative respondent to that of a respondent which we have determined to be uncooperative and to have impeded the conduct of this proceeding. Thus, through its actions in this review, Foshan Shunde has called into question its separate rate status. Indeed because of Foshan Shunde's own conduct . . . the Department is unable to ascertain which part, if any, of Foshan Shunde's submissions are credible and reliable.").

As this Court held in *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1595–96 (2003) (not reported in Federal Supplement), and subsequently reaffirmed, Commerce may not deny separate-rate status to a respondent by applying AFA based solely upon the unreliability of that respondent's questionnaire responses regarding its factors of production and/or sales data. *See Qindago Taifa*, 33 CIT at __, 637 F. Supp. 2d at 1240–41 ("Because the PRC-wide rate thus presumes government control, Commerce may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and [factors of production] data, but the respondent has established independence from government control"); *Since Hardware*, 33 CIT at __, Slip Op. 10–108, at 16 ("Commerce has found that [respondent's] responses failed to report accurately information, such as prices and country of origin, for inputs purchased in market economy countries. The Department, however, made no specific finding that the responses concerning state control were inaccurate. . . . Consequently, remand is warranted."); *See Shandong Huarong*, 27 CIT at 1594 ("the findings that justified the use of facts available and a

resort to adverse facts available with respect to the [respondent's] sales data and factors of production, cannot be used to accord similar treatment to issues relating to the [respondent's] evidence of independence from state control."); *Gerber I*, 29 CIT at 772, 387 F. Supp. 2d at 1287.

Faced with these contrary holdings, Commerce nonetheless insists that it may rely on its "established practice" to deny separate-rate status to respondents that fail to cooperate to the best of their ability. Issues & Dec. Mem. at 5. In doing so, the defendant seeks to distinguish this case from those cited by arguing that, "[u]nlike all of those cases, here Commerce made no determination (preliminary or otherwise) regarding Foshan Shunde's entitlement to a separate rate during this review." Def.'s Mem. 27. It is, indeed, accurate that in each of the prior cases rejecting the approach Commerce has taken here there was a preliminary finding that the respondent had rebutted the presumption of government control, while in this case, Commerce made no such finding.[6] *See Qindago Taifa*, 33 CIT at __, 637 F. Supp. 2d at 1241; *Since Hardware*, 33 CIT at __, Slip Op. 10–108, at 16; *Gerber I*, 29 CIT at 771, 387 F. Supp. 2d at 1287; *Shandong Huarong*, 27 CIT at 1572. This distinction, however, does not justify the Department's use of AFA to deny Foshan Shunde separate-rate status. Rather, Commerce's application of AFA to deny separate-rate status to Foshan Shunde must be remanded because it is not based on record evidence specific to the question of whether the company is subject to state control. *See Gerber I*, 29 CIT at 772, 387 F. Supp. 2d at 1287 (rejecting the use of AFA to find government control where "Commerce neither cited record evidence showing that, nor made a finding of fact that, either plaintiff was subject to the control of the PRC government").

As noted above, the Department may only resort to AFA when it finds that use of facts otherwise available under 19 U.S.C. § 1677e(a) is permitted, and it determines that a respondent has failed to cooperate to the best of its ability. In this case, however, the Department has made no finding that Foshan Shunde's questionnaire responses regarding government control were in any way deficient. In other

[6] Plaintiffs point out that Foshan Shunde had been granted separate-rate status in a prior review under the Order and, thus, argue that "when the Department has assigned a separate rate to a respondent in a prior review, then once the respondent has certified that its status has not changed, it is not necessary for that company to resubmit data supporting a separate rate during subsequent reviews." Pls.' Mem. 40. As the Department correctly explained in the Final Results, however, "Foshan Shunde's claim that it received a separate rate in a prior segment of this proceeding and is therefore entitled to one here" is unavailing because "each segment of the proceeding is separate with separate administrative records." Issues & Dec. Mem. at 5; *see Shandong Huarong Machinery Co. v. United States*,29 CIT 484, 491 (2005) (not reported in Federal Supplement).

words, it is not known if there existed a "gap" in the record concerning Foshan Shunde's separate rate status. Because this fact is an antecedent requirement to Commerce's application of AFA, it was contrary to law for the Department to apply AFA to this determination. *See Zhejiang Dunan Hetian Metal Co. v. United States*, No. 09-cv-0217, Slip Op. 2010–1367 at 26 (Fed. Cir. June 22, 2011) ("Commerce first must determine that it is proper to use facts otherwise available before it may apply an adverse inference.").

