

2003 Court of International Trade Case Summaries

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Below is an analysis of 4 antidumping cases determined by the Court in the last year. I have inserted a comments column. Some of these comments are suggestions that may be helpful for Chinese companies who wish to export to the United States ("US").

<u><i>China National Machinery Import & Export Corporation (CMC), Plaintiff v. United States, Defendant and The Timken Company</i></u> February 13, 2003, Decided Judge: Judith M. Barzilay	Comments
<p>Facts:</p> <ul style="list-style-type: none"> • Plaintiff CMC is an exporter of tapered roller bearings ("TRB's") and parts, finished and unfinished, from the PRC to the US. At issue in this case are the 1999-2000 sales of TRB's from the PRC which constitute sales made during the thirteenth administrative review of the antidumping duty order. Specifically, CMC challenges United States Department of Commerce's ("DOC") rejection of the actual market prices that CMC paid for steel used in the production of the TRB's, in favor of using surrogate values for steel in the final calculation of normal value ("NV") to determine dumping margins. • On July 7, 2000 DOC published the preliminary results of the twelfth administrative review, which showed zero dumping for CMC. On July 31, 2000, DOC initiated the thirteenth review. On February 26, 2001, DOC published the amended final results of the twelfth administrative review, which reflected a jump from zero to .82%. On November 15, 2001, DOC found a 4.64% dumping margin for CMC. In the reviews DOC had "reason to believe or suspect" that the supplied steel was benefiting from subsidies and the actual prices were distorted. • DOC resorted to surrogate country analysis and selected India as the surrogate country. However after finding that India's own import statistics were unreliable DOC selected Japan. CMC maintains that Indonesia should have been the surrogate country, though never explained in detail why this should be the case. • A rebuttal letter was sent to DOC stating briefly that the company did not receive any subsidies. <p>Issue:</p> <ul style="list-style-type: none"> • Whether or not the United States Department of Commerce ("DOC") use of surrogate values was supported by substantial evidence linking either the exporter's supplier or its steel input to any subsidies? Note: Commerce has the authority under 19 U.S.C § 1677b (c) (4) to resort to surrogate country analysis 	<p>- Give a detailed explanation as to why you think a particular surrogate country should be used.</p> <p>- Ensure that there is evidence supporting why your company did not receive subsidies e.g. sale, financial or other economic information demonstrating that prices are not subsidized.</p>

in the case of non-market economies (“NME”) i.e. the PRC.

Law:

- The antidumping duty statute requires the DOC to use the **best available information** concerning the values for factors of production from a market economy in the normal value calculations for product exported from a NME country. 19 U.S.C.S. § 1677b (c) (1). The statute does not define the phrase best available information. *Luoyang Bearing Factory v. United States*, 240 F. Supp. 2d 1268, 1273, 26 CIT (2002).
- The court’s role is not to determine whether the information chosen by the DOC is the best actually available to determine the values for factors of production, but whether the choice is supported by **substantial evidence** and is in accordance with law. Note: substantial evidence does not comprise broad allusions to the verifiers ‘gut feeling’. See 19 U.S.C.S § 1516 a (b) (1) (B) (i).
- Nothing in the antidumping duty statute directs the DOC to employ actual prices paid to a market economy supplier by a NME producer in NV calculations. Under the antidumping statute, DOC’s duty is to determine margins as accurately as possible, and to use the best information available to it in doing so. The DOC has especially wide discretion in the valuation of factors of production. It does not specify in any way where the factors of production must be ascertained in a single fashion. The DOC’s methodology in selecting values for factors of production will be upheld, as long as such methodology does not contravene the purpose of the statute, which is to construct the product’s NV as it would have been if the NME country were a market economy country. See *Coalition for Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. V. United States*, 23 CIT 88, 118, 44F. Supp. 2d 229, 258 (1999)
- In the context of determining whether the DOC’s use of surrogate values for factors of production was supported by substantial evidence, **substantial evidence is more than a mere scintilla; it is relevant evidence as a reasonable mind might accept as adequate to support a conclusion.** In applying the substantial evidence standard, the court affirms an agency’s factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency’s conclusion.
- DOC must base its decision on a clear and substantial record. Under 19 U.S.C.S § 1677 f(i) (3) (A), the DOC must include in a final determination an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review, concerning the establishment of dumping or a countervailable subsidy. This does not mean an explicit response to every argument made by a party. **What constitutes an explanation is an articulation of a rational connection between the facts found and the choice made. It is not a reasonable exercise of discretion for Commerce to use a subsidy finding of a past or different investigation and apply it without inquiring further whether such a finding is applicable to the particular set of circumstances at hand.**

