

CS Wind Vietnam Co., Ltd., and CS Wind Corporation v.
United States and Wind Tower Trade Coalition
No. 2015-1850 (CAFC August 12, 2016)
FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT ORDER

I. SUMMARY

The U.S. Department of Commerce (“the Department”) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT”) issued on October 4, 2016, for proceedings consistent with the opinion issued by the U.S. Court of Appeals for the Federal Circuit (“CAFC” or “the Court”) in *CS Wind CAFC*.¹ This action arises from certain issues in the final determination of the antidumping duty (“AD”) less-than-fair-value investigation of Utility Scale Wind Towers (“wind towers”) from the Socialist Republic of Vietnam (“Vietnam”).²

In its opinion, the CAFC first instructed the Department to use the product weights reported by respondents CS Wind Vietnam Co., Ltd., and CS Wind Corporation (together, “CS Wind”) for its factors of production (“FOPs”) in the Department’s margin calculations. Second, in connection with “Jobwork Charges” in the Department’s overhead expense calculation, the CAFC directed the Department to explain its final determination through the lens of several

¹ See *CS Wind Vietnam Co., Ltd., and CS Wind Corporation v. United States and Wind Tower Trade Coalition*, 832 F.3d 1367 (Fed. Cir. 2016) (*CS Wind CAFC*).

² See *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value*, 77 FR 75984 (December 26, 2012), as amended by *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 FR 11150 (February 15, 2013) (*Wind Towers Final Determination*).

questions that the Court raised, and to change the Department's determination if the revised explanations are insufficient to lawfully support the conclusions. Third, and finally, the CAFC sought clarification and a more fulsome understanding of the rationale the Department used in connection with the financial statements of a non-interested party to the proceedings; *i.e.*, the Indian company whose financial statements were used as surrogate values.

For this final remand redetermination, the Department has recalculated CS Wind's AD margin using its reported product weights for its FOPs, provided additional explanation and clarification regarding the "Jobwork Charges" in overhead to confirm that the Department's analyses in *Wind Towers Final Determination* was consistent with prior practice and based on the substantial record evidence before the agency, and the Department here clarifies certain statements regarding its reliance on a non-interested party's surrogate value financial statements.

II. BACKGROUND

On December 26, 2012, the Department published its final determination in the AD investigation on wind towers from Vietnam.³ As part of this decision, the Department revised the reported FOPs of self-produced and free-of-charge internal components so that the total sum of all FOPs equaled the packed weight of the subject merchandise.⁴ The Department also classified "jobwork expenses," which here are defined as third-party service expenses, as overhead expenses in the calculation of surrogate financial ratios. This was because the surrogate producer's financial statements, Ganges Internationale Private Limited ("Ganges"), provided clear and separate line items for labor and energy consumption, although it did not

³ See *Wind Towers Final Determination*.

⁴ *Id.* at Comment 4.

provide detailed information with respect to the “jobwork charges” other than the reference, “including erection and civil expense.”⁵

CS Wind subsequently filed suit at the CIT and moved for judgment upon the agency record, asserting that the Department acted contrary to law and without substantial evidence in determining its AD margin.

In March 2014, the CIT found that in choosing CS Wind’s packed weight of its products rather than the reported FOP weight, and in deciding to adjust for differences between the data choices, the Department acted reasonably in filling the gap in the record by using the facts available to it. The CIT affirmed this aspect of the Department’s decision.⁶ However, regarding “jobwork charges” in the overhead expense calculation, the CIT held that if the Department were to include the reported jobwork charges, including erection and civil expenses, then it should also include the reported erection income and civil income, or exclude both, or explain why different treatment is warranted.⁷

On remand, the Department issued a redetermination on July 28, 2014,⁸ where the Department continued to exclude erection and civil income from its calculation. The Department explained why it was appropriate to revise the surrogate financial ratio calculations to exclude from overhead only that portion of jobwork charges associated with the erection and civil income, rather than permit an offset to jobwork expenses for the full amount of erection and civil income.⁹ To determine the amount of jobwork charges related to erection and civil income to be excluded from overhead, the Department calculated a ratio of erection and civil income to all

⁵ *Id.* at Comment 3.

⁶ See *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271, 1289 (CIT 2014) (*CS Wind Vietnam I*).

⁷ *Id.* at 1287.

