No. 16-___

IN THE

Supreme Court of the United States

HYOSUNG D&P CO., LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA, DIAMOND SAWBLADES MANUFS. COALITION, SH TRADING, INC., AND SHINAHAN DIAMOND INDUST. CO., LTD.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Kristin H. Mowry
Jeffrey S. Grimson
Jill A. Cramer
MOWRY & GRIMSON, PLLC
5335 Wisconsin Ave., NW
Suite 810
Washington, DC 20015

Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
kr@goldsteinrussell.com

QUESTIONS PRESENTED

1. Whether deference under *Auer v. Robbins*, 519 U.S. 452 (1997), should be afforded to the interpretation of an agency regulation offered by the agency's lawyers in a case in which the agency is itself a party.

2. Whether *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be overruled.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent company and no publicly held corporation holds more than ten percent of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hyosung D&P Co., Ltd. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-17a) is published at 809 F.3d 626. The opinion of the United States Court of International Trade (Pet. App. 18a-91a) is unpublished, but available at 2013 WL 5878684.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2015. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on March 1, 2016. Pet. App. 112a. On May 18, 2016, the Chief Justice extended the time to file this petition through June 29, 2016. No. 15A1182. On June 15, 2016, the Chief Justice further extended the time to file this petition through July 29, 2016. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT REGULATORY PROVISIONS

In relevant part, 19 C.F.R. § 351.102(b)(30) provides:

> An "investigation" is that segment of a proceeding that begins on the date of the publication of notice of initiation of investigation and ends on the date of publication of the earliest of: (i) Notice of

> termination of investigation; (ii) Notice of rescission of investigation; (iii) Notice of a negative determination that has the effect of terminating the proceeding; or (iv) an [antidumping] Order.

Subsection (47) of 19 C.F.R. § 351.102(b) provides:

> Segment of proceeding—
>
> (i) In general. An antidumping or countervailing duty proceeding consists of one or more segments. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.
>
> (ii) Examples. An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

STATEMENT OF THE CASE

This case presents the Court the opportunity, repeatedly sought by several of its members, to rule on the continuing validity and proper scope of deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In 2006, the Department of Commerce made an important change to the method by which it calculates antidumping margins for foreign companies accused of selling products in U.S. markets at less-than-fair value. In the relevant notice-and-comment order, Commerce provided that the change would apply to "all current and future antidumping investigations." Pet. App. 6a. The

investigation of petitioner's sales was terminated in petitioner's favor before, but was reinstated on appeal after, the rule change took effect. Upon reinstatement, Commerce failed to apply the new rule but offered no explanation why. On appeal from a challenge to that decision, the Federal Circuit held that the Order was ambiguous as to whether it applied to cases like petitioner's. But relying on *Auer*, it accepted the interpretation offered by the agency's litigation counsel because "Commerce spoke ambiguously on the timing issue in adopting its new policy and Commerce reasonably resolved the ambiguity to exclude the present matter." Pet. App. 3a.

I. Legal Background

A. Statutory Regime

The Tariff Act of 1930, as amended, authorizes imposition of antidumping duties when foreign merchandise is sold in the United States at less than its fair value, resulting in (or threatening) material injury to domestic industry. *See* 19 U.S.C. § 1673(1)-(2). Antidumping duties are imposed through a process involving both the Department of Commerce ("Commerce") and the International Trade Commission ("ITC"). That process begins with an investigation that proceeds in two parts. First, Commerce determines whether goods are being sold in the United States at less than fair value (*i.e.*, are being dumped). If Commerce finds that the goods are being dumped, the ITC determines whether the domestic industry is being injured, or is threatened with injury, by the dumping. If both dumping and material injury are found, the investigation is

concluded by Commerce imposing an antidumping duty order. *See* Pet. App. 3a-4a (describing statutory regime set forth in 19 U.S.C. §§ 1673-1677n).

As part of its antidumping investigation, Commerce calculates a "dumping margin" for imported merchandise. "The term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A).[1] Commerce decides whether a good was being dumped (and if so, to what extent) by examining a pool of goods and determining whether, *on average*, the goods were being sold below fair market value. Pet. App. 4a. Prior to 2007, however, this "average" was not a real average – a sale $100 below fair market value was counted as $100 below fair market value, while a sale at $100 *above* fair market value was treated as a sale *at* fair market value (that is, at $0 above fair value). *Id*. This so-called "zeroing" methodology inevitably skewed Commerce's results toward finding dumping, and exaggerated the extent of the dumping (and, hence, the amount of the antidumping duty that would be eventually imposed on imports if the ITC found material domestic injury).

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[1] "Normal value" is generally the price charged for the corresponding product in the producer's home market. *See* 19 U.S.C. § 1677b(a)(1).

B. Amendment Of Antidumping Rules In Response To Adverse Ruling By World Trade Organization

In 2003, the European Communities filed a complaint against the United States with the World Trade Organization ("WTO"), alleging that Commerce's zeroing policy was inconsistent with Article 2.4.2 of the WTO Antidumping Agreement.[2] In 2005, a WTO dispute settlement body issued its report, agreeing with the complainants in relevant part.[3] An appellate body upheld that finding in April, 2006.[4]

On March 6, 2006, Commerce published a notice in the Federal Register announcing that it intended to abandon zeroing in antidumping duty investigations in order to bring the agency's practice into compliance with the United States' WTO obligations.[5] In the *Proposed Modification* Commerce stated that the change in methodology would only be applied prospectively, *i.e.*, "in all investigations initiated on the basis of [antidumping] petitions

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[2] *See* Panel Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), ¶1.1, WT/DS294/R (Oct. 31, 2005).

[3] *See id*. at ¶8.1.

[4] *See* Appellate Body Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), ¶263, WT/DS294/AB/R (Apr. 18, 2006).

[5] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't Commerce Mar. 6, 2006) ("*Proposed Modification*").

received on or after the first day of the month following the date of the Department's final notice of the new weighted average dumping margin calculation methodology." *Id.* Consistent with its obligations under section 123 of the Uruguay Round Agreements Act, Commerce then proceeded with formal notice and comment proceedings allowing interested parties, other executive agencies, and members of Congress the opportunity to provide the agency their views on the policy change. *See* 19 U.S.C. § 3533(g)(1).

On December 27, 2006, Commerce published its *Final Modification* in the Federal Register, announcing that consistent with the *Proposed Modification*, it would no longer employ zeroing in antidumping duty investigations.[6] However, in a departure from the *Proposed Modification*, Commerce made the rule change applicable to "all current and future antidumping investigations as of the effective date." *Id.* at 77,725.[7] Commerce explained that it made this change partly in response to interested

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[6] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) ("*Final Modification*").

[7] The effective date was originally set in the *Final Modification* as January 16, 2007. *See Final Modification*, 71 Fed. Reg. at 77,725. Commerce ultimately extended the effective date to February 22, 2007. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (Dep't Commerce Jan. 26, 2007).

parties' arguments that "when a U.S. court announces a new interpretation of a statute it would apply to all pending cases." *Id.* at 77,724. Commerce further explained that retrospective application would not: (1) "create any undue administrative burden on the Department"; (2) "require the Department to gather any new information"; or (3) "prejudice any of the parties to those [affected] proceedings." *Id.* at 77,725.

II. Antidumping Investigation Of Diamond Sawblades From Korea

In May 2005, Diamond Sawblades Manufacturers Coalition ("DSMC") filed a petition with Commerce and the ITC alleging that certain diamond sawblades from Korea and the People's Republic of China were being sold in the United States at less than fair value, causing material injury to the domestic industry. The Government opened an investigation.

A. First Phase Of The Investigation

During the first phase of the investigation, Commerce examined petitioner Hyosung, an exporter of subject merchandise from Korea.[8] On May 22, 2006 – after Commerce had published its notice of intent to abandon zeroing in the Federal Register, but before it issued its final order – Commerce issued

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[8] *See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29,310, 29,312 (Dep't Commerce May 22, 2006) ("*Final Determination*").

its final affirmative determination that petitioner was selling diamond sawblades in the United States at less than fair value.[9] In reaching that conclusion, Commerce employed its discredited zeroing methodology in spite of the WTO's determination that the practice was contrary to the U.S. government's international obligations and the agency's own *Proposed Modification* acknowledging as much.[10] In rejecting petitioner's objections to its continued use of zeroing, Commerce stated that the proceeding to eliminate zeroing "ha[d] not run its course," and, therefore, "it [was] premature to determine precisely how the United States will implement the panel recommendation." *Id.*

Commerce's refusal to apply the new rule was consequential – applying zeroing, Commerce set petitioner's antidumping margin at 6.43 percent *ad valorem*, resulting in millions of dollars in liability for imports that had already occurred during the pendency of the investigation.[11] Without zeroing, the margin would have been zero percent, as confirmed by a separate proceeding in which Commerce recalculated Hyosung's antidumping margin after a second WTO decision. Without applying zeroing, Commerce found no dumping and terminated the

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[9] *See Final Determination*, 71 Fed. Reg. 29,310, and accompanying Issues & Decision Mem. ("Sawblades I&D Mem.").

[10] *See* Sawblades I&D Mem. at Cmt. 11.

[11] *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009).

antidumping order against petitioner prospectively.[12] But that order still left petitioner's U.S. buyers owing millions of dollars in antidumping duties collected under the disavowed zeroing method underlying this action.

B. Second Phase Of The Investigation

Commerce's final determination of dumping meant that the antidumping investigation would now continue at the ITC. On July 11, 2006, the ITC found that the domestic diamond sawblades industry was neither materially injured nor threatened with material injury by reason of diamond sawblades from Korea and China.[13] Ordinarily, that would have ended the investigation, but DMSC challenged the ITC's negative findings in the United States Court of International Trade ("Trade Court").

While that appeal was pending, Commerce issued its final order abandoning zeroing and promising to apply the new regime to all current and future investigations.

Two years later, the Trade Court overturned the ITC's negative findings in this matter and remanded to the ITC for further consideration and

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[12] *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof From the Republic of Korea*, 76 Fed. Reg. 66,892 (Dep't Commerce Oct. 28, 2011).

[13] *See Diamond Sawblades and Parts Thereof from China and Korea*, 71 Fed. Reg. 39,128 (Int'l Trade Comm'n July 11, 2006).

explanation.[14] On remand, the ITC reversed its position and found a threat of material injury.[15] The Trade Court affirmed.[16]

C. Completion Of Investigation

Both parts of the antidumping investigation having finally been completed, Commerce then issued antidumping orders against diamond sawblades from China and Korea.[17] By this point, the *Final Modification* had been in effect for more than two years. Nonetheless, without explanation, Commerce issued an antidumping order enforcing an

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[14] *See Diamond Sawblades Mfrs. Coal. v. United States*, 32 CIT 134, 151 (2008).

[15] *See Diamond Sawblades and Parts Thereof from China and Korea*, Inv. Nos. 731-TA-1092 and 1093 (Final) (Remand), USITC Pub. 4007 (May 2008).

[16] *See Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 48, 67 (2009), *aff'd*, 612 F.3d 1348, 1362 (Fed. Cir. 2010).

[17] *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009). Initially, Commerce took no action while the Trade Court's affirmance of the ITC material injury finding was on appeal to the Federal Circuit. However, on September 20, 2009, the Trade Court issued a writ of mandamus, requiring Commerce to issue a final antidumping duty order, despite the pendency of the appeal. *See Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 1422, 1452-53 (2009), *aff'd*, 626 F.3d 1374, 1383 (Fed. Cir. 2010).

antidumping margin calculated with its repudiated zeroing methodology.[18]

II. Judicial Review

A. Court of International Trade

Petitioner timely filed suit in the Trade Court contesting Commerce's failure to apply the *Final Modification* to this proceeding. It was in this litigation that lawyers from the Department of Justice, representing Commerce, offered an explanation as to why Commerce disregarded the *Final Modification*'s abandonment of zeroing for pending cases. Counsel argued that the Order's reference to "current" investigations meant only investigations in which Commerce had not yet calculated a final antidumping margin; it did not include investigations in which Commerce had already made that finding, but no final antidumping order had yet issued because the proceedings were continuing at the ITC or in the courts.

On October 11, 2013, the Trade Court accepted Commerce's litigating position and denied relief. Pet. App. 83a-89a.

B. Federal Circuit

1. Hyosung timely appealed to the Federal Circuit, which affirmed. Pet. App. 3a.

The court of appeals explained that under *Auer v. Robbins*, 519 U.S. 452 (1997), it was compelled to

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[18] *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009).

accept any reasonable interpretation of an ambiguous regulation proffered by agency counsel in the litigation. Pet. App. 10a. The court then concluded that the *Final Modification* "spoke ambiguously on the timing issue." *Id*. 3a. On the one hand, the court agreed with petitioner that "one might well treat an 'investigation,' under the statute and regulations, as a single matter that is 'pending' before both Commerce and the Commission from the time that it is initiated until it results in a determination or rescission of the investigation or issuance of an antidumping-duty order." *Id*. 11a-12a. But the court also believed that the *Final Modification* "can reasonably be given Commerce's interpretation," *id*. 11a, although it acknowledged that Commerce's treatment of another similar case "gives us pause in assessing the coherence of Commerce's interpretation of the *Final Modification*." *Id*. 14a. In the end, the Court deferred to Commerce's litigation position under *Auer*, finding that the interpretation offered by the agency's lawyers "reasonably resolved the ambiguity to exclude the present matter." *Id*. 3a.

2. The Federal Circuit denied petitioner's timely petition for panel rehearing and rehearing en banc on March 1, 2016. *Id*. 111a-12a.

REASONS FOR GRANTING THE WRIT

Members of this Court have repeatedly called for reconsideration of the scope and validity of deference under *Auer v. Robbins*, 519 U.S. 452 (1997), in an appropriate case. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment); *id*. at 1225 (Thomas, J., concurring in the judgment); *id*. at 1210-11 (Alito, J., concurring in the judgment); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring); *see also United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

This is that case. Unlike several petitions that have come before it, this case squarely and cleanly presents the question members of this Court have already declared in need of review. Moreover, this petition presents the Court the option to either decide the broader question of whether *Auer* should be overruled or the narrower question of whether it should be scaled back in one of its most troublesome applications – cases in which the interpretation of an ambiguous regulation is offered by a government lawyer in a case in which the agency is a party.

I. The Scope And Validity Of *Auer* Deference Warrants Review.

In recent years, several members of this Court – including *Auer*'s author – have expressed doubt about the doctrine's validity, for reasons that apply with particular force in cases in which the government's lawyers insist on deference to an interpretation of a regulation put forth in litigation to which the agency is a party.

A. *Auer* Deference, Particularly To Agency Litigating Positions, Is Incompatible With The Administrative Procedures Act And *Chevron*.

1. Although frequently referred to as "*Auer*" deference, the doctrine originates in this Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410. As Justice Scalia recently explained, *Seminole Rock* predated Congress's enactment of the Administrative Procedures Act and the statute's distinction between legislative rules (which can have the force of law, but generally must be issued through a notice-and-comment procedures) and interpretive rules (which need not undergo notice and comment, but do not carry the force of law). *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment). In the years since, the Court has not undertaken to examine whether *Auer*/*Seminole Rock* deference is consistent with the APA, *see id.,* and there is substantial reason to conclude that it is not.[19]

Although the APA unambiguously requires most legislative rules to pass through the crucible of notice-and-comment rulemaking, *Auer* effectively provides agencies a path to avoid that often unwelcomed requirement – the agency can simply enact broad, ambiguous regulations, elaborate on them in various informal ways (including through its

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[19] *See generally*, Brief of the American Action Forum, Cato Institute, and Judicial Education Project as *Amici Curiae* In Support of Petitioner, *United Student Aid Funds, Inc. v. Bible*, No. 15-861.

litigating positions), and then claim that those informal interpretations are entitled to controlling weight under *Auer*. *See id*. at 1212 (Scalia, J., concurring in the judgment); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449, 1463-64 (2011). This Court has thus acknowledged that *Auer* deference may "frustrat[e] the notice and predictability purposes of rulemaking" under the APA because it "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012); *see also, e.g.*, *Bible*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari); *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).[20] At the same time, *Auer* runs contrary to the APA's organizing principle that agency rules must either be subject to rigorous procedures on the front-end (*i.e.*, notice-and-comment) or demanding judicial review on the back-end (*i.e.*, review without *Chevron* deference).

The conflict between the design of the APA and *Auer* is particularly acute when, as in this case, *Auer* deference is afforded the litigating position of an agency attorney. The APA's notice-and-comment procedure is designed in part to ensure that agency rules that bind the public are the product of reasoned

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[20] *See also* Christopher J. Walker, Chevron *Inside The Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 715-16 (2014) (reporting that approximately 40 percent of agency rule drafters surveyed indicated that their awareness of *Auer* played a role in the drafting of regulations).

decisionmaking by the agency itself. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). But when the operable rule is, instead, presented by litigation counsel in the course of defending the agency in court, there are compelling reasons to doubt that the interpretation in fact represents the agency's considered, expert judgment.

To start, a court cannot be assured that the interpretation is the creation of the agency rather than its lawyers. That difficulty was diminished in *Auer* itself, because the Court deferred to an amicus brief that, by regulation and longstanding practice, required vetting through the agency and the Solicitor General's office. *Auer*, 519 U.S. at 461; 28 C.F.R. § 0.20(a). But that kind of focused attention by the agency is not guaranteed when the agency is a party in the lower courts.

In addition, there is strong reason to suspect that in many cases, agency lawyers' litigating positions will be driven more by the imperatives of winning a particular case than by the agency's considered views on which interpretation best accords with the text and purposes of the regulation and the statute. After all, litigation is handled by attorneys because they are experts at winning cases, not developing policy – indeed, in this case and many others like it, the principal responsibility for litigation is handled by the Department of Justice, not the agency. And those DOJ attorneys are likely to view their primary responsibility as winning the case for their agency clients, a mindset that is understandable, but inconsistent with any assumption that the agency's

litigating position represents an objective exercise of policymaking expertise.

This case aptly illustrates the problem. Here, during the administrative proceedings, the agency itself never explained why it was declining to apply its new rule to petitioner's case. It could well have simply made a mistake. After all, as the Federal Circuit acknowledged, the *Final Modification* can be read to apply to this case, Pet. App. 11a-12a, and the agency had, in fact, applied the new rule to another case that, like this one, was not in the process of having an antidumping margin calculated when the new rule became effective, *id*. 14a-15a. The first explanation for the agency's failure to apply the rule to petitioner was offered by attorneys from the Department of Justice in their brief opposing petitioner's appeal. Even if agency officials were involved, the deliberative process certainly did not approach the level of care, consultation, and transparency required for APA legislative rulemaking.[21]

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[21] In advancing that argument, the lawyers pointed to the Trade Court's decision in *Advanced Technology & Materials Co., Ltd. v. United States*, slip op. 11-105, No. 10-12, 2011 WL 3624674 (Ct. Int'l Trade Aug. 18, 2011). In that case, a Chinese company requested Commerce reopen an investigation in order to apply the new rule against zeroing. *Id*. at *1. A program manager in Office 9 of the Import Administration had sent the company a letter denying its request in December, 2009, on the ground that Commerce had "completed its final determination in the investigation . . . prior to the effective date of the change in methodology." *Id*. at *7; *Advanced Tech.* J.A. Tab 2, at 2. Even assuming this one-paragraph explanation in a letter from a low-level agency official qualifies as an interpretation by the

The point is not that extensive agency deliberation cannot, or does not, take place in cases like this – the point is that Congress was not willing to leave the process up to the agencies, but imposed a specific set of procedures designed to ensure open and careful deliberation. Giving agency litigating positions that have not gone through that process, or anything like it, the same controlling weight as legislative rules contravenes the APA.

2. *Auer* also cannot be reconciled with this Court's standards for deferring to agencies' interpretation of ambiguous statutes.

"In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Northwest Enviro. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part). Yet the Court has not applied the same limitations to deference in both contexts. As this case illustrates, *Auer* deference is regularly applied to statements in legal briefs. Yet this Court has refused to give *Chevron* deference to interpretations in government briefs "on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). It makes no sense to dispense with this rule when an agency lawyer offers an interpretation of an agency regulation rather than a statute – Congress did not

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agency itself, it was issued without notice-and-comment several months after the agency had already applied zeroing to petitioner's case without explanation. *See id*.

delegate responsibility for interpreting regulations to appellate counsel either.

At the same time, the Court has denied *Chevron* deference to agency interpretations embodied in documents that reflect a far great level of deliberation and impartiality than the typical litigation brief. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (no *Chevron* deference to opinion letters, policy statements, agency manuals or enforcement guidelines).

