

UNITED STATES COURT OF INTERNATIONAL TRADE

JIAXING BROTHER FASTENER CO., LTD.,  
A.K.A. JIAXING BROTHER STANDARD  
PARTS CO., LTD., IFI & MORGAN LTD., and  
RMB FASTENERS LTD.,

Plaintiffs

v.

UNITED STATES,

Defendant,

and

VULCAN THREADED PRODUCTS, INC.,

Defendant-Intervenor.

**Before: Gregory W. Carman, Judge**  
Court No. 09-00205

*[Plaintiffs' motion for Judgment on the Agency Record is GRANTED IN PART and the Department of Commerce's final determination is REMANDED.]*

deKieffer & Horgan (Gregory Stephen Menegaz; James Kevin Horgan) for Plaintiffs.

Tony West, Assistant Attorney General; Jeanne E. Davidson, Director; Patricia M. McCarthy; Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Delisa M. Sanchez; Jane Chang Dempsey); Daniel J. Calhoun, Office of the Chief Counsel for Import Administration, United States Department of Commerce; for Defendant.

Vorys, Sater, Seymour and Pease LLP (Frederick Paul Waite; Kimberly Rae Young) for Defendant-Intervenor.

Dated: November 16, 2010

OPINION & ORDER

CARMAN, JUDGE: Plaintiffs Jiaxing Brother Fastener Co., Ltd. (also known as Jiaxing Brother Standard Parts Co., Ltd.) (“Jiaxing Brother”), IFI & Morgan Ltd. (“IFI”), and RMB Fasteners Ltd. (“RMB”) (the three companies will be referred to collectively as the “Brother Companies” or “Plaintiffs”) have brought this case to challenge the Department of Commerce’s (“Commerce” or “the Department”) final determination of sales at less than fair value in Certain Steel Threaded Rod from the People’s Republic of China, 74 Fed. Reg. 8,907 (Feb. 27, 2009) (“Final Determination”), PR<sup>1</sup> 189. The Brother Companies have moved for judgment on the agency record pursuant to Rule 56.2 of the Rules of the United States Court of International Trade (“USCIT”). The United States, Defendant, and Vulcan Threaded Products, Inc. (“Vulcan”), Defendant-Intervenor, oppose the motion.

At issue here is whether Commerce chose the “best available information,” as required by 19 U.S.C. § 1677b(c)(1),<sup>2</sup> when selecting among the financial statements of various Indian companies as surrogate sources of data for calculating the normal value of the subject merchandise, steel threaded rod (“STR”) from China. Of the financial statements at issue in this case, Commerce rejected those of Deepak Fasteners Ltd. (“Deepak”), Mangal Steel Enterprises, Ltd. (“Mangal”), Visakha Wire Ropes Ltd.

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<sup>1</sup> The public administrative record is referred to throughout this opinion as “PR.”

<sup>2</sup> All citation to the United States Code are to the 2006 edition.

("Visakha"), and Rajratan Global Wire Ltd. ("Rajratan"), but accepted those of Lakshmi Precision Screws ("Lakshmi") and Sterling Tools Ltd. ("Sterling").

The Court affirms the Final Determination to the extent that Commerce rejected the financial statements of Deepak, Mangal, and Visakha and accepted the statements of Lakshmi and Sterling because the Court finds that substantial record evidence supports these decisions and that they are otherwise in accordance with law. However, the Court finds that Commerce based its decision to reject the financial statement of Rajratan on a mistake as to the nature of that company's products, and that the decision was therefore not supported by substantial evidence on the record. Plaintiffs' motion is therefore granted in part and the Final Determination is remanded to Commerce to reconsider the appropriateness of using Rajratan's financial statement by analyzing the comparability of Rajratan's merchandise to the subject merchandise.

### I. PROCEDURAL HISTORY

Commerce began this investigation after receiving a petition from Vulcan seeking the imposition of antidumping duties on STR from China. (Petition from Law Firm of Vorys Sater to Sec of Commerce (Mar. 5, 2008), PR 2.) Commerce published its preliminary determination of sales at less than fair value ("LTFV") on October 8, 2008 (Certain Steel Threaded Rod from the People's Republic of China, 73 Fed. Reg. 58,931 (Oct. 8, 2008), PR 132), and an amended preliminary determination later that month

(Certain Steel Threaded Rod from the People’s Republic of China, 73 Fed. Reg. 63,693 (Oct. 27, 2008), PR 146). After conducting verification and accepting submissions of factual information and case briefs from interested parties, Commerce analyzed and made decisions in an Issues and Decision Memorandum regarding all issues raised. (Memo w/attachment(s) from DAS/IA to AS/IA issues and decision memo for Final Det of Sales LTFV (Feb. 20, 2009), PR 186 (“IDM”)). Commerce then published the Final Determination in the Federal Register, incorporating the IDM by reference. (Final Determination, 74 Fed. Reg. at 8,907.)