⁸ See *CS Wind Vietnam Co., Ltd. and CS Wind Corporation v. United States*, Consol. Court No. 13-00102, Slip Op. 14-33 (March 27, 2014), *Results of Redetermination Pursuant to Court Order*, dated July 28, 2014 at 17 (*First Remand Redetermination*).

⁹ See First Remand Redetermination at 14-18 and CSWG Remand Analysis Memorandum at Attachment III.

income that could reasonably be associated with jobwork. We applied the resulting ratio of 8.28 percent (the erection and civil income ratio) to the total jobwork charges to determine the amount of jobwork charges associated with erection and civil income to be excluded from overhead, Indian Rupees in Lacs (IRL) 17,585,126.¹⁰ The items from Ganges' financial statements included in the total value of income that the Department initially found to be reasonably associated with jobwork here resulted in a denominator for the erection and civil income ratio totaling IRL 1,725,478,588. This included: (1) "Sales of Jobwork," (2) "Erection Income," (3) "Civil Income," (4) "Sale of Finished Goods," (5) "Scrap," (6) "Services Income from TSP Activities," and (7) "Miscellaneous Income."¹¹ As a result, the Department revised the surrogate financial ratios on initial remand to exclude the portion of jobwork charges associated with erection and civil income, IRL 17,585,126.¹²

In *CS Wind Vietnam II*, the CIT recognized that the Department's methodology in the *First Remand Redetermination* of excluding the portion of jobwork expenses relating to certain income line items from overhead may be a "reasonable approach in theory and could satisfy the court's remand direction."¹³ However, the CIT found that the Department "failed to provide a reasoned analysis" in determining which income line items could be associated with jobwork and remanded for recalculation and further explanation.¹⁴ The CIT concluded by stating that the Department continued to treat the expense and income line items differently without adequate explanation.¹⁵

¹⁰ See *First Remand Redetermination* at 17-18 and CSWG Remand Analysis Memorandum at Attachment III.

¹¹ *Id.*; see also Memorandum to the File, "Draft Remand Redetermination Analysis Memorandum for CS Wind Group," dated June 13, 2014, at Attachment III.

¹² See CSWG Remand Analysis Memorandum at Attachment III.

¹³ *CS Wind Vietnam Co. v. United States*, Slip Op. 2014-128 *16 (Ct. Int'l Trade 2014) (*CS Wind Vietnam II*).

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 23.

The Department issued its *Second Remand Results* on January 20, 2015.¹⁶ Initially, in the *Draft Results of Second Redetermination*,¹⁷ the Department continued to include “Erection Income,” “Civil Income,” “Sales of Jobwork,” “Sales of Finished Goods,” and “Scrap” as the income items in the denominator of the erection and civil income ratio. The Department concluded that “Erection Income,” “Civil Income,” and “Sales of Jobwork,” demonstrated by their express terms a relationship to “Jobwork Charges (including Erection and Civil Expense).” Regarding the “Sales of Finished Goods” and “Scrap,” the Department determined, based on information in the accompanying notes to Ganges’ financial statements, that it was reasonable to conclude that the value of Ganges’ manufactured finished goods, and the scrap associated with the finished goods, includes jobwork charges. However, in the *Second Remand Results* the Department found that Ganges’ financial statements do not provide any evidence as to whether or not “Miscellaneous Income” or “Services Income from TSP Activities” relates to jobwork charges.¹⁸ Therefore, absent this clarification, and pursuant to the CIT’s instructions, the Department revised the calculation of the denominator of the erection and civil income ratio to exclude “Miscellaneous Income” and “Services Income from TSP Activities.”¹⁹

Further, based on the Department’s consideration of comments from the parties to the *Draft Results of Second Redetermination*, the erection and civil income ratio and the resulting

¹⁶ *Final Remand Redetermination Pursuant to Court Order*, dated January 20, 2015 at 3-8, 11-14. (“*Second Remand Results*”).

¹⁷ See the Department’s *Draft Results of Redetermination Pursuant to Court Remand*, dated December 10, 2014. (“*Draft Results of Second Redetermination*”).

¹⁸ At the time, the Department determined that there was no conclusive evidence one way or the other, whether “Miscellaneous Income” and “Services Income from TSP Activities” were related to jobwork. Ganges’ financial statements provided limited information, and so it was conceivable that “Miscellaneous Income” and “Services Income from TSP Activities” could reasonably be associated with jobwork. However, as the Department was unable to determine definitively from the face of the financial statements to which activities these income items relate, the Department was unable to provide any further reasoned explanation for their inclusion, other than the Department followed its normal approach of including all financial statement items in our surrogate ratio calculations unless record evidence showed otherwise.

