Slip Op. 09–53

ATAR, S.r.l., Plaintiff, v. **UNITED STATES**, Defendant, and **AMERICAN ITALIAN PASTA CO., DAKOTA GROWERS PASTA CO., AND NEW WORLD PASTA CO.,** Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 07–00086
PUBLIC*

[Affirming in part, and remanding in part, the final results issued by the United States Department of Commerce in an administrative review of an antidumping duty order on certain pasta from Italy]

Dated: June 5, 2009

Riggle & Craven (*David J. Craven*) for plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson,* Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*); *Deborah King,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Kelley Drye & Warren, LLP (*David C. Smith, Jr.* and *Paul C. Rosenthal*) for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge: Plaintiff Atar S.r.L. ("Atar"), an Italian producer and exporter of pasta products, contests the final results issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the ninth administrative review of an antidumping duty order on certain pasta from Italy. Atar challenges the Department's finding of a "particular market situation" and its resulting decision to use the "constructed value" provisions of the antidumping statute, rather than the "third

* With the consent of the parties, this public version is being issued without the redaction of any information contained in the confidential version of this Opinion and Order.

country sales" provisions, as the basis for determining the normal value of Atar's merchandise that was subject to the antidumping duty order and the review. In the alternative, Atar challenges certain decisions Commerce made in the constructed value calculation. Defendant and defendant-intervenors argue that these challenges lack merit and that the court should uphold the final results in their entirety. For the reasons discussed in this Opinion and Order, the court concludes that Commerce's decision to proceed under the constructed value provisions of the statute was lawful. However, the court also concludes that the Department's constructed value determinations are, in some respects, not in accordance with law. On remand, the court orders Commerce to reconsider, and redetermine as necessary, the constructed value of Atar's merchandise.

I. BACKGROUND

Commerce published the final results of the ninth administrative review ("Final Results") in February 2007. *Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7011 (Feb. 14, 2007) ("*Final Results*"). Plaintiff brought this action contesting the Final Results on March 7, 2007. Before the court is plaintiff's motion under USCIT Rule 56.2 for judgment upon the agency record.

Commerce initiated the ninth administrative review on August 29, 2005 and published preliminary results of the review ("Preliminary Results") on August 8, 2006. *See Notice of Prelim. Results and Partial Rescission of Antidumping Duty Admin. Review: Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 71 Fed. Reg. 45,017, 45,018 (Aug. 8, 2006) ("*Prelim. Results*"). The review covered two manufacturer/exporters, one of which was Atar, and pertained to entries of certain non-egg dry pasta[1] (the "subject merchandise") made during the period July 1, 2004 through June 30, 2005 ("period of review" or "POR"). *Id.*

Because Atar's sales of the foreign like product in its home market were less than five percent of the aggregate of the sales of Atar's subject merchandise to the United States during the period of review, Commerce found in the Preliminary Results that Atar did not have a viable home market for purposes of determining the normal value of Atar's subject merchandise that was sold in the United States during that period. *Id.* at 45,019; *see* 19 U.S.C. § 1677b(a)(1)(C) (2000). In response to this finding, Atar submitted information on its third-country selling activity in Angola, arguing that the Department

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[1] Imports covered by the order were shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients. *See Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7011, 7012 (Feb. 14, 2007).

should calculate normal value based on that activity. *See Issues and Decisions for the Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part* 2, 4 (Admin. R. Doc. No. 150) ("*Decision Mem.*").

Commerce determined in the review that a "particular market situation," within the meaning of that term as used in 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) and (a)(1)(C)(iii), prevented a proper comparison between Atar's selling activity in Angola and export price. Commerce explained its conclusion in an internal Issues and Decisions Memorandum ("Decision Memorandum") that it incorporated by reference in the Final Results. *See Final Results*, 72 Fed. Reg. at 7012. In the Decision Memorandum, Commerce stated a finding that Atar's selling activity in Angola during the period of review consisted of a single sale. *Decision Mem.* 7. Commerce further found that Atar did not have an established market in Angola for sales of the foreign like product during the period of review. *Id.* at 7–8. Additionally, Commerce found that significant differences existed between the terms and conditions of the sale in Angola and the sales made in the U.S. market that "would prevent a proper comparison even if an established market existed." *Id.*

The Final Results, published on February 14, 2007, assigned Atar a weighted-average antidumping duty margin of 18.18%. *Final Results*, 72 Fed. Reg. at 7012. The Final Results reflected Commerce's conclusion that Atar's sales in Angola could not properly serve as the basis for determining normal value because of the particular market situation that Commerce found to exist with respect to Atar's selling activity in the Angolan market. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) and (a)(1)(C)(iii). Having rejected Atar's proposal that Angola serve as a third country comparison market, Commerce resorted to constructed value. *Decision Mem.* 19; *see* Def.'s Mem. in Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. 16 ("Def.'s Br."). In so doing, when calculating Atar's constructed value indirect selling expense ("ISE") and constructed value profit rate, Commerce used the weighted average indirect selling expenses and profit rate of the six respondents (not including Atar) from the previous (eighth) period of review for sales occurring in the ordinary course of trade. *Decision Mem.* 15, 20. Also, the Department increased Atar's selling, general and administrative expenses to account for services provided to Atar by a shareholder who elected to forego compensation for those services. *Id.* at 24–26.

II. DISCUSSION

The court must uphold the Final Results unless they are unsupported by substantial evidence on the record or are otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). "Substantial evidence is more than a mere scintilla. It means such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Atar argues, first, that Commerce erred in refusing to determine normal value according to Atar's third country selling activity in Angola. Mot. for J. on the Agency R. Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of Int'l Trade 18–34 ("Pl.'s Br."). Contending that Commerce incorrectly found that a "particular market situation" prevented a proper price comparison of Atar's U.S. sales to its selling activity in Angola, Atar argues that a particular market situation analysis "can only be used in very limited circumstances where it is impossible to properly compare a respondent's U.S. sales with its sales in the comparison market." *Id.* at 2. According to Atar, "no legal basis for a finding of [a particular market situation] was established on the facts of record." *Id.*

Atar's second, and alternative, challenge to the Final Results is to Commerce's calculation of ISE and profit for use in the constructed value determination. *Id.* at 39–65. Atar claims that Commerce erred when, in performing the constructed value determination for Atar, it used the indirect selling expenses incurred, and the profits realized, on sales made in the ordinary course of trade by six respondent companies (other than Atar) in the previous (eighth) administrative review. Atar argues that in so doing, Commerce did not comply with the statutory requirement in 19 U.S.C. § 1677b(e)(2)(B)(iii) to calculate ISE and profit according to a "reasonable method." *Id.* at 39–65; 19 U.S.C. § 1677b(e)(2)(B)(iii).

Finally, Atar contends that Commerce acted unlawfully when, in determining constructed value, it included in the calculation of Atar's selling, general and administrative expenses an amount for the value of certain services rendered to Atar by its principal, a shareholder in the company who made a decision to forego salary. Pl.'s Br. 66–67. Atar argues that Commerce acted contrary to law in valuing those services based on the total amount of dividends paid by Atar to the principal. *Id.*

A. Commerce Acted Lawfully in Declining to Determine Normal Value Based on

Atar's Third Country Selling Activity Atar challenges Commerce's findings that Atar's selling activity in Angola constituted a single sale and that, for purposes of 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) and (a)(1)(C)(iii), a particular market situation existed with respect to that sale that prevented a proper comparison with export price. *See Final Results*, 72 Fed. Reg. at 7012. Atar argues that it actually made multiple sales in Angola, rather than one sale as the Department found. Pl.'s Br. 19–24. Atar argues, further, that the Department improperly concluded that a particular market situation existed and that what the Department considered to be significant differences between Atar's U.S. sales and Angolan sales were actu-

ally minor and insignificant. *Id.* at 2, 19–34. Next, Atar contends that Commerce lacked the legal authority to conduct a "particular market situation" analysis in the absence of a specific allegation by a party that a particular market situation existed. *Id.* at 34–37. Finally, Atar claims that even if the regulations permitted a particular market situation analysis in the absence of an allegation, Commerce's stated intention in the Preliminary Results to use such an analysis was not timely and did not allow Atar an adequate opportunity to register its opposition. *Id.* at 37–39. The court does not find merit in these arguments.

1. Commerce's Determination that a Single Sale Occurred Between Atar and Its Angolan Customer Is Supported by Substantial Record Evidence

In finding that Atar made only a single sale in the Angolan market during the period of review, Commerce relied on record evidence including an agreement ("Sale Agreement") setting forth certain terms for the sale of pasta by Atar to a single customer in Angola, dates of invoices, Atar's rebuttal comments submitted during the review, and a statement from an Atar employee. *See Decision Mem. 8; see also Resp. of Atar S.r.l. to Fourth Supplemental Antidumping Duty Questionnaire Ninth Admin. Review*, Ex. S–10 ("*Sale Agreement*")[2] (June 30, 2006) (Confidential Admin. R. Doc. No. 30; Admin. R. Doc. No. 93) ("*Atar's Fourth Supplemental Questionnaire Resp.*"); *Admin. Review of the Antidumping Duty Order on Certain Dry, Non-Egg Pasta from Italy: 07/01/04–06/30/05; Determination of Particular Market Situation; Resp. to Dep't of Commerce letter dated August 1, 2006* 12–16 (Aug. 25, 2006) (Confidential Admin. R. Doc. No. 44) ("*Atar's Confidential Resp.*"). From this record evidence, Commerce concluded that the material terms of sale were established by the Sale Agreement and that Atar's selling activity in Angola constituted a single sale with multiple shipments. *See Decision Mem.* 11.

Atar contends that the record demonstrates that Atar made multiple, distinct sales in Angola during the period of review rather than the one sale the Department found. Pl.'s Br. 19. Atar points to the invoice dates of its shipments, arguing that the Department, pursuant to 19 C.F.R. § 351.401(i) (2006), routinely uses the invoice date as the date of sale unless a different date better demonstrates the date on which the material terms of sale were established. Pl.'s Br. 19–20. According to Atar, each of the separate invoices, per 19 C.F.R. § 351.401(i), is record evidence of a separate sale because the invoices established material terms of sales. *Id.* at 20–22; *see* 19 C.F.R.

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[2] Although Atar claimed proprietary treatment for the existence of the agreement during the administrative proceeding, the company publicly discussed the agreement in its Rule 56.2 brief. *See* Mot. for J. on the Agency R. Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of Int'l Trade 21–22.

§ 351.401(i). Atar argues that the Sale Agreement was an informal preliminary agreement, not a binding sales contract. Pl.'s Br. 19–24. Atar submits that essential terms, such as port of destination, quantities, and production and shipment dates, were subject to change after the Sale Agreement was signed. *Id.* at 21–22. Atar argues that without a port of destination, the destination of the goods ("a key material term . . . not defined in the agreement") and the cost of shipping are not agreed upon. Reply to Resps. of Def. and Def.-Intervenor to Pl.'s Mot. for J. on the Agency R. Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of Int'l Trade 16 ("Pl.'s Reply"). Atar also argues that the Sale Agreement provides no penalty for non-delivery of product or other contractual violations and that the price paid in the actual currency of the transaction (U.S. dollars, rather than Euros) was not established until the invoice date. *Id.* at 17. Further, Atar argues that "[e]ach shipment [into Angola] required a separate import license tailored specifically to the prices and quantities reflected in the pro-forma invoice and not to the preliminary prices and quantities reflected in the memo of understanding," a fact that, along with the requirement for each shipment to have a separate pro-forma invoice, "supports the conclusion that the invoice date, rather than the date of the memorandum of understanding, is the date of sale." Pl.'s Br. 23.

The court is not convinced by plaintiff's argument that Commerce, on the record facts, was required by its regulation, 19 C.F.R. § 351.401(i), to regard each invoice as constituting a separate sale. The cited regulation provides that the Secretary of Commerce "normally" will use the date of invoice as the date of sale, but the regulation also qualifies the normal practice, stating that "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); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,349 (May 19, 1997) (the "*Preamble*") ("If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department *will use that alternative date as the date of sale*." (emphasis added)); *see also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Art. 2.4.1, n.8 (1994) (stating that "[n]ormally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale"). The pertinent question, therefore, is whether substantial evidence of record supports Commerce's finding that the Sale Agreement established the material terms of Atar's entire selling activity in Angola during the period of review. The court concludes that it does.

During the review, Commerce instructed that Atar report as its "date of sale" the date on which the material terms of sale were established. In its initial questionnaire responses, Atar did not disclose the existence of a sales agreement pertaining to its selling activity in Angola. *See Atar's Section A Questionnaire Resp.* 11 (Oct. 31, 2005) (Admin. R. Doc. No. 26) ("[A]ll sales in both markets were initiated by the customer's purchase order. . . . Atar then communicates the order to its unaffiliated tolling processors and . . . issues a commercial invoice to the customer."). Atar claimed during the review that the invoice date was the proper date of sale. *See Letter Regarding § 751 Admin. Review of the Antidumping Duty Order on Certain Dry, Non-Egg Pasta from Italy: 07/01/04–06/30/05* at 10 (Dec. 2, 2005) (Admin. R. Doc. No. 41) ("Invoice date has been used as the date of sale by Atar in each review as it represents the date that all material terms are fixed. . . . "). Atar disclosed the existence of the Sale Agreement only in response to questioning from the Department, which observed that the invoice date for Atar's first sale in Angola preceded the date on which Atar instructed its toll processor to produce pasta. Atar acknowledged that its submitted description of its sales practices in Angola "was not properly qualified" and explained that "Atar invoiced . . . pursuant to the prices agreed upon with the third party trading company in the price agreement, at the quantities ordered by phone. . . . " *Atar's Fourth Supplemental Questionnaire Resp.* 11. Atar went on to explain that "[p]rices and all relevant sales terms are contained in the agreement, attached as *Exhibit S–10*." *Id.* at 12. Commerce found that the Sale Agreement established the material terms of a sale and that the material terms so established did not change. *Decision Mem.* 12 (stating that there was "no documentary evidence that the terms [of the Sale Agreement] were subject to change, nor did the essential terms change in any way from those specified").

Commerce acts reasonably, and within its authority, in considering a sale or an agreement to sell to exist as of the time when the material terms of sale, *i.e.*, price and quantity, have been established between the foreign producer/exporter and the customer. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1376 (Fed. Cir. 2007) ("Neither a sale nor an agreement to sell occurs until there is mutual assent to the material terms (price and quantity)."). In this review, Commerce determined that the Sale Agreement, which was signed by Atar and dated by its Angolan customer, established price and quantity and thereby established the material terms of a sale by Atar to that customer. *Decision Mem.* 12. With regard to quantity, Commerce found that "[t]he quantity specified in the sales agreement is identical to the quantity invoiced and delivered." *Id.* The Department concluded that the price was established in the Sale Agreement because "[t]he record shows that the euro price established in the [Sale Agreement] is the controlling price. . . . This euro price does

not change [al]though foreign currency exchange rates may fluctuate from day to day." *Id.* at 13. Commerce noted that "Atar itself on several occasions referred to the terms of sale, as established in the agreement, as fixed." *Id.* (quoting the Atar submission stating that "[p]rices and all relevant sales terms are contained in the agreement, attached as Exhibit S–10 and are not typically reiterated by the parties").

On this record, the court is unable to agree with plaintiff that Commerce, having found that the Sale Agreement established the price and quantity terms of a sale, erred in concluding that other matters did not constitute essential terms. By Atar's own admission, "[p]rices and all relevant sales terms are contained in the agreement." *Atar's Fourth Supplemental Questionnaire Resp.* at 12. Atar argues that Commerce failed to consider a statement of an Atar official, submitted by Atar, attesting to a personal belief that the Sales Agreement "did not constitute a binding agreement to sell a fixed quantity of pasta at a fixed price." Pl.'s Br. 23–24. In considering the record evidence as a whole, Commerce was not required to accord controlling weight to this self-serving statement, which appears to offer a legal conclusion on whether the Sale Agreement is enforceable rather than inform Commerce of facts probative on the issue of whether the Sale Agreement established the material terms of sale. The court is also unconvinced by Atar's argument that the requirement for each shipment to be accompanied by a separate import license in Angola that is tied to a separate pro forma invoice supports the conclusion that the invoice date, rather than the date of the Sale Agreement, is the date of sale. *See id.* at 23. The pertinent determination is the date upon which the material terms of a sale of merchandise were settled between the parties. The existence of an import licensing requirement in Angola that applies to each separate shipment and invoice does not refute the substantial record evidence that the Sale Agreement settled these terms.

In summary, the court concludes, based on its examination of the record evidence, including the Sale Agreement and Atar's own admission in communications with the Department during the review, that substantial evidence supports Commerce's findings that the material terms of sale were established by the Sale Agreement and that Atar's selling activity in Angola during the review consisted of a single sale.

2. Commerce's Determination that Atar's Angolan Selling Activity Should Not Be Compared to Atar's U.S. Sales Due to a Particular Market Situation Is Supported by Substantial Record Evidence

The court next considers Atar's claim that the record does not support Commerce's determination that a "particular market situation" existed under which Commerce could not make a proper comparison between Atar's selling activity in Angola and Atar's U.S. sales. The

term "particular market situation" is not defined by the statute, Commerce's regulations, or the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) and (a)(1)(C)(iii); 19 C.F.R. § 351.404(c)(2)(i) (2006); Uruguay Round Agreements Act Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. Under the language in the statute, Commerce has considerable discretion in determining whether a particular market situation in a third country prevents a proper comparison with export price or constructed export price. Nevertheless, the court must consider whether such a determination is supported by substantial record evidence and is otherwise in accordance with law. In so doing, it must consider whether the determination is based on "[a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Commerce based its determination on several findings. The Department found that the sale Atar made during the POR in Angola constituted a low percentage of the aggregate volume of Atar's U.S. sales for the POR. *See Ninth Admin. Review of Pasta from Italy - Determination of Particular Market Situation* 2 (Aug. 1, 2006) (Confidential Admin. R. Doc. No. 40; Admin. R. Doc. No. 106) ("*Particular Market Situation Mem.*"). Finding according to record evidence that Atar did not make any sales of the foreign like product in Angola *prior* to the period of review, the agency found that Atar did not have an established market in Angola *during* the period of review, during which only the single sale occurred. *Id.* (concluding, in the absence of other sales of pasta, that "there is no reason to believe that a single sale of pasta would be indicative of an established market"); *see Decision Mem.* 10. In concluding that Atar lacked an established market in Angola during the period of review, the Department also considered evidence consisting of four invoices that Atar placed on the record pertaining to selling activity in Angola *after* the POR. *Decision Mem.* 11. Commerce concluded that these invoices, although speaking to the development of a market over time, were not evidence of an established market prior to the sales represented by the four invoices. Commerce reasoned as follows:

> [W]e note that Atar has placed four invoices on the record of this review as evidence of subsequent sales. Atar did not provide the Department with any sales agreement relating to any of these four subsequent shipments. Consequently, the Department cannot determine whether these four invoices constitute one or more sales, as evidence on the record of this review indicates that multiple invoices may be generated for a single sale. Because the record evidence regarding these subsequent transactions is scant and inconclusive, the Department does not find that the record evidence with respect to subsequent sales pro-

> vides sufficient support for a finding that during the POR Atar had an established market in Angola for the foreign like product.

Decision Mem. 11. The Department found, further, that the particular structure of Atar's sale in Angola prevented a proper comparison with Atar's sales in the United States in that Atar's sales of pasta in Angola, unlike the company's U.S. sales, were made through a "triangular" selling arrangement; *i.e.*, a Lebanese company ordered pasta from Atar on behalf on the Angolan customer. *Particular Market Situation Mem.* 3; *see also* Def.'s Br. 5 (citing *Letter Regarding § 751 Admin. Review of the Antidumping Duty Order on Certain Dry, Non-Egg Pasta from Italy: 07/01/04–06/30/05* at 8–9 (Dec. 1, 2005) ("*Atar's Dec. 1, 2005 Rebuttal Comments*") (Confidential Admin. R. Doc. No. 5)). Atar issued invoices to, and received payment from, the Lebanese company but shipped its pasta to the Angolan customer. *See Particular Market Situation Mem.* 3; *see also* Def.'s Br. 5 (citing *Atar's Dec. 1, 2005 Rebuttal Comments* 8–9).