Similarly, there is no finding that Foshan Shunde failed to act to the best of its ability in responding to the Department's separate-rate questionnaires. Indeed, Commerce acknowledges that its decision to apply AFA in denying Foshan Shunde separate-rate status was based entirely on its finding that the company failed to cooperate to the best of its ability in responding to the Department's questionnaires regarding its factors of production and sales. Issues & Dec. Mem. at 5. Accordingly, Commerce's use of AFA to deny Foshan Shunde separate-rate status is neither lawful nor supported by substantial evidence.

In addition, the record indicates that Commerce did not notify Foshan Shunde that its questionnaire responses concerning government control were deficient, inform it of the nature of any such deficiency, or provide it with an opportunity to remedy or explain any such deficiency. Section 1677m(d), however, requires that Commerce "shall promptly inform" a respondent of any deficiency in its responses, and "provide that person with an opportunity to remedy or explain the deficiency."[7] *See Mannesmannrohren-Werke AG & Mannesmann Pipe & Steel Corp. v. United States*, 23 C.I.T. 826, 838, 77 F. Supp. 2d 1302, 1313 (1999) ("[B]efore Commerce may use facts available, [section 1677m(d)] requires that Commerce give a party an opportunity to remedy or explain deficiencies in its submission."). Therefore, Commerce's reliance on AFA to deny Foshan Shunde separate-rate status is contrary to law.

Conclusion

For the foregoing reasons, the Final Results are sustained in part and remanded. On remand, the Department is to consider evidence on the record concerning Foshan Shunde's independence from state control to determine whether the company is entitled to separate-rate

[7] Although § 1677m(d) only requires that Commerce provide an opportunity to explain any deficiency "when practicable," there is nothing on the record in this proceeding that would indicate that providing this opportunity to Foshan Shunde was impracticable. To the contrary, the Department never made an initial determination as to whether there was a deficiency in Foshan Shunde's submissions concerning government control, but rather, presumed a deficiency based on questionnaire responses concerning factors of production and sales price.

status based solely on that evidence. In addition, if it finds that the record is insufficient to make such a determination, it shall open the record and permit the plaintiffs to place the needed information on the record. If, upon remand, Commerce determines that Foshan Shunde is entitled to separate-rate status, the Department is to determine an appropriate dumping margin specific to Foshan Shunde, taking into consideration the Department's determination, sustained here, to apply AFA to Foshan Shunde's factors of production and sales data.

The remand results shall be due on February 13, 2012; comments to the remand results shall be due on March 28, 2012; and replies to such comments shall be due on April 12, 2012.

Dated: October 12, 2011
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 11–124

NSK CORPORATION, et al., Plaintiffs, and FAG ITALIA S.P.A., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 06–00334

[Plaintiffs' motion for writ of mandamus is denied.]

Dated: October 12, 2011

Crowell & Moring LLP (*Matthew P. Jaffe*, *Robert A. Lipstein*, and *Carrie F. Fletcher*), for Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Sidley Austin LLP (*Neil R. Ellis* and *Jill Caiazzo*), for Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Max F. Schutzman* and *Andrew T. Schutz*), for Plaintiff-Intervenors FAG Italia SpA, Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and The Barden Corporation.

Steptoe & Johnson (*Herbert C. Shelley*, *Alice A. Kipel* and *Christopher G. Falcone*), for Plaintiff-Intervenors SKF Aeroengine Bearings UK and SKF USA, Inc.

United States International Trade Commission, *James M. Lyons* (General Counsel), *Neal J. Reynolds* (Assistant General Counsel for Litigation), and *David A.J. Goldfine*, Office of the General Counsel, for Defendant United States.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; of counsel, *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart*, *Eric P. Salonen* and *Philip A. Butler*), for Defendant-Intervenor The Timken Company.

OPINION

BARZILAY, Senior Judge:

I. Introduction

Before the court is Plaintiffs' JTEKT Corporation, Koyo Corporation U.S.A., NSK Corporation, NSK Ltd., and NSK Europe Ltd. motion for a writ of mandamus to compel the U.S. Department of Commerce ("Commerce") to (1) instruct the U.S. Customs and Border Protection ("Customs") to terminate the suspension of liquidation for entries of ball bearings from the United Kingdom entered on or after August 25, 2010 and from Japan, entered on or after March 1, 2011; and (2) instruct Customs to refund with interest antidumping duty cash deposits for ball bearings from the United Kingdom entered on or after August 25, 2010 and from Japan, entered on or after March 1, 2011. Plaintiffs bring this action to enforce the court's judgment, which, according to Plaintiffs, requires the court to order Commerce to issue liquidation instructions and return all cash deposits for entries entered on or after the U.S. International Trade Commission's ("ITC") negative injury determination dates. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons set forth below, Plaintiffs' motion is denied.

