

No. 16-92

In the Supreme Court of the United States

VINH HOAN CORPORATION, PETITIONER

v.

CATFISH FARMERS OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The antidumping duty statute, 19 U.S.C. 1673, authorizes the United States Department of Commerce to impose duties on imported merchandise if it determines that the merchandise is sold, or is likely to be sold, at less than fair value in the United States. The question presented is as follows:

Whether the Commerce Department's decision to impose certain antidumping duties on petitioner's merchandise was supported by substantial evidence.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 645 Fed. Appx. 1001. The opinion of the United States Court of International Trade (Pet. App. 4a-51a) is not published in the *Court of International Trade Reporter* but is available at 2014 WL 7181411. A prior relevant opinion of the United States Court of International Trade (Pet. App. 111a-159a) is not published in the *Court of International Trade Reporter* but is available at 2013 WL 2250601.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2016. The petition for a writ of certiorari was filed on July 11, 2016. Although the petition invokes the jurisdiction of this Court under 28 U.S.C.

1257 (see Pet. 1), the applicable grant of jurisdiction is 28 U.S.C. 1254(1).

STATEMENT

1. In international-trade law, the practice of exporting goods to another country to be sold at less than their fair value is known as “dumping.” 19 U.S.C. 1677(34). Congress has authorized the U.S. Department of Commerce to determine when dumping occurs and to impose antidumping duties. 19 U.S.C. 1673(1); see 19 U.S.C. 1677(1); see generally *United States v. Eurodif S.A.*, 555 U.S. 305, 310-311 (2009) (explaining that antidumping duties “address harm to domestic manufacturing from foreign goods sold at an unfair price”).¹

To determine whether goods are being sold at less than fair value, the Commerce Department compares the export price (the price of goods sold in the United States) to the “normal value” of the merchandise. 19 U.S.C. 1677b(a). “Normal value” is calculated in different ways depending on whether the goods being exported are sold at market rates in their home country. 19 U.S.C. 1677b(a)(1) and (4). When the goods are sold for consumption in their home country, and that country has a market economy, the “normal value” typical-

¹ Before the Commerce Department may impose antidumping duties, the U.S. International Trade Commission (ITC) must conclude that the dumping has materially injured, or threatens to materially injure, a U.S. industry, or that it has materially retarded the establishment of a U.S. industry. 19 U.S.C. 1673(2); see 19 U.S.C. 1677(2). The ITC made such a determination regarding the products in this case, *Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Aug. 12, 2003), and that prerequisite to the imposition of antidumping duties is not at issue here.

ly is the sale price in the home country. 19 U.S.C. 1677b(a)(1)(B). But when the goods are sold in their home country and that country does not have a market economy, the Commerce Department calculates the “normal value” by using surrogate data from countries with market economies that are roughly comparable to the home country. 19 U.S.C. 1677b(c)(1). In that situation, the “normal value” is “the value of the factors of production utilized in producing the merchandise” plus “an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” *Ibid.*

In valuing the factors of production under this provision, the Commerce Department uses the “best available information regarding the values of such factors in a market economy country or countries” that it “consider[s] to be appropriate.” 19 U.S.C. 1677b(c)(1). In identifying the best available information for valuing factors of production, the Commerce Department typically selects values that are product-specific, representative of a broad-market average, publicly available, contemporaneous with the period of review, and free of taxes or duties. See *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); see also Pet. App. 6a n.1, 44a. But the Commerce Department ultimately has broad discretion in making these value determinations. “While [Section] 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines.” *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

2. Petitioner is a producer of frozen fish fillets from Vietnam that are sold in the United States. Pet. App. 52a. In 2003, the Commerce Department concluded that “frozen fish fillets from the Socialist Republic of Vietnam (‘Vietnam’) are being sold at less than fair value” in the United States and issued an antidumping order. *Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Aug. 12, 2003).

