Decisions of the United States
Court of International Trade

Slip Op. 07–65

USEC INC. and UNITED STATES ENRICHMENT CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court Nos.: 02–00112, 02–00113, 02–00114
PUBLIC VERSION

[Plaintiff's 56.2 Motion for Judgment on the Agency Record is Denied.]

Dated: May 4, 2007

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OPINION

Wallach, Judge:

I
Introduction

Plaintiffs USEC Inc. and its wholly owned subsidiary United States Enrichment Corporation (collectively "USEC") challenge the final antidumping and countervailing duty determination of the United States Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("LEU") from Germany, the Netherlands, and the United Kingdom. This opinion considers antidumping issues, both general and country-specific.

The administrative determination under review is the final determination by Commerce of sales at not less than fair value ("LTFV") with respect to LEU from Germany, the Netherlands, and the United Kingdom, covering the period of investigation ("POI") from October 1, 1999 through September 30, 2000, set forth in *Notice of Final Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium From the United Kingdom, Germany, and the Netherlands*, 66 Fed. Reg. 65,886 (December 21, 2001) ("*Final Determination*").

This court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c).

II
Background

This case comes before the court after consolidated decisions before a three-judge panel, the Court of Appeals for the Federal Circuit ("Federal Circuit") and several remands to the Department of Commerce. *USEC v. United States*, 259 F. Supp. 2d 1310 (CIT 2003) ("*USEC I*"); *USEC v. United States*, 281 F. Supp. 2d 1334 (CIT 2003) ("*USEC II*"); *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) ("*Eurodif I*"); *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) ("*Eurodif II*"); *Eurodif S.A. v. United States*, 414 F. Supp. 2d 1263 (CIT 2006) ("*Eurodif III*"); *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351 (CIT 2006) ("*Eurodif IV*"); and *Eurodif S.A. v. United States*, 442 F. Supp. 2d 1367 (CIT 2006) ("*Eurodif V*"). A brief review follows.

On December 7, 2000, USEC petitioned Commerce to initiate an antidumping duty investigation on imports of LEU from Germany, the Netherlands, and the United Kingdom. In its *Final Determination*, Commerce calculated zero percent margins for Germany and the Netherlands and a *de minimis* margin for the United Kingdom. *Final Determination*, 66 Fed. Reg. at 65,888. The antidumping and countervailing duty determination covered all LEU.[1]

Urenco Ltd. ("Urenco"), the Defendant-Intervenor in these cases, is a holding company located in the United Kingdom, which holds 100 percent of the stock in Urenco Deutschland GmbH ("UD"), located in Germany; Urenco (Capenhurst) Ltd. ("UCL"), located in the United Kingdom; Urenco Nederland B.V. ("UN"), located in the Netherlands; and Urenco Investments, Inc. Urenco Ltd. owns Urenco, Inc., a Delaware corporation that acts as Urenco Ltd.'s marketing arm and contracts representative in the United States, through Urenco Investments.

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[1] "LEU is enriched uranium hexafluoride ($UF_{[6]}$) with a $U^{<235>}$ product assay of less than 20 percent that has not been converted into another chemical form, such as $UO_{[2]}$, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium)." *Id.* at 65,887.

The parties' challenges are now ripe for adjudication.[2] In the court's original Scheduling Order, the three judge panel decided, and the parties agreed, to address initially "general issues" affecting the Department's threshold determinations, to be followed later by case-specific issues, such as "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 6 (August 5, 2002). The threshold issues were decided by the three-judge panel and the Federal Circuit in *USEC I*, *USEC II*, *Eurodif I*, *Eurodif II*, *Eurodif III*, *Eurodif IV* and *Eurodif V*.

The Federal Circuit in both *Eurodif I* and *Eurodif II* held that the separative work unit ("SWU") contracts for uranium enrichment there at issue were contracts for services and therefore not subject to the antidumping duty ("AD") laws, and that 19 U.S.C. § 1673 unambiguously applies to sales of goods and not services.[3] *Eurodif I*, 411 F.3d at 1361–62; *Eurodif II*, 423 F.3d at 1276. The court in *Eurodif I* held that there was no transfer of title or ownership of the LEU from the utility to the enricher since the utility retains title to the quantity of the enriched uranium that it supplies to the enricher. *Eurodif I*, 411 F.3d at 1360. Pursuant to the court's remand in *Eurodif III*, and as upheld by this court in *Eurodif V*, Commerce's Final Results of Redetermination Pursuant to Court Remand (June 19, 2006) ("*Remand Redetermination*") amended the scope language in the original antidumping and countervailing duty order, thereby excluding uranium enrichment services contracts from the order. *See Eurodif III*, 414 F. Supp. 2d at 1263; *Eurodif V*, 442 F. Supp. 2d at 1367; *Remand Redetermination*.[4] Contracts for sales of LEU are unaffected by the previous *Eurodif* cases, and remain within the scope of the antidumping duty order. At oral argument, the parties agreed that the calculational issues related to enrichment services contracts in these case numbers are not mooted because Commerce, on remand in consolidated court numbers 02–00219 and 02–00221, did not address these particular issues.

Familiarity with the courts' prior opinions is presumed.

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[2] The arguments decided here were filed by the parties before the three-judge panel in 2002–2003, prior to the Federal Circuit decisions in the *Eurodif* line of cases. Separate issues were assigned to each participant in that panel after general issues were decided.

[3] A SWU contract is a contract for a "separative work unit," a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium at specified assays. In these SWU contracts, the enricher enriches the unenriched uranium and delivers LEU to the purchaser. *See, e.g.*, *Eurodif I*, 411 F.3d at 1357; *USEC v. United States*, Slip Op. 03–170, 2003 Ct. Int'l Trade LEXIS 170, at *7 n.8 (December 22, 2003).

[4] Following the *Eurodif* line of cases, contracts for the sale of LEU would still be included within the ambit of the antidumping duty order. Urenco acknowledged at oral argument that a portion of the contract with [Utility A] involved a sale of LEU to a U.S. utility. Because Commerce found a *de minimis* dumping margin for the United Kingdom, and a zero percent margin for Germany and the Netherlands, this fact does not affect the calculation of Urenco's dumping margin.

III
Standard of Review

In reviewing Commerce's antidumping duty determinations, the court must sustain any determination, finding, or conclusion 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); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938) (internal citations omitted). The possibility of drawing two inconsistent conclusions from the same evidence does not mean that Commerce's findings are not supported by substantial evidence. *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 131 (1966).

When reviewing the Department's construction of the antidumping statutes, the court first considers whether Congress has spoken directly to the question at issue. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If Congress has addressed the issue, then the court must follow the expressed intent of Congress. *Id.* However, if the issue has not been addressed by Congress, "the court does not simply impose its own construction on the statute . . . [r]ather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* In its analysis, the court need not conclude that the agency's construction is the only permissible construction, or even the reading the court would have reached, in order to find the agency's interpretation reasonable. *Id.* at 843 n.11 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39, 102 S. Ct. 38, 70 L. Ed. 2d 23 (1981)). "[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

To ascertain whether Congress has spoken on an issue, the court considers the plain text of the statute, canons of statutory construction, structure of the statute, and legislative history. *Timex V.I. v. United States*, 157 F.3d 879, 882 (1998).

IV
General Issues Analysis Pertaining To All Three Case Numbers

The first four issues discussed *infra* are common to each of USEC's challenges with respect to LEU from Germany, the Netherlands, and the United Kingdom. Country-specific issues are discussed in Section V *infra*. Case number 02–00112 concerns LEU from the United

Kingdom, 02–00113 LEU from Germany, and 02–00114 LEU from the Netherlands.

A
Commerce Made a "Fair Comparison" Between Urenco's U.S. Export Price and Normal Value Based on Period of Investigation Sales Data
1
Parties' Arguments

USEC argues that Commerce failed to make a "fair comparison" between Export Price ("EP")[5] and Normal Value ("NV")[6] because its date-of-sale methodology allegedly prevented it from doing so. Brief of USEC Inc. and United States Enrichment Corporation in Support of Rule 56.2 Motion for Judgment on the Agency Record ("USEC's Motion") at 18, 24.[7] USEC also claims that Commerce erred in calculating Urenco's EP by comparing, or "blending" POI data with a pre-POI sales contract, resulting in a higher price than the POI sale alone and manipulating the LTFV calculation. *Id.* USEC states that it raised its concerns as early as the initial petition, and that Commerce has been silent on this issue. *Id.* at 12–13. USEC seeks a LTFV recalculation based only on the price of Urenco's new U.S. sales during the POI, "net of any effect of pre-POI sales activity." *Id.* at 14. Commerce may deviate from its standard methodology and practice in making comparisons, USEC contends, if conforming to them would not be fair, and if a deviation would more fully comply with the overarching purpose of the Act. *Id.* at 26.

USEC further argues that quantities of LEU "sold" during the POI under the contracts between Urenco and [Utility B] (a U.S. utility) constitute a distinct sale separate from its pre-POI obligation before the contract renegotiations. USEC's Motion at 16–17. USEC also claims that when Urenco and its customers enter into a new or amended contract that includes new quantity commitments in addition to pre-existing commitments, the new quantity commitments

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[5] Section 1677a(a) defines Export Price as:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . .

[6] Normal Value is defined as:

> [T]he price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B).

[7] All citations to Parties' briefs refer to the briefs in court number 02–00112, unless otherwise specified.

constitute a 'distinct sale' as a matter of law. *Id.* at 15.

Defendant counters that "fair comparison" is not an additional requirement, as the term generally describes the calculations contemplated by the statute, and does not place an additional, independent requirement upon Commerce. Defendant's Response in Opposition to the Motion for Judgment Upon the Agency Record Filed by USEC Inc. and United States Enrichment Corporation ("Defendant's Response") at 18, 20, 24. The Government also says that Commerce correctly used the new price terms in Urenco's renegotiated contracts as the basis for calculating EP for all future deliveries by using Commerce's regular date-of-sale methodology to effectuate a fair comparison. *Id.* at 9. Finally, Defendant argues that its normal methodology best reflected commercial reality. *Id.* at 18, 20, 24.

Defendant also argues that Commerce's determination to apply the new contract terms for all deliveries made pursuant to the amended contracts best reflects the commercial reality of the contractual renegotiations, as opposed to USEC's proposed methodology. *Id.* at 26. Defendant further claims that treatment of transactions after the contract renegotiations as a "distinct sale" is contrary to agency practice and precedent. *Id.* at 25.

Defendant argues that USEC incorrectly focuses on individual quantities, rather than entire contracts, in making its argument about a "fair comparison." *Id.* at 30–31. Defendant further argues that Commerce's determination to apply the new contract terms for all deliveries made pursuant to the amended contracts "reflects the reality," as opposed to USEC's proposed methodology. *Id.* at 26. Defendant notes that "specific changes in certain amendments introduced contractual terms that cannot be accounted for by USEC's proposed methodology." *Id.* at 27 (citing *Memorandum from Cindy Lai Robinson, et al., Import Compliance Specialists, Office of AD/CVD Enforcement, U.S. Dep't of Commerce, to Melissa Skinner, Dir., Office of AD/CVD Enforcement, U.S. Dep't of Commerce, Verification of the Sales Responses of Urenco Ltd. et al.*, (October 4, 2001) ("*Sales Verification Report*") at 5).

Urenco's arguments parallel those made by Commerce.

2
Discussion
a
The Department's Chosen Date-of-Sale Methodology Is Supported By Substantial Evidence and In Accordance With Law

The date of sale is an issue because Urenco renegotiated its SWU contracts to two U.S. utility customers, [Utility B] and [Utility A] during the POI. USEC's Motion at 11. USEC essentially argues that Commerce should have based its methodology only on LEU delivered

pursuant to the renegotiated contract terms, and should not have considered quantities delivered prior to the renegotiations. *Id.*

The "fair comparison" requirement is found in 19 U.S.C. § 1677b(a), which provides that "[i]n determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a *fair comparison* shall be made between the export price [EP] or constructed export price [CEP] and normal value [NV]." (Emphasis added). The statute describes NV as the price "reasonably corresponding to the time of sale used to determine the [EP] or [CEP]," *but does not specify the manner in which Commerce must determine the time of sale*. 19 U.S.C. § 1677b(a)(1)(A). The Department's date-of-sale regulation also provides that it:

> [N]ormally will use the date of invoice . . . [h]owever, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i).

In the preamble to this section, Commerce noted that due to the "unusual nature of long-term contracts . . . date of invoice normally would not be an appropriate date of sale. . . ." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,350 (May 19, 1997) ("*Preamble to Final Rules*"). Further, "[t]he date on which the material terms of sale are finally set would be the appropriate date of sale for such contracts." *Id.* This has also been Commerce's practice in other cases dealing with long-term contracts. *See, e.g.*, *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Preliminary Results of Antidumping Duty Administrative Reviews and Recision of Reviews in Part*, 65 Fed. Reg. 54,481, 54,485 (September 8, 2000) ("For Dofasco's sales made pursuant to long term contracts, we used date of contract as date of sale"); *Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 64 Fed. Reg. 30,664, 30,679 (June 8, 1999).

Even if material terms of sale are not changed, Commerce maintains the authority to use a different date-of-sale methodology. *Hornos Electricos De Venez., S.A. v. United States*, 285 F. Supp. 2d 1353, 1367 (CIT 2003). "The Department may exercise its discretion to rely on a date other than invoice date for the date of sale only if 'material terms' are not subject to change between the proposed date and the invoice date, or the agency provides a rational explanation as to why the alternative date 'better reflects' the date when 'material terms' are established." *SeAH Steel Corp. v. United States*, 25 CIT 133, 135 (2001) (citing *Thai Pineapple Canning Indus. Corp., Ltd. v. United States*, 24 CIT 107, 109, 273 F.3d 1077 (2000), *rev'd on other grounds*). The terms renegotiated by Urenco included price and

quantity, terms determined to be material both by this court and Commerce. *See, e.g., SeAH Steel Corp. v. United States*, 25 CIT 133 (price, quantity and payment terms material); *Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 64 Fed. Reg. 30,664, 30,679 (1999) (price and quantity material).

Commerce has consistently held that a new date of sale is established for all future deliveries, governed by the amended terms, when parties renegotiate material terms of sale. *See, e.g., Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 64 Fed. Reg. 55,243, 55,245 (October 12, 1999); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 64 Fed. Reg. 2173, 2178 (January 13, 1999) ("*Canada*"). Because these terms are material based on court and agency precedent, USEC's argument fails.

The party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence demonstrating that "another date . . . better reflects the date on which the exporter or producer establishes the material terms of sale." *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1377, n.1 (Fed. Cir. 2003) ("*Viraj IV*") (citing 19 C.F.R. § 351.401(i) (2003)); *Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 25, 132 F. Supp. 2d 1087 (2001).

USEC cites *Titanium Sponge from Japan*, 54 Fed. Reg. 13,403 (April 1, 1989) ("*Titanium*") in support of its argument that Commerce chose the wrong date of sale. Reply Brief of USEC Inc. and United States Enrichment Corporation ("USEC's Reply") at 4–5. In *Titanium*, a U.S. customer signed a minimum quantity contract and purchased amounts above that quantity at the contract price; Commerce determined the date of sale for the minimum quantity as the date the contract was signed, and for all amounts sold over the minimum quantity the date the delivery instructions were issued was designated the date of sale. Here, the issue is not a minimum quantity contract, but renegotiations of a contract. *Titanium* is accordingly distinguishable.

USEC also cites several cases in support of its argument that Commerce must reconsider its methodology on remand and adopt USEC's proposed methodology. USEC's Motion at 25–26 (citing *Budd Co. v. United States*, 14 CIT 595, 746 F. Supp. 1093 (1990) ("*Budd I*"); *Budd Co. v. United States*, 15 CIT 446, 447, 773 F. Supp. 1549, 1550–51 (1991) ("*Budd II*"); *Viraj Group, Ltd. v. United States*, 25 CIT 1017, 162 F. Supp. 2d 656 (2001) ("*Viraj I*"), *after remand*, 26 CIT 290, 193 F. Supp. 2d 1331, 1338 (2002) ("*Viraj II*"), *after remand*, 26 CIT 585, 206 F. Supp. 2d 1340 (2002) ("*Viraj III"), rev'd*, 343 F.3d 1371 (Fed. Cir. 2003) ("*Viraj IV*")). Its reliance is misplaced. The remands in those cases concerned different issues, or specifically de-

ferred to the Department's discretion in choosing its own methodology. *See Budd I*; *Budd II*; *Viraj I*; *Viraj II*; *Viraj III*; *Viraj IV*.

Specifically, USEC relies on the *Budd* cases for the proposition that for Commerce to effectuate a fair comparison, it must make a contemporaneous comparison of sales activity. USEC's Motion at 10; *see* 19 U.S.C. § 1677b(a)(1)(A). While it is clear from precedent and the statute that such comparisons are required, the statute does not mandate *how* Commerce must achieve that "apples with apples" comparison. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983). These cases that USEC cites stand for general principles regarding fairness of implementation of the dumping laws; they are not supportive of USEC's argument. *See Budd I*, 14 CIT at 595; *Budd II*, 15 CIT at 446; *Smith-Corona Group*, 713 F.2d at 1578.

Budd I concerned a review of the Department's circumstances of sale adjustments to adjust the effect of currency discrepancies in a hyperinflationary economy.[8] The circumstance of sale adjustment enabled Commerce to "reconstruct a reference point whereby these values are being compared with the U.S. price at the same point in time." *Budd I*, 14 CIT at 605 (examining *Amended Final Determination of Sales at Less than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels From Brazil*, 53 Fed. Reg. 34,566 (September 7, 1988) ("*Brazil*")). The court in *Budd I* upheld Commerce's determination, deferring to its methodology, which used a circumstance of sale adjustment in order to effectuate a fair comparison. *Id.* at 607. The court deferred to Commerce's broad authority to "choose to effectuate the primary statutory purpose in favor of fair determinations based on contemporaneous comparison." *Id.* at 604 (citing *Smith-Corona Group*, 713 F.2d at 1578). In the case *sub judice*, the record shows no manipulation or unfairness resulting from Commerce's chosen date of sale methodology. To the contrary, Commerce's decision to use its date of sale methodology reflects consideration of Urenco's contractual renegotiations of material terms, which complies with the broad "fair comparison" requirement in the statute. *See* 19 U.S.C. § 1677b(a). USEC interprets the "apples to apples" comparison in the statute too literally in arguing the merits of its proposed methodology. *See Smith-Corona Group*, 713 F.2d at 1578.

In *Budd I*, had Commerce not made a circumstance of sale adjustment within its discretion, it would have not made an accurate contemporaneous comparison. However, the court noted that the underlying Commerce determination in *Budd I* was "narrowly tailored to

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[8] The progenitor litigation to the *Budd* cases which originally remanded to Commerce was *Borlem S.A. v. United States*, 12 CIT 563 (1988).

the facts" because of a unique circumstance[9] which does not exist in this case.[10] *Budd I*, 14 CIT at 599 (citing *Brazil*, 53 Fed. Reg. at 34,567).

Defendant contests USEC's reliance on the *Viraj* line of cases for the broad proposition that a failure to explain why a methodology is a "fair comparison" is itself grounds for a remand. Defendant's Response at 23. In *Viraj II*, the court remanded to Commerce to consider the most accurate methodology because a methodology may be "unreasonable in a given case when a more accurate methodology is available and has been used in similar cases." 26 CIT at 296 (quoting *Thai Pineapple*, 273 F.3d at 1085). After three remands, the Department changed its methodology. On appeal, the Federal Circuit held Commerce acted unlawfully when it utilized a date of payment methodology rather than using the date of sale, because Commerce is to utilize date of sale except when certain exceptions apply, which were not applicable in that case. *Viraj IV*, 343 F.3d at 1377. Here, the contract renegotiations qualify as an exception justifying Commerce's decision to use a date of sale methodology based on the contract renegotiation date. 19 U.S.C. § 1677b-1; *Id.* USEC argues that a provision in the suspension agreement in *Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 Fed. Reg. 61,751, 61,752 (November 19, 1997) proves Commerce is willing "to make exactly" the type of calculation it advocates. USEC's Motion at 23. At oral argument, however, USEC was unable to point to any evidence supporting its desired result.[11]

In this case, Commerce extensively analyzed USEC's proposed methodology, concluding Commerce's methodology "better reflected commercial reality." Defendant's Response at 24; *Issues and Decision Memorandum from Bernard T. Carreau, Deputy Assistant Sec'y for Import Administration, U.S. Dep't of Commerce, to Faryar Shirzad, Assistant Sec'y for Import Administration, U.S. Dep't of Commerce*

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[9] The unique circumstance present in *Budd I* was Brazil's hyperinflationary currency. *Budd I*, 14 CIT at 598. To account for the effects of Brazil's unstable economy, Commerce constructed foreign market value for six different one-month periods, using replacement costs. "This practice allows the Department to view costs and prices contemporaneously in order to avoid distortions caused by hyperinflation and achieve a fairer comparison." *Brazil*, 53 Fed. Reg. at 34,566. Commerce subsequently made a circumstance of sale adjustment to account for the devaluation of Brazil's currency, "eliminat[ing] the artificial distortion of value caused by the rapid depreciation of Brazil's currency and . . . more accurately provides a measure of whether dumping is occurring." *Id.* Commerce's usual methodology is to calculate a single constructed value for the entire POI.

[10] In *Budd II*, Plaintiff challenged the underlying reasoning of the same amended final determination, and the court once again denied Plaintiff's claims. *Budd II*, 15 CIT at 448. Thus, *Budd II* is similarly unhelpful to Plaintiff.

[11] The court asked Plaintiff whether there is evidence that "the Department has ever been called upon to make the calculations USEC proposes." Transcript of Oral Argument ("Transcript") at 35. Plaintiff responded, "We don't believe the Department has ever been faced with these specific facts before." *Id.*

(December 13, 2001) ("*Decision Memo*") cmt. 11. That Commerce did analyze USEC's methodology in detail distinguishes it from *Viraj*. Unlike *Viraj*, Commerce here made specific findings to support its determination that there was no reason to deviate from its normal methodology.[12]

USEC contends that Commerce had "an obligation" to make a contemporaneous fair comparison by treating the renegotiated quantities as a distinct sale. USEC's Reply at 5. USEC argues that because the price of LEU had steadily declined in the years prior to the POI, by combining the higher prices with the lower prices, Commerce's "blending" skewed the calculations. However, the statute does not mandate that Commerce treat those quantities that way. 19 U.S.C. § 1677b(a). "Obviously it would be inappropriate for Commerce to have two different methodologies, one for when prices are rising, and another for when prices are falling, so as to maximize dumping margins." Defendant's Response at 29. As long as the Department's methodology is a reasonable means of effectuating the statutory purpose of fairness and there is substantial evidence supporting its conclusions, Commerce's determination is correct. *See Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137 (1987).

At verification, the Department found that the contracts had been renegotiated for a number of different reasons. *Sales Verification Report* at 5–6. Both in its Response and at oral argument, Commerce stated that it would be mere speculation on its part to assume the motivations of parties in contract negotiations. Transcript at 73. Further, Commerce confirmed during verification that Urenco did not view the [Utility A] contract as two separate sales, "one providing for delivery of [X% of Utility A's] requirements at the 'old' price and the other providing for [a percentage] at the 'new' price." Urenco's Rule 56.2 Response Brief in Opposition to USEC's Motion for Judgment upon the Agency Record Regarding Low Enriched Uranium from the United Kingdom ("Urenco's Response") at 29 (alteration in original); *see Sales Verification Report* at 7. Instead, "Urenco considered the blended price to cover one contract and one sale, i.e., their sale to [Utility A] and that [Utility A] only paid one price." *Id.* This point is well supported by the evidence in the record.

Under the amended and restated contract between Urenco and [Utility A], "Urenco agreed to provide [certain different contract consideration] as well. The commercial reality is that Urenco and [Utility A] substantially *renegotiated* the terms of the pre-POI contract

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[12] USEC acknowledged at oral argument that Urenco's contracts were not manipulative, but argued that Commerce's failure to address the issue leaves open the possibility in the future that manipulations can occur in other cases. Transcript at 14–15. Federal courts do not issue advisory opinions. *See Flast v. Cohen*, 392 U.S. 83, 95 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

and emerged with a new, and very different, deal." Urenco's Response at 30 (emphasis in original).

USEC argues that these renegotiated terms in the new contract are mere form, and do not "really" govern future deliveries. USEC's Motion at 18. Urenco responds that it renegotiated the terms of the pre-POI contract price in exchange for greater volume and less uncertainty, incorporating new terms in the already existing contract. Urenco's Response at 30.

The Department's decision to reject USEC's "separate contract" theory was correct and Commerce's methodology is supported by substantial evidence and is in accordance with law. For the purpose of determining Urenco's EP, the "date of contract" accurately reflected the date on which Urenco established the material terms of sale better than the date of invoice. 19 C.F.R. § 351.401(i); *Preamble to Final Rules*, 62 Fed. Reg. at 27,350. USEC has identified no previous determination in which Commerce departed from its usual methodology to disregard quantities delivered pursuant to a preexisting contract simply because it was renegotiated.

As Urenco correctly states, "USEC's proposed methodology would actually require the Department to eschew the required reliance upon verifiable facts and records in favor of a convoluted and artificial mathematical analysis requiring substantial guess-work, speculation and assumption." Urenco's Response at 32. Commerce rightly concluded that USEC's proposed methodology could not be accurately and consistently implemented. *See Decision Memo* at 22.

Based on the record evidence and longstanding methodology, Commerce properly determined that USEC's proposed methodology skews the realities of long-term contracts and renegotiated terms. In the *Notice of Preliminary Determination of Sales at Less Than Fair Value: Low Enriched Uranium From the United Kingdom; Preliminary Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium From Germany and the Netherlands; and Postponement of Final Determinations*, 66 Fed. Reg. 36,748, 36,751 (July 13, 2001) ("*Preliminary Determination*"), Commerce considered USEC's proposed methodology and determined that "we have considered the amended contract to constitute an entirely new sale, and have included in the dumping analysis all deliveries to date pursuant to the amended contract." *Preliminary Determination*, 66 Fed. Reg. at 36,751. "Therefore, in calculating export price, Commerce applied to all quantities delivered pursuant to these amended contracts the new prices that had been agreed to by the parties pursuant to renegotiation." Defendant's Response at 16. In the *Final Determination*, Commerce again rejected USEC's proposed "effective price" methodology. *See Final Determination*, 66 Fed. Reg. at 65,888 (citing *Decision Memo* cmt. 11). Commerce further explained its denial of USEC's methodology, stating that:

> [W]e disagree that these new prices and the new quantities can always be viewed as sale separate from the existing contract. Rather, we find that the new prices and quantities are integrally related to the existing contract, which covers not just quantities and prices over extended periods but a host of other commercially relevant factors. . . . The fact that a new or amended contract may include new quantity commitments in addition to pre-existing quantity commitments does not mean that the new quantity can be viewed as a distinct sale.

Decision Memo at 21–22 cmt. 11. In its *Decision Memo*, Commerce described various factors besides price and quantity that entered into the negotiations.[13] *Id.*

Thus, Commerce's decision to use a date of contract methodology, as opposed to its regulatory presumption in favor of date-of-invoice as date of sale in calculating EP was supported by substantial evidence in the record, agency precedent, and court precedent. Applying *Chevron* deference to Commerce's chosen methodology, the court finds its decision to use the date of sale methodology based on the renegotiated contract date was reasonable. Because Commerce provided a rational explanation as to why the changes in the material terms in Urenco's renegotiated contracts merited a deviation from its normal date-of-sale analysis, it made a "fair comparison" in accordance with the statute. *See Thai Pineapple*, 24 CIT at 109.

b
Fair Comparison Is Not An Additional Statutory Requirement

Plaintiffs in two Federal Circuit cases made an argument identical to USEC's concerning the alleged additional requirement of a fair comparison. *Corus Staal BV v. United States*, 395 F.3d 1343 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004). In rejecting the appellants' claims, the Circuit both times stated that the "fair comparison" requirement of "[section] 1677b(a) does not impose any requirements for calculating normal value beyond those explicitly established in the statute and does not carry over to create additional limitations on the calculation of dumping

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[13] Other factors Commerce considered included "1) utilities' concerns for security of supply; 2) utilities' concerns for a diversity of supply sources, 3) Urenco's desire to maintain long-term relationships with customers, 4) changes in utilities' fuel procurement practices, and 5) the existence of price review clauses in contracts." *Decision Memo* at 22, cmt. 11 (citing *Sales Verification Report* at 5). Commerce also considered factors listed in the U.S. International Trade Commission's Preliminary Determination, such as "discounts on pre-existing supply commitments, extended payment terms, the timing of the provision by the utilities of the converted uranium feedstock, and packaging and handling terms." *Id.* (citing *Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, Inv. 701–TA–409–412 (Preliminary) and 731–TA–909–912 (Preliminary), USITC Pub. 3388 (January 2001)).

margins." *Corus Staal*, 395 F.3d at 1348 (citing *Timken*, 354 F.3d at 1344) (alteration in original). The implementing legislation for the Uruguay Round Agreements Act supports this conclusion, stating "[t]o achieve such a fair comparison, section 773 [§ 1677b] provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–826, at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA") at 820.

Urenco argues that *U.S. Steel Group v. United States*, 25 CIT 1293, 1296 n.7, 177 F. Supp. 2d 1325, 1329 n.7 (2001), directly contradicts USEC's new methodology contention. See Urenco's Response at 14; USEC's Motion at 18 *et seq*. Plaintiffs in *U.S. Steel Group* also offered an argument identical to Plaintiff's here. In *U.S. Steel Group*, the court "[had] not found, nor [had] Plaintiffs presented, any authority supporting a construction of 'fair comparison' as a separate or freestanding requirement." *U.S. Steel Group*, 25 CIT at 1296 n.7. Similarly, this court concludes based on a review of the record that Commerce achieved a 'fair comparison' by complying with the requirements of the statute. *Id.*; *Timken*, 354 F.3d 1334 (finding that "fair comparison" is not an additional requirement).