II. Background

This case has an extensive and contentious history.[1] This opinion recites only as much of that history as is necessary to the issues at hand. Plaintiffs successfully challenged the ITC's second sunset review determination covering ball bearings from the United Kingdom and Japan, which, ultimately, resulted in the revocation of the underlying antidumping duty orders. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 71 Fed. Reg. 51,850 (Dep't of Commerce Aug. 31, 2006); *see also Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41,761 (Dep't of

[1] *See NSK Corp. v. United States*, 774 F. Supp. 2d 1296, 35 CIT __ (2011) ("*NSK VI*") (affirming fourth remand determination); *NSK Corp. v. United States*, 744 F. Supp. 2d 1359, 34 CIT __ (2010) ("*NSK V*") (affirming in part and reminding in part third remand determination); *NSK Corp. v. United States*, 34 CIT ___, 712 F. Supp. 2d 1356 (2010) ("*NSK IV*") (affirming in part and remanding in part second remand determination); *NSK Corp. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1311 (2009) ("*NSK III*") (remanding first remand determination for agency's failure to provide substantial evidence and failure to comply with court's remand instructions); *NSK Corp. v. United States*, 32 CIT ___, 593 F. Supp. 2d 1355 (2008) ("*NSK II*") (denying motion for rehearing); *NSK Corp. v. United States*, 577 F. Supp. 2d 1322, 32 CIT ___ (2008) ("*NSK I*") (affirming in part and remanding in part second sunset review).

Commerce July 15, 2011) ("*Revocation Notice*"). The court must now consider what rights are owed to Plaintiffs as a result of the court's judgment.

On August 25, 2010, the ITC filed its third remand determination in this case, concluding (under protest) that revocation of the antidumping duty order covering ball bearings from the United Kingdom would not be likely to lead to continuation or recurrence of material injury. *See Third Remand Results*, Docket No. 221 (ITC Aug. 25, 2010). The court sustained the ITC's determination with regard to bearings from the United Kingdom but remanded as to bearings from Japan. *See NSK V*, 744 F. Supp. 2d 1359. On March 1, 2011, the ITC filed its fourth remand determination, concluding (also under protest) that revocation of the antidumping duty order on imports of ball bearings from Japan would not be likely to lead to a continuation or recurrence of material injury. *See Fourth Remand Results*, Docket No. 250 (ITC Mar. 1, 2011). On April 20, 2011, the court issued its final judgment sustaining the ITC's negative injury determination in full. *See NSK VI*, 774 F. Supp. 2d 1296.

Defendant-Intervenor, The Timken Company ("Timken") promptly appealed the court's decision and also filed a motion with this court to stay the judgment pending appeal. *See Notice of Appeal to the United States Court of Appeals for the Federal Circuit*, Docket No. 271 (Apr. 26, 2011); *Mot. for Stay of Execution of Final Judgment Pending Appeal*, Docket No. 272 (Apr. 26, 2011). The court entered a temporary stay of its judgment to review Timken's motion. *See Order Entering Temporary Stay*, Docket No. 275 (Apr. 28, 2011). The court ultimately denied the motion, vacated the temporary stay, and entered judgment. *See NSK Corp. v. United* States, 774 F. Supp. 2d 1300, 35 CIT __ (May 13, 2011) (denying Timken's motion to stay pending appeal). Timken appealed the court's decision denying its motion. On appeal, the Federal Circuit also entered a temporary stay of the judgment but, upon review, sustained the court's decision denying the motion to stay. *See NSK Corp. v. United States*, 2011 WL 2648586 (Fed. Cir. July 6, 2011).