## II. STANDARD OF REVIEW

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,” but otherwise shall uphold Commerce’s determination. 19 U.S.C. § 1516a(b)(1)(b)(i); Dorbest Ltd. v. United States, 604 F.3d 1363, 1371 (Fed. Cir. 2010). Substantial evidence “is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (internal quotations omitted). Under this standard, the Court must ensure that Commerce took “into account contradictory evidence or evidence from which conflicting inferences could be drawn.” See id. at 487. The reviewing court must also consider “the record as a whole, including

evidence that supports as well as evidence that ‘fairly detracts from the substantiality of the evidence.’” Huaiyin Foreign Trade Corp. (30) v. United States, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence,” Consolo v. Fed. Maritime Comm’n., 383 U.S. 607, 620 (1966) (citations omitted), so long as there is a “rational connection between the facts found and the choice made” in the agency’s determination. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). Thus, in the specific context of reviewing Commerce’s decision regarding which information constitutes the “best available information” under 19 U.S.C. § 1677b(c)(1), “the court’s role ‘is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.’” Dorbest Ltd. v. United States, 30 CIT 1671, 1676, 462 F. Supp. 2d 1262, 1269 (2006), aff’d-in-part, vacated-in-part, and remanded on other grounds, 604 F.3d 1363 (quoting Goldlink Indus. Co. v. United States, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

### III. DISCUSSION

This case centers on whether Commerce violated the mandate, given by 19 U.S.C. § 1677b(c)(1), to choose the “best available information” with its determinations about

which proxy financial statements from Indian surrogate companies to accept and reject in valuing the factors of production to calculate the normal value of the subject merchandise. The parties' contentions regarding the appropriateness of the financial data from each potential surrogate company are set forth below, along with the Court's analysis relating to that company.

**A. Deepak**

Commerce rejected the financial statements of Deepak, an Indian producer of merchandise identical to the subject merchandise, because Commerce found that Deepak might have benefitted from countervailable subsidies and had submitted incomplete financial statements.

1. Contentions of the Parties

Plaintiffs object to Commerce's rejection of Deepak's financial statements on three grounds. First, the Brother Companies argue that Commerce mistakenly interpreted Annexure XIX, item 4(c) of Deepak's financial statement as showing Deepak's "participation in the DEPB [Duty Entitlement Pass Book Scheme] subsidy." (Pls.' Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency R. ("Pls.' 56.2 Mem.") 10-12 (quoting IDM at 10).) According to the Brother Companies, Annexure XIX "simply lists the broad accounting principles applied in preparing the financial statements," and does not indicate whether DEPB subsidy moneys were actually received by Deepak.

(Id. at 10-11.) The Brother Companies contend that Deepak's profit and loss statement in Annexure XV "shows that, while Deepak did receive [DEPB subsidy moneys] in fiscal year 2006," it did not receive any in fiscal year 2007. (Id. at 11.) Defendant, for its part, acknowledges that Deepak received the DEPB subsidy before the POI, but argues that Commerce's rejection of Deepak's financial statements was nonetheless proper because what matters is whether a company received or may have received a countervailable subsidy at any point, and Deepak's receipt of the DEPB subsidy in 2006 was sufficient to show its participation in the countervailable subsidy regardless of the year in which the funds were received. (Defendant's Response in Opposition to Plaintiff's [sic] Motion for Judgment Upon the Administrative Record ("Def.'s 56.2 Opp.") 10-12 (citing Omnibus Trade and Comp. Act of 1988, H.R. REP. NO. 100-576, at 59 (1988) (Conf. Rep.) (stating that Commerce should "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices") (emphasis added) and Wooden Bedroom Furniture from the People's Republic of China, 73 Fed. Reg. 49,162 (Aug. 20, 2008), and accompanying IDM at cmt. 1c.) Vulcan concurs with the United States, and also asserts that Deepak's lack of revenue under "License Sale Entitlement" does not necessarily mean that Deepak received no income related to the DEPB subsidy in 2007, since such licenses can be sold on the secondary market and the income booked elsewhere in the financial statement. (Defendant-Intervenor's Response Brief in Opposition to Plaintiff's

[sic] Motion for Judgment Upon the Agency Record (“Def.-Int.’s 56.2 Opp.”) 6-9.)

Second, Plaintiffs allege that Commerce arbitrarily and capriciously departed from its practice of preferring financial statements from companies producing identical merchandise—even in the face of evidence of subsidies—if the alternative requires the use of financial statements from producers of merely comparable products. (Pl’s 56.2 Mot. at 11-12 (citing Issues and Decision Memorandum for the Final Determination of Carbazole Violet Pigment 23 from the People’s Republic of China (Nov. 8, 2004), available at <http://ia.ita.doc.gov/frn/summary/prc/E4-3197-1.pdf> (“CVB-23 IDM”) (last visited Nov. 15, 2010), incorporated into Final Determination of Carbazole Violet Pigment 23 from the People’s Republic of China, 69 Fed. Reg. 67,304 (Nov. 17, 2004) and 19 C.F.R. § 351.408(c)(4)).) According to Plaintiffs, Deepak was the only producer of identical merchandise in the preliminary determination, and Commerce’s decision to reject Deepak’s financial statement and accept instead that of Sterling (a producer of merely comparable merchandise) was arbitrary and capricious, and “led to a 15 percentage point increase in Brother’s dumping margin” in the final determination. (Id. at 12.) Commerce rejects the charge that it acted arbitrarily and capriciously here, contending that, by policy, the Department only accepts financial statements bearing evidence of subsidies where there is no alternative, and that Nasco Steel (“Nasco”), Lakshmi, and Sterling—all producers of comparable merchandise—presented viable



