

Tianjin Wanhua Co., Ltd., v. United States
Court No. 15-00190, Slip Op. 16-79 (Court of International Trade August 15, 2016)
FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND

I. SUMMARY

The Department of Commerce (“Department”) prepared these final results of redetermination (“Draft Results”) pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”), issued on August 15, 2016 in *Tianjin Wanhua Co., Ltd. v. United States*, Court No. 15-00190, Slip Op. 16-79 (CIT 2016) (“*Wanhua Co.*”). The remand concerns the fifth administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (“PET film”) from the People’s Republic of China (“PRC”) covering the period November 1, 2012, through October 31, 2013 (the “POR”).¹

II. BACKGROUND

On March 28, 2014, the Department placed on the record a list of certain countries that the Department identified as being at the same level of economic development as the PRC, based upon Gross National Income (GNI) data from 2012, and set a deadline of April 23, 2014 (with rebuttal comments due by April 28, 2014) for parties to comment on, and submit factual information relating to, the list of countries.² Specifically, the Department stated the following:

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 33241 (June 11, 2015), and accompanying Issues and Decision Memorandum (“I&D Memo”) (collectively, “AR5 Final Results”).

² See Letter from Howard Smith, Program Manager, Office IV Enforcement and Compliance to Interested Parties, “Fifth Antidumping Duty Administrative Review of Polyethylene Film, Sheet, and Strip from the People’s Republic of China: Request for Surrogate Country and Surrogate Value Comments and Information,” dated April 16, 2014 (“Surrogate Country Letter”).

*Because it is the Department's practice to determine economic comparability early in a proceeding, we are providing interested parties an opportunity to comment on the list, as a starting point, for surrogate country selection pursuant to section 773(c)(4) of the Act, and to propose, for consideration, other countries that are at a level of economic development comparable to the People's Republic of China. These comments are due by **April 23, 2014, 5 pm EST**. Rebuttal comments are due by **April 28, 2014, 5 pm EST**.*

The Department further established a deadline for submitting comments on, and factual information relating to, surrogate country selection of May 7, 2014, with rebuttals due by May 19, 2014. The Department stated the following:

Section 773(c)(4)(B) of the Act requires, to the extent possible, that the Department select a surrogate country that is a significant producer of comparable merchandise. Policy Bulletin 04.1, entitled "Non-Market Economy Surrogate Country Selection Process," further outlines the Department's policy that the surrogate country should also be a significant producer of merchandise comparable to the merchandise under consideration. Policy Bulletin 04.1 is available on the Department's website at <http://trade.gov/enforcement>. Parties may submit information regarding the selection of a surrogate country by providing the following information:

- (1) Information on whether the country is a significant producer of merchandise comparable to the merchandise subject to this proceeding;*
- (2) Information regarding data availability and the quality of the data available within that single country for the major factors of production used to produce the merchandise subject to this proceeding; and*
- (3) Information regarding data availability and the quality of financial statements available within that country for producers of merchandise identical or comparable to the merchandise subject to this proceeding.*

*The Department intends to identify the surrogate country preliminarily selected in the preliminary results of this segment of the proceeding. Therefore, comments on surrogate country selection must be submitted to the Department no later than **May 7, 2014, 5 pm EST** so that the Department may have an opportunity to consider these comments for the preliminary results. Rebuttal comments, limited to rebutting information submitted by parties on surrogate country selection, are due no later than **May 19, 2014, 5 pm EST**.³*

³ *Id.*

Finally, the Department established a deadline for interested parties to submit factual information to value respondents' factors of production (surrogate value information).

Specifically, the Department stated the following:

*Additionally, the Department will select publicly-available information in the preliminary results to value the factors of production. For surrogate value information to be considered by the Department in the preliminary results, you must submit the information to the Department no later than **May 7, 2014, 5 pm EST**. Rebuttal comments, limited to rebutting surrogate value information submitted by parties, are due no later than **May 19, 2014, 5 pm EST**.*

Notwithstanding the above deadlines, in accordance with 19 CFR 351.301(c), interested parties may submit publicly-available information to value factors of production no later than 30 days before the scheduled date of the preliminary results.⁴

Tianjin Wanhua Co., Ltd (“Wanhua”) filed a number of submissions with the Department in response to the opportunities to comment and submit factual information described above.⁵

On April 23, 2014, Wanhua submitted comments on the surrogate country list, in which Wanhua advocated for the use of as-yet unreleased 2013 GNI data in the Department's surrogate country selection.⁶ On July 7, 2014, Wanhua submitted a document titled “Polyethylene Terephthalate (PET) Film from the People's Republic of China; A-570-924; Submission of Surrogate Value Information” which the narrative on the first page of the document also identified as a submission of surrogate value information. The surrogate value information in this submission was timely pursuant to 19 CFR 351.301(c)(3) (submitted 30 days before the scheduled date of

⁴ *Id.*

⁵ See Letter from Wanhua to the Secretary of Commerce “Polyethylene Terephthalate (PET) Film from the People's Republic of China; A-570-924; Comments on Economic Comparability and Request for Clarification of Date,” dated April 23, 2014 (“Wanhua EC Comments”); letter from Wanhua to the Secretary of Commerce “Polyethylene Terephthalate (PET) Film from the People's Republic of China; A-570-924; Comments on Selection of Surrogate Country, Submission of Initial Surrogate Value Information and Request for Clarification of Deadline,” dated May 7, 2014; and letter from Wanhua to the Secretary of Commerce “Polyethylene Terephthalate (PET) Film from the People's Republic of China; A-570-924; Response to Petitioners' Surrogate Country and Surrogate Value Comments,” dated May 19, 2014.

