

UNITED STATES COURT OF INTERNATIONAL TRADE

GROBEST & I-MEI INDUSTRIAL
(VIETNAM) CO., LTD., *et al.*,

Plaintiffs,

v.

UNITED STATES,

Defendant,

AD HOC SHRIMP TRADE ACTION
COMMITTEE, *et al.*,

Defendant-
Intervenors.

Before: Donald C. Pogue,
Chief Judge

Consol. Court No. 10-00238

OPINION AND ORDER

[Remanding Department of Commerce's final results of
administrative review of antidumping duty order]

Dated: January 18, 2012

David S. Christy and Matthew R. Nicely, Thompson Hine LLP,
of Washington, D.C., for the Plaintiff Grobest & I-Mei Industrial
(Vietnam) Co., Ltd.

Robert G. Gosselink and Jonathan M. Freed, Trade Pacific,
PLLC, of Washington, D.C., for the Consolidated Plaintiffs Cam
Ranh Seafoods Processing Enterprise Co.; Contessa Premium Foods
Inc.; and H&N Foods International.

Adams Chi-Peng Lee, Jay C. Campbell, and Walter J. Spak,
White & Case, LLP, for the Consolidated Plaintiff Amanda Foods
(Vietnam) Ltd.

Matthew R. Nicely, Thompson Hine LLP, of Washington, D.C.,
for the Consolidated Plaintiffs Nha Trang Fisheries Joint Stock
Co.; Nha Trang Seaproduct Co.; Minh Phu Seafood Corp.; Minh Qui
Seafood Co., Ltd.; Bac Lieu Fisheries Joint Stock Co.; Camau
Frozen Seafood Processing Import Export Corp.; Ca Mau Seafood
Joint Stock Co.; Cadovimex Seafood Import-Export and Processing
Joint-Stock Co.; Cafatex Fishery Joint Stock Corp.; Cantho Import
Export Fishery Ltd. Co.; C.P. Vietnam Livestock Corp.; Cuulong

Seaproducts Co.; Danang Seaproducts Import Export Corp.; Investment Commerce Fisheries Corp.; Minh Hai Export Frozen Seafood Processing Joint-Stock Co.; Minh Hai Joint-Stock Seafoods Processing Co.; Ngoc Sinh Private Enterprise; Phu Cuong Seafood Processing & Import-Export Co., Ltd; Phuong Nam Co. Ltd.; Sao Ta Foods Joint Stock Co.; Soc Trang Seafood Joint Stock Co.; Thuan Phuoc Seafoods and Trading Corp.; UTXI Aquatic Products Processing Corp.; Viet Foods Co., Ltd.; and Minh Phat Seafood Co., Ltd.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, Patricia M. McCarthy, Assistant Director.

Nathaniel J. Maandig Rickard, Andrew W. Kentz, Jordan C. Kahn, and Kevin M. O'Connor, Picard, Kentz & Rowe, LLP, of Washington D.C. for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

Robert G. Gosselink and Jonathan M. Freed, Trade Pacific, PLLC, of Washington, D.C., for Defendant-Intervenors Cam Ranh Seafoods Processing Enterprise Co.; Contessa Premium Foods Inc.; and H&N Foods International.

Matthew R. Nicely and David S. Christy, Thompson Hine LLP, of Washington, D.C., for Defendant-Intervenors Minh Phu Seafood Corp.; Minh Phat Seafood Co., Ltd.; Minh Qui Seafood Co., Ltd.; and Nha Trang Seaproduct Co.

Geert M. De Prest and Elizabeth J. Drake, Stewart and Stewart, of Washington D.C., and Edward T. Hayes, Leake & Anderson, LLP, of New Orleans, LA, for the Defendant-Intervenor American Shrimp Processors Association.

Pogue, Chief Judge: This is a consolidated action seeking review of determinations made by the United States Department of Commerce ("Commerce" or "the Department") in the fourth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the Socialist Republic of

Vietnam ("Vietnam").¹ Plaintiffs Grobest & I-Mei Industrial (Vietnam) Co., Ltd. ("Grobest"), Nha Trang Seaproduct Company, *et al.* ("Nha Trang"), and Cam Ranh Seafoods Processing Enterprise Company, *et al.* ("Cam Ranh"); Consolidated Plaintiff Amanda Foods (Vietnam) Ltd. ("Amanda Foods"); and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("AHSTAC") now seek judgment on the agency record, see USCIT R. 56.2, raising for review seven of Commerce's determinations, findings, or conclusions.

Specifically, Plaintiffs Grobest, Nha Trang, and Cam Ranh collectively challenge Commerce's decision to use zeroing in calculating dumping margins during reviews but not during investigations. These Plaintiffs also challenge the exclusion of Bangladesh-to-Bangladesh import data from surrogate value calculations and the use of multi-country averaging in determining surrogate labor wage rates.

Defendant-Intervenor AHSTAC challenges Commerce's exclusion of Fine Foods Ltd.'s 2008-2009 financial statement and Gemini Sea Food Ltd.'s loading and unloading expenses when calculating surrogate financial ratios.

Plaintiff Grobest also challenges Commerce's denial of its

¹ Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 Fed. Reg. 47,771 (Dep't Commerce Aug. 9, 2010) (final results and partial rescission of antidumping duty administrative review) ("Final Results"), and accompanying Issues & Decision Memorandum, A-552-802, ARP 08-09 (July 30, 2010), Admin. R. Pub. Doc. 233 ("I & D Mem.") (adopted in Final Results, 75 Fed. Reg. at 47,772).

request for revocation, and Consolidated Plaintiff Amanda Foods challenges Commerce's rejection of its separate rate certification on the basis of untimely filing.

The court has jurisdiction pursuant to § 516A(a)(2)(b)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C.

§ 1516a(a)(2)(B)(iii) (2006)² and 28 U.S.C. § 1581(c) (2006).

The court discusses below each of the seven issues raised for review. The court concludes, using the following outline, that: (I) Commerce must provide further explanation for its use of zeroing in antidumping reviews but not investigations, consistent with recent decisions of the Court of Appeals for the Federal Circuit; (II) Commerce's decisions to exclude the Bangladesh-to-Bangladesh data from surrogate value calculations, to employ multi-country averaging to determine surrogate labor wage rates, and to exclude both Fine Foods' 2008-2009 financial statement and Gemini's loading and unloading expenses from surrogate financial ratio calculations are reasonable and will, therefore, be affirmed; (III) Commerce's decision not to review voluntary respondents under 19 U.S.C. § 1677m(a) is based on an impermissible construction of the relevant statutory provisions; and (IV) Commerce's decision to reject Amanda Foods' untimely submitted separate rate certification was an abuse of discretion.

² All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

Accordingly, the court will remand the Final Results to Commerce for reconsideration and redetermination consistent with this opinion.

BACKGROUND

The following background information is relevant to the seven issues before the court.³ On March 26, 2009, Commerce, at the request of the domestic producers and certain Vietnamese respondents, initiated the fourth administrative review⁴ of the 2005 antidumping duty order on certain frozen warmwater shrimp from Vietnam⁵ (the "Order"). Commerce issued the preliminary results of its review on March 15, 2010, assigning preliminary dumping margins of 3.27% to mandatory respondent Minh Phu; 2.5% to mandatory respondent Nha Trang; 2.89% to the non-selected, separate rate respondents; and as the Vietnam-wide rate, 25.76%.⁶

³ Because this is a consolidated action, some factual information is relevant only to individual claims, and this will be provided as part of the discussion of individual issues.

⁴ Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 74 Fed. Reg. 13,178 (Dep't Commerce Mar. 26, 2009) (notice of initiation of administrative reviews and requests for revocation, in part, of the antidumping duty orders).

⁵ Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 70 Fed. Reg. 5,152 (Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order).

⁶ Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 Fed. Reg. 12,206, 12,215 (Dep't Commerce

After taking comments from interested parties, Commerce released the final results of the review on August 9, 2010. Final Results, 75 Fed. Reg. at 47,771. In the Final Results, Commerce assigned Minh Phu a 2.96% rate, Nha Trang a 5.58% rate, the separate rate respondents a 4.27% rate, and a rate of 25.76% as the Vietnam-wide rate. Id. at 47,774-75.⁷

STANDARD OF REVIEW

When reviewing the Department's decisions made in administrative reviews of antidumping duty orders, the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Mar. 15, 2010) (preliminary results, partial rescission, and request for revocation, in part, of the fourth administrative review) ("Preliminary Results").