At the administrative level, Commerce published a Timken notice on June 17, 2011, notifying interested parties of a court decision not in harmony with the agency's determination. *See Notice of Court Decision Not in Harmony With Continuation of Antidumping Duty Orders*, 76 Fed. Reg. 35,401 (Dep't of Commerce June 17, 2011) ("*Timken Notice*"); *see also Timken v. United States*, 893 F.2d 337 (Fed. Cir. 1990) ("*Timken*"). In the notice, Commerce instructed Customs to "suspend liquidation of all unliquidated entries of subject merchan-

dise from Japan and the United Kingdom . . . entered, or withdrawn from warehouse, . . . on or after July 11, 2005, the five-year anniversary date of the continuation of the orders." *Timken Notice*, 76 Fed. Reg. at 35.402. The notice stated that "all entries entered, . . . on or after July 11, 2005, that remain unliquidated and not deemed liquidated as of April 30, 2011,[2] will be suspended during the pendency of the appeals process so that they may be liquidated at the court-approved rate after a 'conclusive' court decision." *Id.*

On July 15, 2011, Commerce published a notice revoking the antidumping duty orders on ball bearings from the United Kingdom and Japan. *See Revocation Notice*, 76 Fed. Reg. 41,761. Commerce published the revocation 10 days after the Federal Circuit issued its decision on Timken's motion to stay. *Id.* Pursuant to the revocation, Commerce "discontinu[ed] all unfinished administrative reviews" and indicated that it would "not initiate any new administrative reviews of the orders." *Id.* Furthermore, Commerce instructed Customs to "discontinue the collection of cash deposits for estimated antidumping duties, effective July 16, 2011, which is 10 days after the Federal Circuit lifted the temporary stay." *Id.* Commerce then reiterated that, "[a]s explained in the Timken Notice and pursuant to *Timken*, *Hosiden*, and *Diamond Sawblades*, the suspension of liquidation on all entries of ball bearings from Japan and the United Kingdom entered or withdrawn from warehouse . . . on or after July 11, 2005, that remained unliquidated and not deemed liquidated as of April 30, 2011, will continue until there is a 'final and conclusive' court decision." *Id.* at 41,762–63.

Plaintiffs now challenge Commerce's continued suspension of liquidation and failure to refund cash deposits on entries that postdate the ITC's negative injury determinations.

III. Discussion

A writ of mandamus is an extraordinary remedy with three requirements: (1) defendant must owe plaintiff a clear, nondiscretionary duty; (2) plaintiff must have no adequate alternative remedies; and (3) the issuing court must be satisfied that the writ is appropriate

[2] April 30, 2011 is the effective date of the *Timken Notice*. *See Timken Notice*, 76 Fed. Reg. at 35,402. Under 19 U.S.C. § 1516a(c)(1), Commerce is required to publish notice of a court decision not in harmony with the agency's determination "within 10 days from the date of the issuance of the court decision." *Id.* ; *see Timken*, 893 F.2d at 340. The court issued its judgment on April 20, 2011. *See NSK VI*, 774 F. Supp. 2d 1296. Although Commerce published the notice on June 17, 2011, the effective date for purposes of suspending liquidation is 10 days after the court issued its judgment.

under the circumstances. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). For the following reasons, mandamus is not appropriate in this case.

Plaintiffs claim that Commerce has failed to act on three clear, non-discretionary duties. Pl. Br. 6–7. First, Plaintiffs contend that Commerce had a clear, non-discretionary duty to issue revocation instructions on August 25, 2010 (U.K.) and March 1, 2011 (Japan). Pl. Br. 7–8. Plaintiffs, then, assuming their first argument to be true, claim that Commerce had a clear, non-discretionary duty to (1) issue liquidation instructions and (2) refund cash deposits on Plaintiffs' entries entered on or after August 25, 2010 (U.K.) and March 1, 2011 (Japan). Pl. Br. 7. Plaintiffs' arguments are unavailing given the statutory scheme and unique factual circumstances of this case.

Plaintiffs first claim that Commerce had a clear, nondiscretionary duty under 19 U.S.C. § 1675(d)(2) to issue revocation instructions on the same day that the ITC issued its negative determinations on August 25, 2010 (U.K..) and March 1, 2011 (Japan). Pl. Br. 7. This bold assertion does not withstand scrutiny. The central difficulty with Plaintiffs' argument is that although section 1675(d)(2) clearly directs Commerce to "revoke" an antidumping duty order when the ITC issues a negative injury determination, *id.*, the statute does not speak with equal clarity on exactly *when* this must occur. Commerce must, of course, act within a reasonable time, but Plaintiffs' claim that Commerce had a clear, nondiscretionary duty to revoke the antidumping duty order on the same day as the ITC's negative injury determination is not persuasive. At best the statute is silent, meaning Commerce has some interpretative discretion (under the second step of *Chevron*[3]) in timing its revocation instructions. Commerce has, in turn, promulgated a regulation that provides guidance on when Commerce typically issues revocation instructions, 19 C.F.R. § 351.222(i)(1)(iii). Despite its seeming central relevance to Plaintiffs' petition, Plaintiffs have chosen not to cite or discuss this regulation.