- (The term ‘dumping margin’ means the amount by which the NV exceeds the export price...of the subject merchandise. The dumping margin is thus the difference between the domestic price and the US price of the subject merchandise. In the case of an NME exporting country, the domestic price will not be market determined, and the normal value must accordingly be constructed.)

**Judgment:
(Justice Barzilay)**

- There is no dispute as to the PRC’s NME status.
- CMC contends that the statutory mandate to use the best available information directs DOC to utilize “actual prices paid to market economy suppliers over surrogate values, as support CMC relied on Lasko Metal Prods v United States, 43 F. 3d 142, 1446 (Fed. Cir. 1994) and 19 C.F.R. § 351.408 (c) (1). The court notes that this section was mistakenly quoted as it had been revised and rejects this argument. The final rule merely states that DOC would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant. Court further contends that the antidumping duty statute compels DOC to “use the best available information”, and not necessarily market values.
- In any event the court’s role is not to determine whether the information chosen by DOC is the ‘best’ actually available, but whether the choice is supported by substantial evidence and is in accordance with the law. The court agrees with DOC that nothing in the antidumping duty statute directs DOC to employ actual prices paid to a market economy supplier by an NME producer in NV calculations.
- A critical question before the Court is whether, in this case, DOC’s actions are supported by substantial evidence that would have given DOC “**reason to believe or suspect**” that the steel used by CMC in the production of the TRBs sold in the United States was subsidized.
- The “reason to believe or suspect” standard has no statutory definition. In attempting to define a similar phrase, “reasonable grounds to believe or suspect,” which appears in 19 U.S.C § 1677b(b) (1) (1999), Justice Barzilay observed that “in order for reasonable suspicion to exist there must be “a particularized and objective basis for suspecting” the existence of certain proscribed behavior, taking into account the totality of the circumstances – the whole picture. Al Tech Specialty Steel Corp. v. United States, 6 CIT 245, 247, 575 F. Supp. 1277, 1280 (1983). The “reason to believe or suspect” standard at issue here must be predicated on particular, specific, and objective evidence. On the other hand substantial evidence is “more than a mere scintilla”: it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 229, 83 L. Ed. 126. Ct 206 (1938).
- DOC in support of its contention that there is substantial evidence on record, argued that the discovery of subsidies which are not company specific in the investigations of other steel products gave it reason to infer that CMC’s supplier alongside other steel producers in the relevant country may have benefited from

- Ensure that all legislation relied upon is up to date and correct.

- Rather than argue that DOC should use market values relying on the legislation focus on supplying good evidence to support why you think DOC did not use the best available information. Note that DOC has a lot of discretion to choose market values or surrogate values.