⁷ Commerce later amended the final results reducing Minh Phu's rate to 2.95%, Nha Trang's to 4.89%, and the separate rate respondents to 3.92%, but keeping the Vietnam-wide rate at 25.76%. Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 Fed. Reg. 61,122, 61,123-26 (Dep't Commerce Oct. 4, 2010) (amended final results of antidumping duty administrative review) ("Amended Final Results"). The final results were amended due to ministerial errors made by Commerce in calculating surrogate values and surrogate financial ratios. Id. at 61,123.

DISCUSSION**I. Commerce's Use of Zeroing in Investigations but Not Reviews**

Where, as here, Commerce and the International Trade Commission determine that imported goods are being sold at less than fair value in the United States to the detriment of domestic industry, the statute directs Commerce to impose an antidumping duty on those imported goods "equal to the amount by which the normal value⁸ exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673.⁹ Commerce calculates dumping duties by first determining a dumping margin, or "the amount by which the normal value exceeds the export price or constructed export price," 19 U.S.C. § 1677(35)(A), and then establishing a weighted average dumping margin, which is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer," § 1677(35)(B).

When calculating weighted average dumping margins, Commerce may, under the statute, employ either of two methodologies:

⁸ The statute defines "normal value" as "the price at which the foreign like product is first sold . . . for consumption in the exporting country" 19 U.S.C. § 1677b(a)(1)(B)(i).

⁹ When a producer or exporter sells goods in the United States at a price below that at which the producer or exporter sells the same or comparable goods in its home market, those goods are considered dumped.

zeroing or offsetting. Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (holding that 19 U.S.C. § 1677(35) is ambiguous and that zeroing is a reasonable interpretation); U.S. Steel Corp. v. United States, 621 F.3d 1351, 1360-63 (Fed. Cir. 2010) (holding that 19 U.S.C. § 1677(35) is ambiguous and that offsetting is also a reasonable interpretation). Zeroing is the practice of "treat[ing] transactions [or sales] that generate 'negative' dumping margins (i.e., a dumping margin with a value less than zero) as if they were zero." Timken, 354 F.3d at 1338. Under this approach, only sales at less than normal value contribute to the calculation of the dumping margin. In contrast, when using offsetting, "sales made at less than fair value are offset by those made above fair value. This means that some of the dumping margins used to calculate a weighted-average dumping margin will be negative." U.S. Steel, 621 F.3d at 1355.

Historically, Commerce has employed zeroing methodology in both antidumping duty investigations and reviews. See Timken, 354 F.3d at 1338 (reviewing use of zeroing in an antidumping duty administrative review); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005) (reviewing use of zeroing in an antidumping duty investigation). However, in 2005, the European Community successfully challenged Commerce's use of zeroing, in investigations, before the World Trade Organization ("WTO"), a decision upheld by the WTO's Appellate Body in 2006. U.S. Steel,

621 F.3d at 1354 (citations omitted). In response to the adverse ruling before the WTO, Commerce changed its methodology in antidumping investigations, choosing to use offsetting instead of zeroing, id. at 1354-55, but continued to use zeroing in other segments of antidumping proceedings, including administrative reviews, id. at 1355 n.2.¹⁰

Plaintiffs in this case challenge Commerce's use of zeroing, in the fourth administrative review, as an impermissibly inconsistent interpretation of a single statutory provision. Plaintiffs argue that Commerce may not reasonably read the same statutory provision, 19 U.S.C. § 1677(35), to permit concurrent use of zeroing and offsetting. Pls.' Mem. Supp. Mot. J. Agency R. 15-17, ECF No. 67-2 ("Pls.' Br."). Commerce argues before this court only that Plaintiffs failed to raise the issue of inconsistent interpretations before the agency and have, therefore, not exhausted their administrative remedies. Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. 34-39, ECF No. 102 ("Def.'s Resp. Br.").

The issue has currency because of two recent decisions from the Court of Appeals for the Federal Circuit, Dongbu Steel Co. v. United States, 635 F.3d 1363 (Fed. Cir. 2011) and JTEKT Corp. v.

¹⁰ For the full discussion of Commerce's change in policy see Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) (final modification).

United States, 642 F.3d 1378 (Fed. Cir. 2011), which have addressed Commerce's inconsistent interpretations of 19 U.S.C. § 1677(35). Dongbu held that "[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is arbitrary." 635 F.3d at 1372-73. Subsequently, JTEKT concluded that "[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question – why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" 642 F.3d at 1384. In light of these decisions, the court will remand this issue to Commerce for reconsideration and redetermination consistent with now prevailing law.¹¹ See also

¹¹ As the decision in Dongbu was not available prior to the final results in this administrative review, the court does not credit Commerce's exhaustion argument. See JTEKT, 642 F.3d at 1384 ("[Appellant] did not have the benefit of the Dongbu opinion before filing its briefs and thus could not have argued that the case requires us to vacate, but it nonetheless preserved the issue on appeal by arguing that Commerce's continuing practice of zeroing in administrative reviews, but not in investigations, is unreasonable."). The Defendant-Intervenor, citing Hormel v. Helvering, 312 U.S. 552, 559 (1941), claims that the Federal Circuit's decisions in Dongbu and JTEKT are not intervening judicial decisions justifying Plaintiffs' failure to exhaust because the decisions do not materially alter the result required in this proceeding, but merely require "Commerce to explain its authority for continuing to use zeroing in administrative reviews." Def.-Intervenor's Resp. Pls.' Mot. J. Agency R. 26, ECF No. 87 ("Def.-Intervenor's Resp. Br."). But Hormel requires only that the intervening judicial decision "might" have affected the result. Hormel, 312 U.S. at 558-59. Moreover, the Defendant-Intervenor does not claim that application of the Federal Circuit's decisions in Dongbu and JTEKT will not materially alter

Union Steel v. United States, 35 CIT ___, Slip. Op. 11-144, *20 (Nov. 21, 2011) ("The court concludes, upon reconsidering its decision in Union II, that it is appropriate to set aside its affirmance of the use of zeroing and to direct Commerce to provide the explanation contemplated by the Court of Appeals in Dongbu and JTEKT Corp.").

II. Commerce's Surrogate Value Determinations

In order to determine a dumping margin, as discussed above, Commerce must first establish the normal value of the subject merchandise. However, if the merchandise is exported from a nonmarket economy ("NME") country,¹² the in-country price is presumed to be unreliable, and Commerce is directed to "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). "[T]he valuation of

the result, only that it *may not* alter the result. It is equally clear that application of Dongbu and JTEKT may materially alter the result. If application of these intervening judicial decisions does not materially alter the result, remand will be harmless.

¹² A nonmarket economy country is defined as "any foreign country that [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). None of the parties dispute that Vietnam is an NME.

the factors of production shall [in turn] be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce] [i.e., the surrogate market economy country]." Id.

Though the statute does not define "best available information" it does require Commerce to "utilize, to the extent possible, the prices or costs of factors of production in one or more [surrogate] market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." § 1677b(c)(4).¹³

Commerce has wide discretion in selecting surrogate value data. "[T]he process of constructing foreign market value for a producer in a nonmarket economy country [using surrogate values] is difficult and necessarily imprecise[,]" and, "[w]hile § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines." Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citation omitted) (internal quotation marks omitted). The court will not reverse Commerce's

¹³ For the administrative review under consideration, Commerce chose Bangladesh as the surrogate market economy. Mem. from Bobby Wong, Senior Analyst, to Scot Fullerton, Program Manager, 1 (Mar. 8, 2010), Admin. R. Pub. Doc. 176 ("Surrogate Value Mem."). No party challenges this determination.

surrogate value decision or data choice because an alternative inference or conclusion could be drawn from the evidence. Daewoo Elec. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (quoting Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984))). "[The] court's duty 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.'" Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting Goldlink Indus. Co. v. United States, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)); see also Peer Bearing Co.-Changshan v. United States, 27 CIT 1763, 1770, 298 F. Supp. 2d 1328, 1336 (2003) ("The Court's role . . . is not to evaluate whether the information Commerce used was the best available, but rather whether Commerce's choice of information is reasonable.").

As noted above, Plaintiffs and Defendant-Intervenor challenge several of Commerce's decisions or data choices concerning surrogate values, surrogate financial ratios, and surrogate labor wage rates. These determinations are discussed individually below.