Atar argues, unpersuasively, that the appropriate test for whether an established market exists is whether a market was established for the foreign like product, not whether a market was established for a foreign like product sold by Atar. Pl.'s Br. 24–25. Because the relevant issue was whether Atar's presence in the Angolan market was appropriate to serve as a comparison market for Atar's U.S. sales, it was reasonable for Commerce to consider Atar's own market experience in Angola. Commerce logically considered the evidence Atar submitted to be, on the whole, insufficiently probative on the question of whether a market existed for Atar's products in Angola. *Decision Mem.* 9–10 (noting that Atar's evidence consisted of "invoices of pasta and other products which Atar did not produce" and that "pet food and corn meal are not within the definition of foreign like product in this case"). Commerce also found, based on the record evidence, that "the vast majority of invoices" submitted by Atar consisted of sales to markets in Africa *other than* Angola, including Togo, Congo, Kenya, and Somalia. *Id.* at 9.

In its brief to the court, Atar argues that the differences between the U.S. markets and the Angolan markets were either formalistic or of a type that Commerce could address adequately by calculating artificial additional costs for ordinary operations. Pl.'s Br. 30–33. The court rejects this argument because substantial record evidence supports Commerce's finding that Atar's sales to the United States and Atar's sale to Angola differed in material respects. *See Decision Mem.* 11. Those differences included direct versus indirect sales; differences in product mix; differences in the timing and sequencing of sale, order, production, invoicing, and shipment; and significant differences in the average payment date. *Id.*

The Department took the position that it could adjust for "common differences in terms of sales where such differences are quantifiable." *Id.* It stated, however, that "we have no accurate means through which to measure the effect on price of other, much more unusual differences, *e.g.*, the significant difference in the timing and manner in which order, production, invoicing, shipment and payment occur." *Id.* The Department viewed the triangular sale arrangement affecting Atar's sale to Angola as distinguishable from the arrangement of Atar's sales in the United States; based on Atar's verification statements, Commerce found that title and ownership of pasta were transferred to the trading company at the time of invoicing, making it unclear whether Atar ever held title to the finished pasta it allegedly sold. *Id.* As Commerce pointed out, Atar itself acknowledged at various points in the process that its sale to Angola was unique and admitted that the manner in which it sold to Angola "is in strict contrast to the U.S. market for which no special import licenses are required, no pro-forma invoices are necessary." *Id.* at 12 (quoting Atar in submissions in which the company commented that "[t]he Angolan sales and invoicing process is *significantly different*" and referred to "*unique* requirements for selling product to Angola," the "*unique* nature of the Angolan market," and the "*unique* nature of the triangular sales arrangement." (emphasis in *Decision Mem.*)). Based on the record evidence and the analysis set forth in the Decision Memorandum, the court concludes that Commerce reasonably determined that it could not make a proper comparison between these different types of sales, even through the use of adjustments.

Citing *Chemetals, Inc. v. United States*, 25 CIT 232, 138 F. Supp. 2d 1338 (2001), Atar claims that Commerce should have concluded that Atar's selling activity in Angola did not present a particular market situation. Pl.'s Br. 27–28. Atar points to language in the opinion in that case stating that "even a single entry of subject merchandise is sufficient where such an entry is indicative of the respondent's regular pricing practices." *Id.* 27 (quoting *Chemetals*, 25 CIT at 242, 138 F. Supp. 2d at 1350). The language from *Chemetals* relied on by Atar is not on point. The opinion in *Chemetals* expressly uses the reference to a possible single sale to illustrate the principle that "the statute sets no minimum quantity of *U.S. sales* that may be used in making the direct comparison to home market sales." *Chemetals*, 25 CIT at 242, 138 F. Supp. 2d at 1350 (emphasis added).

In summary, the court concludes that Commerce's decision not to use Atar's third country selling activity in Angola for purposes of determining normal value, based on a finding of a particular market situation affecting that selling activity, is supported by substantial record evidence and is also supported by a rational explanation for the choice Commerce made.

3. Commerce Did Not Err in Proceeding with a "Particular Market Situation" Analysis Without an Allegation

Commerce considered, and decided, whether Atar's proposed third-country comparison market was affected by a particular market situation without first having received from a party to the review an allegation that a particular market situation existed. Atar objects to Commerce's proceeding with its analysis in the absence of such an allegation. Pl.'s Reply 10. Atar directs the court's attention to certain language in the preamble accompanying the promulgation of the Department's regulations (the "Preamble"), which states, "[t]here are a variety of analyses called for . . . that the Department typically does not engage in *unless it receives a timely and adequately substantiated allegation from a party*." Pl.'s Br. 34–35 (quoting *Preamble*, 62 Fed. Reg. at 27,357) (emphasis in Pl.'s Br.). Atar argues further that, if Commerce proceeds without an allegation, it "must provide a substitute for the allegation," and the substitute "must fall within the time lines contemplated by the statute and regulation." Pl.'s Reply 10–11. Atar claims, in addition, that by proceeding as it did, Commerce left Atar no effective way to address the issues involving the comparison market that Atar proposed. *Id.* at 10.

The general shortcoming in plaintiff's argument is that neither the statute nor the regulations prohibit Commerce from determining, even absent an allegation, that a third-country market is affected by a particular market situation. Moreover, the Preamble language, in stating that Commerce "typically" proceeds only upon a timely allegation, does not state or imply that Commerce intended to confine its own discretion such that it could not act *sua sponte*. *See Preamble*, 62 Fed. Reg. at 27,357. Nor do the statute or regulations require Commerce to provide a "substitute" for such an allegation. Atar's argument that, absent an allegation, it has no effective opportunity to respond hinges on certain provisions in Commerce's regulations, namely 19 C.F.R. §§ 351.404 and 351.301(d)(1) (2006). *See* Pl.'s Br. 34–39. Under these provisions, allegations regarding market viability generally, and specific allegations regarding the existence of a particular market situation in the exporting country or a third country, must be made according to specified time limits. *See* 19 C.F.R. § 351.404(d) (requiring that allegations involving a particular market situation be made in accordance with § 351.301(d)(1)); 19 C.F.R. § 351.301(d)(1) (requiring that the allegation be made within forty days of the transmission of the initial questionnaire unless the Secretary alters this time limit). Atar argues that allegations regarding a particular market situation "must" be submitted within forty days of the transmission of the initial questionnaire, as required by 19 C.F.R. § 351.301(d)(1), and that "[t]his regulation is as binding on Commerce as it is to parties to the

proceeding." Pl.'s Reply 12. This argument ignores the purpose of 19 C.F.R. § 351.301, which is to govern time limits for submission of factual information *from interested parties*; the section does not address the question of a time limit when the particular market situation analysis originates with Commerce. *See* 19 C.F.R. § 351.301(a) ("The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding. This section sets forth the time limits for submitting such factual information. . . . ").

The record does not support Atar's contention that it was denied an effective opportunity during the review to address the question of whether its proposed comparison market in Angola was affected by a particular market situation. Commerce announced its finding of a particular market situation in the Preliminary Results. *See Prelim. Results*, 71 Fed. Reg. at 45,020. Atar argues that its opportunity to submit arguments on the preliminary determination was "meaningless" because Commerce did not make its final particular market situation determination until it issued the Final Results, thereby "effectively depriv[ing Atar] of the opportunity to comment on the actual logic of Commerce in making the [particular market situation] determination." Pl.'s Reply 11 (footnote omitted). Atar itself acknowledges, however, that a primary item of information that triggered Commerce's particular market situation analysis–the Sale Agreement–was not filed until late in the proceedings. *See id.* at 13, n.5. Also, neither the statute nor the Department's regulations require Commerce to provide a party the opportunity to comment on a particular market situation analysis prior to issuing the Preliminary Results. *See Preamble*, 62 Fed. Reg. at 27,357 ("[T]he Department's [antidumping] methodology contains presumptions that certain provisions of section [1677b] do not apply unless adequately alleged by a party or unless the Department uncovers relevant information on its own."); *see also* 19 U.S.C. § 1677m(g) (2000) (entitling a respondent to comment on all information in the record prior to the Final Results). Atar in fact submitted comments and information in response to the particular market situation finding by Commerce and submitted additional comments in its case brief to the agency. *See Atar's Confidential Resp.* 1; *Case Br. of Atar Srl Ninth Admin. Review* 4–46 (Dec. 28, 2006) ("*Atar's Admin. Case Br.*") (Confidential Admin. R. Doc. No. 56). For these reasons, the court does not find merit in Atar's arguments concerning the lack of an allegation, the lack of a "substitute" for an allegation, and the alleged lack of an opportunity to comment on the analysis by which the Department concluded that a particular market situation affected Atar's proposed comparison market.

B. The Court Remands the Final Results for Reconsideration of the Department's Determinations of Constructed Value ISE and Profit

The court is remanding the Final Results to the Department for reconsideration, and redetermination as necessary, of its determinations of Atar's constructed value ISE and profit, which are not supported by adequate reasoning. Although concluding that certain of the decisions Commerce made in making these determinations were in accordance with law, the court concludes that these determinations, considered as a whole, do not meet the statutory requirement expressed in 19 U.S.C. § 1677b(e)(2)(B)(iii) that constructed value ISE and profit be determined according to a "reasonable method."

The constructed value of the merchandise of a respondent producer or exporter usually is calculated as the sum of (1) the cost of materials and processing used in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business; (2) the actual selling, general, and administrative expenses incurred by the producer or exporter, and actual profits realized by the producer or exporter, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; and (3) the costs of all containers and coverings and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States. 19 U.S.C. § 1677b(e)(1), (e)(2)(A), (e)(3). The Department calculated a constructed value for Atar's ISE and profit ratios by using the weighted-average indirect selling expenses and a weighted-average profit rate derived from the home market data of six respondent companies in the previous (eighth) administrative review ("Final Results 8th Review").[3] *See Decision Mem.* 20–23 (citing *Notice of Final Results of the Eighth Admin. Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part*, 70 Fed. Reg. 71,464 (Nov. 29, 2005)). Commerce confined its calculations to data pertaining to sales of those six respondents that were in the ordinary course of trade.

In calculating a constructed value for Atar's subject merchandise, the Department determined that it could not proceed under 19 U.S.C. § 1677b(e)(2)(A) because Atar lacked a viable comparison market. *Id.* at 19. Commerce explained that because it had rejected the use of Atar's selling activity in Angola as a comparison market, it could not rely on the actual ISE incurred, and profit realized, in the

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[3] The six respondent companies are Barilla G.e.R. Fratelli, S.p.A. (formerly Barilla Alimentare, S.p.A.), (2) Corticella/Combattenti, (3) Industrie Alimentare Colavita, S.p.A., (4) Pastificio F.lli Pagani S.p.A., (5) Pastificio Antonio Pallante S.r.L. and its affiliate Vitelli Foods LLC, and (6) Pastificio Riscossa F.lli Mastromauro, S.r.L. *Issues and Decisions for the Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part* 15, n.5 (Admin. R. Doc. No. 150).

single sale in Angola when determining Atar's constructed value ISE and profit. *Id.* Accordingly, Commerce considered each of the three alternatives in § 1677b(e)(2)(B)(i)–(iii).

Commerce determined that it could not proceed under alternatives (i) and (ii), and calculated constructed value profit and ISE for Atar under alternative (iii), of § 1677b(e)(2)(B). Commerce disregarded alternative (i) because Atar did not produce any products other than the subject merchandise. *Id.* at 20. Alternative (ii), Commerce concluded, was unavailable because the use of data of the only other respondent in the review, Corticella, would "reveal the business-proprietary nature of that information," Corticella having failed to provide publicly ranged sales and cost data. *Id.* at 19–20. Accordingly, the agency proceeded under alternative (iii), which permits the Department to use "any other reasonable method," subject to the "profit cap" limitation on the determination of constructed value profit. 19 U.S.C. § 1677b(e)(2)(B)(iii). Commerce reasoned that, in accordance with the strong preference in § 1677b(e)(2)(B)(i)–(iii) for the calculation of constructed value profit using data on sales in the home country market, Commerce would use the profit and ISE data from six Italian producers' home market sales from the Final Results 8th Review. *Decision Mem.* 20. Commerce described its methodology as similar to that set forth in alternative (ii), "the only difference being that the methodology used is based on respondents of the preceding review rather than respondents of the current review." *Id.*

1. Commerce Acted Lawfully in Deciding Not to Use Atar's Profit and ISE Data from Selling Activity in Angola in Determining Constructed Value

Atar argues that, even if the court upholds Commerce's finding of a particular market situation, the court should conclude that Commerce erred in not using data on Atar's own profit and ISE for its sales activity in Angola when calculating the constructed value of Atar's merchandise. Pl.'s Br. 42–47 (citing 19 U.S.C. § 1677b(a)(4) and 19 U.S.C. § 1677b(a)(1)(B)(ii)). According to Atar, Commerce could have used the method of 19 U.S.C. § 1677b(e)(2)(A) because that provision directs Commerce to determine constructed value ISE and profit based on the exporter's sales of the foreign like product, in the foreign country, that are made in the ordinary course of trade. *Id.* at 44 ("Section [1677b(e)(2)(A)] does not prevent Commerce from using a producer/exporter's actual experience merely because the market may not be 'viable.' "). Atar argues that a finding of a particular market situation does not mean that the sales are not made in the ordinary course of trade for purposes of 19 U.S.C. § 1677b(e)(2)(A).

Although Atar does not so state, the court understands Atar's argument to rely on 19 C.F.R. § 351.405 (2006). In this regulation, which construes 19 U.S.C. § 1677b(e)(2)(A) and (e)(2)(B), Commerce

addresses the constructed value calculation and "clarifies" the meaning of certain terms relating to constructed value. *See* 19 C.F.R. § 351.405. Commerce's regulation defines the same statutory term, "foreign country," to include a third country for purposes of 19 U.S.C. § 1677b(e)(2)(A) but not for purposes of 19 U.S.C. § 1677b(e)(2)(B). *See id.* § 351.405(b) (referencing 19 C.F.R. § 351.404(e), which addresses criteria for the selection of a third country for purposes of calculating normal value). In *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 32 CIT ___ , ___ , 572 F. Supp. 2d 1353, 1370–71 n.4 (2008) ("*Thai I-Mei II*"), the validity of 19 C.F.R. § 351.405 was questioned. The opinion noted that Commerce, when promulgating this regulation, rejected the position of commenting parties that Commerce, impermissibly and contrary to established principles of statutory construction, was attempting to adopt inconsistent definitions of the same statutory term as that term appeared in the two subparagraphs of 19 U.S.C. § 1677b(e)(2). *Thai I-Mei II*, 32 CIT at ___ , 572 F. Supp. 2d at 1370–71 n.4 (citing *Preamble*, 62 Fed. Reg. at 27,358). However, even if the court were to assume, for purposes of this case, that the regulation is valid and would have enabled Commerce to apply § 1677b(e)(2)(A) on this record, the court still could not conclude that Commerce acted unlawfully in declining to proceed in the way plaintiff advocates. Commerce found that the particular market situation that existed with respect to Atar's sale in Angola prevented a proper comparison between Atar's selling activity in Angola and its selling activity in the United States. Commerce decided against relying on Atar's ISE and profit for Angola because doing so would result in constructing an Angolan price, which the agency concluded would not provide a proper basis for comparison. *Decision Mem.* 19 ("Since price is equal to cost plus profit, to base [constructed value] profit on the sale to Angola in effect would result in us [*sic*] constructing the Angolan sale price. As a result, we cannot determine [constructed value] ISE and profit under section [1677b(e)(2)(A)] (the preferred method), which requires comparison market sales by the respondent to be used as the basis for ISE and profit."). The Department's decision not to use Atar's selling activity in Angola as the source of data for determining constructed value ISE and profit rested on the several findings regarding Atar's sale to Angola that supported Commerce's ultimate finding of a particular market situation. As discussed previously, the administrative record contains substantial evidence supporting those findings. Regardless of whether Commerce validly *could* have used the ISE and profit data from the sale in Angola in its constructed value determination, the court is unable to conclude that Commerce was *required* to do so.

2. Commerce Acted Lawfully in Deciding Not to Use the Corticella Data

Having concluded that determining constructed value ISE and profit for Atar according to 19 U.S.C. § 1677b(e)(2)(A) was inappropriate for this review, Commerce determined these elements of constructed value according to § 1677b(e)(2)(B). Commerce was correct in its conclusion, not challenged by Atar in this litigation, that alternative (i) of § 1677b(e)(2)(B) was unavailable because Atar did not produce any merchandise other than the subject merchandise. 19 U.S.C. § 1677b(e)(2)(B)(i). Atar challenges Commerce's decision not to resort to alternative (ii) and specifically takes issue with Commerce's reasoning that reliance on the submitted information of Corticella, the only other respondent in the current review, "would reveal the business-proprietary nature of that information." *Decision Mem.* 20. According to Atar, Corticella's data were the "perfect surrogate," and the problem Commerce identified–that use of the data would reveal Corticella's confidential information in the absence of a publicly ranged version–should not have prevented Commerce from using those data. Pl.'s Br. 64–65. Atar argues that it was unfairly punished for Corticella's failure to produce its publicly ranged data pursuant 19 C.F.R. § 351.304(c) (2006). *Id.* at 49.

This Court, in analogous circumstances involving data of a single respondent, previously has affirmed Commerce's refusal to rely on business proprietary selling expense data and profit under alternative (ii) where use of such data would reveal that business proprietary information. *Geum Poong Corp. v. United States*, 25 CIT 1089, 1092, 163 F. Supp. 2d 669, 674 (2001) ("*Geum Poong I*") ("Because calculating [constructed value] profit under Alternative Two . . . would result in a [constructed value] profit ratio that impermissibly revealed Samyang's proprietary profit ratio, Commerce properly determined that Alternative Two was unavailable."). In this case, Commerce acted reasonably and in accordance with law in declining to proceed under 19 U.S.C. § 1677b(e)(2)(B)(ii) because of its concern over the business-proprietary nature of Corticella's information. As Commerce pointed out, statutory and regulatory restrictions apply to the dissemination of a respondent's business proprietary information. *See* 19 U.S.C. § 1677f(b)–(c) (2006); 19 C.F.R. § 351.306(a) (2006); *see* Def.'s Br. 37 ("Congress strictly limits Commerce's release of a respondent's business proprietary information to individuals subject to an administrative protective order, employees of Commerce connected with a given review, and employees of Customs and Border Protection in connection with a Customs fraud investigation."). In the absence from the record of a nonproprietary version of the Corticella data, Commerce had a valid reason for rejecting alternative (ii) as a basis for determining constructed value ISE and profit.

Atar's argument that it was unfairly punished by Corticella's failure to place on the record a nonproprietary version of its data relies on Commerce's regulation, 19 C.F.R. § 351.304(c), which addresses the filing of a public version of a business proprietary submission. This regulation requires that public versions of documents containing nonproprietary summaries of proprietary information, or an explanation of why proprietary information cannot be summarized, be filed one business day after the due date of the business proprietary version of the document. 19 C.F.R. § 351.304(c). Although Corticella did not submit a nonproprietary version, Commerce apparently did not reject that company's data. The reason why a nonproprietary version of Corticella's data was absent from the record is irrelevant to the narrow issue presented by Commerce's choice to decline to proceed under alternative (ii). The relevant finding by Commerce is that a nonproprietary version of Corticella's data was not on the record. Atar's argument that it was unfairly punished by Corticella's failure to submit a nonproprietary version of the data is, therefore, unavailing.