<p>these so-called general subsidies. CMC on the other hand argued:</p> <ul style="list-style-type: none"> Ø that “there are no current or prior countervailing duty orders in the US or in the PRC on the material input in question, hot-rolled bars and rods of bearing quality steel manufactured in the exporting country; Ø CMC’s supplier was never investigated in any recent countervailing or antidumping duty investigations; and Ø in recent countervailing/antidumping investigations DOC made one negative determination which appears to spread the notion that there are ‘industry-wide’ subsidies conferring benefits on manufacturers of steel products. <ul style="list-style-type: none"> • Justice Barzilay found that CMC was correct. For the following reasons: <ul style="list-style-type: none"> Ø DOC’s own negative countervailing duty finding for one steel product from the PRC – militates against the conclusion that all steel products from that country could have benefited from general subsidies. It is not merely a contradictory piece of evidence to which DOC should give minimal weight but directly undermines DOC’s justification of using surrogate values in CMC’s case. If the negative finding was an anomaly than DOC must explain why it is. DOC can not reasonably claim that, if one or two steel products in the exporting country were subsidized, particularly when at least one was found by itself not to have been subsidized. Conjectures are not facts and cannot constitute substantial evidence. <u>China Nat’l Arts and Crafts Imp. And Exp. Corp. v. United States, 15 CIT 417, 424, 771 F. Supp. 407, 413 (1991)</u>; Ø There were no further inquiries as to why a subsidy finding of a past or different investigation should apply to this case; Ø There is no record of whether or not there is a general subsidy offered across the board furthermore there is no evidence that CMC benefited from a general subsidy; Ø There is lack of any specific evidence linking either CMC’s supplier or its steel input to any subsidies. <p>Conclusion:</p> <ul style="list-style-type: none"> • In light of the above, Justice Brazilay found that the DOC had failed under the statute to provide substantial evidence. This case was remanded to the agency for review and action consistent with the determination. 	<p>- Conduct a search for cases that deal with the product in question or a similar product and determine what the court had to say about it.</p> <p>- Was the exporting company in question associated with or investigated by the DOC in the past? If so was there a negative determination and was it just an anomaly?</p>
<p><u>Yantai Oriental Juice Co., ET AL., Plaintiffs, v United States, Defendant, and Coloma Frozen Foods, INC., ET AL., Defendant-Inventors</u></p> <p>March 21, 2003, Decided</p> <p>Judge: Richard K. Eaton</p>	<p>Note: in this case there were several other matters that the Court had reviewed from the remanded determinations; this summary only discusses the Cooperative Respondents’ antidumping duty margin.</p>

Facts:

- Plaintiff are foreign exporters of non-frozen apple juice concentrate. The DOC on remand selected a different surrogate country to determine NV (normal value), the antidumping margins of the fully investigated exporters were reduced to zero percent but the margins of the cooperating exporters' margins increased. In view of the investigated exporters' zero percent margin rates, DOC's use of a country wide-margin percentage, and resulted in a substantial increase (14.88 percent to 28.33 percent) in the cooperating exporters' margins.

Issue:

- Whether or not the substantial increase in cooperating exporters' margins was reasonable and supported by substantial evidence?

Law:

- When reviewing the Remand Determination pursuant to 28 U.S.C. § 1581 (c), the court will sustain DOC' determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law..." 19 U.S.C § 1516a (b) (1) (B) (i). Substantial evidence consists of "such relevant evidence as a reasonable mind accepts as adequate to support a conclusion".
- DOC must articulate a "rational connection between the facts found and the choice made." *Rhodia, Inc v. United States, 25 CIT, 185F. Supp. 2d 1343, 1348 (2001)*.

**Judgment:
(Justice Eaton)**

- In the Remand Determination the Fully-Investigated Respondents received antidumping duty margins of zero percent; DOC decided that a new methodology was needed to calculate the margin for the Cooperative Respondents. DOC determined that it would continue to calculate the Cooperative Respondents' margin following the "all-others" methodology found in 19 U.S.C § 1673 d (c) (5). The Plaintiffs objected to Commerce's methodology of recalculating the Cooperative Respondents' antidumping duty margin arguing that:

"While DOC may have certain amount of discretion in devising its methodologies in NME cases, the appellate court states that "the critical question is whether the methodology used by DOC is based on the best available information and establishes antidumping margins as accurately as possible"

- Justice Eaton agreed with the Plaintiff. The Court stated that the Cooperative Respondents "fully and completely complied with all of DOC's requests for information". The only apparent difference between the Fully-Investigated Respondents is that DOC did not select them for full investigations. Furthermore the DOC failed to justify the use of its new methodology in its remanded determination other than by reference to the Statement of Administrative Action (the "SAA" accompanies the Uruguay Round Agreements Act) which is

- Note: there must be a rational connection between the facts found and the choice made.