alternative financial statements. (Def.'s 56.2 Opp. at 12.) Vulcan concurs with the United States. (Def.-Int.'s 56.2 Opp. at 9-10.)

Third, the Brother Companies argue that Commerce wrongly determined that Deepak's financial statement was incomplete. (Pl.'s 56.2 Mot. at 12-14.) According to Plaintiffs, Commerce found that "schedules V and XIV" from the "Consolidated Profit and Loss Account for the Year Ending 31-03-07" were missing, although the documents (Annexures V and XIV to the balance sheet section of the financial statements) are found in Document 98 of the Public Record at pages 23 and 25. (Id. at 12-13.) While Plaintiffs admit that the generic name of Deepak's principle product—fasteners—was omitted from the "Balance Sheet Abstract and Company's General Business Profile page" summary form (a "standard form under the Indian Companies Act that merely summarizes on one page the information found elsewhere in the financial statements"), they note that the financial statements nevertheless indicate that "total sales revenue related to sales of 'fasteners items'" and that the Director Report indicates "that Deepak operates in the 'Fasteners Industry.'" (Id. at 13-14.) Plaintiffs also point out that "extensive product information" in the record showed that "Deepak produced steel threaded rod." (Id. at 14.) From this, Plaintiffs argue that Commerce's final determination, rejecting Deepak's financial statement as incomplete, was not supported by substantial evidence. (Id.) Commerce contends that Plaintiffs are mistaken in

believing that the presence of Annexures V and XIV to the Consolidated Balance Sheet on the record solves the incompleteness problem, since the items Commerce found to be missing were Annexures V and XIV to a different document (the Consolidated Profit and Loss Account for the Year Ending 31-03-07), and remain unaddressed by Plaintiffs. (Def.'s 56.2 Opp. at 13.) Commerce also contends that its "well-founded concerns . . . about the reliability and integrity of Deepak's financial statement" are not addressed "just because the omitted information could potentially be gleaned from another source." Vulcan did not comment on the completeness of Deepak's financial statement.

## 2. Analysis

The antidumping statute requires that, when establishing the normal value of merchandise in a nonmarket economy ("NME"), Commerce "shall determine the normal value of the subject merchandise on the basis of the 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 statute restricts the manner in which the factors may be valued by stating that "the valuation . . . shall be based on the best available information regarding the value of such factors in a market economy country or countries considered to be appropriate" by Commerce (in this instance, India). *Id.* The factors of production include, "but are not limited to—(A) hours of labor required, (B)

quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation.” § 1677b(c)(3).

Commerce has promulgated 19 C.F.R. § 351.408, a regulation further elaborating on the manner in which normal value for an NME is calculated from factors of production in a surrogate market economy country. That regulation specifies that “[f]or manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.” § 351.408(c)(4).

Commerce has also articulated the policy by which it applies the statute and regulation in particular investigations. The Department’s policy is guided by the conference report issued by the Congressional committee charged with reconciling the House and Senate versions of the Omnibus Trade and Competitiveness Act of 1988, which stated, in regard to calculating normal value by the factors of production method, that “Commerce shall avoid using any prices which it has reason to believe or suspect may be . . . subsidized prices. . . . [We] do not intend for Commerce to conduct a formal investigation to ensure that such prices are not . . . subsidized, but rather intend that Commerce base its decision on information generally available to it at that time.”

Omnibus Trade and Competitiveness Act of 1988, H.R. REP. NO. 100-576, at 59, (1988)

(Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24.<sup>3</sup> In accordance with this statement of legislative intent, Commerce's established practice is "to disregard financial statements where we have reason to suspect that the company has received actionable subsidies, and where there is other usable data on the record." (IDM at 8 (citing Issues and Decision Mem. for the Antidumping Inv. of Certain New Pneumatic Off-the-Road Tires from the People's Rep. of China (Jul. 7, 2008), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-16156-1.pdf>, at 37 ("OTR Tires IDM")) (last visited Nov. 15, 2010), incorporated into Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 40,485, 40,486 (Jul. 15, 2008)).