⁶ See generally Wanhua EC Comments.

the preliminary results of review). However, the Department later became aware of the fact that the submission contained not only surrogate value information, but 2013 gross national income (“GNI”) data submitted as rebuttal data for use in selecting potential surrogate countries.

Wanhua first cited and relied upon the 2013 GNI data in its case brief, submitted on January 14, 2015, when addressing the surrogate country issue.⁷ The deadline for submitting such data was April 23, 2014, not July 7, 2014. Based on the above facts, the Department rejected Wanhua’s submission of 2013 GNI data as untimely-filed information.⁸

Accordingly, the Department rejected Wanhua’s case brief, which was filed on January 14, 2015, and requested that Wanhua resubmit its case brief after redacting certain sections of the brief referencing the untimely-filed GNI data.⁹ On March 19, 2015, Wanhua submitted a letter to the record (“Clarification Letter”) claiming that the Department’s requested redaction was excessive, and that portions of the redacted case brief were in fact timely-filed, referring to information on the record in its April 23, 2014 surrogate country comments.¹⁰ On March 19, 2015, the Department rejected the Clarification Letter, because it referred to portions of Wanhua’s case brief previously rejected as containing untimely-filed factual information.¹¹ The Department removed this document from the administrative record.¹² Furthermore, on March

⁷ See Letter from Wanhua to the Secretary of Commerce, “Polyethylene Terephthalate (PET) Film from the People’s Republic of China; A-570-924; Case Brief of Tianjin Wanhua Co., Ltd.,” dated March 23, 2015 (“Wanhua Case Brief”) at 6, 8-10.

⁸ See Letter from Howard Smith, Program Manager, Office IV, Enforcement and Compliance to Wanhua dated March 12, 2015 (“Wanhua Rejection Letter”).

⁹ See Letter from Howard Smith, Program Manager, Office IV, Enforcement and Compliance to Wanhua dated March 12, 2015; *see also* letter from Wanhua to the Secretary of Commerce, “Polyethylene Terephthalate (PET) Film from the People’s Republic of China; A-570-924; Case Brief of Tianjin Wanhua Co., Ltd.,” dated March 23, 2015 (rejected and retained).

¹⁰ See Letter from Wanhua to the Secretary of Commerce “Polyethylene Terephthalate (PET) Film from the People’s Republic of China; A-570-924; Request for Clarification of Rejection,” dated March 19, 2015.

¹¹ *Id.* at Attachment I.

¹² See Bar Code 3265244-01.

19, 2015, Wanhua submitted a letter to the Department, objecting to the Department's decision to reject the 2013 GNI data.¹³

Pursuant to Court order, on March 3, 2016, Wanhua refiled the Clarification Letter with the Department (barcode 3265244-01). The Court further ordered that the Department include the document on the official record of the administrative review. On October 25, 2016, the Department issued its draft remand redetermination. On October 31, 2016, Wanhua and Terphane, Inc. ("Terphane") filed comments on the Department's draft remand redetermination.¹⁴ Terphane's comments consist of a single statement that it concurs with the Department's draft remand redetermination results. We address Wanhua's comments on the draft remand in the Interested Party Comments section below.

III. REMANDED ISSUES

The Court granted the Department's request for a voluntary remand to address its treatment of the Clarification Letter, and to reconsider its selection of a surrogate country, given that reconsideration of the Clarification Letter may implicate surrogate country selection.¹⁵ Moreover, the Court declined to limit the scope of the remand to these two issues. Rather, the Court noted that these two issues may implicate the reasonableness of the Department's decision

¹³ See Letter from Wanhua to Secretary of Commerce, "Objection to Removal of July 7, 2014 Submission from the Record," dated March 16, 2015 ("Objection Letter").

¹⁴ See Letter from Wanhua to the Secretary of Commerce "Polyethylene Terephthalate Film from the PRC; A-570-924; Comments on Draft Remand Determination," dated October 31, 2016; *see also* letter from Terphane to the Secretary of Commerce "Administrative Review Of The Antidumping Duty Order On Polyethylene Terephthalate (PET) Film, Sheet, And Strip From The People's Republic Of China/Comments on Draft Results of Redetermination Pursuant to Court Remand (Ct. No. 15-00190) dated October 31, 2016.

¹⁵ See *Wanhua Co.* at 9.

to reject the 2013 GNI data.¹⁶ Accordingly, we are also addressing the rejection of that data in this redetermination.

First, after reviewing the Clarification Letter, the Department agrees that the redaction of the portions of Wanhua's case brief which Wanhua contested in the Clarification Letter was not appropriate. These sections of Wanhua's case brief do not contain untimely-filed new factual information; rather they contain arguments and references to timely filed factual information on the record, as of Wanhua's April 23, 2014 comments on the surrogate country list.

Because the Clarification Letter contains an exhibit containing those improperly-redacted portions of Wanhua's case brief, we have considered those portions of Wanhua's case brief in our Surrogate Country Selection analysis below. However, the Department notes that the redacted portions of Wanhua's case brief which the Department is now allowing to remain on the record do not contain 2013 GNI data, which Wanhua filed past the deadline for such information and which was properly rejected from the record of this administrative review.