3. The Court Cannot Sustain the Department's Decision to Exclude Sales Outside the Ordinary Course from the Constructed Value ISE and Profit Calculations Under Alternative (iii)

Atar argues that Commerce, when calculating constructed value ISE and constructed value profit under alternative (iii), erred in using a method that excluded the home market sales of the Final Results 8th Review respondents that were outside the ordinary course of trade.[4] Pl.'s Br. 63–64. Stating that alternative (iii) "does not provide for an exclusion of sales outside of the ordinary course of trade," Atar argues that this exclusion was not reasonable. *Id.* at 64. Defendant argues that Commerce properly excluded the sales that were outside the ordinary course of trade out of a desire to model its methodology upon alternative (ii) and that doing so was within its discretion, under alternative (iii), to use "any other reasonable method." *See* Def.'s Br. 32. Defendant-intervenors argue that Commerce properly excluded such sales out of a desire to simulate the "preferred

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[4] The term "ordinary course of trade" is defined in the Tariff Act as:

> the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
>
> (A) Sales disregarded under section 1677b(b)(1) of this title [which section refers to below-cost sales].
>
> (B) Transactions disregarded under section 1677b(f)(2) of this title [which section refers to certain transactions between affiliated parties].

19 U.S.C. § 1677(15) (2000).

method" of 19 U.S.C. § 1677b(e)(2)(A). *See* Resp. Br. of Def.-Intervenors Am. Italian Pasta Co., New World Pasta Co., and Dakota Growers Pasta Co. 29, 32 ("Def.-Intervenors' Br.").

An agency generally is required to base a determination on "[a] rational connection between the facts found and the choice made." *Burlington Truck Lines*, 371 U.S. at 168. In addition, the SAA indicates that Commerce, when choosing a method under alternative (iii), must " 'provide to interested parties a description of the method chosen and an explanation of why it was selected.' " *Geum Poong Corp. v. United States*, 26 CIT 322, 323 n.2, 193 F. Supp. 2d 1363, 1365 n.2 (2002) (quoting SAA at 840, *as reprinted in* 1994 U.S.C. C.A.N. at 4176). Accordingly, the court considers the reasoning Commerce put forth in support of its decision to exclude non-ordinary-course sales from the calculation of Atar's constructed value ISE and profit.

The Decision Memorandum explains that "we note that the Department's preference under alternative (B)(iii) is to closely simulate the preferred method[,] which requires that the sales of the foreign like product be in the ordinary course of trade. Therefore, in accordance with the preferred method, we have only included the respondents' above-cost sales in the *Final Results 8th Review*." *Decision Mem.* 22. In using the term "preferred method," the Decision Memorandum refers to the method of § 1677b(e)(2)(A). *Id.* at 19. That method requires Commerce to use in the constructed value calculation the actual selling expenses incurred (such as ISE), and the actual profit realized, on sales of the foreign like product in the foreign market that are made in the ordinary course of trade by the exporter or producer being examined in the review. The Decision Memorandum discloses that Commerce, relying on the "ordinary course" language in 19 U.S.C. § 1677b(e)(2)(A), determined Atar's constructed value ISE and profit by using only those data from the previous (eighth) administrative review that pertained to sales in Italy of foreign like product that were made above cost by the six other respondents in that review. *Id.* at 22. From the Decision Memorandum, the court concludes that the Department's principal rationale for excluding below-cost sales was that it is the Department's general preference to do so.

As applied to constructed value profit, the reasoning Commerce adopted to support its exclusion of below-cost sales in this review has been rejected by the Court of International Trade in *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 31 CIT ___, ___ , 477 F. Supp. 2d 1332, 1357 (2007) (finding inadequate Commerce's explanation that "including only the sales made in the ordinary course of trade is consistent with the Department's preferred methodology of calculating profit" (internal quotation marks and citation omitted)) and *Thai I-Mei II*, 32 CIT at ___ , 572 F. Supp. 2d at 1368 (rejecting the Department's conclusion "that it was reasonable for Commerce,

when choosing a method under alterative (iii)" for calculating constructed value profit, "to 'mimic' the general preference Commerce found in construing 19 U.S.C. § 1677b(e)(2)(A)"). Under § 1677b(e)(2)(A), Commerce, in determining constructed value, uses the actual selling expenses incurred, and profit realized, on ordinary-course sales of the respondent being reviewed. 19 U.S.C. § 1677b(e)(2)(A). In this case, Atar's own data were not used because Atar lacked a viable home country market for the foreign like product. Consequently, the method Commerce applied under alternative (iii) resulted in Atar's being assigned a margin that was affected by the exclusion of below-cost sales that were made not by Atar but by others. Commerce erred in considering the specific requirements of § 1677b(e)(2)(A), which do not extend to a determination made under § 1677b(e)(2)(B) and to alternative (iii) thereunder, to be relevant to the issue of whether or not below cost sales should be excluded from the calculation of Atar's constructed value ISE and profit under § 1677b(e)(2)(B)(iii). *See Thai I-Mei II*, 32 CIT at , 572 F. Supp. 2d at 1364. The court, therefore, rejects defendant-intervenors' argument that Commerce properly excluded the non-ordinary-course sales out of a desire to simulate the "preferred method" of 19 U.S.C. § 1677b(e)(2)(A), which argument relies on Commerce's flawed analysis. *See* Def.-Intervenors' Br. 29, 32.

The Decision Memorandum uses language in the Preamble informing the public that "depending on the circumstances and the availability of data, there may be instances in which the Department would consider it necessary to exclude certain home market sales that are outside the ordinary course of trade in order to compute a reasonable measure of profit for [constructed value] under the third alternative method." *Decision Mem.* 22–23; *see also Preamble*, 62 Fed. Reg. at 27,359. Thus, the Preamble informs the public that Commerce does not consider it appropriate to exclude non-ordinary-course sales from all constructed value profit calculations under alternative (iii) but will approach the question on a case-by-case basis. The reference in the Decision Memorandum to the Preamble language is puzzling because in this particular review, Commerce excluded the below-cost sales of other respondents without relating that exclusion to any particular circumstance of Atar's. Commerce apparently considered the situations of the respondents in the eighth review to be sufficiently similar to that of Atar in the ninth review merely because the other respondents were also Italian companies that produced or exported the foreign like product. *See id.* at 22–23. However, the Decision Memorandum states no finding, and no record evidence, from which the court could conclude that the partial sales experience of the six respondents in the preceding review (*i.e.*, the sales experience of those respondents as limited to above-cost sales) was a reasonable approximation of what Atar's home market sales experience would have been had Atar had a viable

home market for the foreign like product during the ninth review. In this respect, the exclusion of below-cost sales of the other respondents, as Commerce applied that exclusion to Atar's situation based on the Department's general "preference" to do so, was arbitrary. A default policy or preference under which Commerce inflexibly excludes below-cost sales in all situations such as the one presented here cannot serve as a substitute for determining a "reasonable method" for purposes of alternative (iii). Such a policy or preference is contrary to the Department's own commitment, as stated in the Preamble, to a case-by-case determination and does not further the principle that Commerce is to calculate an antidumping margin as accurately as possible based on the particular record before it. *See Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994); *Geum Poong I*, 25 CIT at 1098, 163 F. Supp. 2d at 679 (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995)).

The Decision Memorandum also explains that Commerce excluded the below-cost sales out of a desire to simulate the "preferred method" as that method is reflected in alternative (ii):

> The Department's methodology used in the *Preliminary Results 9th Review* closely simulates alternative (B)(ii) in that it relies on data of sales of the foreign like product in the foreign country in the normal course of trade, the only difference being that the methodology used is based on respondents of the preceding review rather than respondents of the current review. The Department finds that this methodology, a version of alternative (B)(ii), most closely simulates the preferred method in that it focuses on sales of the foreign like product in the foreign country in the ordinary course of trade. For purposes of these final results, we have continued to use the weighted-average ISE and profit derived from the respondents in the immediately preceding administrative review, *Final Results 8th Review*. The Department has determined that this methodology most closely simulates the requirements of alternative (B)(ii) and consequently, the preferred method, in that the weighted-average ISE and profit amounts from the *Final Results 8th Review* represent actual amounts incurred and realized in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in the foreign country.

Decision Mem. 20. For two reasons, the court concludes that this rationale is misguided. First, as the Decision Memorandum acknowledges, alternative (ii) was inapplicable because the sales data of the only other respondent in the review, Corticella, was not suitable for use in the ninth review for the reasons previously discussed. Because alternative (ii) had no applicability in the circumstance of the review, there was no apparent, logical basis for Commerce to draw

from the language of alternative (ii) a statutory or departmental preference for the exclusion of below-cost sales that applies whenever Commerce is proceeding under alternative (iii) on facts analogous to those presented here. *See Thai I-Mei II*, 32 CIT at ___ , 572 F. Supp. 2d at 1367. Second, the purpose of the exclusion of sales outside the ordinary course under alternative (ii) is to effectuate the general principle that a respondent should not benefit from its own unfair sales in its home market, a consideration not applicable in this case. *See* SAA at 840, *reprinted in* 1994 U.S.C.C.A.N. at 4176. The SAA explains that where Commerce cannot calculate profit for a particular foreign producer under the general rule [*i.e.*, 19 U.S.C. § 1677b(e)(2)(A)] because *all* of that producer's sales were at below-cost prices, that producer, absent the exclusion of below-cost sales in alternative (ii), would benefit from its own unfair pricing because its profit figure would be based on an average of other producers' profitable *and* unprofitable sales. *Id.*; *see Thai I-Mei II*, 32 CIT at ___ , 572 F. Supp. 2d at 1366. The court, therefore, rejects defendant's argument that Commerce properly excluded the sales that were outside the ordinary course of trade out of a desire to model its methodology upon alternative (ii). *See* Def.'s Br. 32.

Commerce's error in excluding non-ordinary-course sales affected both the constructed value ISE and the constructed value profit for Atar. In both respects, there is a failure to ground the decision to exclude those sales in findings of fact, supported by substantial record evidence, that are pertinent to Atar's specific situation. With respect to constructed value profit in particular, the failure to provide adequate reasoning for the method chosen under alternative (iii) also had implications for the profit cap provision within alternative (iii).[5] In the Preliminary Results, Commerce stated that "the weighted-average profit rate of the respondents in the *Pasta Eighth Review Final Results* establishes a profit cap. Thus, the reasonable method used by the Department to calculate profit does not exceed the profit cap." *See Prelim. Results*, 71 Fed. Reg. at 45,022. In the Final Results, Commerce calculated ISE and profit in the same manner as in the Preliminary Results. *Decision Mem.* 19. From the record, it appears that Commerce used the same data set, and the same methodology, to calculate the profit cap that it used to calculate Atar's constructed value profit. The court can only surmise that under the

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[5] In alternative (iii), the statute imposes a general and a specific requirement. The general requirement is that any method that Commerce chooses to use thereunder to determine selling, general, and administrative expenses, and to determine profit, must be a "reasonable method." 19 U.S.C. § 1677b(e)(2)(B)(iii) (2000). The specific requirement is the "profit cap" limitation on Commerce's determination of constructed value profit, which in pertinent part reads, "except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." *Id.*

profit cap methodology the Department applied in the review, no constructed value profit calculation could ever exceed the profit cap because the two calculations would be the same. If this surmising is correct, a question arises as to whether such a methodology results in a meaningless profit cap that fails to serve the purposes Congress intended when it included the profit cap limitation within the language of alternative (iii). For these various reasons, the court is not persuaded by defendant's argument that the court must uphold Commerce's method of determining constructed value ISE and profit according to Commerce's broad discretion in selecting "any other reasonable method" pursuant to alternative (iii). *See* Def.'s Br. at 32, 35; 19 U.S.C. § 1677b(e)(2)(B)(iii).

Atar makes several other arguments in challenging the reasonableness of the Department's calculation of its constructed value ISE and profit. Atar argues that Commerce's use of the weighted-average data from the Final Results 8th Review was unreasonable in general because these data "bore no reasonable relationship to Atar's Corporate make-up, selling practices, market presence, or business experience" during the ninth period of review. Pl.'s Br. 47. Atar argues that its business operations are dramatically different from those of the six companies on which Commerce relied. *Id.* at 54. According to Atar, the number of customers and invoices, the weight of product per invoice, and the number and weight of observations, are indicators of whether business operations of different companies are similar. *Id.* Atar contends that, because the other companies are not tollers, have different sales quantities of pasta, and require utilization of ISE/profit data from a different period of review, these companies are not sufficiently similar to Atar and therefore do not provide a proper comparison for purposes of determining constructed value. *Id.* Atar also makes the specific argument that Commerce should have relied on the weighted averages of only those respondents from the Final Results 8th Review whose sales practices "more closely resemble the manner in which Atar conducts business." *Id.* 55. According to Atar, only certain of the respondents in the Final Results 8th Review had a similar sales practice as Atar, *i.e.*, a large quantity of sales to a limited customer base. *Id.* Atar argues, additionally, that Commerce should exclude the data pertaining to respondent Barilla G.e.R. Fratelli, S.p.A. (formerly Barilla Alimentare, S.p.A.) ("Barilla") from any analysis. *Id.* at 60. Atar maintains that the home market pasta sales of Barilla differ from Atar's sales to Angola with regard to size, marketing efforts and overall business operations. *Id.* at 63. Atar further contends that Barilla cannot be a reasonable surrogate for Atar because Barilla's home market sales were at a more advanced level of trade than Atar's sales. *Id.*

Because the court concludes that the methods Commerce used in calculating Atar's constructed value ISE and profit have not been shown to be reasonable on the administrative record, the court need

not, and does not, consider these additional objections that Atar raises to Commerce's methods. On remand, Commerce, if it so chooses, may reconsider its previous rejection of these additional objections by Atar. In developing a remand redetermination, Commerce need not include in its analysis the data of all six respondents in the previous review but may select those data that it believes are appropriate to a reasonable method. On remand, however, Commerce *must* reconsider its calculations of constructed value ISE and profit and, specifically, must reconsider its prior decision to exclude the data on below-cost sales. Commerce must submit a remand redetermination in which it demonstrates that the methods it uses to calculate constructed value ISE and profit comply with the reasonableness requirement embodied in 19 U.S.C. § 1677b(e)(2)(B)(iii).

C. Commerce Properly Included Dividends Paid by Atar to Its Shareholder in the Selling, General, and Administrative Expense Calculations

The Department increased Atar's selling, general, and administrative expenses to account for the value of certain services that Atar was provided by its principal, an employee and shareholder in the company who elected to forego compensation for those services. *Decision Mem.* 24–26. The services at issue included pursuing customers and arranging sales transactions. *Id.* at 25. Commerce valued those services, as provided during the 2004 fiscal year, at the amount of dividends that Atar paid to the shareholder during that fiscal year. *Id.* at 26. Atar claims that Commerce's addition of the surrogate amount was contrary to law. Pl.'s Br. 66–67. Atar argues that the distributions it paid to the shareholder are corporate dividends, not salary, and that in treating the dividends as salary, the Department departed from its long-standing practice without a factual or legal basis. *Id.*; *see also Decision Mem.* 24 (explaining that Atar argued during the review that, because Atar's normal books and records are in accordance with Italian generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with the production of the merchandise, the Department has no authority to determine an alternative salary amount).

In determining a surrogate value for the services in question, Commerce relied on 19 U.S.C. § 1677b(f)(2), which provides that Commerce may disregard a transaction between "affiliated persons," (which term is defined in 19 U.S.C. § 1677(33) (2000)), "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." 19 U.S.C. § 1677b(f)(2); *see Decision Mem.* 25. If such "a transaction is disregarded . . . and no other transactions are available for consideration," Commerce shall value the cost of an affiliated-party input "based on the information available as to what

the amount would have been if the transaction had occurred between persons who are not affiliated." 19 U.S.C. § 1677b(f)(2). Under the Department's analysis, the amount of the salary–zero–does not fairly reflect the value of the services the principal provided to the company.

Atar does not contest the Department's conclusion that the employee was an "affiliated person" for purposes of 19 U.S.C. § 1677(33)(E) because the employee owned more than five percent of the equity in Atar. *See* 19 U.S.C. § 1677(33)(E); *Decision Mem.* 25. In addition, the record facts are that the employee provided to Atar the services in question and did not receive a salary. The court concludes that Commerce, on the record before it, acted within its authority in including in its calculations a value for those services the principal provided to Atar. Atar's argument that the addition was improper because it constituted corporate dividends is unconvincing. The dividends were not added to the calculation as dividends; instead the total amount of the dividends in the 2004 fiscal year was used to determine the value of the relevant services that the shareholder performed during that fiscal year, as if the shareholder had been paid a salary for the services. The only remaining issue, therefore, is whether the amount of the dividends served as a reasonable surrogate for that hypothetical salary.

After Commerce raised the issue of valuation of the compensation in a cost verification report, neither Atar nor the petitioners commented on a proper method of valuation. *Decision Mem.* 25 (citing *Verification of the Cost Resp. of Atar S.r.l. in the Antidumping Duty Admin. Review of Certain Pasta from Italy* 4 (Nov. 30, 2006) (Confidential Admin. R. Doc. No. 54) ("*Cost Verification Report*")). Atar acknowledges that it was aware of the issue of the value of compensation prior to the issuance of the Final Results but argues that it was unable to comment effectively on Commerce's reasoning because "there was no data of record which could have provided the value" and "[a]s the factual record was closed, Atar could not have provided the new factual information" to enable Commerce to calculate a value. Pl.'s Reply 41. The court disagrees. The agency provided the parties the opportunity to address the issue of how it should value the services, but Atar, rather than providing information on this issue, took the position that the Department, as a matter of law, could not analyze the compensation paid to the employee, citing the principle that corporate dividends should be excluded from the calculation. *See Atar's Admin. Case Br.* 64; *see also* Def.'s Br. 42 (stating that Atar was on notice of the valuation issues by October 16–20, 2006, the dates when Atar's verification occurred). Atar did not take advantage of its opportunity to propose a method by which Commerce should value compensation for the services. *See Atar's Admin. Case Br.* 63–71.

In determining the value of the transaction as if it had occurred between unaffiliated persons, Commerce looked for data on hourly wage rates in Italy but could not locate such rates on the International Labor Organization's website or via the World Wide web. *Decision Mem.* 25. The Department also concluded that Corticella's data would not suffice because it was not specific to the annual wages paid per person. *Id.* Commerce concluded that the only information available on the record that could reflect the fair market value of the employee's services was the total of the dividend distributions that the employee received from Atar during the 2004 fiscal year. *Id.*

Upon examination of the Decision Memorandum, the court concludes that Commerce has not provided an adequate rationale for its determination that the value of the dividends reasonably represented the value of the relevant services that Atar was provided by its principal. The Department's rationale is essentially that it tried, but failed, to find any data better than the dividends with which to value the services, and that Atar could have, but did not, place any relevant information on the record. This rationale does not suffice because the payments involved unquestionably were dividends, which by definition are amounts determined according to equity ownership, not services rendered to the company. Because the record fact is that the amount Commerce used to value the services was the amount of the dividends, and because there was no inherent relationship between the value of the dividends and the value of the services, Commerce's rationale does not suffice. That rationale is not grounded in findings of fact, supported by substantial record evidence, that could support the Department's conclusion that its estimate of the value of the services was reasonable.

Nevertheless, the court concludes, after conducting its own examination of the record, that substantial evidence is available on that record to demonstrate the reasonableness of the amount Commerce used to value the services in question. In the Cost of Production and Constructed Value Calculation Adjustments for the Final Results, Commerce concluded that a salary that Atar paid to a certain minority shareholder, who was not a corporate officer, reflected an arm's length transaction between affiliated parties. *See Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Atar S.r.l. ("Atar")* 2–3 (Feb. 5, 2007) (Confidential Admin. R. Doc. No. 58). This report also reveals that the surrogate salary Commerce determined for Atar's principal was not substantially greater than the salary that the company paid to this other shareholder. *Id.* The record contains other information concerning the nature of the positions in the company that were held by these two shareholders and the relative levels of those positions within the organization. *Id.*; *see also Cost Verification Report* 4. From all of this record evidence, the court readily can conclude that the Department's estimate of a hypo-

thetical salary for the majority shareholder was set at a reasonable amount.