Several years later, interested parties asked the Commerce Department to initiate an administrative review for the period from August 1, 2008, through July 31, 2009, to determine whether the dumping was still occurring and, if so, the amount of antidumping duties due. Pet. App. 160a-161a. The Department issued a notice of its preliminary results, which imposed antidumping duties on frozen fish fillets imported by petitioner and other companies. See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 75 Fed. Reg. 56,063 (Sept. 15, 2010). The notice set out the Department’s conclusion that these companies had sold their products at less than fair value and explained how the Department had reached that conclusion. *Id.* at 56,066-56,070. As relevant here, the Commerce Department explained that, because Vietnam is a country with a non-market economy, the Department would use the Philippines as the surrogate country. *Id.* at 56,062, 56,066-56,068. The Department further explained that when data to value inputs was not available from the Philippines, it would use data from Bangladeshi, Indian, or Indonesian sources. *Id.* at 56,069.

The Department then explained how it had calculated the normal value of the products using surrogate data from those countries. *Ibid.* The agency disclosed the specific calculations it had performed and invited interested parties to provide comments. *Id.* at 56,070.

After receiving comments from petitioner and other interested parties and holding a public hearing, the Commerce Department issued a final determination of antidumping duties against petitioner and other companies. Pet. App. 160a-185a. As relevant here, the Department explained why it had chosen certain data in calculating the normal value. First, the Department explained that it had valued the by-products from the production of petitioner's frozen fish fillets (such as fish waste, broken fillets, and fish skin) using import statistics for the Philippines from the *World Trade Atlas*, and had then offset the value of these by-products against the costs of production. *Id.* at 115a, 178a-184a. The Department declined to use a price quote from the Vitarich Corporation (rather than the import data) to value the by-products because that quote "is not contemporaneous, does not represent a broad market average, and i[s] not publicly available." *Id.* at 181a.

Second, the Department relied on financial statements from Fine Foods, a Bangladeshi company, for financial ratios that could be used to value overhead, profit, and sales, general, and administrative expenses. Pet. App. 176a-178a; see *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319 (Fed. Cir. 2010) (explaining use of financial ratios). Although the Department ordinarily accounts for changes in inventory when calculating surrogate financial ratios, it did not do so in this instance because

the financial statements appeared to lack sufficient detail to account for those changes. Pet. App. 108a-109a.

3. Domestic producers of catfish filed suit in the Court of International Trade (CIT) to challenge numerous aspects of the Commerce Department's anti-dumping order, including its calculations related to fish by-products and financial ratios. Pet. App. 112a-113a.

The CIT remanded for the Commerce Department to reconsider certain aspects of its order. Pet. App. 111a-159a. With respect to the fish by-products, the Commerce Department requested a voluntary remand to consider the plaintiffs' further arguments for why the Vitarich Corporation price quote might be a better source for valuation than the *World Trade Atlas* import data. *Id.* at 114a-118a. With respect to the Fine Foods financial statements, the plaintiffs argued that the Commerce Department had made a "ministerial error[]" in calculating surrogate financial ratios because (contrary to the Department's initial view) the Fine Foods financial statements did include sufficient detail to account for inventory changes. *Id.* at 155a-157a. The CIT remanded for the agency to consider the plaintiffs' specific arguments about how to interpret the financial statements. *Id.* at 158a.

4. On remand, the Commerce Department considered the matter further and concluded that the Vitarich price quote, rather than the *World Trade Atlas* import statistics, constituted the best available information to value petitioner's fish by-products. Pet. App. 75a-76a. The Department compared the two sources and noted that the Vitarich price quote is more specific than the *World Trade Atlas* import data, because

the quote was for the specific fish products at issue, while the import data used “a basket category, containing many other things besides waste, broken meat, and fish skin.” *Id.* at 75a. The Department also noted that using the import data would result in a by-product value that was “higher than [the value] of the whole fish,” thereby “distort[ing] the [normal value] calculation.” *Id.* at 76a. Although the Vitarich price quote did not reflect a broad market average and was dated outside the review period, the Department found it to be the best choice for valuing the by-products at issue because it was specific to those by-products and met the Department’s other valuation criteria (being publicly available, including terms of payment, and excluding tax and duty). *Id.* at 75a-76a. The Department also responded in detail to petitioner’s specific objections to using the Vitarich price quote. *Id.* at 103a-106a.