¹⁹ See Memorandum to the File, “Draft Second Remand Redetermination Analysis Memorandum for CS Wind Group,” dated December 10, 2014 (“CSWG Draft Remand Analysis Memorandum”).

offset to overhead expenses were revised. Specifically, we revised the denominator of the erection and civil income ratio to recognize that income earned on the “Sales of Finished Goods,” “Scrap,” “Erection Income,” and “Civil Income” relates to raw materials and direct labor, as well as jobwork expenses. Therefore, we excluded the portion of the income from the “Sales of Finished Goods,” “Scrap,” “Erection Income,” and “Civil Income” associated with raw materials and labor from the denominator of the erection and civil income ratio. The resulting erection and civil income ratio applied to jobwork charges to determine the offset for erection and civil income was 8.62 percent.²⁰ On May 11, 2015, the CIT affirmed the Department’s recalculated jobwork expenses in overhead.²¹

CS Wind then appealed the CIT’s decision to the CAFC. On August 12, 2016, the CAFC issued its decision, holding that: (1) the Department’s determination that packed product weights were more accurate than the reported FOP weights was not based upon substantial evidence; and (2) the Department did not clearly explain its logic, in terms keyed to the statute, of turning to the income side of the financial statements and using a ratio of certain income items as a way of apportioning the “Jobwork Charges (including Erection and Civil Expenses).”²² The CAFC reversed the CIT’s affirmance of Commerce’s use of packing weights rather than component weights in its calculation of surrogate values, vacated the CIT’s affirmance of Commerce’s overhead determination with respect to jobwork charges, erection expenses, and civil expenses, and directed the CIT to remand these matters to the Department to proceed in accordance with its opinion therein.²³

²⁰ See Memorandum to the File, “Final Second Remand Redetermination Analysis Memorandum for CS Wind Group,” dated January 20, 2015 (“CSWG Final Remand Analysis Memorandum”).

²¹ See *CS Wind Vietnam Co. v. United States*, Slip Op. 2015-45 (Ct. Int’l Trade 2015) (*CS Wind Vietnam III*) at 23-24.

²² See *CS Wind CAFC* at 1381.

²³ *Id.*

III. REMANDED ISSUES

A. Reported Product Weights

In *CS Wind CAFC*, the CAFC stated that the Department lacked evidentiary support to justify choosing CS Wind's packed product weights over CS Wind's reported FOP weights in the calculation of the company's normal value.²⁴ The CAFC stated that the significance of the weight discrepancy identified by the Department is not manifest as a matter of common knowledge, based upon the magnitude of the discrepancy.²⁵ Because the CAFC found the Department's reliance on packed product weight to be unsupported by substantial evidence on the record, it directed the Department to use the manufacturer-reported FOP weights in its AD calculation.²⁶ Pursuant to the Court's remand instructions, under protest,²⁷ we used the product weights reported by CS Wind for its FOPs in the AD calculations.

B. Jobwork Expenses

Summary

The CAFC concluded that, on remand, the Department should provide a coherent, full explanation of the final overhead determination. The CAFC directed the Department to lay out each step, with justification, so that it addresses the Court's concerns and clearly describes the statutory and evidentiary grounds of the final results.²⁸ In accordance with the Court's remand order, herein we further explain the reasoning for our treatment of the "Jobwork Charges" and have reviewed and reconsidered our surrogate value ("SV") ratio calculations, modifying those calculations where we found necessary as a result of that review and reconsideration. As a result of our revised analysis, as discussed in greater detail below, we continue to exclude from

²⁴ See *CS Wind CAFC*, 832F.3d at 1373.

²⁵ *Id.*

²⁶ *Id.* at 1374.

²⁷ See *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)(*Viraj*).

²⁸ *Id.*

manufacturing overhead expenses the portion of jobwork charges attributable to erection/civil income, but revised the SV ratio calculations by allocating a portion of the “in-house” total labor costs and the total store and spares costs (*i.e.*, overhead costs) to the erection and civil income producing activities. We also excluded the sales of jobwork revenue from the income allocation ratios used to allocate the expenses. Finally, in calculating the relative percentages that the “Sales of Finished Goods,” “Scrap,” “Erection Income,” and “Civil Income,” represent of the total income items, we only excluded the raw material costs from the “Sales of Finished Goods” and “Scrap.” That is, in calculating the relative income allocation ratios we assumed that there were no material costs associated with the erection and civil income and thus the full income amounts for erection and civil income were included.