Plaintiffs argue that § 1677b(c)(1) means that Commerce, in selecting the "best available information," must prioritize data regarding identical merchandise over data pertaining to merely comparable merchandise. Plaintiffs' interpretation is supported solely by citation to the CVB-23 IDM. A reading of the CVB-23 IDM, however, reveals that Plaintiffs misinterpret that evidence of agency practice. Contrary to Plaintiffs' interpretation, the CVB-23 IDM expressed the Department's preference for data

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<sup>3</sup> The report also states, "[i]n addition, Commerce should seek to use, if possible, data based on production of the same general class or kind of merchandise using similar levels of technology and at similar levels of volume as the producers subject to investigation." Id.

regarding either identical or comparable merchandise versus Reserve Bank of India data aggregating financial ratios of many hundreds of producers of all manner of merchandise. See CVB-23 IDM at 3-8. While isolated quotes from the CVB-23 IDM appear to express a preference solely for data regarding identical merchandise,<sup>4</sup> read in context it is clear that those quotations merely elide the “or comparable” phrase of “identical or comparable,” and that the CVB-23 IDM does not adopt a preference for data from identical merchandise over data from comparable merchandise. Id.

The Court has found no support for any preference between identical versus comparable merchandise. The statute does not speak to this distinction. See 19 U.S.C. § 1677b(c). Commerce’s regulation does not forbid treatment of identical and comparable merchandise as equivalent. See 19 C.F.R. § 351.408(c)(4) (“[T]he Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise”). Commerce’s stated practice is to exclude “financial statements where there is evidence that the company received countervailable subsidies and there are other sufficient reliable and representative data on the record”;<sup>5</sup> when

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<sup>4</sup> See CVB-23 IDM at 7 (“[T]he Department’s preference is to use, where possible, the financial data of surrogate producers of identical merchandise, provided that the surrogate value data are not distorted or otherwise unreliable.”).

<sup>5</sup> Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Rep. of China: Issues and Decision Mem. for the Final Determination, (Sept. 10, 2010), available at <http://ia.ita.doc.gov/frn/summary/PRC/2010-23549-1.pdf> at 35 (“Seamless Pipe IDM”) (last visited Nov. 15, 2010), incorporated into Certain

determining whether there are other sufficient reliable and representative data on the record, Commerce appears to treat data regarding identical and comparable merchandise as equally adequate alternatives to data reflecting subsidies.<sup>6</sup>

The Court of Appeals for the Federal Circuit (“CAFC”) has recently stated that the requirement in § 1677b(c)(1) that Commerce use the best available information “is ambiguous,” Dorbest Ltd. v. United States, 604 F.3d 1363, 1373 (Fed. Cir. 2010), and Commerce has broad discretion to determine which information is the best available, Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citing cases). Bearing this in mind, the Court concludes that Commerce’s consistent practices of rejecting financial statements that suggest subsidies and treating financial statements regarding identical and comparable merchandise as equally acceptable alternatives are reasonable interpretations of the statutory mandate to use the best available information. For this reason, the Court finds that Commerce acted within its discretion

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Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People’s Rep. of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part, 75 Fed. Reg. 57,449, 57,450 (Sept. 21, 2010).

<sup>6</sup> See Seamless Pipe IDM at Cmt. 6; Issues and Decision Mem. for the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the People’s Rep. of China (Apr. 8, 2010), available at <http://ia.ita.doc.gov/frn/summary/PRC/2010-8994-1.pdf>, at 81 (“OCTG IDM”) (last visited Nov. 15, 2010), incorporated into Certain Oil Country Tubular Goods from the People’s Rep. of China, 75 Fed. Reg. 20,335 (Apr. 19, 2010) (noting that the three companies whose financial statements were under consideration “each produce merchandise that is identical and/or comparable to the subject merchandise.”).

in excluding the Deepak financial statement due to the possibility that Deepak received actionable subsidies, and that Commerce reasonably used financial statements from manufacturers of comparable merchandise instead. The Court therefore upholds this aspect of the Final Determination.<sup>7</sup>

## **B. Lakshmi and Sterling**

In the Final Determination, Commerce determined that the financial statements of Lakshmi and Sterling were among the best available information, and used them in valuing Plaintiffs' factors of production.

### **1. Contentions of the Parties**

Plaintiffs claim that Commerce should have rejected the financial statements of Lakshmi and Sterling. The first prong of this argument is easily disposed of because it hinges on the prior argument regarding Deepak: Plaintiffs contend that Deepak's data, uncontestedly from the only producer of identical merchandise in the record, was better than the data from Lakshmi and Sterling, which only produced arguably comparable merchandise. This argument is unavailing, since the Court has already held that Commerce acted within its discretion in determining not to use the Deepak data due to the possibility that it reflected subsidies. It is also unavailing because, as discussed

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<sup>7</sup> Having concluded that Commerce permissibly excluded the Deepak financial statement due to subsidies, the Court need not reach the question of whether Deepak's financial statement was incomplete.

above, Commerce's practice of treating data regarding identical and comparable merchandise is reasonable.