Second, with regard to the rejection of the untimely-filed 2013 GNI data, the Department determines that it appropriately rejected the data for the reasons stated in the Department's June 3, 2015 Memorandum to The File.¹⁷ The Department has included below the relevant excerpts from that letter explaining why it was appropriate to reject the 2013 GNI data:

Furthermore, on March 19, 2015, Wanhua submitted a letter to the Department, objecting to the Department's decision to reject its untimely filed factual information.¹⁸ Wanhua cited Dupont Teijin Films v. United States, which was remanded to the Department to consider untimely filed GNI data in the surrogate

¹⁶ *Id.*

¹⁷ See Memorandum from Jonathan Hill, International Trade Compliance Analyst, AD/CVD Operations, Office IV through Robert Bolling, Acting Office Director, Office IV to The File "5th Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Tianjin Wanhua Co., Ltd.'s Objection to the Department's Rejection of Untimely Filed Information," dated June 3, 2015 ("Response Letter).

¹⁸ See Letter from Wanhua to Secretary of Commerce, "Objection to Removal of July 7, 2014 Submission from the Record," dated March 16, 2015 (Wanhua Objection Letter).

country selection process, and argues that the same scenario applies here.¹⁹ Wanhua further argues that: 1) rejecting respondent's untimely submitted GNI data treats respondent differently in this review than in the review underlying Dupont Teijin Films, where the untimely filed GNI data was submitted by petitioner and not rejected by the Department; and 2) the Department's rejection of the untimely filed data at a late stage in this proceeding (i.e., after case briefs were filed), was prejudicial and deprived Wanhua of the opportunity to address the issue in its case brief.²⁰ Wanhua argues that the Department's decision here is an abuse of discretion.

The Department disagrees with Wanhua and finds this proceeding distinguishable from the factual scenario in Dupont Teijin Films. First, unlike the review underlying Dupont Teijin Films, this administrative the instant review of polyethylene terephthalate film, sheet, and strip from the PRC [sic] is subject to the Department's specific guidelines for factual information submissions, as detailed in 19 CFR 351.301. Wanhua and other interested parties are aware of the Department's guidelines for factual information submissions, and have timely submitted information or extension requests throughout the review. In particular, Wanhua and other parties are aware that while there are specific guidelines for surrogate value information detailed in 19 CFR 351.301(c)(3), deadlines for information submitted to comment on the surrogate country list are not subject to these guidelines. Accordingly, the Department can specify deadlines for comment on the surrogate country list, and is able to reject any information that is untimely filed, pursuant to 19 CFR 351.302(d). As detailed above, the Department specified a clear deadline of April 23, 2014 for comments on the surrogate country list, with a rebuttal deadline of April 28, 2014, along with further deadlines for comment on surrogate country selection of May 7, 2014 with rebuttals due May 19, 2014. Parties had until these dates to timely submit information on the surrogate country list or surrogate country selection, or to request a timely extension to submit comment. Wanhua's July 7, 2014 submission of GNI data was therefore untimely.

Second, we disagree with Wanhua that rejecting its untimely submission results in unequal treatment for petitioner and respondent, given the fact that the untimely filed GNI data was not rejected from the record in the review underlying Dupont Teijin Films. Wanhua's argument is inapplicable here. The Department develops and considers the record of each administrative proceeding independently.²¹ Regardless, in this proceeding, unlike in the review underlying Dupont Teijin Films, Wanhua's factual information was untimely filed pursuant to the deadlines specified by the Department as well as 19 CFR 351.301. The Court of

¹⁹ See *DuPont Teijin Films v. United States*, 931 F. Supp. 2d 12971 (CIT 2013) ("DuPont Teijin Films").

²⁰ *Id.*

²¹ See, e.g., *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and No Shipment Determination*, 77 FR 63291 (October 16, 2012) and accompanying Issues and Decision Memorandum at Comment 10.

International Trade (CIT) and the Court of Appeals for the Federal Circuit (“CAFC”) have held that the Department has the discretion to set and enforce deadlines, and that the Department should not be burdened by the acceptance of untimely filed submissions close to the final results of a review.²²

*Third, we disagree with Wanhua that the Department’s late rejection of the factual information was prejudicial and deprived Wanhua of an opportunity to brief this issue. Section 351.302(d) of the regulations does not specify a deadline for the rejection of untimely-filed material, only that the Department may reject such submissions. The CAFC noted in *Dongtai Peak* that in rejecting an untimely submission, an interested party’s due process rights are not violated where that party had notice of the deadline and an opportunity for reply.²³ As noted earlier, the Department set clear deadlines for the submission of factual information regarding the surrogate country list, as well as surrogate country selection. Wanhua’s submission of GNI data occurred well past these deadlines. In regards to Wanhua’s argument that the late rejection prevented an opportunity to brief this issue, we note that we have considered Wanhua’s objection to our decision and addressed Wanhua’s objection in this Memorandum to the File.*

Therefore, the Department’s decision to reject Wanhua’s untimely filed surrogate country information is consistent with the regulations and our practice.

Based on the above analysis, the Department continues to find that it appropriately rejected the 2013 GNI as untimely-filed factual information.