A. *Exclusion of Bangladesh-to-Bangladesh Import Data from Valuation of Factors of Production*

As noted above, Bangladesh was chosen as the surrogate market economy country for this administrative review. The Department used United Nations ComTrade Statistics as its primary source of surrogate value data for factors of production in Bangladesh. Preliminary Results, 75 Fed. Reg. at 12,214. In the Final Results, Commerce chose to exclude imports into Bangladesh that were listed in the ComTrade data as originating from Bangladesh. Commerce reasoned that goods moving from Bangladesh-to-Bangladesh could not be considered imports. I & D Mem. Cmt. 6 at 21. Thus, Commerce concluded that “[b]ecause the constitution of this data is unclear, we do not find that it represents the best available information upon which to rely for valuation purposes.” Id.

Plaintiffs argue that Commerce erred in excluding the Bangladesh-to-Bangladesh data because the result was to distort the values of the affected factors of production.¹⁴ Pls.’ Br. 25-27. Plaintiffs further argue that Commerce’s decision to exclude the Bangladesh-to-Bangladesh data was inconsistent with

¹⁴ According to an example provided by the Plaintiffs, “the altered price for cartons in the [Final Results] is dramatically higher than the value in the first review, second review, third review, and preliminary results of the fourth review, by the following percentages: 432 percent higher, 375 percent higher, 259 percent higher, and 355 percent higher, respectively.” Pls.’ Br. 23.

Commerce's prior practice because the Bangladesh-to-Bangladesh data did not fall into one of three enumerated categories of data that Commerce generally excludes from consideration.¹⁵ Id. at 25.

Commerce contends, as it did at the administrative level, that the nature of the Bangladesh-to-Bangladesh data is uncertain, which it believes is a sound basis for excluding the data as not the best available information. Def.'s Resp. Br. 28-30; I & D Mem. Cmt. 6 at 21. Commerce further contends that the data should be excluded without recourse to its prior enumerated categories because the Bangladesh-to-Bangladesh data is, by definition, not import data. Def.'s Resp. Br. 29.

On this record, Commerce's decision is reasonable. As

¹⁵ To identify the three enumerated categories of excludable data, Plaintiffs point to the following statement in the Department's Issues and Decision Memorandum accompanying the Final Results in the third administrative review of this antidumping duty order:

It is the Department's established practice, when using import data as a surrogate value source, to use the AUV for the input imported from all countries, with three exceptions: imports from countries that the Department has previously determined to be NME countries, imports from countries which the Department has determined subsidize exports, and imports that are labeled as originat[ing] from an "unspecified" country.

Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 74 Fed. Reg. 47,191 (Dep't Commerce Sept. 15, 2009) (final results and final partial rescission of antidumping duty administrative review) ("AR3 Final Results"), and accompanying Issues & Decision Memorandum, A-552-802, ARP 07-08 (Sept. 8, 2009) Cmt. 7 at 33-34 ("AR3 I & D Mem.") (adopted in Final Results, 74 Fed. Reg. at 47,191-92).

Commerce noted in the Final Results, “[t]here is no record evidence as to whether the goods classified as imports from Bangladesh into Bangladesh are re-importations, another category of unspecified imports, or the result of an error in reporting.” I & D Mem. Cmt. 6 at 21. Without a clear explanation of the source or nature of this data, it was reasonable for Commerce to exclude the Bangladesh-to-Bangladesh data as potentially aberrational. See Guangdong Chem. Imp. & Exp. Corp. v. United States, 30 CIT 1412, 1419, 460 F. Supp. 2d 1365, 1370-71 (2006) (finding that lack of information on how data points were chosen for a data set was a reasonable basis for rejecting the data set).

Plaintiffs point to the increased values for factors of production, where Bangladesh-to-Bangladesh data was excluded, and note that by excluding that data only a fraction of total imports remained from which a value could be derived. However, the Plaintiffs’ argument does not provide a basis for finding that the Bangladesh-to-Bangladesh data was reliable or the best available. The exclusion of the data may have changed the results, but such a change is not, alone, a basis for the court to insist that the data is the best available. Rather, Plaintiffs’ argument assumes that because the resulting values are inconsistent with those generated in prior reviews, inclusion of the Bangladesh-to-Bangladesh data is the best available

information. Plaintiff's assumption is insufficient to rebut Commerce's reasoned analysis that, without knowing the nature of the data, Commerce could not know the value of the data. See Zhejiang, 652 F.3d at 1342 (finding that plaintiff's assumption that one data set is correct is not sufficient to challenge Commerce's choice of the opposing data set). Furthermore, Plaintiffs are not now in a position to argue that Commerce should have further investigated the ComTrade data, when Plaintiffs could have assumed that responsibility themselves and placed such further evidence on the record. See QVD Food Co. v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("Although Commerce has authority to place documents in the administrative record that it deems relevant, 'the burden of creating an adequate record lies with [interested parties] and not with Commerce.'" (alteration in original) (quoting Tianjin Mach. Imp. & Exp. Corp. v. United States, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992))).

B. Calculation of Surrogate Financial Ratios

After Commerce determines a surrogate value for the factors of production, there "shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." See 19 U.S.C. § 1677b(c)(1)(B). These expenses include factory overhead; selling, general, and administrative expenses ("SG&A"); and profit. To value factory overhead, SG&A,

and profit, Commerce uses financial ratios derived from "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4) (2011)¹⁶; see also I & D Mem. Cmt. 3 at 10.

In this review, Commerce received financial statements for five Bangladeshi companies and determined that only two, Apex Foods Ltd. ("Apex") and Gemini Sea Food Ltd. ("Gemini"), represented "the best available information." I & D Mem. Cmt. 3 at 10. Defendant-Intervenor AHSTAC challenges both Commerce's rejection of the 2008-2009 financial statement from Fine Foods Ltd. ("Fine Foods") and the classification of loading and unloading expenses listed on Gemini's financial statement. Def.-Intervenor's Mem. Supp. Mot. J. Agency R. 7-17, ECF No. 65 ("Def.-Intervenor's Br. ").¹⁷

Though the two issues will be discussed independently below, the court reviews both determinations on a substantial evidence

¹⁶ Unless otherwise noted, all subsequent citations to the Code of Federal Regulations are to the 2011 edition.

¹⁷ AHSTAC also asserts a third argument, contending that Commerce's approach to these two issues was arbitrary - because it inconsistently rejected the Fine Foods financial statement for lack of certainty regarding its status as a shrimp processor but determined that the Gemini loading and unloading expenses were movement expenses on even more uncertain record evidence. Def.-Intervenor's Br. 17-18. What AHSTAC points out is nothing more than the contextual nature of these determinations. So long as each decision is made using a reasonable methodology and based on a reasonable reading of the record evidence, the court will not upset the determinations.

standard. The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" Nippon Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting SSIH Equip. SA v. U.S. Int'l Trade Comm'n, 718 F.2d 365, 381 (Fed. Cir. 1983)). The court will not upset Commerce's decision simply because alternative inferences or conclusions can be drawn from the evidence, Daewoo, 6 F.3d at 1520, but only if no "reasonable mind could conclude that Commerce chose the best available information," Zhejiang, 652 F.3d at 1341 (quoting Goldlink, 30 CIT at 619, 431 F. Supp. 2d at 1327)(internal quotation marks omitted).

1. Fine Foods Financial Statement

Commerce rejected the Fine Foods financial statement as not the best available information because "[a] careful review of the Fine Foods financial statement shows that Fine Foods is a farmer of fish and fish products, and is not a processor of shrimp." I & D Mem. Cmt. 3.D at 15. AHSTAC argues that because the Fine Foods financial statement lists "processing fish" among its main activities and shrimp among its turnover, the conclusion must be drawn that Fine Foods processes shrimp. Def.-Intervenor's Br. 9-11; see also Fine Foods Ltd. Annual Report 2009, ¶ 1.3, at 17, ¶ 21 at 26, reprinted in Letter from Pickard Kentz & Rowe LLP to Secretary of Commerce (Apr. 9, 2010), Admin. R. Pub. Doc. 195,

attach 3 ("Fine Foods Financial Statement").

Even assuming, *arguendo*, that AHSTAC's conclusions may reasonably be drawn from the Fine Foods financial statement, it is equally reasonable to draw the conclusion that Fine Foods does not process shrimp. To arrive at either conclusion, Commerce must have drawn an inference from the record: either shrimp, being listed in turnover alongside fish, are considered fish when Fine Foods states that it "processes fish," or, because Fine Foods does not state that it processes shrimp, shrimp are treated differently from fish. There is nothing definitive in the financial statement to indicate that Fine Foods is or is not a processor of shrimp. Because two alternative inferences could reasonably be drawn from the record, the court defers to Commerce's decision. Daewoo, 6 F.3d at 1520.