The second prong of Plaintiffs' argument is that Lakshmi and Sterling manufacture high tensile automotive fasteners ("HTAF"), a product that Plaintiffs contend is not even comparable to STR. Comparability is not defined in the antidumping statute or the regulation. Commerce's typical practice in analyzing comparability is to consider the similarities in production, end uses, and physical characteristics between two products. (Pls.' 56.2 Mem. at 16 (citation omitted).) Plaintiffs claim that Commerce did not analyze the factors in this case. (Id. at 17.) If it had, Plaintiffs assert, evidence on the record would have shown that HTAFs are custom-made in small batches, "must meet very strict specifications for strength, reliability and structure" to withstand "high-stress critical applications," and thus have "a significantly more advanced and costly manufacturing process" resulting in factory overhead ratios more than ten times that of STR. (Id. at 17-21.) The Brother Companies claim that this evidence was not rebutted at the administrative level and argue that, as a result, the Final Determination is unsupported by substantial evidence on the record. (Id. at 21.)

The United States and Vulcan counter that, given that Deepak's financial statements were properly rejected due to subsidy, the Lakshmi and Sterling financial



statements were the best available information. Commerce contends that it considered the differences and similarities between HTAF and STR and determined that they were comparable because they were both fasteners, and were made using “similar raw materials and production processes.” (Def.’s 56.2 Opp. at 20.) Commerce did not ignore the evidence regarding differences between the products, but concluded that HTAF are comparable to STR, “albeit more specialized.” (Id. at 21.) Commerce therefore exercised its discretion to “choose among imperfect alternatives.” (Id. (internal quotation omitted.))

With regard to Commerce’s decision to use Lakshmi’s financial statement, Plaintiffs also contend that Commerce acted arbitrarily and capriciously because it rejected Deepak’s financial statements due to a subsidy on the one hand, while accepting Lakshmi’s financial statements despite record evidence that Lakshmi received a subsidy on the other hand. (Pls.’ 56.2 Mem. at 22-23.) The United States and Vulcan contend that this last issue is not properly before the Court because the Brother Companies failed to raise it in the administrative proceedings and Plaintiffs thus failed to exhaust their administrative remedies. (Def.’s 56.2 Opp. at 21-23; Def.-Int.’s 56.2 Opp. at 18-21.)

2. Analysis

The statute, 19 U.S.C. § 1677b(c), and the regulation, 19 C.F.R. § 351.408(c)(4), do not define the term “comparable.” Commerce’s practice in determining whether two products are comparable is “to apply a three-prong test that considers: (1) physical characteristics; (2) end- uses [sic], and (3) production processes.” Seamless Pipe IDM at 33. These factors were not ignored by Commerce in the IDM as alleged by Plaintiffs. Commerce, in finding that Lakshmi and Sterling “are producers of merchandise comparable to the subject STR,” noted the “affidavits provided by the [Plaintiffs] . . . discussing the difference between high-tensile fasteners and the STR produced by [Plaintiffs].” IDM at 11. Contrary to Defendant’s argument that Commerce found HTAF and STR to be made using “similar raw materials and production processes,” (Def.’s 56.2 Opp. at 20), Commerce actually noted that “[w]hile high-tensile fasteners for the automotive industry may be different than the fasteners produced by [Plaintiffs] in terms of raw materials and process . . . record evidence demonstrates that both [Lakshmi] and [Sterling] nevertheless produce steel threaded fasteners, and thus, of the remaining financial statements, are manufacturers of products that are comparable, albeit more specialized.” IDM at 11.

It is clear from this analysis that Commerce considered the evidence on the record that fairly detracted from a finding of comparability, as well as the evidence that

ultimately led Commerce to conclude that HTAF and STR were comparable.

Commerce, noting the differences between the two products, ultimately decided that both products are “steel threaded fasteners” and thus viewed the two products as more similar than different. Id.

After close consideration, the Court finds that Commerce’s decision that HTAF and STR are comparable is supported by substantial evidence in the record and took adequate notice of the contrary evidence. Although the Court might not have come to the same conclusion were the decision for the Court to make, Commerce operates in this area with a great deal of discretion, which the Court is bound to respect. Reviewing the IDM, the Court is convinced that a reasonable decisionmaker could have come to the same conclusion as Commerce. The Court therefore upholds the Final Determination to the extent that it chose to use the financial statements of Lakshmi and Sterling as producers of comparable merchandise.

As to Plaintiffs’ arbitrary-and-capricious claim against use of Lakshmi’s financial statement, this Court is mandated to, “where appropriate, require the exhaustion of administrative remedies” in trade cases. 28 U.S.C. § 2637(d). As the CAFC has explained, “[a]lthough that statutory injunction is not absolute, it indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies.” Corus

Staal BV v. United States, 502 F.3d 1370, 1379 (Fed. Cir. 2007). The Court of International Trade generally enforces the exhaustion requirement strictly in trade cases. Id. (citing cases). In addition to the statutory admonition that the Court of International Trade require exhaustion, Commerce by regulation requires that “all arguments that continue in the submitter’s view to be relevant to the . . . final determination or final results” must be raised in the party’s case brief, which is submitted after the preliminary determination but before the final determination. 19 C.F.R. § 351.309(c)(2).