3. To be sure, the Court has said that *Auer* deference should not apply to "convenient litigating positions" and "post hoc rationalizations." *See, e.g.*, *Christopher*, 132 S. Ct. at 2166-67. But as this case illustrates, those limitations have not prevented courts from routinely giving controlling weight to agency litigating positions. That is no doubt due in part to the difficulty in deciding whether an agency interpretation offered in litigation is too "convenient" or constitutes a "post hoc rationalization." After all, the question will only arise if the court is otherwise inclined to find the interpretation reasonable. Without access to the government's internal deliberations, it is hard to show that a reasonable interpretation of a regulation nonetheless is disingenuous. But in any event, the APA precludes *ever* giving controlling weight to an agency's interpretation of a regulation offered in a brief, rather than through APA-mandated procedures.

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In *Perez*, this Court considered one potential solution that would have brought coherence to this area of the law – requiring purportedly interpretive

rules subject to *Auer* deference be issued through notice and comment procedures. But this Court rightly rejected that possibility as inconsistent with the text of the APA. *See Perez*, 135 S. Ct. at 1206-08 & n.4. This petition therefore presents the Court an opportunity to consider the only other plausible means of reconciliation – scaling back or eliminating *Auer* deference to agencies' interpretation of their regulations.

B. Giving *Auer* Deference To Agency Litigating Positions, And Agency Interpretations Of Regulations In General, Raises Significant Constitutional Concerns.

Affording controlling weight to an agency's interpretation of its own regulation also raises serious constitutional concerns.

1. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am., Inc. v. Mich. Bell Tele. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). Doing so "raises two related [separation of powers] concerns." *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).

First, *Auer* effects an impermissible "transfer of judicial power to the Executive Branch." *Id*. The Constitution confers the entirety of the federal government's "judicial power" on this Court and subordinate federal courts. *See* U.S. Const. Art. III, § 1. At the Founding, this "judicial power was understood to include the power to resolve the[] ambiguities" inherent in legal texts. *Perez*, 135 S. Ct.

at 1217 (Thomas, J., concurring in the judgment). To the extent executive agencies may permissibly issue regulations and orders with the force of law, those legal texts are subject to the same constitutional division of authority. And just as the meaning of a statute cannot be determined simply by deferring to legislative history or an amicus brief by members of Congress, the meaning of an ambiguous regulation is derived by applying ordinary tools of legal interpretation, not asking the agency what it meant. *See id*. at 1223-24 ("It is the text of the regulations that have the force and effect of law, not the agency's intent."). Applying those interpretive tools to determine the meaning of a legal text is at the core of the judicial power. Especially given the lengths to which the Constitution goes to ensure that judges may exercise this judicial power independently, courts are not free to transfer any portion of it to an executive agency. *Id*.

Second, the exercise of independent interpretive judgment operates as a check on the excesses of the political branches. *Id*. at 1220-21. By forcing courts to cede a major portion of that independence to the Executive, *Auer* "permits precisely the accumulation of governmental powers that the Framers warned against." *Id*. at 1221 (citing The Federalist No. 47, at 302 (J. Madison)).

These separation of powers problems are particularly severe when a court defers to the interpretation of a lawyer representing an agency as a litigant before the court. It is bad enough when an agency plays the role of both legislator and judge, issuing ambiguous legislative rules then purporting to determine their meaning. It is even worse when

agency officials undertake to exercise the power of all three branches of Government in a single case – applying the agency's legislative rules to a particular matter through an administrative process then demanding the right to authoritatively construe those regulations to defeat a regulated party's plea for judicial review. At the same time, when courts defer to an agency's litigating position in a case challenging the agency's exercise of executive power, "they abandon the judicial check" in the context in which the judiciary plays its most vital role as a bulwark against government overreach. *Id*.

2. Applying *Auer* when the government is a party to the case also raises serious Due Process concerns. In giving the judiciary authority to resolve cases between individuals and the government, the Constitution envisions a level playing field.[22] Yet *Auer* creates a systemic bias in favor of a party to the case, compelling courts to accept one side's legal arguments so long as they are reasonable, while permitting courts to accept an individual's contrary position only if it is absolutely compelling. No one would suggest such a rule would be tolerable if applied to litigation between private parties (*e.g.*, the court must accept a plaintiff's interpretation of a statute or regulation so long as it is reasonable, or must reject a corporation's interpretation unless it is compelling). It is no more tolerable when the

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[22] *See* Brief of Prof. Philip Hamburger and Washington Legal Foundation as *Amici Curiae* In Support of Petitioner, *United Student Aid Funds, Inc. v. Bible*, No. 15-861.

government is brought into court, accused of violating its own regulations.[23]

C. The Questions Presented Are Recurring And Important.

The continuing validity and scope of *Auer* deference is an important question that should not wait any longer for this Court's consideration. Administrative regulations and orders are an increasingly important source of legal obligation and jeopardy. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). And *Auer* has played, and will continue to play, a critical role in the administration of this vast and growing administrative state. Indeed, by petitioner's count, *Auer* has been cited by federal courts more than a thousand times over the past decade.

There is every reason to expect this trend to continue. Recent legislation has expanded existing regulatory authority as well as created new agencies with jurisdiction over immense swaths of the nation's economic activities. *See, e.g.*, *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1884 (2013) ("The Dodd–Frank Wall Street Reform and Consumer Protection Act, for example, authorizes rulemaking by at least

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[23] *Auer* also can give rise to serious federalism concerns when vague agency rules are given unexpected interpretations that violate the expectations of state and local governments subject to federal requirements as a condition of receiving federal funds, or when the interpretation alters the scope of federal preemption of state and local law. *See* Brief of State and Local Government Associations as *Amici Curiae* in Support of Petitioner, *United Student Aid Funds, Inc. v. Bible*, No. 15-861.

eight different agencies."). Moreover, creating new regulations, or amending old ones, has always been burdensome for agencies. In times of budget sequesters and shrinking agency resources, the temptation to avoid the APA and rely on *Auer* can only grow. At the same time, continuing gridlock in Congress may foster a sense in the Executive Branch that pressing problems require bold regulatory solutions, including through adopting aggressive interpretations of existing regulations.

II. This Case Presents An Excellent Vehicle For Reconsidering *Auer*.

1. Petitioner is aware that the Court has denied certiorari in other cases asking the Court to overrule or modify *Auer*. But it appears that the Court did so because each of the prior cases suffered from serious vehicle problems.[24] For example, in *United Student Aid Funds, Inc. v. Bible*, No. 15-861, the majority of judges below did not consider the regulation ambiguous, the case was interlocutory, the underlying program had been replaced, and there was other ongoing litigation challenging the validity of the regulations at issue. *See Bible* BIO 1-2. Likewise, in *Swecker v. Midland Power Coop.*, No. 15-748, there was no on-point regulation to interpret and there were substantial grounds to think that

[24] It is also possible that, despite the statements of several Justices to the contrary, the Court is not yet prepared to consider overruling *Auer* in its entirety. If that is so, the Court should nonetheless consider the narrower first Question Presented by this petition.

Auer question would not affect the outcome. *See Swecker* BIO 1-2.

This case presents none of those problems. The final judgment in this case turned entirely on the proper interpretation of a term in the agency order – "current and future antidumping investigations." Pet. App. 6a (quoting 71 Fed. Reg. at 77,725). The court of appeals unanimously declared that the relevant portion of the order was ambiguous. Pet. App. 3a. And it expressly founded its acceptance of the agency's litigating position on *Auer* deference, explaining that "it suffices for us to uphold Commerce's answer if we conclude that the *Final Modification* is ambiguous on the point and Commerce's interpretation is a reasonable resolution of the ambiguity." *Id*. 10a (citing *Auer*).[25]

Thus, although the court stated that some "aspects of the *Final Modification* strongly support Commerce's determination," Pet. App. 10a, the court also acknowledged that there were other reasons to doubt the agency was correct. *See id*. 11a-12a

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[25] Accordingly, the court of appeals passed upon the applicability of *Auer* deference to this case, which is sufficient to preserve the question whether *Auer* should be limited or overruled. *See Citizens United v. FEC*, 558 U.S. 310, 330 (2010). Although petitioner was obviously precluded from asking the Federal Circuit to overrule *Auer* or disregard cases, like *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1993), applying *Auer* to agency litigating positions, petitioner did object that the interpretation advanced in litigation was announced for the first time by the agency's lawyers rather than the agency itself in the course of the administrative proceedings. *See* Petr. CA Br. 41; *see also* Pet. for Reh. 10-11.

(agreeing "one might well treat an 'investigation,' under the statute and regulations, as a single matter that is 'pending' before both Commerce and the Commission. . . ."); *id*. 14a (stating that Commerce's application of the rule change to another case similar to petitioner's "gives us pause in assessing the coherence of Commerce's interpretation of the *Final Modification*"). In the end, the court accepted Commerce's litigating position because the court believed the language of the order "can reasonably be given Commerce's interpretation" and the broader statutory context "admits of that view." *Id*. 11a.

2. In truth, petitioner presented substantial reasons to conclude that even if Commerce offered a permissible interpretation of the *Final Modification*, it was not the best one, making the application of *Auer* outcome determinative.

a. The "Timetable" section of the order stated that the new rules would apply to any "current or future investigation as of the effective date." 71 Fed. Reg. at 77,725. There is no dispute that the investigation in this case was begun before the effective date of the order; the question is whether it had ended by time the order took effect. The government argued that it had because Commerce had completed its less-than-fair-value determination prior to the effective date, triggering the ITC's obligation to decide whether the dumping injured the domestic injury and leaving Commerce only "ministerial" duties to perform if the ITC made an affirmative injury finding. Pet. App. 10a. But that argument fails because the statute and regulations provide for a single investigation that ended in this case upon the issuance of the final antidumping

order, not Commerce's intermediate less-than-fair-value determination.

The Department of Commerce regulations define "investigation" as:

> that segment of a proceeding that begins on the date of the publication of notice of initiation of investigation and ends on the date of publication of the earliest of: (i) Notice of termination of investigation; (ii) Notice of rescission of investigation; (iii) Notice of a negative determination that has the effect of terminating the proceeding; or (iv) *an [antidumping] Order*.

19 C.F.R. § 351.102(b)(30) (emphasis added). The regulations thus provide that the agency will

> issue an [antidumping] order when *both* [Commerce] and the Commission . . . have made final affirmative determinations. The issuance of an order ends the *investigative phase* [singular] *of a proceeding*.

Id. § 351.211(a) (emphasis added). Conversely, "[a]n investigation [singular] terminates upon publication in the Federal Register of the Secretary [of Commerce]'s or the Commission's negative final determination. . . ." *Id*. § 351.210(k).[26]

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[26] Even while a case is on appeal, the agency may ask for a remand in order to correct clerical errors or apply a new policy. *See, e.g.*, *Am. Signature, Inc. v. United States*, 598 F.3d 816, 828 (Fed. Cir. 2010); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029-30 (Fed. Cir. 2001). That, in fact, occurred in this case, when Commerce requested, and received, permission from the

The statute likewise establishes the investigation as a single proceeding. The statute provides that "[i]f the determinations of [Commerce] and the [International Trade] Commission . . . are affirmative, then [Commerce] shall issue an antidumping order," but "[i]f either such determination is negative, *the investigation* [singular] shall be terminated upon the publication of notice of that negative determination." 19 U.S.C. § 1673d(c)(2) (emphasis added).[27]

In this case, as of the effective date of the *Final Modification*, the Government had not issued an antidumping order. And while the ITC issued a negative determination before the new rules took effect, that determination was reversed, resulting in a final antidumping order ending the investigation more than two years after the effective date of the *Final Modification*. Pet. App. 8a-10a.[28]

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court to make other changes to the antidumping calculations pending appeal. *See* Pet. App. 9a.

[27] *See also, e.g.*, 19 U.S.C. § 1673b(a)(1)(B) (if ITC makes a "negative determination" regarding material injury, "the investigation [singular] shall be terminated"); *id.* § 1673c(a)(1)(A) (upon withdrawal of a petition "an investigation [singular] under this part may be terminated by either [Commerce] or the Commission").

[28] Something similar happened in the *Polyvinyl Alcohol from Taiwan* investigation – the ITC issued a negative determination before the *Final Modification* took effect, but was reversed after the order's effective date. Pet. App. 14a-15a. The Federal Circuit treated the revival as effectively creating a new investigation, which was subject to the new rules as a "future investigation." *Id*. 15a-16a. Whether the investigation in this case is better viewed as having been "current" at the time of the

b. This straightforward understanding of "investigation" based on the statute and regulations is further supported by Commerce's explanation for its decision in the *Final Modification*.

First, in issuing the order, Commerce cited approvingly comments urging the agency to follow the judicial practice of applying changes in law to "all pending cases." 71 Fed. Reg. at 77,724. And in the litigation context, a change in law will be applied to all non-final cases, even if it affects a stage of a case that has already been completed. *See, e.g.*, *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-99 (1993). For example, a change in the rules governing trial procedure can result in a remand for a new trial even if the change occurs while the case is on appeal. *See, e.g.*, *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987).

Second, the order explained that it was following past precedents in which the agency had "applied a change in policy involving a statutory interpretation to *all segments* pending as of the date of the change." 71 Fed. Reg. at 77,725 (emphasis added). The word "segment" is a term of art in the regulations. *See* 19

Final Modification, or a "future investigation" like the case from Taiwan, makes no difference to the outcome – either way zeroing should have been prohibited.

Of course, the Federal Circuit concluded that this case was distinguishable from *Polyvinyl Alcohol from Taiwan*. Pet. App. 15a-16a. But it did so only because it accepted, as reasonable, the view of Commerce's counsel that ITC and Commerce conduct two separate investigations, rather than two parts of a single investigation. *Id*. For the reasons described above, even if reasonable, that is not the best view of the statute or the regulations.

C.F.R. § 351.102(b)(47).[29] Among the specific examples of a "segment" in the regulatory definition is an "antidumping or countervailing duty investigation," without any mention of the investigation's constituent parts. *Id*. § 351.102(b)(47)(ii); *see also id*. § 351.102(b)(30) ("investigation" defined as "*that segment* [singular] of a proceeding that" begins with the announcement of the investigation and ends, *inter alia*, upon issuance of an antidumping order or negative determination by one of the agencies) (emphasis added). Accordingly, by embracing the precedent of making a new rule applicable to all pending segments as of the date of the change, the order indicated Commerce would apply the *Final Modification* to any matter in which the investigation as a whole was still pending.

Third, the reasons the order gives for retroactive application apply equally to cases like petitioner's. Commerce noted that applying the rule retroactively "will not create any undue administrative burden" because relatively few investigations would be

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[29] The regulations define a "segment" as "a portion of the proceeding that is reviewable under section 516A of the Act." 19 C.F.R. § 351.102(b)(47)(i). Section 516A, in turn, permits review only after the entire investigation has been terminated by a negative finding, 19 C.F.R. § 1516a(a)(2)(A)(i)(I) and (B)(ii), or a final antidumping order, *id*. § 1516a(a)(2)(A)(i)(II). It specifically does not permit immediate review of an affirmative dumping finding by Commerce unless and until a final antidumping order is issued. *See id*. § 1516a(a)(2)(A)(i)(I) and (B)(i). Once an investigation is complete and appealed, all interlocutory components of the order are reviewable. *See id*. § 1516a(b).

affected. 71 Fed. Reg. 77,725. Commerce has never claimed that petitioner's interpretation of the regulation would significantly expand the pool of affected investigations. Instead, Commerce has emphasized that the order stated that there were seven specific investigations pending at the time the *Final Modification* issued, which (although the order does not identify those investigations by name) did not include this case. Pet. App. 13a. But that is completely understandable – when the *Final Modification* was issued, the ITC had already issued a negative determination, which ordinarily ends an investigation. The investigation was revived on appeal only later. Commerce subsequently admitted that the *Final Modification* could extend to investigations that – like this one – were overlooked because they had ended in a negative determination that was on appeal at the time the order issued. *See id*. 16a (explaining that Commerce applied the new rules to *Polyvinyl Alcohol from Taiwan* investigation, which was on appeal from a negative ITC determination at the time the *Final Modification* was issued, and therefore not included in the seven cases mentioned in the order).

Commerce also noted that retroactive application of the *Final Modification* would "not require the Department to gather any new information," 71 Fed. Reg. 77,725, a point that remains true under petitioner's interpretation. Indeed, when Commerce subsequently applied the new rule to petitioner in a later proceeding, it simply altered a single line of computer code and re-ran the program with the pre-existing data (which resulting in a dumping margin of zero). *See supra* pp. 8-9.

Finally, Commerce stated that retroactive application would not prejudice any of the parties to the affected proceedings. *Id*. Among other things, the agency promised that even if it had issued a preliminary determination under the old rule, it would "provide parties with notice and an opportunity to comment on the application of this [new] methodology on the record of the investigation." *Id*. The only difference in petitioner's case would have been that Commerce would provide that opportunity in connection with reconsidering its prior *final* determination rather than its *preliminary* determination.[30]

c. The court of appeals was thus forced to justify its deference to Commerce's litigating position in substantial part by pointing to "an explanatory

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[30] The Order also said that "[a]ll of the current pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification." *Id*. That was not true of petitioner's case, but it also was not true in the *Polyvinyl Alcohol from Taiwan* investigation to which Commerce nonetheless applied the rule change. *See* Pet. App. 16a. Again, it is unsurprising that Commerce did not have these cases in mind when it wrote the *Final Modification*. Moreover, in both cases the parties were on notice that zeroing was under challenge before the WTO and could result in a change in the rules. Indeed, in this case, Commerce had issued its Notice proposing to end zeroing months before it made its antidumping margin calculations, Pet. App. 5a, 7a, and the parties had briefed before the agency whether zeroing should be applied, Sawblades I&D Mem. at Cmt. 11. Accordingly, although an opportunity for further comment could have been made available, none was actually needed since the parties had already briefed the applicability of the then-pending revocation of the zeroing methodology.

statement in response to public comments" prefacing the announcement of the actual rule. Pet. App. 11a. In that passage, the agency stated that it had "determined to apply the final modification adopted through this proceeding to all investigations pending *before the Department* as of the effective date." 71 Fed. Reg. 77,725 (emphasis added). The court concluded that the emphasized language could reasonably be read to serve as a gloss on the broader language of the operative provision that referred to "*all* current and future antidumping investigations." Pet. App. 11a (quoting 71 Fed. Reg. 77,725) (emphasis added).

But even if that inference rendered the agency's interpretation permissible, it is not the best reading of the order as a whole. To start, the investigation *was* pending before the Department of Commerce as of the effective date, as illustrated by the fact that *after* the effective date, Commerce issued a final antidumping order. *Id*. 9a. Moreover, any inference in the agency's favor is more than outweighed by other indications of the regulation's meaning discussed above.

* * * * *

Ultimately, this Court need not decide which party has the better view of the *Final Modification* in order to determine that this case provides an appropriate vehicle to decide whether that question even matters given *Auer*. Because *Auer* does not apply to unreasonable agency interpretations, the continuing validity of that doctrine will only ever matter in a case in which there are serious arguments on both sides of the interpretative debate. This is such a case, and for that reason, it provides

the Court a strong vehicle for resolving the certworthy questions about the scope and validity of *Auer* deference presented by the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kristin H. Mowry
Jeffrey S. Grimson
Jill A. Cramer
MOWRY & GRIMSON, PLLC
5335 Wisconsin Ave., NW
Suite 810
Washington, DC 20015

Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Washington, DC 20814
(202) 362-0636
kr@goldsteinrussell.com

July 29, 2016

APPENDIX A

United States Court of Appeals
for the Federal Circuit

DIAMOND SAWBLADES MANUFACTURERS COALITION,
Plaintiff-Appellee

v.

HYOSUNG D&P CO., LTD., EHWA DIAMOND INDUSTRIAL CO., LTD.,
Plaintiffs-Appellants

v.

UNITED STATES, SH TRADING, INC., SHINHAN DIAMOND INDUSTRIAL CO. LTD.,
Defendants-Appellees

2015-1216, 2015-1224

Appeals from the United States Court of International Trade in Nos. 1:06-cv-00248-RKM, 1:09-cv-00508-RKM, 1:09-cv-00509-RKM, 1:09-cv-00510-RKM, Senior Judge R. Kenton Musgrave.

Decided: December 14, 2015

DANIEL B. PICKARD, Wiley Rein, LLP, Washington, DC, argued for plaintiff-appellee. Also represented by MAUREENE. THORSON.