III. CONCLUSION

Commerce lawfully determined that a particular market situation existed with respect to Atar's selling activity in Angola and, therefore, was justified in resorting to constructed value to determine the normal value of Atar's subject merchandise. Substantial record evidence supported Commerce's findings that Atar made a single sale in Angola during the period of review and that the terms and conditions of that sale differed significantly from those of Atar's sales to the United States. Additionally, substantial evidence exists on the record to demonstrate the reasonableness of the amount Commerce used to value certain services that Atar was provided by its principal.

Commerce's decision in the Final Results to calculate Atar's constructed value ISE and profit based on only those sales of respondents in the eighth administrative review that occurred in the ordinary course of trade was not supported by reasoning that allows the court to conclude that Atar's constructed value ISE and profit were determined according to a "reasonable method" as required by 19 U.S.C. § 1677b(e)(2)(B)(iii). The court, therefore, is directing Commerce to reconsider, and redetermine as necessary, these aspects of the Final Results and to submit a remand redetermination conforming with this Opinion and Order.

ORDER

For the reasons stated in this Opinion and Order, plaintiff's motion for judgment upon the agency record is granted in part and denied in part, and it is hereby

ORDERED that the determination set forth and published as the *Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7011 (Feb. 14, 2007), is hereby remanded to the United States Department of Commerce ("Commerce") for further proceedings consistent with the requirements of this Opinion and Order; it is further

ORDERED that Commerce shall reconsider, and redetermine as necessary, its calculations for Atar of a constructed value indirect selling expense and a constructed value profit and in so doing must reconsider its decision to exclude from those calculations the data derived from home market sales of the respondents in the eighth administrative review that occurred outside the ordinary course of trade; it is further

ORDERED that the findings made in the redetermination that Commerce issues upon remand shall be supported by substantial evidence on the record; it is further

ORDERED that the redetermination that Commerce issues upon remand shall include an explanation of the reasoning for the choices Commerce makes with respect to constructed value indirect selling expense and constructed value profit; it is further

ORDERED that Commerce shall explain why its remand redetermination satisfies the "reasonable method" requirement of 19 U.S.C. § 1677b(e)(2)(B)(iii); and it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order to complete and file its remand determination; plaintiff shall have thirty (30) days from the filing of the Remand Redetermination to file comments; and defendant and defendant-intervenors shall have twenty (20) days after plaintiff's comments are filed to file any reply.

Slip Op. 09–59

TARGET CORPORATION, Plaintiff, v. UNITED STATES,Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 06–00383

[Plaintiffs' motions for judgment on the agency record denied; judgment for Defendant.]

Dated: June 17, 2009

Jochum Shore & Trossevin PC (*Marguerite E. Trossevin*) for Plaintiff Target Corporation.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Max F. Schutzman*, *Bruce M. Mitchell*, *William F. Marshall*, *Andrew T. Schutz*) for Plaintiffs Qingdao Kingking Applied Chemistry Co., Ltd., Dalian Talent Gift Co., Ltd., Shanghai Autumn Light Enterprise Co., Ltd., Zhongshan Zhongnam Candle Manufacturer Co., Ltd., Nantucket Distributing Co., Inc., Shonfeld's (USA), Inc., Amstar Business Company Limited, and Jiaxing Moonlight Candle Art Co., Ltd.

Barnes Richardson & Colburn (*Jeffrey S. Neeley*) for Plaintiff Specialty Merchandise Corporation.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*, *David S. Silverbrand*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Arthur D. Sidney*, *Brian R. Soiset*, *Irene H. Chen*), of counsel, for Defendant United States.

Barnes & Thornburg LLP (*Randolph J. Stayin*, *Karen A. McGee*) for Defendant-Intervenor National Candle Association.

OPINION

Gordon, Judge: Before the court are the Final Results Pursuant to Court Remand (Nov. 10, 2008) ("*Remand Determination*") filed by the U.S. Department of Commerce ("Commerce") pursuant to *Target Corp. v. United States*, 32 CIT ___ , 578 F. Supp. 2d 1369 (2008) ("*Target*"), a consolidated action in which Plaintiffs, Target Corporation ("Target"), Qingdao Kingking Applied Chemistry Co., Ltd., *et al.* ("Qingdao"), and Specialty Merchandise Corporation ("SMC"), have challenged Commerce's final affirmative circumvention determination that petroleum wax candles with 50 percent or more palm or other vegetable-oil based waxes ("mixed-wax") are later-developed merchandise covered by the antidumping duty order on petroleum wax candles from China. *See Petroleum Wax Candles from the People's Republic of China*, 71 Fed. Reg. 59,075 (Dep't Commerce Oct. 6, 2006) (final determination anticircumvention inquiry) ("*Final Determination*"); Issues and Decision Memorandum for the Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A–570–504), at 23 (Sept. 29, 2006) (J. App. 11, PR 187), *available at* http://ia.ita.doc.gov/frn/summary/prc/E6–16613–1.pdf (last visited June 17, 2009) ("*Decision Memorandum*"); Memorandum from Julia Hancock, Case Analyst, Evidence Memorandum for the Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (Sept. 29, 2006) (J. App. 36, PR 189) ("*Evidence Memorandum*"). The court has jurisdiction pursuant to Section 516a(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006)[1] and 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, the court sustains the *Remand Determination*.

II. Standard of Review

When reviewing an anticircumvention determination under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c), the Court of International Trade sustains 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. § 1516a(b)(1)(B)(i). When reviewing whether Commerce's actions are unsupported by substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

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[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

III. Discussion

Although the court presumes familiarity with its Target decision, some background will aid the reader. In the *Final Determination* Commerce determined that mixed-wax candles are later-developed merchandise covered by the antidumping duty order on petroleum wax candles from China. The central statutory question for Commerce during the proceeding was whether mixed-wax candles, which were arguably in existence at the time of the antidumping investigation, could nonetheless still constitute "later-developed merchandise" within the meaning of the statute. Section 1677j(d)(1) defines "later-developed merchandise" as "merchandise *developed after* an [antidumping] investigation is initiated." 19 U.S.C. § 1677j(d)(1) (emphasis added). The question for Commerce was whether mixed-wax candles were "developed" by the time of the initiation of the investigation or "developed" sometime thereafter.

In interpreting section 1677j(d)(1), Commerce identified "two key elements" to define "later-developed" merchandise: (1) there had to be a significant technological advancement or a significant alteration of the subject merchandise involving commercially significant changes—an advancement/alteration factor, and (2) the merchandise had to be commercially unavailable at the time of the less than fair value investigation—a commercial availability factor. *Final Determination*, 71 Fed. Reg. at 59,077.

In *Target*, among other things, the court reviewed the advancement/alteration factor and determined that Commerce's proposed requirement that later-developed merchandise must in every instance entail a "significant alteration" or "significant technological advance" of the subject merchandise was contrary to the statute. *Target*, 32 CIT at ___ , 578 F. Supp. 2d at 1377–78. Upon remand Commerce reconsidered its interpretation of the meaning of the term "later-developed" and agreed with the court that later-developed merchandise does not necessarily entail a significant alteration or technological advance in every instance. *Remand Determination* at 2. Consequently, Commerce abandoned this as a requirement for merchandise to be "later-developed."

In *Target* the court sustained Commerce's commercial availability factor as a reasonable interpretation of the statute entitled to deference. *Target*, 32 CIT at ___ , 578 F. Supp. 2d at 1375–76. On the substantial evidence question of whether mixed-wax candles were commercially unavailable at the time of the initiation of the investigation, the court held that Commerce's purported finding (in which it could not "definitively conclude" that mixed-wax candles were commercially available at the time of the antidumping investigation), created confusion for purposes of judicial review. The court explained:

> Rather than make a straightforward finding that mixed-wax candles were commercially unavailable at the time of the LTFV, Commerce introduced an unexplained, subjective, evidentiary standard—definitive conclusiveness—and found this standard had not been met. It is a puzzling turn of phrase; it almost bespeaks an administrative presumption of commercial unavailability-rebuttable by definitively conclusive evidence (whatever that may be) of commercial availability. Commerce, though, directly contradicted such notions:
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> > [B]oth Respondents and Petitioners had the burden to establish whether mixed-wax candles were commercially available at the time of the LTFV investigation. All parties were given the opportunity to submit evidence that mixed-wax candles were available or evidence that mixed-wax candles were not available in the market. Accordingly, the burden did not rest on any single party.
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> [*Decision Memorandum* at 25]. The net effect of all this is that the court cannot review Commerce's new, subjective, evidentiary standard and the associated "finding" in its present posture, and therefore must remand to Commerce for further consideration.

Target, 32 CIT at ___ , 578 F. Supp. 2d at 1376. To resolve the confusion, the court directed Commerce to either (a) make a straightforward finding of commercial unavailability or (b) explain how the proposed "definitive conclusiveness" evidentiary standard constitutes a reasonable interpretation of the anticircumvention provision. *Id.*

In the *Remand Determination* Commerce made a straightforward finding that mixed-wax candles were commercially unavailable at the time of the original investigation, and further clarified that a gradual evolution of wax-mixing technology allowed the appearance in the market of mixed-wax candles after the antidumping investigation. *Remand Determination* at 3–4, 7–12.

Plaintiffs challenge aspects of the *Remand Determination*, as well as aspects of the *Final Determination*, including whether Commerce's commercial unavailability finding was reasonable (raised by Qingdao), whether Commerce's findings in applying the *Diversified Products*[2] criteria were reasonable (raised by Qingdao), and finally whether Commerce's inclusion of mixed-wax candles within the scope of the Order as of the date of the notice of initiation of the anticircumvention inquiry constituted an impermissible retroactive

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[2] The factors set forth in 19 U.S.C. § 1677j(d)(1) to determine whether "later-developed merchandise" is within the scope of an outstanding antidumping duty order are derived from the court's decision in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). They are commonly referred to as the *Diversified Products* criteria.

application of the law (raised by Qingdao and Target). As for the *Remand Determination* Plaintiffs challenge Commerce's finding of commercial unavailability, arguing that Commerce improperly applied a presumption of commercial unavailability; and that in any event, Commerce's finding is not supported by substantial evidence. Plaintiffs also challenge Commerce's finding of a "gradual evolution" of technology as unclear, unsupported by substantial evidence, and contrary to previous findings by Commerce.

A. Commercial Unavailability Finding

Plaintiffs argue that Commerce's finding of commercial unavailability in the *Remand Determination* is an entirely new finding not supported by record evidence, and further that Commerce improperly applied a presumption of commercial unavailability. *See* Target Comments on Remand Determination 3–8 ("Target Comments"); Qingdao Comments on Remand Determination 1–9 ("Qingdao Comments"). Commerce, however, explained in the *Remand Determination* that it was not making an entirely new finding of commercial unavailability. Commerce instead stated that it was merely clarifying its "intent [in the *Final Determination*] to clearly state that there was no information on the record that mixed-wax candles were commercially available prior to the LTFV investigation." *See Remand Determination* at 4. On remand Commerce did not – nor was it required to – address again each and every piece of evidence in the record, or explain again why it found some evidence less persuasive than others on the question of commercial availability. Commerce had already done that in the *Final Determination*, and the accompanying *Decision Memorandum* and *Evidence Memorandum*.

Target argues that Commerce unreasonably employed a rebuttable presumption of commercial unavailability. Target Comments 8. In support of its argument, Target claims that Commerce never asked the petitioner, the National Candle Association ("NCA"), to provide "definitive proof" that mixed-wax candles were commercially unavailable prior to the investigation. Target Comments 8. The problem for Target is that Commerce did not ask any of the parties to provide "definitive proof" of commercial unavailability. The fact is that all of the parties, including the NCA, were asked to provide evidence of the presence of mixed-waxed candles in the marketplace.

Specifically, in a January 18, 2006 letter, Commerce asked all interested parties to submit evidence of the commercial availability of mixed-wax candles in the U.S. market. The NCA submitted hundreds of pages of brochures, price lists, and marketing materials dating back to 1986. *See* Petitioner NCA's Response to Questionnaire (Feb. 15, 2006) ("NCA Feb. 15, 2006 Submission"), Exs. C1–C43. (J. App. 17, PR 116); *see also Decision Memorandum* at 25 (J. App. 11, PR 187). None of the companies identified in these marketing mate-

rials offered mixed-wax candles at the time of the antidumping investigation (1985–86). *Id.*

Again, in a June 2, 2006 questionnaire, Commerce asked all interested parties to provide marketing materials, *i.e.*, product catalogs, brochures, product initiations, articles, etc. that identify when mixed-wax candles were available for sale in the market. The NCA submitted a comprehensive survey of more than 2,200 product catalogues from 1985 to 2004 that demonstrate the fact that mixed-wax candles were not available in 1985–1986. *See* Petitioner NCA's Response to Questionnaire (June 23, 2006), Exs. 3, 4, 6–10. (J. App. 15, PR 160); *see also Decision Memorandum* at 25 (J. App. 11, PR 187). It was not until the early 2000s that brochures and marketing materials first began expansively promoting mixed-wax candles as a new development. *Id.*

In addition to the brochures, price lists, marketing materials, and advertisements, the NCA also provided affidavits of long-standing industry members, stating that at the time of the original LTFV investigation in 1985–1986, mixed-wax candles were not in the marketplace, and that they were not commercially available. *See* NCA Feb. 15, 2006 Submission, Exs. B1–B5 (J. App. 17, PR 116). Additionally, the NCA provided testimony before the United States International Trade Commission ("ITC") that mixed-wax candles were not in the marketplace and not commercially available at the time of the antidumping investigation. *Id.* Ex. D (J. App. 17, PR 116). The NCA also submitted independent marketing studies showing that mixed-wax candles did not appear in the market until the early 2000s. *See Decision Memorandum* at 25 (J. App. 11, PR 187); *see also* NCA Jan. 14, 2005 Submission, Ex. C (J. App. 18, PR 014).

In response to Commerce's specific requests, the NCA submitted evidence that mixed-wax candles were commercially unavailable at the time of the antidumping investigation. In contrast, Plaintiffs claimed that some of this very same evidence was just not available and that they were not required to keep records that far back. Target Comments 10; *see Decision Memorandum* at 25–26 (J. App. 11, PR. 187). Thus, Commerce solicited and received evidence on commercial availability rather than imposing a presumption of commercial unavailability as Plaintiffs claim. Commerce appears to have simply misspoken about the commercial availability requirement in the *Final Determination* — an error that Commerce has corrected in the *Remand Determination*.

With the clarification of a straightforward finding of commercial unavailability from Commerce in the *Remand Determination*, the court now addresses Qingdao's original arguments contesting the reasonableness of this finding. Qingdao references five documents from the administrative record that purportedly demonstrate that mixed-wax candles were sold in the market prior to the petroleum wax candle investigation. Qingdao Mot. J. Agency Rec. 38–43

("Qingdao Br."). First, Qingdao quotes the petroleum wax candle original injury determination in which the ITC stated:

> There are two broad categories of wax used for commercial purposes: natural and synthetic. The bulk of candle manufacturing utilizes natural waxes, principally paraffins, microcrystallines, stearic acid and beeswax. However, specialty candle making operations do have requirements for the more 'exotic' types of wax, such as hydrogenated vegetable oil or jojoba.

Candles from the People's Republic of China, USITC Pub. 1888, Inv. No. 731–TA–282, at 51–52 (Aug. 1986) (final injury determination) ("*Original Injury Determination*"). Qingdao argues that this statement "clearly implies that the more 'exotic' mixed-wax candles were commercially available in the market." Qingdao Br. 38.

Second, Qingdao references a 1906 manual on soap and candle making (entitled the "*Lamborn Manual*") that discusses the benefits of mixing stearic acid with paraffin wax. Qingdao Br. 41–42. Qingdao claims stearic acid is a derivative of vegetable fats or waxes. Qingdao Br. 41–42. Third, Qingdao highlights a 1921 product catalogue from the Will & Baumer Candle Company containing two products called "composite candles." Qingdao Br. 42. Qingdao claims "composite candles can mean nothing less than a candle mixed with, at the very least, paraffin and stearic acid." Qingdao Br. 42. Fourth, Qingdao cites a 1934 patent issued to Howard Will of the Will & Baumer Candle Company ("Will Patent") for a mixed-wax candle containing 50 percent or more vegetable wax. Qingdao Br. 43–44. Finally, Qingdao cites an article from the *Financial Times*, dated August 24, 1983, that discusses the increase in the price of palm oil and its use in the manufacture of candles. Qingdao Br. 42–43.

Commerce considered this evidence in its *Final Determination*. With respect to the *Original Injury Determination*, Commerce concluded:

> [W]hile Respondents argue that mixed-wax candles were referenced by the ITC, [Commerce] finds that mixed-wax candles, as subject to this inquiry, were not discussed as being in commercial production. In any case, the ITC clarified its statements in the *ITC Second Sunset Review*, stating that
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> > the evidence on the record of this review indicates that there was no commercial production in the Unites States (or elsewhere) of blended candles in 1986, when the [ITC] made its original determination. The [ITC] therefore did not consider in the original investigation whether to include blended candles containing 50 percent or less petroleum wax in the domestic like product.

> Therefore, the clarification issued by the ITC as part of its second sunset review analysis is further affirmative evidence that mixed-wax candles were not available in the United States market or the PRC market at the time of the LTFV investigation.

Decision Memorandum at 23–24 (quoting *Candles from the People's Republic of China*, USITC Pub. 3790, Inv. No. 731–TA–282 (July 2005) (second sunset review) (J. App. 14, PR 104) ("*Second Sunset Review*")).

With respect to the *Lamborn Manual*, the Will & Baumer product catalogue, the Will Patent, and the article from the *Financial Times*, Commerce concluded:

> Several parties have argued that, because patents were issued describing mixes of petroleum wax with other waxes (or stearic acid), [Commerce] should conclude that mixed-wax candles were available in the market. [Commerce] disagrees. [Commerce] notes that, although a patent may be issued, the end-product listed as resulting from the invention, as specified within that patent, may never appear in the market. Specifically, only Petitioners have submitted evidence linking the patents issued after the LTFV investigation with the commercial appearance of mixed-wax candles, ... In contrast, Respondents cite to the numerous patents, the Lamborn Manual and a Financial Times article discussing vegetable oil (not wax) mixed with paraffin. Neither of these are indicative of the technology now at issue, much less commercial availability of those mixed-wax candles in the market before the LTFV investigation.
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> * * *
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> Respondents also submitted the *Lamborn Manual* and the Will & Baumer product catalogue from 1921 as evidence that mixed-wax candles were available prior to the LTFV investigation. However, [Commerce] notes that neither the *Lamborn Manual* nor the Will & Baumer product catalogue reference mixed-wax candles. Instead they either refer to candles containing stearic acid, which is not a vegetable-based wax, or they refer to composite candles but without indicating what these composite candles contain.

Decision Memorandum at 24–25.

As noted from the excerpts above, Commerce did not ignore Plaintiffs' evidence. Rather, Commerce weighed the evidence and arguments and ultimately found that mixed-wax candles were not available in the market at the time of the LTFV investigation. The NCA submitted a survey of product catalogues dating from 1985 to 2004. This survey reviewed over 2,227 product catalogues and found that

"the first instance of a blended candle containing palm wax advertised for sale was in 1998." *Id.* at 25. The NCA also submitted industry reports dating from 1995 to 2002 that do not list mixed-wax candles appearing until 2002. *Id.* Finally, the NCA submitted sales data from its member companies. Commerce concluded that this sales data demonstrated "that the earliest any party sold any mixed-wax candle was in 1999." *Id.* at 26.