Finally, in this remand the Department has considered the contested portions of Wanhua’s case brief, which are now part of the record because they are attached to the Clarification Letter, and is not persuaded to change the selected surrogate country based on the information contained therein. In these portions of Wanhua’s case brief, Wanhua simply describes the overlap between the period of review and 2012 and 2013 GNI data, states that the Department used 2012 GNI data in its preliminary determination, argues that the 2012 GNI data on the record is not contemporaneous enough with the period of review, and argues that the Department “did not take into account the proper GNI in its surrogate country determination

²² See, e.g., *Grobest & I-Mei Indus. (Vietnam) v. United States*, 815 F. Supp. 2d 1342, 1365 (CIT 2012); see also *Dongtai Peak v. United States*, 777 F. Supp. 2d 1343, 1353 (Fed. Cir. 2015) (“*Dongtai Peak*”).

²³ *Dongtai Peak*, 777 F. Supp. 2d at 1353.

...” Wanhua argued in this section of its case brief that in *DuPont Teijin Films*,²⁴ the CIT “ordered the Department to reconsider the economic comparability of India when GNI data was {sic} submitted during the course of the review which called the economic comparability into question.” As explained above, unlike in *DuPont Teijin Films*, the Department properly rejected the untimely-filed 2013 GNI data from the record of the review. Accordingly, the Surrogate Country List based upon 2012 GNI data is the only GNI data on the record of the underlying review. Thus, this administrative review is distinguishable from the facts at issue in *DuPont Teijin Films* and the Department does not find Wanhua’s arguments persuasive.

Therefore, the Department finds no reason to change its selection of Indonesia as the primary surrogate country.

IV. INTERESTED PARTY COMMENTS

Issue 1: Rejection of the Clarification Letter and Certain Portions of Wanhua’s Brief

Wanhua’s Comments

- The Department properly concluded that it improperly rejected the Clarification Letter and that certain portions of the case brief should not have been rejected by the Department.
- Wanhua cannot comment on whether the Department placed the appropriate portions of the case brief on the record because, contrary to its claim in the draft remand redetermination, the Department failed to append a copy of the restored arguments of the case brief.

Department Position:

The Department disagrees with Wanhua’s statement that the Department claimed that it would append the restored arguments to the draft remand redetermination. Rather, the Department stated that “...in this remand the Department has considered the contested portions

²⁴ See *DuPont Teijin Films, et al. v. United States*, 896 F. Supp. 2d 1302 (CIT 2013).

of Wanhua’s case brief, which are now part of the record as attached to the Clarification Letter... .” The Clarification Letter contains those arguments that were previously redacted that have been restored. Additionally, the Clarification Letter was filed on the administrative record on March 19, 2016 and, therefore is on the record of the underlying administrative review. Furthermore, the restored arguments are specifically identified and addressed in issue 2, Surrogate Country Selection, below.

Issue 2: Surrogate Country Selection

Wanhua’s Comments

- The restored arguments raise issues as to whether the economic comparability of Indonesia and South Africa was properly examined. The selection of surrogate country and surrogate values requires a weighing of all factors and economic comparability is a factor which must be considered with the other factors. By only examining the restored arguments, the Department is not examining Wanhua’s case brief as a whole and is not, therefore, fully examining the issue of economic comparability. When taken as a whole, the now expanded case brief would result in a different determination of surrogate country.
- The Department admitted that the restored arguments raise questions as to whether the 2012 GNI data are contemporaneous and whether those are the proper data for use in the Department’s surrogate country selection. As such, the Department should have considered the properly filed data of record which relate to, and comments on, the GNI and which were unquestionably timely submitted by Wanhua. Such data, which were from other Government sources, extrapolated the non-contemporaneous World Bank data and predicted what the proper data would show. Rather than considering these additional data, the Department considered the “new” argument without placing it in context.

- In *Tianjin Wanhua Co., Ltd. v. United States*, Slip Op. 16-28, 40 CIT (March 29, 2016), the Court called into question the validity of the only Indonesian annual report of record in that review (which annual report was also used in this review). The Court did not overturn the Department's use of the financial statements because it determined that the usability of the alternate South African data had not been discussed. In this case, the same attacks were made on the identical Indonesian financial statement and the usability of the South African data had been discussed. Due to the weakness of the Indonesian data as it is now a country for which no viable financial statement is of record, the Department needed to examine the restored brief as a whole and would be led to the inevitable conclusion that the selection of Indonesia was not proper.

Department's Position:

First, the Department disagrees with Wanhua's claim that it did not consider Wanhua's case brief as a whole. As an initial matter, in the *AR5 Final Results*, the Department fully examined the issue of surrogate country selection including all issues and data related to economic comparability, whether South Africa is a significant producer of comparable merchandise, the quality of the Indonesian and South African potential surrogate value data on the record, and the surrogate financial statements available for use in calculating financial ratios. After a full consideration of these issues, the Department determined that both South Africa and Indonesia are significant producers of comparable merchandise, and both are at the same level of economic development as the PRC. Ultimately, the Department determined to use Indonesia as the surrogate country because, in relevant part, Indonesia provided the best available information for surrogate financial ratios. The Department explained that it has a preference for selecting the financial statements of a producer of identical merchandise over a producer of comparable

merchandise for calculating surrogate financial ratios when such information is available, and the Indonesian financial statements were for a producer of identical merchandise while the South African financial statements were for a producer of comparable merchandise.²⁵ The unredacted arguments, even when taken as a whole with the other relevant arguments in Wanhua’s case brief, do not provide a basis for a different determination. The unredacted arguments are below:²⁶