JEFFREY S. GRIMSON, Mowry & Grimson, PLLC, Washington, DC, argued for plaintiff-appellant Hyosung D&P Co., Ltd. Also represented by JILL A. CRAMER, KRISTIN HEIM MOWRY, SARAH M. WYSS.

MARK PARDO, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Washington, DC, argued for plaintiff-appellant Ehwa Diamond Industrial Co., Ltd. Also represented by ANDREW THOMAS SCHUTZ; MAX FRED SCHUTZMAN, NED H. MARSHAK, BRUCE M. MITCHELL, NewYork, NY.

ALEXANDER V. SVERDLOV, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by FRANKLIN E. WHITE, JR., BENJAMIN C. MIZER; AMAN KAKAR, Office of Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

MICHAEL PAUL HOUSE, Perkins Coie, LLP, Washington, DC, for defendants-appellees SH Trading, Inc., Shinhan Diamond Industrial Co., Ltd. Also represented by DAVID JOHN TOWNSEND.

Before TARANTO, PLAGER, and LINN, Circuit Judges. TARANTO, Circuit Judge.

In late 2006, the Department of Commerce announced that it was changing one of the methods it uses to calculate whether imported goods are being sold in the United States at less than fair value, i.e., being dumped. Commerce also addressed the issue of what dumping proceedings would be governed by the new policy, which generally made it more difficult to find dumping. When two companies found to have dumped in the present case—Hyosung D&P Co., Ltd. and Ehwa Diamond Industrial Co., Ltd.-argued that their case is among those governed by the new policy, Commerce disagreed. We uphold Commerce's determination, because Commerce spoke ambiguously on the timing issue in adopting its new policy and Commerce reasonably resolved the ambiguity to exclude the present matter.

BACKGROUND

A

Commerce and the International Trade Commission share responsibility for investigations about whether an antidumping duty should be imposed on goods being imported in the United States, and they proceed in two stages-first making certain preliminary determinations and then, for those investigations which proceed, making final determinations. *See* 19 U.S.C. §§ 1673-1677n. Commerce investigates and ultimately determines whether the goods at issue are being or are likely to be sold in the United States at less than fair value, as measured in various ways specified by statute. §§ 1673(1), 1673d(a), 1677-1677n. The Commission

determines whether· a domestic industry is "materially injured" or threatened with material injury, or whether establishment of a domestic industry is materially retarded, by reason of imports or sales for which Commerce has made an affirmative determination *(i.e.,* found dumping). §§ 1673(2), 1673d(b)(l). The statute provides for issuance of an antidumping-duty order-imposing import duties in amounts keyed to the magnitude of the underpricing-if both agencies make the specified affirmative final determinations against the imports, and it provides for termination of the investigation if either agency does not make those determinations. §§ 1673, 1673d(c)(2); *see* 19 C.F.R. §§ 351.205(a), 351.210(a). Specified determinations of Commerce and the Commission are reviewable in the Court of International Trade, 19 U.S.C. § 1516a, and then this court, 28 U.S.C. § 1295(a)(5).

Commerce sometimes determines whether dumping is occurring, and if so in what amounts, by examining certain pools of goods and calculating an average amount by which they are being sold at less than fair market value. 19 U.S.C. § 1677(35). Before early 2007, Commerce employed "zeroing" in making that calculation: for goods sold above fair value, Commerce treated the sale price as being at (rather than above) fair value-it zeroed out the margins above fair value. Thus, Commerce permitted no offset against below-fair-value sales in the calculation of the average, resulting in larger average dumping margins than if offsetting had been allowed. *See Union Steel v. United States,* 713 F.3d 1101, 1104 (Fed. Cir. 2013);

Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005); *Advanced Tech. & Materials Co. v. United States,* 33 I.T.R.D. 1874 (Ct. Int'l Trade 2011); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification,* 71 Fed. Reg. 77, 722 (Dec. 27, 2006) *(Final Modification).*

On October 31, 2005, the World Trade Organization issued a report stating that Commerce's practice of zeroing in certain investigations violated the WTO Antidumping Agreement. *See Advanced Tech.,* 33 I.T.R.D. at 1874. Commerce responded by proposing a formal change in its methodology for calculating dumping margins in investigations, following the notice-and-comment procedures specified in 19 U.S.C. § 3533 for adopting revisions of policies based on certain WTO determinations. It published a notice in the Federal Register on March 6, 2006, proposing to abandon its policy of zeroing and seeking public comment. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation,* 71 Fed. Reg. 11,189 (Dep't of Commerce Mar. 6, 2006). In its "Timetable" section, Commerce proposed that the new policy would apply only to "investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice" of the new policy. *Id.* at 11,189.

On December 27, 2006, after receipt of public comments, Commerce published its final modification, explaining that it would indeed discontinue its

practice of zeroing in investigations. *Final Modification, supra.* Commerce departed from its initially proposed policy, however, in the respect at issue here: it expanded the pool of investigations to which the new policy would apply, no longer limiting its application to new investigations. In its "Timetable" section, which the "Summary" identified as setting forth the schedule for implementing the change, 71 Fed. Reg. at 77, 722, Commerce stated that the change in policy would apply "in all current and future antidumping investigations as of the effective date." *Id.* at 77, 725. In the "Analysis of Final Comments" section, Commerce stated that it had "determined to apply the final modification adopted through this proceeding to all investigations *pending before the Department* as of the effective date." *Id.* (emphasis added). And it noted that there were only seven such investigations, all of them initiated by petitions filed after March *6,* 2006, when the new no-zeroing policy was proposed. *Id.*

Commerce set January 16, 2007, as the effective date for the new policy. *Id.; id.* at 77, 722. Commerce later changed the effective date to February 22, 2007. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification,* 72 Fed. Reg. 3, 783 (Dep't of Commerce Jan. 26, 2007).

B

On June 21, 2005-many months before the March 2006 proposal to end zeroing-Commerce began investigating possible dumping by several Chinese and Korean producers and exporters of diamond sawblades (circular sawblades made partly of diamonds). *Initiation of Antidumping Duty Investigations: Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea,* 70 Fed. Reg. 35,625 (Dep't of Commerce Jun. 21, 2005). On May 22, 2006, Commerce published its final determination that two companies, appellants Hyosung and Ehwa, had engaged in dumping. *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea,* 71 Fed. Reg. 29,310 (Dep't of Commerce May 22, 2006) *(Commerce Final Determination).* Commerce used zeroing in calculating an average dumping margin for each company. *Id.*[1]

Under the statutory regime, after Commerce reached its final determination, the Commission made its final determination regarding domestic-industry

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[1] Issues & Decisions Memorandum for the Final Determination in the Antidumping Investigation of Diamond Sawblades and Parts Thereof from the People's Republic of Korea, May 15, 2006, at 40-42, http://enforcement.trade.gov/frn/summary/KOREASOUTH/E6-7771-1.pdf.

injury. In July 2006, the Commission found no such injury. *Diamond Sawblades and Parts Thereof From China and Korea,* 71 Fed. Reg. 39,128 (Jul. 11, 2006). In late July 2006, the Diamond Sawblades Manufacturers Coalition—a group of domestic producers, which filed the petition that prompted Commerce's investigation here—challenged the Commission's determination in the Court of International Trade under 19 U.S.C. § 1516a(a)(2)(B)(ii). *See* Ehwa Br. 5. The matter was in the Court of International Trade when, in December 2006, Commerce adopted its new no-zeroing policy.

In February 2008, well after the early-2007 effective date of the new no-zeroing policy, the Court of International Trade remanded the matter to the Commission for further consideration. *Diamond Sawblades Mfrs. Coal. v. United States,* 32 C.I.T. 134 (Feb. 6, 2008). In May 2008, the Commission found threatened material injury. *Diamond Sawblades & Parts Thereof from China & Korea,* USITC Inv. Nos. 731-TA-1092 and -1093, USITC Pub. 4007 (May 2008). That determination was sustained by the Court of International Trade in January 2009, *Diamond Sawblades Mfrs. Coal. v. United States,* 33 C.I.T. 48 (Jan. 13, 2009), and this court later affirmed, *Diamond Sawblades Mfrs. Coal. v. United States,* 612 F.3d 1348, 1350 (Fed. Cir. 2010).

While the merits were on appeal in this court, the Court of International Trade issued a writ of mandamus directing Commerce to publish an antidumping-duty order. *Diamond Sawblades Mfrs. Coal. v. United States,* 650 F. Supp. 2d 1331, 1334 (Ct.

Int'l Trade 2009). Commerce did so on November 4, 2009, using the calculations it had made in May 2006 using zeroing. *Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders,* 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4, 2009). This court eventually affirmed the mandamus order. *Diamond Sawblades Mfrs. Coal. v. United States,* 626 F.3d 1374, 1382-83 (Fed. Cir. 2010).

Hyosung and Ehwa filed challenges in the Court of International Trade. With the court's permission, Commerce corrected some ministerial errors in its final determination. *Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof From the Republic of Korea,* 75 Fed. Reg. 14, 126 (Dep't of Commerce March 24, 2010). In 2013, the Court of International Trade decided the issue now presented for decision to us: it held that Commerce did not err by deeming its new no-zeroing policy inapplicable to the calculation of the dumping margin in this matter. *Diamond Sawblades Mfrs. Coal. v. United States,* 2013 WL 5878684 (Ct. Int'l Trade 2013).

The Court of International Trade entered a final decision on October 29, 2014. J.A. 1. Hyosung and Ehwa timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

Because we are presented only with a legal question, we decide this dispute de novo: we apply the same standard applied by the Court of International

Trade, asking if the Commerce decision at issue is "not in accordance with law." 19 U.S.C. § 1516a(b)(l)(B)(i). *See Michaels Stores, Inc. v. United States,* 766 F.3d 1388, 1391 (Fed. Cir. 2014). The question is not whether Commerce committed any reversible error in what it decided in the *Final Modification* about which dumping proceedings would be governed by the new no-zeroing policy; the question is only what it did decide. As to that interpretive question, it is undisputed that it suffices for us to uphold Commerce's answer if we conclude that the *Final Modification* is ambiguous on the point and Commerce's interpretation is a reasonable resolution of the ambiguity. *See Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Michaels Stores,* 766 F .3d at 1391; *Cathedral Candle Co. v. Int'l Trade Comm'n,* 400 F.3d 1352, 1364 (Fed. Cir. 2005).

In the investigation at issue here, Commerce had, by the *Final Modification's* effective date of February 2007, completed its non-ministerial work, making a "final determination" of dumping in May 2006. Even the Commission had completed its work, making a negative injury determination in July 2006. The matter was pending before the Court of International Trade. And when it returned to Commerce in 2009, Commerce had no more than ministerial work to complete in order to issue an antidumping-duty order.

We conclude that the *Final Modification* is at best ambiguous as it applies to the present matter. In fact, aspects of the *Final Modification* strongly support Commerce's determination. We therefore uphold

Commerce's determination that the no-zeroing policy does not apply here.

As we have noted, the *Final Modification's* Timetable section says that the new policy will apply "in all current and future antidumping investigations as of the effective date," 71 Fed. Reg. at 77, 725, while an explanatory statement in the response to public comments, within a section entitled "Whether Implementation Should Apply to On-Going Investigations," says that "the Department has determined to apply the final modification adopted through this proceeding to all investigations pending before the Department as of the effective date," *id.* at 77, 724-25. We need not ·decide whether even the former language, if it stood alone, might properly be read to exclude a matter, like this one, that was not before *either* Commerce *or* the Commission in February 2007 and did not thereafter return to Commerce for non-ministerial work. The "current ... investigations" language does not stand alone, but is accompanied by the facially narrower language, "pending before the Department," which we must take as explanation, not a statement of an inconsistent position. At least when read together, the language can reasonably be given Commerce's interpretation-as not reaching investigations in which Commerce had already made a final determination of whether dumping was taking place (by February 2007) and did not thereafter return to Commerce for substantive determinations.

The two-agency structure of antidumping investigations admits of that view. To be sure, one

might well treat an "investigation," under the statute and regulations, as a single matter that is "pending" before both Commerce and the Commission from the time it is initiated until it results in a termination or rescission of the investigation or issuance of an antidumping-duty order. *Cf.* 19 C.F.R. § 351.102(b)(30) (defining "investigation"). But that is not the only facially reasonable view. As relevant here, it also makes linguistic and structural sense to view the investigation as pending before Commerce until Commerce completes *its* work, except for any ministerial work like correcting arithmetic errors or formal entry of an order, and then pending only before the Commission for its injury determination, which comes later. 19 U.S.C. § 1673d(b) (Commission makes injury determination only as to imports or sales "with respect to which [Commerce] has made an affirmative determination" of dumping). The agencies, after all, investigate different aspects of a dumping allegation: Commerce investigates whether dumping has occurred, and Commerce investigates whether such dumping has or had or threatens certain domestic effects.

That view makes particular sense in determining the application of the *Final Modification* to the present matter, because there is powerful internal evidence that the *Final Modification* was not meant to apply to the *Diamond Sawblades* investigation. *First:* Commerce explained in the *Final Modification* that "[a]ll of the currently pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed

modification," *i.e.,* March 6, 2006. 71 Fed. Reg. at 77, 725. The petitions in this case were filed much earlier-in 2005. 70 Fed. Reg. at 35,625. *Second:* When Commerce stated in the *Final Modification* that it would apply to "all investigations pending before the Department as of the effective date," it also stated that "[t]he number of pending antidumping investigations is few (i.e. there are seven ongoing antidumping investigations)." 71 Fed. Reg. at 77, 725. Hyosung, Ehwa, and Commerce all agree in this court that this investigation is not one of the seven investigations (which consist of those filed after March 6, 2006). *See* Hyosung Br. 33; Ehwa Br. 31 n.7; Gov't Br. 16 n.3. Diamond Sawblades does not disagree. Diamond Sawblades Br. 2. *Third:* Commerce explained that "even in the most advanced of the on-going investigations, there is sufficient time to permit the parties to comment on the application of this approach *prior to the final determination in the investigation.*" 71 Fed. Reg. at 77, 725 (emphasis added); *see id.* (in investigations where Commerce had made a preliminary determination, parties will have an opportunity to comment on application of the new policy). The implication is that Commerce had not made a final determination in any of the investigations to which the new policy would apply; but in this matter, Commerce had already done so. 71 Fed. Reg. at 29,310.

Later events in this investigation did not make this a new investigation (a "future antidumping investigation[]," 71 Fed. Reg. at 77, 725) or make unreasonable the conclusion that this investigation

had not been pending before Commerce in February 2007. When Commerce took up the *Diamond Sawblades* matter again in 2009, after the Court of International Trade upheld the Commission's finding of injury (after remand), Commerce performed only ministerial actions. It issued the antidumping-duty order based on its 2006 determination, 74 Fed. Reg. at 57,145, then made a ministerial correction based on an arithmetic error it had recognized in June 2006 but not implemented at the time, because the Commission had the matter before it. *See Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof From the Republic of Korea,* 75 Fed. Reg. 14,126 (Mar. 24, 2010). Hyosung and Ehwa have pointed to no more substantive actions that Commerce took.

Hyosung and Ehwa argue that the treatment of this investigation as outside the *Final Modification* is contradicted by Commerce's later decision to apply the *Final Modification* to a separate investigation, *Polyvinyl Alcohol From Taiwan: Final Determination of Sales at Less Than Fair Value,* 76 Fed. Reg. 5562 (Feb. 1, 2011). Commerce's decision in the Polyvinyl Alcohol From Taiwan matter gives us pause in assessing the coherence of Commerce's interpretation of the *Final Modification.* But we do not think, in the end, that Commerce's decision in that matter suffices to make unreasonable Commerce's decision that the no-zeroing policy of the *Final Modification* is inapplicable here.

In the Polyvinyl Alcohol From Taiwan matter the Commission issued a preliminary determination of

insufficient injury before Commerce reached even a preliminary determination as to whether dumping had occurred, and the Commission's negative preliminary determination precluded Commerce from going forward. *Initiation of Anti Dumping Duty Investigation: Polyvinyl Alcohol From Taiwan,* 69 Fed. Reg. 59,204 (Oct. 4, 2004); *Polyvinyl Alcohol From Taiwan,* 69 Fed. Reg. 63, 177 (Oct. 29, 2004). At the time the *Final Modification* took effect, therefore, the Polyvinyl Alcohol From Taiwan matter had not been the subject of a Commerce final determination; by February 2007, the matter had just been remanded to the Commission for reconsideration of its preliminary injury determination. *See Celanese Chems. Ltd. v. United States,* 31 Ct. Int'l Trade 279, 280 (Jan. 29, 2007). Only in March 2010 did the matter return to Commerce, and only then did Commerce do the extensive work involved in reaching a final determination of dumping—questionnaire issuance, verification, scope amendment, etc. *See Polyvinyl Alcohol From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 Fed. Reg. 55,552 (Sep. 13, 2010); *see* 76 Fed. Reg. at 5,562. In particular, only then did Commerce calculate the respondent's average dumping margin, which it had not previously done in this matter. 75 Fed. Reg. at 55,558.

Commerce could readily decide that the Polyvinyl Alcohol From Taiwan proceeding was situated differently from the present matter regarding the "final determination" point mentioned by Commerce in the *Final Modification,* 71 Fed. Reg. at 77, 722, 77,

725. The key Commerce work, including the margin determinations to which zeroing is relevant, was not yet done there, whereas here it was. That work was done only after the *Final Modification's* effective date, whereas here no such work was done after the effective date. Thus, for reasons not applicable here, the investigation in the Polyvinyl Alcohol From Taiwan matter to which the no-zeroing policy was applied can be described as a "future" investigation, as of February 2007, insofar as Commerce's active role was concerned. We need not decide whether, as Commerce briefly suggested at oral argument, the investigation might be described, in the alternative, as having been "pending before the Department" in February 2007 within the meaning of the *Final Modification* (Commerce's work in the overall investigation got interrupted well before it arrived at a dumping determination, and the matter had been remanded to the Commission by February 2007).

Those considerations ultimately seem to us enough to prevent Commerce's result in the Polyvinyl Alcohol From Taiwan matter from making its result here unreasonable. And that is so even though neither matter was among the seven mentioned by Commerce in the *Final Modification* (both were initiated before March 2006). We think it reasonable for Commerce to treat the issue of coverage as one to be assessed by looking at the *Final Modification* as a whole, not any single word ("pending" or "current") from its text. The particularly strong reasons that support a finding of non-coverage of the present matter are not

contradicted by the weaker case for finding coverage of Polyvinyl Alcohol From Taiwan.

CONCLUSION

We affirm the judgment of the Court of International Trade.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

DIAMOND SAWBLADES
MANUFACTURERS COALITION,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

EHWA DIAMOND INDUSTRIAL CO., LTD., :
SH TRADING, INC., and SHINHAN DIAMOND :
INDUSTRIAL CO. LTD.,

Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge

Consol. Court No. 06-00248

PUBLIC VERSION

OPINION AND ORDER

[Remanding in part investigation of sales at less than fair value of diamond sawblades and parts from the Republic of Korea.]

Dated: October 11, 2013

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, D.C., for plaintiff Diamond Sawblades Manufacturers Coalition.

Eric C. Emerson and *Laura R. Ardito*, Steptoe and Johnson, LLP, of Washington, D.C., for consolidated plaintiff Hyosung D&P Co., Ltd.

Delisa M. Sanchez, Trial Attorney, and *Melissa M. Devine*, Of Counsel Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Hardeep K. Josan*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Max F. Shutzman, *Bruce M. Mitchell*, *Mark E. Pardo*, *Ned H. Marshak*, and *Andrew T. Shutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Kledstadt, LLP, of Washington, D.C., for defendant-intervenor Ehwa Diamond Industrial Co., Ltd.

Michael P. House and *Sabahat Chaudhary,* Perkins Coie, LLP, of Washington, D.C., for defendant-intervenors SH Trading Inc. and Shinhan Diamond Industrial Co. Ltd.