Analysis

Section 773 of the Tariff Act of 1930, as amended (“the Act”) directs the Department, in determining whether subject merchandise is being, or likely to be, sold at less than fair value, to make a fair comparison between the export price or constructed export price and normal value.²⁹ In matters involving non-market economies (“NMEs”) as the case is here with Vietnam,³⁰ the Act guides the Department further, by directing it to determine the normal value of the subject merchandise on the basis of the value of the factors of production (“FOPs”) utilized in producing the merchandise, adding to the calculation an amount for general expenses and profit, plus the cost of containers, coverings and other expenses. Further, the Act states that the value of the FOPs shall be based on the best available information regarding the values of such factors in a market economy.³¹ Such a constructed value serves as a proxy for a sales price, and “because a fair sales price would recover {selling, general and administrative (“SG&A”)} expenses and

²⁹ See Section 773.

³⁰ See Section 771 (18).

³¹ See Section 773(c)(1)(A)-(B).

would include an element of profit, constructed value must include an amount for GS&A expenses and for profit.”³² In sum, in order to satisfy the purpose of the statute, the Department is tasked with calculating a normal value for the subject wind towers, and that normal value should include a fair sales price for the merchandise, such that the company would recover its expenses and make a profit.

In the instant case there is no record evidence to support the conclusion that Ganges’ “jobwork charges” are *only* attributable to erection and civil income. Rather, it is reasonable to conclude based upon the record evidence that the jobwork charges relate also to the income generated from the sales of finished goods and scrap. This is because in note 15 accompanying Ganges’ income statement,³³ it lists “jobwork charges (including erection and civil expenses).” Additionally, in information accompanying Ganges’ financial statements in the “schedule to the balance sheet & profit and loss account for the year ended 31st March,” it lists “production: steel, structures and pipe (including production done by third parties on job work basis).” As these two footnotes in Ganges financial statements did not specifically state that the jobwork charges related only to erection and civil income, it is reasonable, given the evidence on the record, for the Department to conclude that the “jobwork charges” relate to income from activities other than erection and civil services. In other words, the income associated with the cost producing the finished goods would include jobwork charges. As such, we find that it is reasonable to associate the jobwork charges to production and sales of finished goods and scrap, along with activity associated with erection and civil income.

³² See Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements Act (“URAA”), H.R. Doc. No. 103-316, at 839 (1994) *reprinted in* 1994 U.S.C.C.A.N. 3773, 4175 (stating that “constructed value is used...for normal 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”).

³³ See Letter from CSWG, “CS Wind’s Post-Preliminary Surrogate Value Submission,” dated September 14, 2012, at Exhibit 2A (“Ganges Financial Statements”).

Likewise, there is nothing on the record which leads to the conclusion that all expenses associated with civil and erection income relate only to subcontractors (*i.e.*, jobwork charges), and that no “in-house” labor or other overhead cost items (*e.g.*, store and spares, which are overhead cost items) were incurred in connection with erection and civil income. Consequently, given this gap in the record evidence, it is reasonable for the Department to determine that the “in-house” labor and other overhead cost items are also expenses associated with the production of finished goods and scrap, and civil and erection income.

In other words, we find it reasonable to conclude that all labor costs, jobwork charges and store and spares expenses proportionately relate to the income activity for sales of finished goods and scrap (less material costs) and civil and erection income. Therefore, because it is reasonable to assume that the wind tower and the civil and erection income would need to recover a portion of all of these expenses to reflect a fair price, for this redetermination we have applied a methodology that allocates all of these expenses proportionately to these income activities.³⁴

Methodology Applied By the Department

In the instant case, there are gaps in the record evidence. Ganges’ financial statements do not directly identify the portion of the labor, jobwork, and overhead costs incurred that are associated with each income activity, nor do the financial statements report a direct cost driver (*i.e.*, factor) that has a direct cause-effect relationship for allocating these costs. However, the financial statements do indicate that each of the company’s income activities is related to each of these expenses. Because the income activity is the only information available on the record that