In defining the scope of its discretion to entertain unexhausted claims under 28 U.S.C. § 2637(d), the Court has described certain circumstances in which exhaustion will not be required: where exhaustion would be futile, or inequitable and an insistence of a useless formality; where a court decision issued after the administrative determination might have materially affected the agency’s actions; where entertaining the issue would not intrude upon the agency’s prerogatives because it is a pure question of law not requiring further factual development; and where the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. Consol. Bearings Co. v. United States, 25 CIT 546, 552-53, 166 F. Supp. 2d 580, 586 (2001) (citations omitted). Another line of cases indicates that the Court of International Trade will decide an unexhausted issue on the merits when the party raising the issue had no

opportunity to do so before the agency. See generally, e.g., Qingdao Taifa Group Co., Ltd. v. United States, 33 CIT \_\_\_, 637 F. Supp. 2d 1231 (2009).

None of these exceptions apply to the present case. Futility does not apply here, for if Plaintiffs had raised this issue before Commerce below, it is difficult to see how Commerce would have justified continuing to use Lakshmi's subsidized financial statement while rejecting Deepak's. There is no intervening court decision applicable here. The issue is not one of pure law, because settling it requires consideration of the particular facts regarding the two financial statements, not simply the analysis of a statute using standard tools of statutory construction. See Consolidated Bearings, 166 F. Supp. 2d. at 587. Plaintiffs have not identified some clear judicial precedent that applied to the issue, nor argued that Plaintiffs failed to raise the argument in the expectation that Commerce would follow that clear precedent.

It is true that plaintiffs may raise arguments before the Court of International Trade that were not raised in a case brief before Commerce "if Commerce did not address the issue until its final decision," where the result was that the party did "not have . . . a full and fair opportunity to raise the issue at the administrative level."

Qingdao Taifa Group Co., Ltd. v. United States, 33 CIT \_\_\_, 637 F. Supp. 2d 1231, 1236 (2009) (citing LTV Steel Co. v. United States, 21 CIT 838, 868-69, 985 F. Supp. 95, 120 (1997)). At the core of this issue is Plaintiffs desire to exclude the Lakshmi financial

statement, a position that Plaintiffs previously asserted in their case brief before Commerce. (Brief From Law Firm of DeKeiffer Horgan to Sec of Commerce (Jan. 16, 2009), PR 176, at 15-17). At that time, Plaintiffs had every reason to raise the issue of Lakshmi's receipt of subsidies; yet, while raising other challenges to Lakshmi's financial statement, nowhere in their case brief did Plaintiffs mention Lakshmi's receipt of a countervailable subsidy. (See id.) This failure is all the more striking since Plaintiffs did, in fact, raise the subsidization issue in arguing for the exclusion of the financial statements of two other companies, Sarda Energy and Minerals Ltd. and Welspun Power and Steel Ltd. (Id. at 19-21, 23.) Furthermore, Plaintiffs did not raise the subsidization issue regarding Lakshmi in their rebuttal brief. (See Brief From Law Firm of DeKieffer Horgan to Sec of Commerce (Jan. 26, 2009) PR 182, at 15-16.) Given this record, the Court finds that Plaintiffs simply failed to use the opportunity of their case and rebuttal briefs to argue to Commerce that Lakshmi's financial statement should be excluded due to Lakshmi's receipt of countervailable subsidies. Because Commerce never had the opportunity to decide the issue in its administrative proceedings, the Court will not entertain this unexhausted question.

### C. Mangal

In the Final Determination, Commerce determined that Mangal had received a countervailable subsidy and thus rejected its financial statement when valuing

Plaintiffs' factors of production.

1. Contentions of the Parties

Plaintiffs contend that Commerce erred when it rejected the financial statement of Mangal upon finding that Mangal received countervailable subsidies. (Pls.' 56.2 Mot. at 23-24.) The Brother Companies argue that the subsidies received by Mangal comprised only 3% of the company's gross global sales revenue, and therefore "were the United States to investigate Mangal Steel, sales of subject merchandise to the United States might well be at a de minimis (2% or less) level of subsidization; [sic] hence not countervailable at all." (Id. at 23-24 (emphasis in original).) Defendant reiterates that receipt of the DEPB subsidy, regardless of the amount of that subsidy, is a sufficient basis for Commerce to reject the company's financial statements, and argues that the amount of the subsidy is irrelevant to the legal standard governing this decision. (Def.'s 56.2 Opp. at 15-16.) Defendant-Intervenor agrees with Defendant, and points out that Plaintiffs have, with this argument, conceded that Mangal received subsidies. (Def.-Int.'s 56.2 Opp. at 21-25.)