Musgrave, Senior Judge: This opinion addresses the merits of consolidated challenges to aspects of the investigation into sales of diamond sawblades and parts thereof from the Republic of Korea at less than "fair" value ("LTFV"). *See Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006) (final LTFV determ.) ("*Final Determination*"), as ministerially amended by *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 75 Fed. Reg. 14126 (Mar. 24, 2010). Familiarity is presumed on the background of this matter[1] as well as the standard of judicial review, 19

[1] See, e.g., Diamond Sawblades and Parts Thereof from the People's Republic of China and 1 the Republic of Korea, 70 Fed. Reg. 35625 (June 21, 2005) (initiation of investigation into LTFV sales), PDoc 75; Diamond Sawblades and Parts Thereof from the Republic of Korea, 70 Fed. Reg. 77135 (Dec. 29, 2005) (notice of, inter alia, preliminary LTFV determ.), PDoc 345; Final Determination, 71 Fed. Reg. 29310; Diamond Sawblades and Parts Thereof from . . . the Republic of Korea, 74 Fed. Reg. 6570 (Feb. 10, 2009) (notice of court decision not in harmony with final determination of the antidumping duty ("AD")

U.S.C. §1516a(b)(l)(B)(i) (whether the administrative determination is "unsupported by substantial

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investigations); Amended Final Determination, 75 Fed. Reg. 14126; Diamond Sawblades and Parts Thereof from . . . the Republic of Korea, 74 Fed. Reg. 57145 (Nov. 9, 2009) (AD order); Diamond Sawblades Manufacturers Coalition v. United States, 35 CIT __, Slip Op. 11-117 (Sep. 22, 2011) (denying motion for temporary restraining order and preliminary injunction as unripe); Order of Oct. 13, 2011, ECF No. 56 (granting temporary restraining order in part and enjoining administrative lifting of suspension of liquidation); Order of Oct. 24, 2011, ECF No. 58 (granting motion for preliminary injunction against administrative lifting of suspension of liquidation and denying motion to enjoin revocation of AD duty order); Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof [f]rom the Republic of Korea, 76 Fed. Reg. 66892 (Oct. 28, 2011); Diamond Sawblades Manufacturers Coalition v. United States, 35 CIT __, Slip Op. 11-137 (Nov. 3, 2011) (publishing reasons for Order of Oct. 24, 2011); Diamond Sawblades Manufacturers Coalition v. United States, 36 CIT __, Slip (continued...) (...continued) [1] Op. 12-46 (Mar. 29, 2012) (denying motion to amend injunction). As used above and herein, "PDoc" refers to the public administrative record and "CDoc" refers to the confidential administrative record.

evidence on the record, or otherwise not in accordance with law"), which necessarily frames the issues. The reasonableness of agency action is assessed in light of the record as a whole. *E.g.*, *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed. Cir. 2006). On that basis, the case will be remanded as follows.

Discussion

Addressed in order, the defendant's International Trade Administration of the U.S. Department of Commerce ("Commerce") contends (I) jurisdiction is lacking over post-section-126- determination entries but (II) agrees to remand of the determination not to adjust the total indirect selling expenses ("ISEs") for respondent Ehwa Diamond Industrial Co., Ltd. ("Ehwa") to account for expenses attributable to Ehwa's "Industrial Division." The plaintiff, Diamond Sawblades Manufacturers Coalition ("DSMC"), additionally faults the *Final Determination* for the following: (III) non-inclusion of ISEs incurred in the transaction of subject merchandise through Ehwa and its U.S. affiliates to ultimate purchasers; (IV) non-collapse of various affiliations, namely (A) Ehwa and Shinhan Diamond Industrial Co., Ltd ("Shinhan"), (B) Shinhan and its Korean affiliates, and (C) Ehwa and its affiliates in the People's Republic of China ("PRC"), as well as (D) the impact such non-collapsing had on the weighted average CONNUMs of subject merchandise sold but not produced during the period of investigation ("POI") and the calculation of separate constructed export price ("CEP") offsets for Ehwa and Shinhan; (V) the country of origin determination for finished diamond sawblades; (VI) non-issuance of

Section E questionnaires to respondents and therefore (VII) non-deducted further manufacturing costs from U.S. Net Price and unadjusted CEP profit; (VIII) non-application of the major input rule in the adjustment of prices for Ehwa's and Shinhan's purchases from affiliated suppliers; (XI) unadjusted costs of reported purchases from unaffiliated non-market economy ("NME") suppliers; (X) and the decision not to base Shinhan's financial expense rate on facts otherwise available and/or adverse inferences. The consolidated plaintiff Hyosung D&P Co., Ltd. ("Hyosung") and the defendant-intervenors Ehwa and Shinhan, joined by Shinhan's U.S. affiliate SH Trading, Inc., move to contest (XI) Commerce's determination to employ its traditional zeroing methodology.

I. Jurisdiction

Jurisdiction is here pursuant to 19 U.S.C. §1516a(a)(3) and 28 U.S.C. §1581(c), but the defendant again contends none exists with respect to Commerce's determination under section 129 of the Uruguay Round Agreements Act ("URAA") to revoke the AD order on subject merchandise, and therefore the court lacks jurisdiction over the entries effected thereby.

To repeat: The defendant is correct that no jurisdiction exists over the section 129 determination, since the DSMC did not challenge it, but that does not translate to automatic divestment of jurisdiction over the entries covered by the administrative decision to revoke. Following in the wake of the section 129 determination, Commerce's decision to revoke the AD order is independent of that determination, and the

entries it would effect necessarily remain subject to this action. *See*, *e.g.*, 36 CIT ___, Slip Op. 12-46 (Mar. 29, 2012). In other words, the opportunity to challenge the section 129 determination is indeed a separate matter, but the decision to revoke the AD order is "final" only in the sense that the section 129 determination (upon which that revocation decision depends) may not be challenged judicially. That does not equate to a powerlessness to rescind the revocation, should the final outcome of this matter so require, because it is not the legality of the section 129 determination currently supporting revocation in the first instance that governs jurisdiction here. The outcome of this action in fact governs the "continued propriety" (for want of a better phrase) of that revocation[2], and this court continues to adhere to the

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[2] During the hearing on the DSMC's motion for preliminary injunction the court asked the DSMC whether the "cleaner" procedural avenue would be to bring a separate challenge to the section 129 determination and then consolidate that action with its LTFV action here. The DSMC argued that such a procedure was not only unnecessary but inappropriate, as the section 129 determination was technically correct as it stood, i.e., based on the record before Commerce at the time and before any final judicial decision on this matter affecting the margin calculus, and therefore it had no lawful basis to contest that determination. Reflecting on the argument, the court agreed that a merely technical appeal of that

section 129 determination was unnecessary in order for the DSMC to preserve a right of reinstatement of the AD order, were it to prevail on the issues it raises in its LTFV appeal here. See, e.g., Globe Metallurgical Inc. v. United States, 31 CIT 1722, 1728, 530 F. Supp. 2d 1343, 1349 (2007) ("Commerce is bound to reinstate the order if the legal basis for revocation . . . is withdrawn"), quoting that defendant's reply brief at 4 (this court's ellipsis). Liquidation of the entries "subject to" the section 129 determination, i.e., those made after the effective date of revocation, had been, and could continue to be, enjoined in order to preserve the DSMC's right to relief over those entries pending a final decision in this appeal, and therefore "requiring" a challenge to that section 129 determination, simply, arguendo, in order to "further" preserve the DSMC's rights with respect those entries impacted by the section 129 determination, was not only inappropriate but would have amounted to a waste of resources. The court therefore determined to continue that suspension of liquidation, even after the time for challenging the section 129 determination under 19 U.S.C. §1516a(a)(2)(A) & (B)(vii) had passed. See Slip Op. 12-46; see also Slip Op. 11-137. Entries suspended pursuant to litigation are to be liquidated in accordance with the final judgment in this action, see 19 U.S.C. §1516a(e), or pursuant to administrative review, see infra n.3, and in accordance with that statute, the DSMC averred that to the extent the final decision in this matter is of AD margins that are above

view that Commerce cannot act to divest this court of the jurisdiction here retained, nor deprive the court of the ability to grant relief over any of the entries covered by such jurisdiction, and for which liquidation continues to be suspended. The *status quo* of this matter is of an AD order that is based upon an affirmative final determination of LTFV sales that Commerce has decided to revoke as a consequence of its implementation of the section 129 determination results. Were this matter ultimately to sustain an affirmative final determination of LTFV sales even in the absence of zeroing methodology, rescission of that revocation would not (continue to) be the lawful result. In that circumstance, if liquidation is permitted to occur between revocation and rescission of revocation, the DSMC will have been deprived of the full relief to which success in this matter entitles them, as compelled by the original *status quo* of this matter before Commerce. Therefore, the current *status quo* is not "like" the circumstance of an original negative determination of LTFV sales, where petitioners' precatory motions to a court to enjoin liquidation have been routinely denied. Or, if it is, then the situation is similar to petitioners having no immediate equitable right to enjoinder of liquidation when seeking to change the *status quo* of an original *negative* LTFV

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de minimis and regardless of the absence of zeroing methodology employed in the section 129 recalculation, relevant suspended entries cannot be liquidated in a manner contrary to that final judgment. To that extent, they were, and are, correct.

investigation and pursuant to which no AD order has issued, *i.e.*, respondents have no immediate equitable right to liquidation on the basis of a changed *status quo* occasioned by revocation of an AD order as the result of a section 129 determination that occurs in the midst of a judicial challenge to the underlying *affirmative* LTFV investigation and pursuant to which an AD order has issued. Administrative revocation pursuant to a section 129 determination in that circumstance can only be regarded as interlocutory, *i.e.,* provisional, and dependant upon the outcome of this matter, over which the court has jurisdiction, and the relief sought herein. *Cf. Advanced Technology & Materials Co., Ltd. v.* 3 *United States*, 37 CIT ___, Slip Op. 13-129 (Oct. 11, 2013).

II. Voluntary Remand for Recalculation of Ehwa's Divisional ISEs

The DSMC contest two aspects of Commerce's treatment during the investigation of Ehwa's reported indirect selling expenses (ISEs). These are fixed costs that a seller would incur regardless of whether a sale is made; they do not vary with the quantity sold or relate to a particular sale but may reasonably be attributed to such sales through proper cost accounting methodology[4]. *See* 19 C.F.R. §351.412(f)(2).

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[4] Commerce typically allocates ISEs by calculating an ISE ratio derived by dividing the total ISEs (x) by the total sales value (y). The defendant explains that x and y are linked: if an expense is included in x, then

On the first of its ISE claims, the DSMC point out that early in the investigation Ehwa originally reported that only its Stone & Construction division sells subject merchandise and based its reported ISEs on the expenses and sales of that division. *See* Issues and Decision Memorandum accompanying *Final Determination* ("*I&D Memo*"), PDoc 529, at cmt. 19. Subsequent to the preliminary results, Commerce issued a scope ruling that certain merchandise sold by Ehwa's Industrial Division, its only other division, was

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the sales value is included in y, and vice versa, and the ISE ratio is multiplied by the price of each sale. See, e.g., Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 67 Fed. Reg. 11976, 11979 (Mar. 18, 2002) (final AD review results) and accompanying issues and decision memorandum at cmt. 1. Commerce thus includes ISEs in its calculations by first dividing the value of a company's ISEs by the total value of the company's sales, and then applying the same ratio to all sales. Its general practice has been to calculate separate ISEs for each separate company and regardless of whether separate companies are affiliated. See, e.g., Carbon and Alloy Steel Wire Rod from Trinidad and Tobago, 71 Fed. Reg. 65077, 65079 (Nov. 7, 2006) (prelim. AD review results). Commerce will also accept an intra-company divisional calculation and corresponding application of ISEs where a respondent can show that only certain divisions sold subject merchandise and can accurately segregate those divisions' ISEs from those of divisions not selling subject merchandise.

in-scope. The rationale behind Ehwa's divisional reporting having thus disappeared, the DSMC pointed this out in its case brief and requested that Commerce recalculate and apply Ehwa's ISEs on a company-wide basis. PDoc 528, CDoc 231, at 74. Commerce agreed in principle, but declined to make the adjustment at the time on the belief that the impact would be negligible. It now requests remand in order to reconsider, and the DSMC concur. Ehwa opposes for various reasons, but Commerce's request does not appear to involve a change in or interpretation of policy or frivolousness or bad faith. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1027-30 (Fed. Cir. 2001). The matter will be remanded accordingly.

III. Exclusion of Ehwa's Inter-Company ISE's

The second ISE claim concerns sales of some of Ehwa's subject merchandise being transacted through one, two, or sometimes three affiliates before ultimately being transacted to unaffiliated customers. The DSMC argued for inclusion in the dumping calculation of ISEs incurred at each step of such sale processes. *See* DSMC Br. at 22-25. Commerce agreed in the *Final Determination* that separate ISEs should be calculated for Ehwa and each of its selling affiliates, but it declined to "stack expenses associated with transferring merchandise from one affiliate to the next in addition to the expenses that each affiliate experiences when preparing to sell to external customers." *I&D Memo* at cmt. 20. Commerce reasoned that the inter-company expenses and sales values between Ehwa and its U.S. affiliates are not includable ISEs "because selling expenses are

incurred when selling to external customers, not for transfers between affiliates", *id*., and it thus included only ISEs incurred by the entity selling to the first unaffiliated customer in its calculations.

The DSMC contend this was inappropriate and illogical. They argue that each of Ehwa's U.S. selling affiliates was involved in eventual sales of subject merchandise to unaffiliated customers in the U.S., *see* PDoc 147, CDoc 46, at A-13-14 and Ex. A-6, and that Commerce should capture all of Ehwa's and its affiliates' ISEs that are attributable to sales of subject merchandise. According to the DSMC, this would involve separate calculations of ISE ratios for each affiliate and having the denominator for each ratio reflect the total sales value for each company, inclusive of transfer price, not the U.S. sales value net of inter-company sales.

In opposition, the defendant contends Commerce's practice of not deducting expenses associated with sales made to affiliated customers should be sustained:

> When the ISE ratio is applied to the price of total sales, the resulting ISE that is deducted from the CEP represents the portion of the sales that Commerce deems to represent the ISE associated with that sale. If Commerce were to include the affiliate transfers in the ISEs (x) and total sales value (y) in the ISE ratio for each selling affiliate, Commerce would be including at least a portion of the affiliate-related expense in the ISE that is

> eventually deducted from the CEP[, which] . . . would run afoul of Commerce's practice of not deducting expenses related to sales made to affiliated importers in the United States.

Def's Resp. at 63. The defendant's apparent reference point for this contention, in addition to the *I&D Memo*'s analysis, is *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001) ("Commerce logically must deduct only those expenses incurred solely in CEP transactions, *i.e.*, only those expenses associated with the sale of subject merchandise to an unaffiliated purchaser in the United States by a party affiliated with the foreign producer or exporter").

The court will defer to administrative policy that is reasonably explained, but the reasons here, on why intra-transfer costs are not ISEs that are borne by the ultimate customer, appear *ipse dixit*, and the defendant's explanation of that practice, if it exists, appears circular. To "incur" means "[t]o suffer or bring on oneself (a liability or expense)." *Black's Law Dictionary*, p. 782 (8th ed. 2004). The parties' main difference on this point seems philosophical, but the DSMC's argument has a certain accounting logic behind it, in that an ISE "incurred" with respect to the ultimate customer is no less "incurred" at each stage of transacting the merchandise, in this instance from Ehwa through each relevant affiliate to the ultimate purchaser, which the defendant apparently concedes. *See supra*. While intra-company transfers do not impact cash flow, there are apparent associated selling costs that might properly be considered ISEs in

accordance with 19 U.S.C. §1677a(d)(1)(D). *Cf.* 243 F.3d at 1306 (ISEs include, *e.g.*, rents on sales office space, salespersons' salaries, and certain inventory carrying costs). By contrast, the court does not discern a double-counting concern in Commerce's "stacking" point. Whether that is indeed the case, the matter needs clarification before proceeding further and will therefore be remanded for that purpose. On remand, Commerce is not precluded from reconsidering the issue anew, as long as it provides a reasonable explanation therefor.

IV. Determination Not To Collapse Ehwa, Shinhan, and Affiliates

Commerce may calculate a single AD rate for producers where (1) they are affiliated, (2) have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (3) there is a "significant potential" for the manipulation of price or production. 19 C.F.R. §351.401(f).[5] In the investigation, Commerce found that Shinhan and Ehwa satisfy the first two criteria: they are affiliated with each other, and they have production facilities for similar or identical

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[5] Commerce originally selected "significant potential" as the appropriate standard to address the problem of prospective manipulation. See Antidumping Duties; Countervailing Duties; 62 Fed. Reg. 27296, 27345-46 (final rule) (May 19, 1997) ("Preamble").

merchandise. Shinhan is also affiliated with other Korean firms from which it procures inputs. Ehwa is also affiliated with certain PRC firms from which it too procures inputs. For the *Final Determination*, nonetheless, Ehwa was not collapsed with Shinhan, Shinhan was not collapsed with its Korean affiliates, and Ehwa was not collapsed with its PRC affiliates.

The DSMC's arguments here concern only Commerce's findings and conclusion on the significance of the potential for price or production manipulation. *See* 19 C.F.R. §351.401(f)(1). That significance depends upon a non-exhaustive list of such factors as (1) the level of common ownership, (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (3) whether operations are intertwined, such as through sharing of sales information, involvement in production and pricing decisions, sharing of facilities or employees, or significant transactions between affiliated producers. 19 C.F.R. §351.401(f)(2). The determination is based upon the totality of the circumstances, not upon any single factor. *See*, *e.g.*, *JTEKT Corp. v. United States*, 33 CIT 1797, 1825, 675 F. Supp. 2d 1206, 1233 (2009).

A. Determination Not to Collapse Ehwa and Shinhan

Commerce preliminarily determined to collapse Ehwa and Shinhan on the ground that "[[
]] have the ability and the potential to coordinate their actions in order to direct Ehwa and Shinhan to act in concert with each other, given the management overlap by the companies' senior managers, *i.e.*, [[

]] hold senior management positions and board of director positions in Ehwa and Shinhan." Memorandum, re: *Petitioner's Allegation Regarding the Business Relationship Between Two Respondents* (Dec. 20, 2005) (preliminary collapsing memorandum), PDoc 335, CDoc 123, at 7-8.

For the *Final Determination*, Commerce reversed course. In concluding that as between Ehwa and Shinhan there did not exist a significant potential for price and production manipulation, Commerce specifically found as follows: (1) "there are no individuals jointly employed by both Shinhan and Ehwa, or serving as members of each company's board of directors"; (2) [[ ]] are in the minority on each company's board of directors, [[ ]]; (3) "there is no evidence that Ehwa and Shinhan have shared any employee, let alone a senior manager, for the last 18 years since [[ ]] left in 1987"; (5) "there are no persons that sit on the board of directors of both Ehwa and Shinhan, or are otherwise shared by both companies"; (6) "even though [[ ]], there is no one person or persons shared by both companies that can effectuate and coordinate the activities of both companies"; (7) "there are no intertwined operations between Ehwa and Shinhan"; (8) "[d]uring verification, the Department was unable to identify any business connections between the companies"; (9) "during verification, [it also] found evidence that Ehwa and Shinan do not cooperate with each other", specifically (a) there were no transactions between the companies for 10 years; (b) there were no shared patents; (c) Ehwa had [[ ]]; (d) Ehwa

and Shinan have competing overseas offices; and (10) although the CEO of Shinhan owns 18 percent of Ewha, "the Department verified that he [[ ]]" Memorandum, re: *Collapsing for the Final Determination* at 8-10 (May 15, 2006) ("*FCM*"), PDoc 536, CDoc 241, at 9-10. Thus, "Ehwa and Shinhan[,] while having substantial common ownership, do not have the significant potential for price or production manipulation given the absence of interlocking boards of directors, no shared managers, no intertwined operations, and evidence of non-cooperation" in the form of [[ ]]. *Id.* at 10. *See I&D Memo* at cmt. 13.

Despite the foregoing, the DSMC argue that Commerce's decision was not adequately explained and that the record demonstrates a strong potential for manipulation of price and/or production between these parties. In particular, they point to Commerce's acknowledgment that [[ ]] sat on the boards of directors of both Ehwa and Shinhan, that [[ ]], and that there is "substantial common ownership." The DSMC contend there is no evidence on the record to prove a separation of professional and personal interaction between [[ ]], that Commerce's final "belief" that coordination of activities between the two companies could not be effected through [[ ]] is insufficiently explained, and that there is no new evidence between the preliminary and final determinations to justify the opposite conclusion that collapse was not warranted. *E.g.*, DSMC Reply at 2-3, referencing Def's Resp. at 17 & PDoc 515, CDoc 217, at 22-32. The DSMC also

contend Commerce's practice as it existed in 2006 supported collapsing companies even in the absence of intertwined operations so long as there was common control and overlapping boards.