In the *Remand Determination* Commerce again explained that the record evidence showed that mixed-wax candles did not appear in the market until 1999, and that the record shows a dramatic increase in patents concerning mixed-wax candles in the 1990s that would indicate mixed-wax candles were not being commercially produced until this time. *Remand Determination* at 4. Commerce further explained that its finding of commercial unavailability was consistent with the conclusion of the ITC in the *Second Sunset Review*, that "there was no commercial production in the United States (or elsewhere) of blended candles in 1986, when the commission made its original determination." *Id.*

Plaintiffs challenge Commerce's explanation of the patent evidence in the *Remand Determination*, as well as its finding that mixed-wax candles were not commercially available until 1999. Target Comments 4; Qingdao Comments 6. Target, in particular, argues that Commerce's description of the increase in patents filed in the 1990s and thereafter related to mixed-wax candles ignores "31 patents issued before the investigation that relate to the production of mixed-wax candles." Target Comments 5.

Commerce, though, reasonably found these arguments unpersuasive. For Commerce, the pre-investigation patents would have been more probative if they were supported by additional evidence of the commercial appearance of mixed-wax candles in the marketplace at the time of the LTFV investigation. Of the 30 or so patents identified by Target, most are not addressed to candle wax. Some of the patents concern novel wicks and wick systems that may be used with any conventional candle. NCA Rebuttal Br. 28–29 (J. App. 16, PR 178). Others involve novel decorative features, most of which are simply applied to an existing conventional candle, or incorporated into a conventional wax, and yet others relate to candle body production techniques or preparation methods using conventional waxes. NCA Rebuttal Br. 28–29 (J. App. 16, PR 178). Target singles out four of the pre-investigation patents, including the Will patent, which it claims are relevant to mixed-wax compositions. Target Comments 5. Commerce observed that although a patent may be issued, the resulting end product that is the subject of the patent may never appear in the market. *Decision Memorandum* at 24 (J. App. 11, PR 187).

Commerce considered all of the pre-investigation patents cited by Target (including the Will patent) and determined that there was no

evidence linking these patents with the commercial appearance of mixed-wax candles in the marketplace. *See id.*; *see also Evidence Memorandum* at 2–9 (J. App. 36, PR 189). Thus, Commerce's conclusion in the *Final Determination* that these pre-investigation patents were of little or no probative value on the question of commercial availability is reasonable given the record evidence.

Target argues that the pre-investigation patent activity is equally indicative of the commercial production of mixed-wax candles as are the post-investigative patents. Target Comments 7. This argument though is not persuasive. The record contains nearly 40 patents issued *after* the LTFV investigation directed to novel wax compositions, specifically including vegetable waxes and mixed-waxes, and novel techniques and processes for making modern candles regardless of wax composition. More important, the record includes direct evidence linking these patents with the appearance of mixed-wax candles in the marketplace in the late 1990s. *Decision Memorandum* at 24 (J. App. 11, PR 187); *see Evidence Memorandum* at 2–9 (J. App. 36, PR 189). This evidence consists of press releases issued by the largest wax producer, Cargill, publicizing its acquisition of the rights to the technology enabling the production of mixed-wax candles from wax compositions developed by Dr. Bernard Tao and set forth in two patents filed after the LTFV investigation (the Tao patents[3]); a multi-million dollar lawsuit filed on October 10, 2003, by Candle Corporation of America ("CCA"), a major respondent in the underlying circumvention proceeding, over the rights to the new technology in the Tao patents, *see Second Sunset Review* at 34–36 (CCA admits that it "conceived" of the idea in 1993 to develop candles made of a mixture of vegetable wax and petroleum wax and approached Dr. Tao to develop the technology to create such a candle); and affidavits by U.S. candle producers describing the production of mixed-wax candles and referencing specific patents filed after the investigation. *See Decision Memorandum* at 24 (J. App. 11, PR 187); *Second Sunset Review* at 34–36. The post-investigation patents are relevant to the technological issues and suggest lack of commercial production of mixed-wax candles. There is also evidence on the record linking the production of mixed-wax candles to certain of the patents filed after the original antidumping investigation.

In the *Remand Determination* Commerce found significant the appearance in the 1990s and thereafter of patents directed to mixed-wax composition. The majority of the post-investigation, mixed-wax

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[3] The two Tao patents were initially filed by Dr. Tao in 1998 and were referred to throughout the underlying proceeding as the Tao patents. Target finds noteworthy that the two Tao patents did not issue until 2001, two years after Commerce found mixed-wax candles became commercially available. Target Comments 6. In actuality, the Tao patent applications were filed in 1998, which is consistent with Commerce's finding that mixed-wax candles did not appear in the market until 1999.

candles patents were filed in the late 1990s or thereafter and began issuing in the 2000s. *See* Later-Developed Merchandise Petition (Oct. 8, 2004) Ex. 3. (J. App. 13, PR 001). It was the timing of these new patents and their link to the appearance of mixed-wax candles in the marketplace that Commerce found persuasive. The record supports Commerce's finding that there was a dramatic increase in the number of patents directed to mixed-wax compositions in the 1990s and thereafter.

Plaintiffs also challenge Commerce's finding that the record evidence showed that mixed-wax candles did not appear in the market until 1999. Target Comments 3. The record contains direct evidence supporting Commerce's finding. Both U.S. and foreign candle producers submitted sales data and affidavits stating that they did not start producing and selling mixed-wax candles until at least as early as 1999. *See Decision Memorandum* at 26 (J. App. 11, PR 187); CCCFNA Quantity and Value Submission (Feb. 16, 2006) Exs. 1–7 (J. App. 19, PR 114). This direct evidence is consistent with the timing of the post-investigative patents directed to mixed-wax candles in the 1990s and thereafter; the timing of the independent market studies, and brochures introducing entirely "new" mixed-wax candles in the early 2000s; the timing of the first scope requests directed at mixed-wax candles in 2001; and the ITC findings in the *Second Sunset Review*. Commerce's finding that mixed-wax candles did not appear in the market until 1999 is therefore reasonable.

Target, nonetheless, argues that evidence on the record, namely, the pre-investigation patents and the ITC's original injury determination, contradict this finding. Target Comments 3. As explained above, Commerce did not find the pre-investigation patents a persuasive indicator of commercial availability at the time of the antidumping investigation. Likewise, in the *Final Determination*, Commerce did not consider Plaintiffs' arguments about the *Original Injury Determination* persuasive in view of the ITC's subsequent clarification in the *Second Sunset Review* that there was "no commercial production in the United States (or elsewhere) of blended candles in 1986, when the commission made its original determination there." *See Decision Memorandum* at 24 (J. App. 11, PR 187).

In the *Remand Determination* Commerce found that "there have been changes to petroleum wax candles since the time of the LTFV investigation (*e.g.*, mixing vegetable-oil based waxes with petroleum wax) that represent a gradual evolution in candle production, and these changes have resulted in the later-development of mixed-wax candles." *Remand Determination* at 6. Target argues that Commerce developed an entire new theory on remand unsupported by record evidence. Target Comments 11–15. In the court's view Commerce has not "muddied the waters" with new theories. Target Comments 11–15. Rather, it merely uses the term "gradual evolution" to describe the record evidence that supports its finding that mixed-wax

candles do not fall into the category of later-developed merchandise that requires ITC consultation under 19 U.S.C. § 1677j(e)(1)(C). Commerce's description of the evidence is consistent with Commerce's findings in the *Final Determination*. The record evidence supports the finding that there has been industry research and development in the mixing of petroleum wax and vegetable waxes that resulted in the development of mixed-wax candles after the original antidumping investigation. As Commerce found in the *Final Determination*: "through a large number of submitted patents, manuals, and brochures, the record supports that there has been a sustained and significant series of scientific studies since the LTFV investigation centered on the composition of waxes and the application of those waxes to candle-making." *Decision Memorandum* at 17 (J. App. 11, PR 187).

Target argues that this finding is only supported by a general reference to the *Evidence Memorandum* and ignores the *Lamborn Manual*. Target Comments 13–14. These arguments are unpersuasive. The *Decision Memorandum* provides a detailed analysis of the evidence on record regarding the commercial development of mixed-wax candles after the antidumping investigation. *Decision Memorandum* at 23–26 (J. App. 11, PR 187). The *Evidence Memorandum* specifically refers the reader to the *Decision Memorandum* for an analysis of the evidence. *Evidence Memorandum* at 1. (J. App. 36, PR 189). Commerce also previously considered the *Lamborn Manual* in the *Final Determination* and found that it does not address the mixed-wax candles at issue. *Decision Memorandum* at 25 (J. App. 11, PR 187).

In sum, Commerce's findings on remand are reasonable given the record evidence.

B. *Diversified Products* Analysis

As noted above, in its original brief challenging the *Final Results*, Qingdao raised the issue of whether Commerce's findings in applying the *Diversified Products* criteria were reasonable, findings to which the court now turns. In conventional scope determinations Commerce uses the *Diversified Products* criteria to "determine whether a product is sufficiently similar as merchandise unambiguously within the scope of the order as to conclude the two are merchandise of the same class or kind." *Novosteel SA v. United States*, 25 CIT 2, 15, 128 F. Supp. 2d 720, 732 (2001) (internal citations omitted). The same is true in an anticircumvention inquiry. 19 U.S.C. § 1677j(d)(1).

Here, Commerce compared both sets of candles and determined that mixed-wax candles and petroleum wax candles were similar in all five *Diversified Products* criteria, and were therefore the same class or kind of merchandise. *Decision Memorandum* at 26–39. Plaintiffs challenge Commerce's determination as unsupported by

substantial evidence, arguing that Commerce's findings for four of the *Diversified Products* criteria were unreasonable. Plaintiffs argue that mixed-wax candles are different from petroleum wax candles in general physical characteristics, expectations of the ultimate purchasers, channels of trade, and methods of advertisement. As explained below, Commerce's affirmative class or kind determination is reasonable given the record evidence.

With regard to "general physical characteristics" of the merchandise, 19 U.S.C. § 1677j(d)(1)(A), Commerce found the following:

> [T]he Department notes that the sample candles provided by Petitioners were visually similar. Specifically, the sample mixed-wax candle that contains palm wax and the sample petroleum wax candle were both pillars, had a similar feel, contained a fragrant scent, and were in the same burn stage. While the colors . . . varied slightly in each pillar and the mixed-wax candle contained a label stating "blend," the Department notes that without turning the mixed-wax candle over to identify its wax content, the sample mixed-wax candle and the sample petroleum wax candle have similar physical characteristics making them appear to be indistinguishable by appearance, feel, and scent.

Decision Memorandum at 28 (internal citations omitted).

Plaintiffs challenge these findings arguing that mixed-wax candles have a "crystalline, more opaque, exterior appearance" and are superior to petroleum wax candles in retaining their fragrance and shape. Qingdao Br. 48–50; Target Mot. J. Agency Rec. 36–37 ("Target Br."). Plaintiffs further claim that mixed-wax candles burn at cooler temperatures, increasing the life of the candle, and burn "cleaner," emitting less airborne pollutants than petroleum wax candles. Plaintiffs claim that these qualities are the result of differences in the chemical structure of mixed-wax as compared to petroleum wax. Qingdao Br. 48.

Plaintiffs direct the court to the following evidence to support their claims:

- The declaration of James Groce, R&D Analytical Lab Manager for the Candles Corporation of America (Pub. R. 3105), describing the chemical composition of mixed-wax and petroleum wax candles and the resulting performance of both types of candles.
- A product catalogue distributed by International Group, Inc., a member of the NCA. (Pub. R. 2638). Plaintiffs argue that the product catalogue set forth differences in outward appearance and performance of mixed-wax candles.
- Palm oil wax "use guidelines" distributed by the Candlewic Company, an industry supplier of candle wax (Pub. R. 2638).

Plaintiffs contend that these guidelines describe the crystalline appearance of mixed-wax candles.

- The description of the mixed-wax candles from an industry website.
- Industry marketing material that discusses the appearance of mixed-wax candles.
- Statements from "authorities" in the industry that describe differences in emissions.

Qingdao Br. 47–50.

Defendant-Intervenor, the NCA, refers the court to contrary record evidence, arguing that current wax blending technology allows the production of mixed-wax candles that are indistinguishable from petroleum wax candles. NCA Resp. in Opp'n to Pls.' Mot. J. Agency R. 44 ("NCA Resp. Br."). Defendant-Intervenor states that petroleum wax candles "can be formulated to produce the same milky, creamy, smooth opaque, or non-smooth appearance as some mixed-wax candles, and the merchandise can be made to "look the same, smell the same, feel the same, can be colored the same, and appear in the same assortment of shapes and physical appearances." NCA Resp. Br. 44. Defendant-Intervenor submitted physical samples of both types of candles to Commerce to corroborate their assertions. *Decision Memorandum* at 27.

With regard to soot emissions, Defendant-Intervenor argues that the amount of soot emitted by a candle is controlled by the type of wick used, not the type of wax. NCA Resp. Br. 44–45. In support of this claim, Defendant-Intervenor references an independent study, entitled "Candle System Variations," that found that several "paraffin-only blends" (*i.e.*, petroleum wax candles) emitted less soot than paraffin-vegetable wax or all-vegetable wax blended candles. NCA Resp. Br. 44–45. Defendant-Intervenor also cites "Candle System Variations" for the conclusion that certain "fragrances worked best in 100% paraffinic blend, worst in a 100 percent vegetable wax blend, with the paraffin-vegetable waxes falling into the intermediate category." NCA Resp. Br. 46.

As evident from the excerpted findings of the *Decision Memorandum*, Commerce's determination was largely based on its examination of the candle samples provided by the domestic industry, coupled with an absence of alternative candle samples demonstrating the differences that Plaintiffs alleged. *Decision Memorandum* at 28. Commerce explained:

> Although Respondents continue to claim that differences exist, the Department notes that no Respondent since the Preliminary Determination has submitted physical evidence, such as

> candles samples, that indicate a difference in physical characteristics. In contrast, the Department notes that the sample candles provided by Petitioners were visually similar.

Id. (internal citations omitted).

Commerce did not, as Plaintiffs' contend, "reject" their evidence. Qingdao Br. 45. Rather, Commerce addressed Plaintiffs' arguments regarding the differences in the physical characteristics of the merchandise and drew reasonable inferences from the record as a whole. Specifically, Commerce concluded the following regarding the chemical structure of mixed-wax and its impact on the candles' physical characteristics:

> Although one of the Respondents, . . . , has placed evidence on the record from manufacturers, . . . , regarding the chemical composition of mixed-wax candles and its impact on the candle's physical characteristics, this does not conclusively establish there are physical differences. Instead of submitting actual physical evidence that documents these differences, [Respondents] submitted advertisements . . . that stated candles made from vegetable-based wax are typically harder than petroleum wax candles. While the Department continues to acknowledge . . . that one of the components, palm and vegetable-based oils, of mixed-wax candles possess different chemical structures, this does not necessarily lead to a conclusion that these candles have distinct physical characteristics. As in the Preliminary Determination, the Department continues to find that, without conclusive physical evidence demonstrating the "alleged" physical differences, the sample candles support a conclusion that these mixed-wax candles are not distinguishable from in-scope petroleum wax candles.

Decision Memorandum at 28–29 (internal citations omitted). On the issue of burn performance and soot emissions, Commerce credited the Candle System Variations study that found "using a vegetable wax in a candle blend will not automatically ensure no or low sooting." *Id.* at 29.

Plaintiffs' arguments invite the court to reweigh the evidence and replace Commerce's findings anew, something the court simply cannot do. *Hoogovens Staal BV v. United States*, 24 CIT 242, 247, 93 F. Supp. 2d 1303, 1307–1308 (2000) ("In reviewing agency determinations, the court declines to reweigh or reinterpret the evidence of record. . . . It is not the province of this court to review the record evidence to determine whether a different conclusion could be reached, but to determine whether Commerce's determination is supported by substantial evidence."). Commerce's determination that there is "no substantial difference" between the general physical characteristics of mixed-wax candles and petroleum wax candles is reasonable, and thus supported by substantial evidence.

Commerce's analysis of the remaining *Diversified Products* criteria is likewise reasonable. On the issue of the "expectations of the ultimate purchasers," 19 U.S.C. § 1677j(d)(1)(B), Plaintiffs argue that mixed-wax candles are desired over petroleum wax candles for their asserted superiority in appearance, fragrance, emissions, and burn performance. Qingdao Br. 51–52; Target Br. 37. Specifically, Plaintiffs argue that mixed-wax candles are desired for their "'natural' and clean composition," Qingdao Br. 51, and because they are perceived as being more environmentally sound (*i.e.*,"cleaner burning"). Target Br. 37. Plaintiffs reference marketing material from retailers and manufacturers of mixed-wax candles as well as news articles that "tout" these differences. Qingdao Br. 51.

Commerce, however, was persuaded by contrary evidence:

> While the submitted news articles discuss the growth of the market of natural candles and that the use of petroleum wax candles give off carcinogenic toxins, the Department does not doubt that subset of mixed-wax candle purchasers maybe driven by such concerns. However, the Department finds that these news articles do not conclusively establish that the consumer demand as a whole, even in large, for mixed-wax candles can be attributed to health concerns. In fact, the Department notes that there is other evidence on the record that shows that the alleged health benefits of a candle is not one of the factors that primarily influence a consumer's purchase. Specifically, the 2005 Unity Market Report found that, . . . only 7 percent of consumers reported they based their purchase on a candle's health properties, ...

Decision Memorandum at 31–32 (internal citations omitted). Commerce determined that the two attributes of a candle that drive the purchasing decision of a consumer are "fragrance and decorative touches," and not wax composition. *Id.* at 32. Commerce is entitled to accord that weight it feels is due the evidence. *See, e.g.*, *Novosteel SA*, 25 CIT at 20, 128 F. Supp. 2d at 736 (in the context of a conventional scope determination).

Plaintiffs argue that Commerce "fail[ed] to recognize" that fragrance and decoration "are the very characteristics that distinguish a majority of mixed-wax vegetable candles from petroleum wax candles." Qingdao Br. 52. This argument, however, assumes that consumers can distinguish between the merchandise. Commerce disposed of this argument in its comparison of the physical characteristics of the merchandise concluding that mixed-wax candles are indistinguishable from petroleum wax candles. Here, it addressed the argument again in the context of consumer expectation:

> [I]n the 2005 Unity Marketing Report, only thirteen percent of candle purchasers indicated that they based their purchase on the quality of the candle. The report concluded that this could

> lead one to infer that the ultimate purchaser of a candle "does not know how to distinguish" between types of candles, particularly when there is no distinction of the wax content. Moreover, [Respondents], themselves, acknowledged that consumers base their purchase of a candle upon the following criteria: appearance, form, burn quality, and aroma, which corresponds with some of the top purchasing factors, such as favorite scent, style and design, and long lasting burn, listed in the 2005 Unity Marketing Report. The Department finds that, while two of the Respondents made statements and submitted some evidence, including news articles and other studies, the Department observes that this information, unlike the 2005 Unity Marketing Market Report submitted by Petitioners, does not directly measure the actual buying power sentiments and expectations of the ultimate purchaser.

Decision Memorandum at 32–33 (internal citations omitted).

With regard to the "channels of trade" in which the merchandise is sold, 19 U.S.C. § 1677j(d)(1)(D), Plaintiffs argue that "natural [wax] based candles" (*i.e.*, mixed-wax candles) are sold by "bath, body and beauty 'concept' stores"[4] as well as resort and day spas. Qingdao Br. 53–54. Plaintiffs contend that these markets focus on mixed-wax candles for their "environmental, aromatic and burn qualities." Qingdao Br. 54.