The regulation prescribes a 7-day time frame in which Commerce typically issues revocation instructions following a negative determination by the ITC. This time period, however, is subject to Commerce's discretion to "relax or modify its procedural rule adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'" *PAM S.p.A. v. United States*, 463 F.3d 1345,

[3] The two-step framework provided in *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). The court first considers whether Congressional intent on the issue is clear, and if not, the court next considers whether Commerce's interpretation is reasonable. *Id.*

1348 (Fed. Cir. 2006) (quoting *Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538–39 (1970)). Additionally, because the regulation does not address the precise issue of when Commerce must revoke an order following a negative injury determination issued under protest and subject to appeal, Commerce has additional discretion to interpret its own regulations, which the court reviews deferentially to determine whether the agency's approach is "plainly erroneous or inconsistent with the regulation." *Am. Signature Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) (quoting *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009)); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Here, Commerce revoked the order on July 16, 2011, 10 days after the Federal Circuit lifted the temporary stay of this court's judgment. *See Revocation Notice*, 76 Fed. Reg. at 41,761. Considering the procedural posture of this litigation (with a temporary stay preventing Commerce from acting), Commerce's timing of the revocation after the Federal Circuit's denial of Timken's motion strikes the court as a reasonable application of 19 C.F.R. § 351.222(i)(1)(iii).

To the extent Plaintiffs rely on *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) ("*Diamond Sawblades*"), as support for its argument that Commerce had a clear, nondiscretionary duty to revoke the antidumping duty orders on a date certain, Pl. Br. 7–8, the court is again unpersuaded. *Diamond Sawblades* involved a negative injury determination that changed to an affirmative, whereas this case involves an affirmative injury determination that changed to a negative. The distinction is important. In *Diamond Sawblades*, the court explained that Commerce had to follow specific statutory guidelines (enumerating clear, nondiscretionary duties) to implement the antidumping duty order, *see* 19 U.S.C. §§ 1673d(d) and 1673e(a). *See Diamond Sawblades*, 626 F.3d at 1381. In this case, however, the statute does not mandate *when* Commerce must revoke the order. *See* 19 U.S.C. § 1675(d)(2). Under the statutory scheme at issue here, Commerce has no clear duty to issue revocation instructions on a specific date let alone on the same day that the ITC publishes a negative injury determination. *See id.* At a minimum, Commerce has at least 7 days in the ordinary course to issue instructions revoking an antidumping duty order, *see* 19 C.F.R. § 351.222(i)(1)(iii), and one would expect that the time period might reasonably expand, for the circumstances presented here – a negative injury determination issued under protest and on appeal. Accordingly, Plaintiffs' contention that Commerce had a clear, nondiscretionary duty to issue revocation instructions on August 25, 2010 (U.K.) and March 1, 2011 (Japan) is unpersuasive.

The court next turns to Plaintiffs' principal argument that 19 U.S.C. § 1516a(c) and (e) do not prevent Commerce from issuing liquidation instructions on entries that postdate the ITC's negative determinations [August 25, 2010 (U.K.) and March 1, 2011 (Japan)]. Pl. Br. 9–12. In the court's view, this argument lacks merit.

Section 1516a(c)(1) and (e) and the line of Federal Circuit decisions interpreting these provisions establish a statutory scheme that does indeed prevent the court from providing the relief requested by Plaintiffs. Section 1516a(c)(1) governs liquidation in accordance with an agency determination. It provides that

> [u]nless . . . liquidation is enjoined by the court . . . entries of merchandise . . . covered by a determination . . . shall be liquidated in accordance with the determination . . . if they are entered . . . on or before the date of publication in the Federal Register . . . of a notice of a decision of the [Court of International Trade], or of the [Federal Circuit], not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1516a(c)(1). Section 1516a(e), in turn, governs the liquidation of entries pursuant to decisions of the Court and the Federal Circuit. It states that if

> the cause of action is sustained . . . by a decision of the [Court of International Trade] or of the [Federal Circuit] . . . . (1) entries of the merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse . . . after the date of publication . . . of a notice of the court decision . . . . shall be liquidated in accordance with the final court decision in the action.