- This shows the importance of fully and completely complying with DOC's requests for information. The Court will always look upon this favorably.

calculated by taking into consideration the “weighted average” margin based on the PRC-wide margin of 51.7 percent and the Fully-Investigated Respondents’ margins of zero percent. The DOC failed to explain how its choice of methodology established the Cooperative Respondents’ antidumping duty margin “as accurately as possible” or make a “rational connection between the facts found and the choice made”, therefore DOC’s determination is neither based on substantial evidence nor otherwise in accordance with law.

Conclusion:

- The Court remanded the matter to Commerce. On remand Commerce shall revisit the issue of the proper calculation of the Cooperative Respondents’ antidumping duty margin.

Luyong Bearing Factory, Plaintiff and Defendant-Inventor, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervener and Plaintiff

*April 14, 2003 Dated
Judge: Nicholas Tsoucalas*

Facts:

- Plaintiff manufacturer sued defendant United States, challenging the DOC decision to use surrogate values for imported steel used to manufacturer tapered roller bearings (“TRB”). On remand, DOC found that the import price was not the best available information to value the steel. The manufacturer challenged the decision.
- Louyang contends that rather than evaluate whether or not the PRC trading company import process constitute the “best available information” to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of TRB cups and cones, DOC in the remand Results, instead offered its “subsidy suspicion” policy which amount to a post hoc rationalization. Luoyang further argues that since the Court in Luoyang Bearing Factory, 240F. Supp. 2d 1268, 2002 C.I.T 118 refused to add information pertaining to a subsequent review to the record, the Court now should likewise reject DOC’s rationale in the Remand Results because DOC’s rationale constitutes new record evidence.

Issues:

The issues in this determination reflect upon the decision of the Court on October 1, 2002, directing the DOC, to address the following (these are also issues addressed in this case):

- Examine whether or not the PRC trading company import prices constitute the “best available information” to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of TRB cups and cones and, if DOC concludes that the PRC trading company import prices

present the “best available information” for the purpose of such surrogate evaluation, to recalculate DOC’s determination not inconsistent with this opinion; and

- Examine if, and only if, DOC finds that the PRC trading company import prices do not constitute the “best available information,” whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the “best available information” over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones, and to explain, (if DOC finds that export data from Japan to India is the “best available information,”) how the entire export data from Japan to India falls within the range of values in the United States category benchmark range.

Law:

- The Court will uphold the DOC’s redetermination of value pursuant to the court’s remand unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C.S § 1516a (b) (1) (B) (i). Substantial evidence is something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.
- The courts may not accept post hoc rationalizations for agency action. It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.
- In reviewing the DOC’s valuation the Court is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the antidumping statute.
- The DOC must demonstrate **particular, specific and objective evidence** to uphold its reason to believe or suspect that the prices an exporter plaintiff paid a supplier for the inputs were subsidized.

**Judgment:
(Justice Tsoucalas)**

- The Court disregards the post hoc rationalization argument put forward by Louyang on all accounts.
- The Court however, remanded DOC’s decision to disregard the PRC trading company data to value either all of the subject merchandise at issue or a portion of the subject merchandise purchased by Luoyang through the trading company and used by Luoyang in the manufacture of TRB cups and cones.
- The Court found that DOC’s explanation that the PRC trading company import data did not constitute the “best available information” because “the steel purchased by Luoyang from the PRC trading company was manufactured in [a certain country] ...[and] at the time of the...there was reason to believe or suspect that [the certain country’s steel was subsidized[,]”, is not supported by substantial evidence. The Court was not satisfied with DOC’s reliance on various countervailing duty determinations to support DOC’s reason to believe or suspect that the steel purchased by the PRC trading company at issue could have been subsidized because the various countervailing duty determinations

- PRC trading company data will be accepted so long as it is the ‘best available information’.