Urenco also argues that USEC incorrectly relies on *Ipsco, Inc. v. United States*, 13 CIT 402, 406, 714 F. Supp. 1211, 1215 (1989), for the proposition that the court should remand when Commerce fails to make a "'fair comparison,' even where Commerce was otherwise following its normal practices." USEC's Motion at 25; *see also* Urenco's Response at 15. USEC indeed fails to recognize that *Ipsco* was reversed by the Federal Circuit, which held:

> [Commerce's] original methodology for calculating constructed value was a consistent and reasonable interpretation of section 1677b(e). The trial court therefore also erred in substituting 'its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'

Ipsco, 965 F.2d 1056, 1061 (Fed. Cir. 1992) (citation omitted). The court cannot interfere with Commerce's interpretation of a statute unless it is unreasonable or not otherwise in accordance with law. *See U.H.F.C. Co. v. United States*, 916 F.2d 689, 698 (Fed. Cir. 1990). In *Int'l Union v. Brock*, 816 F.2d 761, 765 (D.C. Cir. 1987), the D.C. Circuit Court of Appeals upheld the district court's substitution of its interpretation for that of the agency because the court found the agency's interpretation to be incorrect in that it conflicted with Congressional intent. *Id.* Specifically, the court found that "the practical effect [of] the Secretary's interpretation . . . graphically demonstrates the absurdity of the agency's construction. . . . It is well-understood that statutes must be construed so as to avoid illogical or unreasonable results." *Id.* at 766. USEC argues that agency prece-

dent cannot "override a statutory directive" and cannot "be excused" from administering the plain requirements of the Act, but does not point to anything specific that shows Commerce's interpretation to be so unreasonable or absurd for the court to replace its interpretation for that of Commerce. *U.H.F.C. Co.*, 916 F.2d at 698; *see, e.g.*, *Chevron*, 467 U.S. at 837; *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451, 57 L. Ed. 2d 337, 98 S. Ct. 2441 (1978) (finding the agency's interpretation of the statute, entrusted by Congress to administer, is to be upheld unless it is unreasonable).

Commerce has achieved a fair comparison by complying with its own regulations. *See* 19 U.S.C. § 1677b(a). Because the substantial evidence in the record shows that Commerce complied with the statute, the Department's fair comparison was in accordance with law.

B
Urenco's U.S. Sales Were Properly Characterized By Commerce As Export Price Sales
1
Arguments

USEC argues that Commerce's treatment of Urenco's U.S. sales as EP sales, instead of undertaking a Constructed Export Price ("CEP") analysis, is contrary to law and precedent as articulated in *AK Steel v. United States*, 226 F.3d 1361 (Fed. Cir. 2000), and should be remanded to Commerce. USEC's Motion at 28. USEC further argues that the level of sales activity by Urenco, Inc., Urenco Ltd.'s U.S. affiliate, indicates that Commerce should have concluded that these sales were made in the United States. *Id.* at 30. USEC cites *AK Steel* as support for the proposition that Commerce is obligated to determine whether sales are to be classified as export price sales or constructed export price sales based on all the record evidence, and not simply the identity of the seller. *Id.* at 29. USEC essentially argues that Urenco, Inc.'s marketing and sales negotiation activities, as well as the choice of law clause in the contract, directs Commerce to calculate CEP pursuant to ***AK Steel***. USEC also argues that a boilerplate provision which states that the contract "shall be construed" as a contract made in the U.S., demonstrates that U.S. EP is improper. *Id.* at 33.

Urenco counters that the language was inserted into the contract in order to clarify that U.S. law would govern the contract because the contract was entered into outside the United States and most of the performance of the contract was in Europe. Urenco's Response at 42. Defendant argues that the Department properly concluded that Urenco Ltd.'s U.S. sales were EP sales because the sales were contracted through Urenco Ltd., Urenco's headquarters located in Marlow, U.K. Defendant's Response at 32, 38.

2
Discussion

Commerce calculates dumping margins by comparing either EP or CEP with NV of subject merchandise. 19 U.S.C. § 1673, 1677a. In comparing EP, Commerce determines the price at which the subject merchandise is sold by a producer or exporter outside of the U.S. to an unaffiliated purchaser in the U.S. § 1677a(a). United States price is calculated using either an EP methodology or a CEP methodology, depending on whether subject merchandise is sold to an affiliated or unaffiliated purchaser in the United States.[14] § 1677a. Normally, Commerce relies on EP when the foreign exporter sells directly to an unrelated U.S. purchaser. CEP is used when the foreign exporter makes sales through a related party in the United States. *See Sharp Corp. v. United States*, 63 F.3d 1092, 1093–94 (Fed. Cir. 1995).

In *AK Steel* the court held that use of the Department's test to classify a sale as an EP sale conflicted with the plain language of the statute, where the sales contract was between a U.S. purchaser and a U.S. affiliate of the foreign producer/exporter. *AK Steel*, 226 F.3d at 1368.[15] The statutory distinction between the use of Export Price or Constructed Export Price rests on 1) where the sale takes place and 2) whether the foreign producer or exporter and the U.S. importer are affiliated. *Id.* at 1369; 19 U.S.C. § 1677a(a)–(b). Although USEC relies heavily on *AK Steel* in its argument, it is not determinative of the outcome of this issue because under the circumstances of this case, EP clearly applies pursuant to the statute. *See AK Steel*, 226 F.3d at 1369 ("When the EP definition is read in conjunction with the CEP definition, the alleged ambiguity in the EP definition disappears.")

Urenco Ltd.'s records show that its sales were made outside of the U.S., and its questionnaire responses show that it controls its sub-

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[14] As noted above, the statute defines EP and CEP as follows:

> (a) Export price
>
> The term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . .
>
> (b) Constructed export price
>
> The term 'constructed export price' means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter . . . .

19 U.S.C. § 1677a(a)–(b).

[15] The *AK Steel* test involved a contract between a U.S. purchaser and a U.S. affiliate of the foreign producer/exporter. In contrast, this case involves a U.S. purchaser and a foreign producer/exporter, which clearly falls within the ambit of the statute.

sidiaries and affiliates and the selling procedures used. Defendant's Response at 38. "Throughout the *Sales Verification Report*, Commerce found that all sales contracts involved the customer(s) and Urenco Ltd., not Urenco, Inc. Defendant's Response at 40 (citing *Sales Verification Report* at 8, 9, 12). Further, Commerce found that only Urenco Ltd. decided when to respond to Requests for Proposals in connection with obtaining new business. *Id.* (relying on *Sales Verification Report* at 6). A review of Urenco Ltd.'s "sales negotiation correspondence, contracts, invoices, shipping documents, records of payment and movement expenses" in the U.S. market show that the sales were tied to Urenco Ltd. *Id.* at 41 (relying on *Sales Verification Report* at 9). Commerce also confirmed that Urenco, Inc. sends contract proposals and defers to Urenco Ltd. for all business decisions involving sales. *Id.* (citing *Sales Verification Report* at 31). Urenco further explained that Urenco Ltd. "issues order confirmations, organizes enrichment, arranges for shipment and arranges for holding of product material at fabricators prior to book transfer to the customer. In contrast, Urenco, Inc. does *not* receive title to the imported LEU; nor does it perform the selling activities that would be indicative of CEP sales." Urenco's Response at 40.

At verification, Commerce analyzed Urenco Ltd.'s contracts and determined that the transactions were made with unaffiliated purchasers in the U.S., thereby supporting its decision to use EP instead of CEP. Urenco, Inc., the U.S. affiliate, was not a party to the contracts at issue. Defendant's Response at 44 (citing *Antidumping Duties on Low Enriched Uranium From Germany: Response to Section A of the Department's Questionnaire*, April 2, 2001 ("*UD Sect. A Response*") Exhibit B–1, JA–2259. Though Urenco, Inc. carries out the marketing activities for Urenco Ltd., Urenco, Inc. is not the *de facto* negotiating entity for Urenco Ltd.'s contracts. The relevant factor in Commerce's decision to use CEP or EP rests on whether an entity is actually empowered to enter into a contract. Urenco, Inc. being the marketing entity was not enough to warrant use of CEP.

USEC argues, both in its initial brief and in its Reply, that Commerce determined where the contract was made and performed based solely on who made the sale, rather than where the sale was made. USEC's Motion at 29; USEC's Reply at 13. USEC provides no evidence that Commerce disregarded record evidence in its analysis; its arguments are merely unsupported assertions. There is substantial evidence, beyond merely the name Urenco Ltd., which supports Commerce's determination that the contract was indeed made and enrichment performed outside of the United States. *See Sales Verification Report* at 31; *UD Sect. A Response* at A–27, Exhibit B–1, JA–2241.

USEC argues that *Pohang Iron & Steel Co. v. United States*, 24 CIT 566, 571 (2000), stands for the proposition that the geographic location of the signing of a document is "irrelevant" to the CEP/EP

determination. USEC is incorrect. The court in *Pohang* noted that the location is not dispositive, but certainly not irrelevant. *Id.* USEC is also incorrect in arguing that all contractual obligations are performed in the United States. *See* USEC's Reply at 14. There is ample evidence in the record showing Urenco Ltd. is the entity empowered to enter into contracts, and that the contract here was, in fact, consummated in the United Kingdom. Even though the contract states it "shall be construed" as being made in the United States, that statement in itself is not sufficient to show it was in fact made in the U.S. That statement is simply a choice by the parties of which law is to apply, rather than a factual statement of the place of its signing.[16]

Because Commerce reasonably concluded that Urenco Ltd. in the United Kingdom was the contracting party, and that sales to U.S. customers were made by unaffiliated foreign producer/exporters, the *AK Steel* test is satisfied.[17] *See, e.g.*, *UD Sect. A Response* at A–13. Therefore, Commerce's decision to calculate Urenco Ltd.'s services using EP, instead of CEP, is supported by substantial evidence and in accordance with law.

C
Commerce's Calculation of Urenco's Normal Value is Supported By Substantial Evidence and in Accordance with Law
1
Commerce Properly Excluded Urenco Ltd.'s Losses Resulting From Futures Hedging Contracts in its Calculation of Normal Value Because They Were Not Related to Manufacturing the Subject Merchandise

USEC argues that Commerce incorrectly excluded certain futures contracts losses from its LTFV calculation of NV because Urenco did not provide evidence that these losses were not associated with its manufacturing activities. USEC's Motion at 34–35. USEC claims

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[16] Choice of law clauses "protect the expectations of the parties . . . regardless of where the case is brought for litigation." THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 4.20 (Ved P. Nanda & Ralph B. Lake, eds., 2002); *see Phillips Petroleum v. Shutts*, 472 U.S. 797, 822, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (expectations of the parties is important when considering fairness); RESTATEMENT 2ND OF CONFLICT OF LAWS § 187 cmt. e (1988) (factors to consider are the "protection of justified expectations"); *see also Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1301 n.63 (1st Cir. 1988); *but cf. Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 946 (5th Cir. 1981) (holding that in the event that parties are from different states, and the subject matter is national in scope, and where the contract states "it shall be deemed to be made under the laws of the state of New York, and for all purposes construed in accordance with laws of said State," New York law applies as the parties' choice of law.)

[17] The second factor in determining where the sale was made in the United States is whether title passes. *AK Steel*, 226 F.3d at 1372. During the enrichment process, the utility retains title to the quantity of unenriched uranium that it supplies to Urenco. *See Eurodif I*, 411 F.3d at 1362; *Eurodif II*, 423 F.3d at 1278.

that Commerce's determination was speculative, because it assumed that such losses occurred outside the POI since they exceeded payments received in a particular one-month period, and because it assumed that the losses were associated with selling activities, as opposed to manufacturing. *Id.*

Defendant counters that Commerce properly excluded Urenco Ltd.'s losses resulting from futures hedging contracts in its calculations of manufacturing costs because they were not related to manufacturing the subject merchandise. Defendant's Response at 51 (citing *Decision Memo* cmt. 17). Defendant cites ample evidence in the record which supports Commerce's determination that such foreign exchange losses related to Urenco Ltd.'s general selling activities and sales contracts entered into outside the POI, and not to its production activity.[18]

Urenco claims that two of the Department's findings specifically support its determination that the LTFV margin calculation should not reflect losses on currency futures contracts. Urenco's Response at 43. First, Urenco identifies the Department's finding that it is "reasonable to conclude that Urenco's hedging contracts, as well as the corresponding loss, are related to the activity being hedged, i.e., Urenco's sales." Urenco's Response at 43–44 (citing *Decision Memo* at 32–33 (citing Urenco 2000 Annual Report at 17)). Second, it points to the Department's conclusion that such losses were related to "[sales] contracts other than those entered into during the POI" based on evidence showing the amount of cash involved in Urenco's futures contracts far exceeded the revenue from Urenco's POI sales. *Id.*

There is no statute which speaks directly to adjustments reflecting currency hedging losses, and the statute concerning calculation of constructed value ("CV") offers only general guidance. *See* 19 U.S.C. § 1677b. Based on this general provision, Commerce determined that such losses were not related to production, which are the costs used to calculate CV. *See* 19 U.S.C. § 1677b(e)(1);[19] *see also Notice of Final Determination of Sales at Less Than Fair Value: Steel Wire Rod from Trinidad & Tobago*, 63 Fed. Reg. 9177, 9181–82 (February

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[18] *See, e.g.*, *Decision Memo* cmt. 17; *UD Sect. A Response* at A–1, A–47; *Memorandum from Ernest Gziryan, Accountant, U.S. Dep't of Commerce, to Neal Halper, Dir., Office of Accounting, U.S. Dep't of Commerce, regarding Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - [for Urenco Ltd. and Urenco Deutschland]* (December 13, 2001) ("*Cost Calculation Memo*") at 4–5.

[19] 19 U.S.C. 1677b(e)(1) states, in pertinent part:

> [T]he constructed value of imported merchandise shall be an amount equal to the sum of –
>
> (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business . . . .

19 U.S.C. § 1677b(e)(1).

24, 1998) (the Department includes currency losses related to manufacturing operations in its calculations, but excludes those related to sales transaction). Defendant explains:

> In the case of currency hedging, there is not necessarily a direct link to the specific activity generating the gains and losses. In contrast, foreign exchange gains and losses directly associated with cash transactions involving purchases or sales are easily traced to a company's accounts payable and accounts receivable activity.

Defendant's Response at 53. Commerce also reviewed Urenco's Fiscal Year 2000 report, which indicated that its business is largely transacted in U.S. dollars, making Urenco continually exposed to that currency. *Decision Memo* cmt. 17; *see also UD Sect. A Response* at A–1, 47. Supporting that interpretation, Urenco's currency hedging contract was for the sale of U.S. dollars. *Id.* In making its determination, Commerce analyzed Urenco's contractual sales information and audited financial statements, ultimately finding that the currency hedging contracts were related to sales occurring outside the POI. Defendant's Response at 53–54. Because the contracts were not directly tied to production activity, Commerce reasonably excluded them from the calculation of CV.

Commerce's treatment of Urenco's losses attributable to currency hedging contracts is supported by court and agency precedent. The court and Commerce have previously rejected adjustments related to foreign currency hedging. *See, e.g., Thyssen Stahl AG v. United States*, 19 CIT 605, 614–15, 886 F. Supp. 23, 31 (1995), *aff'd without op.*, *Thyssen Stahl AG v. AK Steel Corp.*, 155 F.3d 574 (Fed. Cir. 1998); *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 65 Fed. Reg. 60,910 (October 13, 2000) (no hedging contract was directly tied to the sale in question, therefore the Department did not allow exchange rate loss adjustment). Further, "[t]o claim a circumstance of sale adjustment to foreign market value, expenses must be related to the sales of the products under investigation, rather than to sales generally." *LMI - La Metalli Industriale, S.p.A. v. United States*, 13 CIT 305, 307, 712 F. Supp. 959 (1989) (citing *Ipsco, Inc. v. United States*, 12 CIT 384, 687 F. Supp. 633, 642 (1988)). The Federal Circuit, reviewing this court's affirmation of Commerce's remand determination, upheld the Department's requirement that a direct relationship exist between currency hedging costs and sales in the foreign market of the subject products under investigation. *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 458 (citing *Ipsco, Inc.*, 687 F. Supp. at 642) (requiring that each expense be related to sales of the products under investigation)). Additional support comes from the legislative history, which notes that circumstances of sale adjustments should be permitted if they are reasonably identifiable, quantifiable, and directly related to the sales under consideration. *See* H. R. Rep. No. 96–317 at 76 (1979).

Thus, Commerce's conclusion that Urenco's foreign exchange losses were associated with sales transactions is supported by substantial evidence, and is in accordance with law.

2
Commerce's Exclusion of the Cost of Urenco's [Input] Contract Purchases Was Reasonable

USEC argues that Commerce departed from agency practice by excluding from its calculation of normal value, Urenco's purchases of [input] from its [Country A] supplier, [Supplier A]. USEC's Motion at 39. USEC further argues that Commerce erred because Urenco did not physically identify its quantity of [input] obtained from its supplier, thereby failing to differentiate it from [self-produced input] for U.S. utilities. *Id.* at 40–42 (citing *Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta From Italy*, 65 Fed. Reg. 7349 (February 14, 2000) ("*Pasta*"). USEC argues that *Pasta* requires that "the respondent must be able to demonstrate that the same physical product it purchased was sold and delivered to a given market." *Id.* at 40. Further, USEC claims that because Urenco has not established a "direct line" between purchased and resold [input], the cost of the "commingled" purchased [input] should have been included in the calculation of NV, consistent with *Pasta*. *Id.* at 42 (citing *Pasta*, 65 Fed. Reg. at 7,356).

The second argument put forth by USEC is that Urenco paid too much for its [input], and that therefore it could have also paid too little for [another form of processing by Supplier A].[20] *Id.* at 47. Defendant counters that Commerce's exclusion of the cost of Urenco's [input] purchases from [Supplier A], a [Country A] supplier of LEU, was reasonable because the [input] acquired from [Supplier A] was segregated and was never sold in the United States. Defendant's Response at 56; Transcript at 77. Defendant also disagrees with USEC's argument that Commerce has broken with past practice. Commerce was consistent with past practice, Defendant argues, because the purchased [input] was not subject merchandise, but was purchased from a third country. *See* Defendant's Response at 56, 59; *Pasta*, 65 Fed. Reg. at 7,356 cmt. 10. Defendant argues that *Pasta* stands for the proposition that Commerce's practice is to either include the cost of merchandise from an unaffiliated supplier that cannot be separately identified in the weighted-average cost of manufacture, or to exclude such costs if the product "can be directly tied to specific sales by the respondent." Defendant's Response at 59.

Defendant further argues that Commerce based its determination on three findings, the first being that suppliers of [input] do not

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[20] [The other form of processing is a process rendered upon] depleted uranium after the original enrichment process. USEC's Motion at 5,45–6.

qualify as respondents in this proceeding, so their products were excluded from the analysis. *Id.* at 58 (citing *Cost Calculation Memo* at 4). Second, Commerce found that the nuclear industry keeps such tight control over the location of nuclear material that the products continued to be separately identifiable. *Id.* Third, it says, there was no evidence of unfair pricing. *Id.* at 59.

Urenco argued that the [input] purchased from [Supplier A] is sold after enrichment to facilities not located in the United States. Urenco's Response at 45. At oral argument, Urenco acknowledged that a portion of the [Utility A] contract provides for the sale of low enriched uranium.[21] Transcript at 80. Urenco says that Commerce properly excluded [input] that Urenco acquired from an unaffiliated supplier and did *not* sell to customers in the United States because such contracts were not relevant to the cost of production calculation, precisely because the purchased product never reached the United States. Urenco's Response at 45–46. Both Defendant and Urenco agree that there was a sale of merchandise in the [Utility A] contract. Transcript at 71 (citing *UD Sect. A Response*).

Pursuant to statute, Commerce is required to exclude purchased product from the cost of manufacturing. *See* 19 U.S.C. § 1677b(e)(1). The statute directs Commerce to calculate the costs of materials to *produce* the subject merchandise, not the *cost to purchase* it. This practice is supported by the Federal Circuit. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999).[22]

As a result of *Eurodif* precedent, enrichment services SWU contracts are not included within the scope of the Final Determination. *See Eurodif I–V*. The Federal Circuit's decision in *Eurodif II* that the SWU contracts were contracts for services, and not goods, hinged on the court's decision that title under the SWU contracts at issue never passed from the utility to the enricher at any point in the enrichment process. *Eurodif I*, 411 F.3d at 1362; *Eurodif II*, 423 F.3d at 1278. Pursuant to the court's remand in *Eurodif IV*, and as upheld in *Eurodif V*, Commerce's *Remand Redetermination* contained language amending the scope of Commerce's *Final Determination* to exclude SWU enrichment services contracts. *Eurodif IV*, 431 F. Supp. 2d 1351; *Eurodif V*, 442 F. Supp. 2d 1367; *Remand Redetermination*. The new scope language essentially created a carve-out from the *Final Determination*, while sales of LEU covered by SWU contracts may remain within the scope of the *Final Determination*. *Remand Redetermination* at 2; *Eurodif V*, 442 F. Supp. 2d 1367. Therefore, under *Eurodif* precedent, and as conceded by Urenco at oral argu-

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[21] Applying the *Eurodif* precedent, this particular LEU would remain within the scope of the *Final Determination*.

[22] This court in *Eurodif IV* noted that Commerce did not address the issue of affiliated party feed purchase claims because it found that the remand instructions did not direct it open the record on this issue. *Eurodif IV*, 431 F. Supp. 2d at 1354.

ment, its sales of LEU to utilities in the United States could still be included in the scope of the antidumping duty order. *See Eurodif V*, 442 F. Supp. 2d 1367; Transcript at 80.

Here, a portion of the contract with Utility A for the production and sale of LEU involved unenriched uranium originally purchased by Urenco, after which title and ownership were transferred from Urenco to [Utility A], resulting in a sale of goods under *Eurodif I* and *Eurodif II*'s logic. Transcript at 80; *see Eurodif I*, 411 F.3d at 1362; *Eurodif II*, 423 F.3d at 1278. Therefore, it is still within the scope of the *Final Determination*. As clarified at oral argument, no portion of the [input] that Urenco purchased from its [Country A] supplier entered the United States.

Because the *Remand Redetermination* in the *Eurodif* line of cases did not directly pertain to the issues *sub judice*, Commerce's modification of the scope of the *Final Determination* to exclude uranium enrichment contracts, as upheld by this court in *Eurodif V*, is not automatically binding here.[23] Since Commerce's *Final Determination* is sustained in this case, it is unnecessary to apply the *Eurodif* precedent because no antidumping duty order is in place. Commerce made findings of zero and *de minimis* margins, no order was made; accordingly, no further action by this court or Commerce is necessary.

Plaintiff mistakenly argues that Urenco's failure to physically differentiate its purchased [input from its self-produced input for the U.S. utilities'] automatically means that all of the resulting LEU is included within the scope of the antidumping duty order. The [input] that has not physically entered the United States cannot be subject to the antidumping duty order. USEC misconstrues *Pasta* as requiring a direct physical tracking of the subject product; a tangible segregation of LEU is not realistic, and such an interpretation was rejected by the Federal Circuit in *Eurodif I* and *Eurodif II*. *Eurodif IV*, 431 F. Supp. 2d at 1354 ("[I]t is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher . . . the Federal Circuit has already considered this issue and held that the facts/arguments USEC raises in this respect are of no moment.") (citations omitted).[24] Commerce did in fact confirm that the sales of the purchased product could be traced directly to the Supplier with record evidence. Defendant's Response at 61 (citing *Cost Calculation Memo* at 4); *see also Sales Verification Report* at 4. As verified by Commerce, and as Urenco reported, "Urenco does not physically segregate uranium, except for [input from the Country A supplier]." *See Antidumping Duties on*

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[23] The *Remand Redetermination* disposed of consolidated case numbers 02–00119 and 02–00221.

[24] We are not dealing with widgets here, which can be physically marked and separated, but with LEU, which is in tracked in quantities under SWU contracts.

Low Enriched Uranium From the United Kingdom, the Netherlands and Germany: Response to Section D of the Department's Supplemental Questionnaire (May 30, 2001) ("*UD Supp. Sect. D Response*") at 31); *Sales Verification Report*, Tab F, Exhibit 29. That evidence is more than is required by Commerce. *Pasta* does not require physical separation; it only requires a relation between the cost and the subject merchandise sufficient to demonstrate that the supplier is the considered a respondent. Defendant's Response at 62; *Pasta*, 65 Fed. Reg. at 7356–57.

Additionally, in *Pasta*, Commerce did not impose a requirement of physical identity of the tangible product; it required that the respondent separately identify the product "for sales purposes" in order to track it. *See Pasta*, 65 Fed. Reg. at 7356. As USEC acknowledged in its Commerce Brief, Urenco does "track this [purchased input] on paper . . . and segregate[s] its own production from [the purchased input]." Urenco's Response at 47 (citing USEC's Commerce Case Brief at 107–08). LEU, by its nature, is not physically or tangibly identifiable.

USEC also argues that "Urenco paid too much to its unaffiliated supplier for [input], so that it could also pay too little for [another form of processing]." Urenco's Response at 48 (citing USEC's Motion at 47). At verification, Commerce confirmed Urenco's documentation of the transactions, concluding: "the prices paid by Urenco for each of these services/products are based on terms specified in a long-term contract agreed to several years prior to the POI and between unaffiliated parties." *Decision Memo* at 29 (citing *Cost Calculation Memo* at 4). The evidence Commerce evaluated at verification confirmed that the price Urenco paid for [input] from its unaffiliated supplier during the POI was set in a contract amendment [signed] prior to the POI. Urenco's Response at 48 (citing *Sales Verification Report* Tab F, Exhibit 29). Therefore, Commerce concluded that "[w]e have found no evidence or incentive for the parties to have negotiated unfair prices for [the other form of processing] at the expense of [input] purchases." *Cost Calculation Memo* at 4 (alteration in original).[25]

Some of the [input] purchased by Urenco Ltd. were provided in the United Kingdom, but no portion of the [purchased input] entered the United States. It was proper for Commerce to exclude [input] purchases that did not enter the country precisely because that particular merchandise had no contact with the United States. USEC's ar-

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[25] Urenco also points out that:

> USEC makes no allegation that the SWU price was above the market price at the time of this [contract amendment]. Rather, the sole foundation for USEC's claim is an amendment signed during the POI. But the POI amendment did not alter the price set in the earlier amendment for deliveries in the POI; rather, it sets a [different contract term] for deliveries in [a later period].

Urenco's Response at 49.

gument that because Urenco failed to physically identify the purchased [input], it is deemed subject to the antidumping duty law, is unavailing. Whether the [input] from [Supplier A] is a sale or a service, Commerce's exclusion of such [input] from the cost of production is supported by substantial evidence and in accordance with law.

3
The Department Correctly Calculated Urenco's Constructed Value Profit Rate

USEC argues that Commerce miscalculated Urenco's Constructed Value ("CV") profit rate by making inconsistent adjustments. USEC's Motion at 49. Specifically, by allowing Urenco's depreciation expenses, but by excluding its other cost items, USEC argues that Commerce understated Urenco's CV profit rate. *Id.* "Commerce increased the depreciation expense contained in the cost of production for each Urenco subsidiary to reflect the fact that Urenco had understated the depreciation stemming from its purchases of capital assets from affiliated parties." *Id.* Therefore, USEC argues, this issue must be remanded to Commerce for further explanation as to why Commerce failed to make parallel adjustments. *Id.* at 52.

Urenco responds that the Department correctly calculated the CV rate on a company-wide basis.[26] Urenco's Response at 49. "In short, the Department accepted the obvious conclusion that if [Urenco Ltd.'s] total expenses had been higher, [Urenco Ltd.'s] company-wide profit would have been lower." *Id.* at 50 (citing *Decision Memo* at 28). Urenco also argues that the Department properly included in the CV calculation all of the expenses included in the calculation of Urenco Ltd.'s cost of production, and USEC's argument proposing the exclusion of such expenses is barred because it failed to raise this argument during the administrative proceedings. *Id.* at 51.

Defendant says that Commerce's adjustment to Urenco's cost of production by increasing its depreciation expenses on its capital assets (specifically, centrifuges), was in accordance with 19 U.S.C. § 1677b(e) and agency practice.[27] Defendant argues that USEC seeks a remand to Commerce to consider other adjustments not raised at the administrative level. *Id.* Therefore, it says, USEC has failed to exhaust its administrative remedies in its request for Commerce to make further adjustments to its CV profit calculation. Defendant's Response at 66, 71.

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[26] Calculations were made based on Urenco Ltd.'s audited financial statements. Commerce determined the amount of profit by deducting total expenses in 2000 from total turnover in 2000. *See Cost Calculation Memo*, Attachment 6 (citing Urenco Ltd. Cost Verification Exhibit 11, p.26, JA–9291).

[27] This is not disputed by USEC.

Pursuant to statute, CV is calculated by combining the 1) cost of materials and fabrication; 2) sales, general, and administrative expenses and profit; and 3) costs for containers and coverings. 19 U.S.C. § 1677b(e). The cost of materials is calculated by a valuation of the assets used to produce the merchandise, and by depreciating the value of those assets over a number of years. § 1677b(f)(1)(A); Defendant's Response at 67. Because Commerce found that Urenco had purchased some of those assets from affiliated parties for less than the cost of production, Defendant explains that Commerce used the "cost of production of those assets as a surrogate for the market price." Defendant's Response at 67; *see* § 1677b(f)(2). Commerce explained why it used a surrogate value for market price in its *Decision Memo*, stating it may "disregard transactions between affiliated persons if those transactions do not fairly reflect the value in the market under consideration. . . . Because Urenco claimed it was not possible to provide market prices for inputs received by each company from the other Urenco Group companies, we used the COP to determine the market value of the affiliated inputs." Defendant's Response at 67–68 (quoting *Decision Memo* at 27).

"Commerce then increased the depreciation expense contained in the COP for each Urenco subsidiary to reflect the value of capital assets purchased from affiliated parties." *Id.* at 68 (quoting *Decision Memo* at 28). Explaining its rationale for its increase, Commerce stated that

> [t]he transfer price, however, did not include all . . . costs or net financing expenses, both of which are a components (sic) of the cost of production. Therefore, for the final determination, we increased depreciation expenses associated with those fixed assets.