³⁴ See SAA at 839; and see *RHP Bearings Ltd. v. United States*, 23 CIT 967 (Ct. Int’l Trade 1999) (“Profit is a component in the calculation of {constructed value}.”), *citing* URAA, Pub. L. No. 103-465, 108 Stat. 4809 (1994), the preferred method for determining profit for {constructed value} is to add to {constructed value} “the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review...for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country{.}”

segregates finished goods and scrap, from erection and civil income activities, we used the relative revenues generated from each activity to reasonably determine the proportion of the total labor, jobwork, and overhead costs related to each activity. Specifically, we reduced the sales revenue of finished goods and scrap by the cost of the raw materials associated with these items. In other words, since it is reasonable to assume that the erection and civil income do not include material costs, we removed the raw material costs associated with the sale of finished goods and scrap in order to put the relative revenues on a consistent basis. We then divided the sum of the income earned from civil and erection activities by the sum of the erection income, civil income, finished goods income (less raw materials) and scrap income (less raw materials). This resulted in the erection and civil income ratio. Finally, we applied the resulting erection and civil income ratio to the total labor, jobwork charges, and other overhead costs to determine the amount of these expense to allocate to civil and erection income.

Using the methodology stated above, the Department is fulfilling its statutory responsibility in calculating a fair sales price for the merchandise, by excluding the portion of the “in-house” labor costs, jobwork charges, and other overhead costs related to civil and erection income from the expenses included in calculating normal value. Specifically, over 99,000,000 rupees of Ganges labor costs, jobwork charges and stores and spares expenses have been proportionately allocated to Ganges civil and erection income of approximately 142,000,000 rupees. As a result, the revised surrogate overhead, SG&A, and profit ratios for this remand determination are 16.49, 10.42, and 0.60 percent, respectively.

Furthermore, we note that we excluded the sales of jobwork from the income activity associated with jobwork charges because, as the CAFC pointed out, it is reasonable to conclude that Ganges jobwork charges would not be related to the sales of jobwork. Specifically, the

CAFC stated that “we are perplexed by Commerce’s inclusion of “sales of jobwork” as an income if the Department was focusing on what income items tied to jobwork that Ganges purchased (to make merchandise it ultimately sold). Ganges-purchased jobwork and Ganges-sold jobwork seem to involve separate units, one ultimately sold by Ganges, the other not.”³⁵ Accordingly, we agree with the CAFC that the “sales of jobwork” would involve Ganges-sold jobwork, not Ganges-purchased jobwork that was tied to the merchandise produced that was ultimately sold.

C. Ganges’ Surrogate Value Information

Finally, the Court asked that the Department clarify statements made in the Government’s brief submitted in *CS Wind CAFC* that implies constraints on the Department’s authority to ask questions of non-interested parties, and how that authority impacts the Department’s analysis of the surrogate value financial statements of non-interested parties which are placed on the record of a proceeding.³⁶ We clarify the Department’s position herein.

The Department has the authority to ask any party for factual information at any time during a proceeding. However, the Department maintains a practice of refraining from “peeking behind” the underlying data of surrogate financial statements placed on the record by interested parties, because the Department cannot compel a non-interested party (*i.e.*, the surrogate value company) to submit information.

1. The Department Has The Authority To Ask Any Party For Factual Information At Any Time During A Proceeding

In antidumping duty proceedings involving NMEs, Congress directed that the Department “shall determine the normal value of the subject merchandise on the basis of the

³⁵ See *CS Wind CAFC*, 832F.3d at 1380.

³⁶ See *id.*, citing U.S. Br. 42; J.A. 206, 175.

value of factors of production utilized in producing the merchandise.”³⁷ To value FOPs, the Department bases its determinations on the “best available information” from a surrogate market economy country.³⁸ The Department selects FOP surrogate values from among those submitted on the record that are publically available (*i.e.*, non-proprietary), non-export average values, most contemporaneous with the period of review or investigation, product-specific, and tax-exclusive.³⁹

Sometimes, if parties have placed surrogate value information on the record, it might be necessary for the Department to follow up and request additional surrogate value information. In that case, the Department will issue questionnaires to interested parties in order to determine what financial information constitutes an adequate surrogate for the factors consumed in the production of the merchandise by respondent companies investigated or reviewed.⁴⁰

Furthermore, 19 CFR § 351.301(a) states that the Secretary {of Commerce} “may request any person to submit factual information at any time during a proceeding.” Put simply, and to the CAFC’s question in the instant case, we do not disagree that the Department has the statutory and regulatory authority to request factual information from any party, whether that party is designated as an interested party, as defined in section 771(9) of the Act, or a non-interested-party, during a proceeding.