Commerce, however, found otherwise—largely due to a lack of corroborative evidence from Plaintiffs:

> Since the Preliminary Determination, only one Respondent, . . . , submitted information regarding whether mixed-wax candles were sold in different channels of trade than petroleum wax candles. While [Respondents] alleged in their factual information submission that some retailers only sell candles made of natural wax, the Department notes that [Respondents] did not provide any supporting documentation or an indication as to how large a share of the trade this observation covered. Additionally, [Respondents] also alleged that retailers market the environmental and health benefits of mixed-wax candles. However, the Department notes that, while [Respondents] submitted some advertisements marketing the benefits from mixed-wax candles, this does not establish that mixed-wax candles are sold in different channels of trade, or to the extent to which this phenomenon exists throughout the trade as well.

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[4] Specifically, Plaintiffs identify Bath & Body Works, White Barn Candle, Victoria Secret Beauty, The Body Shop, L'Occitane, Sephora, Ulta, PureBeauty, MAC, and Douglas.

Decision Memorandum at 36. Commerce was persuaded by photographs submitted by the domestic industry that depicted the merchandise being sold side-by-side.

> Unlike Respondents, who either did not provide further information or the submitted information that was not supported by corroborative evidence, the Department finds that Petitioners have submitted information on the record demonstrating that mixed-wax candles are sold in the same channels of trade as petroleum wax candles. Specifically, the Department notes that Petitioners submitted photographs of displays from various retailers, including Target; Walmart; Kohls' [sic]; and Bed Bath and Beyond; which shows that candles are sold side-by-side without indication of health benefits and wax content. The Department notes that these photographs of displays from various retailers, . . . , are corroborated by the Spa and Industry Salon Report, which states that both mixed-wax candles and petroleum wax candles are sold within the spa and salon industry.

Id.

Finally, with regard to the manner in which the merchandise is "advertised and displayed," 19 U.S.C. § 1677j(d)(1)(E), Plaintiffs argue that advertisements and displays emphasize the physical characteristics that differentiate mixed-wax candles from petroleum wax candles. Qingdao Br. 53–54; Target Br. 37. Specifically, Plaintiffs argue that advertisers highlight the "environmental, aromatic and burn qualities" of mixed-wax candles. Qingdao Br. 54. As examples, Plaintiffs cite an advertisement for soy candles that state "Benefits of Soy," "Clean & Long Burning," and "Environmentally Safe," as well as packaging from another candle that states "Wax from Coconut Palm. Renewable Resource. Cleaner Burning. Beautifully Fragranced." Qingdao Br. 54. Plaintiffs contend that mixed-wax candles are generally advertised as "higher quality candles" as they are "capable of more subtle and pleasant scents, impart an attractive opaque or crystalline look. . . , and hold their shape better than petroleum wax." Qingdao Br. 54; Target Br. 37.

Again, Commerce was persuaded by contrary evidence:

> One of the Respondents . . . continues to argue that mixed-wax candles are advertised and displayed as environmentally friendly and natural, which petroleum wax candles never are. As support for its argument, [Respondent] submitted website advertisements. However, the Department notes there is record evidence that shows that petroleum wax candles also are advertised and displayed as being environmentally friendly.
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> * * *

> Additionally, the Department finds that the majority of the evidence on the record does not establish that mixed-wax candles as a rule are displayed differently than petroleum wax candles. As noted by [Respondents] and the 2005 Unity Market Report, consumers typically base their purchase upon . . . scent, color, cost, and shape. While [Respondents] argue that consumers may not usually not [sic] be aware of the wax content of the candles they purchase, they can identify mixed-wax candles because these candles are physically distinct from petroleum wax candles. However, as discussed above, the Department finds this argument unpersuasive with respect to display because mixed-wax candles are virtually indistinguishable from petroleum wax candles. . . . Of note is thatthe submitted pictures of Kohls [sic], Bed Bath & Beyond, and Walmart shows that both in-scope petroleum wax candles and mixed-wax candles, . . . , are displayed without any differentiation between these types of candles.

Decision Memorandum at 38–39 (internal citations omitted).

In sum, Commerce's analysis with respect to the remaining *Diversified Products* criteria is reasonable. Accordingly, Commerce's analysis with respect to the expectations of the ultimate purchasers, channels of trade, and manner in which the merchandise is advertised and displayed is supported by substantial evidence.

C. Suspension of Liquidation

The liquidation of merchandise subject to an affirmative anticircumvention determination is suspended as of the date of initiation of the anticircumvention proceeding. 19 C.F.R. § 351.225(l) (2004). After finding that mixed-wax candles were circumventing the underlying dumping order, Commerce instructed U.S. Customs and Border Protection to suspend liquidation of all entries of the subject merchandise that were entered, or withdrawn from warehouse, for consumption on or after February 25, 2005, the date of the initiation of the anticircumvention inquiry, and to collect cash deposits on all such unliquidated entries. *Final Determination*, 71 Fed. Reg. at 59,078.

Plaintiffs contend that Commerce's application of 19 C.F.R. § 351.225(l) has an impermissible retroactive effect on entries of mixed-wax candles subject to the *Final Determination*. Plaintiffs argue that the multiple scope determinations excluding mixed-wax candles from the petroleum wax candle order created a settled expectation on their part that mixed-wax candles were outside the scope of the order. Although this may have been true prior to the initiation of the anticircumvention inquiry (and may have informed Plaintiffs' expectations about its eventual result), Plaintiffs were nevertheless always aware of the legal consequences of an affirma-

tive circumvention determination (and the operation of 19 C.F.R. § 351.225(l)): Entries of mixed-wax candles found to be circumventing the Order would be suspended as of the date of initiation.

19 C.F.R. § 351.225(l) was promulgated and published in the *Federal Register* in 1997, and Plaintiffs are charged with knowledge of the regulation as of that date. *See* 44 U.S.C. § 1507; *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.") (citations omitted). The regulation did not change during the course of the anticircumvention inquiry. Commerce simply applied the regulation to the entries that were the subject of the proceeding, consistent with the regulation's requirements. There is, therefore, no impermissible retroactive application of the law operating in this case.

IV. Conclusion

The court denies Plaintiffs' motions for judgment on the agency record and will enter judgment in favor of Defendant.

Slip Op. 09–60

FORMER EMPLOYEES OF INVISTA, S.A.R.L., *Plaintiffs*, v. U.S. SECRETARY OF LABOR, *Defendant*.

Court No. 07–00160

[Remanding action to U.S. Department of Labor for second redetermination on remand.]

Dated: June 18, 2009

Ruskin Moscou Faltischek, P.C. (*Thomas A. Telesca*), for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Carrie A. Dunsmore*); *Stephen R. Jones*, Office of the Solicitor, U.S. Department of Labor, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

In this action, former employees of the Chattanooga, Tennessee plant operated by Invista, S.a.r.l. ("the Workers") contest the determinations of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") and alternative trade adjustment assistance ("ATAA"). The determi-

nations at issue include the Labor Department's original denial of the Workers' petition, as well as the agency's denial of the Workers' request for reconsideration, and the agency's negative determination on remand. *See* 72 Fed. Reg. 7907, 7909 (Feb. 21, 2007) (notice of denial of petition); 72 Fed. Reg. 15,169 (March 30, 2007) (notice of denial of request for reconsideration); 73 Fed. Reg. 32,739 (June 10, 2008) (notice of negative determination on remand).

Now pending before the Court is the Workers' Renewal of their Motion for Judgment Upon the Agency Record. *See generally* Plaintiffs' Memorandum in Support of Motion for Judgment Upon Agency Record ("Pls.' Brief"); Plaintiffs' Memorandum in Support of Renewal of the Motion for Judgment Upon Agency Record ("Pls.' Renewal Brief"); Plaintiffs' Memorandum in Further Support of Renewal of the Motion for Judgment Upon Agency Record ("Pls.' Reply Brief"). The Government opposes the Workers' motion, maintaining that the Labor Department's denial is supported by substantial record evidence and is otherwise in accordance with law. *See generally* Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Def.'s Brief").

Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000).[1] For the reasons set forth below, this matter must be remanded to the Labor Department once again, for further consideration.

I. *Background*

The trade adjustment assistance laws are generally designed to assist workers who have lost their jobs as a result of increased import competition from – or shifts of production to – other countries, by helping those workers "learn the new skills necessary to find productive employment in a changing American economy." *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 26 CIT 1272, 1273, 245 F. Supp. 2d 1312, 1317 (2002) (*quoting* S. Rep. No. 100–71, at 11 (1987)); *see generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT 1315, 1316–20, 454 F. Supp. 2d 1306, 1307–11 (2006) (detailing history and policy underpinnings of trade adjustment assistance programs).

TAA programs entitle eligible workers to receive benefits that may include employment services (such as career counseling, resume-writing and interview skills workshops, and job referral programs), vocational training, job search and relocation allowances, income support payments, and a health insurance coverage tax credit. *See generally* 19 U.S.C. § 2272 *et seq*. (2000 & Supp. II 2002). In addi-

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[1] Except as otherwise noted, all statutory citations herein are to the 2000 edition of the United States Code. Similarly, all citations to regulations are to the 2006 edition of the Code of Federal Regulations.

tion, older workers may be eligible for a wage insurance benefit, known as alternative trade adjustment assistance ("ATAA").[2]

The trade adjustment assistance laws are remedial legislation and, as such, are to be construed broadly to effectuate their intended purpose. *UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978) (noting "general remedial purpose" of TAA statute, and that "remedial statutes are to be liberally construed"); *see also Fortin v. Marshall*, 608 F.2d 525, 526, 529 (1st Cir. 1979) (same); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 500, 502 (1st Cir. 1977) (emphasizing "remedial" purpose of TAA statute); *BMC*, 30 CIT at 1320–21 n.9, 454 F. Supp. 2d at 1311 n.9 (collecting additional cases).

Moreover, "[b]ecause of the *ex parte* nature of the certification process, and the remedial purpose of the [TAA] program," the Labor Department is obligated to "conduct [its] investigation[s] with the utmost regard for the interest[s] of the petitioning workers." *Local 167, Int'l Molders and Allied Workers' Union, AFL–CIO v. Marshall*, 643 F.2d 26, 31 (D.C. Cir. 1981); *see also BMC*, 30 CIT at 1321, 454 F. Supp. 2d at 1312 (collecting additional cases). Thus, while the Labor Department is vested with considerable discretion in the conduct of its investigations of trade adjustment assistance claims, "there exists a threshold requirement of reasonable inquiry." *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993); *see also BMC*, 30 CIT at 1321, 454 F. Supp. 2d at 1312 (and authorities cited there). Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations. *See BMC*, 30 CIT at 1321 n.10, 454 F. Supp. 2d at 1312 n.10 (cataloguing numerous opinions criticizing Labor Department's handling of TAA cases).

II. *The Facts of This Case*

Until their termination on January 31, 2007, the Workers in this case were employed as part of the Nylon Apparel Filament Fibers Group at the Chattanooga, Tennessee plant operated by Invista, S.a.r.l. At the time of their termination, the Workers processed orders for nylon apparel filament fiber ("apparel fiber") in support of apparel fiber production at a related plant in Monterrey, Mexico. *See* A.R. 2; 73 Fed. Reg. at 32,739; *see also* Pls.' Brief at 4; Def.'s Brief at 6–7.[3] The apparel fiber had been manufactured at the Chattanooga

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[2] ATAA allows workers aged 50 or older, for whom retraining may not be appropriate, to accept reemployment at a lower wage and receive a wage subsidy. Workers who qualify for ATAA are eligible to receive 50% of the difference between their new and old wages, up to a maximum of $10,000 over two years. *See generally* GAO Report 04–1012, "Trade Adjustment Assistance: Reforms Have Accelerated Training Enrollment, But Implementation Challenges Remain" (Sept. 2004) at 2, 10.

[3] The administrative record in this action consists of two parts – the initial Administrative Record (which the Labor Department filed after this action was commenced), and the

plant, until domestic production ceased and all such production was shifted to the Monterrey, Mexico site in 2004. *See* A.R. 5–6, 45–46; 73 Fed. Reg. at 32,739–40. Since that shift, only nylon performance filament fiber ("performance fiber") has been produced at the Chattanooga plant. *See* C.S.A.R. 8.

The 2004 shift in production to Mexico led to widespread layoffs of production workers and support personnel at the Chattanooga plant. *See* C.S.A.R. 7–8. Invista management filed a petition for TAA and ATAA benefits on behalf of the terminated workers, which the Labor Department granted. Specifically, the Labor Department certified as eligible for TAA and ATAA all Invista workers "engaged in *employment related to the production of*," *inter alia*, apparel fiber "who became totally or partially separated from employment on or after June 7, 2003, through two years from the date of certification [*i.e.*, two years from August 20, 2004]." *See* 69 Fed. Reg. 54,320, 54,321 (Sept. 8, 2004) (original certification) (emphasis added); A.R. 5–6 (TAA/ATAA certification of Invista, S.a.r.l., dated Aug. 20, 2004); S.A.R. 35–36 (confirming that 2004 TAA/ATAA certification expired on August 20, 2006).

As indicated by the language of the certification itself (quoted above), the Invista employees covered by the 2004 TAA/ATAA certification included not only those engaged in the actual production of apparel fiber, but also more than one hundred service workers who had supported that production in various capacities. *See* A.R. 1–2; 30–32, 45; C.S.A.R. 7–8; 73 Fed. Reg. at 32,739–40.

The Workers at issue here survived the 2004 lay-offs, and continued their work at the Chattanooga site in support of apparel fiber production, even after that production shifted to Mexico. *See* A.R. 1–2; 30–32, 45; 73 Fed. Reg. at 32,739–40. However, on November 14, 2006 – a mere three months after the 2004 TAA/ATAA certification expired – the Workers were notified that they would be terminated effective January 31, 2007. *See* A.R. 35, 45–46.

In mid-December 2006, Invista's Plant Manager filed the pending TAA/ATAA petition on behalf of the Workers, who include a Product Coordinator as well as three Customer Service Representatives. *See* A.R. 1–3, 36–37; *see also* 69 Fed. Reg. at 54,321; 73 Fed. Reg. at 32,739 (noting that TAA/ATAA petition was filed December 15, 2006). In the TAA/ATAA petition, the Plant Manager attested that the Workers' terminations were "a continuation of the shift in production to Mexico as described in [the 2004 TAA/ATAA certification]

Supplemental Administrative Record (which was filed after the Labor Department's negative determination on remand).

The two parts of the administrative record are separately paginated. Both parts include confidential business information. Citations to the public record are noted as "A.R._____" and "S.A.R. _____," as appropriate, while citations to the confidential record are noted as "C.A.R. _____" and "C.S.A.R. _____."

that expired August 20, 2006." *See* A.R. 2; *see also* 73 Fed. Reg. at 32,739. The Plant Manager further explained that – notwithstanding the 2004 shift in production to Mexico – "all orders [for apparel fiber had] continued to be processed from the United States" up to that time, but that such work was now going to be transferred to "CSR's [*i.e.*, Customer Service Representatives] located in South America." *See* A.R. 2. The TAA/ATAA petition also noted that two of the subject Workers were age 50 or older, that their skills "are not easily transferable," and that "[c]ompetitive conditions within the industry are adverse." *Id.*

The Labor Department denied the Workers' TAA/ATAA petition. *See* 72 Fed. Reg. at 7909 (denying TAA/ATAA petition on grounds that "[t]he workers' firm does not produce an article as required for certification"); A.R. 30–32. The Labor Department stated that, to be eligible for TAA benefits, workers seeking certification "must work for a 'firm' or appropriate subdivision that produces an article domestically and there must be a relationship between the workers' work and the article produced by the workers' firm or appropriate subdivision." *See* A.R. 30–31 (*citing* 19 U.S.C. § 2273). The Labor Department found that the Workers "were engaged in marketing activities," that "domestic production of an article within . . . [Invista's] Nylon Apparel Filament and thatFibers Group [had] ceased more than one year [before]," the petitioning Workers thus "were not in support of domestic production within the requisite one year period." *See* A.R. 31. The Labor Department therefore concluded that the Workers could not be "considered import impacted or affected by a shift in production of an article." *Id.* Because the Labor Department determined that the Workers were not eligible for TAA, the Workers' petition for ATAA was similarly denied. *Id.*

One of the petitioning Workers requested that the Labor Department reconsider its determination. *See* A.R. 35–39. The request for reconsideration underscored that the Workers "missed the opportunity of receiving . . . [TAA and ATAA] benefits by less than 3 months," emphasizing that they would have been covered by the 2004 TAA/ATAA certification – and thus "would have been able to have the opportunity of receiving the benefits of . . . TAA [and ATAA]" – if only Invista management had notified them of their impending terminations "in August, versus November of 2006." *See* A.R. 36. Echoing a point made by Invista's Chattanooga Plant Manager in the TAA/ATAA petition, the request for reconsideration stated that the Workers' layoffs were – in essence – the culmination of the 2004 shift in production of apparel fiber to Mexico, the "direct result of the . . . apparel machines going to Mexico, the loss of textile manufacturing in the U.S. the bigger picture." *Id.*; *see also id.* at 38 (explaining that Workers' layoffs were "a direct result of the textile industry going to developing countries and the loss of textile manufacturing in the U.S.").

With no further investigation, the Labor Department denied the Workers' request for reconsideration, stating that the request neither "present[ed] evidence that the Department [had] erred" nor "contain[ed] new facts of a substantive nature bearing on the [agency's initial] determination." *See* A.R. 45–46; 72 Fed. Reg. at 15,169. In denying reconsideration, the Labor Department acknowledged the Workers' claim that their terminations were "a direct result of the same shift in production to Mexico . . . which resulted in workers certification for TAA in 2004." *See* A.R. 45–46; *see also* A.R. 35–38. However, the Labor Department stated that, pursuant to agency regulations, it only "considers production that occurred one year prior to the date of the petition." *See* A.R. 46. The Labor Department therefore concluded that – because the Chattanooga plant ceased production of apparel fiber in 2004 – the Workers' TAA/ATAA petition was "outside of the relevant period." *Id.*

This action ensued. The Workers filed a Motion For Judgment Upon the Agency Record, which argued, *inter alia*, that the Labor Department had denied the Workers' TAA/ATAA petition based on the agency's determination that the Workers "were not in support of domestic production within the requisite one year period," but that the agency had failed to identify the authority for the asserted one-year requirement. *See* Pl.'s Brief at 10; *see also id.* at 4 (asserting that agency "established an arbitrary one-year cut off date"). In addition, although the Workers' motion did not expressly request that the agency extend the 2004 TAA/ATAA certification, the Workers faulted the Labor Department for "fail[ing] to adequately consider the relevancy of the prior certification." *See* Pl.'s Brief at 10.

Conceding that, by its terms, the one-year limitation in 29 C.F.R. § 90.2 appears to apply only in cases where layoffs result from "increased imports," the Government sought – and was granted – a voluntary remand to permit the Labor Department to determine whether the one-year time bar also applies in "shift of production" cases such as this. *See generally* Defendant's Consent Motion for Voluntary Remand; Order (March 27, 2008). The Government further advised that, if the Labor Department determined that the one-year limitation did not apply, the agency would reconsider the Workers' eligibility for TAA and ATAA. *See* Defendant's Consent Motion for Voluntary Remand.

In its Negative Determination on Remand, the Labor Department abandoned its reliance on the one-year time limitation in 29 C.F.R. § 90.2. Instead, the Labor Department based its negative determination on its conclusion that the Workers' terminations "[were] not related to the shift in production of apparel nylon filament to Mexico in 2004," but, rather, were the result of "a business decision to improve the efficiency of . . . [Invista's] customer service organization." *See* 73 Fed. Reg. at 32,739–40. In light of its conclusion that "the shift of production to a foreign country was not a cause of the work-

ers' separations," the Labor Department reserved judgment as to "the impact of the fact that no production took place at the subject firm during the twelve month period prior to the filing of the petition." *See* 73 Fed. Reg. at 32,739–40. Finally, because the Labor Department determined that the Workers were not eligible for TAA, their petition for ATAA was denied as well. *See* 73 Fed. Reg. at 32,739–40.