Id. (quoting *Decision Memo* at 28). Defendant further argues that because Commerce could not calculate Urenco's NV using home market sales, it likewise could not rely on Urenco's sales for the calculation of CV profit pursuant to 19 U.S.C. § 1677b(e)(2)(A). *Id.* at 69. Because actual data was unavailable, in accordance with section 1677b(e)(2)(B), Commerce looked to "actual amounts incurred and realized . . . for selling, general, and administrative expenses . . . in the same general category of products as the subject merchandise." 19 U.S.C. 1677b(e)(2)(B). Thus, Commerce arrived at a "global profit" figure, derived from Urenco's sales and divided it by a "global COP," made up of all merchandise used in Urenco's profit calculations. Defendant's Response at 69. "The result was . . . a percentage of profit, which it then applied to Urenco's reported COP of subject merchandise . . . [which] was then added to Urenco's COP to determine Urenco's CV." *Id.*

In its *Preliminary Determination*, Commerce did not initially take into consideration Urenco's depreciation expenses. *See Preliminary Determination*, 66 Fed. Reg. 36,748. Urenco argued that if Com-

merce imputes depreciation expenses on its capital assets (namely, centrifuges), Commerce should likewise reduce Urenco's subsidiaries' profits with a depreciation offset, because the increase in costs would necessarily reduce profits. Defendant's Response at 70. Commerce replied that it was not required to make such an offset, but found that it was reasonable. *Id.*; *Decision Memo* at 28.

USEC does not dispute any of Commece's depreciation offsets, but argues that Commerce should have made other adjustments to its CV profit calculation since it already made two. USEC's Motion at 50–51. Defendant responds that USEC failed to raise this argument in its Comments on the *Preliminary Determination* before Commerce and is therefore barred from raising it here.[28] Defendant's Response at 71 (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)). USEC counters that it could not possibly have proffered an argument at the agency level about adjustments that were yet to be made in the *Final Determination*. USEC's Reply at 24.

Defendant's "exhaustion of administrative remedies" argument need not be addressed.[29] Commerce has reasonably explained how and why it arrived at Urenco's profit rate, with the increased depreciation adjustment, based on the evidence contained in the record. Commerce's calculations and explanation are in conformity with 19 U.S.C. § 1677b(e) and (f). Even though Commerce's interpretation of § 1677b(e) and (f) was not required, it was a permissible and reasonable construction of the statute. *See Chevron*, 467 U.S. at 843 n.11.

V
Country Specific Issues
A Low Enriched Uranium From the United Kingdom, Court No. 02–00112
1
Commerce Properly Allocated a Proportion of Urenco's Centrifuge Losses as Period Costs in its Calculation of Constructed Value

USEC argues that not including the entire amount of UCL's centrifuge failure losses in Commerce's cost of production calculation because they were deemed not to be within the POI, was incorrect and runs contrary to agency precedent. USEC's Motion at 52–53. USEC

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[28] Defendant additionally argues that it would be "unreasonable" for Commerce to reconsider on remand only the new adjustments proposed by USEC, without opening the record for other interested parties to comment. Defendant's Response at 73. Defendant states that such a remand is contrary to the underlying policies of the exhaustion doctrine. *Id.* at 74 (citing *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155, 67 S. Ct. 245, 91 L. Ed. 2d 136 (1946).

[29] Defendant's exhaustion argument is without merit because Plaintiff was not in a position to argue for additional adjustments to the CV profit calculation at the administrative level. Because Commerce adjusted Urenco's CV profit rate in the *Final Determination*, the only opportunity for Plaintiff to contest that adjustment was before this court.

also objects to Commerce's treatment of such losses as period costs, because UCL reported these losses as "materials costs" and because the loss did not relate to the "company as a whole" since the equipment was used for other activities besides the production of LEU. *Id.* at 54; *see* 19 U.S.C. 1677b(f)(1)(A) (directing agencies to follow a producer/exporter's accounting records when they are in accordance with generally accepted accounting principles ("GAAP")). Therefore, USEC asks that the Final Determination be remanded to Commerce to include the full amount of UCL's centrifuge losses as manufacturing costs. *Id.* at 55.

Additionally, USEC argues that Commerce "gave no rationale for departing from Urenco's normal accounting treatment for this loss," and that any arguments by Defendant or Urenco now "constitute[ ] post hoc rationalization by counsel." USEC's Reply at 25–26. In particular, USEC refers to Defendant's argument in its Response that it applied its normal methodology of treating maintenance costs as manufacturing period costs, and that centrifuge replacement benefits production throughout the fiscal year. *Id.* at 26. Therefore, USEC claims, in the absence of an explanation, Commerce should have applied Urenco's classification of the expense.[30] *Id.* at 27.

USEC relies on *Steel From Korea* as support for its argument that the replacement of Urenco's centrifuges "to restore Urenco to full capacity" is more comparable to plant expansion expenses (a manufacturing cost), rather than "certain maintenance expenses" for replacements. *Id.*; *see Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Korea*, 58 Fed. Reg. 37,176, 37,187 (July 9, 1993) ("*Steel From Korea*"). In *Steel From Korea*, Commerce treated replacement expenses as period costs and included them in the cost of production to the extent allocable within the POI. *Id.* USEC has not cited any direct support for the proposition that a large replacement cost transforms into a POI related expense on par with expansion.

UCL listed the costs associated with its centrifuge failures as "materials costs applicable solely to production during the POI," but Commerce characterized it as a period cost in the *Final Determination*, allocating it proportionately throughout the year incurred. Defendant's Response at 75, 82 (citing *Decision Memo* cmt. 23). Commerce's decision to allocate the cost commensurate to the portion that fell within the POI is consistent with agency practice and with the evidence provided by Urenco in the record. *Id.* at 76 (citing *Decision Memo* cmt. 23); *see, e.g.*, *Steel From Korea*, 58 Fed. Reg. at 37,187 (stating that production assets, such as rollers and parts,

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[30] USEC argues in both of its briefs, concerning all other issues in this case, that Commerce should depart from Urenco's established accounting procedures.

"benefit production throughout the fiscal year" and are treated as period costs). Specifically, Commerce found that centrifuge failure is not "unusual in nature" or "infrequent in occurrence" and Urenco's financial statements expensed the entire amount associated with loss. *Decision Memo* cmt. 23. Pursuant to statute, Commerce is directed to follow a respondent's normal accounting methodology when it is consistent with accounting standards and is reasonable. 19 U.S.C. § 1677b(f)(1)(A).[31]

Another reason for Commerce's allocation of period costs, Defendant argues, is that they benefit production throughout the fiscal year, unlike material costs. Defendant's Response at 77; *see also Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31,411, 31,436 (June 9, 1998) (By spreading period costs proportionately over the POI, each product absorbs proportionate amount of period costs; period costs are more related to an accounting period and manufacturing costs are more related to a particular product).

Because UCL's primary business and "the source of virtually all its revenue, is the enrichment of uranium using centrifuges," it was reasonable for Commerce to attribute a proportionate amount of the losses over the POI.[32] Urenco's Response at 53; *Decision Memo* cmt. 23. USEC offers no support for its proposition that the statute prohibits Commerce from allocating period costs throughout the POI, and ignores Commerce's longstanding practice of treating replacement expenses as period costs. Indeed, the statute does not speak directly to this matter. USEC cites *U.S. Steel Group v. United States*, 22 CIT 104, 105–06, 998 F. Supp. 1151 (1998) in support of its argument that "Commerce's rationale for allocating only a portion of these losses to POI production was its conclusion that these losses constituted a 'period cost.' " USEC's Motion at 53. While *U.S. Steel* held that "G&A [general and administrative] expenses are those expenses which relate to the activities of the company as a whole rather than to production process," it does not address the attribution of losses over the POI in Commerce's cost of production and constructed value calculation, which is the crux of Plaintiff's argument.

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[31] Commerce shall normally calculate costs according to the following criteria:

> [B]ased on the records of the exporter or producer of the merchandise if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise . . . .

19 U.S.C. § 1677b(f)(1)(A).

[32] In Commerce's *Decision Memo*, it held that Urenco's centrifuge failure was not "unusual in nature" or "highly abnormal" because it is clearly related to the production of LEU since centrifuges are critical to the production of uranium. *Decision Memo* cmt. 23 (citing *Antidumping Duties on Low Enriched Uranium From the United Kingdom: Response to Section A of the Department's Questionnaire* (April 2, 2001) ("*Urenco Sect. A Response*"), Exhibit D–14 at 3, and Exhibit D–16 at 5).

U.S. Steel, 22 CIT at 106 (citing *Rautaruukki Oy v. United States*, 19 CIT 438, 444 (1995)). *U.S. Steel* does not mention period costs, but describes G&A expenses, not applicable here. Because Urenco allocated period costs over the fiscal year in which they were incurred, the costs were properly allocated over the nine-month portion of the POI that overlapped with the fiscal year.

Additionally, USEC's argument to include the entire cost of the replacement centrifuges would "unreasonably attribute replacement costs" to LEU sold outside the POI. Defendant's Response at 82. Consistent with the rationale in *Steel From Korea* and section 1677b(f)(1)(A), centrifuges are a production asset and costs of replacing them benefit production throughout the year; thus, Commerce's treatment of Urenco's centrifuge losses as period costs and allocating the cost of replacement centrifuges is supported by substantial evidence and is in accordance with law.

2
The Department Correctly Excluded Urenco's Research and Development Costs from its CV Determination

USEC argues that Commerce miscalculated UCL's research and development ("R&D") rate by excluding costs associated with the New Products Division ("NPD"). USEC's Motion at 55. USEC further argues that Commerce's allegedly erroneous conclusion that such R&D projects generated revenue, led it to wrongly exclude these costs in its calculation of Urenco's cost of production. *Id.* USEC claims that 19 U.S.C. § 1677b(f)(1)(B) requires Commerce to include a share of R&D expenses where a respondent incurs expenses on new products, therefore, Commerce understated Urenco's cost of producing LEU by excluding non-recurring expenses rather than reflecting them in the calculation of cost of production. USEC's Motion at 57; USEC's Reply at 30.

At oral argument, USEC clarified its argument, stating that because there were "no discernible sales" from the NPD as per Commerce's verification report, the only way for the NPD to be financed was internally, that is, through profit from Urenco's uranium enrichment division. Transcript at 52. Because the R&D on new products had no sales, USEC added, its expenses should be attributable to general R&D. *Id.* at 54.

Defendant counters that Commerce's determination to exclude R&D expenses pertaining to Urenco's NPD from its calculation of CV was correct because they related to the development and production of non-subject merchandise. Defendant's Response at 83 (citing *Decision Memo* cmt. 19). Urenco adds that USEC's reliance on § 1677b(f)(1)(B) is misplaced, given that the statute and preamble address whether a nonrecurring expense should be expensed in the year in which the expense occurred, as opposed to amortizing it in future years. Urenco's Response at 57.

USEC cites previous final determinations made by the Department in support of its arguments; however, they support Defendant's arguments under the particular facts of this case. Specifically, longstanding agency practice has been to include R&D expenses in its CV calculation only when the benefits of R&D could not be tied to a specific product or production activity. *See Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses From Colombia*, 60 Fed. Reg. 6,980, 7,016 (February 6, 1995) (including R&D expenses in CV calculation after finding no conclusive evidence that the R&D related specifically to production). The underlying factual basis for that determination was directly contrary to the agency's record in this case. Here, Commerce has found no evidence demonstrating any linkage between Urenco's NPD activities and its LEU production.

Section 1677b(f)(1)(A) directs Commerce to calculate CV based on the records of the producer/exporter, when in accordance with GAAP of the exporting or producing country. Addressing USEC's claim that the statute directs Commerce to include the R&D expenses, Urenco correctly explains, "[n]othing in the language quoted from the Preamble to Proposed Rules indicates that the Department's policy is to include in the cost of producing subject merchandise a company's R&D costs unrelated to subject merchandise." Urenco's Response at 57. In the Preamble to Proposed Rules, it states, "because of the fact-specific nature of determinations involving nonrecurring costs, the Department has not drafted any regulations to implement section 773(f)(1)(B) of the Act [19 U.S.C. § 1677b(f)(1)(B)]." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,342 (February 27, 1996) ("*Preamble to Proposed Rules*"); *see also Preamble to Final Rules*, 62 Fed. Reg. at 27,362. The subsection of the statute is a general provision, guiding Commerce to calculate costs "based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the [GAAP] of the exporting country . . . ." 19 U.S.C. § 1677b(f)(1)(A). Subsection (B) only notes that "[c]osts shall be adjusted appropriately for these nonrecurring costs that benefit current or future production . . . ." § 1677b(f)(1)(B). Section (f) contains more specific instructions on calculating sales at less than the cost of production and CV in sections (b) and (e), and is not the basis by which Commerce makes its calculations.

Upon review of Urenco's records, Commerce found "that [Urenco Ltd.'s] New Products Division is dedicated to the development and production of two major products unrelated to the enrichment process," and the work conducted there "provide no intrinsic benefits to Urenco's enrichment activities." Defendant's Response at 85 (citing *Decision Memo* cmt. 19); Urenco's Response at 54. USEC argues that R&D expenses may only be excluded from the CV calculation when the respondent is producing *and selling* the non-subject merchandise. The reasoning is that generation of revenues is the determinative factor in whether to include expenses in the CV calculation.

USEC's Motion at 57 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea*, 63 Fed. Reg. 8,934, 8,939–41 (February 23, 1998) ("*SRAMS*")). USEC's Motion at 57.

SRAMS is, however, distinguishable from the case at bar. In *SRAMS*, Commerce determined that because there was "significant cross-fertilization" between R&D work and the subject merchandise, all R&D expenses should be allocated over all products. *SRAMS*, 63 Fed. Reg. at 8,939. Here, USEC has not alleged, and the Department has not identified, any potential cross-fertilization between Urenco's NPD and its LEU enrichment.

The Department arrived at the same conclusion in *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20,216, 20,218 (May 6, 1996) ("*DRAMS*"), finding that R&D costs cannot be included in the CV calculation in the absence of "any record evidence of R&D cross-fertilization." *Id.* (citing *Micron Tech. v. United States*, 19 CIT 829, 832, 893 F. Supp. 21 (1995), *aff'd*, 117 F.3d 1386 (Fed. Cir. 1997)). Urenco explains its NPD as "a laser process to enrich and deplete non-radioactive materials such as gadolinium and it develops processes for the manufacture of power storage flywheels; it performs no activity that benefits Urenco's uranium enrichment activities."[33] Urenco's Response at 54–55.

In *Micron Tech.*, the court rejected Commerce's inclusion of R&D costs unrelated to the subject merchandise in its calculation of CV of the subject merchandise. *Micron Tech.*, 19 CIT at 831. The court held that expenses associated with R&D not directly related to the subject merchandise, and which do not provide an "intrinsic benefit" to the subject merchandise, should not be included in the cost of production. *Id.* at 832. Because substantial evidence did not support a determination that the subject merchandise intrinsically benefitted from R&D for non-subject merchandise, the court directed Commerce to amend its calculation in its Final Determination. *Id.*; *see Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea*, 58 Fed. Reg. 15,467, 15,472 (March 23, 1993) ("*DRAMS 1993*"). A review of agency precedent shows that Commerce has consistently used the "intrinsic benefit" analysis as the relevant test, and not the method which USEC advocates. *See, e.g.*, *SRAMS*, 63 Fed. Reg. 8,934; *DRAMS*, 61 Fed. Reg. 20,216l; *DRAMS 1993*, 58 Fed. Reg. 15,467.

Because the Department determined, based on the record, that UCL's R&D associated with its NPD provided no "intrinsic benefits

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[33] Urenco corroborated this statement at oral argument.

to Urenco's enrichment activities," its determination is supported by substantial evidence and is in accordance with law.

B
Low Enriched Uranium From Germany, Court No. 02–00113[34]
Commerce Properly Accepted Urenco Deutschland's Tails Disposal Costs Estimate

By failing to adjust Urenco Deutschland's ("UD") accrued expense for tails disposal, USEC argues that Commerce understated its cost of production and committed "legal error." USEC's Motion at 53. USEC argues that the Supplier, [Supplier A's] price was "an appropriate 'benchmark' for determining whether UD's tails accrual was reasonable," and that Commerce's determination that the small difference between the [Supplier A] price and UD's estimates proved UD was reasonable is unsupported by substantial evidence. USEC's Reply at 25–26.

Defendant argues that UD's valuation of disposal costs for depleted uranium tails was reasonable and Commerce's use of these figures is supported by the record. Defendant's Response at 75.

Germany's GAAP require that producers of LEU include in their annual expenses, in the normal course of business, costs associated with tails disposal, even if the tails were not disposed. 19 U.S.C. § 1677b(f)(1)(A); Defendant's Response at 76. UD estimated its costs because it kept its tails in a storage facility. *Id.* Its estimates were based on an official quote provided by [Supplier B, an unaffiliated third party]. *Id.* at 77 (relying on *UD Supp. Sect. D Response* at 16, Exhibit 8, at 10–11). Urenco disputes USEC's assertion that Urenco's accrual for the expenses of tails disposal is based only on "Urenco's internal estimates," rather, it argues it is based on "information from other sources, including cost proposals from unaffiliated third parties." Urenco's Response at 5; USEC's Motion at 4. Commerce reviewed UD's estimates at verification and found them to be reasonable estimations of disposal costs. *See Memorandum from Ernest Z. Gziryan, Accountant, U.S. Dep't of Commerce, to Neal M. Halper, Dir., Office of Accounting, U.S. Dep't of Commerce, regarding Antidumping Duty Investigation of Low Enriched Uranium from Germany: Verification of the Cost of Production and Constructed Value Data submitted by [UD]* (September 25, 2001) ("*Germany Cost Verif. Report*") at 16–18. Commerce based its determination on meetings with nuclear enrichment scientists, reviewing Urenco's cost determination report, and by comparing UD's 2000 tails estimate with the cost of sending tails for [another form of processing to Supplier A],

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[34] All briefs and appendices containing the administrative record cited in this section were filed in case number 02–00113.

its unaffiliated supplier. Defendant's Response at 78–79 (citing *Germany Cost Verif. Report* at 16–18, and *UD Supp. Sect. D Response* at 16–18, Exhibit 9, at 12).

Defendant agrees with USEC that the Department does not usually rely on estimates for its calculations. *See Stainless Steel Wire Rod from Spain; Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 10,988 cmt. 2 (February 21, 2001); *Decision Memo* cmt. 2. But, it says, here USEC fails to distinguish that UD's figures were merely estimates of future disposal and costs of future expenditures, and it was not possible to provide a concrete price for disposal. Defendant's Response at 82.

USEC also argues that Commerce erred by not choosing the higher [Supplier B] estimate for tails disposal. USEC's Motion at 56. Commerce was aware of the higher tails disposal cost estimate from [Supplier B in Year A], however, Defendant argues that UD explained that it was not a formal quote received by UD, but priced as a "testing market" because [Supplier B] did not have the capacity in [Year A] to dispose of all of its tails as it did in [Year B]. Defendant's Response at 80 (citing *UD Supp. Sect. D Response*, Exhibit 8, at 6); *Germany Cost Verif. Report* at 18. In its *Decision Memo* incorporated in the *Final Determination*, Commerce dismissed UD's claims that adopting its own estimates would distort Commerce's methodology, noting that "[w]e found no reason to believe that these assumptions represent a manipulation of Urenco's financial reporting." *Decision Memo* at 29. Commerce also explained that under German GAAP, a company can choose a method of computing which permits depreciation of expenses. *Id.* cmt. 21. Urenco argued before Commerce that its accounting should not be followed because the particular method was selected for the benefit of a tax advantage under German law. *Id.* However, Commerce ultimately determined that because UD had used a "widely accepted depreciation method" approved by UD's own auditors and prepared in accordance with German GAAP, it was reasonable to accept UD's reported costs. *Id.*

For the purpose of calculating CV, 19 U.S.C. § 1677b(f)(1)(A) states that costs shall normally be calculated on the basis of the records of the exporter or producer, when in accordance with GAAP. *Id.* Based upon the reasons explained above, and because UD's accounting records are annually audited, Commerce found the difference between the [Supplier A] figure and UD's estimate was minimal enough not to question the reasonableness of UD's estimates. *Germany Cost Verif. Report* at 17. Therefore, Commerce properly determined that UD's records satisfied the statute and were appropriate to use in its CV calculations. *Decision Memo* cmt. 16.

USEC further argues that UD understated its tails accrual by 6.9 percent, based on a comparison between UD's tails disposal provision with the cost of [another form of processing] performed by [Supplier A, a Country A company]. USEC's Motion at 55. USEC also as-

serts that the Department "implicitly concluded" that [Supplier A's] price was the "market rate." *Id.* In its verification report, Commerce states that the Department made this comparison only "to assess the reasonable of UD's year 2000 tails provision." *Germany Cost Verif. Report* at 16. Urenco also says the price of [Supplier A's other form of processing] was only for a limited quantity. *UD Supp. Sect. D Response*, Exhibit 8 at 9. Because Commerce investigated UD's estimates at verification, and there is no evidence presented to support USEC's claims of "manipulation," USEC's argument fails.

USEC also claims that because UD's tails disposal costs were adjusted by Commerce, UNL's costs should have likewise been changed. USEC's Motion at 54. However, Urenco argues, and as Commerce noted at verification, "each company uses different cost assumptions for the final disposal of tails and different timing of future payments, which affects discounting of the charges to present value. . . . As such, it may not be appropriate to simply compare each Urenco company's final disposal cost of tails . . . ." *Germany Cost Verif. Report* at 17–18. Further, in Commerce's *Decision Memo*, it stated that UNL's situation was different "due to the fact that UNL's tails provision is premised on certain services provided by an affiliated party." *Decision Memo* at 30. UD's tails provision, on the other hand, is premised on services provided by an *un*affiliated party, thus accounting for a difference in estimates. According to 19 U.S.C. § 1677b(f)(2),[35] transactions between affiliated parties may be disregarded if the amounts do not fairly reflect market rates. In addition, the final tails disposal provision "depends on numerous counterbalancing factors," including the fact that the three Urenco companies estimates differ because storage capacity at each company's facilities differ. Defendant's Response at 56 (citing *Germany Cost Verif. Report* at 16–18). Urenco's Response at 56 (citing *Germany Cost Verif. Report* at 16–18). The record evidence shows that exact comparisons are not possible.

USEC offers no evidence to support its assertions, aside from claiming Commerce "implicitly" makes its determinations. USEC's entire argument is built on speculation, with a conspicuous absence of factual support. USEC even goes so far as to argue that "the fact that UD's assumptions may be required 'German government policy' or German law is simply irrelevant." USEC's Reply at 27. In the ab-

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[35] 19 U.S.C. § 1677b(f)(2) states:

A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

sence of evidentiary support for USEC's arguments, and in light of Commerce's reasonable explanations, the Department's treatment of the tails disposal cost was supported by substantial evidence and in accordance with law.

C
Low Enriched Uranium From The Netherlands, Court No. 02–00114

There are no country-specific issues in this case.

VI
Conclusion

All parties having agreed at oral argument that if the court sustains Commerce's findings, all of the issues in these cases are decided.[36] Commerce's Final Determination is sustained and USEC's Motion for Judgment Upon the Agency Record is Denied.

USEC INC. and UNITED STATES ENRICHMENT CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court Nos.: 02–00112, 02–00113, 02–00114

ORDER AND JUDGMENT

This case having come before the court upon the Motion for Judgment Upon the Agency Record filed by USEC Inc. and United States Enrichment Corporation (collectively, "Plaintiffs' Motion"); the court having reviewed all pleadings and papers on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiffs' Motion is DENIED, and it is further

ORDERED ADJUDGED AND DECREED that the decision of the U.S. Department of Commerce ("Commerce") in *Notice of Final Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium From the United Kingdom, Germany and the Netherlands*, 66 Fed. Reg. 65,886 (December 21, 2001) is hereby SUSTAINED; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Tuesday, May 15, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish de-

leted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before May 15, 2007.

Slip Op. 07–100

PAUL MÜLLER INDUSTRIE GMBH & CO. et al., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 04–00522
PUBLIC VERSION

[The United States Department of Commerce's Final Remand Determination on Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom is AFFIRMED.]

Dated: June 29, 2007

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*Bruce M. Mitchell*, *Mark E. Pardo* and *William F. Marshall*) for Plaintiffs Paul Müller Industrie GmbH & Co., FAG Kugelfischer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Limited, FAG Bearings Corporation and The Barden Corporation.

Steptoe & Johnson LLP (*Herbert C. Shelley*, *Alice A. Kipel* and *Susan R. Gihring*) for Plaintiffs SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, and SKF Industrie S.p.A.

Peter D. Keisler, Assistant Attorney General; *Claudia Burke* International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Mykhaylo A. Gryzlov*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

This matter comes before the court following its remand on May 26, 2006, to the United States Department of Commerce ("Commerce" or "the Department"). In *Paul Müller Industrie GmbH & Co. v. United States*, 435 F. Supp. 2d 1241 (CIT 2006) ("*Paul Müller I*"), the court remanded in part the Department's determination for Paul Müller Industrie GmbH & Co. ("Paul Mfuller") in the administrative review of the antidumping duty order on antifriction bearings and parts thereof from Germany in *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative*

Reviews, Rescission of Administrative Reviews in Part, and Determination to Revoke Order in Part, 69 Fed. Reg. 55,574 (September 15, 2004) ("*Final Results*") (as amended by *Ball Bearings and Parts Thereof from Germany; Amended Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 63,507 (November 2, 2004) ("*Amended Final Results*")).

In *Paul Müller I* the court granted Commerce's request for remand to fully explain its calculation of Paul Müller's inventory carrying costs, and if necessary open the record for additional information. *Paul Müller I*, 435 F. Supp. 2d at 1247. The court also granted the Department's request for a remand to correct a clerical error regarding Paul Müller's margin program. *Id.* This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons that follow, Commerce's Remand Determination is affirmed.

II
BACKGROUND

On September 15, 2004, Commerce published in the Federal Register its *Final Results* of its review of the antidumping duty orders on antifriction bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom covering the period of review from May 1, 2002, through April 30, 2003. *Final Results*, 69 Fed. Reg. at 55,574. The scope of this order covers antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof. *Final Results*, 69 Fed. Reg. at 55,575.

The court remanded this matter in part upon Commerce's request to allow the Department to explain its calculation of Paul Müller's carrying costs and to correct a clerical error regarding Paul Müller's margin program.[1] *Paul Müller I*, 435 F. Supp. 2d at 1247. Oral argument concerning Commerce's Remand Determination was held on April 24, 2007.

III
STANDARD OF REVIEW

This court will sustain Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.

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[1] None of the parties commented on the Department's correction of the billing adjustment in the margin calculations, which involved an inadvertent change in the value of all observations for a particular invoice number instead of changing one observation as was intended. *Paul Müller Industrie GmbH & Co. v. United States*, 435 F. Supp. 2d at 1247 ("*Remand Determination*"). Upon review of the adjustment, and having received no comments from the parties, the correction in the margin calculations is affirmed and will not be discussed below.

§ 1516a(b)(1)(B); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "more than a mere scintilla." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed 126 (1938)). Under this standard the court does not substitute its own judgment for that of the agency, and the possibility of drawing two inconsistent conclusions from the evidence presented does not necessarily prevent the agency's findings from being supported by substantial evidence. *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1076–77, 699 F. Supp. 938 (1988); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citing *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106, 62 S. Ct. 960, 86 L. Ed. 1305 (1942)).

The court uses a two step analysis to determine the level of deference to give an agency's statutory interpretation. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. et al.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The court examines, first, whether "Congress has directly spoken to the precise question at issue," in which case, courts "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If Congress instead left a gap for the agency to fill, the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44. The Court of Appeals for the Federal Circuit has held that statutory interpretation by Commerce is entitled to deferential treatment by the courts in their review under *Chevron*. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001).

IV
DISCUSSION

The court remanded this matter at the request of Commerce for further explanation of the Department's calculation of Paul Müller's carrying costs in its home and U.S. markets, and to address the assertion made by Defendant-Intervenor Timken US Corporation ("Timken") that Commerce's treatment of Paul Müller's home market was inconsistent with its treatment of its U.S. carrying costs. *Paul Müller I*, 435 F. Supp. 2d at 1247. Upon remand, the Department determined that Paul Muller valued its inventory with respect to its home market carrying costs based on its own cost of goods sold, and its U.S. sales by applying its interest rate factor to the entered value of each model that represents the transfer price to its U.S. affiliate. Final Remand Determination, *Paul Müller Industrie GmbH & Co. v. United States*, Consol. Court No. 04–00522 (September 13, 2006) ("Remand Determination") at 3. After reviewing the record, Commerce determined that there was information available that

would allow it to calculate inventory carrying costs in both markets on a consistent basis. *Id.* at 4. The Department thus recalculated the U.S. and home market costs to reflect the respective cost of producing each model on a per-unit cost. *Id.* In response, Timken argued that the Department still needs to account for U.S. carrying costs incurred on an ex-factory basis, as it did for the home market side. *Id.* Timken suggested that the sum of the time in inventory in the home market, the transit time, and the time in inventory in the U.S. would be a more accurate approach for the calculation. *Id.* The Department responds in its Remand Determination that its longstanding practice is to treat in-transit inventory carrying costs as indirect selling expenses relating to the sale to the affiliate, rather than associated with economic activity in the U.S. market. *Id.* (citing *Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 67,855, 67,856 (December 9, 1988) ("*Stainless Steel Final Results*")). In this case, Commerce determined that both in-transit carrying costs and time in inventory in the home market are not associated with U.S. economic activity or the resale of the merchandise. *Id.* at 5. Timken also suggested that Commerce consider the entered value as the cost of goods upon entry to the U.S., to which the Department responded that there was sufficient information to allow Commerce to calculate cost factors that better reflect the respective cost in the two markets. *Id.* at 4, 6.

A
Timken Waived its Argument Regarding Freight, Duty, and Brokerage Fees by Failing to Raise it in Agency Proceedings

In Timken US Corporation's Comments on Commerce's Remand Results ("Timken's Comments"), Timken argues that for U.S. inventory, the estimate of inventory cost must account for costs incident to the transaction between the producer and the U.S. affiliate such as transportation costs, duties, and brokerage fees. Timken's Comments at 2. According to Timken, the statute reflects that additional costs are incurred to transport and sell the product where it provides for the adjustment of U.S. prices for "any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." *Id.* at 3 (quoting 19 U.S.C § 1677a(c)(2)(A)). Timken requests that the Department adjust the value of the products in U.S. inventory to reflect those costs.