- *“In the preliminary results the Department selected Indonesia as the surrogate country. This decision is contrary to the facts of record and cannot be sustained. There are multiple reasons why the Department should not select Indonesia for the Final Results, and each reason is individually sufficient for the rejection of Indonesia. But when taken as a whole, the facts against the selection of Indonesia are overwhelming.”*
- *“The Department made its initial determination of economic comparability before the GNI data was available for most of the POR. The determination was placed on the record by the Department memorandum of April 24, 2014. This data was for 2012, which overlaps only 2 months with the POR. The appropriate GNI data, which is for the 2013 calendar year, and thus overlaps the POR by 10 months.”*
- *“In its initial selection, the Department established a GNI band from \$3,420 to \$7,610. It appears, although it is not explicitly stated, that the Department did not use the most current data. In the I&D memorandum, the Department simply stated: Consistent with Departmental practice, the Department identified a number of countries that are at the same level of economic development as the PRC. The Department determined economic comparability based on per capita GNI, as reported in the most current annual issue of the World Development Report (The World Bank). The countries identified, namely Bulgaria, Columbia, Ecuador, Indonesia, South Africa, and Thailand, are not ranked and are considered equivalent in terms of economic comparability. See I&D Memo at 7.”*
- *“The surrogate countries selected included ones with a difference, on the low side, of \$2,320, and on the high side, \$1,870.”*
- *“In the footnotes, the Department identified the “surrogate country list at attachment 1”. As discussed above, the “surrogate country list” was the document issued by the Department on April 24, 2014 and thus used 2012 data. Accordingly, the Department did not take into account the proper GNI in its surrogate country determination, and its preliminary determination that Indonesia is economically comparable with China is thus not based on substantial evidence and is otherwise unsupported.”*
- *“Wanhua notes that the Court of International Trade, in DuPont Teijin Films, et al. v. United States, 896 F. Supp 2d 1302 (CIT 2013), for an earlier segment of this review, addressed this very issue and ordered the Department to reconsider the economic*

²⁵ See AR5 Final Results at Comment 2C.

²⁶ See Clarification Letter at Attachment B.

comparability of India when GNI data was submitted during the course of the review which called the economic comparability into question. In that case, the data which raised questions as to the economic comparability of India was submitted at a later stage of the review, and well after the date when the current data became available.”

- *“...as the Department has alternate record data for a country which is economically comparable to China, the Department should not use Indonesia as a surrogate country.”*

Taken as a whole, Wanhua argues that the Department “did not take into account the proper GNI in its surrogate country determination, and its preliminary determination that Indonesia is economically comparable with China is thus not based on substantial evidence and is otherwise unsupported” (*i.e.*, 2013 GNI data). However, Wanhua did not point to any evidence on the record in these arguments to support this claim, nor do its unredacted arguments provide any substantive reasons why, the 2012 GNI data are not the proper GNI data other than to note that the data “overlaps only 2 months with the POR.” Although Wanhua claims that the Department admitted that the unredacted arguments raise questions as to whether the 2012 GNI data are contemporaneous with the POR and whether they are the proper data for use in the Department’s surrogate country selection, the Department does not agree and made no such statement in the draft remand redetermination. Nevertheless, the 2012 GNI data are the only GNI data properly on the record of the underlying review. Based on these data, the restored arguments, even when considered with the case brief as a whole, are not supported by record evidence and do not form a basis for the Department to change its surrogate country selection.

Second, in its comments on the draft remand redetermination, Wanhua states, “{t}he Department did not, however, consider the properly filed data of record which related to, and comments on, the GNI and which was unquestionably timely submitted by Wanhua. Such data, which was from other Government sources, extrapolated the non-contemporary World Bank data

and predicted what the proper data would show.”²⁷ Wanhua, however, fails to specifically identify those Government sources or data, and does not provide any cites to the record.²⁸ The Department considered Wanhua’s comments on economic comparability – including the restored arguments from its case brief – and did not change its determination because it was based on the best available information on the record. Wanhua’s argument appears to be speculative in nature.

Finally, the Department disagrees with Wanhua’s claim *Wanhua Co., Ltd. v. United States*, Slip Op. 16-28, CIT (March 29, 2016) calls into question the validity of the Indonesian financial statements in the underlying review and ultimately deems the financial statements unusable. As an initial matter, in that case, the CIT upheld Commerce’s use of the Argha Karya financial statements as the best available information on the record of that administrative review. Furthermore, although Wanhua has attempted to draw a conclusion in this remand redetermination using the Court’s case regarding another segment of this proceeding, the Department notes that each segment of a proceeding is independent of other segments of that proceeding and the determination in each segment is decided based upon the record developed in that segment of the proceeding.²⁹

Additionally, to the extent Wanhua raised issues concerning the Indonesian financial statements in its case brief, the Department addressed all of these issues in the *AR5 Final Results*, and found the Indonesian financial statements usable for the calculation of financial ratios.³⁰

²⁷ Wanhua Comments at 3.

²⁸ If Wanhua is referencing the GNI data from the CIA World Fact Book, filed on the record on April 23, 2014, the Department notes that these data are estimates projected for 2013. Projections are speculative and, therefore, do not provide support for a change in the Department’s economic comparability analysis.

²⁹ See *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012) (“*Orange Juice from Brazil*”) and accompanying Issues and Decision Memorandum at Comment 10.