III. *Analysis*

As explained in section I above, "because of the *ex parte* nature of the certification process, and the remedial purpose of the [TAA/ATAA] program," the Labor Department is obligated to "conduct [its] investigation with the utmost regard for the interests of the petitioning workers." *Int'l Molders and Allied Workers Union*, 643 F.2d at 31. Indeed, "the Labor Department is charged with an *affirmative* obligation to *proactively* and thoroughly investigate all TAA [and ATAA] claims filed with the agency – and, in the words of its own regulations, to 'marshal all relevant facts' to make its determinations." *BMC*, 30 CIT at 1372, 454 F. Supp. 2d at 1357 (*citing* 29 C.F.R. § 90.12). It is thus no exaggeration to characterize the Labor Department's role in the development of a TAA/ATAA claim as "pivotal." *BMC*, 30 CIT at 1372, 454 F. Supp. 2d at 1357.

In stark contrast to the Labor Department officials who are charged with the day-to-day administration of the complex statutory and regulatory scheme, petitioning workers and their (typically *pro bono*) counsel cannot reasonably be expected to have knowledge of the frequently–changing, nuanced, and "sometimes esoteric criteria" for TAA/ATAA certification. *Former Employees of IBM Corp. v. U.S. Sec'y of Labor*, 29 CIT 951, 956, 387 F. Supp. 2d 1346, 1351 (2005); *see also id.* (rejecting agency's argument that because workers did not allege certain facts, agency was not obligated to make further inquiry, and holding that – to the contrary – "it is incumbent upon Labor to take the lead in pursuing the relevant facts").[4] Accordingly, it would be absurd and inconsistent with the Labor Department's duty to petitioning workers to require that a TAA/ATAA claimant "specify with precision the statutory provisions or the corresponding regulations under which he is seeking benefits." *BMC*, 30 CIT at 1372 n.91, 454 F. Supp. 2d at 1357 n.91 (*quoting Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991)). Claimants should not be required "to develop expertise in laws and regulations on . . . [TAA/ATAA] before receiving any [benefits]." *Id.* (*quoting Akles*, 1 Vet. App. at 121).

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[4] *See generally BMC*, 30 CIT at 1372, 454 F. Supp. 2d at 1357 (noting that "Congress designed TAA as a *remedial* program, recognizing that petitioning workers would be (by definition) traumatized by the loss of their livelihood; that some might not be highly-educated; that virtually all would be *pro se*; that none would have any mastery of the complex statutory and regulatory scheme; and that the agency's process would be largely *ex parte*").

In sum, "Congress did not intend the TAA[/ATAA] petition process to be adversarial. Nor did Congress intend to cast the Labor Department as a 'defender of the fund,' passively sitting in judgment, ruling 'thumbs up' or 'thumbs down' on whatever evidence petitioning workers might manage to present." *BMC*, 30 CIT at 1372, 454 F. Supp. 2d at 1357. Instead, Congress envisioned that – much like the role of the Veterans Administration in veterans' benefit cases – the Labor Department would take a very active role in developing petitioning workers' TAA/ATAA claims, so as to "render a decision which grants *every benefit that can be supported in law* while protecting the interests of the Government." *See BMC*, 30 CIT at 1372 n.89, 454 F. Supp. 2d at 1357 n.89 (*quoting* VA regulation, 38 C.F.R. § 3.103(a)) (emphasis altered). Thus, in investigating TAA/ATAA claims, the Labor Department cannot limit its review solely to the petitioning workers' express claims. Instead, the agency must independently investigate the facts of each case, and – based on that investigation – consider all legal theories under which the petitioning workers might be eligible for certification. In a case such as this, where there is a relevant prior TAA/ATAA certification, the Labor Department must consider the possibility of amending the prior certification to extend coverage to the new group of petitioning workers. The Labor Department failed to do so here.

Although the statute and regulations do not explicitly address the amendment of TAA/ATAA certifications, the Labor Department extends certifications beyond two years when necessary "to cover all adversely affected workers at the subject firm or appropriate subdivision," in cases where "the later worker separations [were] attributable to the basis for [the original] certification." *See United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Service Workers v. U.S. Sec'y of Labor*, 33 CIT at ___ , 2009 WL 1175654 at *4 (2009); Weirton Steel Corporation, Weirton, WV: Negative Determination on Remand, 73 Fed. Reg. 52,066, 52,068–70 (Sept. 8, 2008)[5]; *see also* 29 C.F.R. § 90.17(f) ("Upon reaching a determination

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[5] In its Negative Determination on Remand in the Weirton Steel case, the Labor Department explained:

> [I]n implementing its authority to certify all adversely affected workers, the Department has [amended] and continues to amend the expiration date of certifications when the facts of the case show that the later worker separations are attributable to the basis for [the original] certification (the increased imports or shift of production to a foreign country).

73 Fed. Reg. at 52,068. The agency further stated:

> Requests for an amendment to extend the period of a certification are rare. However, in response to each request for such an amendment to a certification, the Department reviews the facts of the case and determines whether or not it has been demonstrated that the worker separations that occurred after the expiration date of the certification has expired are also "attributable" to the basis for that certification.

73 Fed. Reg. at 52,069; *see id.* at 52,068 (noting that "requests to amend certification to ex-

that the certification of eligibility should be continued, the certifying officer shall promptly publish in the Federal Register a summary of the determination with the reasons therefor.").

As outlined in section II above, there is ample record evidence in the case at bar indicating that the terminations of the Workers here were "attributable to the basis for [the original, *i.e.*, the 2004] certification" – that is, the 2004 shift of apparel fiber production to Monterrey, Mexico. *See* 73 Fed. Reg. at 52,068. In contrast, there is relatively little record support for the Labor Department's conclusion that the layoffs at issue "[were] not related to the shift in production of apparel nylon filament to Mexico in 2004," but, rather, were the result of "a business decision to improve the efficiency of . . . [Invista's] customer service organization" – and the evidence that exists is relatively weak. *See* 73 Fed. Reg. at 32,739–40.

The Labor Department's principal evidence in support of its determination is the negative response of an Invista representative to a single, pointed inquiry by the agency:

> [P]lease answer the following question with "Yes" or "No" and a detailed explanation: Was the business decision to reorganize the Customer Service Organization the result of the shift of production two years earlier?

See C.S.A.R. 17. There are, however, several problems with the Labor Department's reliance on such evidence.

First, the Labor Department, in effect, asked the Invista representative the "ultimate question." In essence, the agency delegated to the Invista representative the power to decide the Workers' TAA/ATAA petition. But "it is Labor's responsibility, not the responsibility of [a] company official, to determine whether a former employee is eligible for benefits." *BMC*, 30 CIT at 1340, 454 F. Supp. 2d at 1328 (quotation omitted). The Labor Department erred by substituting a company representative's conclusory opinion for its own probing inquiry into all the relevant underlying facts concerning the relationship between the 2004 shift in production to Mexico and the Workers' subsequent terminations. *See generally BMC*, 30 CIT at 1339–41, 454 F. Supp. 2d at 1328–29 (cataloguing wide range of opinions criticizing agency for posing "ultimate question" to employers, and for abdicating agency's responsibility to conduct its own independent

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tend the expiration period are granted in cases where . . . the worker separations are 'attributable' to the basis for the earlier certification"). *See also*, *e.g.*, Thomson, Inc., Circleville, OH: Notice of Termination of Investigation, 72 Fed. Reg. 5751 (Feb. 7, 2007); O/Z Gedney, Terryville, CT: Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance, 69 Fed. Reg. 43,454 (July 20, 2004); Wiegand Appliance Division, Emerson Electric Company, Vernon, AL: Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance, 68 Fed. Reg. 50,198 (Aug. 20, 2003).

factual investigations and to reach its own independent legal conclusions).[6]

Moreover, there is a false dichotomy embodied in the Labor Department's conclusion that the Workers' terminations "[were] not related to the shift in production of apparel nylon filament to Mexico in 2004," but were instead the result of "a business decision to improve the efficiency of . . . [Invista's] customer service organization." *See* 73 Fed. Reg. at 32,739–40. As a matter of pure logic, the fact that a company states that layoffs are part of a plan to "increase efficiency," "restructure," or "save money" says nothing about whether or not those layoffs are attributable to effects of international trade. As a general principle, companies are obviously *always* striving to operate in an efficient and cost-effective manner. No doubt the 2004 shift in production was the result of a "business decision" designed to "increase efficiency," "restructure," and "save money" in the manufacture of apparel fiber. But the driving force behind that "business decision" was unquestionably foreign competition.

The Labor Department cannot premise its determinations in TAA/ATAA cases on conclusory assertions about companies' "business decisions" or on euphemisms such as "enhanced competitiveness" and "increased efficiency." For purposes of a TAA/ATAA analysis, the relevant question as to any asserted "business decision" is: *Why*? In this case, why did Invista feel the need to "improve the efficiency" of its customer service organization, and how (if at all) was it related to the 2004 shift in production to Mexico (or otherwise related to the pressures of foreign competition)? *See, e.g.*, *BMC*, 30 CIT at 1338 n.32, 454 F. Supp. 2d at 1326–27 n.32 (criticizing Labor Department for accepting similar statements by employers); *Former Employees of Int'l Business Machines v. U.S. Sec'y of Labor*, 31 ___ , ___ n.72, 483 F. Supp. 2d 1284, 1335 n.72 (2007) (same).

In its Negative Determination on Remand, the Labor Department cited three other findings in an effort to bolster its conclusion that the Workers' terminations were not related to the shift in production of apparel fiber to Mexico in 2004. *See* 73 Fed. Reg. at 32,739–40. But those findings too are questionable.

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[6] Other flaws in the Labor Department's investigation include the agency's failure to explain why it credited some sources of information and rejected other information. Further, the Labor Department failed to confront sources with conflicting information provided by others, depriving them of the opportunity to clarify discrepancies, and diminishing the usefulness of the information elicited by the agency.

But perhaps most troubling is the Labor Department's failure to contact the Workers, to apprise them of the proof required to establish their entitlement to TAA/ATAA certification, and to elicit information in support of their case. On remand, the Labor Department's sole contact with the Workers was an April 8, 2008 letter to their counsel requesting certain specific information about the Workers' duties at Invista, and the responsibilities which were transferred abroad. *See* S.A.R. 1. Given the Labor Department's failure to reach out to the Workers on remand, the Government's objection to the Workers' submission of a declaration in support of their motion rings very hollow indeed. *See* Def.'s Brief at 12–13.

The Labor Department asserts, for example, that "two of the four separated workers worked on a product line (Performance Materials) whose production was not shifted to Mexico." 73 Fed. Reg. at 32,739. But the evidence on that point, in fact, is in conflict and unclear (and, in any event, obviously says nothing about the terminations of the two other workers). The Labor Department similarly emphasizes that more than two years elapsed between the shift of manufacturing operations to Mexico and the terminations of these Workers. *See* 73 Fed. Reg. at 32,739–40. But that is the very point of the Labor Department's procedure for amending TAA/ATAA certifications to extend the expiration period: The Labor Department has implicitly recognized that, in certain cases, the employment of some trade-impacted workers may extend for a time beyond the presumptive two- year period reflected in the agency's standard TAA/ATAA certification. In the instant case, the Workers were notified of their impending terminations *less than three months* after the 2004 TAA/ATAA certification expired. As its third and final piece of corroborating evidence, the Labor Department notes that the Customer Service Representatives were replaced not by workers in Mexico, but instead by workers in Brazil and elsewhere. *See* 73 Fed. Reg. at 32,739–40. Again, the Labor Department misses the point. The gravamen of the Workers' case is that, if production had not been shifted to Mexico in 2004 (but rather had continued at the Chattanooga plant), the Workers would still have their jobs supporting that domestic production. Nothing in law or logic requires that the Workers' jobs necessarily have shifted to Mexico. Under the Labor Department's own standards, if there is a "causal nexus" between the 2004 shift in production and the Workers' terminations, they are entitled to certification. *See* 73 Fed. Reg. at 52,068.

IV. *Conclusion*

For all the reasons set forth above, this matter must be remanded to the Labor Department for a second time. On remand, the Labor Department shall thoroughly and independently investigate the facts of the case, and – based on that investigation – shall consider all legal theories under which the petitioning Workers might be eligible for certification, including the possible amendment of the 2004 TAA/ATAA certification.

A separate order will enter accordingly.

Slip Op. 09–61

ZHEJIANG NATIVE PRODUCE AND ANIMAL BY-PRODUCTS IMPORT & EXPORT GROUP CORP., JIANGSU KANGHONG NATURAL HEALTHFOODS CO., LTD., AND ANHUI HONGHUI FOODSTUFF (GROUP) CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 06–00234

[United States Department of Commerce's Final Results of Redetermination are sustained.]

Dated: June 19, 2009

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell, Ned H. Marshak, Elaine F. Wang*), for plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, United States Department of Justice Commercial Litigation Branch, Civil Division, (*Jane C. Dempsey*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, (*Sapna Sharma*), of counsel, for defendant.

Kelley Drye & Warren (*Michael J. Coursey, R. Alan Luberda*), for defendant-intervenors.

OPINION

Eaton, Judge: In *Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. v. United States*, 32 CIT ____ , Slip Op. 08–68 (June 16, 2008) (not reported in the Federal Supplement) ("*Zhejiang I*"), this court sustained, in part, and remanded the final results of the United States Department of Commerce's ("Commerce" or the "Department") third administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC") for the period of review ("POR") beginning on December 1, 2003 through November 30, 2004. See Honey from the PRC, 71 Fed. Reg. 34,893 (Dep't of Commerce June 16, 2006) (final results) and the accompanying Issues and Decision Memorandum (Dep't of Commerce June 9, 2006) ("Issues & Dec. Mem.") (collectively, "Final Results").

Commerce has now issued the Final Results of Redetermination Pursuant to Court Remand (Dep't of Commerce Dec. 18, 2008) ("Remand Results"). Plaintiffs Zhejiang Native Produce and Animal By-Products Import & Export Group Corp., Jiangsu Kanghong Natural Healthfoods Co., Ltd., and Anhui Honghui Foodstuff (Group) Co., Ltd. (collectively, "plaintiffs") have filed their comments in response to the Remand Results. *See* Pls.' Comments Resp. Remand Results ("Pls.' Comments"). In addition, Commerce has filed its response to those comments, and defendant-intervenors the American Honey

Producers Association and the Sioux Honey Association have filed their respective responses, as well. *See* Def.'s Resp. Pls.' Comments ("Defs.' Resp."); Def.-Ints.' Comments Remand Results ("Def.-Ints.' Comments").

Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). As explained in *Zhejiang I*, certain of the issues in this action have been litigated previously in this Court.[1] *Zhejiang I*, 32 CIT at ___ , Slip Op. 08–68 at 3. For the reasons set forth below, the court sustains the Remand Results.

STANDARD OF REVIEW

The court reviews the Remand Results under the substantial evidence and in accordance with law standard set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . .").

DISCUSSION

I. Calculation of Surrogate Values

In determining whether the subject merchandise is being, or is likely to be, sold at less than fair value, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison . . . between the export price[2] or constructed export price[3] and normal value." When merchandise that is the subject of an antidumping investigation is exported from a nonmarket economy ("NME")[4] country, such as the

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[1] These include: a challenge to Commerce's second administrative review of the antidumping duty order on Chinese honey (for the period of review from December 1, 2002 through November 30, 2003) in *Shanghai Eswell Enter. Co. v. United States*, 31 CIT ____ , Slip Op. 07–138 (Sept. 13, 2007) (not reported in the Federal Supplement) and in *Wuhan Bee Healthy Co. v. United States*, 31 CIT ____ , Slip Op. 07–113 (July 20, 2007)(not reported in the Federal Supplement); and a challenge to Commerce's first administrative review of the antidumping duty order on Chinese honey (for the period of review from December 1, 2001 through May 31, 2002) in *Wuhan Bee Healthy Co. v. United States*, 29 CIT 587, 374 F. Supp. 2d 1299 (2005).

[2] The "export price" is "the price at which the subject merchandise is first sold . . . 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," as adjusted. 19 U.S.C. § 1677a(a).

[3] "Constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . 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," as adjusted. 19 U.S.C. § 1677a(b).

[4] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from

PRC, Commerce, under most circumstances, determines normal value by valuing the factors of production used in producing the merchandise using surrogate data, to which it adds

> an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he 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)(1).

A. Calculation of Surrogate Financial Ratios: Expenses for Jars and Corks

In determining normal value, Commerce uses ratios[5] to calculate amounts for "general expenses and profit," calculating separate values for selling, general and administrative expenses; manufacturing overhead; and profit. *See Wuhan Bee Healthy Co. v. United States*, 31 CIT ___ , ___ , Slip Op. 07–113 at 41–42 (July 20, 2007) (not reported in the Federal Supplement) (citation and quotation omitted); 19 U.S.C. § 1677b(c)(1)(B).

In the Final Results, Commerce did not include expenses for jars and corks as direct material costs in the calculation of the materials, labor and energy ("MLE") denominator in the Department's financial ratio calculations. *See Zhejiang I*, 32 CIT at ___ , Slip Op. 08–68 at 30–31; Remand Results at 2.[6] Commerce stated that the financial statements of the Mahabaleshwar Honey Producers' Cooperative

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Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise."*Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes from the PRC, Commerce constructed normal value by valuing the factors of production using surrogate data from India. *See* 19 U.S.C. § 1677b(c)(4).

[5] As this Court has explained:

> [t]o calculate the SG&A ratio, the Commerce practice is to divide a surrogate company's SG&A costs by its total cost of manufacturing. For the manufacturing overhead ratio, Commerce typically divides total manufacturing overhead expenses by total direct manufacturing expenses. Finally, to determine a surrogate ratio for profit, Commerce divides before-tax profit by the sum of direct expenses, manufacturing overhead and SG&A expenses. These ratios are converted to percentages ("rates") and multiplied by the surrogate values assigned by Commerce for the direct expenses, manufacturing overhead and SG&A expenses. *Wuhan Bee Healthy Co. v. United States*, 31 CIT ____ , ____ , Slip Op.07–113 at 42 n.15 (July 20, 2007) (not reported in the Federal Supplement) (citing *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004)).

[6] In the calculation of surrogate financial ratios, the denominator should include the expenses of all direct material costs. *See* Persulfates from the PRC, 68 Fed. Reg. 6,712 (Dep't of Commerce Feb. 10, 2003) (notice of final results), and accompanying Issues and Decision Memorandum, at Comm. 9 (Dep't of Commerce Feb. 3, 2003).

("MHPC")[7] indicated that these items were being purchased and sold by MHPC, rather than being consumed in the sale of honey: "Respondents failed to provide evidence that the 'jars and corks' were consumed as packing[8] in the manner described." Issues & Dec. Mem. at 23.

The court in *Zhejiang I* found no reason to deviate from its finding in *Shanghai Eswell* with regard to this issue.[9] *Zhejiang I*, 32 CIT at ____ , Slip Op. 08–68 at 32–33 (citing *Shanghai Eswell Enter. Co. v. United States*, 31 CIT ____ , Slip Op. 07–138 at 24–25 ("*Shanghai Eswell*")). The court thus rejected as unsupported by substantial evidence Commerce's findings regarding expenses for jars and corks and remanded this question to Commerce. *Id.* at ____ , Slip Op. 08–68 at 33.

In its Remand Results, Commerce states:

> In accordance with the Court's instruction, and after careful examination of the record, and consistent with the Department's finding in the *Shanghai Eswell* Remand, as affirmed by the Court, the Department has revised the financial ratio calculations to include MHPC's reported expenses for jars and corks as direct materials used to produce finished honey.

Remand Results at 3 (citation omitted). As a result, the Department revised the calculation of the surrogate financial ratios to include expenses for jars and corks in the MLE denominator.