Defendant responds that the methodology used in the remand was reasonable because it allocates expenses in a consistent way and comports with the Department's prior practice.[2] Defendant's Re-

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[2] Plaintiff Paul Müller's Response Memorandum in Opposition to Timken US Corpora-

sponse to Timken's Comments upon the Results of the Final Remand Determination ("Defendant's Response") at 6. Additionally, Defendant notes that Timken advocated the result reached in the Remand Determination in the administrative case brief it filed after Commerce's preliminary results, and only changed its position during the remand proceedings. *Id.* (citing Timken's Case Brief at 22, Public Record at 213; Timken's Rule 56.2 Motion for Judgment on the Agency Record at 24). Defendant asserts that in this case Timken is requesting that Commerce add expenses incurred overseas and relating solely to sales from Paul Müller to its affiliated importer in the U.S. *Id.* at 8. Defendant also argues that because Timken failed to present its argument after the preliminary results and the draft remand determination, Timken waived its right to raise the argument now. *Id.* at 9–10 (citing *Carpenter Tech. Corp. v. United States*, 464 F. Supp. 2d 1347 (CIT 2006)). Counsel for Paul Muller added during oral argument that Exhibit N of Paul Muller's original Section A Questionnaire Response accounts for freight as "other expenses" which are directly deducted from the U.S. price. Defendant's Confidential Appendix, Tab 2, Response of Paul Müller Industrie GmbH & Co. KG to Antidumping Questionnaire Section A, Exhibit N.

Timken waived its right to raise the issue of freight, duties, and brokerage fees by failing to raise the issue before Commerce in the course of its review. *See Ta Chen Stainless Steel Pipe v. United States*, 342 F. Supp. 2d 1191, 1205 (CIT 2004) (noting that all arguments relevant to a decision must be presented to the agency in case briefing). The doctrine of exhaustion provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). Timken failed to raise this challenge both after the Preliminary Results and in its remand comments to commerce. A party that fails to exhaust administrative remedies waives the right to raise them on appeal. *AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998); *Ta Chen Stainless Steel Pipe*, 342 F. Supp. 2d at 1205. As counsel for the United States asserted during oral argument, that Timken raised general issues regarding inventory carrying costs is not adequate to apprise Commerce of what it would need to specifically respond to regarding these additional issues. Thus, Timken waived its right to argue that additional costs be considered upon appeal.

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tion's Rule 59 Motion for Reconsideration (Paul Müller's Response) follows the arguments made by Defendant unless otherwise noted. Plaintiff SKF declined to file commentary on the remand. *See* Letter from SKF to the court dated December 21, 2007.

B
The Department's Treatment of Paul Mǔller's Carrying Costs Upon Remand was Correct

According to the Government, Commerce's regular practice is to treat in-transit carrying costs as indirect selling expenses related to the sale to the affiliate rather than associated with economic activity or the sale of the merchandise in the U.S. Defendant's Response at 7. Additionally, Defendant argues that the result Commerce reached upon remand is the result Timken advocated in the case briefs it filed before the agency and before this court; Timken only changed its position once it became apparent that the cost-based comparison would not result in more than a *de minimis* margin for Plaintiff. *Id.* at 6–7.

Commerce's treatment of Paul Mǔller's inventory carrying costs is supported by substantial evidence and is in accordance with law. As there is no methodology mandated by statute for assessing inventory costs, Commerce has considerable discretion to determine its method of calculation. *E.I. Dupont De Nemours & Co. v. United States*, 22 CIT 220, 229, 4 F. Supp. 2d 1248, 1256 (1998); *see Chevron*, 467 U.S. at 842–43 (stating that when a statute is silent on a particular matter the court is only to assess whether the agency's interpretation is a permissible one). In this case, Commerce used information on the record to calculate inventory costs based on the cost of manufacturing from both markets. Remand Determination at 3–4. This change from the use of entered value for the U.S. market allowed Commerce to follow its prior practice of calculating inventory carrying costs based on the cost of manufacturing. *See, e.g, Extruded Rubber Thread from Malaysia; Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 12,752, 12,760 (March 16, 1998). Additionally, as Commerce explains in its Remand Determination, it is the agency's practice to treat in-transit carrying costs as indirect selling expenses related to the sale to the affiliate rather than related to U.S. economic activity or the resale of the merchandise. Remand Determination at 4; *see Stainless Steel Final Results*, 63 Fed. Reg. at 67,856. This approach is reasonable under the substantial evidence standard of review applicable to this case; Commerce need not recalculate the inventory carrying costs to account for the additional costs incident to the transaction between the producer and the affiliate, as Timken suggests. In fact, the approach taken by Commerce in its Remand Determination is consistent with that advocated by Timken itself throughout the review until the determination was remanded. As the approach used by Commerce to calculate Paul Mǔller's inventory carrying costs is permissible under the antidumping statute, Commerce's Final Remand Determination is affirmed.

V
CONCLUSION

For the above stated reasons, Commerce's Remand Determination is affirmed.

PAUL MÜLLER INDUSTRIE GMBH & CO., et al., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Consol. Court No.: 04–00522

ORDER AND JUDGMENT

Upon consideration of the U.S. Department of Commerce's ("Commerce") Final Remand Determination on Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom ("Remand Determination"), filed pursuant to this court's Order dated July 31, 2006; the court having reviewed all comments contesting the Remand Determination and all pleadings and papers on file herein, and good cause appearing therefor, the court having found that Commerce's Remand Determination is in accordance with this court's Order; it is hereby

ORDERED that Commerce's Remand Determination is AFFIRMED; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Monday, July 9, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before July 9, 2007.

Slip Op. 07 – 107

ALLIED TUBE & CONDUIT CORP., IPSCO TUBULARS INC., AND WHEATLAND TUBE COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and TOSÇELIK PROFIL VE SAC ENDUSTRISI A.S., Defendant-Intervenor.

Before: Richard W. Goldberg,
Senior Judge
Court No. 06–00285
PUBLIC VERSION

[Commerce's final new shipper review determination is remandedfor further consideration and explanation of the commercialreasonableness of Defendant-Intervenor's single U.S. sale.]

Dated: July 9, 2007

Schagrin Associates (*Roger B. Schagrin*, *Brian E. McGill*, and *Michael James Brown*) for Plaintiffs Allied Tube & Conduit Corp., IPSCO Tubulars Inc., and Wheatland Tube Company.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Jennifer I. Johnson*), Of Counsel, for Defendant United States.

Law Offices of David L. Simon (*David L. Simon*) for Defendant-Intervenor Tosçelik Profil ve Sac Endustrisi A.S.

OPINION

GOLDBERG, Senior Judge: On May 31, 2005, Tosçelik Profil ve Sac Endustrisi A.S. and its affiliated trading company Tosyali Dis Ticaret A.S. (collectively, "Tosçelik") requested that the U.S. Department of Commerce ("Commerce") conduct a new shipper review based on a single U.S. sale during the period of review from May 1, 2004 through April 30, 2005 ("POR"). Commerce found that the single U.S. sale was bona fide, and subsequently determined that a zero percent antidumping duty margin existed. *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 71 Fed. Reg. 43444, 43445 (Dep't Commerce Aug. 1, 2006) (final results of new shipper review). Allied Tube and Conduit Corporation, IPSCO Tubulars, Inc., and Wheatland Tube Company (collectively, "Allied Tube") have brought this action to challenge Commerce's determination that Tosçelik's single U.S. sale during the POR was bona fide. For the reasons that follow, the Court remands the issue of whether Tosçelik's single U.S. shipment was a bona fide transaction.

I. *STANDARD OF REVIEW*

A court shall hold unlawful Commerce's final determination in an antidumping administrative review if it is "unsupported by substan-

tial evidence on the record, or otherwise not in accordance with the law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). To determine if substantial evidence exists, the Court reviews the record as a whole, including evidence that supports as well as evidence that "fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

II. *DISCUSSION*

A. New Shipper Review and the Bona Fide Sale Test

On May 15, 1986, Commerce published an antidumping duty order on imports of welded carbon steel pipe and tube from Turkey. *See Welded Carbon Steel Standard Pipe and Tube Products from Turkey*, 51 Fed. Reg. 17784 (Dep't Commerce May 15, 1986) (final determination). The order imposes an "all others" antidumping duty rate of 14.74%, which applies to Turkish producers and exporters that have not had their antidumping duty rate determined in an investigation or review. *Id*. If a producer or exporter did not export merchandise that was the subject of an antidumping duty order during a previous investigation period, it may request a new shipper review. *See* 19 U.S.C. § 1675(a)(2)(B) (2000).[1] During the course of a new shipper review, Commerce endeavors to establish an individual dumping margin and antidumping duty rate for the new shipper. This process allows the new shipper to demonstrate that the "all others" rate should not apply to its entries. On May 31, 2005, Tosçelik timely re-

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[1] A new shipper review may be requested pursuant to the following requirements:

> If the administering authority receives a request from an exporter or producer of the subject merchandise establishing that–(I) such exporter or producer did not export the merchandise that was the subject of an antidumping duty or countervailing duty order to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation, and (II) such exporter or producer is not affiliated (within the meaning of section 1677(33) of this title) with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during that period, the administering authority shall conduct a review under this subsection to establish an individual weighted average dumping margin or an individual countervailing duty rate (as the case may be) for such exporter or producer.

19 U.S.C. § 1675(a)(2)(B)(i) (2000); *see also* 19 C.F.R. § 351.214 (2006).

quested a new shipper review based on a single sale to the United States.

When a new shipper review involves only a single U.S. sale, it is Commerce's practice to determine if that sale is a bona fide transaction. *See Freshwater Crawfish Tail Meat from the People's Republic of China*, 68 Fed. Reg. 1439, 1440 (Dep't Commerce Jan. 10, 2003) (rescission of new shipper review); *Fresh Garlic from the People's Republic of China*, 67 Fed. Reg. 11283, 11284 (Dep't Commerce Mar. 13, 2002) (rescission of new shipper review). A sale is not bona fide when it is "commercially unreasonable" or "atypical of normal business practices." *Tianjin Tiancheng Pharmaceutical Co. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1246, 1249–50 (2005); *see also Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 230, 193 F. Supp. 2d 1303, 1313 (2002). Commerce makes this determination so that a producer does not "unfairly benefit from an atypical sale to obtain a lower dumping margin than the producer's usual commercial practice would dictate." *Tianjin*, 29 CIT at ___ , 366 F. Supp. 2d at 1250. A single sale is not inherently commercially unreasonable, but "it will be carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales." *Id*. at ___ , 366 F. Supp. 2d at 1263.

Commerce looks at the totality of the circumstances to determine whether a particular sale is bona fide. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT ___ , ___ , 374 F. Supp. 2d 1333, 1338 (2005). In the present case, Commerce initially issued a Commercial Reasonableness Memorandum ("CRM") which set forth its basis for finding that Tosçelik's U.S. sale was commercially reasonable under the totality of the circumstances. *See* CRM, A–489–501, NSR 5/1/04–4/30/05 (Apr. 24, 2006); Pl.'s App. 5A–B. In the CRM, Commerce considered three factors: (1) the price and quantity of the U.S. sale; (2) the sales process; and (3) freight expenses. Commerce subsequently issued the preliminary results of the new shipper review on May 3, 2006, and found that Tosçelik's sale had no dumping margin. *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 71 Fed. Reg. 26043, 26047 (Dep't Commerce May 3, 2006) (preliminary results). Commerce subsequently adopted the same position in its final determination. *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 71 Fed. Reg. at 43445. In that determination, Commerce referred to its Issues and Decision Memorandum ("IDM"), which found Tosçelik's single U.S. sale to be commercially reasonable, and therefore bona fide. IDM, A–489–501, POR 5/1/04–4/30/05 (Aug. 1, 2006), *available at* http://ia.ita.doc.gov/frn/summary/turkey/E6-12372-1.pdf.

Allied Tube challenges Commerce's determination that Tosçelik's transaction is bona fide. Specifically, it claims that the price, quantity and freight expense of the sale indicate that the transaction is not commercially reasonable.

B. Commerce's Determination That the Price of Tosçelik's U.S. Sale Is Commercially Reasonable Is Not Supported by Substantial Evidence

i. *Overview of Commerce's Methodology Comparing the Unit Value of Tosçelik's Sale to the Average Unit Value of Other Turkish Exporters*

Commerce calculated the average unit value ("AUV") per metric ton ("MT") for all U.S. imports of welded steel pipe and tube from Turkey during the POR, and found that the unit value of Tosçelik's sale is about [ ] the AUV of all imports from Turkey.[2] Commerce did not primarily rely on a comparison between the AUV of all imports from Turkey and the unit value of Tosçelik's sale. Instead, Commerce obtained data from U.S. Customs and Border Protection ("Customs") that listed the AUV of each Turkish exporter during the POR. The unit value of Tosçelik's single sale fell within the range of the other Turkish exporters' AUVs ([ ] per MT). Commerce concluded that because Tosçelik's sale is "comfortably within the range of other commercial transactions . . . [there is] no reason to suspect that [it] is not a bona fide commercial transaction." CRM 4.

The "range" Commerce refers to is derived from a chart attached to the CRM. The chart is reproduced here:[3]

[REDACTED]

CRM Attach. 1 (Confidential). Each row represents data from a specific Turkish exporter. The far left column lists the total quantity of welded steel pipe and tube shipped from each exporter.[4] The next column lists the total value of the shipments, followed by the AUV for each exporter. Tosçelik's shipment is represented by the company name "Tosyali Dis Ticaret A.S.," which is Tosçelik's affiliated trading company. The unit value of Tosçelik's sale, [ ] per MT, does indeed fall within the range of AUVs listed by exporter.

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[2] In the chart provided by Commerce, Tosçelik's unit value is [ ] per MT. CRM Attach. 1 (Confidential). Commerce reached this value by dividing the "entered value" of Tosçelik's single U.S. sale [ ] by the "theoretical quantity" of the shipment [ ]. Whereas the chart lists the [ ] per MT figure, the analysis in the CRM refers to the AUV of Tosçelik's sale as [ ] per MT. The [ ] per MT figure is reached by dividing the "total value" of the sale [ ] by the "actual quantity" [ ]. Presumably, this includes the transportation costs associated with the sale. It is unclear why Commerce includes the [ ] figure in the chart, but discusses the [ ] figure in its analysis. The Court's determination that Tosçelik's sale is [ ] than the AUV of all Turkish imports is based on the [ ] figure. The discrepancy rises to [ ] when the [ ] figure is used. The precise calculation does not affect the disposition of this case at this stage in the proceedings, but may be highly relevant on remand.

[3] The names of some exporters have been shortened for formatting purposes.

[4] The chart encompasses steel pipe and tube classified under the same Harmonized Tariff Schedule of the United States ("HTSUS") classification as Tosçelik's U.S. shipment.

Allied Tube believes that the range of AUVs used by Commerce in the above chart includes highly aberrational data. Specifically, the range of data used by Commerce includes a small quantity of sales [ ] imported at relatively high prices.[5] Allied Tube argues that a single sale with a unit value in the [ ] percentile is atypical of normal business practices and commercially unreasonable. If the top [ ] of sales by quantity is excluded, the remaining [ ] of all imports by quantity fall within an AUV range between [ ] per MT. Tosçelik's sale, at [ ] per MT, does not fall within this range. Thus, Allied Tube claims the price of Tosçelik's sale is commercially unreasonable.

ii. *Commerce's "Range" Methodology Including Allegedly Distortive Entries Does Not Reasonably Support Its Determination That Tosçelik's Sale Is Commercially Reasonable*

The Court must now determine whether Commerce's "range" methodology, which includes the allegedly distortive entries, is reasonable and supported by substantial evidence. Commerce has the discretion to choose whatever methodology it deems appropriate, as long as it is reasonable and its conclusions are supported by substantial evidence. *See Federal-Mogul Corp. v. United States*, 18 CIT 785, 807–08, 862 F. Supp. 384, 405 (1994); *see also Windmill*, 26 CIT at 230, 193 F. Supp. 2d at 1312 ("Given Commerce's discretion in employing a methodology to exclude sales from the United States price that are unrepresentative or distortive . . . the Court must determine whether Commerce's actions in this case were reasonable.").

Allied Tube believes that Commerce acted contrary to its own established practice "of using AUVs derived only after excluding aberrant data for its analysis" to determine the commercial reasonableness of U.S. sales in new shipper reviews. Pl.'s Mot. J. Agency R. 13. Commerce does frequently choose to exclude aberrational data in its antidumping duty determinations. *See, e.g.*, *Hebei*, 29 CIT at ___ , 374 F. Supp. 2d at 1340 (approving Commerce's exclusion of "clearly aberrational" data in a new shipper review); *Luoyang Bearing Corp. (Group) v. United States*, 29 CIT ___ , ___ , 358 F. Supp. 2d 1296, 1299 (2005) (in determining a surrogate value for China, Commerce excluded price data from countries with steel imports of less than seven MTs); *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT ___ , ___ , 318 F. Supp. 2d 1339, 1350 (2004) (explaining that when calculating surrogate values for non-market economies, it is Commerce's practice to exclude aberrational data); *FAG U.K. Ltd. v. United States*, 20 CIT 1277, 1282, 945 F. Supp. 260, 265 (1996) (per-

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[5] The [ ] of imports by quantity that Allied Tube argues should be excluded from Commerce's analysis are those imported by [ ]. Pl.'s Mot. J. Agency R. 12 n.7. These exporters each have an AUV of [ ] per MT or higher.

mitting Commerce to exclude "certain sales which are clearly atypical" in an antidumping administrative review). Commerce excludes aberrant data because a "[f]air (apples to apples) comparison is the goal of the price comparisons required by the antidumping laws. . . ." *Am. Permac, Inc. v. United States*, 16 CIT 41, 42, 783 F. Supp. 1421, 1423 (1992).

While Commerce often excludes potentially aberrational data in its antidumping determinations, it is not always required to do so. In *Corus Staal BV v. United States*, the plaintiff, a domestic party, challenged Commerce's decision to include sales of defective merchandise in its calculation of the U.S. price. 27 CIT 388, 404–05, 259 F. Supp. 2d 1253, 1267–68 (2003). The plaintiff argued that because transactions involving defective merchandise are not in the "ordinary course of trade," they must be excluded from the analysis. The Court disagreed, and stated that unlike the definition of normal value,[6] the definition of U.S. price contains no requirement that Commerce exclude sales that are arguably outside of the ordinary course of trade. *Id*. at 406, 259 F. Supp. 2d at 1269.

Corus Staal is easily distinguishable from the present case because the commercial reasonableness test for new shipper reviews necessarily implies that the analysis should only include prices "in the ordinary course of trade." Commerce cannot reasonably conclude that the price of a new shipper's single sale is commercially reasonable if it is only similar to prices that are atypical of the industry. In the present case, the "range" methodology can only be deemed reasonable if Commerce can explain why the allegedly distortive entries, some over [ ] the AUV for the industry, should be included in the range of reasonableness. When Commerce's commercial reasonableness determination hinges on comparing the new shipper sale price to a range of values, it is crucial to make sure the values at both ends of that range are commercially reasonable.

Commerce has not only failed to explain why its "range" methodology is reasonable, but it even suggests that its own dataset might be overinclusive and therefore inaccurate. Commerce states:

> Given that the [HTSUS] numbers covered by the scope include more than subject merchandise, [and] that actual products included within any given shipment maybe different from each other[,] [a] direct comparison between shipments should not be viewed as accurate price to price comparison. Rather, such data are generally reflective of commercial transactions.

CRM 5 n.3. In other words, the high-priced, small-quantity sales included in Commerce's analysis might be different types of merchan-

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[6] The definition of "normal value" is "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and *in the ordinary course of trade*. . . ." 19 U.S.C. § 1677b(a)(1)(B)(i)(2000) (emphasis added).

dise than the standard pipe imported by Tosçelik even though they are encompassed in the same HTSUS classification. The potential inaccuracy of the dataset further undermines the reasonableness of Commerce's "range" methodology.

In previous investigations, Commerce stressed the importance of comparing the total AUV of all imports to the new shipper sale. In *Hebei*, where Commerce determined that a new shipper sale was *not* bona fide, Commerce viewed the large price differential between the new shipper sale and the AUV of all the entries of the subject merchandise as significant. *See* 29 CIT at ___ , 374 F. Supp. 2d at 1336. Specifically, Commerce compared the Chinese manufacturer's U.S. sale price to:

(1) the weighted AUV of all Chinese entries of the subject merchandise during the POR that were covered by the antidumping duty order and not clearly aberrational based on proprietary data in the Customs database;

(2) the weighted AUV of all Chinese imports of the subject merchandise during the POR based on public import statistics; and

(3) the weighted AUV of U.S. imports of the subject merchandise from all countries during the POR based on publicly available U.S. import data.

See id. at ___ , 374 F. Supp. 2d at 1336; *see also Tianjin*, 29 CIT at ___ , 366 F. Supp. 2d at 1255 (stating that the prices listed in four invoices from a single company "do not go as far as the AUV data in showing the typical price for Plaintiff's product"). By contrast, in this case, Commerce relied primarily on a comparison of Tosçelik's sale to small import quantities with comparatively high per-unit values. Commerce has not persuaded the Court that this methodology is reasonable. *See Shanghai*, 28 CIT at ___ , 318 F. Supp. 2d at 1351 ("A Commerce decision to rely on potentially aberrational data without explanation and contrary to its own practice is not based on substantial evidence and cannot be sustained.").

In summary, Commerce's "range" methodology is a shaky foundation on which to rest its conclusion that the price of Tosçelik's sale is commercially reasonable. The methodology merely shows that the unit value of Tosçelik's sale is [ ] the AUVs of certain other Turkish exporters' aggregated entries under the same HTSUS classification. Given that the unit value of Tosçelik's sale is [ ] the AUVs of the Turkish exporters that comprise [ ] of the total U.S. imports of welded carbon steel pipe and tube by quantity, Commerce has failed to demonstrate, by substantial evidence, that Tosçelik's price is commercially reasonable. As such, this issue is remanded so that Commerce may attempt to explain why its methodology is reasonable, or to point to other grounds that support its ultimate conclusion that

Tosçelik's sale is commercially reasonable. *Cf. Luoyang Bearing Corp. (Group) v. United States*, 28 CIT ___ , ___ , 347 F. Supp. 2d 1326, 1353 (2004) (remanding because Commerce failed to explain why it did not address the aberrational import data that the plaintiffs believed should be excluded).

iii. *Commerce's Analysis Excluding Allegedly Distortive Entries Does Not Demonstrate That Tosçelik's Sale Is Commercially Reasonable*

In response to Allied Tube's concerns, Commerce explains in its final determination that even if the allegedly distortive data are excluded, Tosçelik's sale would still be considered commercially reasonable. IDM 5–6. To support this conclusion, Commerce states that a disaggregation of import data from major Turkish exporters indicates there are "a meaningful number of shipments with comparable unit values and quantities." *Id*. 6. Commerce does not point to any useful shipment-level data to demonstrate what it means by a "meaningful" number of shipments or "comparable" unit values and quantities. Instead, Commerce asserts that "while the average value of each shipment of welded pipe and tube during the POR was [ ], the value of individual shipments ranged from [ ] to [ ]." CRM 4. Commerce claims that because the value of Tosçelik's single shipment fits within this range, it is commercially reasonable. However, this analysis is problematic because Commerce only compares the value, but ignores the quantity, of each individual shipment. This range of values is meaningless if the quantity of each shipment is unknown. Instead, Commerce could have disaggregated the import data, calculated the shipment unit values, and then compared them to the unit value of Tosçelik's shipment. At present, Commerce has not demonstrated by substantial evidence that when the allegedly distortive entries are excluded from the analysis, Tosçelik's sale is commercially reasonable.[7]

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[7] Commerce also suggests that Allied Tube did not include all relevant figures in its analysis:

> [W]e found [Allied Tube's] analysis did not include the AUV for a certain Turkish manufacturer, which was within a reasonable range of Tosçelik's AUV and higher than the threshold AUV identified by petitioner. Moreover, the entry for the exporter reported by [Customs] was disregarded in petitioner's analysis altogether, despite the fact that the specific exporter's shipment was higher in volume than Tosçelik's U.S. sale. Furthermore, the entered value of Tosçelik's U.S. sale is only slightly higher than the entered value of sales made by the specific exporter not named by the petitioner, as reported by [Customs].

IDM 5–6. This explanation is difficult to comprehend because the Court is unable to identify the "certain Turkish manufacturer" that Allied Tube failed to include in its analysis. Allied Tube appears to have accounted for all of the exporters listed in the chart accompanying the CRM. *See* Pl.'s Mot. J. Agency R. 12 n.7. Additionally, the Court is unable to find an entry that: (1) has an AUV that is higher than "the threshold AUV identified by petitioner" (i.e., [ ] per MT), (2) has a higher quantity than Tosçelik's sale, and (3) has an entered

iv. *Tosçelik's U.S. Sale, in Comparison to Its Home Market Prices, Does Not Demonstrate That the Sale Is Commercially Reasonable*

At the suggestion of Allied Tube, Commerce compared Tosçelik's U.S. sale price to its home market prices. Allied Tube alleges that the price of Tosçelik's single U.S. sale was [ ] than Tosçelik's average home market sales.[8] If this were true, it would support the claim that Tosçelik was artificially inflating its U.S. price in order to obtain a favorable antidumping duty margin. In response, Commerce states that it "used the prices included in [Tosçelik's home market database] and calculated an average [home market price] that is very comparable to the AUV of U.S. imports. . . ."[9] IDM 5. Notably, Commerce did not directly compare the price of Tosçelik's U.S. sale to its home market sales. Instead Commerce found that Tosçelik's home market sales were comparable to the AUV for all U.S. imports. As a result, the usefulness of this analysis is entirely dependent on how Tosçelik's U.S. sale compares to the AUV for all U.S. imports. Because, as discussed above, Commerce's analysis of the AUV of all U.S. imports does not demonstrate that Tosçelik's sale was commercially reasonable, Commerce's analysis of the home market sales provides no independent support for its position.

C. Commerce's Determination That the Quantity of Tosçelik's U.S. Sale Is Commercially Reasonable Is Supported by Substantial Evidence

Allied Tube claims that there is not substantial evidence to support Commerce's conclusion that the quantity of Tosçelik's U.S. sale is commercially reasonable. In its final determination, Commerce found that:

> [The quantity of Tosçelik's U.S. sale] is not atypical of Tosçelik's normal business practices. Specifically, the majority of Tosçelik's home market sales are made with invoices that have a total quantity that is less than the sale in question. Therefore, we find the quantity of Tosçelik's one sale to the U.S. is comparable to the size of Tosçelik's sales in its home market,

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value that is only slightly lower than Tosçelik's sale.

Therefore, this explanation is insufficient to support Commerce's finding that the price of Tosçelik's single U.S. sale is commercially reasonable.

[8] Allied Tube claims that Tosçelik's U.S. sale ([ ] per MT) was priced [ ] than that of the average of Tosçelik's home market sales. Pl.'s Mot. J. Agency R. 11. In fact, the U.S. sale is only [ ] than the average home market sale.

[9] The original language states "U.S. price" instead of "homemarket price." The Court assumes this is a clerical error, because Commerce could not have used Tosçelik's home market price database in order to calculate an average U.S. price.

and consistent with Tosçelik's business practices in the home market.

IDM 5. The fact that Tosçelik's single U.S. sale is of a larger quantity than a majority of its home market sales is adequate to support the conclusion that the quantity is commercially reasonable. *Cf. Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313 ("[S]ingle sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices.").[10]

D. Commerce's Determination That the Freight Charges Includedin Tosçelik's U.S. Sale Price Are Commercially ReasonableIs Not Supported by Substantial Evidence

Tosçelik shipped its U.S. sale by container with an international freight charge of [ ] per MT.[11] Allied Tube points out that this freight charge is [ ] the average international freight charge for U.S. imports from Turkey that fall under the same HTSUS classification category as Tosçelik's entry. Pl.'s Reply Br. 11. Commerce has considered extraordinarily high freight costs to be evidence that a sale is not bona fide. *See Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313.

To support its finding that Tosçelik's freight cost is not unreasonably high, Commerce states that it "verified Tosçelik's reported freight expenses and found the container shipment to be consistent with Tosçelik's typical business practices." IDM 6. Commerce cites to a Sales Verification Exhibit that shows how much Tosçelik paid for the freight cost. *See id.* n.14. Commerce has not adequately explained how this information supports the conclusion that Tosçelik's freight charge in this case was consistent with its typical business practices.

Commerce also suggests that Tosçelik's freight expenses are so high because "Tosçelik's U.S. sale was shipped by container rather than full vessel load and included inland freight expenses from the

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[10] Allied Tube points out that the average quantity per shipment of welded carbon steel pipe and tube from Turkey during the POR was more than [ ] the quantity of Tosçelik's shipment. Pl.'s Mot. J. Agency R. 17–18. However, Commerce has demonstrated that the quantity of the sale is in line with Tosçelik's selling practices in its home market. The fact that Tosçelik's sale is smaller than the industry average does not render it commercially unreasonable if the quantity is typical of Tosçelik's normal business practices.

[11] Initially, Allied Tube claimed that the international freight cost of Tosçelik's sale was [ ] per MT. Pl.'s Mot. J. Agency R. 18. Allied Tube believed that this figure excluded domestic shipping costs. Defendant-Intervenor Tosçelik responded that this was a clear misstatement of fact, because the [ ] per MT figure does in fact include domestic inland freight. Def.-Int.'s Resp. Br. 32–33. In its Reply Brief, Allied Tube explained that it believed [ ] per MT constituted only the international freight cost Tosçelik reported in its questionnaire response that "international freight" was [ ] per MT. Pl.'s Reply Br. 10–11. Allied Tube corrected its initial error, and states that the actual international freight charge (excluding domestic inland freight) is [ ] per MT. *Id*. 11.

port of Mersin, Turkey." *Id*. 6. The fact that the shipment was made by container is irrelevant because Commerce did not demonstrate that it is commercially reasonable to use this method of shipment. Additionally, the [ ] figure does not include domestic inland freight in Turkey. Pl.'s Reply Br. 11. Even without the additional cost of domestic inland freight, the international freight cost of Tosçelik's sale is [ ] the industry average.