Plaintiffs also claim that "to the extent Mangal's financial statement reflects any subsidies that in fact would be countervailable, this is already adverse to [the Brother Companies] in the ratio calculations because the Department's practice is to offset revenue from subsidies against G&A expense." (Pls.' 56.2 Mot. at 24 (emphasis in

original).) In response, Defendant asserts that the offsetting of subsidy revenue against G&A expenses is irrelevant to the determination of what constitutes the best available information when calculating the factors of production. (Def.'s 56.2 Opp. at 15.)

Defendant-Intervenor objects that Plaintiffs' proposal is contrary to Commerce's practice, unprecedented, and would be impossible to realize in a non-market economy. (Def.-Int.'s 56.2 Opp. at 24-25.)

Plaintiffs final argument related to the financial statement of Mangal is that Commerce erred because, regardless of subsidy, Mangal's financial statement was still the "best available information," given that Mangal produced merchandise identical to that produced by the Brother Companies, and given that Mangal had the same level of production experience as the Brother Companies. (Pls.' 56.2 Mot. at 25-26.)

## 2. Analysis

As explained regarding Deepak, Commerce acted permissibly in rejecting Mangal's financial statement due to evidence that Mangal may have received a countervailable subsidy. Plaintiffs' argument that the subsidy Mangal received "might well" not be countervailable were Mangal investigated is beside the point. Commerce need not turn the search for suitable proxy financial statements into a full-blown countervailing duty investigation before it may reject a financial statement that indicates that the company may have received subsidies. And Commerce does not err



in rejecting such a financial statement where an interested party offers mere speculation that the subsidy “might well” be at a de minimis level were a countervailing duty investigation conducted. Plaintiffs cite no authority to support their confused claim that Mangal’s receipt of a subsidy already counts against it; and, as discussed above in relation to Deepak, Commerce did not err in choosing statements from manufacturers of comparable merchandise over Mangal, which manufactured identical merchandise. The Court therefore affirms the Final Determination in regard to Mangal.

#### **D. Rajratan**

##### **1. Contentions of the Parties**

Plaintiffs contest Commerce’s decision to reject the financial statement of Rajratan. (Pls.’ 56.2 Mem. at 27-29.) As to Rajratan, Commerce stated in the IDM that “the Department agrees with [Vulcan] that the financial statements of companies that produce inputs—which are consumed in manufacturing the subject merchandise—would not capture the downstream costs of producing STR.” IDM at 9. But Vulcan never argued before the agency that Rajratan’s product was an input to STR (See generally Brief From Law Firm of Vorys Sater to Sec of Commerce (Jan. 16, 2009), PR 178 (“Vulcan Case Brief”; see Brief From Law Firm of Vorys Sater to Sec of Commerce (Jan. 23, 2009), PR 181 (“Vulcan Rebuttal Brief”) at 7-9). Without explicitly saying that Rajratan produced an input to STR, Commerce appears to have found so as a basis for

rejecting Rajratan's financial statement. See IDM at 9-10 (stating that "[w]ire rod is a general production material input that often involves value-added further manufacturing in order to produce a finished (or semi-finished) steel product, including STR, and is thus less comparable to STR than companies that produce finished steel product . . . [t]herefore . . . the Department finds that the 07/08 Rajratan Global . . . financial statements are not appropriate sources for the surrogate financial ratios"). This is also the position Defendant argues in its brief before the Court. (Def.'s 56.2 Opp. at 16 ("Commerce excluded Rajratan's financial statement . . . because Rajratan produces wire rod, an input consumed in the manufacturing of the subject merchandise" (citing IDM at 9)).)

Plaintiffs contend that Commerce erred because Rajratan's financial statement shows that it does not manufacture Plaintiffs' input, steel rod, but rather manufactures "p.c. [prestressed concrete] wire" and "tyre bead wire." (Pls.' 56.2 Mem. at 27; Pls.' Reply Mem. at 13-14.) Rajratan's financial statement in the administrative record confirms that the company produces "P.C. Wire" and "Tyre Bead Wire." (Letter w/attachment(s) from Law Firm of deKieffer & Horgan to Sec of Commerce Jiaying Brother Surrogate Data, (Dec. 12, 2008), PR 165 at Ex. 3, p. 27.) Plaintiffs argue that, contrary to the findings in the IDM, both Rajratan and the Brother Companies use the same input, steel rod, as an input in the manufacture of simple downstream products.

(Pls.' 56.2 Mem. at 27; Pls.' Reply Mem. at 13-14.)

Vulcan does not challenge Plaintiffs on this question. As mentioned above, Vulcan did not argue in its case brief before Commerce that Rajratan produced an input to STR, but rather that “[a] wire company will not have the same manufacturing costs as a producer of steel threaded rod or other fasteners.” (Vulcan Rebuttal Brief at 8.) Vulcan concedes here that the Brother Companies and Rajratan use the same input. (Def.-Int.’s 56.2 Opp. at 26 (“The primary input for the production of steel wire is wire rod—the same input that is used for the production of steel threaded rod.”).) Vulcan then makes the same arguments to the Court that it made to the agency: that although Plaintiffs begin the STR manufacturing process by drawing steel rod inputs, as do steel wire manufacturers such as Rajratan, Plaintiffs then perform additional processing on the drawn rod which makes STR incomparable to the steel wire manufactured by Rajratan. (Id.)