These arguments are insufficient to undermine the substantiality of the evidence of record in support of Commerce's determination. Apart from the fact that the cases to which the DSMC refer[6] post-date the investigation at bar, even if Commerce's practice in 2006 existed as contended it could not be construed as a *per se* rule, since Commerce specifically rejected that approach when it adopted 19 C.F.R. §351.401(f)[7]. And regarding the absence of new facts between the

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6 See DSMC Br. at 9-10, referencing Chlorinated Isocyanurates from the People's Republic of China, 74 Fed. Reg. 68575 (Dec. 28, 2009) (final AD new shipper review results); Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 74 Fed. Reg. 11349 (Mar. 17, 2009) (final AD admin. and new shipper reviews)

[7] *See Preamble*, 62 Fed. Reg. at 27345-46 (any finding of potential for price manipulation would lead to collapsing in almost all circumstances in which producers are affiliated, which "is neither the Department's current nor intended practice"; collapsing "requires a finding of more than mere affiliation"). Commerce also refused to include examples because collapsing is "very much fact-specific in nature, requiring a case-by-case analysis". *Id*. at 27246.

preliminary and final determinations, that circumstance does not, without more, render the latter decision unreasonable on its own, since, by definition, a preliminary determination is without the force of law. *See*, *e.g.*, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *NEC Corp. v. United States*, 151 F.3d 1361, 1374 (Fed. Cir. 1998); *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998) ("*SCBD*"). The only relevant question for the court is whether substantial record evidence supports the final conclusion that there was no potential for price or production manipulation based on the totality of the evidence. *Cf. SCBD*, 143 F.3d at 523.

On a more precise tack, the DSMC also stress that Commerce failed to address a report alleging that the president of Ehwa "created a sales subsidiary in the United States under his wife['s] name[,] . . . began exporting product to the United States at a 10 percent discounted price, . . . [and] misappropriated the additional profit of $2.55 million and the U.S. subsidiary's sales profit, for a total of $4.37 million", and that "evidence of a previous criminal scheme involving price manipulation was clearly relevant to the question of whether there was a significant potential for the manipulation of price". They also mention that both Ehwa and Shinhan in their Section A questionnaires [[ ]]. *See* DSMC 56.2 Br. at 9-13, referencing Petitioners' letter to Commerce dated December 6, 2005, re: *Collapsing of Shinhan and Ehwa*; DSMC Reply at 4; *see also* DSMC Collapse Request, PDoc 293, CDoc 106, at 2.

Ehwa contends it provided rebuttal to Commerce to show that Ehwa's president was never arrested nor charged with any criminal scheme involving price manipulation but was instead charged with failing to report to the Korean Ministry of Finance his purchase and ownership of real estate in the United States, for which penalties were suspended upon the presumption that he had been unaware of his reporting requirement as a permanent resident of the United States. Ehwa also contends Commerce verified the evidence it provided to contradict the claim of [[ ]]. *See* Ehwa Resp. at 14-15; CDoc 202 at 5-6, referencing Ex. 4 at 30A-30B thereto. The defendant adds that Commerce considered the relevancy of the arrest allegation "unclear" to the collapsing analysis, that Commerce can pick and chose which factors are relevant and make factual findings as to those factors, and that an explanation is not required in instances "where the agency's decisional path is reasonably discernible." Def's Resp. at 24, referencing, *inter alia*, *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998), and *JTEKT*, *supra*, 33 CIT at 1826, 675 F. Supp. 2d at 1234. The defendant and Ehwa both argue that Commerce examined the issues thoroughly[8], and that in the 8

[8] See Shinhan Cost Verification Report, CR 193; Ehwa Cost Verification Report, CR 194; Shinhan Home Market and Export Price Sales Verification Report, CR 198. Shinhan CEP Sales Verification

final analysis Commerce's conclusion not to collapse Ehwa and Shinhan was reasonable because a party cannot be required to provide indisputable proof of a negative, *i.e.*, of a lack of professional and personal interaction between [[ ]]. *See Allied Tube*, 24 CIT at 1374-75, 127 F. Supp. 2d at 222-23.

The absence of evidence is not evidence of absence[9], of course, *cf. id.*, but Commerce is duty-bound to consider the available evidence on the level of common ownership and the extent to which there are shared board members. *See*, *e.g.*, *JTEKT*, 33 CIT at 1826-27, 675 F. Supp. 2d at 1234. The court cannot substitute its own judgment on such matters but can only review on the basis of substantial evidence on the record or for abuse of discretion. At the same time, however, the agency's explanation of its decision must be clear enough to enable judicial review, and cannot "leave vital questions, raised by comments which are of cogent materiality, completely unanswered." *United*

Report, CR 199; Ehwa CEP Sales Verification Report, CR 201; Ehwa Home Market and Export Price Sales Verification Report, CR 202.

[9] *See*, *e.g.*, *Porter v. Secretary of Health and Human Services*, 663 F.3d 1242, 1264 (Fed. Cir. 2011), parenthetically quoting *Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 436 (6th Cir. 2009) (Boggs, C.J., dissenting).

States v. Nova Scotia Food Prods., 568 F.2d 240, 252 (2d Cir. 1977).[10]

The material issue here is the potential for price or production manipulation. From the fact that Commerce did not discuss the DSMC's evidence or arguments with respect to the arrest and [[ ]] allegations of record in the *I&D Memo* or in the final collapsing memorandum for Ehwa and Shinhan, it may be inferred that Commerce determined that the DSMC's evidence was insignificant, immaterial, or not seriously undermining enough to merit discussion. In that regard, the DSMC do not persuade that Commerce's determination on the evidence of record before it was unreasonable. *See Altx, Inc. v. United States*, 370 F.3d 1108, 1113 (Fed. Cir. 2004) (an agency must "address significant arguments and evidence which seriously undermines its reasoning and conclusion" but "need not address every argument and piece of evidence"). More broadly, the DSMC do not

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[10] According to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, H. Doc. 103-316, vol. VI (1994) ("*SAA*"), at 892, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4215, "[e]xisting law does not require that an agency make an explicit response to every argument made by every party, but instead requires that issues material to the agency's determination be discussed so that the path of the agency may reasonably be discerned by the reviewing court" (internal citations omitted).

persuade that Commerce's determination not to collapse Ehwa and Shinhan was unreasonable at the time. Although Ehwa and Shinhan are not only affiliated but [[ ]], Commerce essentially concluded that the other evidence of record showed the two to be competitive, not cooperative or potentially cooperative. The court cannot re-weigh the evidence in support thereof and substitute judgment therefor.

B. Determination Not to Collapse Shinhan with its Korean Affiliates

The threshold question in a collapsing inquiry is whether the affiliate is a producer of the subject merchandise or the foreign like product. *See* 19 C.F.R. §351.401(f)(1). Commerce determined not to collapse Shinhan and three of its Korean affiliates, Technoplus Co., Ltd. ("TPC"), Namdong Tools ("Namdong"), and INCOM, "because TPC, INCOM, and Namdong have not been demonstrated to be producers of either subject merchandise or the foreign like product". Shinhan Collapsing Memo, PDoc 235, CDoc 242, at 5. More precisely, Commerce observed that the "petitioner notes that TPC [[ ]] and that INCOM provided Shinhan, through TPC, [[ ]]" and it found that a review of the scope language evidenced that "[[ ]] are neither subject merchandise [n]or the foreign like product"; therefore, Commerce found that neither TPC nor INCOM were producers as required by the regulation. Shinhan Collapsing Memo, PDoc 235, CDoc 242, at 4-5. Commerce thus found no record evidence to demonstrate that during the POI either Namdong or INCOM have production facilities for producing

subject merchandise or foreign like or similar products that would not require substantial retooling in order to restructure manufacturing priorities, and it rejected the DSMC's argument that the likelihood that they possessed such facilities should be assumed. *See id*. Commerce further found that TPC's facility had not been used before the POI to make subject merchandise or foreign like product, and from the fact that Shinhan had [[ ]] during the POI Commerce concluded that TPC did not "make use" of the production facility during the POI. *Id*. The DSMC contest those determinations, but they do not appear to be unreasonable. They argue that the fact that TPC [[ ]] in no way demonstrates or supports finding that TPC did not make use of the facility during the POI, that there is no other evidence of record to support the assertion, and that the very fact that [[ ]] demonstrates that TPC met the second requirement for collapse, *i.e.*, that it "has" a facility that would not require substantial retooling in order to produce subject merchandise or foreign like product. The argument overlooks the standard of judicial review, however. The collapsing regulation does not delimit the extent to which producers "have" the necessary facilities to qualify under the regulation. Possession being nine-tenths of the law, the court is unable to find Commerce's interpretation of its regulation in this instance unreasonable.

The DSMC also contend Commerce points to no evidence supporting its finding that Namdong and INCOM were not producers of subject merchandise. That, however, does not accurately characterize the

standard for satisfying the particular collapsing criterion, *see Allied Tube*, *supra* (re: proof of a negative), or the reviewing standard here. The administrative determination is based on a lack of evidence on the record that these affiliates produced subject merchandise. Commerce's finding with respect to INCOM is based upon the DSMC's own description of INCOM's production. PDoc 235, CDoc 242, at 5. With respect to Namdong, Commerce found no record to demonstrate that the goods it produces were in fact subject merchandise or foreign like product, *id.*, and Commerce verified that all the transactions on Namdong's domestic sales ledger for fiscal year 2004 were for tolling services for Shinhan. *Id.* Reasonable minds may differ over the same set of facts, but it appears Commerce investigated the issue and reasonably construed the available record in making its finding. The court, once again, cannot substitute judgment on the matter even were it to agree with the DSMC on the issue. *See Consolo*, *supra*, 383 U.S. at 620.

C. Determination Not to Collapse Ehwa with Certain PRC Affiliates

Weihai Xingguang Mechanical Ind. Co., Ltd. ("Weihai") and Fujian Ehwa Diamond Industries ("Fujian") are Ehwa's [[ ]] PRC affiliates. They provided inputs used in the production of Ehwa's subject merchandise in Korea. Weihai and Fujian both produced [[ ]], and Ehwa reported [[ ]] from both of these affiliates. The operations of all these entities were intertwined by significant [[ ]] arrangements between them. *See* PDoc 528, CDoc

231, at 64-65; Ehwa's Sec. A QR (Aug. 26, 2005), PDoc 147, CDoc 46, at A-4, A-7 & Ex. A-4; Ehwa's Supp. Sec. A QR (Sep. 29, 2005), PDoc 185, CDoc 56, at SA-6. For the *Final Determination*, Commerce concluded that the AD statute precludes it from collapsing producers across country lines, and it therefore determined not to collapse Ehwa with its PRC affiliates. *See I&D Memo* at cmt. 15, referencing *Stainless Steel Bar from Italy*, 67 Fed. Reg. 3155 (Jan. 23, 2002) (final LTFV determ.), and accompanying issues & decision memorandum at cmt. 8. *See Slater Steels Corp. v. United States*, 27 CIT 1786, 297 F. Supp. 2d 1362 (2003)[11].

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[11] Commerce's reasoning in *Slater Steels*, as restated and sustained by the court at the time, may be reduced to the following: the definition of "normal value" in 19 U.S.C. §1677b(a)(1)(B) is the price of "foreign like product" sales in the home market, in a third country, or constructed value, and the definition of "foreign like product" under 19 U.S.C. §1677(16) is identical or similar merchandise that is "produced" in the "same country" as the subject merchandise; *ergo*, Commerce can only analyze for purposes of collapsing that production that occurs in the same country as the foreign like product or the subject merchandise -- and notwithstanding any cross-border production line. *See* 27 CIT at 1788, 297 F. Supp. 2d at 1364-65. Commerce also gleaned support from the definition of "country" in 19 U.S.C. §1677(3), which does not permit more

The DSMC argue that but for Commerce's conclusion that it is statutorily precluded from collapsing across country lines, Ehwa and its PRC affiliates would meet that test, since Commerce's regulation asks, among other considerations, whether there is "involvement in production and pricing

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than one country from being aggregated and treated as an "association" for purposes of AD proceedings. *See id.*; *see also* 19 U.S.C. 1677(12) ("attribution of merchandise to country of manufacture or production": "[f]or purposes of part I of this subtitle, merchandise shall be treated as the product of the country in which it was manufactured or produced without regard to whether it is imported directly from that country and without regard to whether it is imported in the same condition as when exported from that country or in a changed condition by reason of remanufacture or otherwise"). Commerce emphasized for the *Final Determination* that its regulation makes "clear" that collapsing is relevant to "an antidumping proceeding," which "only involves the subject merchandise of one country", *I&D Memo* at cmt. 15, referencing 19 C.F.R. §351.401(f), and it further stated that when it has used information from two companies to calculate a single weighted-average margin for those companies, it has done so only within the confines of "single proceeding, which involved a single country", *id.*, referencing *Gray Portland Cement and Clinker From Mexico*, 66 Fed. Reg. 14889 (Mar. 14, 2001) (final AD admin. rev. results).

decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers" 19 C.F.R. §351.401(f)(2)(iii). The DSMC point out that the definition of "affiliated persons" in 19 U.S.C. §1677(33) is not limited to any type of geographical location and that Commerce's collapsing regulation only asks whether those affiliates "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. §351.401(f)(1). They also point out that Congress specifically provided for cross-border analysis in several instances such as the "special rule for multinational corporations," which requires, when certain conditions are met, normal value to be determined by reference to the value at which the foreign like product is sold from one or more facilities outside the exporting country. 19 U.S.C. §1677b(d)[12].

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[12] Ehwa argued before Commerce that section 1677b(d) was "inapposite" to the facts of this 12 case because that provision pertains to situations where normal value is determined by being based, in part, on sales in a third country, whereas the *Final Determination* is based entirely on a normal value of home market sales. The *Final Determination* does not rest on such ground, but that may well be the case, as

It is undisputed that this was a "single proceeding" to determine the viability of an AD order on subject merchandise from a "single country" and that the merchandise that is the subject of the investigation consists, at least in relevant part, of Ehwa-exported products of Korea comprised of inputs

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there are three criteria that must be met before section 1677b(d) is invoked: (1) subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in one or more third countries; (2) the market in the country from which the merchandise is exported to the United States is "not viable" because either (a) the foreign like product is not sold for consumption in the exporting country; (b) the aggregate quantity (or value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States; or (c) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price; and (3) the normal value of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the normal value of the foreign like product produced in the facilities located in the exporting country. *See* 19 U.S.C. §1677b(d).

manufactured by Weihai and Fujian and transferred to Ehwa. The DSMC are correct in pointing out that the AD statute does contemplate cross border analysis in certain situations, and that *Slater Steels* does not amount to a blanket prohibition against such analysis in every instance, *see* 27 CIT at 1788, 297 F. Supp. 2d at 1364 ("[*e*]*xcept for* specific enumerated exceptions to the rule, consolidating . . . data across country lines for [AD] investigations is prohibited")[13] (italics added),

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[13] It has been observed that the most "vital" consideration to preserving the integrity of AD 13 orders is the determination of the "country of origin" of "production", not only of subject merchandise but also of the foreign like product. *See E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 375, 8 F. Supp. 2d 834, 859 (1998). In those determinations, the necessity of cross-border analysis is readily apparent in other contexts. For example, the anti-circumvention statute specifically precludes completion or assembly operations -- which are indisputably a part of "production" -- from attaching a different country of origin to subject merchandise. 19 U.S.C. §1677j. Congress has also recognized a state of subject merchandise "exportation from an intermediate country" in which production of foreign like product is also occurring. In that instance, subject to certain exceptions, normal value is to be determined "in" such intermediate country based on that foreign like product. 19 U.S.C. §1677b(a)(3). Thus, under such analyses, the foreign like product that is used for the

but the fact that cross-border analysis is required in certain instances does not render Commerce's broad interpretation of preclusion from "collapsing" "producers" across country lines unreasonable, and the DSMC's arguments do not persuade that calculating a single weighted-average margin that would include Ehwa's PRC affiliates within the ambit of the order pursuant to Commerce's collapsing methodology would be permissible under the AD statute. The DSMC's concerns implicate the whole of the production line, including one that cuts across country borders, but a degree of protection from manipulation of "production" (as Commerce interprets that term) may be afforded in the forms of the anti-circumvention statute, 19 U.S.C. §1677j, as well as the present AD order on diamond sawblades and parts thereof from the PRC from that separate proceeding.

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determination of normal value is not considered "produced" in the "same country" as that in which the subject merchandise has actually been produced -- as otherwise "required" by 19 U.S.C. §1677(16). *And cf.* 19 U.S.C. §1677b(d) (special rule for multinational corporations). In other words, the analyses required by the "exceptions" to which *Slater Steels* alludes can only be achieved without violating the "produced in the same country" mandate of section 1677(16)(A) via cross-border analyses. But, that, perhaps, is merely to restate the obvious.

D. Incidental Issues Implicated By Collapsing

In addition to the foregoing, the DSMC contest the effect of the determination not to collapse Ehwa and Shinhan upon the calculation of separate constructed export price (CEP) offsets and CONNUMs sold but not produced during the POI that were not weight-averaged. These issues being derivative, the foregoing obviates their further consideration.

V. Country of Origin for Finished Diamond Sawblades

Commerce typically uses a three-part "substantial transformation" test to determine a product's country of origin: (1) whether the processed downstream product falls into a different class or kind of product when compared to the upstream product, (2) whether the essential component of the merchandise is substantially transformed in the country of exportation, and (3) the extent of processing in the exporting country. *See I&D Memo* at cmt. 3; *see*, *e.g.*, *Advanced Technologies & Materials Co. v. United States*, 35 CIT __, Slip Op. 11-122 (Oct. 12, 2011) ("*Advanced Tech II*"), at 8. In this instance, Commerce ultimately determined that the place where the segments and cores are joined governs the finished diamond sawblades' country of origin.

The DSMC argue this result is an invitation for circumvention. They contend the first of the above factors clearly supports finding a lack of substantial transformation, in that cores, segments and sawblades were all considered the same "class or kind" of merchandise, *see* Def.'s Br. at 54, and that Commerce

has failed to explain how it could logically make that determination and also find that joining two of those items into the third constitutes a "substantial transformation."

The court again cannot agree Commerce's reasoning was illogical or unsupported by substantial evidence. As in the investigation of subject merchandise from the PRC, Commerce had to make a choice, and it resolved the factual issues by reference to *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 39680 (Oct. 30, 1986) (final LTFV determ.) and *3.5" Microdisks and Coated Media Thereof From Japan*, 54 Fed. Reg. 6433 (Feb. 10, 1989) (final LTFV determ.) ("*Microdisks*"). Commerce found the fact that finished diamond sawblades, segments and cores are all one "class or kind" not dispositive because substantial transformation can occur between upstream and downstream products within the same class or kind of merchandise under investigation. Commerce concluded that the substantial transformation test in such instances is not controlled by whether there is a "change" in the class or kind of merchandise but by what the "essential quality" is that is imparted to the imported merchandise through such transformation, as well as the extent of manufacturing and processing. The DSMC argued that the diamond segments are what give a finished diamond sawblade its essential character, but Commerce concluded

> it appears that neither the cores nor the segments *alone* constitute the essential component of the product under investigation.

> A finished DSB is not *functional* until the segments are attached to the core . . . [and i]t is apparent that even the petitioner recognizes the importance of the attachment process in imparting the essential quality of the finished product. Therefore, given the priority that both the petitioner and a respondent have placed on the importance of attaching cores and segments, the Department finds that the essential quality of the product is not imparted until the cores and segments are attached to create a finished DSB.

I&D Memo at cmt 3 (italics added).

The DSMC here contend Commerce never explained what qualities or quality it deemed essential in this instance. If that is technically true, it is not fatal to the agency's determination. Commerce could not tell whether segments or cores impart the "essential quality" of a finished diamond sawblade, but it found that the attachment process governs when that essential quality -- whatever it is -- comes into being, *i.e.*, when the functional finished product is created. The DSMC regard "essential quality" as extant in the diamond segments, not the cores. That may be true, but Commerce regarded "essential quality" as a function of the "finished" product. The DSMC contend this "finding" has the potential to "turn[ ] the entire concept of 'substantial' transformation on its head", DSMC Br. at 38 n.9, referencing *National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993) (finding that finishing operations applied to

hand tool forgings did not substantially transform the forgings, as the forgings were in the basic shape of the finished tool, and thus could not have been processed except into finished tools), but that is not this case. Although the court can aid resolution of esoteric factual disagreements, it has not been so tasked in the AD context, *see* 19 U.S.C. §1516a(b)(l)(B)(i), and cannot weigh in.