-Ensure that when the DOC examines various countervailing determinations it includes the same product you are exporting, if it is a similar product

<p>relied upon by DOC did not include the hot-rolled bearing quality steel bar, the steel product at issue in this case.</p> <ul style="list-style-type: none"> • The Court found that DOC failed to examine whether or not Indonesian data (that is, Indonesian import statistics and export data from Japan to Indonesia) constitute the “best available information” over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones. • The Court found that it was illogical for DOC to utilize export data from Japan to India and then to subsequently fail to review analogously structured export data from Japan to Indonesia. When DOC used export data from Japan to India and treated that data as ‘refined’ Indian data, DOC illogically and unreasonably failed to review Indonesian import statistics and export data from Japan to Indonesia prior to ultimately resorting to export data from Japan to India as the “best available information” in valuing the bearing quality steel bar used to produce the TRB cups and cones at issue. <p>Conclusion</p> <ul style="list-style-type: none"> • The Court remanded this case to DOC to: <ol style="list-style-type: none"> 1. point to specific evidence demonstrating that the type of steel at issue (i.e., hot-rolled bearing quality steel bar) purchased by the PRC trading company was subsidized; and 2. examine, if and only if, DOC finds that the PRC trading company import prices do not constitute the “best available information”, whether or not Indonesian data constitute the “best available information” over export data from Japan to India to value the bearing quality steel bar used in the production of TRB cups and cones. 	<p>determine whether or not it is a similar product in terms of quality.</p> <p>- Demonstrate with evidence that your product is not subsidized.</p> <p>-If you disagree with DOC’s choice of surrogate country, demonstrate why they should have considered another country’s data which would have been comparable and logical.</p>
<p><u><i>Fujian Machinery and Equipment Import & Export Corporation, and Shandong Machinery Import & Export Corporation, Plaintiff, v. United States, and The United States Department of Commerce, Defendants, and O. Ames Company, Defendant-Intervenor</i></u></p> <p>July 28, 2003, Dated</p> <p>Judge: Richard W. Goldberg</p>	
<p>Facts:</p> <ul style="list-style-type: none"> • This case was before the Court following remand to the DOC, the court sustained in part and remanded in part DOC’s determination with respect to plaintiffs Fujian Machinery Equipment Import & Export Corporation (“FMEC”) and Shandong Machinery Import & Export Corporation (“SMC”) in heavy forged hand tools, finished /unfinished, with/without handles from PRC. • The Court held that DOC had not adduced substantial evidence showing that FMEC had failed verification with respect to the other three classes of subject merchandise, or that SMC’s and FMEC’s supplier factories, had failed 	

verification. In addition, the Court found Commerce's decision to apply adverse facts available and to apply the PRC-wide dumping margins to FMEC and SMC to be unsupported by substantial evidence and not otherwise in accordance with law.

- The Court remanded this case to be re examined by the DOC, giving FMEC more time to furnish DOC with the requested information.

Issue:

- Whether or not Commerce's redetermination that FMEC failed verification with respect to all four classes of subject merchandise was supported by substantial evidence?

Law:

- If a respondent in an antidumping investigation withholds or fails to provide information requested by the DOC, significantly impedes a proceeding, or provides information that is not verifiable, the DOC is directed to use the facts otherwise available in reaching the applicable determination. 19 U.S.C.S. § 1677e (a) (2). If the DOC determines that the respondent has failed to cooperate by not acting to the best of its ability to comply with a request for information, the DOC may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. 19 U.S.C.S. § 1677e (b).
- In order for its finding to be supported by substantial evidence, the DOC needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of that information is of significance to the progress of its anti-dumping investigation. However, the function of a court is not to reweigh the evidence, but rather to ascertain whether the DOC's determination is unsupported by substantial evidence on the record.
- In the context of an antidumping investigation, the DOC need not prove willful or deliberate noncompliance, rather, the ***DOC must find that the respondent could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply. The DOC must also find either a willful decision not to comply or behavior below the standard for a reasonable respondent.*** It is not uncommon for the DOC to assign uncooperative respondents the highest margin assigned to any respondent in an antidumping review.