³⁰ *AR5 Final Results* at Comment 2C.

Wanhua claimed that the Indonesian financial statements on the record in the underlying review were not complete, and thus unusable for the calculation of surrogate financial ratios.

Specifically, Wanhua claimed that the Department requires a complete annual report (including financial statements) and not just financial statements to calculate surrogate financial ratios. In response, the Department stated:

Argha Karya's financial statements on the record of this administrative review include an auditor's statement, the income statements are complete, the necessary schedules (as previously stated) are present, and the financial statements are legible.³¹ Therefore, for these final results, the Department continues to find Argha Karya's financial statements usable for the calculation of the surrogate financial ratios.

Furthermore, Wanhua argued that the Indonesian financial statements are unusable due to the Department's determination that Indonesia maintains broadly available, non-industry-specific export subsidies. In response to Wanhua's claim, the Department stated:

The Department agrees with Wanhua that it has reason to believe or suspect that prices of inputs from Indonesia may have been subsidized because we have found in other proceedings that Indonesia maintain broadly available, non-industry-specific export subsidies.³² Therefore, it is reasonable to infer that all exports to all markets from Indonesia may be subsidized, and to therefore disregard import

³¹ See Memorandum from Petitioners to the Secretary of Commerce "Polyethylene Terephthalate (PET) Film, Sheet, and Strip from the People's Republic of China: Surrogate Value Submission," dated May 7, 2014 at Exhibit 10.

³² See, e.g., *Carbazole Violet Pigment 23 from India: Final Results of the Expedited Five-year (Sunset) Review of the Countervailing Duty Order*, 75 FR 13257 (March 19, 2010), and accompanying Issues and Decision Memorandum at 4-5; see also *Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia: Final Results of Expedited Sunset Review*, 70 FR 45692 (August 8, 2005), and accompanying Issues and Decision Memorandum at 4; see also *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 74 FR 2512 (January 15, 2009), and accompanying Issues and Decision Memorandum at 17, 19-20.

prices from Indonesia.³³ However, the Department notes that this decision typically pertains to import-based SVs, not the calculation of surrogate financial ratios.³⁴ Imports into a surrogate country from an exporting country, that has broadly available export subsidies, may reflect such subsidies in their prices, as these are broad price averages. Thus, the Department avoids using such import prices. In contrast, the Department's calculation of surrogate financial ratios is based on a specific company's costs and sales experience within the surrogate country. In valuing FOPs (in this case, surrogate financial ratios), Congress has directed Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices."³⁵ Therefore, where the Department has reason to believe that a company received subsidies, based on information in the company's financial statements, the Department may find that the financial ratios derived from that company's financial statements are less representative of the financial experience of the company or the relevant industry compared to ratios derived from financial statements that do not contain evidence of subsidies.³⁶ It is our policy not to reject financial statements based on the grounds that the company received export subsidies unless we have previously found the specific export subsidy program to be countervailable.³⁷ Here, Wanhua

³³ See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China, 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 7.

³⁴ *Id.* (referring to "market-economy purchases from Indonesia, Korea, and Thailand").

³⁵ See Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 576, 100th Cong., 2nd Sess., at 590-91 (1988).

³⁶ See, e.g., *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results and Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 19174 (April 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

³⁷ See, e.g., *Certain Steel Nails From the People's Republic of China: Final Results of the First Antidumping Duty*

does not cite or identify any specific subsidy program related to the financial statements which the Department has previously found to be countervailable.

Therefore, the Department continues to find that Argha Karya's financial statements are suitable for use in the calculation of surrogate financial ratios.

The Department concluded its analysis of the surrogate financial statements on the record with the following statement:

For this reason, the Department is continuing to use Argha Karya's financial statements to calculate surrogate financial ratios for the final results. By using the financial statements of Argha Karya, all FOPs employed by the respondents can be valued using contemporaneous, specific SV data from Indonesia.

The Department's conclusion with regard to Argha Karya's financial statements remains unchanged.

Issue 3: Rejection of GNI Data

- The Department stated that it "...has the discretion to set and enforce deadlines, and that the Department should not be burdened by the acceptance of untimely-filed submissions close to the *final results* of a review" (emphasis added).³⁸ The Department's claim that it needs these data is predicated on its claim that a decision as to surrogate country must be made "early" in the proceeding. The rejected GNI data were submitted in July, 2014, and the preliminary and final results of the review were issued in December and June of 2015, respectively. Under no reasonable interpretation of the phrase "close to the final results of a review" can it be said

Administrative Review, 76 FR 16379 (March 23, 2011), and accompanying Issues and Decision Memorandum at Comment 3; *see also Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 1592 (January 12, 2010), and accompanying Issues and Decision Memorandum at 37-38; *see also Certain Steel Threaded Rod From the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 68400 (November 4, 2011) and accompanying Issues and Decision Memorandum at 11-12.

³⁸ *See* Response Letter at 3.

that a submission made 11 months before the final results (and 5 months before the preliminary results) is “close.”