## 2. Analysis

Commerce’s rejection of Rajratan’s financial statement was based on the mistaken finding that Rajratan manufactured an upstream product used as an input in the production of STR. This finding is not supported by substantial evidence on the record, which shows that Rajratan produces p.c. wire and tyre bead wire, not steel rod. Defendant points to nothing in the record indicating that Rajratan manufactures steel

rod; and Vulcan concedes that Rajratan does not produce steel rod. The record is utterly devoid of any evidence that Rajratan does so. Commerce, having mistakenly concluded that Rajratan's product was an input used in Plaintiffs' STR manufacture, rejected Rajratan's financial statement for that reason. The Court thus finds that Commerce's decision to reject Rajratan's financial statement is not supported by substantial evidence on the record. This aspect of the Final Determination is therefore remanded to Commerce. Commerce is directed, on remand, to reconsider the appropriateness of using Rajratan's financial statement by analyzing the comparability of Rajratan's merchandise to the subject merchandise.

**E. Visakha Wire Ropes Ltd.**

1. Contentions of the Parties

As for Visakha Wire Ropes Ltd. ("Visakha"), Plaintiffs state that Commerce "did not articulate a factual basis for its decision or any other reason," (Pls.' 56.2 Mem. at 27-28), apart from "baldly assert[ing] that wire rope is not 'comparable' to subject merchandise" (Pls.' 56.2 Reply at 14). Plaintiffs therefore argue that the decision is "defective and must be remanded for a proper explanation of the Department's reasoning based on record evidence." (Pls.' 56.2 Mem. at 28.)

Commerce's articulated rationale for rejecting the Visakha financial statement was that "the Department agrees with [Vulcan] that the company does not appear to

manufacture products comparable to STR.” (IDM at 9-10.)<sup>8</sup> That appears to be the extent of the analysis relating to Visakha in the IDM.

Defendant, in its brief, quotes Commerce’s IDM summary of Vulcan’s position in summarizing Commerce’s findings. (Def.’s 56.2 Opp. at 17-18.) According to Defendant, “[t]hrough adoption of Vulcan’s unrebutted positions backed by record evidence, Commerce indicated a reasonable and discernible basis for its decision.” (Id. at 18 (citing NMB Sing. Ltd. v. United States, 557 F.3d 1316, 1319 (Fed. Cir. 2009) for the proposition that the explanation for how Commerce reached its decision need only be reasonably discernable, not perfect.) Vulcan argues that Visakha manufactures wire rope by “stranding or braiding multiple steel wires together” and that “there is no indication in the company’s financial statement—or anywhere else in the record—that [Visakha] produces steel threaded rod or any other type of steel fastener.” (Def.-Int.’s 56.2 Opp. at 28.) Contending that “[t]here are no similarities between” the processing used to make steel rope and that used to make STR, Vulcan asserts that Commerce correctly rejected Visakha’s financial statement. (Id.)

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<sup>8</sup> Earlier in the IDM, Commerce summarized Vulcan’s position—the argument with which Commerce purports to agree in deciding to reject Visakha’s financial statement—in these words: “that the company is a producer of steel wire rope, which is a downstream product made from steel wire, but has an entirely different production process from STR” and that “the manufacturing process is wholly dissimilar, and not comparable to STR.” IDM at 3.

2. Analysis

Although the IDM does not present Commerce's reasoning in the most lucid terms, it does indicate that Commerce accepts Vulcan's position in rejecting Visakha's financial statement. In doing so, Commerce implicitly indicates that it finds that wire rope is not a comparable product to the subject merchandise due to the differences in production process. Given that Commerce, in making such decisions, operates within a wide area of discretion, and given that Commerce referenced the record and Vulcan's arguments from the record in articulating its decision, the Court finds that Commerce's decision is based on substantial evidence. Plaintiffs' motion is therefore denied with regard to the rejection of Visakha's financial statement.

**IV. CONCLUSION**

For the reasons discussed above, it is hereby

**ORDERED** that Plaintiffs' motion is granted in part, and this case is remanded to Commerce, which is directed to reconsider the appropriateness of using Rajratan's financial statement by analyzing the comparability of Rajratan's merchandise to the subject merchandise; and it is hereby

**ORDERED** that Commerce file with the Court a remand redetermination that is consistent with this opinion by December 16, 2010, that Plaintiffs file any comments on the remand redetermination by January 6, 2011, that Defendant and Defendant-

Intervenor file any responses to Plaintiffs' comments by January 20, 2011, and that Plaintiffs' comments, and the responses of Defendant and Defendant-Intervenor, shall not exceed 15 pages in length; and it is further

**ORDERED** that Plaintiffs' motion is denied in all other respects.

/s/Gregory W. Carman  
Gregory W. Carman, Judge

Dated: November 16, 2010  
New York, NY