Judgment:

(Justice Goldberg)

- On remand the DOC found that FMEC failed verification with respect to certain merchandise. DOC cited the following reasons for its determination:
 1. An overall lack of preparation by FMEC prior to verification;
 2. Its lack of confidence in the overall accuracy of FMEC's submissions, engendered by FMEC's total failure to report its U.S. sale of bars/wedges;
 3. FMEC's failure to provide timely and sufficient information about its other branches and subsidiaries, sufficient to prove that those branches and subsidiaries had no U.S. sales;

<p>4. Significant discrepancies with respect to the sales revenue reported on the Hand Tools Department's 1997 financial statements and its income statement;</p> <p>5. FMEC's failure to submit all its February 1997 sales invoices and vouchers; and</p> <p>6. FMEC's failure to submit quantity and value worksheets.</p> <ul style="list-style-type: none"> • In response to the first and second of these arguments Justice Goldberg found the following: <ul style="list-style-type: none"> Ø The first and second of these reasons do not constitute substantial evidence supporting DOC's determination. A general reference to a respondent's lack of advance preparation is not itself evidence of a verification failure; it is the manifestations of that unpreparedness that matter. DOC must point to specific examples of how the alleged unpreparedness impacted the verification process, rather than rely on such a vague unsupported, conclusory assertion. Ø Moreover, a general reference to the respondent's lack of preparation is particularly unwarranted in this case, since the Court already determined that the FMEC verification was marred by miscommunication. Ø The determination that FMEC's failure to report its one U.S. sale of bars/wedges casts a similar shadow over the total veracity of FMEC's responses is also a form of impermissible "bootstrapping" not consistent with the Court's holding in the first instance. Because a completely errorless investigation is simply not a reasonable expectation, <i>Nippon Steel Corp. v United States</i>, 25 CIT, 146 F Supp. 2d 835, 841 n. 10 (2001), it would be unfair to a respondent if Commerce were permitted to extrapolate from a single error, which may well have been an isolated oversight, a conclusion that the entirety of the respondent's submissions concerning other classes of subject merchandise are unreliable. Ø However, numerous 'oversights' would likely suggest a 'pattern of unresponsiveness' justifying not only the application of facts available ('FA'), but of adverse facts available ('AFA'). It is incumbent upon DOC specifically to identify such oversights. Substantial evidence does not comprise broad allusions to the verifiers' gut feelings. • In response to the rest of the arguments Justice Goldberg found the following: <ul style="list-style-type: none"> Ø DOC asserts that it could not verify the quantity and value of FMEC's U.S. sales for the hand tool production unit for the period from January through April 1997, when it was known as the "Hand Tools Department". There was confusion about whether a particular value reported on the income statement for April 1997 was cumulative, bi-monthly, or monthly. DOC concluded that FMEC was either under reporting or over reporting with a discrepancy of either 15% or 47%, respectively. Ø The Court found that FMEC's explanation that the value is cumulative is valid, but this explanation does not dispel the under reporting or over reporting. FMEC offers no excuse for this error. It's argument that the Hand Tools Department's financial statements is not part of the administrative record is bogus, as the original FMEC Verification Report plainly references the statement and the value that DOC cites in its Remand Results. FMEC also baldly claims that the income statement can be reconciled with the financial statement, but it fails to explain how this can be so given the 47% disparity between the reported sales figures in the two documents. Consequently it is reasonable to conclude, the 	<p>- Note: lack of confidence and preparation does not constitute substantial evidence.</p> <p>-Note: A complete errorless investigation is not a reasonable expectation. In other words there is limited room for accidental error and miscommunication.</p> <p>- Be clear about information supplied to DOC. Do not under any circumstances give false or misleading information. Such an undertaking will most definitely undermine your case.</p>
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“nature and size of this reconciliation discrepancy alone makes it impossible for DOC to determine whether FMEC fully and accurately reported its U.S. sales.