Commerce claims that although Tosçelik's freight charges may be higher than average, this fact alone does not render the sale commercially unreasonable. In *American Silicon Technologies v. United States*, the Court held that a high shipping price or unusual mode of shipment does not alone render a sale commercially unreasonable. 24 CIT 612, 617–18, 110 F. Supp. 2d 992, 997 (2000). In that investigation, Commerce had found that although the shipping costs were high, the timing and mode of shipment did not indicate the sale was commercially unreasonable because the merchandise entered the United States "fully six months" prior to the POR and the exporter did not request a new shipper review. *Silicon Metal from Brazil*, 64 Fed. Reg. 6305, 6317 (Dep't Commerce Feb. 9, 1999) (final results of new shipper review). The Court sanctioned that approach. *Am. Silicon Techs.*, 24 CIT at 618, 110 F. Supp. 2d at 997. By contrast, Tosçelik's single shipment entered the United States on April 28, 2005, only two days before the end of the POR. Additionally, Tosçelik requested the new shipper review. This record evidence seems to undercut Commerce's claim that "there was no evidence that the freight charge was incurred for any reason related to the new shipper review." Def.'s Resp. 17. Both the timing of the sale and Tosçelik's request for the new shipper review indicate otherwise.

In summary, there is ample record evidence that Tosçelik's freight charges are too high to be commercially reasonable. Commerce has failed to present any contradictory evidence that amounts to more than unsupported assertions. As a result, Commerce's finding that Tosçelik's freight charge does not indicate that the sale is commercially unreasonable is not supported by substantial evidence.

E. Commerce's Ultimate Determination That Tosçelik's Single U.S. Sale Is Bona Fide Is Not Supported by Substantial Evidence

The Court must aggregate Commerce's findings to ultimately determine whether there is substantial evidence to support its decision that under the totality of the circumstances, Tosçelik's single U.S. sale is bona fide. *See Tianjin*, 29 CIT at ___, 366 F. Supp. 2d at 1249–50. As discussed above, Commerce has failed to show that substantial evidence supports its findings that the price and freight cost of Tosçelik's sale are commercially reasonable. On the other hand, there is substantial evidence to support Commerce's finding that the quantity of Tosçelik's sale is commercially reasonable. The only re-

maining factor Commerce considered is Tosçelik's "sales process." CRM 5. Commerce reviewed Tosçelik's home market and export selling practices, and found that the U.S. sale "followed the same sales process as their other export sales." CRM 5. Allied Tube does not dispute this finding. The fact that Tosçelik appears to have followed its normal business practices in executing its single U.S. sale is evidence that the sale is bona fide. *Cf. Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313 (holding that purchaser's failure to follow normal business practices is evidence that sale is not bona fide). However, "the price factor has significant weight, and cannot necessarily be offset by a recitation of other factors by which the sale could be considered typical. . . ." *Tianjin*, 29 CIT at ___ , 366 F. Supp. 2d at 1263. Accordingly, under the totality of the circumstances, the Court does not find substantial evidence to support Commerce's finding that Tosçelik's U.S. sale is bona fide.

III. *CONCLUSIONS*

For the foregoing reasons, the Court remands Commerce's final new shipper review determination. Specifically, Commerce must explain, if it is able, why its "range" methodology (ranking the AUVs of the aggregate imports, within the same HTSUS classification, of each Turkish exporter) is a reasonable approach to determining whether the price of Tosçelik's U.S. sale is commercially reasonable. In the course of this explanation, Commerce must address why the seemingly distortive entries identified by Allied Tube should not be excluded from the analysis concerning the price of Tosçelik's U.S. sale. If Commerce is unable to provide such an explanation, it must either (1) point to other record evidence that shows whether Tosçelik's sale is a bona fide transaction under the totality of the circumstances, or (2) conduct further investigations to determine the same. A separate order will be issued accordingly.

ALLIED TUBE & CONDUIT CORP., IPSCO TUBULARS INC., AND WHEATLAND TUBE COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and TOSÇELIK PROFIL VE SAC ENDUSTRISI A.S., Defendant-Intervenor.

Before: Richard W. Goldberg,
Senior Judge
Court No. 06–00285
PUBLIC VERSION

Upon consideration of Plaintiffs' motion for judgment upon the agency record and briefs in support thereof, Defendant's and Defendant-Intervenor's briefs in opposition thereto, upon all other

papers and proceedings had herein, and upon due deliberation, it is hereby

ORDER

ORDERED that Commerce's final antidumping duty new shipper review determination in *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 71 Fed. Reg. 43444 (Aug. 1, 2006) is remanded;and it is further

ORDERED that Commerce explain, if it is able, why its "range" methodology (ranking the AUVs of the aggregate imports, within the same HTSUS classification, of each Turkish exporter) is a reasonable approach to determine whether the price of Tosçelik's U.S. sale is commercially reasonable; and it is further

ORDERED that Commerce address in the course of that explanation why the seemingly distortive entries identified by Allied Tube should not be excluded from the analysis concerning the price of Tosçelik's U.S. sale; and it is further

ORDERED that Commerce shall, if it is unable to provide such an explanation, point to other record evidence or conduct further investigations to determine whether the price of Tosçelik's single U.S. sale is commercially reasonable; and it is further

ORDERED that Commerce shall explain why, in the course of comparing the AUV of Tosçelik's single U.S. sale to other AUV data, it refers to a different value in its data chart [ ] than in the text of its Commercial Reasonableness Memorandum [ ], and it is further

ORDERED that Commerce shall, if it is able, point to record evidence, or, if other record evidence is unavailable, conduct further investigations to adequately explain why the freight charge associated with Tosçelik's sale is typical of Tosçelik's business practices, or otherwise commercially reasonable; and it is further

ORDERED that if Commerce is unable to conclude that Tosçelik's sale is a bona fide transaction, the new shipperreview shall be rescinded; and it is further

ORDERED that Commerce shall, within sixty (60) days of the date of this Order, issue a remand determination in accordance with the instructions provided herein; and it is further

ORDERED that the parties may, within twenty (20) days of the date on which Commerce issues its remand determination, submit briefs addressing Commerce's remand determination, not to exceed twenty (20) pages in length; and it is further

ORDERED that the parties may, within fifteen (15) days of the date on which briefs addressing Commerce's remand determination are filed, submit response briefs, not to exceed fifteen (15) pages in length.

SO ORDERED.

Slip Op. 07–109

JAZZ PHOTO CORPORATION, Plaintiff, v. **UNITED STATES**, Defendant.

Before: Judge Timothy C. Stanceu
Court No. 04–00494

[Granting in part plaintiff's application for attorneys' fees and expenses under the Equal Access to Justice Act]

Decided: July 16, 2007

Neville Peterson LLP (*John M. Peterson, Curtis W. Knauss, George W. Thompson, Maria E. Celis* and *Catherine Chess Chen*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stefan Shaibani* and *David S. Silverbrand*); *Beth Brotman* and *Paul Pizzeck*, Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge: Before the court is the application of Jazz Photo Corporation ("Jazz" or "plaintiff") for attorneys' fees and other expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (2000). The court conditionally grants the application in part because the positions that the United States ("defendant") took before the United States Court of Appeals for the Federal Circuit on two of the issues in the litigation – the issue of permissible repair and the issue of segregation of merchandise – were not substantially justified.

I. BACKGROUND

The subject EAJA application arose from litigation involving Jazz's importations into the United States of certain "lens-fitted film packages" ("LFFPs"), which are more commonly known as "disposable cameras," "single use cameras," or "one-time use cameras." The LFFPs that Jazz imported were previously-used LFFPs that had been fitted ("refurbished" or "reloaded") in China with new rolls of

film and, for some models, new batteries for the flash mechanism. Background information relevant to Jazz's EAJA application is presented in the opinion of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094 (Fed. Cir. 2001) ("*Jazz I*"), the opinion of the United States Court of International Trade in *Jazz Photo Corp. v. United States*, 28 CIT ___, 353 F. Supp. 2d 1327 (2000) ("*Jazz II*"), and the opinion of the Court of Appeals in *Jazz Photo Corp. v. United States*, 439 F.3d 1344 (Fed. Cir. 2006) ("*Jazz III*"), which affirmed the court's judgment in *Jazz II*. A summary of the background information pertinent to the court's ruling on plaintiff's EAJA application is presented below.

In its application, Jazz seeks, under 28 U.S.C. § 2412(d) (2000), legal fees and expenses paid to the law firm Neville Peterson LLP in litigation before the Court of International Trade and the Court of Appeals in *Jazz II* and *Jazz III*, respectively. *Jazz II* arose from litigation that Jazz commenced in the Court of International Trade on October 4, 2004 to contest the denial by United States Customs and Border Protection ("Customs") of Jazz's administrative protest of the exclusion from entry of two of its shipments of LFFPs that were entered at the port of Los Angeles/Long Beach, California on August 26 and August 27, 2004. *Jazz II*, 28 CIT at ___, ___, 353 F. Supp. 2d at 1329–30, n.2. On September 24 and September 26, 2004, respectively, Customs excluded all merchandise in the August 26 and August 27 shipments. *Id.* at 1329. In so doing, Customs ruled that the imported LFFPs were excluded from entry by a General Exclusion Order and Order to Cease and Desist ("Exclusion Order") issued in 1999 by the U.S. International Trade Commission ("ITC" or "Commission") pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2000) ("Section 337"). *Id.* at 1329, 1331. In 1998, Fuji Photo Film Co., Ltd. ("Fuji"), the holder of various patents used in manufacturing LFFPs, had initiated the Section 337 proceedings, in which the ITC determined that LFFPs imported by Jazz infringed patents held by Fuji. *Id.*; *see In the Matter of Certain Lens-Fitted Film Packages*, USITC Pub. No. 3219, Inv. No. 337–TA–406 (Aug. 1999). On or about September 26, 2004, Jazz filed an administrative protest under 19 U.S.C. § 1514 contesting the exclusion of the merchandise in the August 26 and August 27, 2004 shipments. *Jazz II*, 28 CIT at ___, 353 F. Supp. 2d at 1329. On September 29, 2004, Customs denied the protest, concluding that Jazz had not established admissibility of the imported LFFPs. *Id.* at 1330, n.2.

During the litigation contesting the denial of the protest, the Court of International Trade set an expedited trial schedule with the consent of both parties. *Id.* To establish admissibility of its imported merchandise, Jazz was required to prove that the LFFPs in the two shipments were outside the scope of the Exclusion Order. *See id.* at 1329. This required Jazz to show that the spent disposable camera

"shells" refurbished in China resulted from disposable cameras that had undergone a patent-exhausting "first sale" in the United States and that the reloading operation effected a "permissible repair," rather than a "prohibited reconstruction," of the original camera. *Id.* at 1333. During a four-day bench trial on October 12–14 and October 18, 2004, plaintiff produced documentary, videographic, and testimonial evidence relevant to the issues of permissible repair and first sale. *Id.* at 1330, 1340–47. The government did not introduce its own evidence at trial to demonstrate that Jazz's importations were not entitled to admission. *Id.* at 1340–41. Instead, the United States challenged the sufficiency of the proof of admissibility offered by Jazz, arguing that Jazz had failed to meet its burden of rebutting a statutory presumption that the decision by Customs to exclude the merchandise was correct. *See id.* at 1333, 1340–41; 28 U.S.C. § 2639(a)(1) (2000). The government argued that Jazz's factual showings on the shell collection procedure and the reloading operation failed to satisfy the burden of proof for the admissibility of any individual camera. *See Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1333, 1340–41.

The imported LFFPs at issue in *Jazz II* had been refurbished by Polytech Enterprise Limited ("Polytech") at facilities in China. The majority of these LFFPs were produced from used shells that Polytech obtained from a collector of shells, Photo Recycling Enterprise, Inc. ("Photo Recycling"). The remaining LFFPs were processed using shells that Jazz acquired from another shell collector, Seven Buck's Inc. ("Seven Buck's"), and provided to Polytech for processing. *Id.* at 1341–42. The court held in *Jazz II* that plaintiff had produced evidence sufficient to establish a "first sale" for the LFFPs processed from shells purchased from Photo Recycling and that these LFFPs were entitled to admission to the extent that Jazz could demonstrate that these LFFPs could be segregated from the remaining cameras in the two shipments. *Id.* at 1347–54. The court concluded that plaintiff failed to establish a "first sale" in the United States for the LFFPs processed from the Seven Buck's shells, which accordingly did not qualify for admission. *Id.* at 1348–50. Distinguishing between the two types of shells, the court concluded that Jazz was unable to produce evidence showing that the Seven Buck's shells had been collected, directly or indirectly, from photo processors located in the United States. *Id.* The court further held that plaintiff produced evidence sufficient to establish that all of the LFFPs in the two shipments had undergone processing constituting a permissible repair. *Id.* at 1347–48. Because the two shipments contained some LFFPs resulting from Seven Buck's shells, the court issued an order directing Customs, with the participation of Jazz, to conduct an examination of the merchandise to determine if the LFFPs processed from Seven Buck's shells could be segregated from the remaining LFFPs in the shipments. *Id.* at 1352; Order for Expedited Administrative

Determination (Nov. 5, 2004). The court reopened the trial record to allow the parties to obtain and to introduce evidence on the segregation issue and considered the responsive submissions of the parties. *Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1352. The court concluded that Jazz had established the ability to segregate the LFFPs made from Seven Buck's shells from the admissible LFFPs, except for certain cartons in which LFFPs from the master lot number Jazz had assigned to Seven Buck's shells ("Master Lot Number 463") were commingled with other master lot numbers, for which cartons the court, in entering judgment, denied admissibility in the entirety. *Id.* at 1352–54.

Following appeal by Jazz, the government, and Fuji, the Court of Appeals affirmed the court's judgment in *Jazz II*. *See Jazz III*, 439 F.3d at 1358. No party sought a rehearing or a writ of *certiorari.*

II. DISCUSSION

Jazz brings its application for attorneys' fees and expenses pursuant to USCIT Rule 54.1(a), under which the court may award attorneys' fees and expenses where authorized by law. Jazz argues that EAJA, 28 U.S.C. § 2412(d)(1)(A), authorizes the award of attorneys' fees and expenses in this case. Pl.'s Application for an Award of Att'y Fees Under the Equal Access to Justice Act 1 ("Pl.'s Application"). In pertinent part, EAJA provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). To award fees and expenses upon an EAJA claim, the court must determine that the claimant met the following criteria: plaintiff prevailed in the action, the government's position was not substantially justified, the award of attorneys' fees is not unjust, and the fee application is timely filed and supported by an itemized statement. *Comm'r, INS v. Jean*, 496 U.S. 154, 158 (1990). An application is timely if submitted to the court within thirty days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B).

In addition to those criteria, § 2412(d) imposes financial eligibility requirements. A company that operates for profit is an eligible "party" under subsection (d) if it has a net worth not exceeding $7,000,000 and not more than 500 employees at the time the civil action was filed. 28 U.S.C. § 2412(d)(2)(B)(ii). Defendant does not argue that plaintiff has failed to satisfy the financial eligibility re-

quirements. *See* Def.'s Response to Pl.'s Application for Fees and Other Expenses under the Equal Access to Justice Act 28 U.S.C. § 2412(d), Title II of Pub. Law 96–481, 94 Stat. 2325 and Rule 54.1 ("Def.'s Response"). Based on the parties' submissions, the court finds that plaintiff has satisfied these financial eligibility requirements. *See* Pl.'s Application, Ex. A (setting forth plaintiff's bankruptcy petition).

Plaintiff seeks fees and expenses incurred during the appellate litigation culminating in the *Jazz III* decision as well as the litigation conducted before the Court of International Trade in *Jazz II*; there is no indication in the opinion of the Court of Appeals in *Jazz III* or in the briefs plaintiff filed therein that plaintiff sought EAJA fees and expenses for its appellate representation during the *Jazz III* litigation. Therefore, an awarding of fees and expenses for the appellate phase of the case would require the court to make determinations regarding substantial justification and special circumstances with respect to issues raised before, and decided by, the Court of Appeals. The first question, then, is whether there is any bar to a trial court's making these determinations and awarding fees and expenses accordingly.

The court finds no such bar. EAJA authorizes the award to be made by "a court." 28 U.S.C. § 2412(d)(1)(A). *See United States v. 22249 Dolorosa St.*, 190 F. 3d 977, 981 (9th Cir. 1999) (concluding that an appellate court may make an EAJA award but assuming "that in the usual case in which fees are sought for the entire litigation, the determination of whether the government was 'substantially justified' . . . is for the district court to make."). An EAJA award may include fees and other expenses for an appeal. *See Jean v. Nelson*, 863 F.2d 759, 770 (11th Cir. 1988) (concluding that EAJA authorizes a lower court to award fees for work done on appeal but reversing the trial court's award of fees incurred in litigation before the Supreme Court because the claimant did not prevail on appeal at that level), *aff'd on other grounds, Comm'r, INS v. Jean*, 496 U.S. 154 (1990).

The court next considers whether Jazz qualifies as a prevailing party for EAJA purposes. A prevailing party is one that "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotation marks and citation omitted). The government does not contest that plaintiff prevailed on the part of its claim pertaining to the Photo Recycling LFFPs. It is sufficient for this purpose that plaintiff succeeded in obtaining the release of some of the excluded merchandise and successfully defended on appeal the judgment partially in its favor. Nor does the government contest Jazz's satisfying the requirements of timeliness and support of the fee application statement. Defendant argues instead that plaintiff's application must be denied because the government's posi-

tion in the litigation was substantially justified and because special circumstances exist to make an award unjust.

For the reasons discussed below, the court concludes that defendant, in opposing plaintiff's EAJA application, has met its burden of establishing that the position it took in the *Jazz II* and *Jazz III* litigation with respect to the first sale requirement was substantially justified. The court further concludes that defendant was substantially justified in the position it took in the *Jazz II* litigation on the issue of permissible repair but was not substantially justified in pursuing its position on permissible repair before the Court of Appeals in the *Jazz III* litigation. The court also concludes that defendant has not established a substantial justification for its contesting, during that appeal, the Order for Expedited Administrative Determination that the Court of International Trade issued in the *Jazz II* litigation to address the segregation of Jazz's merchandise. The court determines that the positions taken by Customs in the administrative proceeding resulting in the *Jazz II* and *Jazz III* litigation were substantially justified. Finally, the court does not find special circumstances that would render unjust an award pertaining to attorneys' fees and other expenses that plaintiff incurred during the appellate litigation of these two issues.

The court, rather than award fees and other expenses at this time, is ordering plaintiff to submit a revised application statement that identifies the fees and other expenses for the specific legal services rendered in litigating before the Court of Appeals the issue of whether the processing conducted on Jazz's imported merchandise constituted permissible repair and the issue of the authority of the Court of International Trade to order an expedited administrative proceeding directed to the segregation of merchandise.

A. The Government's Litigation Position Was Substantially Justified in Part

When a party seeking fees and expenses under EAJA has prevailed in litigation against the government, the government bears the burden of establishing that its position was substantially justified or that special circumstances preclude an EAJA award. *Covington v. Dep't of Health & Human Serv.*, 818 F.2d 838, 839 (Fed. Cir. 1987); *see* 28 U.S.C. § 2412(d)(1)(A). The term "substantially justified" means "justified in substance or in the main–that is, justified to a degree that could satisfy a reasonable person. That is no different from [a] reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks and citations omitted). That a party other than the government prevailed does not establish that the government's position was not substantially justified. *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988). Instead, the determination of whether to award attorneys' fees is "a

judgment independent of the result on the merits . . . reached by examination of the government's position and conduct through the EAJA prism, . . . not by redundantly applying whatever substantive rules governed the underlying case." *Id.* (internal quotation marks and citations omitted).

1. The Government's Position on First Sale was Substantially Justified

The government argued in *Jazz II* that Jazz could not meet its burden on the first sale requirement unless it could establish by a preponderance of the evidence "that *each and every one* of the cameras contained in the two entries at issue were made with shells first sold in the United States." Def.'s Post-Trial Br. 5. In the post-trial phase of the case, the United States argued generally that Jazz had failed to establish that each of the LFFPs in the two shipments satisfied the first sale requirement. *Id.* at 1. The government supported its general argument by citing to testimony by Mr. Zawodny, Jazz's quality manager with oversight responsibility of the shell sorting process conducted by Polytech. Mr. Zawodny testified to the effect that it may not have been possible for Polytech to screen out all "foreign" shells, *i.e.*, shells from LFFPs that were first sold in a foreign country; the testimony pertained specifically to shells with English-language labels that may have been first sold abroad in an English-speaking foreign country or shells from new LFFPs that were labeled in both English and French and that likely were first sold in Canada. *Id.* at 10–14; *see Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1344. The government also emphasized that Polytech's sorters were, for the most part, not English-speaking. *Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1344. As the court found in *Jazz II*, the evidence established that Polytech's sorting process depended on comparing shell packaging to packaging on sample packages. *Id.* Although Mr. Zawodny had testified that, in his opinion, the sorting system is "quite accurate" and "works well," the court in *Jazz II* was not presented with record evidence demonstrating that the sorting system was error-free, and the court did not so conclude. *See* id. at 1344–45. In arguing that Jazz's proof fell short of demonstrating that every camera in the two shipments satisfied the first sale requirement and that, accordingly, all the merchandise at issue should be excluded from entry, the government's argument had a reasonable basis in fact.

In *Jazz II*, the court relied on various findings of fact, reasonable inferences, and conclusions of law in determining that Jazz had demonstrated admissibility of the LFFPs resulting from refurbishing of shells obtained from Photo Recycling. The record evidence in *Jazz II* relevant to the first sale issue did not consist of documentary evidence, such as sales records, that directly established the original sale in the United States of each LFFP that later was refurbished

and imported by Jazz. *Id.* at 1333. The court in *Jazz II* concluded that the nature of the business in which Jazz was engaged made obtaining such documentary evidence impracticable. *Id.*

Jazz instead produced evidence, which consisted in part of testimony that the court found credible, supporting the finding that the Photo Recycling shells, unlike the Seven Buck's shells, were collected, directly or indirectly, from photo processors in the United States. *See id.* at 1348–49. With respect to the Photo Recycling shells, the court applied a "presumption of regularity" under which Customs is presumed to have enforced the Exclusion Order to prevent the commercial importation of patent-infringing LFFPs. *Id.* at 1334. The conclusion of admissibility also required the court to make certain findings of fact and conclusions of law concerning the issue of "tourist shells," *i.e.*, shells resulting from LFFPs that were first sold outside the United States yet were imported lawfully under a provision of the Exclusion Order allowing for noncommercial importations of LFFPs sold abroad. *Id.* at 1334–35. The court explained that because tourist shells could have resulted from these lawfully-imported LFFPs, tourist shells theoretically could be present among shells collected from photo processors in the United States; the court concluded, however, that the evidence of record supported the finding that if tourist shells were present in the subject shipments, they were present as a small percentage of less than one percent. *Id.* at 1335. The court found Polytech's sorting process, although not shown to be capable of removing every foreign shell, to have been sufficient, in the context of the other facts demonstrated in the case, to establish that Jazz had met its burden of establishing first sale for LFFPs refurbished from shells collected from photo processors in the United States. *Id.* at 1349–50. The discussion in the court's opinion in *Jazz II* of the evidence Jazz offered on the first sale issue reveals that the court's conclusions on the admissibility of the LFFPs from Photo Recycling shells and the inadmissibility of the LFFPs from Seven Buck's shells depended on the resolution of close factual questions.

In *Jazz II*, the United States argued for a more stringent interpretation of the first sale requirement than that ultimately adopted by the court. The court concludes, nevertheless, that the government's argument had a reasonable basis in law. The Court of Appeals established in *Jazz I* that the permissible repair defense to patent infringement was available to Jazz provided Jazz could establish both that the first sale of the LFFPs occurred in the United States and that the refurbishing process constituted permissible repair. *See Jazz I*, 264 F.3d at 1102–05. In applying the permissible repair defense in the circumstances of the Commission's Exclusion Order, the Court of Appeals described the "first sale" requirement of the defense unambiguously and identified no exceptions to that requirement. *Id.* at 1105 (stating that "[the court's] decision applies only to LFFPs for

which the United States patent right has been exhausted by first sale in the United States. Imported LFFPs of solely foreign provenance are not immunized from infringement of United States patents by the nature of their refurbishment."). At the time the government advanced its argument on first sale in the *Jazz II* litigation, the nature of the proof necessary to establish first sale of an imported refurbished LFFP had not been defined in law and, in this respect, can be viewed as a matter of first impression. It was reasonable for the government, during the *Jazz II* litigation, to advocate an interpretation of *Jazz I* requiring a higher degree of proof on the first sale issue even though the court in *Jazz II*, as discussed previously, ultimately interpreted the first sale requirement in the context of certain commercial realities of the LFFP refurbishing business and applied a presumption of regularity that Customs was enforcing the Exclusion Order so as to preclude the importation of infringing LFFPs.

The United States also advocated a higher degree of proof of first sale during the appellate litigation culminating in the decision in *Jazz III*. Specifically, defendant argued on appeal that the Court of International Trade erred in applying the presumption of regularity, *i.e.*, the presumption that Customs was enforcing the Exclusion Order, which aided Jazz in establishing the first sale of some of the imported merchandise. Br. of Def.-Appellant United States 32–34. The issue of whether such a presumption of regularity was appropriate was not addressed in *Jazz I* and, accordingly, also was a matter of first impression.

That the issues under consideration were of first impression does not necessarily render the position of the government substantially justified. *See Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984). The government, for example, may not advocate a position that is unsupportable given statutory, regulatory, and judicial authority. *See id.* In *Jazz II* and *Jazz III*, however, the government's general litigation position advocating a stringent interpretation of the first sale requirement that was set forth in *Jazz I* was not inconsistent with established principles of law and, more specifically, was a plausible interpretation of the holding of the Court of Appeals in *Jazz I*. As discussed previously, *Jazz I* stated the first sale requirement unambiguously and identified no exceptions to that requirement. *Jazz I*, 264 F.3d at 1105.

Plaintiff's principal argument that the government's position was not substantially justified is that the United States, by declining to put on a case in chief, failed to proffer a factual justification for the exclusion of Jazz's merchandise and failed to present evidence to rebut the evidence Jazz presented at trial to establish the admissibility of the LFFPs. Pl.'s Application 3, 8–10. Plaintiff argues further that the government introduced no evidence showing that Customs had ever inspected the two shipments, either before or during the

proceedings before the Court of International Trade and presented no witness to testify about the circumstances of the exclusion or the reasons why Customs believed the goods were inadmissible. *Id.* Jazz also argues that the government's litigation position was not justified in law because, under the decision of the Court of Appeals in *Jazz I*, no absolute ban on the importation of LFFPs was in place and, accordingly, no exclusion of merchandise was justifiable absent an inspection. *Id.* at 9.

The decision by Customs to forego introducing evidence to demonstrate the inadmissibility of Jazz's LFFPs does not require the court to conclude that the government's litigation position was not substantially justified. The government was entitled to rely on a presumption that the exclusion of the merchandise by Customs was correct, while Jazz bore the burden of producing evidence demonstrating that the excluded merchandise qualified for admission. *See* 28 U.S.C. § 2639(a)(1); *Jazz III*, 439 F.3d at 1353 ("We recognize that the government was not required to present evidence that the LFFPs at issue were actually processed from used foreign shells, infringing shells, and tourist shells. However, in the absence of such conflicting evidence, the court was entitled to give weight to Jazz's evidence."); *Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1333. Meeting the burden of proof required Jazz to satisfy, by a preponderance of the evidence, the requirements established in *Jazz I*; among those requirements was that each individual camera offered for admission be shown to have undergone a patent-exhausting first sale in the United States. *Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1333.

Similarly, a failure by the government to inspect the LFFPs in the two shipments, either during the detention and protest procedure or during the litigation before the Court of International Trade, does not compel a conclusion that the government's position lacked substantial justification. The findings of fact needed to determine the admissibility of the merchandise depended in part on evidence that was relevant to the "first sale" issue. Certain of that evidence was beyond that obtainable by physical inspection, including, in particular, evidence on where and how the shells had been collected. Nor was the government required to present a witness to testify about the circumstances of the exclusion or the reasons why Customs ordered it. As required by statute, the *Jazz II* litigation, in which plaintiff contested the protest denial, was a *de novo* proceeding, not a review on the administrative record made by the agency. *See* 28 U.S.C. § 2640(a)(1) (2000).

2. The Government's Position on Permissible Repair Was Reasonable at the Trial Level But Lacked Substantial Justification at the Appellate Level

In *Jazz II* and on appeal in *Jazz III*, the government argued that Jazz failed to establish that the processing performed on the im-

ported cameras was limited to permissible repair. *Jazz III*, 439 F.3d at 1353; *Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1333. The court concludes that the government, although proceeding on a reasonable basis in litigating this issue at the trial level, took on appeal a litigation position on the permissible repair issue that was not substantially justified, either in fact or in law.

It was reasonable for the government to argue in *Jazz II* that Jazz's factual showing of permissible repair was inadequate. During the trial, defendant cross-examined plaintiff's witness, Mr. Zawodny, on the permissible repair issue, testing the extent of Mr. Zawodny's personal knowledge of the processing conducted at the Polytech facility in China and challenging the sufficiency of the videotape evidence that plaintiff offered in support of its claim of permissible repair. *See* Def.'s Post-Trial Br. 18–19. The government argued that the two videotapes admitted into evidence to demonstrate the processing performed at the Polytech facility were not sufficiently probative because they were made in 2003, prior to the processing of the imported LFFPs that occurred in 2004, and because they did not depict the processing for every kind of camera Jazz imported. *Id.* at 18. The government also argued that Polytech had been found to have engaged in "full back replacements" in the past and that Jazz failed to establish that use of full-back replacements had ceased in Polytech's facilities. *Id.* at 18–19. "Full back replacement" refers to the refurbishing of a Kodak LFFP using a completely new, full-width back cover, a process found to have infringed Fuji's patents. *See Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1332, 1346.