In accordance with *EPROMs* and *Microdisks*, Commerce also considered the extent of processing and found that both segment manufacturing and the attachment process required "substantial capital investment[s] and great technical expertise." *I&D Memo* at cmt 3. Commerce determined that this finding did not alter its conclusion that the country of origin is determined by the location where segments and cores are attached to create a finished product. The DSMC would here juxtapose the record of production costs for segments, which it argues typically represent approximately [[ ]], against the process of joining segments to the blade, which is typically a much smaller percentage of production cost (as low as [[ ]]), *see* CDoc 157, PDoc 412 at 8 & Exhibit 1; CDoc 231, PDoc 528 at 46, to argue that the agency has not adequately explained how finding that both segment processing and core-segment-attachment processing require substantial capital investments and technical expertise supports its country of origin determination, especially when considered in conjunction with the "same class or kind" of merchandise factor of the substantial transformation test, but Commerce

appears to have considered this production cost point, as well as the numbers of workers employed in both processes, in "continu[ing] to find that the country of origin is determined by the location where segments and cores are attached to create finished DSB." *I&D Memo* at cmt 3. In the final analysis, Commerce reached a country-of-origin conclusion that accorded with both parties' arguments on the "priority" of the attachment process in the making of a finished diamond sawblade. Here again, the court cannot re-weigh the evidence and substitute judgment on these issues for that of Commerce.

VI. Section E Questionnaire Exemptions

Commerce sends out "Section E questionnaires" to request information pertaining to respondents' value added in the United States via further manufacturing or assembly of subject merchandise prior to delivery to unaffiliated United States customers. *See Antidumping Manual*, Ch. 4, §III.A.5. (Dep't Comm. 2009); *see*, *e.g.*, *Kawasaki Steel Corp. v. United States,* 24 CIT 684, 686, 110 F. Supp. 2d 1029, 1031-32 (2000). A respondent may obtain an exemption from Section E questioning if it persuades Commerce that its United States sales of further manufactured subject merchandise constitute a small percentage (typically less than 5 percent) of its overall United States sales. *See*, *e.g.*, *Certain Cold-Rolled Carbon Steel Flat Products From Belgium*, 67 Fed. Reg. 62130 (Oct. 3, 2002) (final LTFV determ.) and accompanying issues and decision memorandum (Sep. 23, 2002) at cmt. 1. Ehwa and Shinhan reported further manufacturing operations in the United States and requested Section

E exemption after claiming such sales constituted a small percentage of total sales. DSMC's opposition to such exemption was unavailing, and Commerce issued no Section E questionnaires to them.

A. Exhaustion

The DSMC's objections before Commerce are in the form of several filed submissions. CDoc 50, PDoc 157 (Sep 7, 2005); PDoc 164, CDoc 53 (Sep. 9, 2005); PDoc 213, CDoc 71. These argue that Section E questionnaires were necessary prior to the case briefing stage of the investigation, but Commerce either rejected or ignored the DSMC's objections. The DSMC then raised claims in its administrative case brief arising from the non-issuance of Section E questionnaires, namely the impact this had on adjustments to United States net price and CEP profit to reflect further manufacturing costs. *See*, *e.g.*, PDoc 528, CDoc 231, at 35 ("under the statute, Commerce *must* require respondents to place all necessary information on the record in order to calculate 'Total Expenses' including further manufacturing expenses") (DSMC's emphasis).

Commerce and the defendant-intervenors here argue that the DSMC failed to exhaust their administrative remedies over the issue of Section E questionnaires issuance. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). The DSMC respond that they did indeed pursue those claims, albeit in the context of claims that arose as a necessary consequence of Section E questionnaire non-issuance,

and that the issue thus remained "live" in their administrative brief.

The court will require the exhaustion "where appropriate," 28 U.S.C. §2637(d), which is generally regarded as a "strict" requirement. *See*, *e.g.*, *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). In light of the current *status quo*, the court can agree with the defendant to the extent that the DSMC would have better served its cause had it more directly and forcefully described their objection in their administrative case brief, but this is not an instance where a party did not even attempt to raise its argument before the agency. *Cf. L.A. Tucker Truck Lines*, 344 U.S. at 35 ("Appellee did not offer . . . any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding"); *Corus Staal*, 502 F.3d at 1378 ("Corus acknowledges that it failed to raise any issue relating to the duty absorption issue in the [administrative] case brief"); *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 453 (1991) ("[r]elying on the futility exception as a defense, Plaintiff nonetheless conceded at oral argument that Commerce never refused to hear its contentions"). Commerce's immoveable stance on the DSMC's repeated objections to the Section E questionnaire exemptions is apparent from the record, and exhaustion does not require Sisyphean repetition or exactitude in wording in order that an objection be noted and preserved. *Cf.*, *e.g.*, *L.A. Tucker Truck Lines*, 344 U.S. at 35; *Corus Staal*, 502 F.3d at 1379; *Budd Co.*, 15 CIT at 453.

An argument satisfies the exhaustion requirement "if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 761, 347 F. Supp. 2d 1326, 1352 (2004), citing, *inter alia*, *Hormel v. Helvering*, 312 U.S. 552 (1941). Here, the DSMC did not "abandon" their objection in their administrative brief, it is implicit in their argument that all U.S. further manufacturing cost information must be placed on the record in order to accurately adjust U.S. net price and CEP profit. *See infra*, section VII. Therein couched, their brief presented "all arguments that continue[d] in the submitter's view to be relevant to the Secretary's final determination or final results" and "includ[ed] any arguments presented before the date of publication of the preliminary determination or preliminary results". *See* 19 C.F.R. §351.309(c)(2). Since the record adequately reflects the DSMC's attempt to rectify Commerce's stance on Section E questionnaires issuance, the underlying record is adequate for judicial review.

B. Merits

Commerce indicated during the original investigation that "if we issue an [AD] order in this case, we expect to examine these issues during the first administrative review conducted in this proceeding if sales are made under these same conditions." *E.g.*, PDoc 199, CDoc 64, at 2. The DSMC interpret this as follows:

> When the exemptions were granted, the Department merely postponed examination of this issue to the first administrative review. Ehwa Exemption, PR 199, CR 64, at 2; Shinhan Exemption, PR 200, at 2. In so doing, the Department seems to have acknowledged the appropriateness of examining the respondents' further manufactured sales, but for unarticulated reasons, chose not to conduct the examination at that time. Although the DSMC repeatedly objected to the exemptions, there was, arguably, no real harm to the DSMC *at that time*, in light of what w[ere] likely to be substantial dumping margins. Now, however, the *status quo* has changed. The margins at issue are now *de minimis*, and failure to raise them above *de minimis* in this appeal will result in liquidation of relevant entries without duties, . . . a prospect that would cause irreparable harm to the domestic diamond sawblades industry. Therefore, to the extent that the Department's failure to conduct a full and appropriate original investigation is now contributing to serious prejudice to one of the parties, including the potential revocation of the [AD] order, the DSMC respectfully submits that equity counsels in favor of remanding this decision for reconsideration.

DSMC 56.2 Br. at 19-20 (citations omitted in part, italics in original).

In their reply brief, the DSMC argue that an agency decision may be deemed "unreasonable" if the decision has "entirely failed to consider an important aspect of the problem". *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,463 U.S. 29, 43 (1983). They argue the lack of Section E questionnaires from respondents was unreasonable because Commerce relied only on Ehwa's and Shinhan's representations that further manufactured sales comprised only a small volume of U.S. sales. *See* PDoc 199, CDoc 64, at 1-2; PDoc 200 at 2. The DSMC argue that when sales value is taken into account, the record shows otherwise[14]. DSMC 56.2 Br. at 18, referencing PDoc 213, CDoc 71, at 2.

"Full" and "appropriate" (*see* above) are not synonymous, and the court interprets Commerce's statement not as an admission of error in not issuing Section E questionnaires but rather in light of the strict time constraints imposed on the investigation. *See, e.g.*, 19 C.F.R., Part 351, Annex III (2005). The administrative expedient of disregarding U.S.-affiliate

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[14] One of the respondents reported a percentage derived by dividing the total value of segment exports by the total of U.S. sales of Korea-origin products plus Korean origin segments. The DSMC argued that this figure understates, and that a significantly higher percentage appears if based on the total sales value of U.S. manufactured finished products divided by the total U.S. sales of Korea-origin products plus the sales value of U.S. manufactured finished products.

sales amounting to less than five percent is arguably authorized by statute, *cf.* 19 U.S.C. §1677a(e) (requiring at least "a sufficient quantity of sales to provide a reasonable basis for comparison"), and was at least based upon the respondents' representations at the time, but with time Commerce's unexplained reaction to the DSMC's objection has taken on new life. At this point, front and center perhaps, the effect of the Section E questionnaire exemptions, and the consequent *ipso facto* absence of further manufacturing cost information (*see infra*, section VII), may very well be case determinative in light of the administrative decision to revoke the AD order as a result of the section 129 determination requiring recalculation of the margins without zeroing methodology. *See supra*, section I; *see also* 36 CIT ___, Slip Op. 12-46 (Mar. 29, 2012). Ehwa argues that is beside the point, since it raised the zeroing methodology issue in its administrative case brief, and the DSMC were on notice

> from the outset that the Department ultimately would conclude that Ehwa was entitled to a *de minimis* margin in this investigation, [and therefore] the 'harm' to Petitioner arising from the Department's other subsidiary conclusions in 2006 (*e.g.*, failure to require that Ehwa complete a Section E response) was no different from the harm today. This being the case, there has been no change in the *status quo* and no reason for this Court to consider equitable claims.

Ehwa Resp. at 22-23.

The *I&D Memo*, however, ultimately dismissed the zeroing argument as "premature," since the URAA section 123 determination to which Ehwa alludes (*see infra* section XI) had yet to reach finality, and thus the argument above is a stretch as to notice of what "would" be the *status quo* at this point. If the *status quo* had truly remained unchanged, the court might come to a different conclusion, but it has now been altered, Commerce is now less constrained by statutory time limits, and Commerce did express expectation that the issue of Section E questionnaire issuance would be revisited in the future. Shinhan contends there is no need, because the exemptions were granted through calculation of the relevant percentage based solely on volume figures and in accordance with Commerce's longstanding practice[15], but even if that is so, the *Final Determination* does not address the DSMC's argument that Commerce's prior Section E practice should not be construed as

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[15] *See* Shinhan's Resp. at 25. *Cf. Pure Magnesium from the Russian Federation*, 66 Fed. Reg. 49347 (Sep. 27, 2001) (final LTFV determ.) and accompanying issues and decision memorandum (Sep. 14, 2001) at cmt 10; *Hot Rolled Flat Rolled Carbon Quality Steel Products from Japan*, 64 Fed. Reg. 8291, 8295 (Feb. 19, 1999) (prelim. LTFV determ.); *Coated Groundwood Paper from Finland*, 56 Fed. Reg. 56363, 56365, 56371 (Nov. 4, 1991) (final LTFV determ.); *Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan*, 55 Fed. Reg. 34585, 34588, 34597 (Aug. 23, 1990) (final LTFV determ.).

applicable on a record of allegedly "substantial" further-manufacturing-added value to the merchandise, which the DSCM contends is the case here, *see* CDoc 64, PDoc 199 at 1-2; PDoc 200 at 2, as well as the DSMC's allegation of an understated percentage of Ehwa's further manufactured sales that were based on [[ ]], *see id.*, as well as the DSMC's argument on the fact that the respondents argued before the U.S. International Trade Commission that their U.S. further manufacturing were of such significance that they should be considered part of the domestic industry, *see generally* PDoc 260, CDoc 88. Commerce's full consideration of these objections is necessary in order to reach a final and just decision on this matter, and the determination not to issue Section E questionnaires will therefore be remanded to address the DSMC's concerns.

In addition, because Commerce has requested remand in order to consider aspects of Ehwa's ISEs that apparently entails additional fact finding, and because soliciting and analyzing responses to a request for Section E information would not appear to add onerous hardship to the parties' burdens, and also since "the basic purpose of the statute [is] determining . . . margins as accurately as possible," *see Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990), Commerce is not precluded from soliciting Section E responses upon remand. For the analysis, Commerce is also requested to explain its alleged policy of exempting Section E questionnaire responses based on a respondent's claim of sales *volume*, when

Section E questionnaires are purportedly for the purpose of eliciting information about further manufacturing or assembly *value* added in the United States.

VII. Adjustments to U.S. Net Price and CEP Profit

The decision not to solicit Section E questionnaire responses from Ehwa and Shinhan impacts the deduction of "further manufacturing costs" from Commerce's constructed export price ("CEP") and CEP profit calculations for them. *See I&D Memo* at cmt. 5 (*i.e.*, on the basis that Ehwa and Shinhan were "excused . . . from reporting their further manufactured sales"). Commerce took the position that "implicit" in the additional statutory adjustments to CEP provided in 19 U.S.C. §1677a(d)(2) is that the "further manufacturing costs to be deducted actually [have been] incurred with respect to the particular transaction providing the basis for the CEP starting price." *Id.* As above indicated, the fact that Section E questionnaire responses were not solicited is used as cover for the fact that further manufacturing cost information that may "actually" have been incurred is not on the record. The DSMC contend that section 1677a(d)(2) is unambiguous in directing Commerce to reduce "the price used to establish" CEP by "the cost of *any* further manufacture or assembly (including additional material and labor)" (italics added). *Micron*, *supra,*"agree[s] that the word 'any' necessarily includes 'all'. . .", 243 F.3d at 1308, but the issue of Section E questionnaire non-issuance, implicating this issue, is being remanded, above, and the court will defer to Commerce's reasonable interpretation of

statute and regulation. *Cf.* 243 F.3d at 1308 (". . . the real question here is 'all of what'"?) *with Antidumping Manual*, Ch. 7, §III.C.3.a ("[a]s a rule of thumb, if the expense is incurred in the United States by the affiliated importer or the exporter, it should be deducted").

VIII. Non-Application of the Major Input Rule

The DSMC also contend Commerce erred in not fully addressing its arguments or validly explaining its determination not to apply the "major input rule," 19 U.S.C. §1677b(f)(3), to Ehwa's and Shinhan's purchases from affiliated suppliers. The "rule" is that if the production of subject merchandise involves transaction of a "major" input from one affiliate to another and Commerce has "reasonable grounds to believe or suspect" that the amount reported as the value of the input is below the cost of production, Commerce may calculate the value of the input on the basis of the information available regarding its cost of production, if such cost exceeds the market value of the input (as determined under subsection 1677b(f)(2)). 19 U.S.C. §1677b(f)(3). Commerce interprets the statute as permitting valuation of an affiliate party's major[16] input based on the highest of:

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[16] Designed to evaluate whether the sale of a major input was made at arm's-length, the 16 determination of whether an input is "major" is necessarily made on a case by case basis. *See Huvis Corp. v. United States*, 32 CIT 845, 845 (2008); *Torrington Co. v. United*

(1) the actual transfer price for the input; (2) the market value of the input; or (3) the cost of producing the input. 19 C.F.R. §351.407(b). Towards that end, Commerce will consider both the percentage of an individual input purchased from affiliated parties and the percentage each individual input represents in relation to the product's total cost of manufacturing, among other factors in that determination. *See I&D Memo* at cmt. 10; *see*, *e.g.*, *Stainless Steel Plate in Coils from Belgium*, 70 Fed. Reg. 72789 (Dec. 7, 2005) (final AD admin. review results) at cmt 1.

During the investigation, the DSMC argued to Commerce that the record shows that Ehwa owns [[ ]] of Weihai, its PRC subsidiary, that the inputs in question are major, *i.e.*, that the [[ ]] purchased from Weihai were significant in quantity, accounting for [[ ]] sold in the home market during the POI, and significant in total cost, accounting for [[ ]] percent thereof when calculated on the basis of the DSMC's estimate of the actual value of the [[ ]] rather than on the [[ ]] Ehwa used for the calculation, and that Commerce has acknowledged that prices from an NME producer are inherently tainted because they are not based on market-determined factors. *See* DSMC's Case Br., PDoc 528, CDoc 231, at 25-29; Major Input Allegation re Ehwa (Dec. 12, 2005), PDoc 295,

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States, 25 CIT 395, 407- 08, 146 F. Supp. 2d. 845, 865 (2001); *see also SAA* at 838, 1994 U.S.C.A.N. at 4174-75.

CDoc 103, at 5-6; *see also* Ehwa's Second Supp. Section A QR at Ex. 3 (Nov. 21, 2005), PDoc 257, CDoc 87; Ehwa's Section D QR at D-5, D-6 (Nov. 21, 2005), PDoc 256, CDoc 90; Rebuttal Br., PDoc 515, CDoc 217, at 10; Import Admin. Policy Bull. No. 94.1 (Mar. 25, 1994); *I&D Memo* at cmt. 12 ("the Act generally assumes that prices for goods produced in NMEs cannot be relied upon for purposes of a price-based analysis"). Similarly, the DSMC pointed out that Shinhan sources [[ ]] from TPC, [[ ]] in the form of [[ ]] from TPC and Namdong, [[ ]] through TPC, and [[ ]] from Qingdao Shinhan. *See* Major Input Allegation re Shinhan (Dec. 12, 2005), PDoc 292, CDoc 105, at 2. The DSMC thus urged Commerce to value such inputs using the same surrogate value factors of production analysis Commerce uses in determining normal value in non-market economy investigations. *See* 19 U.S.C. §1677b(c).

Commerce agreed with the DSMC in part, and adjusted the respondents' purchases from affiliated suppliers to the higher of the reported transfer price or market value. In passing, Commerce noted that 19 U.S.C. §1677b(f)(2) requires adjusting input cost to account for below market price transfer prices between affiliates, so for some of the inputs it used the respondent's cost of producing the input as a market surrogate. But, it also "determine[d] that inputs purchased by Ehwa and Shinhan from affiliates are not significant in relation to the total costs incurred to produce subject merchandise and accordingly, are not major inputs". *I&D Memo* at cmt. 10.

The DSMC argue Commerce's reasoning is conclusory and does not address their substantive arguments. Responding, the defendant proffers percentages of the respondents' total cost of manufacturing accounting for the affiliated inputs. It contends that Ehwa's purchase of the input [[ ]] accounted for only [[ ]] of the total cost of manufacturing for all subject merchandise and that Ehwa's purchase of the input [[ ]] only accounted for [[ ]] of the total cost of manufacturing for all subject merchandise Def.'s Br. at 43, referencing Ehwa's Supp. Sec. D (Jan. 17, 2006), CDoc 138 at 3-4. Regarding Shinhan, the defendant points out as fact that Shinhan sourced from Technoplus [[ ]] percent of its [[ ]], [[ ]] percent of its [[ ]], [[ ]] percent of its [[ ]], and [[ ]] percent of its [[ ]], which made up only [[ ]] percent, [[ ]] percent, [[ ]] percent, and [[ ]] percent, respectively, of the cost of manufacturing. *Id*, referencing Shinhan's Section D Supp. QR, CDoc 132 at App. S-57. It also points out that the tolling services provided by Technoplus and [[ ]] accounted for [[ ]] percent and [[ ]] percent, respectively, of all the tolling services purchased and [[ ]] percent and [[ ]] percent, respectively, of the total cost of manufacturing. *Id.*, referencing *id*. It further points out that the carbon and steel frames purchased from [[ ]] accounted for [[ ]] percent of Shinhan's total carbon and steel frame purchases, but represented only [[ ]] percent and [[

]] percent, respectively, of the total cost of manufacturing. *Id*., referencing *id*.

The DSMC reply that such reasoning is *post hoc*[17] and that to the extent the calculations are based on unadjusted or non-market prices they therefore conflict with Commerce's expressed opinions on such matters. *See supra* & *I&D Memo* at cmt. 10 ("the transfer prices between the respondents and their affiliates could be unreasonably low due to their affiliation") & cmt. 12 ("the Act generally assumes that prices for goods produced in NMEs cannot be relied upon for purposes of a price-based analysis"). Further, they contend the calculations do not address their substantive point with respect to Ehwa that when the cost of the [[ ]] is adjusted to reflect the actual value of the [[ ]] (as based on the [[ ]] of another [[ ]] manufacturer) rather than "unrealistically low" (according to the DSMC) transfer prices, the [[ ]] represent [[ ]] percent of Ehwa's total cost of manufacturing. *See* PDoc 295, CDoc 103, at 6. At this point, the court consider the DSMC's arguments unrebutted.

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[17] *See*, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168-69 (1962) ("courts may not accept . . . *post hoc* rationalizations for agency action"); *NEC Home Electronics, Ltd.*, 54 F.3d at 743 (the court is "powerless to affirm an administrative action on a ground not relied upon by the agency") (citation omitted).