19 U.S.C. § 1516a(e).

Therefore, when a reviewing court issues a final (non-interlocutory) decision that is not in harmony with a contested agency determination, Commerce must publish notice of such a decision in the Federal Register. 19 U.S.C. § 1516a(c)(1). Under *Timken*, the published notice has the effect of suspending liquidation of the subject entries until there is a "final court decision" under 19 U.S.C. § 1516a(e). *See Timken*, 893 F.2d at 341 ("§ 1516a(e) indicates that if the CIT (or [the Federal Circuit]) issues such an adverse final decision, then all entries after publication of notice of that adverse decision will be liquidated in accordance with the *final*, i.e. *conclusive*, court decision in

the action."); *Hosiden Corp. v. United States*, 85 F.3d 589, 591 (Fed. Cir. 1996) ("The Court of International Trade does not have discretion to require liquidation before the final decision on appeal."); *Diamond Sawblades*, 626 F.3d at 1381 ("We held that the effect of [Timken] notice, . . . is to suspend liquidation of the subject entries until there is a final and conclusive court decision in the action, i.e., until judicial review proceedings of the antidumping duty order have been completed."). A decision by the Court of International Trade that has been appealed is not considered the "final court decision" under the statute. *See Timken*, 893 F.2d at 341; *Hosiden Corp.*, 85 F.3d at 591; *Fujitsu General Am. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002); *Diamond Sawblades*, 626 F.3d at 1381.

Here, Plaintiffs seek an order compelling Commerce to issue liquidation instructions at a rate of zero on entries that postdate the ITC's negative determinations. As explained above, the dates on which the ITC issued its negative determinations, August 25, 2010 and March 1, 2011, are not the dates on which Commerce had a clear, nondiscretionary duty to issue revocation or liquidation instructions.

Section 1516a(e) controls liquidation following a court decision that is inconsistent with the agency's determination. *See id.* This court's judgment was inconsistent with the ITC's original affirmative determination. Because the judgment has been appealed to the Federal Circuit, the subject entries, including those entered after August 25, 2010 and March 1, 2011, are suspended by operation of law until the issuance of a *conclusive* court decision that fixes the antidumping duty rates, if any, on the subject merchandise. *See, e.g.*, *Timken,* 893 F.2d at 341. There is no conclusive court decision at this time. Accordingly, the court cannot order Commerce to issue liquidation instructions, which reflect the revocation (i.e. no duties), when binding authority mandates that Commerce suspend liquidation until a "final court decision" is issued. *See id.* Plaintiffs have failed to establish a clear, nondiscretionary duty for Commerce to issue liquidation instructions.

Plaintiffs also argue that Commerce has a duty to refund cash deposits on entries that postdate the ITC's negative determinations. Pl. Br. 12–13. Plaintiffs fail to cite a statute, regulation, case law, or other authority that would require the court to order Commerce to refund cash deposits made on those entries. Pl. Br. 12–13. Instead, Plaintiffs request a refund of their cash deposits based on undue financial hardship and the lack of an alternative remedy. Pl. Reply Br. 4. This claim, however, does not establish a clear, nondiscretionary duty and therefore this requirement for a writ of mandamus has not been met.

Moreover, Plaintiffs have an alternative remedy under the statute. If they prevail before the Federal Circuit, all entries that have been suspended will be liquidated in accordance with that final court decision. *See* 19 U.S.C. § 1516a(e). Likewise, all cash deposits will be refunded with interest. *See* 19 U.S.C. § 1505(b).

The court has also concluded that mandamus is inappropriate under the circumstances. Liquidation is the final computation or ascertainment of duties on an entry and normally cannot be undone. *See* 19 C.F.R. § 159.1; *Diamond Sawblades*, 626 F.3d at 1380 ("The liquidation of entries is normally irrevocable."). Ordering liquidation would be contrary to binding Federal Circuit precedent, which sought to avoid "the yo-yo effect on liquidations that could result absent suspension during the review process." *Id.* at 1380 n.3 (citation and quotation marks omitted). Conversely, cash deposits can be refunded and present no irreparable consequences. *See id.* ("[W]hile liquidation normally cannot be undone, the collection of cash deposits has no irreparable consequences.").

IV. Conclusion

For these reasons, Plaintiffs' motion for a writ of mandamus is denied. It is so ordered.

Dated: October 12, 2011
New York, NY

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