The resolution at the trial level of the factual issues pertaining to the question of permissible repair required the court to make findings that Mr. Zawodny's testimony on the nature and extent of the processes performed on the imported LFFPs in China was probative and credible. *See id*. at 1348. The physical evidence on the permissible repair issue was limited to the above-described videotapes, which were made the year prior to the processing of the two shipments of imported LFFPs and did not depict the processing of all the types of LFFPs that Jazz imported. As a result, the court was called on to make significant findings on the extent of Mr. Zawodny's knowledge of the Polytech processes and inventory control systems. *See id.* Although the court ultimately found that Jazz had established permissible repair by a preponderance of the evidence, a reasonable basis existed on which the defendant could question whether that evidence sufficed. The reasonable basis for such a questioning is shown by the fact that Jazz had used full back replacements in the past and by the limitations inherent in the type and quantity of evidence, *i.e.*, the videotapes, that Jazz presented to establish the permissible repair of the subject LFFPs. Plaintiff did not offer any additional physical evidence on permissible repair, such as more contemporaneous or comprehensive videotape evidence, nor did

plaintiff introduce documentary evidence such as production records identifying or recording the specific processing steps performed on each LFFP or type or model of LFFP actually present in the two shipments.

Following the court's ruling on permissible repair in *Jazz II*, however, the defendant did not proceed on a reasonable basis in litigating the permissible repair issue before the Court of Appeals. The argument defendant chose to present to the Court of Appeals on the permissible repair issue unnecessarily required plaintiff to incur a litigation burden and needlessly consumed the judicial resources of the Court of Appeals.

The government argued on appeal in *Jazz III* that the Court of International Trade did not apply correctly the legal test for permissible repair and that it "failed to make the requisite findings of fact as to whether the processes used to make the LFFPs contained in the entries at issue were limited to eight steps as described by the Court in [*Jazz I*], or 19 substeps described by Court No. 04–00494 Page 18 the Court in [*Fuji*]." Reply Br. of Def.-Appellant United States 14 (citing *Fuji Photo Film Co. v. Jazz Photo Corp.*, 394 F.3d 1368, 1371 (Fed. Cir. 2005), *aff'g*, 249 F. Supp. 2d 434 (D.N.J. 2003) ("*Fuji*")). The government argued that the court, by failing to identify "various minor operations" that occurred in the permissible repair process, left open the possibility that the processing of the subject LFFPs included a full back replacement step, and also argued that the Court of International Trade was required to identify in detail the "minor operations" to confirm that no additional steps were undertaken to process the LFFPs and to confirm that none of the steps which it identified constituted "impermissible reconstruction pursuant to the Court's precedent in [*Jazz I*]." Reply Br. of Def.-Appellant United States 14–15.

The government's appellate argument pertaining to the steps in a permissible repair process lacked a substantial basis in law. The argument was based on a misinterpretation of *Jazz I*, in which the Court of Appeals concluded that refurbishing LFFPs according to the eight-step process identified by the administrative law judge in the underlying ITC proceeding constituted permissible repair, and not prohibited reconstruction. 264 F.3d at 1098, 1109. That process consisted of eight steps: (1) removing the cardboard cover, (2) cutting open the plastic casing, (3) inserting new film and a container to receive the film, (4) replacing the winding wheel for certain cameras, (5) replacing the battery for flash cameras, (6) resetting the counter, (7) resealing the outer case, and (8) adding a new cardboard cover. *Id.* at 1098.

In *Jazz II*, the Court of International Trade concluded that Jazz demonstrated that it engaged in permissible repair, rather than prohibited reconstruction of LFFPs, based on the following seven-step process undertaken by Polytech: (1) opening of the body of the shell,

(2) replacement of the advance wheel, (3) replacement of the film and of the battery (if a flash camera), (4) resetting the counter, (5) closing and repairing the case using original parts except for an additional molded part, (6) repackaging the refurbished camera, and (7) various minor operations incidental to these processes. 28 CIT at ___ , 353 F. Supp. 2d at 1346. Mr. Zawodny's testimony at trial described minor operations incidental to the six-step process undertaken by Polytech, including removing labels and wrappings from camera shells, cleaning the shells, removing dust and debris from the inside of the camera, conducting loading operations under dark conditions for certain cameras, testing the charge for the flash, and marking the cameras processed for the U.S. market with an ink dot. *Id.* at 1345–47.

The government's argument before the Court of Appeals was not based on a plausible interpretation of the opinion of the Court of Appeals in *Jazz I*. The eight-step process considered by the Court of Appeals in *Jazz I* was found by the administrative law judge to constitute "common steps" conducted by various respondents. *See* 264 F.3d at 1101. The Court of Appeals reversed the Commission, concluding that the eight-step process – which on the record before the Court of Appeals was the factual ground for the Commission's conclusion of law that prohibited reconstruction had occurred – instead constituted permissible repair. *Jazz I* does not hold that any processing departing from the eight specific steps constitutes, as a matter of law, prohibited reconstruction. To the contrary, the Court of Appeals explained in *Jazz I* that "[p]recedent has classified as repair the disassembly and cleaning of patented articles accompanied by replacement of unpatented parts that had become worn or spent, in order to preserve the utility for which the article was originally intended." *Id.* at 1103–04 (discussing *General Electric Co. v. United States*, 572 F.2d 745 (Ct. Cl. 1978) and *Dana Corp. v. American Precision Co.*, 827 F.2d 755 (Fed. Cir. 1987)). Thus, the discussion of the permissible repair issue in *Jazz I* dispels any suggestion that the Court of Appeals intended to preclude, as prohibited reconstruction, minor operations that were incident to the overall repair process or implicit in one of the identified steps. As the Court of Appeals stated in *Jazz I*, prohibited reconstruction is "'a second creation of the patented entity.' " *Id.* at 1103 (quoting *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 346 (1961)).

On appeal, defendant's mischaracterization of the holding of *Jazz I* was readily apparent from its misguided argument to the Court of Appeals, as quoted above, that the Court of International Trade in *Jazz II* "failed to make the requisite findings of fact as to whether the processes used to make the LFFPs contained in the entries at issue were limited to eight steps as described by the Court in [*Jazz I*], or 19 substeps described by the Court in [*Fuji*]." Reply Br. of Def.-Appellant United States 14 (citing *Fuji*, 394 F.3d 1368, 1371

(Fed. Cir. 2005), *aff'g*, 249 F. Supp. 2d 434 (D.N.J. 2003)). The principles governing permissible repair, as elucidated by the Court of Appeals in *Jazz I*, did not require such findings of fact. The government's reliance on *Fuji* was similarly misguided, failing to observe that the district court in *Fuji* cautioned against semantic distinctions of the very type advanced by the government on appeal. *See* 249 F. Supp. 2d at 445–46. Based on the principles governing permissible repair as established in *Jazz I*, the district court in *Fuji* stated that "[w]hether these refurbishment procedures are counted as four, eight or nineteen 'steps' is a matter of semantics, as virtually any step can be divided into multiple 'sub-steps.' The legal issue is whether the totality of the refurbishment procedures are of such a nature that they preserve the useful life of the patented article, or whether they in fact recreate the article after it has become spent." *Id.* at 446–47. In *Jazz III*, the Court of Appeals, after reiterating the principles governing permissible repair and prohibited reconstruction that it had explained and applied in *Jazz I*, stated that "[w]hile there is no bright-line test for determining whether a device has been permissibly repaired, it does not turn on minor details." *Jazz III*, 439 F.3d at 1354. "Here, the court characterized the seventh step as various minor operations incidental to the first six steps. Because the first six steps did not make a new single use camera, it follows that minor operations which were incidental to those steps also did not make a new single use camera." *Id.* (internal quotation marks omitted). Because the minor operations undertaken by Polytech, whether considered individually or collectively, did not constitute the type of process that remotely could be described as a prohibited reconstruction of the camera under the principles that the Court of Appeals discussed at length in *Jazz I*, the government's appellate argument to the contrary in the *Jazz III* litigation was baseless.

Moreover, there was not a factual basis on the record in *Jazz II* on which the government could ground its appellate argument that the "minor operations" might have included the use of patent-infringing full width replacement backs for Kodak cameras. The record evidence in *Jazz II* on the nature of the minor operations identified those minor operations so as not to include full back replacements. The court found, on the basis of testimony by plaintiff's witness, Mr. Zawodny, that "full back replacements . . . are not used for production of Jazz cameras intended for sale in the United States." *See Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1346. The government presented no evidence to the contrary. The court gave weight to Mr. Zawodny's testimony, finding it both credible and probative. *Id.* at 1344. Undeterred by the lack of any evidentiary support in the record on appeal, the government argued that full back replacements may have occurred at the Polytech facility when the subject LFFPs were refurbished. The Court of Appeals rejected the govern-

ment's argument, observing that "[e]vidence in the record supports the court's determination, demonstrating that at the time the subject LFFPs were produced, Polytech had stopped using full back replacements." *Jazz III*, 439 F.3d at 1355.

Defendant further argued on appeal that the Court of International Trade erred in relying on the two 2003 videotapes of Polytech's factory, alleging that the videotapes were not relevant and that, in crediting the videotapes, the court employed "novel standards." Br. of Def.-Appellant United States 26–30. Defendant contended that those standards departed from "the standards applied by other fora in deciding the permissible repair defense." Reply Br. of Def.-Appellant United States 12. The government argued that the tapes "did not even purport to demonstrate the actual processes used to produce the subject LFFPs" and argued that the Commission had, in a prior proceeding, rejected this evidence because it depicted repair of Kodak shells using half back, not full back, replacements. Br. of Def.-Appellant United States 27 (asserting that "[t]he Commission found this evidence to be adequate to demonstrate a permissible repair process *only* for Kodak shells using half backs, not full backs. The Commission specifically found that this evidence was *insufficient* to satisfy this Court's requirements for a permissible repair process with regard to *Fuji*, Konica, and Concord shells." (citations omitted)).

The government was not substantially justified in arguing on appeal that the videotapes were not relevant evidence. Plaintiff offered the tapes to demonstrate the nature of the repair operations conducted at the Polytech plant in Shenzhen, China, the very plant that produced the LFFPs in the case. The relevance of this evidence to the permissible repair issue in *Jazz II* was readily apparent once plaintiff established an adequate evidentiary foundation. Mr. Zawodny, in testifying regarding the steps of the permissible repair process depicted in the videotapes at issue, stated that the operations depicted in the videotapes were still being performed during the summer of 2004 when the imported LFFPs were produced in the Polytech Shenzhen factory. He addressed in his testimony the repair of the various brands of LFFPs. The Commission's rejection of the evidence, in a different proceeding, on the ground that it was confined to repair of Kodak shells using half back replacements did not support the exclusion of the videotape evidence for the narrow purpose for which it was offered at trial in *Jazz II*.

The court also finds no rational basis for defendant's appellate argument that in crediting the videotapes, the court employed novel standards that departed from the standards applied by other fora in deciding the permissible repair defense. For the reasons discussed above, there was no basis in law under which defendant plausibly could contend that the permissible repair standard as applied by the court in *Jazz II* departed from that established in *Jazz I*. Nor was that standard inconsistent with the standard applied by the district

court in *Fuji*, which, as noted previously, was a standard not premised on semantic distinctions. The courts that have considered the LFFP permissible repair issue have based their decisions, properly, on whether the particular processes employed constituted permissible repair or prohibited reconstruction, declining to draw meaningless or trivial distinctions from the descriptions of the various steps or sub-steps.

3. Defendant's Appellate Argument on the Segregation of LFFPs Was Not Substantially Justified

Before the Court of Appeals, defendant argued that the Court of International Trade erred in *Jazz II* by issuing the November 5, 2004 Order for Expedited Administrative Determination. That order directed Customs to conduct a physical examination of the merchandise in the two shipments in the presence of plaintiff's representatives and ordered Customs, in effect, to report to the court on whether the packaging and labeling of the imported LFFPs afforded a means of identifying the merchandise in Master Lot Number 463, the master lot number pertaining to the LFFPs made from Seven Buck's shells. Claiming that "[u]nprecedented" and "burdensome" administrative responsibilities had been improperly imposed upon Customs, the United States argued to the Court of Appeals that the Court of International Trade should have sustained Customs' exclusion based on the holding that the LFFPs resulting from Seven Buck's shells were inadmissible but, instead, "improperly ordered Customs to assist Jazz in identifying the inadmissible merchandise and segregating it from merchandise deemed to be admissible." Br. of Def.-Appellant United States 53, 55. The government on appeal argued, further, that "the trial court impermissibly usurped the role and discretion of Customs by ordering Customs to supervise Jazz while it segregated the merchandise that the court held to be properly excluded from that it deemed admissible. The trial court exceeded its authority by directing Customs to assist in the segregation and in ordering release of the goods, without taking into account the many elements that Customs might have considered, such as those in [19 C.F.R. § 141.52], as well as the other statutes and regulations in place that dictate the release and entry of merchandise." *Id.* at 56. In reference to those "other statutes and regulations," defendant's brief clarified that "[f]or example, Jazz could have filed a warehouse entry pursuant to 19 C.F.R. § 144.1, withdrawn its entries for exportation pursuant to 19 C.F.R. § 144.37, and then reimported that merchandise which the court found to be incorrectly excluded. Or, alternatively, Jazz could have availed itself of the Foreign Trade Zone Acts [*sic*], 19 U.S.C. § 81a, to deal with its merchandise." *Id.* at 57.

The appellate argument that the government directed to the court's order on segregation was pointless. Defendant's brief to the

Court of Appeals fails to explain how directing Customs to participate in the brief proceeding commenced by the Order for Expedited Administrative Determination was beyond the authority of the Court of International Trade. The government's arguments are inconsistent with the scope of judicial authority granted by 28 U.S.C. § 2643(b), which statutory provision was expressly cited in the court's order. As Congress provided in 28 U.S.C. § 2643(b), "[i]f the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision." At the time of issuing the Order for Expedited Administrative Determination, the court lacked a factual record on which it could decide the question of whether the merchandise in Master Lot Number 463 could be segregated, in whole or in part, from the remainder of the merchandise in the two shipments. The answer to that question required only an examination of the packaging and labeling of the two shipments and a comparison to Jazz's business records pertaining to Master Lot Number 463. The court's resort to its authority under 28 U.S.C. § 2643(b) allowed an expeditious resolution of this straightforward factual question.

The court finds no substantial justification for the government's argument that Customs was impermissibly burdened by having to comply with the court's order. The government's briefs fail to cite a rule or principle under which the routine obligations imposed on Customs by the court's order could be adjudged contrary to law. Following the issuance of the order, defendant raised no objection in the *Jazz II* litigation directed to the burden on Customs. As the Court of Appeals concluded in *Jazz III*, the burden of establishing that the admissible merchandise could be segregated from the inadmissible merchandise fell upon Jazz, not Customs, as reflected in the judgment entered in *Jazz II*. *See Jazz III*, 439 F.3d at 1356.

Finally, the government's appellate argument concerning bonded warehouse and foreign trade zone procedures was misguided and irrelevant to the question of the court's authority to order an administrative proceeding and to reopen the record to resolve a factual issue affecting the judgment the court was preparing to enter. *See* Br. of Def.-Appellant United States 55–57. The implication of the government's argument is that because bonded warehouse and foreign trade zone procedures exist under the tariff laws, the court was required to force Jazz to resort to one of these procedures rather than resolve the segregation issue directly through the expedited administrative proceeding. The government cited no law or principle that would support such a novel contention, which if adopted by the court could have delayed the proceedings unnecessarily. The government's argument appeared to regard the exclusion of Jazz's merchandise by

Customs, at least in some respects, as final. Such was not the case. The legality of the exclusion of all of the merchandise was the very issue under consideration by the court in *Jazz II*. That issue had not been resolved at the time the court issued the Order for Expedited Administrative Determination, at which time judgment had not yet been entered.

In summary, during the appellate phase of the litigation neither the position advocated by defendant on the permissible repair issue nor the position it advanced on the segregation issue was substantially justified. Plaintiff, and the Court of Appeals as well, were burdened unnecessarily by issues that the government should not have raised.

B. The Government's Position at the Administrative Level Was Substantially Justified

Under the applicable scope and standard of review, the court did not consider the actions of Customs at the administrative level during the *Jazz II* litigation. *See Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1333 (citing 28 U.S.C. § 2640(a)(1)); *see also ITT Corp. v. United States*, 24 F.3d 1384, 1388–89 (Fed. Cir. 1994) (interpreting § 2640(a) to require a court to make its own findings of fact rather than rely on the facts on the agency record). Under *de novo* review, the court does not examine the reasonableness of Customs' conduct but instead presumes that the factual determinations made by Customs are correct. *See* 28 U.S.C. §§ 2639(a)(1), 2640(a)(1).

Plaintiff does not request an EAJA award for the attorneys' fees and other expenses incurred during the proceedings before Customs. Nonetheless, because the denial of the protest by Customs caused plaintiff to be put through the expense of commencing and maintaining the litigation in *Jazz II*, the court considers whether the administrative position taken by Customs leading to the *Jazz II* litigation was substantially justified. *See, e.g.*, *ICI Worldwide, Inc. v. United States*, 14 CIT 201, 202 (1990) (stating that "[b]ecause Customs's conduct in denying the protests was unjustified, the fees and expenses of this action are to be awarded even though defendant admitted liability in its answer to the complaint herein. Defendant's reasonable litigation conduct does not change the agency's prior conduct. Plaintiff should not have been put to the expense of commencing a lawsuit."). In this case, the court concludes that the actions by Customs in excluding the two shipments of LFFPs and denying the protest had a reasonable basis in fact and law.

In its EAJA application, plaintiff argues that at the administrative level, Customs never inspected its merchandise, initially excluded its merchandise based upon administrative requirements "adopted in contravention of Administrative Procedure Act (APA) rulemaking," and, even after rescinding these requirements, declined to release plaintiff's goods. Pl.'s Application 8. However, Jazz did not

present Customs with conclusive evidence establishing that the LFFPs were outside the scope of the Commission's Exclusion Order. As part of its protest submission, Jazz provided Customs with "documentary and video evidence of the 'repair and alteration' processes performed at various Chinese plants engaged in the permissible repair of the cameras"; the determination of the administrative law judge in a Section 337 enforcement proceeding, *In the Matter of Certain Lens-Fitted Film Packages,* Inv. No. 337–TA–406, Enforcement Proceedings (II) (June 18, 2004), which concluded that the repair process at the Polytech facility constituted "permissible repair"; and an affirmation by the Chief Executive Officer of Jazz. *See* Mem. of P. & A. in Supp. of Protest 7–8, Exs. E, F (Sept. 26, 2004). Although plaintiff later introduced, during the trial in *Jazz II*, a substantial amount of evidence adduced from testimony, and the court relied on this evidence in concluding that the subject cameras purchased from Photo Recycling qualified for admission, *see Jazz II*, 28 CIT at ___ , 353 F. Supp. 2d at 1341–47, not all of that evidence was presented to Customs during the administrative process. *See* Def.'s Resp. 5, 20 (stating that "Jazz's protest, and the information submitted by Jazz to Customs, consisted of legal arguments and did not include the testimony and documentary proof later presented to the Court" and further stating, in reference to Pl.'s Application, that "Jazz acknowledges that it did not present testimony to Customs during the administrative protests."). Therefore, Customs was required to reach its position at the administrative level based on a factual record even more limited than the record made before the court in *Jazz II*. Given the limitations of the factual showing made at the administrative level, Customs was justified in then deciding that Jazz presented insufficient evidence to establish the admissibility of its merchandise.

The administrative position taken by Customs in excluding the merchandise from entry and denying the protest did not lack a legal justification. At that time, the "first sale" requirement of the permissible repair defense was relatively new, with some parameters yet to be defined by the courts. The Court of Appeals in *Jazz I* did not identify every possible type of factual showing that could establish first sale and was not presented with a record requiring it to do so. Specific legal issues raised by the evidence Jazz produced at trial in the *Jazz II* litigation later were clarified by the Court of Appeals in *Jazz III*.

In summary, the administrative position of Customs was justified to a degree that could satisfy a reasonable person. *See Pierce*, 487 U.S. at 565. Customs at that time did not press a tenuous position without factual or legal foundation. *See Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986).

C. Special Circumstances Do Not Exist to Make an Award Unjust

Having concluded that defendant United States has not demonstrated substantial justification for its appellate positions on the per-

missible repair and segregation issues, the court considers whether, under EAJA, "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The court does not find such circumstances. Where the government unsuccessfully advances novel and credible legal theories in good faith, or where an area of law is unsettled, the government may defend its actions for EAJA purposes by alleging the existence of special circumstances. *Traveler Trading Co. v. United States*, 13 CIT 380, 384, 713 F. Supp. 409, 413 (1989). " 'This 'safety valve' helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.' " *Devine*, 733 F.2d at 895–96 (quoting H.R. REP. NO. 96–1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990).

At the appellate level, the government did not advance a credible legal theory on the issue of permissible repair or the issue of segregation. Instead, despite lacking a plausible legal theory and a suitable factual record, defendant caused plaintiff to waste resources responding to its baseless appellate arguments that the resolution of the permissible repair issue in *Jazz II* was unsupported by necessary findings of fact and incorrect as a matter of law. Equally baseless was defendant's appellate argument that the court lacked authority to order an expedited administrative proceeding to resolve issues of segregating merchandise, when such a proceeding was within the court's powers granted by statute.

III. CONCLUSION AND ORDER

For the reasons discussed herein, the court concludes that the positions taken by defendant in the *Jazz II* litigation and at the administrative level were substantially justified but that defendant was not substantially justified in the litigation positions presented to the Court of Appeals on the issues of permissible repair and segregation of merchandise. The court further concludes that special circumstances do not exist in this case that make an award under EAJA unjust. Accordingly, upon consideration of Plaintiff's Application for an Award of Attorney Fees Under the Equal Access to Justice Act, defendant's response thereto, and all other submissions and proceedings herein, it is hereby

ORDERED that Plaintiff's Application for an Award of Attorney Fees Under the Equal Access to Justice Act be, and hereby is, conditionally GRANTED IN PART and DENIED IN PART; and it is further

ORDERED that plaintiff shall file with the Clerk of the Court, by August 31, 2007, a revised confidential application statement prepared in accordance with this Opinion and Order that identifies the

specific legal services rendered in litigating before the Court of Appeals the issue of whether the Court of International Trade erred in holding that processing conducted on Jazz's imported merchandise constituted permissible repair and the issue of the authority of the Court of International Trade to order an expedited administrative proceeding directed to the segregation of merchandise, and any expenses incurred in connection with the performance of such services for which plaintiff seeks reimbursement.

Slip Op. 07–110

MITTAL STEEL GALATI S.A., FORMERLY KNOWN AS ISPAT SIDEX S.A., Plaintiff, v. UNITED STATES, Defendant, IPSCO STEEL., INC. Defendant-Intervenor.

BEFORE: Pogue, Judge
Court No. 05–00311
PUBLIC VERSION

[Commerce's determination **affirmed-in-part** and **remanded-in-part**; Plaintiff's Motion for Judgment on the Agency Record **denied**]

Decided: July 18, 2007

Arent Fox Kintner Plotkin & Kahn (*John M. Gurley*, *Nancy A. Noonan*) for Plaintiff.
Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Allessandris*, Trial Attorney) for Defendant.
Schagrin Associates (*Roger B. Schagrin*) for Defendant-Intervenor.

OPINION

Pogue, Judge: In this action, Plaintiff Mittal Steel Galati, S.A. ("Mittal" or "Plaintiff") seeks judicial review of the final results of the 2002–2003 administrative review, conducted by the United States Commerce Department ("the Department" or "Commerce"), of the antidumping duty order on cut-to-length carbon steel plate from Romania. *See Certain Cut-to-Length Carbon Steel Plate from Romania*, 70 Fed. Reg. 12,651 (Dep't Commerce March 15, 2005) (final results and final partial rescission) ("*Final Results*").

Mittal challenges three of Commerce's data selection decisions, all contained in the Final Results. Specifically, Mittal protests: (1) Commerce's decision to value Plaintiff's recycled iron scrap factor as a material input, instead of assigning it a value of zero or providing an appropriate offset to the assigned value; (2) Commerce's choice of a surrogate value for limestone; and (3) Commerce's rejection of data – to be used in deriving surrogate financial ratios – from the financial

statements for Mittal's Algerian affiliate, Ispat Annaba. Mittal also asks the court to order the re-liquidation of subject merchandise entries that were liquidated prior to the expiration of the statutory time limit for appeal, and prior to Mittal's application for a preliminary injunction.

Pending before the court is Plaintiff's USCIT R. 56.2 motion for judgment on the agency record. For the reasons stated herein, the court remands for reconsideration Commerce's decision to value Plaintiff's recycled iron scrap factor and its choice of a surrogate value for limestone. The court affirms Commerce's rejection of the financial statement from Ispat Annaba. Further, the court declines to exercise its authority to order re-liquidation.

Background

Mittal Steel Galati, S.A., formerly known as Ispat Sidex S.A., is the producer of certain cut-to-length carbon steel plates in Romania. These products are covered by an antidumping duty order that was issued in 1993. *See Certain Cut-to-Length Carbon Steel Plate from Romania*, 58 Fed. Reg. 44,167 (Dep't Commerce Aug. 19, 1993) (antidumping duty order). Commerce conducted an administrative review of this antidumping duty order for entries during the period from August 1, 2002 to July 31, 2003 (the "period of review" or "POR"). *See Certain Cut-to-Length Carbon Steel Plate from Romania*, 69 Fed. Reg. 54,108 (Dep't Commerce Sept. 7, 2004)(preliminary results and notice of intent to rescind in part) ("*Preliminary Results*"); *see also Final Results*, 70 Fed. Reg. 12,651.[1]

It is a fundamental premise of antidumping law that, in establishing an antidumping duty rate (whether prospectively, as the initial cash deposit rate set during an initial antidumping investigation, or as a result of the retrospective assessment conducted during the administrative review), Commerce is charged by Section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 (2000)[2] with determining the difference between the "normal value" of the subject merchandise and the "export price" or the "constructed export price," which is the price at which the subject merchandise is sold in the

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[1] The antidumping duty order establishes an estimate of the antidumping duty rate (the "cash deposit" rate) that will be assessed on the goods covered by the order at the time of entry. *See Decca Hospitality Furnishing LLC. v. United States*, 30 CIT ____, ____, 427 F. Supp. 2d 1249, 1251 (2006). As the United States antidumping duty regime is a retrospective system, the administrative review establishes the actual antidumping duty rate. *See* 19 CFR § 351.212 (2006) ("Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported."); *see also Am. Signature Inc. v. United States*, 31 CIT ____, 477 F. Supp. 2d 1281, 1282 (2007).

[2] Further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition.

United States market. *See Dorbest Ltd. v. United States*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1262, 1265 n.1 (2006).

For market economy countries, the "normal value" is the "price of the foreign merchandise in its country of origin, in an appropriate third country, or the foreign product's cost of production." *Id.*; *see* 19 U.S.C. § 1677b(a). In the case of non-market economy countries ("NME's"), due to the fact that the market does not operate based on market-determined prices or the intersection of supply and demand, the cost of the goods cannot be based upon the prices attributed to them by the selling companies. *Dorbest* 30 CIT at ___ , 462 F. Supp. 2d at 1265 n. 1; *see also Magnesium Corp. of Am. v. United States*, 166 F. 3d 1364, 1368 (Fed. Cir. 1999) ("[T]he prices of the goods produced in an NME are subject to discrepancies which distort their value.") (quoting *Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1095, 938 F. Supp. 885, 890 (1996). As a result, Commerce constructs the "normal value" of goods from an NME by assigning a value to the inputs of the goods, based on the "factors of production," and extrapolating the "normal" value based on that information.[3] The value assigned to the inputs of the goods is known as a "surrogate value" and is generally determined by identifying the cost of inputs in a comparable market economy country. *See* 19 U.S.C. § 1677b(c); *Dorbest*, 30 CIT at ___ , 462 F. Supp. 2d at 1265 n.1. In calculating these costs, the Statute generally requires that Commerce seek to determine an accurate dumping margin. *See Dorbest*, 30 CIT at ___ , 462 F. Supp 2d. at 1268 ("The term 'best available' is one of comparison, *i.e.*, the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin."); *see also Lasko Metal Prods., Inc. v. United States*, 43 F. 3d 1442, 1443 (Fed. Cir. 1994). To this end, in making its data choices, Commerce normally considers the quality, specific-

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[3] *See Dorbest*, 30 CIT at ____ , 462 F. Supp. 2d at 1265 n.1 ("the antidumping statute authorizes Commerce to approximate normal value based on the cost of producing the foreign merchandise (with a margin of profit factored in)." In particular, the statute reads:

> (c) Nonmarket economy countries
> (1) In general
> If
> (A) the subject merchandise is exported from a nonmarket economy country, and
> (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section,
>
> the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c).

ity and contemporaneity of the data and prefers to use public, country-wide data, where it is available. *See Goldlink Indus. Co. v. United States*, 30 CIT ___ , ___ , 431 F. Supp. 2d 1323, 1337 (2006); *Freshwater Crawfish Tail Meat from the People's Republic of China*, 66 Fed. Reg. 20,634 (Dep't Commerce Apr. 24, 2001) (final results and final partial rescission), Issues and Decision Mem. (cmt. 2).

Halfway through the period of review, in the administrative review at issue here, Commerce changed Romania's status from a nonmarket to a market economy country, effective January 1, 2003. Def.'s Mem. in Opp'n to Pl.'s Mot. for J. Upon the Agency R. 3 ("*Def.'s Br.*"). As a result Commerce determined that, for the purposes of this administrative review, it would treat Romania as an NME for the period from August 1 to December 31, 2003, and as a market economy country from January 1 to July 31, 2003. *Id.*; *see Preliminary Results*, 69 Fed. Reg. at 54,108–109. Therefore, Commerce calculated a normal value using surrogate values, in addition to using the statutory market economy analysis. Mittal's challenges relate to Commerce's data choices in the calculation of the normal value for the portion of the POR for which Romania was considered by Commerce to be an NME. The court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(c).