Commerce also concluded that the inputs and services received from Shinhan's affiliates do not constitute a significant percentage of Shinhan's total cost of manufacturing. *See* Def.'s Br. at 43-44. This was apparently based upon Commerce's examination of Shinhan's purchase of these inputs at verification, at which it verified that Shinhan had purchased them at above the suppliers' costs of production even after adjusting for G&A expenses. *See* Shinhan Cost Verification Report, CDoc 193, at 28-29; Shinhan's Supp. Sec. D QR (Jan. 11, 2006), CDoc 132, at App. S-57. The DSMC contend that in order to reach this conclusion, Commerce again had to have used the transfer prices that were supplied by Shinhan in its supplemental Section D questionnaire response. *See* Def.'s Br. at 44. The DSMC contend that although Shinhan claimed that the transfer prices reflected market prices, it provided no documentation to support that claim. *See* CDoc 105, PDoc 292 at 2. They reiterate that Commerce recognized that transfer prices between Shinhan and its affiliates are not a valid basis for comparison, and they also argue that even based upon Commerce's calculated percentages at least some of Shinhan's purchases from affiliates should have been considered "major" inputs, *e.g.,* the tolling services provided by TPC accounted for [[ ]] percent of Shinhan's total cost of manufacturing, *see* Def.'s Br. at 44, and that Commerce in the past has conferred major inputs status to material goods that constitute as little as two percent of the total cost of production of a finished good. *See Large Newspaper Printing Presses and Components Thereof, Whether*

Assembled or Unassembled, from Japan, 61 Fed. Reg. 38139, 38162 (July 23, 1996) (final LTFV determ.).

The defendant characterizes the DSMC's points as an invitation to re-weigh the evidence, and that Commerce in fact considered the inputs' *per*-affiliate percentages and cost ratios based on market prices for the inputs and each company's total cost of production ("COP"). The DSMC's points, however, present not a "choice of two fairly conflicting views" but substantial contradiction of Commerce's declaration and its precedent, and their points therefore detract from the reasonableness of the *Final Determination* as it stands. The issue as a whole requires fuller proof on the record by way of fuller explanation or reconsideration. If on remand Commerce continues to find 19 U.S.C. §1677b(f)(2) applicable, it shall further state why the respondents' cost of producing the input is a "reasonable surrogate" for the market price of the disregarded transaction(s) for which it found no comparative unaffiliated sales to use as a market price for comparison to the transfer price. *Cf Antidumping Manual*, Ch. 9, §II.D.1. ("[i]f a transaction is disregarded . . . and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated").

IX. Non-Adjustment of Costs of Purchases From Unaffiliated Non-Market Economy Suppliers

The DSMC also take issue with the fact that Commerce refused to adjust respondents' reported

costs for inputs purchased from unaffiliated NME suppliers. *See I&D Memo* at cmt. 12. Commerce will "normally" use the costs as recorded in the respondent's books and records in calculating COP if: (1) those records are kept in accordance with the respondent's home country's generally accepted accounting principles, and (2) those recorded costs reasonably reflect the costs associated with the production and sale of the subject merchandise. 19 U.S.C. §1677b(f)(1). *See Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 9041, 9043 (Feb. 24, 2005) (final LTFV determ.). For an NME producer, 19 U.S.C. §1677b(c) requires a factors-of-production based methodology. Consequently, Commerce will not use a price-based method for such producers unless the record evidence demonstrates that a market-oriented industry exists. *See* 19 C.F.R. §351.408. For the *Final Determination*, Commerce stated that it had

> reviewed the relative percentages that these inputs represent of the respondent's COP and compared the NME prices to either market based prices or the cost of producing the input. We have determined that the use of such prices does not result in an unreasonable reflection of the cost associated with the production and sale of the merchandise. Thus, while we may consider this issue in future cases, for the final determination in this case we have not restated the prices recorded by respondents for inputs purchased from NME suppliers.

I&D Memo at cmt. 12.

Defending this conclusion, the government points to the example of Ehwa's purchases of [[ ]] from [[ ]], which constituted only [[ ]] percent (by volume) and [[ ]] percent (by value) of Ewha's total purchases of cores during the period of investigation and only [[ ]] of Ehwa's total costs. Def's Resp. at 46, referencing Ehwa Supp. Sec. D QR, PDoc 159, CDoc 133 (Jan. 11, 2006), at SD-3; Ehwa Second Supp. Sec. A QR, PDoc 257, CDoc 87 (Nov. 21, 2005), at 9. It argues that when considering the record evidence, Commerce reasonably determined that Ehwa's inputs from unaffiliated NME suppliers were not major and did not result in an unreasonable reflection of Ehwa's COP for subject merchandise. *Id.*, referencing *Consolo*, *supra*, 383 U.S. at 620.

The DSMC contend that Commerce's calculation results from using the NME values of the sourced inputs, and they remind that elsewhere Commerce has recognized the inherent distortions in NME transfer prices, that the record shows that prices from NME suppliers in this investigation were significantly below market prices insofar as Commerce verified that both the market price and self-production costs for the inputs purchased from such NME suppliers [[ ]], PDoc 515, CDoc 217, at 10, and that the conclusion that the "amount" of inputs sourced from unaffiliated NME suppliers was "negligible" is itself undercut by the referenced fact that Ehwa purchased [[ ]] by value of its [[ ]] from one unaffiliated NME supplier.

Commerce did not determine that the "amount" was negligible but "that any distortion they may create as percentage of the respondents' total COP is negligible." *I&D Memo* at cmt. 12. Nonetheless, the DSMC's allegation directly contradicts Commerce's simple declaration of comparison of the NME prices of the inputs to market-based prices or the COP of the input. Since the prices of inputs sourced from *all* of Ehwa's NME suppliers are indeed relevant, and since the determination is that the NME prices themselves do not unreasonably reflect the cost associated with the production and sale of the subject merchandise, a fuller explanation of, and/or redetermination on, those comparisons upon remand would assist the court's and parties' understanding. *See supra*.

X. Use of Facts Otherwise Available or Adverse Inferences

The DSMC also contest Commerce's calculation of Shinhan's financial expense rate. Shinhan provided as part of its Section A questionnaire responses the audited unconsolidated financial statements for itself and each of its affiliated companies. *See* Shinhan's Section A QR, CDoc 47 at Exs. A-11 to A-16. Commerce instructed Shinhan via the the Section D questionnaire to calculate its financial expense based on the consolidated audited fiscal year financial statements of the highest consolidation level available. *See I&D Memo* at cmt. 44. At verification, Commerce "discovered that Shinhan had not provided the financial statements of its parent company TPC and had not reported its financial expense rate as instructed, and Commerce requested Shinhan to

submit TPC's consolidated financial statements. *See* Shinhan's Verification, PDoc 312 (Apr. 4, 2006). Shinhan complied. Although Commerce's verification report provides the caveat "[t]his report does *not* draw conclusions as to whether the reported information was successfully verified, and further does *not* make findings or conclusions regarding how the facts obtained at verification will ultimately be treated," Shinhan Cost Verification Report, CDoc 193 at 1 (emphasis in original), Commerce recalculated Shinhan's expense ratio based on the newly submitted information, and the *I&D Memo* holds as sufficient that "[d]uring the verification, the Department analyzed TPC's consolidated financial statements and compared them to TPC's unconsolidated financial statements".

The DSMC contended the situation compelled the use of facts otherwise available or adverse inferences under 19 U.S.C. §1677e, arguing in their administrative rebuttal brief that Shinhan's late filing had deprived them of any meaningful opportunity to analyze and comment upon the financial statements. *Cf.* PDoc 255, CDoc 89 (Nov. 22, 2005). After noting that the argument was improperly raised by way of rebuttal, Commerce rejected it on the merits by reasoning that it had the authority to request and accept Shinhan's information for TPC pursuant to 19 C.F.R. §351.301(b)(1). "While we agree with the petitioner that Shinhan should have provided these financial statements when initially asked, we do not believe Shinhan intentionally failed to do so in an effort to impede the investigation. Accordingly, we do

not deem it appropriate to resort to facts available with regard to calculating the interest expense rate for Shinhan." *I&D Memo* at cmt. 44.

There are two distinct parts of 19 U.S.C. §1677e that respectively address two distinct circumstances of administrative receipt of less than the full and complete facts needed to make a determination. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). In either circumstance, "Commerce first must determine that it is proper to use facts otherwise available before it may apply an adverse inference." *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) (citation omitted). To do so, Commerce must follow the statutory outline governing the propriety of that determination. The first part, of section 1677e, subsection (a) ("In general"), provides that if --

> (1) necessary information is not available on the record, *or*
>
> (2) an interested party or any other person--
>
> > (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
> >
> > (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> the administering authority and the Commission *shall*, *subject to section 1677m(d)* of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. §1677e(a) (italics added).

Commerce's regulation interpreting the above provisions provided (during the investigatory proceeding) in relevant part as follows:

> (a) Introduction. The Secretary *may* make determinations on the basis of the facts available *whenever* necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information.

19 C.F.R. §351.308 (2005--2006) (italics added).

The DSMC emphasize that the Court of Appeals for the Federal Circuit stated "[t]he mere failure of a respondent to furnish requested information -- for any reason -- *requires* Commerce to resort to other sources of information to complete the factual record on which

it makes its determination". *Nippon*, 337 F.3d at 1381 (italics added). The DSMC contend that whether Commerce believed that Shinhan had not significantly impeded the investigation, or that the necessary information was (eventually) on the record, Shinhan failed to provide information by the deadlines for submission of its Section D questionnaire response in the form and manner requested by Commerce. DSMC Reply at 19, referencing 19 U.S.C. §1677e(a)(2)(A)&B).

The argument, in effect, is that whenever, at a particular point in time, there is less-than-perfect compliance with an administrative request for information, resort to facts otherwise available is required in that circumstance. *See Nippon*. 19 C.F.R. §351.308 also appears to support the proposition. But, the relevant and operative point in time for determining whether "necessary information is not available on the record" is at that point in time when Commerce must "use the facts otherwise available in *reaching* the applicable determination", 19 U.S.C. §1677e(a) (italics added), not "whenever" the necessary information is not available on the record.

Be that as it may, 19 C.F.R. §351.301, the regulation governing time limits for submission of factual information, provided in relevant part as follows during the investigation:

> (b) *Time limits in general*. Except as provided in paragraphs (c) and (d) of this section and §351.302, a submission of factual information is due no later than:

(1) For a final determination in . . . an antidumping investigation, seven days before the date on which the verification of any person is scheduled to commence, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed[.]

* * *

(c) *Time limits for certain submissions*--

* * *

(2) *Questionnaire responses and other submissions on request*.

(i) Notwithstanding paragraph (b) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.

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

19 C.F.R. §351.301(b)&(c) (2005--2006) (italics added in part).

And, as noted, Commerce, relied on the latter part of subsection (b)(1), above, to find that necessary information was not missing from the record; thus, the information concerning TPC was simultaneously "discovered" missing and "requested" by Commerce at verification. Such an interpretation obviates, or obfuscates, the fact that the information had been requested from Shinhan at an earlier point in time, and had been due in accordance with the first clause of section 351.308(a) as well as subsection 351.301(c)(2)(ii), governing written requests.

A failure to provide timely, mannerly or formally factual submissions is "subject to" the "deficient submissions" provision of 19 U.S.C. §1677m(d). This provision curtails the ability to reject information that is necessary for the administrative record and has otherwise been properly submitted, subject to the following conditions. When Commerce makes any of the enumerated "final" determinations in section 1677m(e) (including the determination at bar), Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established" by Commerce if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by Commerce

with respect to the information, and (5) the information can be used without undue difficulties. 19 U.S.C. §1677m(e). In addition, 19 U.S.C. §1677m(d) requires that from the time Commerce determines that a response to a request for information does not "comply" with its prior request, it must "promptly" inform the person submitting the information of the nature of the deficiency and provide an opportunity to remedy or explain the deficiency "in light of the time limits established for the completion" of the administrative proceeding. The statute provides Congress' expectation of how the unexpected discovery of information missing from the record is to be addressed, whether at verification or otherwise. And, Commerce is to be accorded "substantial" deference in the reasonable interpretation of the AD statute and its own regulations. *See*, *e.g.*, *Torrington Co. v. United States*, 156 F.3d 1361, 1363 (Fed. Cir.1998).

However, administrative discretion, over the "required" use of facts otherwise available in the face of less-than-perfect compliance with a request for information, is not unrestricted. Commerce cannot, of course, engage in partisanship, *cf.*, *e.g.*, 19 C.F.R. §351.301(c)(2) (2005) (Commerce "may" request any person to submit factual information at any time during a proceeding and "will" specify in its written request for a written response to a questionnaire or for other factual information that failure to submit requested information in the requested form and manner by the date specified "may" result in use of the facts available), nor can it deprive a party of meaningful opportunity to analyze and comment upon

any significant new factual development, *cf id. with* 19 C.F.R. §351.301(c)(1) (2005) (providing ten days after submission of factual information for a non-submitter to rebut) *and with China Kingdom Import & Export Co., Ltd. v. United States*, 31 CIT 1329, 1350, 507 F. Supp. 2d 1337, 1357 (2007) (noting that defendant's argument that verifying and using substitute information "would be unfair to the petitioners and other interested parties in the proceeding by depriving them of an opportunity to meaningfully comment"). The "discovery" of any necessary factual material that had been missing from the record to that point necessarily triggers a section 1677e(a)(1) analysis, in order that the record should reflect why the information was missing, and regardless of whether the information is subsequently deemed acceptable for the record and proper for consideration.

Here, Commerce stated that it "do[es] not believe Shinhan intentionally failed to [disclose] in an effort to impede the investigation," thus providing explanation, albeit cursory, that might in some context satisfy section 1677e(a)(2)(C). But Commerce does not provide further context or commentary to satisfy section 1677e(a)(2)(B), and the record is reviewably vague as to what called Commerce's attention to Shinhan's non-provision of TPC's consolidated financial statements. *Cf.* PDoc 312 at 3 ("[a]t verification, we discovered that SDC's parent, TPC[,] prepared consolidated financial statements for the year end 2004"). It is undisputed that Commerce "instructed Shinhan to calculate its financial expense based on the consolidated fiscal year financial

statements of the highest consolidation level available," and that "Shinhan did not provide the financial statements of its parent company (TPC), which were the highest level of consolidated financial statements." Def.'s Br. at 47. Was it the case that TPC had not yet prepared consolidated financial statements by the time Shinhan submitted its responses to Commerce's questionnaire requests? If TPC had, then even if Commerce's Section D request to Shinhan could reasonably be construed as expressing patent ambiguity regarding the information requested, the DSMC here are no less correct that Commerce's acceptance and incorporation of TPC's consolidated financial statements into the *Final Determination* without addressing each relevant section 1677e(a) factor would appear to be an abuse of discretion and therefore not in accordance with law: the burden would have been on Shinhan to seek clarification prior to responding in that circumstance. But if, as a result of its "discovery" of the missing information at verification, Commerce concluded that its prior Section D request had presented some reasonably latent or inconspicuous ambiguity that was revealed only in light of Shinhan's prior response(s) to the question(s) posed (*i.e.*, Shinhan's interpretation of the questions asked could be construed as reasonable and therefore excusable), and that the failure to produce TPC's consolidated financial statement was unintentional and inadvertent, then the request therefor at verification would fall squarely within 19 U.S.C. §1677m(d), and the ultimate conclusion Commerce reached might not be unreasonable. As the court cannot discern which is

the circumstance at bar, it requests guidance via reconsideration on remand.

In addition, the DSMC vociferously argue that the circumstance called for application of adverse inferences and that Commerce must address the statutory standard for its application -- whether the respondent failed to cooperate by not acting to the best of its ability regardless of motive or intent; *see Nippon Steel Corp.*, 337 F.3d at 1383 -- including examination in accordance with agency practice of the extent to which the respondent may benefit from its own lack of cooperation. *See Gourmet Equipment (Taiwan) Corp. v. United States*, 24 CIT 572, 577 (2000) ("Commerce is to consider the extent to which a party may benefit from its own lack of cooperation"), citing *SAA* at 870, 1994 U.S.C.C.A.N. at 4199. Since Commerce must first determine whether resort to facts available is appropriate, further discussion of that contention is here deferred, although Commerce may choose to address it on remand.

XI. Use of Zeroing

The defendant-intervenors' Rule 56.2 motions for judgment focus again on Commerce's use of zeroing to argue it was unreasonable for Commerce not to have determined that the investigation was "pending" for purposes of the applicability of Commerce's change of policy on zeroing in investigations announced in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006), with effect from

January 16, 2007. According to them, because Commerce had not yet issued its AD order when the URAA section 123 proceeding that underpins that announced "final modification" was concluded, the investigation of diamond sawblades from Korea was allegedly "pending" and therefore covered by that section 123 determination.

This court has previously rejected similar challenges on two occasions in the appeals of the diamond sawblades from the PRC investigation. *See Advanced Technology & Materials Co. v. United States,* 35 CIT ___, Slip Op. 11-105 (Aug. 18, 2011) ("*Advanced Tech I*") at 13-16. In that case, the Court recognized that Commerce's "policy change with respect to 'zeroing[ ]' . . . became effective after the final determination . . . but before issuance of an [AD] order." *Advanced Tech I* at 2 (footnote omitted). The court considered that

> the question that Commerce needed to resolve here did not require a survey of the various alternative ways that an investigation might be termed "pending"; the task, rather, was to interpret the meaning of that term *as it was used in the Section 123 Determination*. More precisely, to determine which investigations the Department was describing [in that Determination] when it referred to "all investigations pending before the Department."

Id. at 15 (italics added). The court concluded that Commerce had properly determined that the diamond

sawblades investigation was not one of those "pending" before the agency (and to which the section 123 determination specifically alluded), and therefore Commerce had properly determined that the diamond sawblades investigation "did not qualify for the policy change." *See id.* at 25; *see also Advanced Tech II*, *supra*, at 2 n.1 ("[T]he court . . . need not address ATM's first contention because argument thereon was addressed in Slip Op. 11-105. To the extent any arguments remain, past precedent of this Court has shown them to be without merit.").

There are no material factual or legal distinctions between this case and past precedent. The court will therefore dismiss the defendant-intervenors's challenge to Commerce's use of zeroing methodology in the *Final Determination*.

The defendant-intervenors argue that *Advanced Tech I* is inapplicable because it was decided under the arbitrary and capricious standard of review accompanying actions challenging changed circumstances reviews brought under 28 U.S.C. §1581(i), whereas this case is brought pursuant to 28 U.S.C. §1581(c) to challenge a less than fair value determination. *See* Shinhan Br. at 17 n.1; Ehwa Br. at 10-11. That is not a valid distinction. *Advanced Tech II* concerned an LTFV challenge instituted pursuant to section 1581(c), and the opinion relied exclusively upon the reasoning contained in *Advanced Tech I* as determinative. The respondents' claim in *Advanced Tech I* was that the diamond sawblades investigation did not "properly receive" the benefit of that section 123 determination. The court found jurisdiction over

such a claim in section 1581(i). That does not mean, however, that the court entertained jurisdiction over the section 123 determination itself. If a party believed Commerce should have included a particular LTFV investigation within the section 123 determination as one of those "pending" before Commerce, the party had the opportunity to challenge that in a separate proceeding, but attempting to characterize such a claim as "subject to" section 1581(c) jurisdiction, in the context of a LTFV challenge, would be subject to dismissal.

The defendant-intervenors argue that according to 19 C.F.R. §351.211(a) and §351.102(b)(30), an "investigation" is "pending" beyond the issuance of a final LTFV determination up until the issuance of an AD order. *See* Shinhan Br. at 20-23; Hyosung Br. at 8-11. However, as before, the legal definitions of the term "pending" that defendant-intervenors would advance here are "ultimately immaterial" to the issue of whether the investigation of diamond sawblades from Korea was "pending" before Commerce. Insofar as what may properly be considered within the context of this matter is concerned (*i.e.*, the section 1581(i) jurisdictional issue), Commerce "would have no legal authority to apply the section 123 determination in a manner that ignores the express legal directive set

forth therein" in any event[18]. *See Advanced Tech I* at 24.