2. It May Be Futile For The Department To Ask Questions Of Surrogate Value Companies; Commerce’s Authority To Apply Adverse Facts Available Extends Only To Interested Parties

³⁷ See section 773 of the Act.

³⁸ *Id.*

³⁹ *Id.*; see also 19 CFR § 351.408(c); and see *Golden Dragon Precise Cooper Tube Grp., Inc. v. United States*, Slip Op. 16-73, (Ct. Int’l Trade July 21, 2016).

⁴⁰ See 19 CFR § 351.221(b)(2) regarding the distribution of questionnaires requesting factual information and Commerce’s subsequent review of those responses.

If a party is an “interested party” within the meaning of section 771(9) of the Act, and that party withholds information that has been requested by the Department, or otherwise necessary information is unavailable, then section 776(a) of the Act states that the Department “shall” use facts otherwise available on the record in reaching a conclusion.⁴¹ If the Department also finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the Department, then the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.⁴² This is commonly referred to as applying adverse facts available or “AFA.” The purpose of employing AFA is to entice full and frank participation that ensures parties do not obtain a more favorable result by failing to cooperate than if it had cooperated fully.⁴³

The Department did not request from Ganges additional information regarding its financial statements, because the Department does not, as a matter of course, independently request supplemental information directly from the surrogate companies with respect to publicly available sources of surrogate values. One reason for this is because, in part, the Department has no means of compelling non-interested parties, in accordance with sections 776(a) and (b), to provide the requested information. The Department has no authority to apply either facts otherwise available or AFA if that third-country company ignores the Department’s questionnaire, or to verify whether any information submitted is complete or incomplete, truthful or misleading information. Also, the Department has no authority to compel a non-interested party to respond within the government’s regulatory or statutory deadlines.⁴⁴ This lack of an

⁴¹ See section 776(a) of the Act.

⁴² See section 776(b) of the Act.

⁴³ See *Mannesmannrohren-Werke AG & Mannesmann Pipe & Steel Corp. v. United States*, 23 CIT 826, 846, (Ct. Int’l Trade 1999), citing, SAA, H.R. Doc. No. 103-316, at 970 (1994) reprinted in 1994 U.S.C.C.A.N.4040, 4199, (“the purpose of adverse facts available is to ensure that an uncooperative party, does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”)

⁴⁴ See 19 CFR § 351.301.

ability to compel action on behalf of the Department contrasts with the International Trade Commission (ITC), which has subpoena power over non-interested parties, and can compel a party's participation on the record in a timely manner.⁴⁵

Companies in surrogate countries may have little or no interest in participating in the Department's procedures. Thus, even if the Department did issue questionnaires to Ganges, the Department could not presume that any answer would be forthcoming or take any actions to compel a response. Furthermore, preparing questionnaires and incorporating responses into the Department's record takes time and resources, and absent the likely response from companies in surrogate countries, such an exercise would be unreasonable and fruitless.

Accordingly, in response to the Court's question, when the Government stated in its Brief to the CAFC that it was not possible to further dissect the financial statements of a surrogate company as if the surrogate company were an interested party to the proceeding, as a matter of clarification, the Government in fact meant that in accordance with the Department's practice and resource constraints, no additional information was requested to be placed on the record which might have hypothetically enabled such an additional analysis.⁴⁶

The Department has "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis."⁴⁷ Ganges' surrogate financial ratios, including the overhead ratio, were placed on the record and analyzed to ensure the company was a producer of identical or comparable merchandise. The information was publically available, as well as audited, complete, showed a profit, and reflected no evidence of subsidies found by the

⁴⁵ See 19 CFR § 210.32; see also *Rules of General Application and Adjudication and Enforcement: Final Rule 73* Fed. Reg. at 38318 (ITC July 7, 2008).

⁴⁶ See U.S. Br. 42; J.A. 206.

⁴⁷ *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp.2d 1323, 1327 (2006)(quoting *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp.2d 608, 616, 2001 Ct. Int'l Trade 96 (2001).

Department to be countervailable.⁴⁸ Accordingly, the Department acted consistently within its discretion and practice in determining that the use of Ganges' surrogate financial statements was reasonable and constituted the best available information.