In their response to the Remand Results, plaintiffs state that they "agree with the Department['s] . . . determination that in calculating surrogate value financial ratios, jars and corks should be included as

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[7] In the Final Results, Commerce determined that the information from the 2004–2005 financial statements of the MHPC was "the best and most contemporaneous available information for valuing the financial ratios." Issues & Dec. Mem. at 19 (footnote omitted). The court upheld Commerce's determination to use the MHPC financial statements in *Zhejiang I*. *See* 2 CIT at _____ _, Slip Op. 08–68 at 25.

[8] The Department refers to "packing" and "packaging" interchangeably. It is not clear to the court that the words, as used in MHPC's financial statements, are necessarily referring to the same thing.

[9] First, the court observes . . . that the chart specifically pertains to honey sale and collection. Next, the court notes that the chart contains line items for 250 gram, 500 gram and 1 kilogram jars; 53 millimeter and 38 millimeter corks; and honey machines in both the "Sale" column and the "Purchase" column. The line item for 100 gram jars appears only in the "Sale" column. The chart is therefore ambiguous. While it is possible that MHPC buys and sells jars [with] corks that are either empty or filled with something other than honey, there is no evidence in the MHPC financial statement tending to support such a conclusion. Without further explanation the court cannot accept as adequate Commerce's reliance solely on the line items for jars and corks being separate from other line items, to support its conclusion that they are not direct materials associated with finished honey.

Zhejiang I, 32 CIT at _____ _, Slip Op. 08–68 at 32–33 (citing *Shanghai Eswell Enter. Co. v. United States*, 31 CIT _____ , Slip Op. 07–138 (Sept. 13, 2007) (not reported in the Federal Supplement) (citations and footnote omitted)).

'direct material costs' in the materials, labor and energy denominator." Pls.' Comments 2. No other party has objected to the Department's finding. Accordingly, the court sustains Commerce's inclusion of jar and cork expenses in its calculation of surrogate financial ratios.

B. Calculation of Labor Costs

The cost of labor is another factor of production used to determine normal value. To calculate the labor wage rate in NME countries, Commerce, pursuant to its regulations, employs a regression-based analysis using data from multiple countries. *See Dorbest Ltd. v. United States*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1262, 1291 (2006); *see* 19 C.F.R. § 351.408(c)(3) ("For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.").

In *Zhejiang I*, plaintiffs challenged the Department's use of this methodology, primarily because it was based on a basket of countries not economically comparable to China, which "contradicts the statute's language that the factors of production be valued using data from economically comparable countries pursuant to 19 U.S.C. § 1677b(c)(4)." 32 CIT at ___ , Slip Op. 08–68 at 34–35 (quotation omitted). On remand the court instructed Commerce to reconsider its analysis

> with specific reference to the reliance on data from countries whose level of development is not comparable to the PRC, and how its insistence that it need not alter its database for the wage rate calculation conforms to its behavior in other cases.

Zhejiang I, 32 CIT at ___ , Slip Op. 08–68 at 44.

On remand the Department "recalculated the regression analysis to include all countries for which data are available and suitable, pursuant to the country data selection criteria established in *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716 (Dep't of Commerce October 19, 2006) ("Selection Criteria"). . . ." Remand Results at 6. Commerce thus revised its labor rate regression to include all countries in its analysis that meet the Department's Selection Criteria. *Id*. Plaintiffs state that they "do not challenge the Department's redetermination." Pls.' Comments 2. Nor does any other party object to Commerce's findings.

Consequently, the court sustains Commerce's redetermination regarding the selection of data[10] to calculate the labor wage rate.

C. Calculation of Brokerage and Handling

In the Final Results, in calculating surrogate values, Commerce used a simple average of two surrogate values to calculate domestic brokerage and handling. *See* Remand Results at 18. Commerce calculated this average using data provided by Essar Steel Limited ("Essar Steel") and Pidilite Industry ("Pidilite"). Commerce explained that the simple average "achieves the most representative surrogate value in lieu of a honey-specific brokerage and handling value." Remand Results at 18 (citation omitted). Moreover, the Department explained in the Final Results that "it calculated the surrogate value using the Essar Steel and Pidilite data because together they constitute the best available information for valuing brokerage and handling based on the quality and specificity of the data." Remand Results at 18.

In *Zhejiang I*, plaintiffs challenged the Department's use of the Pidilite data, arguing that only the Essar Steel data should be used because: "(1) the Essar data is more contemporaneous; and (2) the Pidilite data has an aberrationally high brokerage and handling value based on a very low sales quantity." *Zhejiang I*, 32 CIT at ___ , Slip Op. 08–68 at 40 (citation and quotation omitted).

The *Zhejiang I* court found that "Commerce acted within its discretion when it concluded that, in the absence of data more specific to honey, the several months' difference in contemporaneousness was not material, and thus that the Pidilite data should not be excluded on that basis alone." 32 CIT at ___ , Slip Op. 08–68 at 42. However, the court also found that:

> Commerce's determination that use of a simple average of the data constituted the best available information for valuing brokerage and handling, . . . does not appear to be supported by substantial evidence. Commerce states that the Pidilite data constitutes the best available information for valuing brokerage and handling because of the data's "quality and specificity." The Department at no point, however, explains how the data meets either one of these standards.

Id. at ___ , Slip Op. 08–68 at 42.

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[10] The only question dealing with Commerce's cost of labor regulations addressed by this opinion relates to which countries should be included in Commerce's regression analysis. The court does not have before it issues dealing with the validity of the regression analysis, and therefore has made no finding with respect thereto. *Cf. Allied Pac. Food (Dalian) Co. v. United States*, 32 CIT ____ , ____ 587 F. Supp. 2d 1330, 1361 (2008) (concluding "that 19 C.F.R. § 351.408(c)(3) is contrary to 19 U.S.C. § 1677b(c) and therefore invalid.").

On remand, the Department "continues to find that the combination of both Pidilite and Essar Steel comprise the best available information in terms of quality and specificity." Remand Results at 19.

The Department explained that "lacking a honey-specific brokerage and handling value, the brokerage and handling costs of Essar Steel's hot-rolled carbon steel flat products, and Pidilite's carbazole violet pigment, are equally applicable to determine a surrogate brokerage and handling value." Remand Results at 19 (citation omitted). "[W]ithout additional record evidence to suggest that hot-rolled steel was more comparable to honey than carbazole violet pigment, the selection of either Pidilite's or Essar's data over the other would not be supported by substantial evidence." Def.'s Resp. 5 (citation omitted).

In objecting to the use of the Pidilite data on remand, plaintiffs make three primary arguments: (1) that Commerce has not shown that the Pidilite data is as representative as the Essar Steel data; (2) that the Pidilite data should not be used because it consists of only 19 shipments, while the Essar Steel data represents 446 shipments;[11] and (3) that the Pidilite data itself is marred by the presence of "clearly anomalous" value derived from a single shipment. *See* Pls.' Mem. 3–6. Despite plaintiffs' arguments to the contrary, the Department has supported with substantial evidence both the use of the Pidilite data and the use of a simple average.

First, Commerce has shown that the Pidilite data is as representative as the Essar Steel data. As noted, there are no brokerage and handling values for honey on the record. Thus, the Department looked elsewhere. The Essar Steel data represents values for steel; those for Pidilite, brokerage and handling costs for carbazole violet pigment. Each of these products is far removed from honey, however, no party questions the use of the Essar Steel data.

That being the case, it is difficult to see how the Pidilite data is less representative of honey than the Essar Steel data. Both data sets are relatively contemporaneous to each other and to the POR. *See Zhejiang I*, 32 CIT at ___ , Slip Op. 08–68 at 42. While the Essar Steel data represents many price points, the nineteen price points for the Pidilite data is not a *de minimis* number. Thus, the court agrees with Commerce that:

> in terms of specificity, the Department finds that neither of the products shipped by Essar Steel nor Pidilite is more or less comparable to honey, and thus the brokerage and handling

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[11] *See* Factors of Production Valuation Mem. for the Preliminary Results and Partial Rescission of Antidumping Duty Admin. Review of Honey from the PRC dated December 9, 2005, Administrative Record 229, Att. 15.

> costs of both are equally relevant. In terms of quality, the Department finds that neither Essar Steel nor Pidilite are more or less reliable than the other, and thus are both equally reliable.

Remand Results at 19.

Commerce's decision to use the Pidilite data even though it represents fewer data entries than the Essar Steel data is also not unreasonable. The mere fact that there are fewer data points does not necessarily render the Pidilite data unreliable, and plaintiffs have provided no specific reason pointing to the data's unreliability.

Finally, plaintiffs' insistence that the Pidilite data should either be adjusted or disregarded altogether because of the presence of one "clearly anomalous" data entry is unconvincing. Again, beyond pointing out that the price for one entry is far greater than the other 18 price points, plaintiffs give no reason why that price point should be excluded. The court thus agrees with Commerce that plaintiffs "fail[ ] to cite to any record evidence demonstrating that the price values for the 19 shipments 'skewed' the data and fails to identify any record evidence establishing the 'normal' brokerage and handling value for carbazole violet pigment" which would demonstrate that a "particular shipment value was aberrational." Def.'s Resp. 5. Accordingly, the court finds that because there is no record evidence supporting a conclusion that Commerce should exclude a particular Pidilite shipment value, or exclude Pidilite's data as a whole, Commerce's inclusion of Pidilite's data to calculate the brokerage and handling value is reasonable. The court thus finds that the Department has provided substantial evidence to support its use of the Pidilite data.

Further, the court sustains Commerce's decision to use a simple average of the Pidilite and Essar Steel data. Commerce explained that it found these two sets of data to be equally probative for determining the surrogate brokerage and handling value, and plaintiff has not demonstrated that its preference of using Essar Steel data alone will yield a more reliable result than the average of the Essar Steel and Pidilite data. Without additional record evidence to suggest that hot-rolled steel was more comparable to honey than carbazole violet pigment, the selection of either Pidilite's or Essar Steel's data over the other would not be supported by substantial evidence. This Court has held that "[w]here there exist[ ] on the record 'alternative sources of data that would be equally or more reliable . . . it is within Commerce's discretion to use either set of data.' " *Wuhan Bee Healthy Co. v. United States*, 29 CIT 587, 592–93, 374 F. Supp. 2d 1299, 1304 (2005) (quoting *Geum Poong Corp. v. United States*, 26 CIT 322, 326, 193 F. Supp. 2d 1363, 1369 (2002)). Using the same reasoning Commerce acted within its discretion by including both sets of data and averaging them.

CONCLUSION

For the foregoing reasons, the court sustains the Department's Remand Results.

Slip Op. 09–62

LARRY J. HACKER and NANCY A. HACKER, Plaintiffs, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No. 07–00008

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

Decided: June 19, 2009

Miller & Chevalier Chartered (*Daniel P. Wendt*) for the plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin F. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Brian T. Edmunds*); and Office of General Counsel, U.S. Department of Agriculture (*Jeffrey Kahn*), of counsel, for the defendant.

Memorandum

AQUILINO, Senior Judge: Upon commencement of this action pursuant to 19 U.S.C. § 2395 and 28 U.S.C. § 1581(d) to contest the denial of a cash benefit under the Trade Adjustment Assistance for Farmers program by the Foreign Agricultural Service ("FAS"), U.S. Department of Agriculture, the defendant interposed a motion to remand to FAS so that

> it may issue a new and more detailed decision explaining the reasons for its denial of plaintiffs' request for certification for trade adjustment assistance ("TAA").

I

That motion was granted, and the order of remand has brought forth a reconsidered decision by FAS that, nevertheless, on the basis of the net farm income reported on the 2003 and 2004 Schedule F's that Mr. Hacker submitted, there was not a decline in his net farm income from 2003 to 2004, and therefore Mr. Hacker does not meet the requirements of 19 U.S.C. § 2401e(a)(1)(C) and 7 C.F.R. § 1580.301(e)(4) and is not eligible for a cash payment under TAA.[1]

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[1] The "Schedule F"s" referred to were part of plaintiffs' submissions to the Internal Rev-

Whereupon, with the able assistance of counsel *pro bono publico*, the plaintiffs filed an amended complaint, which has been duly answered by the defendant, and then a motion for judgment on the agency record pursuant to USCIT Rule 56.1.

That motion indicates that plaintiffs are American farmers who have grown and harvested *Concord* and *Niagara* grapes in the state of Michigan. It proceeds to describe *in haec verba* their circumstances in this matter as follows:

> A drought in 2001 ruined much of the Hackers' grape crop, but the Secretary was there to help, providing a disaster relief payment of $80,000. The Hackers received the payment in early 2004. By that time, however, the Hackers were struggling to cope with an influx of low-priced imports from Argentina. Soon, the Secretary recognized that grape prices had significantly fallen due to the low-priced imports and made TAA payments available to eligible farmers. To be eligible, a farmer must show that his or her net farm income has decreased at the same time as low-priced imports penetrated the market. For the Hackers, this meant that they were required to show that their 2004 net farm income was lower than their 2003 net farm income.
>
> But the Hackers' net farm income – as reported in their tax filings – did *not* decline from 2003 to 2004 because the Hackers' 2004 net farm income included the $80,000 disaster relief payment. However, the Hackers' *true* net farm income – *i.e.*, the net farm income excluding the disaster relief payment – *did* decline from 2003 [to] 2004. Indeed, although they farmed approximately the same acreage in 2003 and 2004, the Hackers produced fewer grapes in 2004 in a market with declining prices.
>
> The Secretary relied solely on the Hackers' net farm income as reported in their tax returns and denied the Hackers' request for TAA payments. . . .

Hackers' Rule 56.1 Brief, pp. 1–2 (emphasis in original).

The motion takes the position that defendant's denial of assistance was not based on substantial evidence because the Secretary relied

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enue Service on Forms 1040 for those calendar years. *See* Administrative Record ("AR"), pp. 5, 6.

Footnote 1 to this decision states that, according to the agency record,

> Larry J. Hacker was the sole applicant for TAA benefits. Although Nancy A. Hacker also signed the application, her name is not listed as an applicant, and all determinations were made solely with respect to Larry J. Hacker. . . . However, this does not affect the determination in this case.

AR citations omitted. Plaintiffs' counsel concur. *See* Hackers' Rule 56.1 Brief, p. 1 n. 1.

solely on the Hackers' net farm income as reported in their tax returns.

> Also, the Secretary's determination was not otherwise in accordance with law because the . . . regulation defining net farm income, as applied to Mr. Hacker's application, unjustifiably and arbitrarily distinguishes between farmers based on the irrelevant facts of (1) if and when a farmer receives a disaster relief payment unrelated to the relevant period; and (2) whether the farmer reports net farm income for tax purposes on an accrual or cash basis.

Id. at 2. It argues that the defendant could have and should have provided the plaintiffs with relief, first by excluding the disaster payment "*per se*" from its determination of their net farm income or, second, by accepting plaintiffs' "invitation" to calculate that income on an accrual, rather than a cash, basis. *See id.* at 2–3.

A

Congress has enacted qualifying requirements for relief of the kind prayed for herein, including that a

> producer's net farm income (as determined by the Secretary) for the most recent year [be] less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part.

19 U.S.C. § 2401e(a)(1)(C). In furtherance of this statutory condition, the Secretary of Agriculture has determined to define "net farm income" to mean

> net farm profit or loss, excluding payments under this part, reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration.[2]

And the courts have determined that this is a "reasonable definition of the statutory term, to which [they] are obligated to defer." *Steen v. United States*, 468 F.3d 1357, 1360 (Fed.Cir. 2006), *aff'g*, 29 CIT 1241, 395 F.Supp.2d 1345 (2005).

In this matter, the defendant has proceeded in accordance with this law, thereby leaving the plaintiffs to attempt to find relief in certain cases decided subsequent to *Steen*, including *Robert L. Anderson v. U.S. Sec'y of Agriculture*, 30 CIT 1993, 469 F.Supp.2d 1300 (2006); *Dus & Derrick, Inc. v. U.S. Sec'y of Agriculture*, 31 CIT ___ , 469

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[2] 7 C.F.R. § 1580.102. The court notes that plaintiffs' $80,000 disaster relief payment was not the kind of "payment[ ] under this part" contemplated by this regulation.

F.Supp.2d 1326 (2007); *Mark T. Anderson v. U.S. Sec'y of Agriculture*, 31 CIT ___ , Slip Op. 07–77 (May 16, 2007).

In the case of Robert L. Anderson, the court remanded his claim because it found the agency failed to consider the reasonableness of its regulation as applied to Mr. Anderson in its determination. *See* 30 CIT 1742, 1753, 462 F.Supp.2d 1333, 1342 (2006). Citing *Steen*, which was decided by the court of appeals one month after that order, the agency declined to carry out its mandate. Whereupon the CIT ordered the Secretary, yet again, to comply on the grounds of improper procedure and that "a plain reading of *Steen* would have demonstrated its inapplicability"[3] because that matter lacked any contention that the tax returns distorted the net amount of income derived from all fishing sources in the two relevant years. There was such an assertion in *Robert L. Anderson. See* 31 CIT ___ , ___ , 493 F.Supp.2d 1288, 1291 (2007).

Such a reading does not lead to the same conclusion in this action. Indeed, what seemingly has come to discomfort the plaintiffs is the timing of their application at the end of one tax year for the disaster relief payment, which was then received soon after the start of the ensuing such year.

> It is well-established that the cash method usually leads to distorted income statements for any one taxable year. *See, e.g., Frysinger v. Comm'r*, 645 F.2d 523, 527 (5th Cir. 1981). However, the "sacrifice in accounting accuracy under the cash method represents an historical concession by the Secretary and the Commissioner to provide a unitary and expedient bookkeeping system for farmers and ranchers in need of a simplified accounting procedure." *United States v. Catto*, 384 U.S. 102, 116 (1966); *see also Frysinger*, 645 F.2d at 527 (finding the Commissioner has specifically granted farmers the special privilege of using the cash method despite the high probability for substantial distortions of income in any one taxable year). For income reporting purposes, the distortions are not considered material because "over a period of years the distortions will tend to cancel out each other." *Van Raden v. Comm'r*, 71 T.C. 1083, 1104 (1979); *see also Spitalny v. United States*, 430 F.2d 195, 197 (9th Cir. 1970).

Robert L. Anderson v. U.S. Sec'y of Agriculture, 30 CIT at 1750, 462 F.Supp.2d at 1340. Presumably the delayed receipt of the disaster relief payment was the result of appropriate business planning, yet having the effect countenanced by the foregoing cited cases.

Moreover, the evidence of those farm-relief funds on the agency record differentiates this action from all the others cited by the

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[3] 30 CIT at 1994, 469 F.Supp.2d at 1301.

plaintiffs herein. *Compare*, *e.g.*, *Dus & Derrick, Inc. v. U.S. Sec'y of Agriculture*, *supra*, *with id.*, 32 CIT ___ , Slip Op. 08–19 (Feb. 6, 2008), *and Mark T. Anderson v. U.S. Sec'y of Agriculture*, 30 CIT 1104, 441 F.Supp.2d 1379 (2006), *with id.*, *supra*. In sum, this court is unable to conclude that defendant's determination after remand is not in accordance with law and not supported by substantial evidence on the record.

B

With regard to appropriate relief, the plaintiffs take the position that the Secretary of Agriculture's definition of "net farm income", *supra*, is not in accordance with law. To contend that the disaster relief payment received be excluded from farm income for TAA–calculation purposes does not coincide with plaintiffs' own understanding of the payment, which they included as net farm income on that line of their Schedule F income-tax filing. Nor does it concur with the Secretary's recognized use under its Generally Accepted Accounting Principles all-inclusive concept of net income that includes even extraordinary items. *See*, *e.g.*, *Selivanoff v. U.S. Sec'y of Agriculture*, 30 CIT 1051 (2006); *Dorsey v. U.S. Sec'y of Agriculture*, 32 CIT ___ , Slip Op. 08–76 (July 11, 2008).

II

In view of the foregoing, plaintiffs' Rule 56.1 motion for judgment on the agency record must be denied. Judgment dismissing this action will enter accordingly.