In response to the suggestion of ministerial error in the calculation of financial ratios, the Commerce Department revisited the Fine Foods financial statements and concluded that they “do in fact contain the detail necessary to account for change[s] in inventory.” Pet. App. 79a, 81a; see *id.* at 108a-109a. The Department explained that the line items for total inventory “tie to the inventories in the cost of goods sold,” and that the inventory changes in the financial statements therefore “should be considered as changes in the finished goods inventory.” *Id.* at 108a-109a.

5. The CIT upheld the Commerce Department’s determination. Pet. App. 4a-51a. The CIT held that the agency’s decision to rely on the Vitarich price quote to value petitioner’s fish by-products was reasonable and supported by substantial evidence. *Id.* at

47a. In particular, the CIT explained that the agency had considered the pros and cons of relying on the Vitarich price quote (as opposed to the import statistics) and had reasonably concluded that the price quote provided the “best available evidence” because it was specific to the by-products at issue and satisfied the Department’s other criteria of “public availability, terms of payment, and tax and duty exclusivity.” *Id.* at 44a-46a. The CIT further explained that the Department had addressed each of petitioner’s arguments and had “provided a detailed, adequate explanation” for its decision to use the price quote to value the fish by-products. *Id.* at 46a.

The CIT also upheld the Commerce Department’s decision to revise the financial ratios derived from the Fine Foods financial statement. Pet. App. 48a-49a. The CIT sustained, as reasonable and supported by substantial evidence, the Department’s conclusion that the financial statements contain sufficient detail to adjust the financial ratios. *Id.* at 49a. The court also concluded that the agency had adequately explained its change in position regarding this calculation. *Ibid.*

6. The court of appeals affirmed in an unpublished, per curiam order. Pet. App. 1a-3a. The court cited Federal Rule of Appellate Procedure 36, which permits entry of a judgment of affirmance without an opinion. Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 8-16) that this Court should grant review to determine whether substantial evidence supports the Commerce Department’s calculation of antidumping duties regarding its frozen fish products. The court of appeals correctly rejected pe-

itioner’s substantial-evidence challenge, and its decision does not create or implicate any circuit conflict or raise any issue of exceptional importance. The Federal Circuit’s unpublished summary affirmance, moreover, has no precedential effect and establishes no legal rules, but simply rejects a fact-specific challenge to an agency antidumping order. Further review is not warranted.

1. On judicial review of an antidumping determination, the Commerce Department’s decision will be sustained unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. 1516a(b)(1)(B)(i); see *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012). “[S]ubstantial evidence” is “relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). In this case, the courts below correctly concluded that the Commerce Department’s decisions about valuing fish by-products and calculating financial ratios from financial statements were supported by substantial evidence.

a. With respect to the first issue, the CIT appropriately recognized that identifying the best available information for calculating the surrogate valuation of factors of production “is a product- and case-specific determination.” Pet. App. 6a n.1; see *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (“Whether such analogous information from the surrogate country is ‘best’ will necessarily depend on the circumstances.”). Here, after the CIT remanded to the Commerce Department to further consider whether the import data or the Vitarich price quote

was the best information for valuing fish by-products, the Department concluded that neither source was perfect but that the Vitarich price quote ultimately provided the better data. Pet. App. 44a-45a, 76a. The agency found that the Vitarich quote was superior because, although it did not reflect broad market data, it was specific to the three by-products at issue. *Id.* at 44a. The Department also noted that using the import data would attribute to the by-products a value greater than that of the whole fish fillets, which would not make sense. *Ibid.* And the Department observed that the price quote satisfied the other factors it typically considers in evaluating whether information is the best available. *Id.* at 46a; see *id.* at 76a.