IV. SUMMARY AND ANALYSIS OF PARTIES COMMENTS

The Department issued the draft results of redetermination on November 23, 2016.⁴⁹ The Wind Tower Trade Coalition ("WTTC")⁵⁰ and CS Wind⁵¹ submitted comments on the draft results. These comments are addressed, below. After considering the parties' comments, we continue to reach the same conclusions from that of our Draft Redetermination in the final results of redetermination.

Interested Party Comments

Comment 1: Whether the Department should have used the product weights reported by CS Wind for its FOPs in the AD calculations.

WTTC

- The Department is the expert fact finder in an antidumping proceeding, and the CAFC has inappropriately usurped the Department's authority in a manner not in accordance with law. The CAFC's decision ignores the fact that counsel pointed the CAFC to evidence that showed that the packed weight was not an "estimate" as CS Wind claimed, but weights used in the normal course of business. Thus, the Department should

⁴⁸ See *Wind Towers Final Determination*.

⁴⁹ See *Draft Results of Redetermination Pursuant to Court Order: CS Wind Vietnam Co., Ltd., and CS Wind Corporation v. United States and Wind Tower Trade Coalition*, No. 2015-1850 (CAFC August 12, 2016) ("Draft Results").

⁵⁰ See Letter from WTTC to The Honorable Penny Pritzker, "Re: Utility Scale Wind Towers from the Socialist Republic of Vietnam: Comments on Third Draft Results of Redetermination Pursuant to Remand, *CS Wind v. United States*, Court No. 2015-1850," dated December 7, 2016. WTTC originally submitted its comments on November 30, 2016. However, due to the inclusion of unsolicited arguments and new factual information included in the comments, the Department rejected the submission, and requested that WTTC resubmit its comments with the unsolicited arguments and new factual information removed from the document. See Letter from Abdelali Elouaradia to WTTC, "RE: *CS Wind Vietnam Co., Ltd., and CS Wind Corporation v. United States and Wind Tower Trade Coalition*, No. 2015-1850 (CAFC August 12, 2016), Draft Results Of Redetermination Pursuant To Court Order Regarding Utility Scale Wind from the Socialist Republic of Vietnam: Rejection of Submission Filed by Wind Tower Trade Coalition," dated December 5, 2016.

⁵¹ See Letter from CS Wind to Hon. Penny Pritzker, "Re: CS Wind's Comments on Department's Draft Remand Redetermination – Remand of the Antidumping Duty Investigation on Utility Scale Wind Towers from the Socialist Republic of Vietnam," dated November 30, 2016.

respectfully submit that the CAFC's opinion was over-reaching, protest the decision, and request to be granted another remand to explain its reasoning.

Department Position:

We are filing these Remand Results under protest, and respectfully disagree with the CAFC's holding in *CS Wind CAFC* regarding our adjustment to CS Wind's reported FOPs in the *Wind Towers Final Determination*. However, the remand order of the CIT on October 4, 2016, stated that "Commerce shall follow the {CAFC's} direction to use the manufacturer-reported weights in its calculations." We have therefore followed the orders of the CAFC, and we have cancelled the weight adjustment in CS Wind's margin calculation.

Comment 2: Whether the Department should have obtained clarification regarding its jobwork expenses from Ganges.

WTTC

- The CAFC stated in its remand that the Department has the authority under law to try to obtain empirical data that can be readily obtained. Attempting to obtain clarification from Ganges regarding expenses reported in its financial statement does not place a significant burden on the Department. The Department should send Ganges a letter, and request that the CIT allow a reasonable amount of time for a response prior to issuing its final remand determination.

Department Position:

As noted above, the Department does not request information from non-interested parties, in this case, third-party companies whose financial statements were placed on the record as proposed surrogate values, as WTTC suggests we do. First, the Department has no legal mechanism of requiring non-interested parties to provide the requested information, because: (1) the Department has no statutory authority to apply facts otherwise available or AFA if that third-country company ignores the Department's questionnaire, or even verify whether any information provided is complete or incomplete, truthful or misleading; and (2) the Department has no statutory authority to compel a non-interested party to respond within the government's

regulatory or statutory deadlines. Second, the Department cannot have any expectation that a company such as Ganges would respond to an inquiry such as that suggested by WTTC, since a company that is uninvolved in the proceeding would have little or no interest in responding. Further, as we've explained, preparing questionnaires and supplemental questionnaires does take a certain amount of time and resources, which would be fruitless in a case in which it is unlikely a company which is not an interested party is unlikely to provide a response.