Standard of Review

When reviewing Commerce's final determination in an administrative review under 19 U.S.C. § 1516a, the court upholds Commerce's determinations, findings, or conclusions when they are supported by substantial evidence on the record, and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Specifically, the court reviews the agency's legal interpretation of the governing statutes—whether or not issued by formal notice-and-comment rulemaking—to confirm that such interpretation is in accordance with law. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842–43 (1984); *Zenith Elec. Corp. v. United States*, 988 F. 2d 1573, 1582 (Fed. Cir. 1993); *cf. Christensen v. Harris County*, 529 U.S. 576, 587(2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The agency's factual determinations are reviewed to determine whether there is substantial evidence in the record supporting the agency's findings. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F. 3d 1330, 1335 (Fed. Cir. 2002) Substantial evidence review requires weighing the totality of the evidence, *id.*,[4] to determine whether the agency's factual findings are

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[4] "To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Ta Chen Stainless Steel Pipe*, 298 F. 3d at 1335 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F. 2d 1556, 1562 (Fed. Cir. 1984)).

reasonable when viewed in light of that complete record. *Nippon Steel Corp. v. United States*, 458 F. 3d 1345, 1351 (Fed. Cir. 2006).

Analysis

1. *Assignment of a Surrogate Value to Mittal's Recycled Iron Scrap Input*

As noted above, in calculating a normal value for goods from an NME country, Commerce assigns a surrogate value to the various inputs that are used to manufacture the subject merchandise covered by the antidumping duty order. *Dorbest*, 30 CIT at ___, 462 F. Supp. 2d at 1265 n.1; 19 U.S.C. § 1677b(c). In order to ascertain the factors of production that were used for the subject merchandise, Commerce sends questionnaires to the exporters subject to the investigation. *Def.'s Br.* 3. After a verification process, Commerce then selects an appropriate surrogate value for the goods. *Id.* at 3–5.

In some investigations, the remnants or by-products of one part of the production process (the cost of which is already accounted for) are re-utilized in a secondary production process. To re-value these re-cycled inputs in evaluating the costs of the secondary production could result in counting the cost of that factor of production twice. Therefore, as a general rule, when Commerce can verify that scrap was produced from an earlier stage of the production process, and that it is utilized in a later stage of the production process, Commerce will value the scrap input at zero, and not assign a surrogate value to the scrap input. *Def.'s Br.* 10 ("Typically, Commerce does not assign a surrogate value to recycled products because the factors used in producing the recycled by-products have already been reported.").

This general rule appears applicable to Mittal, which is a fully integrated steel mill that manufactures the subject merchandise from start to finish (that is to say from the production of coke to the production of liquid steel and then the rolling of steel slabs into the subject merchandise). Pl.'s Reply to Def.'s & Def.-Intervenor's Mem. in Opp'n to Pl.'s Mot. J. Agency R. 2–3 ("*Pl.'s Reply*"). As a result, in this administrative review, Mittal reported the factors of production used for each stage of the production process. *Id.* In its response to Commerce's questionnaire regarding Mittal's factors of production, Mittal "requested Commerce *not* to value the recycled iron scrap as the factors of production for such scrap are already part of the integrated factors reported." Pl's Mem. of P. & A. in Supp. of its R. 56.2 Mot. J. Agency R. 7 ("*Pl.'s Br.*") 7. Mittal's response stated:

> In this field we have reported the consumption of self-produced scrap which re-entered the production process, per 1 MT of heavy plate. Scrap is introduced in the refractory and steel works plant to produce liquid steel. No surrogate value should be applied to this factor as the factors needed to produce the re-

> cycled scrap are already reported.

Pl.'s Br. 7 (quoting Letter from Coudert Brothers LLP to the U.S. Department of Commerce, Case No. A–485–803 *Re: Certain Cut-to-Length Steel Plate from Romania* (December 22, 2003), Prop. Doc. No. 569, Pl.'s App. 4 ("*Section D Questionnaire Response*") at 11.

In its Issues and Decision Memorandum for the Final Results of the Administrative Review ("*Issues and Decision Mem.*"), [5] Commerce announced its contrary decision to assign a value to Mittal's iron scrap product. Commerce explained:

> In this case, [Mittal] did not request a scrap offset, supply adequate documentation for the recycled scrap, or provide a reasonable alternative methodology to account for these inputs. The burden is on the respondent to create an adequate record to substantiate its claim for an offset. . . . [Mittal] has not met its burden and has not provided any evidence on the record to support its claim for an offset.

Issues and Decision Mem., at 27 (Cmt. 12).

Mittal argues that by assigning a value to Mittal's scrap input, Commerce double-counts the cost of those inputs, valuing them a first time when they initially entered the production process, and then valuing them a second time when they were used as scrap product in a latter portion of the production process. Mittal claims that by double-counting the cost of these inputs, Commerce runs afoul of statutory and court strictures that require Commerce to calculate the antidumping margin as accurately as possible. *See Lasko*, 43 F. 3d at 1443.

Mittal argues that, while it is true that they did not request an offset for its iron scrap product whether the scrap input is valued at "zero" or is instead added in as a factor of production, with that value then "offset", the result is the same, *i.e.*, ultimately the scrap input is not valued. *Pl.'s Br.* 10. Mittal also argues that it has previously reported its scrap input in the same way in Commerce's investigations of similar products, covering in part the same time period, without requesting a scrap offset, and Commerce did not assign a surrogate value to Mittal's scrap input. *Id.* As an example, Mittal points to *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, and the first administrative review thereof (conducted for 2002–2003). *Pl.'s Br.* 12; *see Certain Hot-Rolled Carbon Steel Flat Products from Romania*, 66 Fed. Reg. 49,628 (Dep't Commerce Sept. 28, 2001) (final determination); *Certain Hot-Rolled Carbon Steel Flat Products*

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[5] Memorandum from Barbara E. Tillman to Joseph A. Spetrini, *Issues and Decision Memorandum for the Final Results and Final Partial Recission of Certain Cut-to-Length Carbon Steel Plate from Romania*, Dep't Commerce (March 17, 2005), *available at* http://ia.ita.doc.gov/frn/0503frn/E5–1127.txt.

From Romania, 70 Fed. Reg. 34,448 (Dep't Commerce June 14, 2005)(final results).

In the proceedings for hot-rolled carbon flat steel products from Romania, the second review of which overlaps the same time period as the proceeding under review here, Mittal claims that recycled iron scrap was valued at zero, and, as is the case here, no formal request for an offset was made. The fact that Commerce seemingly changed its methodology, without explaining the change or inconsistency, according to Plaintiff, implicates a reliance interest that companies have in a past methodology. *Pl.'s Br.* 14; *see Böwe-Passat v. United States*, 17 CIT 335, 339 (1993); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1169, 178 F. Supp. 2d 1305, 1327 (2001); *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992) ("[p]rinciples of fairness prevent Commerce from changing its methodology at this late stage").

Mittal also argues that it had no opportunity to comply with any new policy that would have required it to formally request an offset, stating that Commerce's questionnaire does not include a requirement to request such a "scrap offset." *Pl.'s Br.* 12. Plaintiff claims that when Commerce instituted its new methodology, Plaintiff should have had the opportunity to "address the new methodology which Commerce adopted in the Final Results." *Id.* at 14.

Finally, Mittal argues that, despite Commerce's assertions to the contrary, it did provide sufficient documentation to account for the amount of input used at specific stages of the production process. In particular, Mittal points to its Section D questionnaire response and its first supplemental questionnaire response, in which Mittal stated that it reported all of the factors of production that go into the production of the subject merchandise and the recovered iron scrap. *Pl.'s Br.* 15; *Section D Questionnaire Response*, Prop. Doc. No. 569, Pl.'s App. 4 at 11; Letter from Coudert Brothers LLP to the U.S. Department of Commerce, Case No. A–485–803 *Re: Certain Cut-to-Length Steel Plate from Romania* (February 11, 2004), Prop. Doc. No. 611, Pl.'s App. 5 at 11, Ex. 17 ("*First Supplemental Questionnaire Response*"). Mittal also provided additional information to explain "an apparent discrepancy between the recycled iron scrap factors of production reported and the total scrap produced." *Pl.'s Br.* at 16. *See* Letter from the Coudert Brothers LLP to the U.S. Department of Commerce, Case No. A–485–803 (May 17, 2004), Prop. Doc. No. 634, Pl.'s App. 14 ("*Second Supplemental Questionnaire Response*") at 6–7 and at Exs. 13–14.

While Commerce concedes that it "[t]ypically [ ] does not assign a surrogate value to recycled products because the factors used in producing the recycled by-products have already been reported," *Def.'s Br.* 10, it argues that its decision in this review to assign a surrogate value to the scrap input here is supported by the record.

Commerce specifically claims that during the administrative review "Mittal Steel failed to demonstrate the amount of recycled scrap it actually produced and consumed during the production of subject merchandise." *Id.* at 14. Commerce states that Mittal only provided estimates of the amount of iron scrap reintroduced into the production process, did not provide any calculations of the amount of iron scrap, did not allocate the amount of scrap used in the production of subject versus non-subject merchandise, and never provided an actual amount of recycled iron scrap used in production. *Id.* at 14–15 (citing *First Supplemental Questionnaire Response*, Prop. Doc. No. 611, Pl. App. 5. Exs. 17, 18; *Second Supplemental Questionnaire Response*, Prop. Doc. No. 634, Pl.'s App. 14 at 6–7 and Ex. 13–14). Additionally, Commerce points to the fact that Mittal also purchased iron scrap. *Def.'s Br.* 15 (citing *Section D Questionnaire Response*, Prop. Doc. No. 569, Pl.'s App. 4 at 10–11.

Commerce also responds that Mittal's claim – that there is sufficient information on the record for Commerce to calculate the amount of recycled scrap used – is unavailing because, even were Commerce able to calculate the amount of recycled scrap used by subtracting the purchased scrap from the total amount of scrap used, that calculation nonetheless would not reveal how much recycled scrap was used or allocated between subject and non-subject merchandise, and therefore provides no information as to the actual amount of such recycled scrap that was consumed in the production of the subject merchandise.[6] *Def.'s Br.* 16.

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[6] Ipsco Steel, Inc., the Defendant-Intervenor, points out that "[s]crap recovered from the production of *non*-subject merchandise does *not* qualify for a scrap offset (even though it is required to be reported as an input if used in producing the subject merchandise) because the inputs used in producing this recycled scrap (*i.e.* the inputs used to produce the non-subject merchandise from which this recycled scrap was generated) are *not* reported in response to Commerce's questionnaire." Opp'n of Def.-Intervenor Ipsco Steel Inc. to Pl.'s Mem. in Supp. of its R. 56.2 Mot. J. Agency R. 8 ("*Def.-Intervenor's Br.*") (emphasis in original). The Defendant-Intervenor also notes the similarity of this situation to that of *Non-Malleable Cast Iron Pipe Fittings from the PRC*, where Commerce could not properly ascertain the *source* of the scrap used. Commerce did not, however, make this argument or explanation in the *Issues and Decision Mem.*, in which it claimed that Mittal "did not . . . supply adequate documentation for the recycled scrap." *Issues and Decision Mem.* at 27 (cmt 12).

Defendant states, in its brief, that "Mittal Steel failed to demonstrate the amount of recycled scrap it actually *produced and consumed* during the production of the subject merchandise." *Def.'s Br.* 14 (emphasis added). Other than this statement, however, Defendant appears to be basing its argument on the lack of actual figures for the *consumption* of recycled iron scrap in the production of subject merchandise rather than recycled iron scrap *produced* during the production of subject merchandise.

In fact, Commerce claims several times in its brief that Mittal did not provide the amount of iron scrap consumed in the production of subject merchandise. *Def.'s Br.* 14 ("Specifically, Mittal Steel failed to demonstrate the amount of scrap it actually consumed and failed to allocate its recycled scrap over both its subject and non-subject merchandise."); *see also id.* at 11, 15, 16.

Mittal claims, in its Reply Brief, that "the reported self-produced iron scrap factor of production already accounts for the production of subject merchandise and not the universe of products made by [Mittal]." *Pl.'s Reply Br.* 8. Mittal further claims that "in order to account

Commerce further claims that the administrative determinations that Mittal cites addressing the use of the same or similar methodology, in which Commerce did not assign a surrogate value to the recycled scrap product, are of no moment. Commerce contends that the court is foreclosed from considering the methodologies adopted in other determinations because the record data in those cases are not on the record as part of the underlying administrative proceeding at issue here. Commerce concedes that Appendix 7, which is the Factor Valuation Memorandum for *Certain Hot-Rolled Steel Flat Products from Romania*, can be considered part of the record here, but argues that that determination is not relevant as it only indicates that in a review for a different product, recycled scrap was not valued. *Def.'s Br.* 12. Commerce claims that Mittal's reliance on proceedings in other reviews for other products is equally unavailing, as none of the determinations to which Mittal points are for the same order. *Def.'s Br.* 13.[7]

Mittal counters this argument by the Defendant-Intervenor by asserting that it has reported the scrap product at the same level of specificity as all of the other materials reported. *Pl.'s Reply Br.* 3. Additionally, Mittal claims it calculated the contribution of recycled iron scrap to the subject merchandise, saying that the worksheets provided demonstrated the allocations of scrap in the production of subject merchandise. Mittal states that it "provided both the stage-specific input consumption and the cumulative input consumption over all of the stages of the production process for the subject merchandise." *Pl.'s Reply Br.* 8. It then adjusted the recycled scrap by the yields of the slab caster and the plate mills, utilizing "the same reporting methodology applied to all material inputs in this proceeding." *Id.*

Finally, Mittal notes that in *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, Commerce valued recycled iron scrap at zero both in its investigation and in the first administrative review. Mittal claims that the integrated production processes for hot-rolled steel and steel plate are identical until the liquid steel stage (at

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for the liquid steel used only in the production of subject merchandise, [Mittal] adjusted the recycled scrap FOP by the yields and production of the slab caster and the plate mills." *Id.*

The court notes that there is nothing on the record that indicates that Commerce was questioning the production of the recycled iron scrap rather than its usage. Consequently, it appears that the Defendant-Intervenor's argument about the production of recycled scrap is a red herring.

[7] Defendant-Intervenor also notes that there is no change in practice at all here, stating that it has long been the policy of Commerce to ascertain what portion of the scrap utilized is generated by the production of the subject merchandise (versus production of the non-subject merchandise). *Def.-Intervenor's Br.* 13–14. Defendant-Intervenor claims that any difference in treatment alleged by Mittal is based on a factual difference, *i.e.*, that in cases where the offset is given, Commerce is able to ascertain what percentage of recycled scrap is generated from the subject merchandise as opposed to the non-subject merchandise, or where the respondent produces only the subject merchandise. *Id.*

which point the difference lies in the finishing of the products). Mittal argues that even though hot-rolled steel is not covered by the same order, it is so like the goods at issue here that Commerce's treatment of the recycled scrap input here is a departure from its previous methodology. *Pl.s Br.* 11–12.

The court finds it is necessary to remand this issue to Commerce. The agency's policy is that "Commerce will offset the respondent's cost of production by the value of a reported by-product where the respondent's questionnaire responses indicate that it was sold, or where the record evidence demonstrates clearly that the by-product was re-entered into the production process." *Def.'s Br.* 11. Here, Commerce's decision not to follow its own policy is unsupported by substantial evidence; nor did Commerce "articulate[ ] a rational connection between the facts found and the choices made." *Celanese Chems. Ltd. v. United States*, 31 CIT ___, ___, Slip Op. 07–16 at 38 (January 29, 2007) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Construed generously, Commerce's determination gives the following reasons for providing a value to the recycled scrap: (1) Mittal never requested a scrap offset; (2) Mittal did not provide the actual amount of scrap used in manufacturing the subject merchandise; (3) there was no means of distinguishing between recycled and purchased scrap inputs; and (4) there was no means of distinguishing between recycled scrap that had been used in the production of subject merchandise as opposed to the production of non-subject merchandise.

As for the first point, it appears that Mittal would not have known to request such an offset based on its experience in other [8] investigations and reviews. More importantly, nowhere in the questionnaires Mittal received (which it received prior to the issuance of the *Preliminary Results*) was there any indication that Mittal was required to ask for an offset in order for the recycled scrap not to receive a value.

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[8] *See* Memorandum from Christopher Riker to Gary Tavermen *Re: Preliminary Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from Romania*, Dept' Commerce (April 23, 2001), Prop. Doc. 735 at Ex. 10, Pl.'s App. 7 at 2 (showing that recycled iron scrap for the same producer for a product with a similar production process was not valued). Commerce argues before the court that the court should not take into account the *Final Factors Valuation Memo* in the 2002–2003 Administrative Review of *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, (Dep't Commerce June 6, 2005) or from the *Preliminary Factors Valuation Memo*. in the 2002–2003 Administrative Review of *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, (Dep't Commerce Nov. 29, 2004), as these were not part of the record of the proceeding. The court notes that these are all documents that are part of the public record, involving the same parties and a similar product, and would be of relevance in deciding whether or not Commerce had a different prior past practice. However, the court need not consider the documents that were not part of the administrative record of this proceeding in order to decide this issue.

As for Commerce's remaining points, the evidence on the record demonstrates the contrary. Specifically, the evidence on the record demonstrates that Mittal provided specific usage calculations for recycled scrap product on a per Metric Ton basis.[9] This information was provided for the subject merchandise produced. Mittal provided a worksheet that indicated the consumption, by kilogram per metric ton, for the various inputs used to calculate the subject merchandise. *See Second Supplemental Questionnaire Response*, Prop. Doc. No. 634, Pl.'s App. 14 at Ex. 14. This table provides a break-out used for Iron Scrap Recycled and Iron Scrap Purchased used in the manufacture of subject merchandise. Commerce's decision is therefore inconsistent with the record. To say that Mittal's table does not "document" the recycled scrap entering into the production of subject merchandise, or that this submission is not an appropriate allocation methodology, is therefore to say that none of the factors of production reported by Mittal were allocated properly between subject and non-subject merchandise. But Commerce makes no such claim. On the contrary, Commerce accepted Mittal's filings for other factors. *See* Memorandum from Ann Barnett-Dahl and Brandon Farlander, Case Analysts, to Richard Weible, Office Director, Office VII *Re: Preliminary Results of Review: Certain Cut-to-Length Carbon Steel Plate from Romania; Factors of Production Valuation Memorandum for the Preliminary Results*, (Dep't Commerce Aug. 30, 2004), Prop. Doc. No. 698, Pl.'s App. 3 at Attach. 1 ("*Factors Valuation Mem.*"). Thus Commerce relies on the fact that Mittal did not provide data that was, in fact, on the record. Consequently, Commerce's determination not to value the recycled iron scrap as zero is not supported by substantial evidence. On remand, Commerce must review Mittal's filings and address specifically their sufficiency for making the required calculations.

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[9] In responding to the questionnaire, Mittal stated:

> Exhibit 17 of [Mittal's] February 10, 2004 supplemental response contained (a) the step-by-step detailed explanation of how [Mittal] derived the recycled scrap FOP (the Recycled Iron Scrap FOP Worksheet) and (b) a worksheet with monthly scrap consumptions for each of BOF1 and BOF3. A revised version of Exhibit 17 of [Mittal's] February 10, 2004, supplemental response, containing minor corrections, is attached at Exhibit 13 of this response.

See also id. at Ex. 13,("The specific consumption of recycled iron scrap at BOF1 for the production of 1 MT of liquid steel was derived as follows . . . "). Defendant-Intervenor contends that while Mittal reported factor data based on only inputs that entered the blast furnaces that produced the subject inputs, the scrap was recovered from multiple sources including the finishing of non-subject merchandise. *Def. Intervenor's Br.* 11. Mittal refutes this point by stating that it uses the same means of reporting recycled iron scrap as any other input, by adjusting the recycled scrap factor of production by "the yields and production of the slab caster and the plate mills" in order to calculate the contribution of recycled iron scrap to subject merchandise. *Pl.'s Reply Br.* 8. Mittal further explained that "[t]he reporting of all of the material inputs that went into the production of steel slab, including the recycled iron scrap, was adjusted to reflect only the slab corresponding to the cost groups used to manufacture the subject merchandise." *Id.* at 3–4.

2. *Commerce's choice of Surrogate Value for Limestone*

When choosing surrogate values during an investigation or administrative review, Commerce selects a country that, to the extent practicable, will be the source of data to value the individual factors of production. *See* 19 U.S.C. § 1677b(c)(1)&(4); 19 C.F.R. § 351.408(c)(1) & (2)[10] ; *see also Dorbest*, 30 CIT at ___ , 462 F. Supp. 2d at 1270. For this administrative review, Commerce determined that "Egypt, Algeria, and the Philippines (1) are comparable to Romania in its level of economic development, and (2) are significant producers of comparable merchandise" and therefore would be acceptable surrogate countries. *Preliminary Results*, 69 Fed. Reg. at 54,113. From those countries, Commerce then chose Egypt as its surrogate country for this investigation.[11] *Id.* For valuing limestone, however, Commerce calculated a surrogate value using import data from the Philippines from 2001.

After the issuance of the *Preliminary Results* and prior to the issuance of the *Final Results*, Mittal argued that Commerce's selection of Filipino import data was not appropriate because the data was aberrational. Mittal argued that Commerce should instead use Mittal's own 2003 purchase price, from the latter half of the Period of Review, during which Commerce classified Romania as a market economy country, as a surrogate value for limestone.

In the *Issues and Decision Mem.*, Commerce declined to change its surrogate value for limestone,[12] stating that if could not use Mittal's own information, as that information was proprietary and therefore did not meet the criteria that Commerce has established for selecting surrogate values. *Issues and Decision Mem.* at 26 (cmt 11). Commerce further stated, with respect to aberrational data, that it

> examined, where applicable, 2002 data from the countries on the surrogate country list and [Commerce was] unable to find data that was not aberrational. [Commerce] repeated this process for 2001 data and [Commerce] found the 2001 Philippines limestone data to be non-aberrational.

Issues and Decision Mem., at 24 (cmt 11).

Before the court, Mittal again challenges the selection of the Filipino import data stating that the selection of this surrogate value contravenes the statutory directive that Commerce is to "value the factors of production 'based on the best available information regarding the values of such factors in a market economy country or coun-

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[10] All references to the Code of Federal Regulations are to the 2006 edition.

[11] No party challenges this choice.

[12] Commerce selected 2001 Filipino import data that valued limestone at $0.07/kg. *Factors Valuation Mem.* at 4. With adjustments for inflation and converted to Metric Tons ("MT"), this is equivalent to an adjusted price per MT of $77.45. *Id.*

tries considered to be appropriate by [Commerce].' " *Pl.'s Br.* 24 (citing 19 U.S.C. § 1677b(c)(1)(B)(2000)). Mittal avers that there is other non-aberrational data on the record that satisfies the statutory objective of being the "best available information." Mittal also claims that the choice of Filipino data is not supported by substantial evidence due to the fact that the Filipino data selected is aberrational.

Mittal supports its assertion that the Filipino limestone data is aberrational by pointing to (1) the fact that the data selected is based on very low import volumes (contrary to Commerce's preferred practice),[13,14] and (2) the data selected is ten times higher than the benchmark data provided on the record. *Pl.'s Br.* 25.

The chart below demonstrates the range of prices for limestone that Plaintiff has placed on the record for the POR:

Limestone Import Prices in dollars per kg
(for POR unless otherwise noted)

Commerce's selection (2001)	U.S. Data[15]	E.U. data	El Salvador data	Polish data	Albanian data	Peak actual price (half of POR)
0.07	0.006	<0.015	0.054	0.007	0.02	[ ][16]

Pl.'s Br. 26; *see also Pl.'s Case Br.*, Prop. Doc. No. 735, Pl.'s App. 12 at 55–56; Letter from the Coudert Brothers LLP to the U.S. Depart-

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[13] Specifically, Plaintiff points to the fact that the 2001 data from the Philippines was based on import data with a value of $6000. Letter from Coudert Brothers LLP to the U.S. Department of Commerce, Case No. A–485–803 *Re: Certain Cut-to-Length Steel Plate from Romania* (October 18, 2004), Prop. Doc. No. 735, Pl.'s App. 12 at 54 ("*Pl.'s Case Br.*") (citing *Factors Valuation Mem.* at 4)). Additionally, Plaintiff claims that this import data was based on imports from the United States. *Id.*

[14] Plaintiff cites to several of Commerce's previous investigations of other products, where Commerce rejected surrogate data which are based on low levels of imports. In particular, Plaintiff references *Steel Concrete Reinforcing Bars from Belarus* 66 Fed. Reg. 33,528 (Dep't Commerce June 22, 2001) (final determination) (Issues and Decision Memorandum at 4 (cmt. 1) *available at* http://ia.ita.doc.gov/frn/summary/belarus/01–15743–1.txt (rejecting a surrogate value, Commerce states that it "[does] not believe that a value that differs significantly from both the Thai and U.S. values for the same input and is based on import data primarily from one country, and in relatively low quantities, is a representative or reliable value to use as a surrogate value in [Commerce's] calculations"); *Silicon Metal from the Russian Federation*, 68 Fed. Reg. 6885 (Dep't Commerce Feb. 11, 2003) (final determination) (Issues and Decision Memorandum at 20 (cmt. 5)) *available at* http://ia.ita.doc.gov/frn/summary/russia/03–3408–1.pdf (excluding low volume imports when the per unit values were substantially different than the per unit values of the larger quantities of the import on the record). *See Pl.'s Case Brief*, Prop. Doc. No. 735, Pl.'s App. 12 at 54.

[15] In its Brief before the court, and in its case brief before Commerce, Plaintiff listed the U.S. import price for limestone data as $0.006/MT. *Pl.'s Br.* 26; *Pl.'s Case Br.*, Prop. Doc. No. 735, Pl.'s App. 12 at 55. A further examination of the record, however, reveals that the correct unit of measurement is $0.006/kg. Letter from Coudert Brothers LLP to the U.S. Department of Commerce, Case No. A–485–803 *Re: Certain Cut-to-Length Steel Plate from Romania* (August 3, 2004) Pl.'s App. 18 at Ex.3.

[16] This is Plaintiff's proprietary data. It is substantially less than Commerce's selection.

ment of Commerce, Case No. A–485–803 (October 8, 2004), Prop. Doc. No. 733, Pl.'s App. 14 at Ex. 4.[17]

Mittal also notes that Commerce's choice of data from the Philippines is contrary to case law directing that Commerce "be consistent in applying benchmark variations to determine which values are aberrational." *Pl.s' Br.* 28 (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT ___, ___, Slip Op. 04–88 at 21–22 (July 19, 2004). More specifically, Mittal notes that, in the instant administrative review before the court, Commerce itself declined to use Algerian data that was based on imports worth $7,720, and having a value ten times other surrogate data on the record for the same input. *Pl.'s Br.* 28; *see Issues and Decision Mem.* at 14–15 (cmt. 6).

In response to Mittal's challenges to the Filipino data selected, Commerce explained that its procedures led to the selection of Egypt as Commerce's primary surrogate country, and therefore as its primary choice for surrogate data. When data from Egypt was unavailable or unusable, Commerce sought data from other economically comparable countries that were also significant producers of comparable merchandise—here the Philippines and Algeria-in its search for appropriate surrogate value information. Commerce claims that it chose the Filipino data because

> the 2002 data from the WTA [World Trade Atlas] were aberrational or non-existent for Egypt, the Philippines, and Algeria, as were the 2001 data from Egypt and Algeria. Commerce found that these import prices were unreasonably high priced, except for the 2001 Filipino data.

Def.'s Br. 18 (citing *Factors Valuation Mem.,* Prop. Doc. No. 698, Pl.'s App. 3 at 4).

While, Commerce "agree[s] that 'aberrational' surrogate input values should be disregarded"[18] and that its practice is "to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries,"[19] Commerce argues that it adjusted the Filipino import data to account for any aberrations. *Def.'s Br.* 20. Of all the available limestone data from all the surrogate

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[17] Plaintiff hypothesizes that the high value of the Filipino import data is based on the low volume of that data, the fact that the imports came from the United States, and the fact that the category used to select the imports was a basket category of goods, and therefore was not specific enough to obtain the particular limestone input utilized by Mittal. *Pl.'s Br.* 27–28.

[18] *Def.'s Br.* 19 (quoting *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27366 (Dep't Commerce May 19, 1997)(final rule).

[19] *Def.'s Br.* 19 (quoting *Heavy Forged Hand Tools from the People's Republic of China*, 62 Fed. Reg. 11,813 (Dep't Commerce March 13, 1997) (final results); citing *Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, 23 CIT 479,485, 59 F. Supp. 2d 1354, 1360 (1999).

countries, Commerce argues that the Filipino import data was the most reasonable choice, warts and all, within the universe of choices.

The court remands this issue to Commerce for further explanation in light of the data placed on the record that demonstrates that the limestone value that Commerce selected was much higher than the value of limestone imported in other countries and applied to a small volume of imports. *See Shakeproof Assembly*, 23 CIT at 485, 59 F. Supp. 2d at 1359–60; *see also Shanghai Foreign Trade Enters. v. United States*, 28 CIT ___, ___, 318 F. Supp 2d 1339, 1353 (2004) *Hebei Metals & Minerals*, 28 CIT at ___, Slip Op. 04–88 at 21–22.

In the cases cited above, Commerce excluded import statistics where the import value was aberrational and the import values low, and when alternative import statistics included imports from several countries. In this administrative review, as noted above, Commerce excluded data from Algeria based on this principle. *Pl.'s Br.* 29; *Issues and Decision Mem.* at 14–15 (cmt 6).[20]

When confronted with a colorable claim that the data that Commerce is considering is aberrational, Commerce must examine the data and provide a reasoned explanation as to why the data it chooses is reliable and non-distortive. *See Dorbest*, 30 CIT at ___, 462 F. Supp. 2d at 1287–88. Here, confronted with data that indicates that Commerce chose low volume, aberrational data, Commerce did not evaluate the data on the record in comparison to benchmarks, but instead relied only on the claim that the data selected was better than other data from the acceptable surrogate countries. As such, Commerce's decision skips over Mittal's claim that the Filipino data is outside Commerce's own standard of acceptability, and thus avoids an important aspect of the problem presented. *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where it fails to consider an important aspect of the problem).