- Ø The next deficiency cited is FMEC’s failure to submit all its February 1997 sales invoices and vouchers. FMEC turned over only invoices for two U.S. sales and one voucher from a third U.S. sale. FMEC’s explanation for these shortcomings is that it substantially complied with DOC’s information request because the invoices and voucher it provided are “samples” of its sales documentation and should be deemed sufficient, since verification is only a “spot check” and a “selective examination rather than testing of an entire universe”. This explanation was not accepted. Justice Goldberg stated that, DOC quite reasonably chose to sample the Hand Tools Department’s sales documentation by requesting such documentation for only a single month and having issued that request, it was entitled to FMEC’s full compliance. Thyssen Stahl AG v. United States, 19 CIT 605 -608, 886 F Supp. 23, 25, 26-27.
- Ø The Court concludes that DOC determination that FMEC failed verification to be supported by substantial evidence.
- With respect to the application of AFA (adverse facts available) to FMEC and SMC and the application of the PRC wide margin the Court found the following:
 - Ø In order for DOC to apply AFA it must be supported by substantial evidence. DOC needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation. American Silicon Techs., 26 CIT at 240 F. Supp. 2d at 1311.
 - Ø DOC must find that [the respondent – FMEC] could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply. DOC must also find either a willful decision not to comply or behavior below the standard for a reasonable respondent. Branco Peres, 173 F. Supp. 2d at 1372.
 - Ø Had FMEC used that opportunity to furnish DOC with all requested documents, DOC would have no basis to find that FMEC did not comply to the best of its ability. On the other hand, it is precisely because FMEC had this extra time that its noncompliance is particularly conspicuous. FMEC specifically represented to DOC and the Court that it would have provided all necessary documents if only the verification had progressed more smoothly. Ipso facto, FMEC could comply with DOC’s information requests, or believed that it did. Accordingly, its failure to provide the various data constitutes behavior below the standard of a reasonable respondent. Therefore the Court sustains DOC’s use of AFA to calculate FMEC’s dumping margin.
 - Ø Both sides devote considerable effort to debating essentially factual issues such as what the verifiers told a particular employee or FMEC’s counsel. In the first instance, the Court considered FMEC’s consistent and uncontested assertions on this point sufficient to order a remand. In order to issue a final judgment that turned in part on such a factual issue, however, the Court would at a minimum expect to see affidavits from the relevant persons, which neither party has furnished, or else take the extraordinary step of trying the matter.
 - Ø AFA is also applied to SMC for its failure to disclose information that was

Note:

-The DOC and the ITC can use “facts otherwise available” if a part withholds information that has been requested by the agency, or fails to provide the information in a timely manner, or impedes a proceeding significantly, or submits information that cannot be verified.

-Adverse facts available AD margins can be extremely high, and margins of over 100 percent are not uncommon.

- Where a party cooperates to the best of its ability but nevertheless its data cannot be used, the DOC’s rule is less severe.

- It is a good idea to supply affidavits when proving someone (e.g. a particular employee), had communicated important information during the course of the investigation.

necessary to show that SMC reported all U.S. sales. The Court finds this non compliance not due to mere inadvertence or oversight, but due to lack of attention to its statutory obligations.

Conclusion:

- The Court recognizes that it is not uncommon for DOC to assign uncooperative respondents the highest margin.
- The Court sustains DOC's remand results.

In Conclusion:

As we can see from the recent cases above the Court of International Trade determinations have been both fair and impartial. The Court does not appear to be influenced by political and administrative forces (the ingenuity of the 'separation of powers').

The key for all Chinese companies who wish to export to the US would be to keep clear records e.g. financial and sales records, do your homework when you are faced with an antidumping investigation and understand how the Court handles antidumping legislation (as portrayed in the cases above). That way even if the Department of Commerce and International Trade Commission demands extraneous information and "appear to be working against you", appealing to the Court of International Trade is most definitely a feasible option.