Comment 3: Whether the Department should revise its SG&A methodology by allocating certain SG&A expenses to erection and civil activities

CS Wind

- CS Wind believes that the Department acted reasonably, and within the spirit and letter of the CAFC's instructions, by not reducing the erection income and civil income by raw material expenses in the income ratio allocation formula. The Department is correct that raw material expenses cannot reasonably be associated with these income items.
- Notwithstanding the above, CS Wind proposes that the Department fine tune its revised methodology in order to achieve an even more accurate result, to fully respond to the CAFC's concerns, and account for all relevant record evidence. The Department should reject any suggestion that Ganges' erection and civil income are related to towers owned and sold by third parties, which is not supported by the record. The Department should adjust its calculation by offsetting a portion of several SG&A expenses, and allocating it to erection and civil activities.
- The Department may also offset jobwork expenses by sales of jobwork, erection income and civil income.

Department Position:

We agree with CS Wind that the revised calculations in this redetermination reasonably addressed the CAFC's concerns regarding the allocation of the jobwork charges to civil and erection income activities and to other income activities associated with jobwork charges. In addition, we addressed other concerns noted by the CAFC by allocating all associated labor and overhead costs from Ganges' financial statements to the associated income activities for Ganges (*i.e.*, sales of finished goods, sales of scrap and income and erection income). Further, we

excluded the sales of jobwork from the income activity associated with jobwork charges because, as the CAFC pointed out, it is reasonable to conclude that Ganges jobwork charges would not be related to the sales of jobwork.

We disagree with CS Wind that record evidence definitively indicates that Ganges only provides civil and erection services for the towers it produces in-house versus providing the same types of services for towers produced by others. Nonetheless, we find that the lack of this definitive record evidence, regarding Ganges' business operations, does not in any way affect the reasonableness of the calculations and assumptions used in this redetermination.

Further, we disagree with CS Wind's assertion that the Department did not properly account for SG&A expenses because it did not allocate a portion of these expenses to civil and erection income. In accordance with the Department's normal practice, and as demonstrated in the surrogate financial ratio calculations, we allocated SG&A expenses (*i.e.*, period costs) over the total cost of goods sold of the company as whole, including the portion of jobwork charges, labor and overhead costs allocated to erection and civil income.⁵² As such, a portion of the SG&A expenses has been attributed to civil and erection income.

With respect to CS Wind's continued contention that the Department may also offset jobwork expenses by the sales of jobwork, erection income and civil income, we disagree. The Department's normal practice is to not include separately reported revenue line items in a surrogate income statement as a direct offset to costs in the calculation of the surrogate financial ratios.⁵³ Normally, if a revenue line item is separately reported in the revenue section of a

⁵² See, e.g., *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order*, 76 FR 77772 (December 14, 2011) and the accompanying Issues and Decision Memorandum at Comment 11 ("The statute does not prescribe a specific method for calculating surrogate financial ratios. Therefore, the Department over time, has developed a consistent and predictable practice of using COGS as the denominator to calculate the SG&A and interest and profit ratios.").

⁵³ See Ministerial Error Memorandum at 2.

financial statement, it reflects a main business activity of the company. It is miscellaneous income items, which are typically reported along with the miscellaneous expense items at the bottom of the income statement, that the Department normally included as an offset to the surrogate financial ratios.⁵⁴ Consistent with that practice, we have continued to exclude Ganges' erection/civil income as a direct offset from the surrogate financial ratio calculations. Specifically, the income related to these erection and civil activities is not related to the general manufacturing operations of the company but, rather, is related to unique revenue generating activities that require specific treatment for revenue recognition. As such, because the erection and civil income are not miscellaneous revenues related to the general operation of the company, we did not revise the calculation of the surrogate overhead ratio to offset for erection/civil income.

V. FINAL RESULTS OF REDETERMINATION

Based on the above analysis, CS Wind's weighted-average dumping margin is 0.0 percent.⁵⁵

12/9/2016

X



Signed by: PAUL PIQUADO

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

⁵⁴ See, e.g., *Chlorinated Isos from the PRC* and accompanying Issues and Decision Memorandum at Comment 5.

⁵⁵ Based on the results of this remand redetermination, merchandise produced and exported by CS Wind will be excluded from the order on Utility Scale Wind Towers from the Socialist Republic of Vietnam.