Commerce effectively claims that it chose the Filipino import data due to a process of elimination. While Commerce argues that this is its best choice within its universe of choices, Commerce has not explained, why, given the benchmark data (which is plentiful and remarkably consistent), it found the 2001 Filipino import data to be reliable and non-aberrational. If the Filipino data which meets Commerce's surrogate criteria nonetheless proves to be unusable, or demonstrably aberrational, Commerce should examine data sources that it has outside of those from the surrogate countries. *Cf. Dorbest*, 30 CIT at ___, 462 F. Supp 2d at 1280–81 (noting that Commerce's desire for contemporaneity might be trumped if data that is non-contemporaneous is otherwise accurate).

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[20] Even in using the Filipino data, Commerce made adjustments, eliminating data from Spain, because Commerce found that data to be aberrational. *Factor Valuation Memo.*, Prop. Doc. No. 698, Pl.'s App. 3 at 4.

On this record, Mittal has provided several options for surrogate values for limestone. Commerce has rejected the U.S. and the EU data because Commerce's practice is " 'to only resort to data from countries not on the surrogate country list' such as the United States and the European Union, where Commerce 'cannot identify surrogate value data from any country on the surrogate country list that is a significant producer of comparable merchandise.' " *Def.'s Br.* 20 (quoting the *Issues and Decision Mem.*, 26 (cmt. 11)). While Commerce has every right to prefer data from economically comparable countries, Commerce cannot meet its statutory objective to use the best available information, or to obtain the most accurate margin possible, by relying on aberrational data for the sole reason that it comes from a country that is on the surrogate country list. *See Globe Metallurgical, Inc. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1148, 1160 (2004)("Commerce will disregard values from the primary surrogate country when it finds those values to be (1) unavailable; (2) not sufficiently contemporaneous; (3) of poor quality, or (4) otherwise unreliable, *i.e.*, aberrational." (internal citation omitted)). As Commerce itself recognizes, it does not use surrogate country data that is aberrational. *Id.*; *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27366; *Shakeproof Assembly*, 23 CIT at 485, 59 F. Supp. 2d at 1359–60.

In addition, Commerce's analysis of its alternatives is incomplete. Commerce declined to use Mittal's own data on the basis that this data consists of proprietary information. *Def.'s Br.* 21; *Issues and Decision Mem.*, at 26 (cmt. 11). But the argument against using proprietary information does not apply when it is the respondent's own information that is at issue. Commerce is using the respondent's proprietary information throughout its investigation or review, when relying on the respondent's reporting of factors of production. Indeed, Commerce's own regulations provide for the usage of respondent's own information in a non-market economy situation, when a factor is purchased from a market-economy supplier. 19 C.F.R. § 351.408(c)(1).[21] Accordingly, Commerce should reconsider this rationale.

Commerce also claims that it cannot use the Mittal data because that data is outside the period of review. However, the Filipino data is also outside the period of review, though adjusted. Consequently, Commerce appears to apply its standards in an arbitrary fashion. *See Shanghai Foreign Trade Enters.*, 28 CIT at ___ , 318 F. Supp. 2d

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[21] Commerce's regulation reads:

(1) *Information used to value factors*. The Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier. . . .

19 C.F.R. § 351.408(c)(1).

at 1352 (Commerce's determination was not supported by substantial evidence when "Commerce summarily discarded the alternatives as flawed but did not evaluate the reliability of its own choice."). The fact that Commerce was willing to rely on Filipino data that were outside the period of review indicates that data from outside the period of review is not automatically disqualified.

Finally, Commerce relies on its preference for "country-wide, publicly available data." *Def.'s Br.* 21–22. Invoking this general policy preference, however, does not appear to be logical here. It is of course reasonable that Commerce establish conditions and criteria in order to help ensure that it has accurate and reliable data. It confounds the issue, however, if Commerce rejects a company's own actual price paid, during a period when that country is considered part of a market economy country, on the basis that the price is non-representative of the entire country.

Commerce's task is to duplicate, to the best of its ability, the prices a company would pay for its inputs were that company functioning in a market economy country. 19 U.S.C. § 1677b(c). When Commerce accepts the value of the subject merchandise as the normal value in a market economy country,[22] it implicitly accepts the price paid for the inputs as accurate and the true price paid by the respondent. It therefore appears irrational to accept that these values are the true prices paid by a company on the one hand, and then to simultaneously reject them because they are not publicly available information that is country-wide. Therefore, this issue is remanded. On remand, Commerce shall reconsider its position in light of the benchmark data on the record.

3. *Commerce's Rejection of Ispat Annaba Financial Statements to determine SG&A ratios*

When Commerce is constructing the normal value for a respondent in a non-market economy country, Commerce must also take into account those costs that are not covered by the factors of production (the physical inputs and the wages of the workers directly involved in the manufacturing process). "Because firms have 'general expenses and profits' not traceable to a specific product, in order to capture these expenses and profits, Commerce must factor (1) factory overhead ('overhead'), (2) selling, general and administrative expenses ('SG&A'), and (3) profit into the calculation of normal value." *Dorbest*, 30 CIT at ___, 462 F. Supp. 2d at 1300; *see* 19 U.S.C.

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[22] *See Preliminary Results*, 69 Fed. Reg. at 54,115 (after determining that the amount of sales in Romania were sufficient to base the value on Romanian sales, Commerce "based the determination of [Normal Value] upon the [Home Market] sales of the foreign like product. Thus, [Commerce] used as [Normal Value] the prices at which the foreign like product was first sold for consumption in Romania, in the usual commercial quantities, in the ordinary course of trade, and, to the extent possible, at the same level of trade (LOT) as the [Export Price] or [Constructed Export Price] sales, as appropriate. . . . ").

§ 1677b(c)(1). In order to capture these costs, Commerce relies upon financial statements from one or more companies based in the primary surrogate country (or other surrogate countries if need be) to create financial ratios that Commerce then applies to its factors for production data in order to recreate the full expenses of the respondent. *Dorbest*, 30 CIT at ___ , 462 F. Supp. 2d at 1300–1.

In the *Preliminary Results*, Commerce selected Egyptian Iron and Steel ("EIS") as its surrogate producer. After the publication of the *Preliminary Results*, Mittal challenged Commerce's choice of the financial statements from Egyptian Iron and Steel ("EIS") to calculate the SG&A ratios, and argued that instead Commerce should use the financial statement for an Algerian company (a Mittal Steel affiliate), Ispat Annaba. Mittal argued that Ispat Annaba's financial statement met Commerce's own criteria for a surrogate producer because it is "reliable, contemporaneous with the POR, contains a detailed break-out of expense categories, earned a profit, and operates under common management principles." *Issues and Decision Mem.*, at 17 (cmt. 10).

Mittal also identified a range of problems with EIS's data, and stated that if Commerce chose to continue to use Egyptian surrogate data, the agency should use data from another Egyptian company, Alexandria National Iron and Steel ("AIS"). *Id.* at 20 (cmt. 10). Additionally, Commerce had initially supplemented EIS's financial statements with those from three different sources. Mittal claimed that if Commerce insisted on supplementing the data from EIS or AIS with those of companies from non-surrogate countries, they should use manufacturers based in Indonesia, and suggested the financial statement of PT Jaya Pari Steel Tbk ("Jaya Pari"). *Id.* at 22 (cmt. 10).

Commerce selected the financial statement from AIS, but also supplemented AIS' data with those of Jaya Pari, in order to calculate non-depreciation overhead. *Issues and Decision Mem.*, at 22–24 (cmt. 10). Commerce declined to used the financial statement from Ispat Annaba stating that:

> [b]ecause [Mittal] is affiliated with Ispat Annaba, the Department determines that there is a potential conflict in that Ispat Annaba's financial statement is more likely to be manipulated and is therefore less preferable than non-affiliated companies' financial statements. In contrast, while AIS is not an integrated steel producer, like [Mittal] (or Ispat Annaba), it is not affiliated with [Mittal] and is an Egyptian producer of comparable merchandise.

Id. at 23 (internal citations omitted).

Mittal challenges Commerce's rejection of the financial statements from Ispat Annaba, claiming that Commerce's decision was not supported by any data on the record, that affiliation is not a statutory

test to qualify or disqualify producers, and finally, that the financial data from Ispat Annaba represents the best surrogate value data on record. *Pl.'s Br.* 30.

To support its claim that there is insufficient evidence on the record of data manipulation, Mittal cites case law indicating that Commerce's data choice must be based on record evidence and not on speculation. *See Anshan Iron & Steel Co. v. United States*, 28 CIT ___, ___, 358 F. Supp.2d 1236, 1241 n.2 (2004) (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 15, 704 F. Supp. 1114, 1117, (1989) ("Speculation is not support for a finding. . . . ")).

Mittal also points to instances in which affiliated companies were used to determine surrogate financial ratios in an antidumping investigation or administrative review involving an NME. *See Certain Ball Bearings and Parts Thereof From the People's Republic of China*, 68 Fed. Reg. 10,685 (Dep't Commerce Mar. 6, 2003) (final determination) (Issues and Decision Mem. at 18–22 (cmt. 1H) *available at* http://ia.ita.doc.gov/frn/summary/prc/03–5300–1.pdf.[23]

Finally, Mittal argues that the data from Ispat Annaba is the best available as it is from one of the countries from Commerce's surrogate country list (Algeria), contemporaneous with the POR, audited, publicly available, and from producers that manufacture similar merchandise. While these characteristics also describe AIS, Mittal argues that Ispat Annaba is the superior data source because the financial statements from Ispat Annaba provide a break-out of non-depreciation overhead items, and Ispat Annaba is at the same level of integration as Mittal (whereas AIS is not). Mittal notes that in previous investigations or reviews, Commerce has viewed the level of integration to be a relevant factor for consideration because "an integrated producer will likely have greater overhead (particularly depreciation expense) because of its more expensive equipment. . . . " *Pl.s' Br.* 35, (quoting *Ball Bearings and Parts Thereof From the People's Republic of China*, 68 Fed. Reg. 10,685(Issues and Decision Mem. at 15 (cmt. 1F)).[24]

Commerce admits that AIS is not a fully integrated steel producer. *Def.'s Br.* 24. *See also Issues and Decision Mem.* at 23 (Cmt. 10). It also notes that it had to supplement AIS' information with a non-

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[23] In the cited case, the financial statements were prepared after the petition was filed, and respondents chose which financial statements to place on the record. Commerce used the data because there was no evidence of "any accounting irregularities or improper adjustments." *Certain Ball Bearings and Parts Thereof From the People's Republic of China*, 68 Fed. Reg. 10,685(Issues and Decision Mem. at 18–22) (cmt.1H)).

[24] Defendant-Intervenor points out that following the logic of Plaintiff's argument here would lead to an implication "that the AIS statements *understate* manufacturing overhead because AIS is less integrated than [Mittal]." *Def.-Intervenor's Br.* at 27 (emphasis in the original). Therefore, "it does not logically follow that Commerce overstated factory overhead by selecting AIS's financial data over that of Ispat Annaba." *Id.*

depreciation overhead financial ratio taken from Jaya Pari's financial statement. *Def.'s Br.* 23. Commerce states, however, that the information from Ispat Annaba also had to be supplemented.

Commerce notes that, in this administrative review, the agency was faced with a choice between a manufacturer that was not fully integrated,[25] and one that was fully integrated but affiliated. Commerce has previously stated its preference for information that is not provided by affiliates of interested parties in the proceeding. *Def.'s Br.* 25; *see Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 48,612 (Dep't Commerce July 25, 2002) (final results and partial rescission) (Issues and Decision Mem. at 13 (cmt. 4)) *available at* http://ia.ita.doc.gov/frn/summary/prc/02–18856–1.pdf; *see also Kaiyuan Group Corp. v. United States*, 28 CIT ___, ___, 343 F. Supp. 2d 1289, 1314 (2004) (affirming Commerce's determination not to utilize surrogate values placed on the record by a party affiliate).

Regarding Mittal's claim that there was no evidence of accounting irregularities in the Ispat Annaba data, and that Commerce has accepted affiliate data in the past,[26] Commerce notes that the financial statements provided by Ispat Annaba did not include a cost breakout. In order for the financial statements to be of use in this investigation, Mittal obtained cost break-out information from Ispat Annaba's accountant, and did so solely for use in this administrative review. *Def.'s Br.* 25–26; Letter from the Coudert Brothers LLP to the U.S. Department of Commerce, Case No. A–485–803 (May 17, 2004), Pub. Doc. No. 128, Def.'s App. Tab 10 at 5–6. Commerce viewed this extra information, obtained solely for this proceeding and apparently not prepared in the ordinary course of business, to qualify as an "accounting irregularity."

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[25] Defendant-Intervenor notes that while AIS is not a fully-integrated producer, it does "engage[ ] in substantial manufacturing processes involved in producing the subject steel plate." *Def.-Intervenor's Br.* 26. Commerce noted in its *Issues and Decision Mem.* that:

> AIS has a direct reduction plant for producing direct reduced iron and produces steel in electric arc furnaces. *See Iron and Steel Works of the World*, 15th edition(2002). However, AIS is not an integrated steel producer because it does not produce pig iron in a blast furnace or steel in a basic oxygen furnace.

Issues and Decision Mem. at 23 (cmt. 10).

[26] Defendant-Intervenor also notes that in the case referenced by Mittal as standing for the proposition that affiliate data can be used to determine surrogate values, *Ball Bearings*, "Commerce was able to corroborate the financial statements from affiliated parties with financial statements from unaffiliated parties." *Def.-Intervenor's Brief* 24 (citing *Certain Hot-Rolled Carbon Steel Flat Products from Romania*, 70 Fed. Reg. 34,448 (Dep't Commerce June 14, 2005) (final determination) (Issues and Decision Mem. at 38–39 (cmt. 7)) *available at* http://ia.ita.doc.gov/frn/summary/romania/E5–3067–1.pdf. Therefore, the data in that case was not solely from affiliated companies, nor was additional break-out data needed; accordingly, the case is not analogous to the case here.

Therefore, Commerce maintains, it was reasonable to choose the non-fully-integrated producer over the data provided by Mittal's affiliate.

The Court affirms Commerce's decision not to use Ispat Annaba's financial statements in calculating surrogate financial ratios. Commerce had a choice between two imperfect financial statements. It was within the agency's statutory authority to choose to use non-affiliated data when some of the information provided was obtained specifically for this proceeding, and was therefore produced in circumstances providing a significant opportunity for data-manipulation.

While Mittal correctly argues that there is no statutory requirement that the data come from non-affiliated companies, it does not argue, nor can it, that Commerce does not have the discretion to determine that it does not want to use affiliated data when such data has "accounting irregularities."

Mittal argues that Commerce here is engaged in mere speculation, and as such, Commerce's determination cannot be deemed to be supported by substantial evidence. In this case, however, Commerce has more than a mere conjecture. Ispat Annaba's financial statements were not complete; in order for them to be completed, additional information had to be specifically compiled, outside of the ordinary course of business, and Commerce could not ascertain that from where the data was derived. Moreover, Commerce did have an alternate source of data which it deemed more reliable under the circumstances.

Where Commerce is confronted with two alternatives(both of which have their good and bad qualities), and Commerce has a preferred alternative, the court will not second-guess Commerce's choice. *See Luoyang Bearing Factory v. United States*, 27 CIT 1638, 1644, 288 F. Supp. 2d 1369, 1375 (2003); *Dorbest*, 30 CIT at ___, 462 F. Supp. 2d 1289–90; *see also Goldlink Indus. Co. v. United States*, 30 CIT ___, ___, 431 F. Supp. 2d 1323, 1327 (2006) ("The Court's role in the case at bar is not to evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.") (citation omitted). Here, a reasonable mind could conclude that Commerce chose the best available information in selecting between the two choices in front of it. As such, Commerce's decision was supported by substantial evidence.

4. *Commerce's Adoption and Application of a 15 Day Liquidation Instruction Policy*

Commerce completes its administrative review of antidumping duty orders by publishing its final results in the Federal Register. These results include notice that liquidation instructions will be issued to Customs within 15 days of publication (Commerce's "15 Day Policy"). Commerce's 15 Day Policy states:

> The Department of Commerce announces that, effective immediately, it intends to issue liquidation instructions pursuant to administrative reviews conducted under section 751 of the Tariff Act of 1930, as amended, [19 U.S.C. § 1675] to the U.S. Customs Service within 15 daysof publication of the final results of review in the *Federal Register* or any amendments thereto. This announcement applies to reviews conducted under sections 751(a)(1) and (2) of the Tariff Act.

Int'l Trade Comm'n, Dep't of Commerce, Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews (August 9, 2002), *available at* http://ia.ita.doc.gov/download/liquidation-announcement.html.

The relevant provisions in 19 U.S.C. § 1675 require, at subparagraph (a) (3)(C), that the "administering authority," in this case Commerce, "issue [liquidation] instructions to the Customs Service . . . , " and, at (a)(3)(B), that "any liquidation . . . pursuant to a review . . . shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued." 19 U.S.C. § 1675(a)(3)(B)&(C). The statutory provisions do not explicitly indicate how or when the liquidation instructions should be transmitted from Commerce to Customs; accordingly, there is a statutory gap that the agency must fill. *See Mittal Steel Galati S.A. v. United States*, 31 CIT ___ , Slip Op. 2007–73 at 14 (May 14, 2007).

At the same time, the statute provides that in order to appeal from an administrative review to the United States Court of International Trade, a party has thirty days to file "a summons, and within thirty days thereafter a complaint." 19 U.S.C. § 1516a(a)(2)(A)(ii). Rule 56.2 of the United States Court of International Trade allows another thirty days after the service of the complaint during which the party may file a motion for a preliminary injunction to enjoin liquidation of the subject entries during the process of judicial review. USCIT R. 56.2.

In the matter in dispute here, Commerce notified the Plaintiff, through publication in the Federal Register, that it intended to issue liquidation instructions for Plaintiff's entries within 15 days after publication of the Final Results. *Final Results*, 70 Fed. Reg. at 12,653. Thereafter, Commerce actually issued the liquidation instructions 23 days after publication of the *Final Results*. Liquidation of some of Mittal's subject entries occurred 22 days after the instructions issued, or 45 days after publication of the *Final Results*.

Mittal challenges Commerce's 15 Day Policy, arguing that the Policy undermines its right of judicial review, citing the 90–day period initiated by 19 U.S.C. § 1516a(a)(2)(A)(i)(I). Mittal also cites the court's decision in *Tianjin Machinery Import & Export Corp. v. United States* for the proposition that the 15 Day Policy directly contravenes the statutory framework established in 19 U.S.C.

§ 1516a(a)(2)(A)(i)(I). *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT ___ , 353 F. Supp. 2d 1294 (2004). Effectively, Mittal claims that its option to appeal Commerce's decision should constrain Commerce's choice of a time period for issuing liquidation instructions to Customs. *But see Mukand Int'l, Ltd. v. United States*, 30 CIT ___ , ___ , 452 F. Supp. 2d 1329, 1334–35 (2006) (finding that the 15 Day Policy was a reasonable and acceptable means of statutory gap-filling); *see also Mittal Steel Galati*, 31 CIT at ___ , Slip Op. 2007–73 at 14.

Mittal claims injury because liquidations are effectively final. *See United States v. Utex Int'l Inc.*, 857 F.2d 1408, 1409–1410 (1988). Mittal notes that the injunction against liquidation in this matter took effect after several entries had been liquidated, and that those liquidations occurred while Mittal was negotiating with counsel for the Defendant the terms of the injunction. Mittal argues that decisions of the Federal Circuit indicate that a party should not suffer injury from premature liquidations when it has exercised its rights in a timely manner. *See Mukand Int'l, Ltd. v. United States*, No. 06–1259, 2007 WL 571026 (Fed. Cir. Feb. 6, 2007) (comparing the plaintiff's untimely actions with timely actions of the plaintiff in *Shinyei*); *see also Shinyei Corp. of Am. v. United States*, 355 F. 3d 1297 (Fed. Cir. 2004).

Commerce claims that it has a statutory obligation to order liquidation instructions unless enjoined from doing so. 19 U.S.C. § 1675(a)(3)(B)–(C); 19 U.S.C. § 1516a(c)(1). While the statute does not specify a time frame for liquidation itself, unless enjoined, entries subject to an antidumping duty administrative review that remain unliquidated on the six-month anniversary of the Federal Register publication date are deemed liquidated at the rate asserted at the time of entry. *Int'l Trading Co. v. United States*, 412 F. 3d 1303, 1313 (Fed. Cir. 2005). Accordingly, Commerce developed the 15 Day Policy to facilitate timely liquidations.

Commerce also argues that the affected parties bear the burden of enjoining liquidation, citing *Agro Dutch Indus. Ltd. v. United States*, 29 CIT ___ , 358 F. Supp. 2d 1293, 1295–96 (2005).[27]

Faced with these competing claims, the court must begin its analysis by determining the degree of deference due to Commerce's statutory interpretation. *Timken Co. v. United States*, 26 CIT 1072, 1081, 240 F. Supp. 2d 1228, 1239 (2002) ("In the case of statutory in-

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[27] Subsequent to the publication in *Agro Dutch*, the case was dismissed for lack of jurisdiction due to the absence of unliquidated entries, and a motion for reconsideration was denied. *Agro Dutch Indus. Ltd. v. United States*, 29 CIT ____ , Slip Op. 05–28 (Feb. 28, 2005). That judgment was reversed and remanded by the Federal Circuit in an unpublished decision. *Agro Dutch Indus. Ltd. v. United States*, 167 Fed. Appx. 202 (2006). The Federal Circuit did not address the holding in the initial *Agro Dutch* case, that plaintiffs are burdened with enjoining liquidation, and that 19 U.S.C. § 1516a(a)(2)(A)(i)(I) does not establish a minimum liquidation period.

terpretations by agencies . . . judicial review must take place within the confines of either *Chevron* or *Skidmore* deference.") *Chevron* deference should be accorded to agency actions when the statute has failed to speak on an issue and the agency advances an interpretation through formal channels. *Chevron*, 467 U.S. at 842–45.

As noted above, however, in the matter at issue here, Commerce did not issue its 15 Day Policy through formal notice-and-comment rulemaking procedures. Nor did it do so in the course of the administrative review or after formal briefing and deliberations. *Cf. Mittal Steel Galati*, 31 CIT at ___, Slip Op. 2007–73 at 11 ("In this case though, Plaintiff challenged Commerce's liquidation instruction policy during the administrative review, and Commerce squarely addressed Plaintiff's claim in the *Decision Memorandum*.").

Instead, Commerce posted the 15 Day Policy on its website and restated the 15 Day Policy in final decisions published in the Federal Register. In the months and years preceding the announcement of the 15 Day Policy, there was no announcement in the Federal Register stating that this policy was under consideration, or providing for the opportunity for comment. These informal means of establishing policy, albeit in interpreting statutory ambiguity, do not warrant *Chevron* deference. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (describing the informalities of the administrative procedure used in issuing Customs classification rulings such that these rulings are "best treated like interpretations contained in policy statements, agency manuals, and enforcement guidelines, . . . beyond the *Chevron* pale.") (internal quotations omitted); *U.S. Steel Group v. United States*, 25 CIT 1046, 1051, 162 F. Supp. 2d 676, 682 (2001). Accordingly, the agency's interpretations are "entitled to respect . . . but only to the extent that those interpretations have the power to persuade." *Christensen v. Harris County*, 529 U.S. at 587 (citations omitted).

In order to assess whether Commerce's policy is a persuasive interpretation of the statute, the relevant statutory framework must be defined. The 15 Day Policy could be a reasonable and persuasive means of closing the statutory gap in 19 U.S.C. § 1675(a)(3)(B)–(C) if the policy is in accordance with the statute, consistent with legislative intent, has been properly announced, and is based on the agency's particular expertise. *See Mead*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . . . ").

While Mittal argues that the relevant statutory framework for the 15 Day Policy includes both 19 U.S.C. § 1675(a)(3) and 19 U.S.C. § 1516a(2)(A), the court in *Mukand*, as noted above, foundthe 15 Day Policy to be a reasonable and acceptable means of statutory gap-

filling by Commerce. *Mukand*, 30 CIT at ___ , 452 F. Supp. 2d at 1333–34; *see also Mittal Steel Galati*, 31 CIT ___ , Slip Op. 2007–73 at 14. In *Mukand*, the court explained that 19 U.S.C. § 1675(a)(3) creates obligations for Commerce and Customs regarding the liquidation of entries that inform the analysis of Commerce's 15 Day Policy. *Mukand*, 30 CIT at ___ , 452 F. Supp. 2d at 1334.

This court agrees with the statutory analysis in *Mukand* and *Mittal*. The scope of 19 U.S.C. § 1516a covers the actions of interested parties, and of the courts reviewing Commerce's completed antidumping administrative reviews. Thus, 19 U.S.C. § 1516a(2)(A) does not prohibit Commerce's action, and Commerce may, but is not required to heed 19 U.S.C. § 1516a in interpreting 19 U.S.C. § 1675(a)(3). Therefore, the relevant statutory framework for analyzing the 15 Day Policy is 19 U.S.C. § 1675(a)(3). *See Turtle Island Restoration Network v. Evans*, 284 F. 3d 1282, 1292 (Fed. Cir. 2002) (declining to invoke the doctrineof *in pari materia* in statutory interpretation).

Moreover, Customs cannot liquidate promptly if Commerce does not issue the instructions in a timely manner. While it is on the outer boundary of reasonableness, the 15 Day Policy encourages prompt liquidation and is therefore consistent with the statutory intent.

Additionally, the intent behind the antidumping statutory framework was to create a more transparent antidumping review procedure and to further the protection of parties' rights through heightened due process. *H.R. Rep. No. 103–826(I)*, at 13 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3773, 3785. The 15 Day Policy increases transparency by informing affected parties of Commerce's anticipated timetable for transmitting liquidation instructions to Customs. Commerce also aids due process through the 15 Day Policy by encouraging affected parties to exercise their rights of judicial review in a timely manner. *See* 19 U.S.C. § 1516a(2)(A). Thus, the 15 Day Policy advances this legislative intent.

Commerce also announced the 15 Day Policy properly and has consistently provided appropriate notice of its intended application. Commerce has regularly restated the 15 Day Policy in either the "Assessment" or "Final Results" published in the Federal Register. In the matter at issue here, Commerce gave Plaintiff explicit notice of its intent to apply the policy. *Final Results*, 70 Fed. Reg. at 12,653. Moreover, Commerce's 15 Day Policy had been in place for over two years at the time that Commerce announced that the 15 Day Policy would be applied to Plaintiff in this case. As such, for purposes of addressing Plaintiff's facial challenge, it does not offend notions of administrative fairness that Plaintiff's goods were liquidated prior to the combined 60–day time period for commencement of an action provided by section 1516a, and prior to the issuance of a preliminary injunction. *Cf. Mukand*, 30 CIT at ___ , 452 F. Supp. 2d at 1333

(finding that, as the actual liquidation took place 75 days after the publication of the results, plaintiffs were not harmed in their ability to protect their interests).

Plaintiff claims that it was harmed, in this instance, because it was in the midst of negotiating a preliminary injunction with Commerce when the liquidation instructions were issued. Assuming that Plaintiff's description is accurate, Commerce's behavior is hardly commendable; nonetheless, this fact does not affect the court's analysis of a facial challenge to the 15 Day Policy. Mittal was aware of Commerce's Policy and of Commerce's intention to apply it. Mittal had other means to protect its interests, including applying for a Temporary Restraining Order, or applying for an injunction immediately without Commerce's consent. *Cf. Mukand*, Appeal Number 2006–1259 (writ of mandamus not granted when parties failed to protect their own interest through pursuit of injunctive relief).[28]

Finally, in adopting its 15 Day Policy, Commerce is acting in an area in which it has substantial expertise. *See Pesquera Mares Australes Ltda. v. United States*, 266 F. 3d 1372, 1379 (Fed. Cir. 2001) ("Antidumping investigations are complex and complicated matters in which Commerce has particular expertise and thus Commerce's determinations are entitled to deference.") (internal quotation omitted). While, as noted above, Commerce's 15 Day Policy was adopted informally, outside of the administrative review at issue, and is therefore not accorded *Chevron* deference, its action was within Commerce's area of particular expertise and statutory authority.

Accordingly, Commerce's 15 Day Policy advances a reasonable and – albeit not compellingly – persuasive interpretation of 19 U.S.C. § 1675(a)(3)(B)–(C). The 15 Day Policy fills the statutory gap in a manner consistant with the statute's language and the legislative intent. Commerce announced the policy adequately, and based on its own, special expertise.

It is certainly true that a longer period – for issuance of instructions and initiating liquidation by Customs – would be more indicative of Commerce's consideration of all the factors and interests involved in the adoption of its 15 Day Policy. A 15 day policy for the issuance of instructions, with, for example, an instruction to Customs that no liquidation should occur for another 15 days, would be more persuasive and would be more likely to make unnecessary the

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[28] While Mittal argues for relief in the nature of an injunction directing Commerce and Customs to reverse the liquidation of Mittal's entries, its filings are devoid of the kind of presentation necessary for such relief. *Cf. Canadian Lumber Trade Alliance v. United States*, 30 CIT ____ , 441 F. Supp. 2d 1259, 1263–64 (2006). Accordingly, the court need not decide whether Commerce and Customs in this case acted "so quickly" by liquidating the relevant entries as "to practically foreclose" Mittal "from obtaining judicial review of subject entries pursuant to 19 U.S.C. § 1516a." *Mittal Steel Galati*, 30 CIT at ____ , Slip Op. 07–73 at 14–15.

kind of Temporary Restraining Order practice that Commerce's chosen policy may engender. Nonetheless, the court cannot conclude that Commerce's policy is unworthy of *Skidmore* deference. Accordingly, Mittal's challenge fails and the court will not order reliquidation.

Conclusion

For the foregoing reasons, the court **affirms-in-part and remands-in-part** Commerce's determinations, and **denies** Plaintiff's Motion for Judgment on the Agency Record. Remand results are due by October 1, 2007. Comments are due by October 22, 2007. Reply comments are due by November 1, 2007. SO ORDERED.