Further, it was not inconsistent with its regulations for Commerce to interpret the section 123 determination's meaning of "pending" as meaning those proceedings that were in the midst of (and subject to) further proceedings before it prior to the final LTFV determination issuance. The defendant-intervenors apparently expand the meaning of the pendency of the LTFV investigation before Commerce into the pendency of the investigation as a whole, including the injury investigation before the ITC, but the regulations differentiate between investigation

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[18] And, in any event, neither of those regulations defined "pending," either in 2006 or currently. In 2006, section 351.102 defined (and section 351.102(b)(30) currently defines) the term "investigation" as "that segment of a proceeding that begins on the date of publication of notice of initiation of investigation and ends on the date of publication of the earliest of: (i) Notice of termination of investigation, (ii) Notice of rescission of investigation, (iii) Notice of a negative determination that has the effect of terminating the proceeding, or (iv) An order." The "order" referenced in section 351.102 is also referenced in section 351.211(a), and likewise then as now: "The Secretary issues an order when both the Secretary and the Commission . . . have made final affirmative determinations. The issuance of an order ends the investigative phase of a proceeding."

proceedings before Commerce that lead up to the "final affirmative determination," 19 C.F.R. §351.211(a), and the overall investigation proceedings before both Commerce and the ITC that ultimately lead to an AD order. *See id.*

The publication of an AD order is a purely ministerial act. *Royal Business Machines, Inc. v. United States*, 1 CIT 80, 86, 507 F. Supp. 1007, 1012 (1980). Irrespective of that, once Commerce issues its final LTFV determination, no issues are "pending" before Commerce, and nothing in the statute or regulations suggests that Commerce could continue its proceedings, accept more submissions, or change its decision after it issued its final determination in its investigation. Rather, the statute and regulations contemplate that, if Commerce issues an affirmative less than fair value determination, and the ITC issues an affirmative injury determination, an order should issue. Indeed, the parties' own behavior confirms the finality of these individual steps. The DSMC appealed the *Final Determination* to this court in 2006, long before Commerce issued the AD order. But the statute contemplates this, confirming that the *Final Determination* was indeed "final" and not "pending" at the time that Commerce issued its section 123 determination. *See* 19 U.S.C. §§ 1516a(a)(2)(B)(i), 1673d. Equally obvious is that if the determination was still "pending," then it was not "final," and the court would have had no jurisdiction to entertain a challenge to it.

Sub silencio, the court has also considered the defendant-intervenors remaining arguments, in

particular those concerning inconsistency in abandonment of zeroing in investigations but not in administrative reviews, but finds they do not merit further discussion. *See*, *e.g.*, *Union Steel v. United States*, 36 CIT ___, 823 F. Supp. 2d 1346, *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013).

Conclusion

For the above reasons, *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006), as amended by *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 75 Fed. Reg. 14126 (Mar. 24, 2010), is hereby remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings not inconsistent with this opinion.

The parties shall provide comment, or indication of none, on the sufficiency of the information indicated to be redacted from the confidential version of this opinion (indicated above by double bracketing) to the Clerk of the Court within seven (7) days, including any indication of information that should be but is not presently indicated as subject to redaction.

The results of remand shall be due Monday, February 3, 2014, comments thereon by Monday, March 3, 2014, rebuttal by Friday, March 28, 2014.

So ordered.

/s/ R. Kenton Musgrave

R. Kenton Musgrave, Senior Judge

Dated: October 11, 2013

New York, New York

Errata

Diamond Sawblades Manufacturers Coalition v. United States, Consol. Ct. No. 06-00248, Slip Op. 13-130, dated Oct. 11, 2013:

Page 3, line 7, correct "section-126" to "section 129".

Page 27, lines 6 and 19, and page 33, line 14, change "its" to "their".

Page 27, line 19, change "it" to "they".

Page 34, footnote 16, correct "U.S.C.A.N." to "U.S.C.C.A.N.".

Page 35, line 15, add "[,]" after "and".

Page 37, line 4, add "s" after "consider".

Page 41, line 4, add closed-quotation mark after "discovered".

Page 41, line 6, change "Shinhan's Verification, PDoc 312" to "Shinhan Cost

Verification Report, CDoc 193".

Page 46, line 18, change “PDoc 312” to “CDoc 193”.

APPENDIX C

71 FR 77722-01, 2006 WL 3779585(F.R.)

NOTICES

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification

Wednesday, December 27, 2006

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

[77722] ACTION: Final Modification; Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation.

SUMMARY: The Department of Commerce is modifying its methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin. This final modification is necessary to implement the recommendations of the World Trade Organization Dispute Settlement Body. Under this final modification, the Department will no longer make

average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The schedule for implementing this change is set forth in the "Timetable" section, below.

DATES: The effective date of this final modification is January 16, 2007.

FOR FURTHER INFORMATION CONTACT: Mark Barnett (202) 482-2866, William Kovatch (202) 482-5052, or Michael Rill at (202) 482-3058.

SUPPLEMENTARY INFORMATION:

Background

This change in methodology concerns the calculation of the weighted-average dumping margin in investigations using the average-to-average comparison methodology.

Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) provides:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act), implements this provision of the

Antidumping Agreement, providing that normally in an antidumping investigation, the Department may determine whether the subject merchandise is being sold at less than fair value through one of two options. The Department may compare a weighted-average of normal value to a weighted-average of the export or constructed export prices of comparable merchandise, known as the average-to-average comparison methodology. The Department also may compare normal values of individual transactions to the export prices or constructed export prices of individual transactions for comparable merchandise, known as the transaction-to-transaction comparison methodology.[1] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, Vol. 1 at 842-43 (1994), reprinted in U.S.C.C.A.N. 3773 (SAA), and the Department's regulations state that the Department normally will use the average-to-average comparison

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[1] Section 777A(d)(1)(B) of the Act also provides for an exceptional methodology to be used in antidumping investigations. The Department may compare a weighted-average normal value to the export prices or constructed export prices of individual transactions if there is a pattern of export prices or constructed export prices that differs significantly among purchasers, regions or periods of time, and the Department explains why such differences cannot be taken into account using one of the methods described in section 777A(d)(1)(A). This is known as the targeted dumping or average-to-transaction methodology.

methodology in an investigation. 19 CFR 351.414(c)(1).

When the Department applies the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade ("averaging groups"). 19 CFR 351.414(d)(2). The Department then compares an average of the export prices or constructed export price of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 CFR 351.414(d)(1).

Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the Department did not permit the results of averaging groups for which the weighted-average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value.

In October 2005, a World Trade Organization (WTO) dispute settlement panel issued a report in United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (WT/DS294) ("US Zeroing (EC)"). The panel found, among other things, that the Department's denial of offsets when using the average-to-average comparison methodology in certain antidumping investigations challenged by the European Communities ("EC") was inconsistent with Article 2.4.2 of the Antidumping

Agreement.[2] The United States did not appeal this aspect of the panel's report.

On March 6, 2006, the Department published a notice in the Federal Register (71 FR 11189) proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. In that notice, the Department solicited comments and rebuttal comments on its proposal and appropriate methodologies to be applied in future antidumping investigations in light of the panel's report in US - Zeroing (EC). On April 25, 2006, the Department extended the period of time for the submission of rebuttal comments (71 FR 23898). The Department received numerous comments and rebuttal comments submitted pursuant to these notices, as discussed below.

Final Modification Concerning the Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation

After considering all of the comments submitted, the Department is adopting this final modification concerning the calculation of the weighted-average

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[2] Panel Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R, para. 7.32, circulated October 31, 2005.

dumping margin. The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.

Analysis of Public Comments

Numerous comments and rebuttal comments were submitted in response to the Proposed Modification. We have carefully considered each of the comments submitted. We have grouped and summarized the comments below according to common themes and responded accordingly.

[77723] ***Whether to Adopt the Department's Proposal***

Some commentors welcomed the Department's proposal to permit offsets when making average-to-average comparisons, which would bring the Department's methodology into conformity with U.S. international obligations.

Other commentors argue that the denial of offsets creates more accurate results, because it combats the phenomenon of masked dumping. According to these commentors, masked dumping occurs when import transactions which are sold at less than normal value are masked by those sold at prices greater than normal value. The U.S. Court of Appeals for the Federal Circuit, these commentors note, has upheld the denial of offsets on these grounds. These commentors argue that if the Department is to grant offsets, it should do so on the narrowest grounds possible.

A few commentors argue that the Department cannot provide offsets without a statutory change. These commentors contend that the denial of offsets is required by the statute, because otherwise one of the permitted comparison methodologies would become redundant. According to these commentors, the statute permits the use of the average-to-average comparison methodology, the transaction-to-transaction comparison methodology, and, in some circumstances, the average-to-transaction comparison methodology. If offsets were for non-dumped sales are provided, the results of the average-to-average and the average-to-transaction comparison methodologies would be mathematically equivalent. To avoid this outcome, the Department must interpret the statute to require the denial of offsets.

Other commentors rebut this argument, contending that the use of the average-to-transaction comparison methodology will not necessarily be mathematically equivalent to the use of the average-to-average comparison methodology.

Department's Position: The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in US - Zeroing (EC), following the procedures set forth in section 123 of the URAA.

While some commentors argue that this modification requires a change in statute, the

Department disagrees. Specifically, the courts have consistently held that the denial of offsets is not required by statute, but rather is a result of an interpretation of the statute. See Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006); Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Paul Muller Industrie GmbH v. United States, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

While we recognize that the Department may not interpret or apply the statute in a way so as to nullify a statutory provision, the Department is not making such an interpretation. This final modification is addressing only the calculation of the weighted-average dumping margin in an investigation using the average-to-average comparison methodology and not the average-to-transaction comparison methodology. The argument that the targeted dumping methodology would be nullified presumes that offsets would be provided under that methodology and that certain other methodological choices would be made. To date, the Department has not used the targeted dumping comparison methodology, nor made any determination as to the issue of offsets pursuant to that methodology. Consequently, to the extent appropriate, the Department will consider the nullification argument when it applies the targeted dumping methodology.

Whether the Average-to-Average Comparison Methodology Should Continue to be the

Department's Preferred Methodology in Investigations

Some commentors argue that the average-to-average comparison methodology should continue to be the preferred methodology for use in an antidumping investigation. This would be consistent with the SAA and the Department's own regulations. The use of the average-to-average comparison methodology simplifies the calculation of the weighted-average dumping margin, because it involves much simpler matching of export prices and normal values than would be involved if the transaction-to-transaction comparison methodology were used. According to these commentors, the average-to-average comparison methodology yields more predictable results because it is less sensitive to aberrational sales and price fluctuations due to market forces. The average-to-average comparison methodology is appropriate to use when there are a large number of sales, whereas 19 CFR 351.414(c)(1) states that the transaction-to-transaction comparison methodology is more appropriate for investigations involving few sales and the merchandise sold in both markets is identical, very similar, or custom-made.

Some of these commentors argued that even if the Department were to use the transaction-to-transaction comparison methodology, the application of that methodology should include the provisions of offsets. According to these commentors, the denial of offsets when using transaction-to-transaction comparison methodology results in an even more unbalanced calculation than the denial of offsets when

using the average-to-average comparison methodology because the transaction-to-transaction comparisons would eliminate any impact of non-dumped sales.

Other commentors argue that the transaction-to-transaction comparison methodology with the denial of offsets should become the Department's standard methodology in antidumping investigations. These commentors note that the use of the transaction-to-transaction comparison methodology is permitted by statute. The Department has used this methodology recently in the Section 129 determination in Certain Softwood Lumber Products from Canada, and a WTO panel upheld its application. Any concerns over the complexity of applying the transaction-to-transaction comparison methodology are alleviated by technological advances that ease the burden of matching a single normal value transaction to a single export transaction.

Some commentors argue that the Department itself has not proposed any change in methodology other than providing for offsets when engaging in average-to-average comparisons. According to these commentors, the Department cannot adopt a new comparison methodology without fulfilling the applicable notice and comment requirements of both section 123(g) of the URAA and the Administrative Procedures Act.

Department's Position: While the statute itself does not provide for a preference between the use of the average-to-average and transaction-to-transaction comparison methodologies in an antidumping

investigation, the Department is mindful of the preference expressed in the SAA and in the Department's regulations for the use of average-to-average comparisons in investigations. See SAA at 842-43; 19 CFR 351.414(c)(1). Thus, we agree with those commentors that indicated that altering this preference would, at a [77724] minimum, require a change in regulation. Although the Department is not proposing a change of regulation at this time, the transaction-to-transaction methodology remains available to be used in appropriate situations.

Providing Offsets in All Types of Proceedings

Several commentors argue that the Department should provide offsets, not only when using the average-to-average comparison methodology in an antidumping investigation, but in all types of antidumping proceedings. These commentors contend that the denial of offsets violates overarching principles of fairness embodied in the WTO agreements. The distortion and inherent bias stemming from the denial of offsets apply equally to administrative reviews as they do to investigations. Moreover, this change would be simple to execute, as it would only require the deletion of a single line from the Department's standard computer programs.

Other commentors note that the finding of the WTO panel was narrow. The panel did not find that the denial of offsets in administrative reviews was inconsistent with the Antidumping Agreement, only that the Department's denial of offsets in certain investigations, when using the average-to-average

comparison methodology, was inconsistent with the Antidumping Agreement. Moreover, if the Department were to provide offsets in other proceedings, it would need to provide a specific proposal and solicit further comments.

One commentor urges the Department to propose regulations to implement the targeted dumping provision of the Act. These regulations should specify that the Department will act whenever an interested party has demonstrated that targeted dumping is occurring, and should establish a threshold of when the price differences are significant enough to trigger the targeted dumping analysis.

Department's Position: In its March 6, 2006 Federal Register notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

Adopting a Change During the Negotiation of the Doha Round

Several commentors argue that the Department should not adopt a change with respect to offsets while the Doha Round of negotiations is still underway. According to these commentors, Congress gave explicit negotiation instructions to defend the denial of offsets.

Thus, the Department should not adopt a change and provide for offsets while the issue is still being negotiated.

Department's Position: The Department is conducting this exercise pursuant to the procedures specifically established by section 123 of the URAA. This exercise is necessary to implement the panel report in US - Zeroing (EC) within the reasonable period of time negotiated by the United States. Notwithstanding this determination, the Department will continue to work closely with United States Trade Representative to pursue the negotiating objectives of the United States in the Doha Round.

Whether the Department Should Change Its Methodology as it Applies to Constructed Value and Non-Market Economies

One commentor argues that the WTO panel report did not address the denial of offsets when the Department compares constructed value to export price, or when the Department engages in a non-market economy analysis. Accordingly, the Department should continue to deny offsets in these two situations.

Department's Position: The Department has declined to adopt this suggestion. As stated above, when the Department engages in an average-to-average comparison, it divides the sales of the subject merchandise into "averaging groups." These averaging groups usually consist of identical or virtually identical merchandise sold at the same level of trade.

19 CFR 351.414(d)(2). The Department then calculates a weighted-average of the export prices or constructed export prices of the sales included in the averaging group, and compares that to the weighted-average of the normal values of such sales. 19 CFR 351.414(d)(1).

The use of constructed value and the factors of production methodology concerns the manner by which the Department calculates the average normal value in the average-to-average comparisons.

For example, the Department bases its calculation of normal value on constructed value "where home market sales of the merchandise in question are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price, such as where sales are disregarded because they are sold at below-cost prices." SAA at 839. Constructed value is calculated on a control number-specific basis, and compared to the average export price of the corresponding averaging group.

Similarly, pursuant to section 773(c) of the Act, when an investigation involves a non-market economy country, the Department calculates normal value based on the factors of production methodology. Under this methodology, in an investigation the Department calculates a control number-specific normal value and compares it to the average export price for the corresponding averaging group.

Whether normal value is based on home market sales, third country sales, constructed value, or the factors of production methodology does not alter the

manner in which the comparison is made between the weighted-average export price and the weighted-average normal value or the manner in which those results are aggregated in an investigation. Thus, if the Department is to provide offsets for non-dumped sales when utilizing the average-to-average comparison methodology in an antidumping investigation, there is no basis for treating investigations involving constructed value or the factors of production methodology that also utilize the average-to-average comparison methodology in a different manner.

Whether Implementation Should Apply to On-Going Investigations

Some commentors argue that if the Department provides offsets when using the average-to-average comparison methodology during an antidumping investigation, this change should apply to all pending proceedings. These commentors argue that when a U.S. court announces a new interpretation of a statute it would apply to all pending cases. Failing to do so would create unequal justice, and, according to these commentors, would be a deliberate and purposeful violation of the WTO Antidumping Agreement.

Other commentors note that there is no precedent for a retroactive implementation of a WTO dispute settlement report. Rather, sections 123 and 129 of the URAA, which govern implementation, set forth a specific effective date.

Department's Position: In the March 6, 2006 Federal Register notice, the Department stated:

[77725] Any changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology.

71 FR at 11189.

Section 123(g)(2) of the URAA provides that a final modification may not go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. While the statute establishes the manner of determining the effective date of any final modification adopted pursuant to section 123, the statute does not specify whether the final modification must apply only to new segments of proceedings initiated after the effective date, or may apply to any segments pending as of the effective date.

The SAA does not provide any more specific guidance regarding the application of any final modification adopted pursuant to section 123. The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date. SAA at 1026.

However, the SAA makes no such statement with respect to section 123 modifications. The SAA merely states, "A final rule may not go into effect before the end of the 60-day consultation period unless the President determines that an earlier date is in the national interest." SAA at 1021.

In the prior four section 123 proceedings, the Department has applied the final modification or final rule to segments initiated after the effective date. See, e.g., Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 FR 62061 (October 28, 2005) (applying amended regulations to sunset reviews initiated on or after the effective date); Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125, 37138 (June 23, 2003) (applying new privatization methodology to investigations and reviews initiated on or after the effective date); Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186, 69197 (November 15, 2002) ("Arm's Length Test") (applying new methodology to investigations and reviews initiated on or after the effective date); Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 64 FR 51236 (September 22, 1999). However, on occasion the Department has adopted and applied a change in policy involving a statutory interpretation to all segments pending as of the date of the change. See, e.g., Basis for Normal Value When Foreign Market Sales Are Below Cost, Policy Bulletin 98.1 (February 23, 1998); Treatment of Inventory Carrying Cost in Constructed Value, Policy Bulletin 94.1 (March 25, 1994).

In the section 123 proceeding concerning the Arm's Length Test, the Department found it significant that section 123 uses the term "go into effect." 67 FR at 69196. Thus, the Department noted

that section 123 does not preclude applying the change so as to affect entries made prior to the announcement of the change. Id.

After careful consideration of the arguments presented by the commentors and of the information needed to implement this change, and weighing the administrative burdens, the Department has determined to apply the final modification adopted through this proceeding to all investigations pending before the Department as of the effective date.

First, in this particular instance, applying this final modification to all investigations pending before the Department will not create any undue administrative burden on the Department. The number of pending antidumping investigations is few (i.e. there are seven ongoing antidumping investigations).

Second, applying this change will not require the Department to gather any new information in those investigations.

Third, this announcement of the Department's intention to apply this modification to all pending investigations will not prejudice any of the parties to those proceedings. All of the currently pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification. Thus, all of the interested parties in each of these investigations had notice of the Department's intention to modify the manner in which it calculates the weighted-average dumping margin when using the average-to-average comparison final

methodology in investigations. Moreover, even in the most advanced of the on-going investigations, there is sufficient time to permit the parties to comment on the application of this approach prior to the final determination in the investigation. In those investigations in which the Department will have reached a preliminary determination prior to the effective date of this notice, the Department will provide parties with notice and an opportunity to comment on the application of this methodology on the record of the investigation.

Timetable

The effective date of this notice is January 16, 2007, which is sixty days after the date on which the United States Trade Representative and the Department began consultations with the appropriate congressional committees, consistent with section 123(g)(1)(E) of the URAA. This methodology will be used in implementing the findings of the WTO panel in US - Zeroing (EC) pursuant to section 129 of the URAA concerning the specific antidumping investigations challenged by the EC in that dispute. The Department will apply this final modification in all current and future antidumping investigations as of the effective date.

Dated: December 20, 2006.

David Spooner,

Assistant Secretary for Import Administration.

APPENDIX D

United States Court of Appeals
for the Federal Circuit

DIAMOND SAWBLADES MANUFACTURERS COALITION,
Plaintiff-Appellee

v.

HYOSUNG D&P CO., LTD., EHWA DIAMOND INDUSTRIAL CO., LTD.,
Plaintiffs-Appellants

v.

UNITED STATES, SH TRADING, INC., SHINHAN DIAMOND INDUSTRIAL CO. LTD.,
Defendants-Appellees

2015-1216, -1224

Appeals from the United States Court of International Trade in No. 1:06-cv-00248-RKM, 1:09-cv-00508-RKM, 1:09-cv-00509-RKM, 1:09-cv-00510-RKM, Senior Judge R. Kenton Musgrave.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, PLAGER1 LOURIE, LINN1, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and, STOLL, *Circuit Judges**.

O R D E R

Appellant Hyosung D&P Co., Ltd. filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on March 8, 2016.

FOR THE COURT

March 1, 2016
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

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* Circuit Judge Hughes did not participate.

[1] Circuit Judges Plager and Linn participated only in the decision on the petition for panel rehearing.