In addition, Commerce's rejection of the Fine Foods financial statement does not rest solely on whether Fine Foods processes shrimp. Assuming, *arguendo*, that Fine Foods is a processor of shrimp, it must also be assumed that Fine Foods is a farmer of shrimp - as its financial statement lists production and breeding among its main activities.¹⁸ Therefore, Fine Foods,

¹⁸ Fine Foods' financial statement lists the "main activities of the company" as "[p]roduction of fish, fish product, fish spawn breeding, fingerling growing, production of fish meal & oil, processing fish and marketing the same products in local and foreign market. Plantations of good quality timber trees." Fine Foods Financial Statement ¶ 1.3 at 17. Assuming that "fish" includes shrimp in the phrase "processing fish," it

unlike the mandatory respondents in this review, is vertically integrated. I & D Mem. Cmt. 3.D at 15. This is sufficient reason for Commerce to determine that Fine Foods' "production experience[] [is] less representative of respondents' production experience, [as shrimp processors] and therefore, [does] not represent the best information available for the purpose[] of calculating surrogate financial ratios." Id.¹⁹

2. Gemini's Loading and Unloading Expenses

In the Final Results, Commerce found that, "based on the limited description in Gemini's financial statement, loading and unloading expenses are best considered as movement expenses and thus should be excluded from the surrogate financial ratio calculation." Id. Cmt. 3.A at 11.²⁰ AHSTAC challenges Commerce's finding on two grounds. First, AHSTAC argues that Commerce's decision is not supported by substantial evidence on the record. Second, AHSTAC argues that Commerce has insufficiently explained its decision.

is equally reasonable to assume that "fish" includes shrimp in the phrases "production of fish" and "fish spawn breeding."

¹⁹ The court also notes that a straightforward reading of Fine Foods' financial statement clearly indicates that its basic character is that of a farm or plantation rather than a shrimp processor.

²⁰ The Department notes that it includes freight expenses in its dumping calculations for each company, therefore it excludes similar expenses from the SG&A calculation to avoid double-counting. Id.

In its first line of argument, AHSTAC contends that the record does not contain substantial evidence supporting Commerce's decision to consider the line item for loading and unloading as movement expenses appropriate for exclusion from the surrogate financial ratio calculation. Def.-Intervenor's Br. 13-14. Rather, AHSTAC contends that these loading and unloading expenses are related to the movement of goods and materials within "production facilities or warehouses." Id. at 14.

AHSTAC does not, however, provide any compelling evidence supporting its interpretation of the expense in question or establishing that Commerce's conclusion is unreasonable. Rather, AHSTAC's argument before Commerce and again before this court is only that "the loading and unloading expenses are listed as a line item in the Gemini Financial Statement next to a line item for depreciation support[ing] their classification as SG&A, given that that [sic] Commerce calculates SG&A including line items for depreciation." Id. at 13-14; see AHSTAC Rebuttal Br., Admin. R. Pub. Doc. 209, at 6; see also Gemini Sea Food Ltd. Annual Report 2007-2008 at 29, reprinted in Surrogate Value Memo, exhibit 9 ("Gemini Annual Report"). The court finds no reason, based on the record evidence, to infer from the adjacent placement of these line items any relationship or correlation between them.

Even more importantly, Commerce's determination, based on its expertise and prior practice, is reasonable. In their Case

Brief to Commerce, the Vietnamese respondents pointed out that the Department excluded loading and unloading expenses from the surrogate financial ratio in the third administrative review of this Order. Vietnamese Resp'ts' Case Br., Admin. R. Pub. Doc. 206, at 12; I & D Mem. Cmt. 3.A. at 11. Similarly, Commerce noted in the Final Results that its practice is to exclude movement expenses from surrogate financial ratios in order to avoid double-counting. I & D Mem. Cmt. 3.A at 11; see also Fuyao Glass Indus. Grp. v. United States, 27 CIT 1892, 1909 (2003) (remanding to Commerce to demonstrate that valuing water as a separate factor of production did not result in impermissible double-counting). The Department pointed to a prior review where it had similarly classified "loading and unloading" expenses as movement expenses to be excluded from surrogate financial ratios. I & D Mem. Cmt. 3.A at 11 n.61; Certain Frozen Warmwater Shrimp from India, 74 Fed. Reg. 9,991, 9,995, 9,998 (Dep't Commerce Mar. 9, 2009) (preliminary results and preliminary partial rescission of antidumping duty administrative review) (unchanged in final results).²¹

²¹ For other examples where Commerce has categorized "loading and unloading" expenses as movement expenses see Certain Frozen Warmwater Shrimp from India, 75 Fed. Reg. 12,175, 12,181, 12,184 (Dep't Commerce Mar. 15, 2010) (preliminary results of antidumping duty administrative review, partial rescission of review, notice of intent to rescind review in part, and notice of intent to revoke order in part); Certain Frozen Warmwater Shrimp from India, 73 Fed. Reg. 12,103, 12,109-10, 12,112 (Dep't Commerce Mar. 6, 2008) (preliminary results and preliminary

This analysis is similar to that affirmed in Hebei Metals & Minerals Imp. & Exp. Corp. v. United States, 29 CIT 288, 366 F. Supp. 2d 1264 (2005). In Hebei, Commerce determined on remand that “‘internal consumption’ represented only inter-facility transfers, which would be double-counted if not removed from the expense values in the surrogate ratios’ denominators.” Id. at 304, 1277. Though the plaintiffs attacked Commerce’s determination as “unsupported speculation,” the Court held that Commerce, relying on prior investigations where it deducted internal consumption, drew reasonable inferences from the record. Id. at 304-05, 1278-79. In this case, Commerce also drew a reasonable inference from the record evidence, using its past experience as a guide, that the loading and unloading expenses in the Gemini financial statement were movement expenses that should be excluded from the surrogate financial ratios to avoid impermissible double-counting.

As noted above, AHSTAC argues that Commerce insufficiently explained its decision to exclude loading and unloading expenses

partial rescission of antidumping duty administrative review); Structural Steel Beams from Korea, 69 Fed. Reg. 53,887, 53,889 (Dep’t Commerce Sept. 3, 2004) (preliminary results of antidumping duty administrative review); Structural Steel Beams from the Republic of Korea, 68 Fed. Reg. 53,129, 53,131-32 (Dep’t Commerce Sept. 9, 2003) (preliminary results of antidumping duty administrative review); Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People’s Republic of China, 61 Fed. Reg. 15,028, 15,033 (Dep’t Commerce Apr. 4, 1996) (final results of antidumping administrative review).

from the surrogate financial ratios, contending that "Commerce merely referenced the 'limited description' of these expenses and thereafter stated its general approach to calculating surrogate financial ratios." Def.-Intervenor's Br. 15. However, AHSTAC ignores the discussion in the Final Results of Commerce's policy of avoiding double-counting and its belief, based on prior experience, that loading and unloading expenses are best classified as movement expenses to avoid such double-counting. Though Commerce's discussion may not be as thorough as AHSTAC would like, the agency's "decisional path is discernable," and a more "explicit explanation . . . is not necessary." AL Tech Specialty Steel Corp. v. United States, 28 CIT 1468, 1489 (2004) (citing Wheatland Tube Co. v. United States, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998) (internal quotation marks omitted)).

C. Multi-country Averaging for Surrogate Labor Wage Data

As noted above, when valuing most factors of production Commerce analyzes data from a single market economy country. See 19 C.F.R. § 351.408(c)(2); Dorbest Ltd. v. United States, 604 F.3d 1363, 1367-68 (Fed. Cir. 2010). Until recently, Commerce valued surrogate labor wage rates differently, using regression analysis to determine wage rates based on "the observed relationship between wages and national income in market economy countries." See § 351.408(c)(3); Dorbest, 604 F.3d at 1368. However, in Dorbest, the Federal Circuit invalidated

§ 351.408(c)(3), holding that the regulation did not comply with 19 U.S.C. § 1677b(c)(4) which requires use of data from economically comparable countries that are significant producers of comparable merchandise. Dorbest, 604 F.3d at 1372 (“[19 C.F.R. § 351.408(c)(3)] improperly requires using data from both economically comparable and economically dissimilar countries, and it improperly uses data from both countries that produce comparable merchandise and countries that do not.”).