The CIT determined that the Commerce Department had appropriately “weigh[ed] the evidence” and provided a “detailed, adequate explanation” for its decision, and that its decision was supported by substantial evidence. Pet. App. 46a-47a. The CIT’s ruling is correct. “[T]he process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise.” *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997). Here, the Department considered appropriate factors, discussed relevant evidence, and provided a reasoned explanation for its decision. The agency’s analysis and ultimate conclusion were well within its “wide discretion” in valuing factors of production. *Nation Ford Chem. Co.*, 166 F.3d at 1377. Petitioner’s disagreement with the agency’s weighing of the pros and cons of different data sources does not justify overturning its decision on substantial-evidence review.

b. In its proceedings on remand from the initial CIT decision, the Commerce Department concluded

that it had previously erred in calculating financial ratios for valuing factors of production. Pet. App. 108a-109a. Although the Department originally believed that the Fine Foods financial statements did not contain sufficient detail to account for changes in inventory, it concluded after further review that it could account for such changes. *Ibid.* The Department explained that, because particular inventory line items on the statements were tied to the cost of goods sold, “the inventory changes presented in Fine Foods’ financial statement should be considered as changes in the finished goods inventory” for purposes of calculating financial ratios. *Ibid.*

The CIT correctly held that the Commerce Department’s conclusion was supported by substantial evidence. The CIT properly rejected petitioner’s argument that the agency “ha[d] not adequately explained its change in position,” Pet. App. 49a, in light of the Department’s detailed explanation of how it had reached its conclusion. The Federal Circuit’s summary affirmance of the CIT’s ruling was likewise correct. Petitioner’s disagreement with the lower courts’ application of the settled administrative-review standard to the facts of this case presents no issue of broad importance warranting this Court’s review.

2. Petitioner primarily argues (Pet. 8-14) that the CIT and court of appeals erred in upholding the agency’s antidumping order because the agency’s ultimate conclusions on two particular valuation issues were contrary to its initial determinations on those issues. Contrary to petitioner’s contention, however, the Commerce Department’s change of course does not suggest arbitrariness or caprice. On review of the initial decision, the CIT remanded and directed the agency

to consider those particular issues in greater detail, and the agency conscientiously complied with that directive. Indeed, the Department voluntarily requested a remand on the first issue (valuation of fish by-products) so that it could consider the issue further in light of arguments raised during the first judicial review. Pet. App. 115a-118a.

Once the matter had been remanded to the Commerce Department, the agency considered the issues afresh and obtained additional comments and objections from the parties, including petitioner. Pet. App. 103a-108a. The agency then explained why it had ultimately decided to use the Vitarich price quote data for valuing fish by-products, and why it had concluded that it could account for inventory changes in determining financial ratios from the Fine Foods financial statements. *Id.* at 44a-46a, 108a-109a. As explained above, those conclusions are supported by substantial evidence, and the fact that the agency initially took the opposite view does not render them arbitrary or otherwise unlawful. Indeed, the common practice of remanding matters for further agency consideration would be largely pointless if deviation from the agency's initial decision were treated as illegitimate.

Contrary to petitioner's contention (Pet. 8-10), the court of appeals' decision does not conflict with decisions of this Court. First, the decision below is an unpublished order that does not set out any rules of law or serve as precedent. Second, the decisions petitioner cites are inapposite because they address what explanation an agency must provide when it makes a policy change. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009). In

this case, the Commerce Department did not make a policy change. Rather, it applied its settled factors for determining which evidence is the best available and concluded, upon further consideration and with additional input from the parties, that it should use a different data source for valuing fish by-products and that it had made an error in calculating financial ratios from particular financial statements. To the extent that the cited decisions of this Court stand for the proposition that an agency should “provide a reasoned explanation” for a change in position and “display awareness that it is changing position,” *Encino Motorcars*, 136 S. Ct. at 2125-2126 (citation omitted), the Commerce Department did both of those things here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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