- The 2013 GNI data were submitted in July 2014. Petitioners made a later submission of surrogate value data that the Department used in the preliminary results of the review. Thus, the Department had time to review the July 2014 submission prior to the preliminary results of the review. As it would be improper for the Department to review the submissions of one party and not others, the only reasonable assumption in this case is that the Department did review the 2013 GNI data and elected not to reject the data.
- The Department claims that its deadline applies to data which support “comment{s} on the surrogate country list.” However, the 2013 GNI data were submitted to reduce the scope of economically comparable countries by calling into question the usability of Indonesia as a surrogate country.
- The Department did not address the issue of its late rejection of the 2013 GNI data and the post-brief rejection of the case briefs. The Department argues that it is free to reject data as long as parties were aware of the deadlines and were provided an opportunity to reply to the rejection. However, due to the nature of the data, and the fact that the uses of such data were not clear, the deadline for the submission of such data was not made clear.
- The 2013 GNI data were also usable for selecting surrogate values from economically comparable countries in cases where the selected surrogate country had incomplete data. Had the Department determined that complete surrogate values were not available from the selected surrogate country, it would have been forced to select data from another country. The level of economic comparability (and the 2013 GNI data) would, therefore, be a factor in selecting alternate surrogate value data.

- The Department continues to be inconsistent in its administration of the dumping laws and in selectively rejecting or not rejecting data. While Wanhua is not allowed to expand the record by placing on the record new factual information demonstrating this inconsistency; however, the Department, as master of this process, necessarily knows that it is not administering this regulation in a consistent fashion. The Department cannot properly assert to the Court that it is consistently administering this regulation when it has knowledge that it is not doing so.
- Wanhua requested a hearing, but withdrew the request for a hearing after receiving and reviewing the briefs of other parties. However, Wanhua withdrew its request for a hearing based on its understanding of the briefs before the Department. In light of the fact that the Department rejected all case briefs containing discussion of the 2013 GNI data two months after being filed, Wanhua should have been entitled to a hearing as the basis for the withdrawal of the hearing request no longer existed.
- Had the Department rejected the data prior to the deadline to file its case brief, Wanhua would have made an argument based on the U.S. Government data of record. However, as these data were secondary in nature, and as the primary data were of record at the time case briefs were due to be filed with the Department, there was no reason to complicate the briefing by including redundant arguments based on secondary data.

Department's Position:

The Department disagrees with Wanhua's claim regarding the timing of its submission of the 2013 GNI data and the Department's implicit acceptance of this data because of the rejection close to the Final. As an initial matter, the Department set clear deadlines of April 23, 2014, for comments on the surrogate country list, and May 7, 2014, for comments on surrogate country selection. Wanhua did not submit the 2013 GNI data until well after these deadlines and, as

such, the data were untimely-filed.

The Department sets these deadlines in order to establish the record regarding potential surrogate countries at a point in the proceeding which provides ample opportunity for parties to consider, obtain, and comment on surrogate values from the universe of potential surrogate countries prior to the *Preliminary Results*. To restart the process later in the proceeding, and to set new deadlines for comments on a new surrogate country list and on surrogate country selection, would be burdensome on the administrative process and could result in an inequitable situation where parties had relied on one set of facts to conduct surrogate value research only to have those fact supplanted by later data. Hence, even if one concludes that Wanhua's July 2014 submission of 2013 GNI data was not close to the deadline for the final results of the review, accepting Wanhua's submission would not have been appropriate because it could effectively be restarting the surrogate country selection process.

Moreover, the Department disagrees with Wanhua's conclusion that the Department elected not to reject the 2013 GNI data earlier in this review. In its Response Letter, the Department stated that it "...later became aware of the fact that the submission contained not only surrogate value information, but 2013 GNI data submitted as rebuttal data for use in selecting potential surrogate countries."³⁹ As stated above, Wanhua did not rely on the 2013 GNI data, and thus these data were not highlighted, until it filed its case brief, submitted on January 14, 2015, when addressing economic comparability as part of surrogate country selection. Furthermore, Wanhua labeled the submission containing the 2013 GNI data as SV data; thus it appeared that Wanhua's submission simply contained surrogate values. Regardless, under 19 CFR 351.302(d)(2), the Department is not required to reject an untimely factual

³⁹ See Response Letter at 1-2.

submission within a specified period of time.

The Department also disagrees with Wanhua's claim that, due to the nature of the data, the deadline for the submission of such data was not made clear. As stated above, "the Department placed on the record a list of certain countries that the Department identified as being at the same level of economic development as the PRC, based upon Gross National Income (GNI) data from 2012, and set a deadline of April 23, 2014 (with rebuttal comments due by April 28, 2014) for parties to comment on, and submit factual information relating to, the list of countries."⁴⁰ Thus, the Department informed all parties that GNI data were used to determine the economic comparability of potential surrogate countries for this review and of the deadline for commenting on such information. Wanhua claims that its submission of the 2013 GNI data was related to the selection of surrogate values, but raw GNI data form the basis for identifying potential surrogate countries. Accordingly, Wanhua's argument that the 2013 GNI data was intended to reduce the scope of economically comparable countries supports the Department's position. The Department agrees that GNI data can influence the scope of economically comparable surrogate countries; however, the Department established a deadline for the submission of such data, and Wanhua did not follow these deadlines. Wanhua also claims that the Department continues to be inconsistent in its administration of the dumping laws, in rejecting or not rejecting data, and in not administering its regulations in a consistent fashion. Wanhua did not specifically identify the regulation to which it was referring, or provide any evidence to demonstrate, or provide examples of, its claim.