Dorbest was decided on May 14, 2010, following the Preliminary Results but prior to the Final Results in the fourth administrative review at issue here. In light of the decision of the Court of Appeals in Dorbest, Commerce sought comments from interested parties on a new methodology for calculating surrogate wage rates in the instant review. Final Results, 75 Fed. Reg. at 47,772. After considering the comments, Commerce decided to value surrogate wage rates “by averaging earnings and/or wages in countries that are economically comparable to Vietnam and that are significant producers of comparable merchandise.” Id.; see also I & D Mem. Cmt. 9 at 27-31. Among the methodologies Commerce rejected was a proposal by the Vietnamese respondents to “value labor using wage data specific to the shrimp processing industry in Bangladesh taken from the Bangladesh Bureau of Statistics’ 2007 Wage Survey.” I & D Mem. Cmt. 9 at 26.

Plaintiffs now contend that it was error for Commerce to use

an averaging methodology that uses data from multiple countries, rather than using the industry specific data on shrimp processing wages in Bangladesh, the surrogate country used in valuing other factors of production. Pls.' Br. 27. Plaintiffs argue that the Bangladesh data is the "best available information," because it is the most industry specific data on the record, and that such specific data is required by the statute and relevant case law. Id. at 31-33. Commerce maintains that it has broad discretion to determine what is the best available information, and that its decision - that "reliance on wage data from a single country [is] unreliable and arbitrary" - is a reasonable determination. I & D Mem. Cmt. 9 at 27.

These competing positions require the court to decide whether the only reasonable interpretation of the statute is that industry specificity trumps other concerns when considering what constitutes best available information under 19 U.S.C. § 1677b. The court answers this question in the negative.

First, the plain language of the statute does not require that the best available information include industry specific information when such is available.

The best available information concerning the valuation of a particular factor of production may constitute information from the surrogate country that is directly analogous to the production experience of the NME producer . . . or it may not. . . . Commerce need not duplicate the exact production experience of the [NME] manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market

value

See Nation Ford, 166 F.3d at 1377 (citation omitted) (internal quotation marks omitted).

While § 1677b(c)(3) directs Commerce to obtain values for the "factors of production utilized in producing [the subject] merchandise," § 1677b(c)(4) specifies that these values are, "to the extent possible," to come from "market economy countries that are significant producers of comparable merchandise." Assuming that by using the phrase "comparable merchandise," Congress intended Commerce to consider factors of production for industries in the surrogate country or countries as similar as possible to those in the NME, it unduly strains the language to hold that specificity is the sole touchstone of the analysis, to the exclusion of such factors as data stability and reliability.

Second, contrary to Plaintiffs' assertion, the legacy of Dorbest and this Court's decision in Allied Pac. Food (Dalian) Co. v. United States, __ CIT __, 587 F. Supp. 2d 1330 (2008), is neither that "the statute contains no exception for how the labor factor of production should be selected," nor that "the pursuit of the best available information requires Commerce to apply to the selection of labor surrogate values the same selection criteria it applies when selecting other surrogate values." Pls.' Br. 32. Plaintiffs read both decisions too narrowly and would constrain Commerce in an area where the Department has broad

discretion. See Nation Ford, 166 F.3d at 1377. Contrary to Plaintiffs' reading, in Dorbest and Allied Pac., the Court of Appeals and this Court, respectively, held specifically that 19 C.F.R. § 351.408(c)(3) was contrary to 19 U.S.C. § 1677b(c)(4) because it required the use of data that was prohibited by the statute. Dorbest, 604 F.3d at 1372; Allied Pac., ___ CIT at ___, 587 F. Supp. 2d at 1357-61.

Dorbest held that, pursuant to § 1677b(c)(4), Commerce's regulation employing regression analysis was overbroad because it included non-comparable countries. Dorbest, 604 F.3d at 1372-73. Dorbest did not hold that the regulation lacked industry specificity, nor did it discuss the idea of industry specificity. Id. at 1371-72. By invalidating § 351.408(c)(3), Dorbest required that any new methodology must comport with the statute by limiting itself to countries that were of comparable economic development and significant producers of comparable merchandise. Id.

In Allied Pac., this Court did endorse the use of industry specific data.²² Allied Pac., 587 F. Supp. 2d at 1357-58.

²² The Court noted that "[l]egislative history supports the principle that Congress intended Commerce to use, where possible, information on the cost of the specific labor used to produce the subject merchandise." Allied Pac., 587 F. Supp. 2d at 1357. The Court then went on to give the following example:

It is at least conceivable that a party to a proceeding might obtain, from one or more countries that are economically comparable to China and are significant

However, it stopped short of holding that such data is required by § 1677b(c)(4). Rather, Allied Pac. held that Commerce's regression-based regulation, which prohibited Commerce from even considering such industry-specific data, could not withstand judicial scrutiny in light of the plain language of the statute. Id. at 1357, 1361. Thus, in light of Dorbest and Allied Pac., so long as all the data on the record is limited to countries meeting the § 1677b(c)(4) criteria and the record is not foreclosed to any data meeting that criteria, Commerce retains the discretion to consider all of the data on the record and determine what constitutes the best available information.

Third, Commerce's preference for industry-specific data does not necessarily outweigh its preference for labor data from multiple countries. Plaintiffs correctly note that Commerce has expressed a preference for industry-specific data. See Pls.' Br. 29-30. However, Commerce also has a long-standing policy of favoring data from multiple countries when calculating surrogate wage rates. I & D Mem. Cmt. 9 at 28 ("[T]he Department maintains

producers of merchandise comparable to the subject merchandise, information on wage rates in the specific industry that produces the comparable merchandise or on wage rates for the specific type of labor used. Such information would seem to be ideal, according to the statutory criteria of 19 U.S.C. § 1677(b)(c)(1) and (c)(4), for the purpose of valuing the hours of labor required to produce the subject merchandise.

Id. at 1358.

its longstanding position that, even when not employing a regression methodology, more data are still better than less data for purposes of valuing labor."). Commerce, in this case, chose to use data from multiple countries over industry-specific data because it believed that this led to more accurate values. Def.'s Resp. Br. 34. Such a result is not inconsistent with Commerce's stated policies.

It follows that the language of the statute, the relevant case law, and the agency's established methodologies do not support the proposition that a predominating preference for industry-specificity is the only reasonable interpretation of the statute. See Shandong Rongxin Imp. & Exp. Co. v. United States, __ CIT __, 774 F. Supp. 2d 1307, 1314 (2011). Furthermore, Commerce's decision on this issue was reasonable. The court accepts, as does Commerce, that industry-specificity may add accuracy to data used to calculate surrogate values. However, Commerce has also repeatedly pointed out the discrepancies that exist between wages and gross national income ("GNI"), noting in the Final Results that:

[f]or example, when examining the most recent wage data, even for countries that are relatively comparable to Vietnam in terms of GNI for purposes of factor valuation . . . the wage rate spans from USD 0.49 to USD 1.30. . . . There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries.

I & D Mem. Cmt. 9 at 27-28.

In this case, Commerce had industry-specific data for one country, Bangladesh. Id. at 24-27. With industry-specific data for only one country, Commerce was faced with making a choice between specificity and accounting for wage rate variance by averaging data from as many countries as possible. It chose the latter. A reasonable mind could determine that Commerce chose the best available information, see Zhejiang, 652 F.3d at 1341; see also Shandong, ___ CIT at ___, 774 F. Supp. 2d at 1314, and the court will not upset Commerce's reasonable choice. Zhejiang, 652 F.3d at 1341.

Finally, the court does not find, as Plaintiffs suggest in their reply brief, that Commerce's subsequent decision - to use, in future reviews, wage rate data from a single surrogate country - is a basis for finding unreasonable the decision to use multi-country averaging in this review. Pls.' Reply Mem. Supp. Mot. J. Agency R. 7-8, ECF No. 95 ("Pls.' Reply Br."). The court recognizes that, going forward, Commerce has adopted a policy similar to that advocated by Plaintiffs in this review. See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092, 36,094 (Dep't Commerce June 21, 2011) ("Labor Valuation Methodology") ("Pursuant to the comments received and the Department's analysis thereof, the Department will value the NME

respondent's labor input using industry-specific labor costs prevailing in the primary surrogate country, as reported in Chapter 6A of the ILO Yearbook of Labor Statistics."). However, this policy change was issued almost eleven months after the Final Results in the fourth administrative review.²³

Furthermore, Commerce's decision to move away from multi-country averaging was premised, in large part, on the intervening decision in Shandong, where this Court held that because 19 U.S.C. § 1677b(c)(4) requires that surrogate countries be *significant* producers of comparable merchandise, Commerce could not use data including countries which "almost certainly have no domestic production." Shandong, __ CIT at __, 774 F. Supp. 2d at 1316.²⁴ In light of the Court's holding in Shandong, Commerce found that "the base for an average wage calculation would be so limited that there would be little, if any, benefit to relying on an average of wages from multiple countries for purposes of

²³ The new policy, itself, cannot control in this case because it is not retroactive. See Labor Valuation Methodology, 76 Fed. Reg. at 36,093 (applying new methodology to antidumping proceedings "initiated on or after the date of publication of this Federal Register notice"); see also Dorbest Ltd. v. United States, __ CIT __, 789 F. Supp. 2d 1364, 1369 n.9 (2011) ("While Dorbest urges the court to hold that Commerce's current methodology is unlawful when considered in light of Commerce's recent announcement [valuing labor using a single surrogate country], the court cannot do so because Commerce's change in methodology is not retroactive.").

²⁴ No party claims that the data relied on here was inconsistent with Shandong.

minimizing the variability that occurs in wages across countries." Labor Valuation Methodology, 76 Fed. Reg. 36,093.

Because the circumstances at the time of the fourth administrative review were not the same as those that led Commerce to change its labor valuation methodology, the court will not hold Commerce's earlier decision unreasonable.

III. Commerce's Denial of Grobest's Revocation Request

Plaintiff Grobest contends that Commerce improperly denied its request for revocation on the grounds that it was not reviewed as a mandatory respondent.²⁵ Grobest makes three primary arguments supporting its claim for revocation review. First, Grobest asserts that 19 U.S.C. § 1677f-1(c)(2), which permits Commerce to limit the number of companies it reviews, does not apply in the context of a request for revocation. Pls.' Br. 43-46. Second, Grobest asserts that Commerce should have applied the procedure articulated in Certain Fresh Cut Flowers

²⁵ In the Respondent Selection Memorandum for the fourth administrative review, Commerce, pursuant to 19 U.S.C. § 1677f-1(c)(2)(B), limited the number of mandatory respondents selected for review to the two largest companies by import volume. Memorandum from Scot T. Fullerton, Program Manager, to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations 1-4 (June 11, 2009), Admin. R. Pub. Doc. 89 ("Resp't Selection Mem."). The companies selected as mandatory respondents were Minh Phu and Nha Trang. Id. at 7. The Department received 143 requests for review, of which eighteen respondents also requested revocation. Id. at 1. Twelve respondents subsequently withdrew their revocation requests but maintained their requests for review. Id. at 1-2.

from Colombia ("Flowers") in this review.²⁶ Pls.' Br. 37-43.

Third, Grobest asserts that Commerce should have reviewed it as a voluntary respondent in accordance with 19 U.S.C. § 1677m(a).

Pls.' Br. 46-47.

Grobest's first and second arguments are addressed by the Court's recent decision in Amanda Foods (Vietnam) Ltd. v. United States, 35 CIT ___, Slip Op. 11-155 (Dec. 14, 2011), which reviewed the third administrative review of this Order. The third issue, Grobest's request for voluntary respondent status, was not addressed in Amanda Foods because the plaintiff in that case did not seek voluntary respondent status. Id. at 28.

Regarding Grobest's first argument, the court notes, as discussed at length in Amanda Foods, that neither the statutes nor the regulations relevant to administrative review and revocation of antidumping duty orders require the Department to initiate an individual review upon request for revocation. See Id. at 21-22. In Amanda Foods, the Court held reasonable Commerce's interpretation of 19 U.S.C. § 1675(d)(1), which requires an individual review under § 1675(a) or (b) (i.e., in an administrative review or a changed circumstances review) as a prerequisite to revocation. Id. at 13-18. It follows, that it is

²⁶ Certain Fresh Cut Flowers from Colombia, 62 Fed. Reg. 53,287, 53,290-91 (Dep't Commerce Oct. 14, 1997) (final results and partial rescission of antidumping duty administrative review) ("Flowers Final Results").

also a reasonable interpretation of the statute for Commerce to conclude that when the number of respondents is limited under § 1677f-1(c)(2) for the purpose of review, respondents who are not selected for individual review, whether mandatory or voluntary, are ineligible for revocation. Id. Furthermore, it is reasonable for the Department to interpret its regulations, found at 19 C.F.R. § 351.222, as procedures for conducting a revocation when a respondent has been selected for individual review. Id. at 18-22. This interpretation is consistent with both the regulatory language and the statutory structure. Id. Because neither 19 U.S.C. § 1675(d) nor 19 C.F.R. § 351.222 requires a separate review for the purposes of revocation, the court finds Grobest's appeal to these provisions unavailing.

The court also finds Grobest's second argument, that Commerce should have applied the Flowers procedure, unavailing. As the court articulated in Amanda Foods, the procedure announced in Flowers is not binding on Commerce. Id. at 27-28. The Flowers procedure was never implemented in practice, nor has Commerce subsequently relied upon this procedure to govern a review. Id. Furthermore, Commerce has "in practice, changed its policy to rely instead on the voluntary review process in order to achieve the objectives stated in Flowers" Id. Given this history, the court finds that the Flowers procedure is not a precedential agency policy.

Thus, the court turns to Grobest's third argument, which was not considered in Amanda Foods. Grobest argues that it should have been reviewed as a voluntary respondent, pursuant to 19 U.S.C. § 1677m(a),²⁷ because (1) Commerce limited the number of companies individually examined under § 1677f-1(c)(2); (2) Grobest complied with the statutory requirements for voluntary respondent status; and (3) the number of companies seeking voluntary respondent status, two, would not have been unduly burdensome to review. Pls.' Br. 46-47. Commerce maintains that considering companies as voluntary respondents is discretionary, and that because it determined under § 1677f-1(c)(2) that it could only review two mandatory respondents, reviewing any voluntary respondents would have been unduly burdensome. Def.'s

²⁷ Section 1677m(a) reads in relevant part:

In . . . a review under section 1675(a) of this title in which the administering authority has, under section 1677f-1(c)(2) of this title . . . limited the number of exporters or producers examined . . . [Commerce] shall establish . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination . . . who submits to the administering authority the information requested from exporters or producers selected for examination, if (1) such information is so submitted by the date specified (A) for exporters and producers that were initially selected for examination . . . and (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

Resp. Br. 18-21.

Commerce's determination fails to comply with § 1677m(a), which requires that Commerce separately determine whether reviewing the voluntary respondents "would be unduly burdensome and inhibit the timely completion of the investigation." Commerce's determination is, therefore, an unreasonable interpretation of the statute because it violates the well-established principle that, where possible, the court should give effect to all parts of the statute. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (citations omitted)(internal quotation marks omitted)).²⁸

Contrary to this principle of statutory construction, Commerce's interpretation of § 1677m(a) renders that provision meaningless. Commerce argues that when it limits the number of mandatory respondents under § 1677f-1(c)(2), it need not consider any voluntary respondents under § 1677m(a) because it has already determined the number of respondents that it can review (in this case two). Def.'s Resp. Br. 18. But this argument conflates the two statutory provisions and renders § 1677m(a) a dead letter.

²⁸ More generally, following step one of the familiar Chevron analysis, the court employs the traditional tools of statutory construction to determine whether Congress has spoken directly to the issue. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

Though § 1677m(a) is written to have effect only when Commerce "has, under 1677f-1(c)(2) . . . limited the number of exporters or producers examined," Commerce's interpretation would mean that § 1677m(a) review of voluntary respondents is already curtailed once a § 1677f-1(c)(2) decision to limit the number of respondents is made.²⁹

²⁹ Commerce also argues that the purpose of § 1677m(a) is to permit voluntary respondents to fill vacancies created when one or more mandatory respondents are not reviewed. See, e.g., Calgon Carbon Corp. v. United States, 35 CIT __, Slip Op. 11-21 (Feb. 17, 2011) (reviewing voluntary respondent where mandatory respondent refused to participate). Commerce further contends that, because a mandatory respondent could exit the review process opening a spot for voluntary respondents, using § 1677f-1(c)(2) to limit the number of respondents generally does not foreclose the opportunity for voluntary respondents to obtain review. Rather, according to Commerce, it only forecloses the opportunity for voluntary respondents when it declares, at the outset, that it will not consider any voluntary respondents. See, e.g., Zhejiang Native Produce & Animbal By-Products Imp. & Exp. Corp. v. United States, __ CIT __, 637 F. Supp. 2d 1260 (2011).

The court finds this interpretation of the statute unreasonable. Such an interpretation fails to address the bifurcated nature of the two statutory provisions at issue, §§ 1677f-1(c)(2) and 1677m(a), as discussed above. Furthermore, such an interpretation surely discourages voluntary respondents because it confines the opportunity for voluntary respondent review to the irregular situation where a mandatory respondent is not reviewed. Such discouragement is contrary to the expressed intent of Congress, which noted in the Statement of Administrative Action for the Uruguay Round Agreements Act that "Commerce, consistent with Article 6.10.2 of the Agreement will not discourage voluntary responses and will endeavor to investigate all firms that voluntarily provide timely responses in the form required" Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 873 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4201. To limit voluntary respondents through § 1677f-1(c)(2) is to foreclose the review under § 1677m(a) barring the unexpected and irregular.

Furthermore, Commerce has misread the statute. According to Commerce, under § 1677m(a), "if Commerce limits the number of respondents it individually reviews, it *may* still consider voluntary respondents who request review only if 'the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.'" Def.'s Resp. Br. 18 (emphasis added) (quoting 19 U.S.C. § 1677m(a)). However, the language of the statute states:

[Commerce] *shall establish* . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination . . . [if] the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

19 U.S.C. § 1677m(a)(emphasis added). Contrary to Commerce's view that the statute contains a discretionary grant of authority to review voluntary respondents if such review is practical, the statute plainly requires Commerce to conduct individual reviews unless such reviews would be unduly burdensome and inhibit the timely completion of the investigation.

Finally, Commerce ignores the separate standards set out in §§ 1677f-1(c)(2) and 1677m(a). Where § 1677f-1(c)(2) permits Commerce to limit the number of mandatory respondents "[i]f it is not practicable to make individual weighted average dumping

margin determinations," § 1677m(a) sets a higher standard, requiring review of voluntary respondents unless such review "would be unduly burdensome and inhibit the timely completion of the investigation." The two, distinct standards call for separate determinations, and the latter determination, pursuant to § 1677m(a), sets a higher threshold of agency burden before the requirement of individual review can be avoided.

Arguing to the contrary, Commerce relies on this Court's opinion in Longkou Haimeng Mach. Co. v. United States, ___ CIT ___, 581 F. Supp. 2d 1344 (2008), for the proposition that Commerce may choose not to review voluntary respondents once it has limited the number of mandatory respondents it will review. Def.'s Resp. Br. 20. Commerce is correct that in Longkou the Court held that Commerce has exclusive authority to limit the number of respondents it examines, and that it may limit the number of respondents solely to mandatory respondents. Longkou, ___ CIT at ___, 581 F. Supp. 2d at 1352. In other words, Commerce is not absolutely required to review voluntary respondents, as the exception clause at § 1677m(a)(2) makes clear. However, Longkou does not stand for the proposition that Commerce's determination under § 1677f-1(c)(2) is effective in determining whether it will review voluntary respondents. That question was

not reached in Longkou.³⁰

Thus, the court finds that Congress has spoken directly to the issue of whether Commerce's determination under § 1677f-1(c)(2) controls its decision to review voluntary respondents under § 1677m(a). See Chevron, 467 U.S. at 842-43. Congress intended for respondents to have the opportunity to seek voluntary respondent status, without having such efforts foreclosed by the Department's determination under § 1677f-1(c)(2), the very decision that initiates the § 1677m(a) process. Thus, in order for § 1677m(a) to be meaningful, it must be read as requiring Commerce to make an independent determination of whether it can review the voluntary respondents without such review being unduly burdensome and inhibiting the timely completion of the investigation.

For these reasons, Commerce's determination will be remanded.

³⁰ The court acknowledges that the Longkou opinion states that "[t]he provisions in sections 1677m(a) and 1677f-1(c)(2) are clear expressions of Commerce's statutory authority to limit the number of respondents it chooses to review." Longkou, ___ CIT at ___, 581 F. Supp. 2d at 1351. This statement is consistent with today's opinion. The court affirms its prior position that Commerce has exclusive authority to limit the number of respondents it will review, id. at 1352, but such determinations must be made consistent with statutory guidelines, and the court holds today that § 1677m(a) requires an independent determination of whether reviewing the voluntary respondents would be unduly burdensome and inhibit the timely completion of the investigation.

IV. Commerce's Rejection of Amanda Foods' Separate Rate Certification

In antidumping proceedings concerning NME countries, such as Vietnam, Commerce presumes that all exporters and producers in the country are subject to government control unless the exporter or producer rebuts this presumption by showing *de jure* and *de facto* independence from government control. See Amanda Foods (Vietnam) Ltd. v. United States, __ CIT __, 647 F. Supp. 2d 1368, 1374 n.9 (2009) (citation omitted).³¹ Exporters or producers demonstrating such independence receive separate-rate status. If an exporter or producer received a separate rate in a prior review and has not undergone relevant changes, it may submit a separate-rate certification ("SRC") to maintain separate-rate status in subsequent reviews. Preliminary Results, 75 Fed. Reg. at 12,210 n.6. All other companies seeking separate-rate status must file a separate-rate application ("SRA"). Id.

Amanda Foods received separate-rate status based on its SRA in the initial investigation,³² and retained its separate rate in

³¹ An exporter or producer that can rebut the presumption of government control will receive a separate rate; all other exporters and producers receive the country-wide rate. Preliminary Results, 75 Fed. Reg. at 12,210.

³² Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 Fed. Reg. 71,005, 71,009 (Dep't Commerce Dec. 8, 2004) (final determination of sales at less than fair value) ("Investigation Results").

all subsequent reviews prior to the fourth by filing an SRC.³³

In this fourth administrative review, Amanda Foods filed its SRC on July 31, 2009, ninety-five days after the deadline, Amanda

Foods' Separate Rate Certification, Admin. R. Pub. Doc. 109, but more than seven months before the Preliminary Results. Shortly

after filing the SRC, Amanda Foods sent a letter to Commerce requesting that the Department accept its late-filed submission.

Letter from Mayer Brown to Secretary of Commerce (Aug. 4, 2009),

Admin R. Pub. Doc. 115. On August 7, 2009, Commerce rejected

Amanda Foods' SRC as untimely under 19 C.F.R. § 351.302(d)(2).³⁴

Letter from Scot Fullerton, Program Manager, to Amanda Foods

(Aug. 7, 2009), Admin. R. Pub. Doc. 117. Amanda Foods

resubmitted the SRC on August 12, 2009 requesting

reconsideration. Letter from Mayer Brown to Secretary of Commerce

(Aug. 12, 2009), Admin. R. Pub. Doc. 118. However, in the

Preliminary Results Commerce maintained that it would not

³³ Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 71 Fed. Reg. 42,628, 42,629 (Dep't Commerce July 27, 2006) (partial rescission of the first administrative review) (assigning respondents prior rate following rescission of review); Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 73 Fed. Reg. 52,273, 52,274 n.3 (Dep't Commerce Sept. 9, 2008) (final results and final partial rescission of antidumping duty administrative review) ("AR2 Final Results"); AR3 Final Results, 74 Fed. Reg. at 47,194 n.9.

³⁴ 19 C.F.R. § 351.302(d)(2) states that "[Commerce] will reject such [untimely filed] information, argument, or other material, or unsolicited questionnaire response with, to the extent practicable, written notice stating the reasons for rejection."

consider Amanda Foods' SRC because it was untimely filed and preliminarily assigned Amanda Foods the Vietnam-wide rate.

Preliminary Results, 75 Fed. Reg. at 12,210. Commerce maintained this position in the final results, assigning Amanda Foods the Vietnam-wide rate of 25.76%. Final Results, 75 Fed. Reg. at 47,776 n.16; I & D Mem. Cmt. 11 at 35-36.

The law applicable to this issue recognizes that Commerce has discretion both to set deadlines and to enforce those deadlines by rejecting untimely filings. See NTN Bearing Corp. v. United States, 74 F.3d 1204, 1206-07 (Fed. Cir. 1995); see also Yantai Timken Co. v. United States, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1371 (2007) ("In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations."). However, Commerce's discretion in this regard is not absolute. NTN Bearings, 74 F.3d at 1207 ("[A] regulation which is not required by statute may, in appropriate circumstances, be waived and must be waived where failure to do so would amount to an abuse of discretion."); see also Fischer S.A. Comercio, Industria and Agricultura v. United States, ___ CIT ___, 700 F. Supp. 2d 1364, 1375-77 (2010).

When considering whether Commerce's rejection of an untimely filing amounts to an abuse of discretion, the court is guided

first by the remedial, and not punitive, purpose of the antidumping statute, Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990), and the statute's goal of determining margins "as accurately as possible," Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The court also weighs "the burden imposed upon the agency by accepting the late submission," Usinor Sacilor v. United States, 18 CIT 1155, 1164, 872 F. Supp. 2d 1000, 1008 (1994), and "the need for finality at the final results stage," Timken U.S. Corp. v. United States, 434 F.3d 1345, 1353 (Fed. Cir. 2006). Thus, while deferring to Commerce's necessary discretion to set and enforce its deadlines, the court will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on the Department and the interest in finality.

The court's analysis of this issue is necessarily case specific. On the facts of this case, Commerce abused its discretion by refusing to accept Amanda Foods' late-filed SRC. The Vietnam-wide rate of 25.76% assigned to Amanda Foods, Final Results, 75 Fed. Reg. at 47,776 n.16, stands in stark contrast to the 4.27% rate assigned to the separate-rate respondents, id. at 47,774-75, which was later revised down to 3.92% in the Amended Final Results, 75 Fed. Reg. at 61,123-25. In both the second and third reviews, Commerce noted that "because [Amanda Foods] is wholly foreign-owned, and we have no evidence indicating that its

export activities are under the control of the Vietnamese government, a separate rates analysis is not necessary to determine whether this company is independent from government control."³⁵ In the SRC that was rejected in the fourth administrative review, Amanda Foods again indicated that it was wholly owned by foreign entities located in a market economy country, Singapore. Amanda Foods' Separate Rate Certification 2. Amanda Foods received separate-rate status in the initial investigation and has maintained that status in each subsequent review prior to the fourth due to it being wholly foreign-owned; thus, it appears likely that, but for the untimeliness of its submission, Amanda Foods would have received a separate rate in the fourth administrative review, as it remains wholly foreign-owned. Therefore, Commerce's rejection of Amanda Foods' submission as untimely appears to have worked a substantial hardship upon that company and resulted in an inaccurate dumping margin.³⁶ This conclusion, however, is only the first step in

³⁵ Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 73 Fed. Reg. 12,127, 12,132 (Dep't Commerce Mar. 6, 2008) (preliminary results, preliminary partial rescission and final partial rescission of the second administrative review) ("AR2 Preliminary Results"); see also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 74 Fed. Reg. 10,009, 10,013 (Dep't Commerce Mar. 9, 2009) (preliminary results, preliminary partial rescission and request for revocation, in part, of the third administrative review) ("AR3 Preliminary Results").

³⁶ The court notes that the Vietnam-wide rate of 25.76% is over six times greater than the rate of 3.92% assigned to the

the analysis.

As noted above, the court must weigh the interests in accuracy and fairness against the burden placed on the Department. Amanda Foods argues at length that consideration of SRCs is not a burdensome process.

[Commerce's] stated justification of needing early submission of SRCs in order to have sufficient time to pursue questions that may arise and provide opportunities to comment on the submitted information is undermined by the fact that [Commerce's] consideration of SRCs has always been minimal and not time-consuming. By design, the SRC was structured to limit the amount of information that respondents had to submit and that [Commerce] had to review.

Consol. Pl.'s Mem. Supp. Mot. J. Agency R. 17, ECF No. 63 ("Consol. Pl.'s Br."). Commerce responds that Amanda Foods' argument is entirely speculative regarding how Commerce would react to the SRC. "Commerce cannot speculate about how it would have reacted to the information in the certification because Commerce rejected it as untimely. Thus, Amanda Foods' arguments that Commerce would not have spent much time reviewing the certification fail because they depend upon the substance of the untimely certification Commerce rejected." Def.'s Resp. Br. 41.

The court must reject both lines of argument as overbroad. The court cannot, as Amanda Foods' suggests, assume that the consideration of an SRC is perfunctory. The court acknowledges

separate-rate respondents in the Amended Final Results, 75 Fed. Reg. at 61,123-25.

that consideration of an SRC may require further inquiry and investigation of the respondent by Commerce. However, contrary to Commerce's reasoning, a wholly hypothetical burden does not carry compelling weight. While it is not the court's place to determine whether further inquiry into Amanda Foods' SRC is necessary, every indication suggests that the burden of reviewing the SRC would not be great. Commerce has not conducted a separate-rate analysis in response to any of Amanda Foods' prior SRCs. See AR2 Preliminary Results, 73 Fed. Reg. at 12,132; AR3 Preliminary Results, 74 Fed. Reg. at 10,013. Nor did Commerce conduct any further questioning of the other separate-rate respondents in this review, whether they submitted SRCs or SRAs. Preliminary Results, 75 Fed. Reg. at 12,210-11. Furthermore, the court is not convinced that if further investigation of Amanda Foods' SRC were necessary, the burden on Commerce would be sufficient to outweigh the interests in fairness and accuracy.³⁷ While the court acknowledges, both generally and in this case, that Commerce's resources are limited, the burden on Commerce is not sufficient in this case. This is because the court finds two further considerations weigh in favor of accepting Amanda Foods' late-filed SRC.

First, though the submission was ninety-five days late, it

³⁷ The court notes that of the twenty-nine SRCs or SRAs submitted in this review, only Amanda Foods' was submitted late.

arrived early in the review process: more than seven months before Commerce released the preliminary results³⁸ and one year before Commerce released the final results. Thus, there is no concern with finality in this case. Timken, 434 F.3d at 1353-54. Second, Amanda Foods was diligent in seeking to correct the omission of its SRC, promptly filing its late submission as soon as it discovered the omission. See Letter from Mayer Brown to Secretary of Commerce (Aug. 4, 2009), Admin. R. Pub. Doc. 115, at 3. Though late, Amanda Foods filed its SRC early in the review and promptly upon discovering its error, and the court credits these efforts to cooperate in the review and to maintain the accuracy of the dumping margins.

The court therefore finds that in this case: (1) the margin assigned to Amanda Foods was likely inaccurate and disproportionate; (2) Amanda Foods was diligent in correcting its submission; (3) Amanda Foods' submission was early enough in the proceeding to minimize concerns for finality; and (4) the burden on Commerce in considering the late-filed SRC would likely be minimal given that only one SRC was filed late, the late-filed SRC appears to maintain the status quo, and no follow-up was

³⁸ When Amanda submitted its SRC, the Preliminary Results were due in three months' time, on October 31, 2009; however, on October 27, 2009, Commerce extended the filing deadline until March 1, 2010. Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 74 Fed. Reg. 55,192, 55,192 (Dep't Commerce Oct. 27, 2009) (extension of preliminary results of antidumping administrative reviews).

conducted with regard to other separate-rate requests. In light of these findings, the court holds that in this case, the interests in fairness and accuracy outweigh the burden upon Commerce; therefore, Commerce's rejection of Amanda Foods' late-filed submission was an abuse of discretion. In light of the foregoing, this issue is remanded.

CONCLUSION

For all of the foregoing reasons, the Department's Final Results, 75 Fed. Reg. at 47,771, are REMANDED to the agency for reconsideration and redetermination consistent with this opinion.

Upon remand, Commerce will provide further explanation or reconsideration of its zeroing policy in administrative reviews consistent with the Federal Circuit's opinions in Dongbu and JTEKT; will review the voluntary respondents or provide an explanation consistent with the statutes, regulations, and Commerce's policies; and will accept Amanda Foods' separate-rate certification, conduct the necessary review of the certification, and reconsider Amanda Foods' duty rate as appropriate.

All other determinations challenged in this case are AFFIRMED.

Commerce shall have until March 16, 2012 to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until March 30, 2012 to file comments.

Plaintiffs, Defendant, and Defendant-Intervenors shall have until April 13, 2012 to file any reply.

It is **SO ORDERED**.

 /s/ Donald C. Pogue
Donald C. Pogue, Chief Judge

Dated: January 18, 2012
New York, New York