Wanhua asserts that it was entitled to a hearing given the later redaction of its case brief, and claims that it would have made alternate arguments had it been aware that the Department

⁴⁰ See Background Section.

would reject the 2013 GNI data. However, Wanhua did not request a hearing, so this argument is moot. Furthermore, with regard to its case brief, Wanhua was free to make any argument pertaining to information on the record of the administrative review in its case brief. Wanhua's decision not to make these arguments cannot be attributed to the Department. Additionally, the 2013 GNI data was untimely-filed and Wanhua should not have had any expectation to use the untimely-filed 2013 GNI data in its case brief or in a hearing with the Department.

Issue 4: Other Issues the Department Should Address

Wanhua maintains that the Court expressly stated that the remand was not limited and gave the Department the discretion to consider other issues. According to Wanhua, during the course of the Court proceedings, the United States conceded or waived certain arguments made by Wanhua. Specifically, Wanhua contends that the issues where the Department has either conceded or waived certain arguments are as follows:

A. The annual report submitted for purposes of calculating financial ratios from an Indonesian company are incomplete and unusable.

- The Indonesian annual report submitted by the petitioners for the purposes of calculating financial ratios is incomplete.
- The complete South African annual report submitted by Wanhua was both usable and superior to that of the Indonesian producer. In its reply brief, the United States did not address this issue and did not respond to this argument in any fashion. The United States therefore waived this argument.
- The Defendant-Intervenors also elected not to respond to this argument. This was a waiver of the argument as the Defendant-Intervenors were provided two additional weeks to review the submission of Defendant and to supplement the submission with any arguments that it did not deem sufficient. Accordingly, under the provisions of Calgon

Corporation v. United States, Slip Op. 16-4, 40 CIT (January 29, 2016) Wanhua has prevailed on this issue and the Department should have recalculated the dumping margins without the invalidated Indonesian annual report.

- Moreover, based on the Court's determination in *Tianjin Wanhua Co., Ltd. v. United States*, Wanhua's argument should have been dispositive. The same annual reports with the same flaws were at issue in that case. However, unlike the first Wanhua determination, in this matter Wanhua established that the South African financial statements of record were not only usable without difficulty, they had been used by the Department in another segment of this proceeding to value surrogate financial ratios. In other words, not only were the South African financial statements usable in theory, they were usable in fact.

Department's Position:

The Department requested a voluntary remand on the issue of surrogate country selection, as it was implicated by Wanhua's unredacted arguments in its case brief. Had we changed our determination concerning surrogate country selection, the question of whether we had used the appropriate surrogate financial statement might have been implicated. However, in this remand, we have made no changes to our surrogate country selection. Therefore, in light of our determination on remand to continue to select Indonesia as the surrogate country, this remand is not an opportunity for Wanhua to reargue its challenge to the surrogate financial ratios which are based on Indonesian financial statements and, accordingly, the Department has not reexamined its selection of surrogate financial statements. Nevertheless, in the final results of the underlying review and again in this remand, the Department specifically addressed all of Wanhua's concerns regarding the Indonesian financial statements. *See* Issue 2 above.

B. Wanhua Should Have Been Provided the Opportunity to Submit a New Administrative Case Brief

- The Department should have allowed Wanhua an opportunity to submit a new case brief after the long delayed, and inherently unfair, rejection of its case brief. At Page 13 of its response in this litigation, the United States stated:

Notably, while Wanhua objected to Commerce's rejection of the information, and consequential request to redact portions of the case brief, *Wanhua did not request the opportunity to submit a new case brief with different arguments*, nor did it, at that time, raise its inability to make alternate arguments as a basis for tempering Commerce's action (emphasis added).

- The corollary must also be true; it would be notable if Wanhua had requested an opportunity to submit a new case brief. The conclusion from the United States' statement above is that such a request would have been granted. Wanhua demonstrated that the United States, in the above statement, had misapprehended the record and had gotten the basic fact underlying this statement wrong. In Wanhua's letter to the Department of March 16, 2015, it noted :

Should the Department elect not to do so, *it must re-open the briefing process and allow a reasonable period of time for Wanhua to draft and file briefs that allow it to make argument that it would have filed had the Department rejected the July 7, 2014 submission in a timely manner.* Letter of March 16, 2015 at page 6 (Emphasis Added).

- The March 16, 2015 letter to the Department is both clear and unambiguous and is a request to “submit a new case brief with different arguments.” Accordingly, the Department should have allowed, as part of this remand, Wanhua to submit a new case brief in which it would have made those arguments that it would have made had the Department rejected the July 7, 2014 submission in a timely fashion.

Department’s Position:

The Department finds that Wanhua had the opportunity to comment on issues relating to surrogate country selection, its Clarification Letter, and the rejection of the GNI data as part of this remand proceeding. The Department considered Wanhua’s arguments and addressed them. *See* Issues 1 and 2, above. Accordingly, Wanhua has not been deprived of the opportunity to make additional arguments on these issues.

V. Conclusion

In accordance with the Court's remand instructions, the Department has reconsidered Wanhua's Clarification Letter and accepted and addressed arguments previously redacted from Wanhua's case brief, explained why the 2013 GNI data submitted by Wanhua was untimely-filed and properly rejected from the record, and explained why its surrogate country selection remains unchanged in light of comments filed on the draft remand by Wanhua. Because the Department has not made any change with respect to surrogate country, there are no changes to the dumping margins for any respondent pursuant to this redetermination.

11/23/2016

X 

Signed by: RONALD LORENTZEN
Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance