U.S. Customs and Border Protection

Slip Op. 10–50

KYD, INC., Plaintiff, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, AND SUPERBAG CORPORATION, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 09–00034
PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record is GRANTED to the extent described in this opinion, and this matter is REMANDED to the U.S. Department of Commerce for action consistent with this opinion.]

Dated: May 6, 2010

Riggle & Craven (*David J. Craven*) for Plaintiff KYD, Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Carrie A. Dunsmore* and *Stephen C. Tosini*); and *Scott D. McBride*, U.S. Department of Commerce, Of Counsel, for Defendant United States.

King & Spalding LLP (*Stephen A. Jones* and *Daniel L. Schneiderman*) for Defendant-Intervenors Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation.

OPINION

Wallach, Judge:

I.
Introduction

As a U.S. importer of merchandise subject to an antidumping duty order, Plaintiff KYD, Inc. ("KYD") challenges determinations made by the U.S. Department of Commerce ("Commerce") in the 2006–07 administrative review of that order. *See* Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 Fed. Reg. 2,511, 2,511 (January 15, 2009) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). In moving for judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2, KYD argues that the application of adverse inferences with

respect to its relevant entries and the selection of a particular antidumping duty rate for those entries are unsupported by substantial evidence on the record and otherwise not in accordance with law. *See* Motion for Judgment on the Agency Record Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("KYD's Motion"); Memorandum in Support of Motion for Judgment on the Agency Record Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("KYD's Brief").

KYD's Motion is GRANTED to the extent described below. Commerce's determination of the assessment rate for KYD's relevant entries is unsupported by substantial evidence on the record. Commerce determined that assessment rate without regard to the information submitted by KYD even though it made no finding under 19 U.S.C. § 1677e(b) that KYD had failed to cooperate and no finding under 19 U.S.C. § 1677m(e) that it could decline to consider KYD's information. Accordingly, this matter is REMANDED to the agency for action consistent with this opinion.

II.
Background

In 2004, Commerce published an antidumping duty order on certain polyethylene retail carrier bags ("PRCBs") from Thailand. *See* Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand, 69 Fed. Reg. 48,204 (August 9, 2004) ("AD Order"). Before the third anniversary of the AD Order, Commerce provided notice of the opportunity to request an administrative review for the period of review from August 1, 2006 to July 31, 2007 ("the POR"). *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 72 Fed. Reg. 42,383, 42,383 (August 2, 2007).

During the POR, KYD had imported merchandise subject to the AD Order from King Pac Industrial Co., Ltd. ("King Pac") and Master Packaging Co., Ltd. ("Master Packaging").[1] *See* Memorandum from Barbara E. Tillman, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Antidumping and Countervailing Duty Operations, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the Period of Review August 1, 2006, through July 31, 2007 (January 7, 2009), 2009 WL 113442 ("Final

[1] Commerce "consider[s] King Pac Industrial Co., Ltd., and King Pak Ind. Co., Ltd., to be alternative spellings of the name of one company." Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 73 Fed. Reg. 52,288, 52,288 n.1 (September 9, 2008).

Results Memo"). KYD and Defendant-Intervenors Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation requested an administrative review with respect to King Pac. *See* Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand; A-549–821; Request for §751 Administrative Review of King Pac Industrial Co., Ltd. (August 31, 2007), Public Record ("PR") 2; Letter from King & Spalding to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand: Request for Administrative Review (August 31, 2007), PR 3 ("Defendant-Intervenors' Review Letter") at 1. Defendant-Intervenors also requested an administrative review with respect to Master Packaging and three other Thai suppliers of the subject merchandise. *See* Defendant-Intervenors' Review Letter at 1–2.

Commerce initially selected as mandatory respondents "the three largest exporters/producers of subject merchandise . . . to the United States during the POR." Memorandum from Kristin L. Case, International Trade Compliance Analyst, AD/CVD Operations, Office 5, U.S. Department of Commerce, to Laurie Parkhill, Office Director, AD/CVD Enforcement, Office 5, U.S. Department of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand — Respondent Selection (December 6, 2007), PR 22 ("Respondent Selection Memo") at 4; Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 73 Fed. Reg. 52,288, 52,289 (September 9, 2008) ("Preliminary Results").

KYD actively participated in Commerce's administrative review. KYD notified Commerce that it would "monitor the submission of questionnaire responses" and provide necessary information if any of its suppliers failed to submit an adequate response. Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand; A-549–821; Request to Extend Deadline for Submission of Factual Information (December 28, 2007), PR 27 at 2. KYD subsequently submitted information to Commerce "in a form resembling a response to Section C of [Commerce's] standard questionnaire for U.S. sales and included copies of its relevant purchase orders and supplier invoices. Additionally, KYD explained the sales, shipping, and payment terms associated with its purchases." Preliminary Results, 73 Fed. Reg. at 52,291; *see* Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand; A-549–821; Submission of Certain Factual Information Pursuant to 19 U.S.C. §1677m (January 25,

2008), Confidential Record ("CR") 11 ("KYD's Submission"); Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand; A-549–821; Submission of Certain Factual Information Pursuant to 19 U.S.C. §1677m (April 8, 2008), CR 28 ("KYD's Resubmission").[2] KYD suggested that Commerce could calculate "a separate assessment rate for imports by KYD" using KYD's information and, as necessary, information provided by those mandatory respondents that had responded to Commerce's requests. KYD's Submission at 3 n.2, 13; KYD's Resubmission at S–3 n.2, S–13.

As part of its submission, KYD also provided evidence that King Pac "has apparently arranged for all of its U.S. export business to be supplied by" Master Packaging. KYD's Submission at 4; KYD's Resubmission at S–4.[3] Defendant-Intervenors responded that "KYD's submission raises serious new issues which were — from [Defendant-Intervenors'] perspective — entirely unexpected" and urged Commerce to investigate the relationship between King Pac and Master Packaging. Letter from King & Spalding to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand (February 4, 2008), CR 14 at 2. Commerce subsequently added Master Packaging as an additional mandatory respondent. Memo from Richard Rimlinger, Program Manager, AD/CVD Enforcement, Office 5, U.S. Department of Commerce, to Laurie Parkhill, Office Director, AD/CVD Enforcement, Office 5, U.S. Department of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand: Selection of Master Packaging as a Mandatory Respondent (March 27, 2008), PR 79 ("Master Packaging Selection Memo").[4]

King Pac and Master Packaging did not fully participate in the administrative review. King Pac responded to Commerce's initial request for information but failed to respond to the antidumping questionnaire, even after Commerce notified King Pac that it was extending the deadline for a response. *See* Letter from Pattida Julsasaksrisakul, Managing Director, King Pac Industrial Co., Ltd. to Office of AD/CVD Operations, U.S. Department of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand (October 19, 2007),

[2] KYD resubmitted its information after Commerce "determined that KYD had not justified many of its requests for proprietary treatment of [that] information." Preliminary Results, 73 Fed. Reg. at 52,291 n.3.

[3] KYD stated that it was also disclosing information to U.S. Customs and Border Protection pursuant to 19 U.S.C. § 1592(c)(4). *See* KYD's Submission at 4 n.3; KYD's Resubmission at S–4 n.3.

[4] Although Commerce was aware of KYD's allegations concerning King Pac and Master Packaging, *see* KYD's Submission, its explanation for adding Master Packaging as a mandatory respondent makes no reference to these allegations. *See* Master Packaging Selection Memo.

PR 11; Preliminary Results, 73 Fed. Reg. at 52,289; Letter from Laurie Parkhill, Office Director, AD/CVD Enforcement, Office 5, U.S. Department of Commerce, to King Pac Industrial Co., Ltd. (January 16, 2008), PR 39 ("Extension Letter"). Master Packaging responded to both the initial request for information and the antidumping questionnaire but failed to respond to a supplemental questionnaire. *See* Letter from Suthep Dansiriviroj, General Manager, Master Packaging Co., Ltd., to Office of AD/CVD Operations, U.S. Department of Commerce (October 22, 2007), PR 12; Preliminary Results, 73 Fed. Reg. at 52,289–90.

Because King Pac and Master Packaging failed to provide the information that Commerce requested, Commerce preliminarily concluded that the use of facts available was required with respect to each of them. *See* Preliminary Results, 73 Fed. Reg. at 52,290. Furthermore, because each of these suppliers "failed to cooperate by not acting to the best of its ability," Commerce preliminarily concluded that "the use of an adverse inference [was] warranted with respect to" each of them. *Id.* Commerce "preliminarily assigned King Pac and Master Packaging the highest [transaction-specific] rate found in the less-than-fair-value investigation, which was 122.88 percent." *Id.* ; *see also* Initiation of Antidumping Duty Investigations: Polyethylene Retail Carrier Bags from The People's Republic of China, Malaysia, and Thailand, 68 Fed. Reg. 42,002, 42,004 (July 16, 2003) ("Based on comparisons of export price to normal value" provided in the 2003 petition, "the estimated dumping [rates] for PRCBs from Thailand range from 34.84 percent to 122.88 percent.").[5]

For the purpose of corroboration, Commerce preliminarily concluded that the assigned dumping rate was reliable and relevant. Preliminary Results, 73 Fed. Reg. at 52,290. As to reliability, Commerce stated that the rate had been "calculated from source documents included with the petition" and had been found reliable in the investigation. *Id.* As to relevancy, Commerce stated that the rate had been calculated from a price quotation that "reflected commercial practices of the particular industry during the period of investigation," had not been contested in the investigation, and had been applied to King Pac in the previous administrative review. *Id.*

Commerce explicitly declined to calculate an importer-specific assessment rate for KYD and implicitly declined to use the information that KYD provided. *Id.* at 52,291. Commerce noted that KYD had proposed using "data collected from other respondents as a surro-

[5] Under its statutory definition, "dumping margin" refers to an amount rather than a percentage. *See* 19 U.S.C. § 1677(35)(A); *infra* Part IV.A.

gate." *Id.* However, Commerce concluded that it did "not have all of the information that is necessary to calculate an accurate margin for the supplier(s) from which KYD purchased subject merchandise during the POR." *Id.*

Following publication of the Preliminary Results, KYD and Defendant-Intervenors submitted administrative briefs to Commerce. *See* Case Brief of KYD, Inc., Case No. A–549 821, U.S. Department of Commerce (October 15, 2008), PR 184 ("KYD's Administrative Brief"); Petitioners' Case Brief, Case No. A-549–821, U.S. Department of Commerce (October 15, 2008), PR 185. KYD also requested, and Commerce held, an administrative hearing. *See* Transcript of Hearing, U.S. Department of Commerce, Administrative Review of the Antidumping Duty Order on Polyethylene Bags from Thailand (October 29, 2008), PR 189; Letter from David J. Craven, Riggle & Craven, to Carlos M. Gutierrez, Secretary of Commerce, Re: Polyethylene Retail Carrier Bags from Thailand; A-549–821, Request for a Hearing (September 16, 2008), PR 179.

The Final Results mirrored the Preliminary Results with respect to all issues relevant to this action. *See* Final Results, 74 Fed. Reg. 2,511, 2,511–12; *see also* Final Results Memo. Commerce announced that it had relied on "total adverse facts available to establish the dumping [rates] for King Pac and Master Packaging" and that it would accordingly "instruct [U.S. Customs and Border Protection] to apply [an antidumping duty assessment rate] of 122.88 percent to all entries of subject merchandise produced and/or exported by these companies." Final Results, 74 Fed. Reg. at 2,512. With respect to entries supplied by the two other mandatory respondents, Commerce calculated importer-specific assessment rates and reported weighted average dumping margins of 32.67 percent and 8.94 percent. *Id.*

KYD subsequently commenced this action under 19 U.S.C. § 1516a(a)(2). *See* Summons (January 26, 2009); Complaint (February 5, 2009). Defendant-Intervenors intervened as a matter of right pursuant to CIT Rule 24(a). *See* February 6, 2009 Order. KYD moved for judgment on the agency record pursuant to CIT Rule 56.2. *See* KYD's Motion.

III.
Standard of Review

The court will hold unlawful a determination by Commerce resulting from an administrative review of an antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

A determination is supported by substantial evidence if the record contains "evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Id.* (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996); *Universal Camera*, 340 U.S. at 487–88).

To determine whether Commerce's interpretation and application of an antidumping statute at issue is otherwise "in accordance with law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the first step of the *Chevron* analysis, the court must ascertain "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (quoting *Chevron*, 467 U.S. at 842–43).

The court reaches the second step of the *Chevron* analysis only "if the statute is silent or ambiguous with respect to the specific issue." *Id.* (quoting *Chevron*, 467 U.S. at 843). Under this second step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978) (citations omitted). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation had the question first arisen in a judicial proceeding. *Id.* (citations omitted).

IV.
Discussion

Jurisdiction is available under 28 U.S.C. § 1581(c) to review KYD's claims. KYD argues that Commerce's application of adverse inferences and selection of a particular antidumping duty assessment rate are unsupported by substantial evidence on the record and otherwise

not in accordance with law. At this point it is sufficient to conclude that substantial evidence does not support Commerce's selection, in disregard of information submitted by KYD, of a total adverse facts available assessment rate for KYD's relevant entries.[6]

A
Relevant Statutory Framework

In an administrative review, Commerce is required to "determine—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A); *see also* 19 U.S.C. §§ 1677b (defining "normal value"), 1677a (defining "export price"). The "dumping margin" is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A).

"[I]f there is a significant volume of sales of the subject merchandise or a significant number or types of products," then Commerce is authorized, but not required, to "use averaging and statistically valid samples" to determine export price, constructed export price, or normal value and to "carry[] out" the administrative review. 19 U.S.C. § 1677f-1(a). The "preferred methodology" in an administrative review is to compare "export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product." 19 U.S.C. § 1677f-1(d)(2); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994) ("SAA") at 843, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178.[7]

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[6] KYD also argues that the total adverse facts available dumping rate that Commerce selected for King Pac and Master Packaging was improperly corroborated and impermissibly punitive. *See* KYD's Brief at 19–35. As KYD acknowledges, this court previously rejected similar arguments in *KYD, Inc. v. United States*, 613 F. Supp. 2d 1371 (CIT 2009) ("*KYD I* "), *appeal docketed*, No. 09–1366 (Fed. Cir. May 28, 2009). *See* KYD's Brief at 19 n.1; *see generally KYD I*, 613 F. Supp. 2d at 1376–81. Reassessment of these arguments may be appropriate in light of *Gallant Ocean (Thailand) Co. v. United States*, No. 2009–1282, 2010 WL 1508198 at *4–5 (Fed. Cir. April 16, 2010) (holding that a particular total adverse facts available rate that was "more than ten times higher than the average dumping [rate] for cooperating respondents" was unsupported by substantial evidence because it was "unrelated to commercial reality and, thus, not a reasonably accurate estimate of [the exporter's] actual dumping rate") (citations omitted). At this point, however, such reassessment would be premature, since Commerce could render these arguments moot by considering KYD's information pursuant to 19 U.S.C. § 1677m(e). *See infra* Part IV.B.

[7] The Uruguay Round Agreements Act approved the new World Trade Organization Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C. § 3511(a)(1). The SAA, which was submitted to and approved by Congress, *see* 19 U.S.C. § 3511(a)(2), is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the

If "necessary information is not available on the record" or if "an interested party or any other person" fails to submit complete, timely, and verifiable information in a reasonably proper form or "significantly impedes" the administrative review, then Commerce is required to "use the facts otherwise available" in making the applicable determination. 19 U.S.C. § 1677e(a). In selecting from among these "facts otherwise available," Commerce is permitted, but not required, to "use an inference that is adverse to the interests of" an interested party that Commerce finds "has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." 19 U.S.C. § 1677e(b); *see* SAA at 870, 1994 U.S.C.C.A.N. at 4199 ("Where a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."). When Commerce resorts to what it deems "total adverse facts available," it applies adverse inferences "not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of [a respondent's] sales encompassed by the relevant antidumping duty order." *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1271 n.2, 435 F. Supp. 2d 1261 (2006) (citing *Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT 753, 769 n.3, 387 F. Supp. 2d 1270 (2005)).

The pertinent version of 19 U.S.C. § 1677e(b) was intended to "conform[] with" Commerce's prior use of adverse presumptions under a "best information available" standard. SAA at 870, 1994 U.S.C.C.A.N. at 4199. The Federal Circuit had concluded that this statutory standard permitted Commerce to presume that "the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990). Moreover, "since the presumption is rebuttable, it" induces cooperation with Commerce "without sacrificing the basic purpose of the statute: determining current margins as accurately as possible." *Id.* at 1191.[8]

Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[8] Despite the changed statutory context, the Federal Circuit has since cited *Rhone Poulenc* for the proposition that Commerce can select the highest prior dumping rate, *see Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc*, 899 F.2d at 1190), and for the proposition that Commerce is to "calculate dumping margins as accurately as possible," *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) (citing *Rhone Poulenc*, 899 F.2d at 1191).

Statutory provisions relevant to the instant action do impose certain obligations on Commerce that were not explicit in the best information available standard. *See* SAA at 864, 1994 U.S.C.C.A.N. at 4194; *Fujian Lianfu Forestry Co., Ltd. v. United States*, 638 F. Supp. 2d 1325, 1336 (CIT 2009); *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 947–948, 491 F. Supp. 2d 1326 (2007); *Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 932 n.6, 24 F. Supp. 2d 304 (1998).

First, when Commerce "relies on secondary information rather than on information obtained in the course of" the administrative review, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). Congress intended for this requirement to "prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence." *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (quoting *F.lli De Cecco di Filippo Fara S. Martino S.p.A.* v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

Second, in reaching a determination, Commerce:

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce], if—
>
> > (1) the information is submitted by the deadline established for its submission,
> > (2) the information can be verified,
> > (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> > (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information, and
> > (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e); *see* 19 C.F.R. § 351.308(e); *Gerber Food*, 29 CIT at 764; *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1581–82 (2003).

This court has previously considered Commerce's obligations under 19 U.S.C. § 1677m(e) with respect to information submitted by an importer. In the administrative review challenged in *World Finer Foods, Inc. v. United States*, 24 CIT 541 (2000), an importer submitted information about its purchases from an exporter that had withdrawn from the U.S. market and was suffering financially as a result of the antidumping duty rate that Commerce had imposed in the

original investigation. *World Finer Foods*, 24 CIT at 542, 544. Commerce did not consider the submission and decided to use inferences that were explicitly adverse to the exporter (and implicitly adverse to the importer). *See id.* at 542–43. This court concluded, in part, that Commerce had failed "to consider the information submitted by" the importer without first evaluating "any of the five statutory criteria" contained in 19 U.S.C. § 1677m(e). *Id.* at 545 (citation omitted).[9] "[E]ven though Commerce could not use the [importer's] information to determine the normal value," that information "indicated that [the exporter] likely would not have received a high margin, and certainly not a margin as high as the one selected by Commerce." *Id.* at 545–46.

B

Commerce's Decision To Disregard KYD's Information Is Unsupported By Substantial Evidence On The Record

In the instant action, the application of 19 U.S.C. § 1677m(e) to the information submitted by KYD reflects the "unambiguously expressed intent of Congress," *Wheatland Tube*, 495 F.3d at 1359. *See World Finer Foods*, 24 CIT at 545 ("The [importer's] information meets all of the criteria set forth in 19 U.S.C. § 1677m(e) for the use of information.").[10]As the importer of subject merchandise, KYD is an interested party. *See* 19 U.S.C. § 1677(9)(A). The purchase orders, invoices, and computer data that it submitted are "necessary to the determination" of the export price of these entries. 19 U.S.C. § 1677m(e); *see* 19 U.S.C. § 1675(a)(2)(A); 19 U.S.C. § 1677a.

Moreover, in submitting its information, KYD explicitly addressed each 19 U.S.C. § 1677m(e) criterion. *See* KYD's Submission at 12–14; KYD's Resubmission at S-11–14. KYD's information is timely and susceptible to verification. *See* KYD's Submission at 12–13; KYD's Resubmission at S-12–13. It appears to provide a "reliable basis" for determining export price, even if supplementation is necessary to

[9] This court also concluded that Commerce had failed to "respond to overtures of cooperation from the exporter." *World Finer Foods*, 24 CIT at 545. The record in the instant action contains no evidence of "overtures of cooperation" from King Pac and instead demonstrates that Commerce sought to assist and accommodate both King Pac and Master Packaging. *See, e.g.*, Letter from Laurie Parkhill, Office Director, AD/CVD Enforcement 5, U.S. Department of Commerce, to King Pac Industrial Co., Ltd. (December 6, 2007), PR 20; Extension Letter; Letter from Laurie Parkhill, Office Director, AD/CVD Enforcement 5, U.S. Department of Commerce, to KYD, Inc. c/o David Craven (January 22, 2008), PR 40; Letter from Laurie Parkhill, Department of Commerce, to Master Packaging Co., Ltd. (March 27, 2008), PR 77; Memorandum from Richard Rimlinger to Laurie Parkhill, Re: Polyethylene Retail Carrier Bags from Thailand: Master Packaging's correspondence received June 12, 2008 (June 30, 2008), PR 138.

[10] KYD's submission of information pursuant to 19 U.S.C. § 1677m(e) distinguishes the instant administrative review from the previous administrative review, which KYD challenged unsuccessfully in *KYD I*, 613 F. Supp. 2d 1371. *See supra* note 6.

account for the adjustments specified in 19 U.S.C. § 1677a(c). *See* 19 U.S.C. § 1677m(e)(3); KYD's Submission at 13; KYD's Resubmission at S–13; 19 U.S.C. § 1677a(c).[11] Its use presents no obvious difficulties, as Commerce can resort to the facts otherwise available in determining the normal value of KYD's relevant entries. *See* KYD's Submission at 13–14; KYD's Resubmission at S–14; KYD's Administrative Brief at 28; 19 U.S.C. §§ 1677b(a)(4), (e)(2)(B)(ii). Finally, the record suggests that, in the context of the administrative review, KYD "acted to the best of its ability in providing the information" consistent with Commerce's requirements, 19 U.S.C. § 1677m(e)(4). *See* KYD's Submission at 14; KYD's Resubmission at S–14. By attempting to "produce[] *current* information showing the margin to be less" than "the highest prior margin," *Rhone Poulenc*, 899 F.2d at 1190, KYD tried to act exactly as the Federal Circuit anticipated that an importer in KYD's position would. *See id.*

Accordingly, Commerce should have either considered KYD's information or explained why it could decline to do so pursuant to 19 U.S.C. § 1677m(e).[12] However, Commerce did neither. *See* Final Results Memo. Indeed, Commerce did not determine the export price, the normal value, or the dumping margin of KYD's entries as directed by 19 U.S.C. § 1675(a). Instead, it resorted to "total adverse facts available" and selected a uniform antidumping duty rate of 122.88 percent. *See* Preliminary Results, 73 Fed. Reg. at 52,289–90; Final Results, 74 Fed. Reg. at 2,512.

Commerce's explanation of its resort to total adverse facts available is at odds with the plain meaning of 19 U.S.C. § 1675(a)(2)(A). *See* Final Results Memo. Commerce concluded that it was "not authorize[d]" to "calculate an importer-specific assessment rate that is based on anything other than the dumping margins [Commerce] determines and applies to King Pac and Master Packaging for the period of review." Final Results Memo. However, Commerce is not directed to determine dumping margins at an exporter level. Rather, it is directed by Congress to determine the normal value and export price of—and the dumping margin for—"*each entry* of the subject merchandise." 19 U.S.C. § 1675(a)(2)(A) (emphasis added). As Com-

[11] 19 U.S.C. § 1677m(e)(3) does not require complete information, merely "information [that] is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." 19 U.S.C. § 1677m(e)(3). "Basis" means, *inter alia*, "the principal component of something" or "something on which something else is established or based." Merriam-Webster Online Dictionary (2010).

[12] Had Commerce found pursuant to 19 U.S.C. § 1677e(b) that KYD did "not act[] to the best of its ability to comply with a request for information," a separate finding under 19 U.S.C. § 1677m(e) would not have been necessary. *See NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007). However, neither Commerce nor any party in this action has suggested that KYD was uncooperative. *See, e.g.*, Final Results Memo.

merce's own regulation states, Commerce "normally will calculate an assessment rate for each importer of subject merchandise covered by" an administrative review and "normally will calculate [that] assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes." 19 C.F.R. § 351.212(b)(i); *see also* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,314 15 (May 19, 1997) (justifying Commerce's prior shift from an entry-specific assessment method to an importer-specific assessment method); Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7,308, 7,316–17 (February 27, 1996) ("To the extent possible, these assessment rates will be specific to each importer, because the amount of duties assessed should correspond to the degree of dumping reflected in the price paid by each importer.").[13]

An additional regulation reflects Commerce's recognition of the statutory propriety of entry- and importer-specific determinations. 19 C.F.R. § 351.402(f) requires each importer to certify whether its suppliers have agreed to pay or reimburse antidumping duties for each of its subject entries, permits Commerce to presume reimbursement if no such certification is filed, and directs Commerce to reduce the export price to negate actual or presumed reimbursement. *See* 19 C.F.R. § 351.402(f); *see also* 19 C.F.R. § 353.26 (1989); 19 C.F.R. § 353.55 (1981); *Hoogovens Staal BV v. United States*, 22 CIT 139, 140–41, 4 F. Supp. 2d 1213 (1998). In other words, Commerce correctly believes that it is authorized to determine specific export prices, and hence specific dumping margins, for entries and for importers.

It was in the context of this regulation that this court previously rejected arguments similar to those now raised by Defendant and Defendant-Intervenors. In the administrative review challenged in *Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989 (2007), Commerce found that an exporter had entered into a reimbursement agreement with an importer other than the plaintiff. *See Valley Fresh*, 24 CIT at 1992. Commerce then made an adverse inference that the exporter "had entered into such agreements with all of its U.S. importers," and it accordingly increased the assessment rate for all of

[13] Use of total adverse facts available could produce antidumping duties that are highest when the actual margin of dumping is lowest (or nonexistent). This is because the antidumping duty would be directly proportional to the export price even though the actual margin of dumping would be inversely proportional to that price (assuming that normal value remains constant). *See* 19 U.S.C. §§ 1401a, 1677a, 1677b. A simplified example illustrates this phenomenon: Assume that certain merchandise has a constant normal value of $10 and is subject to a total adverse facts available antidumping duty of 100%. For sales of that merchandise at $8, $9, and $10, the respective actual dumping margins would be $2, $1, and $0, but the respective duties would be $8, $9, and $10. Consideration of KYD's information pursuant to 19 U.S.C. § 1677m(e) would obviate this paradoxical result.

these importers, including the plaintiff. *Id.* The plaintiff challenged this adverse inference, and the United States and the defendant-intervenors unsuccessfully moved to dismiss. *See id.* at 1997. The United States contended that "[a]bsent certain exceptions which do not apply here . . . , the law does not provide for importer rates which are separate from the producer/exporter rates." *Id.* (quotation omitted). The defendant-intervenors likewise contended that "when Commerce applies facts otherwise available and adverse inferences to a foreign producer or exporter that has failed to cooperate to the best of its ability, that same rate applies equally to all of the importers for that producer or exporter regardless of the expectations or specific actions of the importers involved." *Id.* (quotation omitted). Because this court found no merit in these arguments, particularly in light of 19 U.S.C. § 1675(a)(2)(A), it declined to dismiss the action. *Id.* at 1998.

These arguments—including Defendant's augmentation of Commerce's administrative analysis with selectively quoted statutory language—are no more persuasive in the instant action. Defendant states that "Commerce 'shall determine the individual weighted average dumping margin for each *known exporter and producer* of the subject merchandise.'" Defendant's Response at 10 (quoting and emphasizing 19 U.S.C. § 1677f-1(c)(1)). 19 U.S.C. § 1677f-1(c)(1) actually states the "[g]eneral rule" that, "[i]n determining weighted average dumping margins under" 19 U.S.C. § 1675(a), *inter alia*, Commerce "shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1).[14] It does not state that Commerce is to calculate only weighted average dumping margins.

Indeed, "dumping margin" and "weighted average dumping margin" have distinct statutory definitions. *See* 19 U.S.C. § 1677(35)(A)-(B). 19 U.S.C. § 1675(a) refers explicitly to weighted average dumping margins only in the context of new exporters and producers. *See* 19 U.S.C. § 1675(a)(2)(B)(i). Otherwise, 19 U.S.C. § 1675(a) directs Commerce to "determine . . . the dumping margin for each . . . entry," 19 U.S.C. § 1675(a)(2)(A), and establishes this determination as "the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties," 19 U.S.C. § 1675(a)(2)(C).[15]

[14] 19 U.S.C. § 1677f-1(c)(2) provides an exception authorizing, but not requiring, Commerce to limit the examination to, *inter alia*, certain "exporters and producers." 19 U.S.C. § 1677f-1(c)(2).

[15] 19 U.S.C. § 1673e(c)(3), from which Defendant also quotes, applies only to "[s]ecurity in lieu of estimated duty pending early determination of duty." 19 U.S.C. § 1673e(c); *see* Defendant's Response at 10 (quoting 19 U.S.C. § 1673e(c)(3)).

This court has previously recognized that 19 U.S.C. § 1675(a) entitles a cooperative party "to have its margin determined accurately and according to the relevant information on the record of the administrative review." *SKF USA, Inc. v. United States*, Slip Op. 2009–148, 2009 Ct. Int'l Trade LEXIS 154 at *30 (December 21, 2009) (citations omitted).[16] To the extent that Commerce believes that it must treat a cooperative importer otherwise, it is misinterpreting its clear statutory mandate. Because the record in the instant action contains no evidence that Commerce evaluated any 19 U.S.C. § 1677m(e) criteria with respect to KYD's information, Commerce's disregard of this information is "unsupported by substantial evidence on the record." 19 U.S.C. § 1516a(b)(1)(B)(i); *see World Finer Foods*, 24 CIT at 546. On remand, Commerce must either consider this information in determining an assessment rate for KYD's entries or explain why it can decline to do so pursuant to 19 U.S.C. § 1677m(e).[17]

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[16] In the administrative review challenged in *SKF*, Commerce used an inference adverse to an exporter based on a finding that a supplier unaffiliated with the exporter had failed to act to the best of its ability. *SKF*, 2009 Ct. Int'l Trade LEXIS 154 at *4, *23–24. This court concluded that Commerce lacks "authority under 19 U.S.C. § 1677e(b) to use an inference that is adverse to a party to the proceeding absent a factual finding that such party 'failed to cooperate by not acting to the best of its ability to comply with a request for information.'" *Id.* at *26–27 (citing 19 U.S.C. § 1677e(b)). Although this court found that 19 U.S.C. § 1677e(b) is "silent or ambiguous on the precise question" of whether "the non-cooperating party against whom an inference is drawn [must] also be a party to the proceeding," it could not accept as reasonable "a construction of 19 U.S.C. § 1677e(b) under which the party who suffers the effect of the adverse inference is not the party who failed to cooperate." *Id.* at *27–28 (citing *Chevron*, 467 U.S. at 843), *31. Paradoxically, a party that cooperated fully could obtain a less favorable result "than if it had cooperated fully." *Id.* at *31 (quoting SAA at 870; 1994 U.S.C.C.A.N. at 4199). That construction, this court stated, "makes a mockery of any notion of fairness" by permitting an "absurd result" that contravenes the "fundamental purpose of the antidumping law," which is to "determin[e] current margins as accurately as possible." *Id.* at *30 (quoting *Rhone Poulenc*, 899 F.2d at 1191) (citing 19 U.S.C. § 1675(a)), *32.

[17] Commerce can continue to ensure that King Pac and Master Packaging do "not obtain a more favorable result by failing to cooperate than if [they] had cooperated fully." SAA at 870, 1994 U.S.C.C.A.N. at 4199. Remand in this action is limited to KYD's entries of the subject merchandise during the POR—entries which have already occurred and for which KYD alone is required to pay duties pursuant to 19 U.S.C. § 1673g(b)(4). Commerce need not revisit the assessment rate for entries not imported by KYD or the cash deposit rate for entries subsequently exported by King Pac and Master Packaging. KYD's information would not appear to provide a "reliable basis" for these determinations, 19 U.S.C. § 1677m(e)(3), as they involve entries by importers other than KYD. Finally, it is premature to decide whether Commerce may use inferences that are adverse to KYD, either in the determination of the normal value of KYD's entries or in the renewed application of "total adverse facts available." On remand, Commerce could conceivably determine that the use of adverse inferences is unwarranted by the facts even if such use is authorized by the law.

V.
Conclusion

For the reasons and to the extent stated above, KYD's Motion is GRANTED. This matter is REMANDED to Commerce for action consistent with this opinion.

Dated: May 6, 2010
New York, New York

/*s*/ *Evan J. Wallach*
EVAN J. WALLACH, JUDGE

Slip Op. 10–53

QINGDAO TAIFA GROUP CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and GLEASON INDUSTRIAL PRODUCTS, INC. AND PRECISION PRODUCTS, INC., Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 08–00245

[Department of Commerce's remand results remanded for proper investigation and analysis regarding government control of plaintiff.]

Dated: May 12, 2010

Adduci, Mastriani & Schaumberg, LLP (*Louis S. Mastriani* and *William C. Sjoberg*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M.* McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Thomas M. Beline*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Crowell & Moring LLP (*Matthew P. Jaffe* and *Alexander H. Schaefer*) for the defendant-intervenors.

OPINION

Restani, Chief Judge:

Introduction

Plaintiff Qingdao Taifa Group Co., Ltd. ("Taifa") challenged the final results of an administrative review of the antidumping duty order on hand trucks and certain parts thereof from the People's Republic of China ("PRC"), which assigned Taifa the PRC-wide dumping margin of 383.60% based on total adverse facts available ("AFA"). *See Hand Trucks and Certain Parts Thereof from the People's Republic of China; Final Results of 2005–2006 Administrative Review*, 73 Fed. Reg. 43,684 (Dep't Commerce July 28, 2008) ("*Final Results*"). Following initial briefing and oral argument, the court granted in

part and denied in part Taifa's motion for judgment on the agency record and remanded the matter to the United States Department of Commerce ("Commerce") to determine whether a government entity exercised nonmarket control over Taifa sufficient to link the PRC-wide rate to Taifa and to calculate a separate, substitute AFA rate if the PRC-wide were not warranted. *Qingdao Taifa Group Co. v. United States*, 637 F. Supp. 2d 1231 (CIT 2009) ("*Taifa I*"). The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Jan. 22, 2010) (Docket No. 100) ("*Remand Results*"). For the reasons stated below, the court remands the matter to Commerce again.

Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determination in an antidumping review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Background

In February 2007, Commerce initiated an administrative review of the antidumping duty order on hand trucks and certain parts thereof from the PRC with respect to Taifa for the period December 1, 2005, through November 30, 2006. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 Fed. Reg. 5005 (Dep't Commerce Feb. 2, 2007). Taifa submitted a separate rate certification and responses to Commerce's questionnaires stating that the government did not control or own any interest in Taifa. (*See* App. of Docs. in Supp. of Pl.'s Mem. of P. & A. in Supp. of Pl.'s Mot. for J. on the Agency R. Tab 1; Def.'s App. 13; Def.-Intervenors' App. to Mem. of P. & A. in Opp'n to Pl.'s Mot. for J. on the Agency R. Tab 3, at 2–3.) Taifa also stated in its questionnaire responses that it did not sell wheels with its hand trucks. (*See* Def.'s App. 41, 56.) Commerce's *Preliminary Results*, issued in January 2008, applied an individual weighted-average dumping margin of 3.82% for Taifa, while the PRC-wide rate was 383.60%. *Hand Trucks and Certain Parts Thereof from the People's Republic of China; Preliminary Results, Partial Intent to Rescind and Partial Rescission of the 2005–06 Administrative Review*, 73 Fed. Reg. 2214, 2222 (Dep't Commerce Jan. 14, 2008) ("*Preliminary Results*").

Commerce conducted verification of Taifa in April 2008 and issued its verification report in June 2008. (Def.'s App. 81.) According to the report, Commerce found production notices for subject merchandise

that referenced wheels, and a Taifa manager admitted that Taifa sold hand trucks and wheels together but did not attach the wheels to avoid antidumping duties. (*See id.* at 93.) The report also indicated that Taifa officials misrepresented that they had destroyed Taifa's production notices and factory-out slips and that Taifa employees attempted to remove and hide pages from the current production subledger. (*Id.* at 91–93.)

The report further stated that some documents indicated that a collective called Qingdao Taifa Group Co. owned a majority of Taifa's shares, but other documents indicated that the Yinzhu Town Government owned those shares. (*Id.* at 83–87.) Specifically, Commerce found that a Capital Verification Report, Application for Registration of the Company's Establishment, Circular of Jiaonan City State Assets Management Bureau: Approval of Equity Settlement for Preparing to set up Qingdao Taifa Group Co., Ltd., and Certification by the Jiaonan City Yinzhu Town People's Government, all dated 1997, list the Yinzhu Town People's Government as the holder of 51.42% or 18 million shares of Taifa's stock. (*Id.* at 84–87.) All other documents identified the collective Qingdao Taifa Group Co. as the owner of those shares. (*See id.* at 87.) Commerce's verification report also found that documents reflecting a 2003 transfer of the majority interest to other individuals, a 2003 Shares Transfer Agreement and Taifa's 2003 Articles of Association, were not registered with the proper Chinese authorities.[1] (*Id.* at 85–86.) Commerce found no other evidence of government control. (*Id.* at 88–89.)

In its July 2008 *Final Results*, Commerce determined that Taifa failed to cooperate with the review, applied total AFA, denied Taifa a separate rate, and assigned Taifa the PRC-wide margin of 383.60%. *Final Results*, 73 Fed. Reg. at 43,686–88. Taifa challenged the *Final Results*.

In *Taifa I*, the court concluded that AFA was appropriate for all of the facts relevant to Taifa's sales and factors of production data based on Taifa's failure to report data relating to wheels shipped with its hand trucks and Taifa's conduct at verification. 637 F. Supp. 2d at 1238–40. The court, however, held that Commerce could not apply AFA to conclude that Taifa was government-controlled because the mere evidence that the town government had an ownership interest in Taifa, without any additional evidence of or explanation about why there was a finding of government control, was insufficient to support the application of the PRC-wide rate as the AFA rate. *Id.* at 1240–44. Because Commerce never made a final factual determination about

[1] The 2003 Articles of Association also lacked the seals of some of Taifa's shareholders. (*See id.* at 85.)

the presence or absence of government control over Taifa, the court remanded for a proper analysis of government control, instructing Commerce "to determine whether a government entity exercised de facto nonmarket control over Taifa sufficient to link the China entity rate to Taifa" and to "calculate a separate, substitute AFA rate" if the PRC-wide was not warranted. *Id.* at 1244.

On remand, Commerce concluded that it could not affirmatively demonstrate that a government entity exercised control over Taifa and calculated a 227.73% separate AFA rate for Taifa. *Remand Results* at 3. Following remand, defendant-intervenors Gleason Industrial Products, Inc. ("Gleason") and Precision Products, Inc. ("Precision") challenge Commerce's conclusion that Taifa is entitled to a separate rate. (Gleason and Precision's Comments on Final Results of Redetermination Pursuant to Court Remand 2–11.) Taifa asserts that Commerce misinterpreted the court's remand instructions as shifting the burden of proving entitlement to a separate rate away from Taifa, but Taifa agrees with Commerce's determination that Taifa is entitled to a separate rate. (Taifa's Comments on Final Redetermination on Remand 2–4.) Taifa also challenges the 227.73% AFA rate. (*Id.* at 5–23).

Discussion

Commerce misconstrued the remand instructions as requiring Commerce "to affirmatively demonstrate" that a government entity exercised de facto control over Taifa before it could apply the PRC-wide rate to Taifa and as shifting the burden of proof away from a respondent claiming a separate rate. *Remand Results* at 4. The court did not address the strength or effect of Commerce's presumption of government control for a respondent in a nonmarket economy ("NME") country or for the PRC in particular. *Taifa I*, 637 F. Supp. 2d at 1240 n.6.[2]

Under this presumption, a respondent receives the NME country-wide rate, rather than a separate, company-specific rate, unless it affirmatively demonstrates an absence of central government control, both de jure and de facto, with respect to exports. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Evidence of absence of de jure government control "includes: (1) [a]n absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the

[2] The foreign and domestic interests, which agree on nothing else, agree that Commerce misconstrued the court's remand order. The particular manner of "complying" with the court's remand order has given, at least, the appearance of unwillingness to attempt to comply with the order in a reasonable way. This appearance should be avoided.

government decentralizing control of companies." *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991); *see also Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229, 242 (CIT 1999) ("*Brake Drum*"). Evidence of absence of de facto government control includes whether: (1) "each exporter sets its own export prices independently of the government and other exporters;" (2) "each exporter can keep the proceeds from its sales;" (3) "the Respondent has authority to negotiate and sign contracts and other agreements;" and (4) "the Respondent has autonomy from the government in making decisions regarding the selection of management." *Brake Drum*, 44 F. Supp. 2d at 243 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,587 (Dep't Commerce May 2, 1994)).

The problem in this case is that it appears that Taifa presented Commerce with information that may rebut the NME presumption. Commerce preliminarily found that Taifa had presented statements and documentation satisfying each form of evidence of absence of de jure and de facto government control. *Preliminary Results*, 73 Fed. Reg. at 2219. Commerce's *Preliminary Results* therefore found that Taifa demonstrated an absence of de jure and de facto government control. *Id.* Commerce's verification report also "noted no indication of government control." (Def.'s App. 88.) Nevertheless, Commerce's *Final Results* applied the PRC-wide rate as AFA because Commerce could not verify certain documents regarding Taifa's ownership structure. *See* 73 Fed. Reg. at 43,686; *Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Hand Trucks and Certain Parts Thereof from the People's Republic of China*, A-570–891, POR 12/01/2005–11/30/2006, at 4 (July 14, 2008), Admin R. Pub. Doc. 96, *available at* Def's App. 102.

Without any further information, the only adverse inference that might be drawn from the discrepancies in these documents is that the town government owned a majority interest in Taifa, which may have been in transition to ownership by private individuals. As the court previously held, although "local government ownership is of some limited relevance," *Taifa I*, 637 F. Supp. 2d at 1242, the central inquiry is whether a government entity exercised *nonmarket* control over Taifa's prices, export activities, or operations sufficient to link Taifa to a countrywide rate, *id.* at 1243–44. Commerce has also repeatedly stated that ownership is not dispositive and is not a basis for denying separate rate status. *See id.* at 1242–43 (citing Commerce documents). Accordingly, Commerce's decision to apply the PRC-wide

rate as AFA on the issue of government control where there was merely evidence of possible town government ownership was not supported by substantial evidence or in accordance with law. *Id.* at 1242–44; *cf. East Sea Seafoods LLC v. United States*, Slip Op. 10–42, 2010 WL 1644029, at *16 (CIT Apr. 19, 2010) ("Commerce's application of the presumption of state control, without considering abundant record evidence rebutting that very presumption, pushed legal fiction into the realm of legal fantasy. Doing so was not in accordance with law.").

The PRC-wide rate, however, may be appropriate in this case, but Commerce must make a factual determination explaining why the PRC-wide rate is or is not appropriate. Commerce cannot conclude that the PRC-wide rate is not appropriate for Taifa without proper analysis or explanation, just as Commerce cannot use the presumption of government control for a respondent in an NME country as "an excuse for inadequate investigation and assessment." *Taifa I*, 637 F. Supp. 2d at 1240 n.6; *see also East Sea Seafoods*, 2010 WL 1644029, at *15 (finding unlawful Commerce's decision to assign the respondent the NME country-wide rate without first considering evidence on the record that specifically addresses the extent to which the respondent is de facto and de jure independent from the NME government's control). Although the burden of rebutting the presumption of government control remains on the respondent, in some circumstances Commerce may have to perform an independent investigation of the facts related to the question of government control if the parties' filings do not answer it to Commerce's satisfaction. *See Rhone-Poulenc, Inc. v. United States*, 927 F. Supp. 451, 456 (CIT 1996); *see also Sigma Corp. v. United States*, 841 F. Supp. 1255, 1267 (CIT 1993) ("The burden of proof to show that a company is independent is on the respondent, but if it has not supplied enough information, the burden shifts to Commerce to ask for more information.").

Where, as here, Commerce has made a preliminary finding of absence of government control, Commerce must provide sufficient explanation, grounded in reasonable inferences from record evidence, to support a contrary finding. *See Sigma Corp.*, 841 F. Supp. at 1267. Commerce, however, failed to perform any meaningful investigation of the facts related to the question of government control before issuing the initial *Final Results* and again by misconstruing the court's remand instructions as requiring that Commerce affirmatively demonstrate government control over Taifa. *See Remand Results* at 17. Commerce still has not made a final finding about the presence or absence of de jure and de facto government control over Taifa, including a finding and explanation which substantiates or

rejects a sufficient link to a country-wide PRC rate. Commerce thus did not comply with the court's remand instructions to make a determination based on a proper analysis of nonmarket control. *See Taifa I*, 637 F. Supp. 2d at 1244. As stated previously, town or village ownership in name alone does not provide an answer. A remand is therefore necessary for Commerce to consider all evidence pertaining to Taifa's de jure and de facto independence from the PRC government and to make a determination as to whether a separate rate or a country-wide rate is warranted.

Conclusion

The court hereby remands the matter to Commerce again to determine, after proper investigation and analysis, whether a government entity exercised nonmarket control over Taifa sufficient to link the PRC-wide rate to Taifa. Commerce must provide an explanation to support its determination that addresses how Taifa's possible nominal town government ownership relates to whether a government entity exercises nonmarket control over Taifa comparable to the paradigmatic situation in which the central government of an NME country controls its companies' pricing, export activities, and operations.[3] Commerce's decision—whatever it may be—must be supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

Commerce thus has three options on remand. First, if Commerce determines that Taifa is not independent of the PRC government's control based on the documents indicating town government ownership, Commerce must explain, based on PRC law, prevailing practices in the PRC, or other relevant information, why these particular documents are significant to the issue of government control, how the documents ultimately link Taifa to central PRC government control and a rate relating thereto, and why the fact that the documents indicating the transfer of the town government's interest were not properly registered in the PRC is significant to the issue of govern-

[3] Such an explanation may be particularly necessary where Commerce has recognized that, due to the PRC's "significant and sustained economic reforms," the PRC economy no longer resembles the traditional Soviet-style command economies but is more of a hybrid featuring "both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance." *Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China—Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy*, C-570–907, at 3, 7 (Mar. 29, 2007), *available at* http://ia.ita.doc.gov/download/nmesep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf (last visited May 10, 2010); *see also GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1237, 1246 n.14 (CIT 2009).

ment control.[4] Alternatively, if Commerce finds that the evidence does not indicate that a government entity controlled Taifa's prices, export activities, or operations and no ultimate link between Taifa and the rates applicable to central PRC government-controlled entities, then Commerce should conclude that Taifa has established its independence from government control sufficient to reject a country-wide rate. Finally, if, after thorough investigation and analysis, Commerce finds the evidence regarding government control of pricing, export activities, or operations and regarding Taifa's relationship to the central PRC government in equipoise, Commerce may apply a well-supported and explained presumption based on current conditions that Taifa is government-controlled and apply the appropriate rate.[5]

Because a remand is appropriate on the issue of government control, the court declines to decide whether the non-PRC-wide 227.73% substitute AFA rate was supported. If Commerce concludes based on substantial evidence that Taifa was not government-controlled so as to require the PRC-wide rate, Commerce must calculate a separate, substitute AFA rate for Taifa in accordance with the standard set forth in *Gallant Ocean (Thailand) Co. v. United States*, __ F.3d __, Appeal No. 2009–1282 (Fed. Cir. Apr. 16, 2010).[6]

Commerce shall file its remand determination with the court within sixty days of this date. Taifa, Gleason, and Precision have eleven days thereafter to file objections, and the Government will have seven days thereafter to file its response.

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[4] Gleason and Precision have cited some documents, including Taifa's Assets Evaluation Report and a 1997 Capital Verification Certificate, which might indicate that a government entity controls Taifa's operations, but Commerce has never evaluated these documents. If Commerce finds that these documents are relevant, it must explain why they indicate that the PRC-wide rate is appropriate.

[5] If the evidence is in equipoise, Commerce may choose the opposite result as well. Either would be sustainable.

[6] As the court stated in *Taifa I*, Commerce may not apply the PRC-wide rate as the AFA rate if Taifa has established its independence from government control because "[i]n such a situation, there is no connection between the PRC-wide rate and an estimate of [Taifa's] actual rate." 637 F. Supp. 2d at 1240–41. The Court has properly rejected the notion that Commerce may apply the PRC-wide rate as the AFA rate to respondents that qualify for separate rates simply because the PRC-wide rate is the highest on record. *See, e.g.*, *Gerber Food (Yunnan) Co. v. United States*, 491 F. Supp. 2d 1326, 1350–51 (CIT 2007); *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1287–88 (CIT 2005). Although *Zhejiang DunAn Hetian Metal Co. v. United States*, Slip Op. 10–41, 2010 WL 1558343 (CIT Apr. 19, 2010), recently affirmed the use of a petition rate, which was the highest rate in the proceeding and also happened to be the PRC-wide rate, against a respondent that was independent of the Chinese government, in that case, Commerce did not deny the respondent a separate rate. *Id.* at *14–16. Rather, Commerce used the rate because it determined that the rate approximated the respondent's actual rate, and corroboration was not challenged. *Id.* at *15–16.

Dated: This 12th day of May, 2010.
New York, New York.

/s/ *Jane A. Restani*
JANE A. RESTANI CHIEF JUDGE

Slip Op. 10–54

UNION STEEL, Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION AND NUCOR CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 10–00106

[Holding that plaintiff-intervenor qualifies for an injunction to prevent the liquidation of certain entries during the pendency of this action, including all appeals]

Dated: May 13, 2010

Troutman Sanders LLP (*Donald B. Cameron*) for plaintiff.

Drinker Biddle & Reath, LLP (*William R. Rucker* and *Michelle L. Welsh*) for plaintiff-intervenor.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Daniel J. Calhoun*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden Arps Slate Meagher & Flom, LLP (*Jeffrey D. Gerrish*) for defendant-intervenor United States Steel Corporation.

Wiley Rein, LLP (*Timothy C. Brightbill*, *Lori E. Scheetz*, and *Alan H. Price*) for defendant-intervenor Nucor Corporation

OPINION

Stanceu, Judge:

I.
Introduction

Plaintiff Union Steel brought this action under 19 U.S.C. § 1516a (2006) to contest a determination (the "Final Results") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued in the fifteenth administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("subject merchandise") from the Republic of Korea. Summons 1; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*,

75 Fed. Reg. 13,490 (Mar. 22, 2010) ("*Final Results*"). The Final Results pertain to imports of the subject merchandise made during the period of August 1, 2007 through July 31, 2008 (the "period of review"). *Final Results*, 75 Fed. Reg. at 13,490. On April 21, 2010, Plaintiff-intervenor Whirlpool Corporation ("Whirlpool"), a U.S. importer of the subject merchandise, moved for a temporary restraining order and preliminary injunction to prevent the liquidation of its entries subject to the review. Mot. for Temporary Restraining Order & Prelim. Inj. ("Whirlpool Mot."). The court entered a temporary restraining order on April 23, 2010 that will expire on May 13, 2010. Temporary Restraining Order 1–2.

During a status conference held with the parties on April 26, 2010, defendant-intervenors United States Steel Corporation and Nucor Corporation informed the court that they do not oppose Whirlpool's motion for a preliminary injunction. *See* Order, Apr. 27, 2010. At the status conference, defendant United States, acknowledging that no relevant factual issues were in dispute, waived its right to a hearing on Whirlpool's motion for a preliminary injunction and consented to the court's adjudicating Whirlpool's motion on the basis of the submissions filed by the parties. *See id.* Defendant filed an opposition to the motion on May 11, 2010, arguing that "[a]s an intervenor, Whirlpool may not expand the issues in this case beyond the complaint filed by Union Steel by requesting that its entries, which were not the subject of Union Steel's complaint, be enjoined." Def.'s Opp'n to Whirlpool Corp.'s Mot. for Prelim. Inj. 1 ("Def. Opp'n."). For the reasons stated herein, the court rejects defendant's argument. Whirlpool has established its right to an injunction to prevent the liquidation of its entries during the pendency of this action, including all appeals.

To prevail on a motion for preliminary injunctive relief, Whirlpool must demonstrate (1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the petitioner. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) ("*Zenith*").

With respect to the irreparable injury factor, Whirlpool has demonstrated that irreparable injury is imminent if the court does not enjoin liquidation of Whirlpool's entries. *See* Whirlpool Mot. 3–4. A party whose entries have liquidated no longer may obtain relief in the form of a revised assessment rate on its entries. *See SKF USA, Inc. v. United States*, 512 F.3d 1326, 1328–29, 1332 (Fed. Cir. 2008) ("*SKF*"); *Zenith*, 710 F.2d at 810.

Whirlpool argues that, in granting Union Steel's motion to enjoin liquidation of certain entries subject to the administrative review, the Court of International Trade already has determined that plaintiff Union Steel had satisfied the likelihood of success requirement and that "[t]he likelihood of Whirlpool Corporation's success is intrinsically tied to that of the Plaintiff." Whirlpool Mot. 6; Order, Mar. 24, 2010. Whirlpool argues, further, that the "important and difficult questions" that it and plaintiff are raising merit full consideration and are sufficient as a showing of likelihood of success on the merits for purposes of the injunction being sought. Whirlpool Mot. 5 (internal quotation marks and citation omitted). Based on a review of the complaint and other proceedings herein, including the proceedings in which the court granted Union Steel's motion for a preliminary injunction, the court agrees. Moreover, plaintiff and plaintiff-intervenor are pursuing in this action relief on two claims that are highly similar to claims plaintiff asserted in contesting the final results of the fourteenth administrative review; in that previous action the Court of International Trade granted Whirlpool's motion for a preliminary injunction against liquidation, concluding that Whirlpool had satisfied all four requirements for preliminary injunctive relief. *Union Steel v. United States*, 33 CIT __, __, 617 F. Supp. 2d 1373, 1380–83 (2009) ("*Union Steel*").

Concerning the question of whether the public interest would be served by the preliminary injunction being sought, the public interest is served by enjoining the liquidation of Whirlpool's entries so that the correct assessment rate may be applied to those entries upon the final judgment in this case. *See Smith-Corona Group v. United States*, 1 CIT 89, 98, 507 F. Supp. 1015, 1023 (1980) ("Generally, the public interest is best served by preventing entries subject to assessment of antidumping duties from escaping the correct amount of such duties.").

The balance of hardships also favors the injunction sought by Whirlpool. As Whirlpool argues, defendant, through actions by United States Customs and Border Protection ("Customs"), in the ordinary course collects deposits of estimated antidumping duties. Whirlpool Mot. 5. Should the final rate determined after judicial review exceed the amounts collected, Customs will be entitled to collect the additional duties owed, with interest. Defendant, therefore, will suffer no hardship from the grant of a preliminary injunction. In the absence of such an injunction, Whirlpool potentially would suffer hardship from liquidation of its entries prior to the results of these judicial review proceedings.

Defendant opposes Whirlpool's motion on the ground that an injunction would "enlarge the issues in this case" and "'compel an alteration of the nature of the proceeding'" contrary to the holding in *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944) ("*Vinson*"). Def. Opp'n 2 (quoting *Vinson*, 321 U.S. at 498). In so doing, defendant makes the same arguments that the court rejected when granting Whirlpool's motion for an injunction in *Union Steel*, 33 CIT at __, 617 F. Supp. 2d at 1380–83. Although acknowledging this much, defendant states that it disagrees with that decision and with the decision to the same effect in *NSK Corp. v. United States*, 32 CIT __, 547 F. Supp. 2d 1312 (2008). Def. Opp'n 3. The court has considered each of defendant's arguments a second time and again concludes that they lack merit, for the same reasons the court discussed in *Union Steel*, 33 CIT at __, 617 F. Supp. 2d at 1380–83.

While it is unnecessary to reiterate those reasons in detail in this Opinion, it is worth emphasizing that the court's entry of an order enjoining liquidation of Whirlpool's entries would in no way enlarge the issues that the court will adjudicate in this case, or compel an alteration in the nature of the proceeding, in any way precluded by the holding in *Vinson*. *Vinson* involved as petitioners two federal government agency heads, the Director of Economic Stabilization and the Administrator of the Office of Price Administration, who participated as intervenors in agency hearings conducted by the Public Utilities Commission of the District of Columbia (the "Commission"), which hearings culminated in the Commission's approval of a rate increase for a public utility, the Washington Gas Light Company. *Vinson*, 321 U.S. at 491–95. The case arose in the context of federal wartime price control statutes containing provisions under which public utilities, although outside the scope of federal price regulation under those statutes, were prohibited from increasing their rates unless allowing agencies designated by the President to intervene in administrative proceedings by the federal, state, or local authorities with jurisdiction to consider such increases. *Id*. at 494–95. The court gave full effect to these provisions and to a local intervention rule of the Commission, under which

> [t]he granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where such change or enlargement is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties.

Id. at 494 (internal quotation marks and citation omitted). The Supreme Court characterized this local rule as reasonable, stating that "one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Id.* at 498. The discussion of the local rule occurred in the context of rejecting the petitioners' arguments that Congress intended to prevent state and local regulatory authorities from permitting increases in utility rates that were not proven necessary to prevent hardship and that the petitioners, as intervenors, were not afforded a full and fair hearing before the Commission. *Id.* at 498–99.

The holding in *Vinson*, 321 U.S. 489, which arose from intervention before a regulatory commission that was made according to a local rule and affected by a particular statutory scheme, does not require the court to deny Whirlpool's motion in the circumstances presented here. Regarding intervention in general, Whirlpool has not indicated that it intends to raise before the court any issues that are not raised in the complaint filed by plaintiff Union Steel. Nor would the injunction "compel an alteration of the nature of the proceeding" in the context in which the Supreme Court used that term in deciding *Vinson*. *See id.* at 498. To the contrary, enjoining liquidation will serve the purpose, contemplated by Congress in enacting 19 U.S.C. § 1516a(c)(2), of allowing in appropriate circumstances entries that were the subject of the administrative review and the Final Results to be liquidated according to the duty rate ultimately determined to be correct upon judicial review. In providing for intervention in cases brought under 19 U.S.C. § 1516a, Congress provided that

> [a]ny person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—
>
> . . .
>
> (B) in a civil action under [19 U.S.C. § 1516a], only *an interested party* who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right.

28 U.S.C. § 2631(j)(1) (2006) (emphasis added). In § 1516a(c)(2), Congress could have, but did not, preclude the grant of an injunction upon a proper showing made by a party who intervenes as of right according to 28 U.S.C. § 2631(j). Instead, Congress authorized the

grant of injunctions against liquidation "upon a request by *an interested party* for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2) (emphasis added). Defendant's construction in effect urges the court to deny to any intervenor of right in an action brought under § 1516a, who by statute necessarily qualifies as "an interested party" who is "adversely affected or aggrieved" by Commerce's final determinations, the remedy Congress provided in § 1516a(c)(2). 19 U.S.C. § 1516a(c)(2); 28 U.S.C. § 2631(j)(1). The plain language and purpose of the governing statutory provisions caution against any such construction. It is beyond dispute that in all but limited situations, a private litigant in a proceeding brought under 19 U.S.C. § 1516a will lack any meaningful remedy upon judicial review absent an appropriate injunction against liquidation. *See SKF*, 512 F.3d at 1328–29, 1332; *Zenith*, 710 F.2d at 810. Therefore, adopting defendant's construction would diminish greatly, and in many instances extinguish altogether, the usefulness of the statutory procedure for intervention as of right in cases brought under 19 U.S.C. § 1516a. The court cannot conclude that Congress, having provided the specific form of intervention of right that it did in 28 U.S.C. § 2631(j), could have intended such a result.

Defendant also argues that USCIT Rule 56.2(a) is contrary to Whirlpool's motion for injunctive relief. Def. Opp'n 4–5. USCIT Rule 56.2(a) was not intended to address, and does not resolve, the question defendant raises with respect to Whirlpool's motion. *See Union Steel*, 33 CIT at __, 617 F. Supp. 2d at 1383.

III. CONCLUSION

For the reasons that are presented above and discussed in further detail in *Union Steel*, 33 CIT at __, 617 F. Supp. 2d at 1380–83, the court concludes that Whirlpool has made a showing qualifying it to a grant of an injunction against liquidation according to the requirements of 19 U.S.C. § 1516a(c)(2).

Dated: May 13, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–55

BRIDGESTONE AMERICAS, INC., BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, AND TITAN TIRE CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and XUZHOU XUGONG TYRES CO., LTD. Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge
Consol. Court No. 08–00256

[Commerce's remand determination sustained.]

Dated: May 14, 2009

King & Spalding, LLP (*Joseph W. Dorn*, *Daniel L. Schneiderman*, and *J. Michael Taylor*) for plaintiffs Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC.

Stewart and Stewart (*Wesley K. Caine* and *Terence P. Stewart*) and *King & Spalding, LLP* (*Daniel L. Schneiderman*) for plaintiff Titan Tire Corporation.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E.* White, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael David Panzera*, *John J. Todor* and *Loren Misha Preheim*); *Daniel J.* Calhoun, *Irene H. Chen* and *David Richardson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

White & Case, LLP (*Adams C. Lee* and *Frank H. Morgan*) for the defendant-intervenor.

OPINION

Restani, Chief Judge:

Introduction

This matter is before the court for decision following objections by Defendant-Intervenor Xuzhou Xugong Tyres Co., Ltd. ("Xugong") to the Final Redetermination issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"). In 2008, Plaintiffs Bridgestone Americas, Inc., Bridgestone Americas Tire Operations, LLC, and Titan Tire Corporation (collectively, "Bridgestone"), domestic producers of certain off-the-road ("OTR") tires, contested Commerce's exclusion of Xugong, a Chinese producer of OTR tires, from the scope of a final antidumping ("AD") determination. *See Certain New Pneumatic Off-The-Road-Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485, 40,488

89 (Dep't Commerce July 15, 2008) ("*Final Determination*"). Specifically, Plaintiffs contested Commerce's determination that fifteen of the raw material inputs Xugong used in producing the tires were indirect materials.

In August 2009, the court remanded the *Final Determination* to Commerce to "reconsider whether each of the fifteen inputs was a direct or indirect material, to reopen the record as appropriate, and to recalculate the dumping margin accordingly." *Bridgestone Americas, Inc. v. United States*, 636 F. Supp. 2d 1347, 1357 (CIT 2009) ("*Bridgestone I*"). On remand, Commerce adjusted the antidumping duty rate upward from 0.00 percent to 10.01 percent. *Final Redetermination Pursuant to Court Remand* (Dep't Commerce Jan. 8, 2010) (Docket No. 88) ("*Final Redetermination*").[1] Following remand, Xugong asserts that Commerce's redetermination with respect to one of fifteen manufacturing inputs, "HO Oil," cannot be sustained. (Defendant-Intervenor Xuzhou Xugong Tyres Co., LTD.'s Objections to the Department of Commerce's January 8 Remand Determination, at 5, 13 (Docket No. 94) ("Xugong Objection").) The court will enter judgment affirming Commerce's redetermination.

Background

In July 2007, Commerce initiated an antidumping ("AD") investigation to determine whether imports of certain pneumatic OTR tires from the People's Republic of China for the period of 1 October 2006 through 31 March 2007, were being sold in the United States at less than fair value. *See Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*, 72 Fed. Reg. 43,591, 43,592 (Dep't Commerce Aug. 6, 2007). Commerce selected Xugong as a mandatory respondent. *Certain New Pneumatic Off-The-Road Tires From the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 Fed. Reg. 9278, 9282 83 (Dep't Commerce Feb. 20, 2008) ("*Preliminary Determination*").[2] In the *Preliminary Determination*, Commerce calculated a dumping

[1] For a complete discussion of background information, the reader is referred to this Court's August 2009 opinion ordering remand. *Bridgestone I*, 636 F. Supp. 2d at 1347.

[2] The other mandatory respondents were Guizhou Tyre Co., Ltd., Hebei Starbright Co., Ltd., and Tianjin United Tire & Rubber International Co., Ltd. *Id.* at 9278 n.3, 9283. Those respondents were also mandatory respondents in an accompanying countervailing duty ("CVD") investigation. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480, 40,483 (Dep't Commerce July 15, 2008). Currently pending before the court is Commerce's AD and CVD remand determinations as they relate to those separate respondents. *See GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231 (CIT 2009).

margin of 51.81% for Xugong. *Id.* at 9291.

After the *Preliminary Determination*, Commerce issued Xugong a supplemental questionnaire requesting clarifying information and an updated factors of production database for the purpose of calculating normal value to compare with the United States price. (*See* Xugong's Fifth Supplemental Questionnaire Response ("Fifth Supplemental Questionnaire"), Exs. Accompanying the Pl.'s. Br. of Bridgestone, Tab 3 (Docket No. 107) ("Pl.'s App.").) In addition to providing the requested information, Xugong informed Commerce that fifteen of the raw material inputs it previously reported as direct materials were in fact indirect materials and included the corrections in the updated database. (*Id.*) Although Commerce treated the fifteen inputs as direct materials in calculating the preliminary dumping margin, Commerce treated them as indirect materials in its *Final Determination* and calculated a zero dumping margin for Xugong. *Final Determination*, 73 Fed. Reg. at 40,488 89.

Bridgestone challenged Commerce's zero dumping margin and the court remanded this matter to the Department to "reconsider whether each of the fifteen inputs was direct or indirect material." *Bridgestone I*, 636 F. Supp. 2d at 1357. In response, Commerce reopened the administrative record and issued a Supplemental Questionnaire. (*See* Pl.'s App. Tab 7.) Xugong asserts that in the course of preparing the response it determined that the raw material it "referred to as HO Oil was, in fact, aromatic oil." (Xugong Objection 5.) Xugong submitted the alleged translation error correction in its Supplemental Questionnaire Response and postulates that aromatic oil should be valued under HTS Heading 2707.50 as opposed to its suggested HTS Heading 2902.90.90 for HO Oil. (*See* Xugong Objection 13; Def.'s Resp. to Def.-Intervenor's Objections to the Dep't of Commerce's Remand Redetermination, 11 (Docket No. 99) ("Def.'s Resp.").) Throughout its objection Xugong focuses on the input labeled HO Oil, and considers the other fourteen inputs "irrelevant," because if Commerce treats HO Oil as an indirect material or values it under the now-claimed HTS Heading 2707.50, Xugong's dumping margin would be *de minimis*. (*Id.*) Accordingly, Xugong objects to Commerce's Final Redetermination.

Jurisdiction And Standard Of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final results of redetermination pursuant to the court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Commerce Applied An Appropriate Standard to Determine Whether An Input Was A Direct Or Indirect Material

As a preliminary matter, Xugong submits that Commerce acted unlawfully when it relied on a "new and previously unarticulated standard in the remand determination for defining direct and indirect materials." (Xugong Objection 13.) Xugong relies on Commerce's articulation of a standard it its *Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, A-570–912, POR: 10/1/2006 3/31/2007, at 88 90 (July 7, 2008) ("*I&D Memo*"), Admin. R. Pub. Doc. 648, *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf (last visited May 14, 2010). In the *I&D Memo*, Commerce stated that

> [i]n determining whether a given material should be treated as a part of factory overhead versus a direct material for purposes of calculating [normal value], the Department takes into consideration: 1) whether the material is physically incorporated into the final product; 2) the material's contribution to the production process and finished product; 3) the relative cost of the input; and 4) the way the cost of the input is typically treated in the industry.

I&D Memo at 88 89. Xugong argues that Commerce improperly focused on only the first two of the four criteria the physical incorporation of the input and its significance to the production process. *See Final Redetermination* at 3 5. Xugong further argues that if Commerce is going to rely solely on the first two criteria, the input is direct only if the "subject merchandise could not be produced without using [the input]." (Xugong Objection 14 15.)

Although Xugong is correct that the Department's language in its *I&D Memo* appears to refer to a hard-and-fast four-prong standard, it appears that such a characterization is not appropriate. This "standard" is merely a survey of various criteria taken into consideration in different past determinations to distinguish direct materials. *See I&D Memo* at 89. Indeed, Commerce acknowledged that in prior proceedings, for this and other antidumping cases, the Department evaluated other criteria. *Final Redetermination* at 4. Commerce explained its decision, however, to focus on the first two criteria. (*Id.* at 5.) Specifically, the criterion of "the way the cost of the input is

typically treated in the industry," *I&D Memo* at 89, was not assessed by Commerce because there was insufficient evidence to discern Indian surrogate producers' treatment of the inputs.[3] *Final Redetermination* at 4 5. Thus, the criterion did not provide a useful manner to determine whether the input was direct and therefore, Commerce did not rely upon it. Accordingly, the court finds that in focusing on the first two criteria, Commerce did not abuse its discretion to rely on various criteria to value factors of production. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

Further, although Commerce has found, as Xugong contends, a material to be direct if the subject merchandise could not be produced without using the input, *see e.g.*, *Issues and Decision Memorandum for the Less-Than-Fair-Value Investigation of Wooden Bedroom Furniture from the People's Republic of China*, A-570–890, at 118 19 (Nov. 8, 2004), *available at* http://ia.ita.doc.gov/frn/summary/prc/04–25507–1.pdf (last visited May 13, 2010), Commerce has also found a material to be direct when "the chemicals are physically incorporated into, and become part of, the finished product," *Notice of Final Determination of Sales at Less Than Fair Value: Certain Paper Clips from the People's Republic of China*, 59 Fed. Reg. 51,168, 51,174 (Dep't Commerce Oct. 7, 1994). Xugong's Supplemental Questionnaire describes HO Oil as an input that is "added in [the] milling process, for the purposes of softening rubber and improving its processing technical function." (Pl.'s App. Tab 7.) In ordinary parlance this description characterizes an input that is physically incorporated into the finished product. Accordingly, Commerce's determination that HO Oil is a direct input is supported by substantial evidence and in accordance with law.

II. Xugong Did Not Exhaust Its Administrative Remedies As To Valuation Of The Key Input

The exhaustion doctrine provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart v. United States*, 395 U.S. 185, 193 (1969) (internal quotation marks and citation omitted). "In the Court of International Trade, a [party] must . . . show that it exhausted its administrative remedies, or that it qualifies for an

[3] The Department has noted previously that under Indian accounting practices, factory overhead materials assist the manufacturing process, but do not enter physically into the composition of the finished product. *I&D Memo* at 90. In this case, the Indian surrogate financial statements did not provide enough detail to determine whether the inputs were treated as overhead materials. Final Redetermination at 4.

exception to the exhaustion doctrine." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (citing 28 U.S.C. § 2637(d)).[4] This doctrine reflects a respect for judicial economy and the agency's administrative autonomy. *See McKart*, 395 U.S. at 194 95 ("other justifications for requiring exhaustion . . . [include] very practical notions of judicial efficiency . . . ."); *Unemployment Comp. Comm'n of Ala. v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it . . . deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

Xugong was selected as a mandatory respondent and officially notified of that fact in February 2008. *Preliminary Determination*, 73 Fed. Reg. at 9282 83. In its *Preliminary Determination*, the Department valued HO Oil as a direct input using Xugong's suggested HTS Heading 2902.90.90 and calculated a dumping margin of 51.81% for Xugong. *Id.* at 9291; *Final Redetermination* at 20. Between February 2008 and the *Final Determination* issued in July 2008, Xugong responded to Commerce's Fifth Supplemental Questionnaire and submitted its case brief. (*See* Pl.'s App. Tab 3 4.) In its response to the Fifth Supplemental Questionnaire Xugong stated that "we hereby claim [the fifteen inputs] as indirect raw materials . . . ." (Pl.'s App. Tab 3.) Normally, indirect materials are part of overhead and thus would not be valued as a separate item. Shortly after submitting the Fifth Supplemental Questionnaire, Xugong submitted a similar classification correction to the one at issue here, of the material "pine oil," which it claimed was originally improperly translated as "wood tar." (Xugong Objection 7.) In its May 2008 case brief, Xugong did not mention its new characterization of the fifteen inputs as indirect materials, but it did submit the classification correction for "pine oil." (Pl.'s App. Tab 4.) Commerce accepted the correction as timely and revised the HTS classification and corresponding surrogate value of "pine oil" in its *Final Determination*. *See I&D Memo* at 130 31.

Xugong, in its case brief, also did not challenge Commerce's use of HTS Heading 2902.90.90 for HO Oil (then a direct material) in the *Preliminary Determination* and instead, made its new claim here for the first time after the *Final Redetermination*. Under the Department's regulations, Xugong had an obligation to make any argument

[4] Exceptions to the exhaustion doctrine may include: (1) raising a pure question of law that neither creates undue delay nor causes expenditure of scarce party time and resources, *Thai I-Mei Frozen Foods Co. v. United States*, 477 F. Supp. 2d. 1332, 1354 55 (CIT 2007); (2) "judicial interpretations of existing law after decision below and pending appeal interpretations which if applied might have materially altered the result," *Hormel v. Helvering*, 312 U.S. 552, 558 59 (1941); and (3) raising the issue before the agency would have been futile, *Gerber Food (Yunnan) Co. v. United States*, 601 F. Supp. 2d. 1370, 1380 81 (CIT 2009).

that might be relevant. *See* 19 C.F.R. § 351.309(c)(2) (requiring briefs to "present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results"); *see also Dorbest Ltd. v. United States*, Appeal No. 2009–1257, –1266 (Fed. Cir. May 14, 2010); *GPX Intern. Tire Corp.*, 645 F. Supp. 2d at 1250; *Gerber Food*, 601 F. Supp. 2d at 1379. Xugong's response to the Fifth Supplemental Questionnaire demonstrates its awareness that the direct versus indirect status of the fifteen inputs was at issue in the investigation. There does not seem to be any adequate reason for Xugong to rely on an expectation that Commerce would simply accept its characterization that HO Oil was an indirect material and reverse its *Preliminary Determination* decision. Xugong is correct that parties need not always raise issues before the administrative agency that become important because of later developments, such as reversal as to the prevailing party, *see e.g.*, *Qingdao Taifa Group Co. v. United States*, 637 F. Supp. 2d 1231, 1236 37 (CIT 2009); however, the facts here do not lead to this exception. The appropriate time for Xugong to have asserted the classification correction for HO Oil was in its case brief before the *Final Determination* as required by the Commerce's regulations and as Xugong did for "pine oil." *See China First Pencil Co. v. United States*, 427 F. Supp. 2d 1236, 1243 (CIT 2006) (finding a failure to exhaust administrative remedies when the plaintiff did not "challenge Commerce's decision . . . during the administrative comment period following publication of the Preliminary Results and instead chose to challenge the issue on appeal"); *IPSCO, Inc. v. United States*, 749 F. Supp. 1147, 1150 (CIT 1990), *aff'd in relevant part*, 965 F.2d 1056, 1061 62 (Fed. Cir. 1992) ("Judicial economy, fairness to the parties and the need to fulfill Congress's intent . . . requires that errors . . . be raised from the outset . . . . Unless a thorough examination of the record is made prior to briefing, the court and the parties risk becoming involved in unnecessary litigation of unimportant issues."). Commerce might have chosen to evaluate the classification correction for HO Oil upon remand, but it was under no regulatory obligation to do so. *See Nokornthai Strip Mill Public Co. v. United States*, 587 F. Supp. 2d 1303, 1312 (CIT 2008) ("Commerce acted within its discretion, and in compliance with the agency's own regulations, to limit its remand consideration to the timely-submitted arguments and evidence.").[5] Commerce complied

[5] The court does not opine on whether consideration of this issue was within the scope of the court's remand order. Certainly, if Xugong had raised the classification issue the first time this matter was before the court, the court would have addressed this matter before it was remanded. Other classification issues were within the scope of remand. *See Bridgestone I*, 636 F. Supp. 2d at 1357. Xugong's untimely actions needlessly complicate the proceedings.

with the law by giving Xugong every opportunity to present its argument at the appropriate administrative level. Xugong does not argue that the circumstances warrant applying an exception to the exhaustion doctrine, nor are any appropriate.

Although the court has discretion to remand an issue to the agency despite non-exhaustion of remedies, *see* 28 U.S.C. § 2637(d) (court shall require exhaustion "where appropriate"), the "Supreme Court has cautioned that a remand requires a showing that the failure to raise an issue was not the result of a lack of due diligence on the part of the claimant," *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, 206 (CIT 1998) (citations omitted); *see also Peer Bearing Co. v. United States*, 57 F. Supp. 2d 1200, 1205 (CIT 1999) (finding that a failure to carefully review preliminary results "is no excuse for [a party's] failure to discover and raise the possibility of error as early in the administrative process as possible and thereby to exhaust its administrative remedies, as required under 28 U.S.C. § 2637(d)"). As indicated, Xugong knew that the valuation of HO Oil was important after Commerce issued the *Preliminary Determination* because the input was declared a direct material. Further, if, as Xugong submits, the classification of HO Oil means the difference between a dumping margin of 10.01% or a *de minimis* dumping margin, it seems reasonable to expect that Xugong would have reviewed its submission and detected the alleged translation error before the *Final Determination*. Accommodating Xugong's delay now would prolong this matter and require an additional remand, which the court declines to order.[6]

III. Commerce Did Not Exhibit Bias In Favor of the Domestic Industry

Xugong claims that Commerce exhibited bias in favor of the domestic industry's position regarding the valuation of HO Oil during the remand proceeding because the Department: (1) held an *ex parte* meeting with petitioners; (2) provided insufficient time for Xugong to respond to the supplemental questionnaire; and (3) failed to conduct verification. (Xugong Objection 2 5.) Such favoritism, Xugong contends, is contrary to the general principle that Commerce must conduct investigations in an impartial manner. (*Id.*) "The right to an impartial decision maker is unquestionably an aspect of procedural

[6] Because Xugong did not properly exhaust its administrative and judicial remedies we will not reach the merits of Xugong's claim that Commerce erred when it concluded that Xugong failed to provide sufficient support for Commerce to conclude that the HTS Heading 2902.90.90 was an inappropriate source for valuing HO Oil. Commerce maintains that Xugong did not provide specific descriptive information from which the Department could conclude that HTS Heading 2707.50 was more appropriate. In all likelihood, further fact-gathering would be necessary to resolve this. This factor further supports denial of consideration of this issue.

due process." *NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998); *see FAG Italia S.p.A. v. United States*, 110 F. Supp. 2d 1055, 1061 (CIT 2000). Allegations of favoritism, however, that are merely speculative or unsubstantiated are insufficient. *Spezzaferro v. Fed. Aviation Admin.*, 807 F.2d 169, 173 (Fed. Cir. 1986).

First, Commerce is permitted to conduct *ex parte* meetings pursuant to 19 U.S.C. § 1677f(a)(3), provided that a record of them is maintained and made available. 19 U.S.C. § 1677f(a)(3). Xugong does not allege any procedural irregularities with respect to Commerce's obligations under § 1677f(a)(3) and admits that it was informed of the meeting after it took place. (Xugong Objection 3.) Xugong does not dispute Defendant's assertion that it was afforded the same opportunity and declined to meet with Commerce during the remand proceeding. (Def.'s Resp. 18.) Even if Commerce's meeting with Bridgestone were a procedural irregularity, Xugong must demonstrate material prejudice. *See Gilmore Steel Corp. v.* United States, 585 F. Supp. 670, 679 (CIT 1984). Xugong has neither alleged nor demonstrated prejudice. Accordingly, Xugong's *ex parte* argument is unavailing.

Second, Xugong argues that Commerce failed to act impartially because it delayed in issuing the Supplemental Questionnaire and provided insufficient time for Xugong to respond. (Xugong Objection 3 4.) Xugong was initially given eleven days (eight business days) to respond; however, Xugong was granted an extension and ultimately allowed 26 days (20 business days) to respond. (*Id.*) This is roughly equivalent to, if not greater than, the amount of time Commerce took to issue the questionnaire. (*Id.*) Xugong does not identify how it was prejudiced by the perceived delay in Commerce's notification that it was reopening the record and issuing a supplemental questionnaire. *See Boynton v. United States*, 536 F. Supp. 2d 1344, 1346 (CIT 2008) (finding no merit in the due process claim, in part, because Plaintiff did not demonstrate prejudice). Further, the fact that Xugong's extension was granted vitiates any potential prejudice Xugong may have suffered had it been required to abide by the initial deadline. Accordingly, Xugong's claim that Commerce's timing of the remand is evidence of bias is similarly unavailing.

Lastly, Xugong contends that Commerce's cancellation of verification on the same day that Xugong submitted its Supplemental Questionnaire Response further demonstrates favoritism toward the domestic industry's position. (Xugong Objection 4 5.) It is well established, however, that agencies enjoy broad discretion in allocating their investigative resources. *Torrington Co. v. United States*, 68

F.3d 1347, 1351 (Fed. Cir. 1995); *see Carpenter Tech. Corp. v. United States*, 662 F. Supp. 2d 1337, 1346 (CIT 2009) ("[T]he Department[] [has] discretion to decide whether and how to verify the information submitted during an antidumping proceeding."). Here, Commerce determined that it had all the information it needed via the submissions of the party. (Def.'s Resp. 20.) The spot check of verification would not change that. Thus, Commerce's invocation of its discretion not to conduct a verification does not demonstrate bias.

In sum, Xugong's allegations of favoritism are unavailing. Commerce is permitted to conduct *ex parte* meetings, allocate time reasonably in response to remand instructions, and decline to conduct verifications. Accordingly, its choice to do all three does not amount to a lack of impartiality in violation of procedural due process.

Conclusion

The results of the remand determination are sustained in their entirety.

Dated: This 14th day of May, 2010.
New York, New York.

/*s*/ *Jane A. Restani*
JANE A. RESTANI

ERRATA

Please make the following three changes to *Bridgestone Americas, Inc. v. United States*, Consol. Court No. 08–00256, Slip Op. 10–55:

(1) Page 1, date: strike the following

- Dated: May 14, 2009

and replace with

- Dated: May 14, 2010

(2) Page 1, counsel list: strike the following from Titan Tire Corporation's counsel list

- "and *King & Spalding, LLP* (*Daniel L. Schneiderman*)"

(3) Page 10, formatting: on the eighth line start new paragraph with

- "The appropriate time for Xugong to have asserted the classification correction . . ."

May 17, 2010

Slip Op. 10–56

SHANDONG TTCA BIOCHEMISTRY CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and ARCHER DANIELS MIDLAND CO. et al., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Ct. No.: 09–00241

[JBL Canada's Motion to Intervene as a Matter of Right is DENIED.]

Dated: May 14, 2010

Troutman Sanders LLP (*Julie Clark Mendoza*) for Plaintiffs Shandong Biochemistry TTCA Co., Ltd. *et al.*

James M. Lyons, General Counsel, *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Mary Jane Alves*, Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, for Defendant United States.

Sidley Austin, LLP (*Neil R. Ellis*) for Defendant-Intervenors Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC.

Vorys Sater Seymour and Pease LLP (*Frederick P. Waite* and *Kimberly R. Young*) for Proposed Plaintiff-Intervenor Jungbunzlauer Canada Inc.

OPINION

Wallach, Judge:

I
Introduction

Jungbunzlauer Canada Inc. ("JBL") seeks to intervene as a matter of right in the instant action. *See* Motion to Intervene as a Matter of Right ("JBL's Motion"). The action challenges material injury determinations by the U.S. International Trade Commission ("ITC") in antidumping and countervailing duty investigations of citric acid and certain citrate salts (together "citric acid") from the People's Republic of China ("China"). The action does not challenge the material injury determination by ITC in the antidumping duty investigation of citric acid from Canada. The court has jurisdiction pursuant to 19 U.S.C. § 1581(c).

JBL's Motion is DENIED. JBL is not an interested party to either of the investigations of citric acid imports from China even though it is an interested party to the investigation of citric acid imports from Canada. Accordingly, it cannot intervene in the instant action.

II
Background

On April 14, 2008, three domestic producers of citric acid petitioned the U.S. Department of Commerce ("Commerce") and ITC for the

imposition of antidumping duties on imports of citric acid from Canada and the imposition of both antidumping and countervailing duties on imports of citric acid from China. *See* Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Initiation of Antidumping Duty Investigations, 73 Fed. Reg. 27,492, 27,492 (May 13, 2008) ("Notice of AD Investigations"); Notice of Initiation of Countervailing Duty Investigation: Citric Acid and Certain Citrate Salts from the People's Republic of China, 73 Fed. Reg. 26,960, 29,960 (May 12, 2008) ("Notice of CVD Investigation").

In response, ITC "instituted" an antidumping duty investigation of imports from Canada, an antidumping duty investigation of imports from China, and a countervailing duty investigation of imports from China. *See* Citric Acid and Certain Citrate Salts From Canada and China, 73 Fed. Reg. 21,650, 21,650 (April 22, 2008) ("ITC Notice of Investigations"). Commerce similarly "initiat[ed]" three investigations. *See* Notice of AD Investigations, 73 Fed. Reg. at 27,492; Notice of CVD Investigation, 73 Fed. Reg. at 26,960.[1]

Following affirmative determinations by Commerce, ITC proceeded to make a final determination as to material injury for each of the three investigations. *See* U.S. International Trade Commission, Citric Acid and Certain Citrate Salts from Canada and China, Investigation Nos. 701-TA-456 and 731-TA-1151–1152 (Final), Publication 4076 (May 2009) ("Final Report") at 1; *see also* 19 U.S.C. §§ 1671d(b), 1673d(b). In making these determinations, ITC considered three statutory factors:

> (I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products . . . .

19 U.S.C. § 1677(7)(B)(i); *see* Final Report at 15–37. ITC considered these factors by "cumulatively assess[ing] the volume and effects of imports of the subject merchandise" from Canada and China. 19 U.S.C. § 1677(7)(G); *see* Final Report at 15.[2]

As a result of this cumulative assessment, *inter alia*, ITC determined that "an industry in the United States is materially injured by reason of imports from Canada and China of citric acid and certain

[1] The use of the plural terms "investigations" and "determinations" in this Part is consistent with ITC usage and with the conclusions below. *See infra* Part IV.

[2] 19 U.S.C. § 1677(7)(G)'s cumulation provisions apply to only the first two factors. *See* 19 U.S.C. § 1677(7)(C)(i)-(ii), (G)(i). However, ITC appears to have used cumulation for the third factor as well. *See* Final Report at 32 ("Impact of the Cumulated Subject Imports on the Domestic Industry").

citrate salts . . . that have been found by [Commerce] to be subsidized by the Government of China and to be sold in the United States at less than fair value (LTFV)." Final Report at 1 (footnote omitted). ITC announced these determinations in a single paragraph of a single publication. *See id.*

After receiving notification of ITC's determinations, Commerce issued two antidumping duty orders and one countervailing duty order. *See* Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Antidumping Duty Orders, 74 Fed. Reg. 25,703, 25,703 (May 29, 2009) ("Notice of AD Orders"); Citric Acid and Certain Citrate Salts From the People's Republic of China: Notice of Countervailing Duty Order, 74 Fed. Reg. 25,705, 25,705 (May 29, 2009).

Plaintiffs brought the instant action challenging "the final affirmative injury determination of [ITC] concerning imports from China of citric acid . . . from [China]." Complaint, Docket No. 9, ¶ 1. "Plaintiffs are Chinese producers and exporters to the United States of citric acid from China." *Id.* ¶ 3.[3]

The Procter & Gamble Manufacturing Company ("P&G") brought a separate action challenging "the final affirmative injury determination by [ITC] in the antidumping and countervailing duty investigations of" subject merchandise from Canada and China. Complaint, Court No. 09–00242 Docket No. 8, ¶ 1. P&G is "an importer of [subject merchandise] from Canada." *Id.* ¶ 5.

In August 2009, the court consolidated these actions under *Shandong Biochemistry TTCA Co. v. United States*, Consol. Court No. 09–00241. *See* August 11, 2009 Order, Docket No. 18. Later that month, JBL, which describes itself as "the sole producer of citric acid in Canada," moved to intervene in the consolidated action. JBL's Motion at 1. In October 2009, the court dismissed P&G's action in response to a stipulation of dismissal filed by P&G. *See* October 1, 2009 Order of Dismissal, Docket No. 39.

III
Standard of Review

"On timely motion, the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute."

[3] Plaintiffs are Shandong TTCA Biochemistry Co., Ltd., Yixing-Union Biochemical Co., Ltd., RZBC Group, Anhui BBCA Biochemical Co., Ltd., Weifang Ensign Industry Co., Ltd., Huanghsi Xinghua Biochemical Co., Ltd., Huozhou Coal Electricity Shanxi Fenhe Biochemistry Co., Ltd., A.H.A. International Co., Ltd., Laiwu Taihe Biochemsitry Co., Ltd., Gansu Xuejing Biochemical Co., Ltd., Hunan Dongting Citric Acid Chemicals Co., Ltd., Shihezi City Changyun Biochemical Co., Ltd., Jiali International Corp., Lianyungang Shuren Scientific Creation Imp & Exp Co., Ltd., Jiangsu Gadot Nuobei Biochemical Co., Ltd., and Changsha Glorysea Biochemicals Co., Ltd.

USCIT Rule 24(a); *see* 28 U.S.C. § 2631(j)(1)(B). The court—not Commerce or ITC—determines this class of intervenors. *See USEC Inc. v. United States*, 27 CIT 489, 510, 259 F. Supp. 2d 1310 (2003) (subsequent history omitted).

IV
Discussion

JBL cannot intervene in the instant action because it is not an interested party to either of the two investigations that produced the determinations challenged by this action. *See infra* Part IV.A. The exclusion of JBL from this action is further supported by the court's lack of jurisdiction over imports for which JBL seeks relief. *See infra* Part IV.B.

A
JBL Cannot Intervene Because It Is Not An Interested Party

JBL cannot intervene in the instant action because it is not an interested party to either of the two investigations that produced the determinations challenged by this action.

"[I]n a civil action under [19 U.S.C. § 1516a], only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right." 28 U.S.C. § 2631(j)(1)(B). "Interested party" includes "a foreign manufacturer, producer, or exporter . . . of subject merchandise." 19 U.S.C. § 1677(9); *see* 28 U.S.C. § 2631(k)(1).

"Subject merchandise" in this context means "merchandise which is the subject of the investigation." 19 U.S.C. § 1677(9) (1993). The 1994 Uruguay Round Agreements Act ("URAA") introduced the term "subject merchandise," defined it in relevant part as "the class or kind of merchandise that is within the scope of an investigation," and substituted it throughout the antidumping and countervailing duty statutes for variants of both "merchandise which is the subject of the investigation" and "class or kind of the merchandise which is the subject of the investigation." *See* 19 U.S.C. § 1677(25); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994) ("SAA") at 820, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4161 (characterizing these substitutions as a simplification of nomenclature); *compare, e.g.*, 19 U.S.C. § 1673a(c)(2) (1993) *and* 19 U.S.C. § 1673d(a)(1) (1993) *with* 19 U.S.C. § 1673a(c)(2) (1995) *and* 19 U.S.C. § 1673d(a)(1) (1995).[4] Prior to its amendment by the URAA, 19 U.S.C. § 1677(9) referred to "merchan-

[4] The URAA approved the new World Trade Organization Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C.

dise which is the subject of an investigation" rather than "subject merchandise." 19 U.S.C. § 1677(9) (1993). This history clarifies that, for the purpose of defining "interested party," "subject merchandise" includes only that merchandise which is the subject of the investigation.

The key term in this definition is "investigation."[5] The antidumping and countervailing duty statutes do not define this term or otherwise specify the geographic scope of an investigation. *See* 19 U.S.C. §§ 1671–1677n.[6] However, they do demonstrate that a single investigation encompasses a component that is statutorily assigned to Commerce as well as a component that is statutorily assigned to ITC. *See, e.g.*, 19 U.S.C. §§ 1673a (describing the initiation of an antidumping duty investigation), 1673b(a) (describing ITC's role in the preliminary phase of an investigation), 1673d(c)(2) (directing the termination of an investigation following a negative final determination by either Commerce or ITC). Moreover, they contemplate simultaneous investigations of the same type of product from different countries. In particular, the provision governing material injury determinations states that, if certain conditions are satisfied, ITC:

> shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which—(I) [antidumping or countervailing duty] petitions were filed . . . on the same day . . . or (III) [antidumping or countervailing duty] petitions were filed . . . and [antidumping or countervailing duty] investigations were initiated . . . on the same day . . . .

§ 3511(a)(1). The SAA, which was submitted to and approved by Congress, *see* 19 U.S.C. § 3511(a)(2), is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and the [URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[5] If a single antidumping duty investigation covers citric acid imports from both Canada and China, then JBL is an interested party to that investigation. However, if one antidumping duty investigation covers citric acid imports from Canada alone and another antidumping duty investigation covers citric acid imports from China alone, then JBL is an interested party only to the former and, as such, cannot intervene in the instant action. For the reasons identified in this Part, the antidumping duty investigation of citric acid imports from Canada is distinct from the antidumping and countervailing duty investigations of citric acid imports from China.

[6] The SAA is ambiguous with respect to the geographic scope of an investigation. *Compare* SAA at 810, 1994 U.S.C.C.A.N. at 4514 ("Article 3.3 expressly authorizes the longstanding U.S. practice of cumulating the impact of imports from multiple countries simultaneously subject to investigations") *with* SAA at 847, 1994 U.S.C.C.A.N. at 4181 ("[ITC] cumulatively assesses the volume and effect of imports from all countries subject to the investigation . . . .").

19 U.S.C. § 1677(7)(G)(i). This language requires ITC to cumulatively assess certain elements that are common to multiple investigations; *it does not require ITC (or Commerce) to cumulate the actual investigations*. Indeed, as Defendant notes, ITC:

> must first determine whether imports from any individual country are negligible (19 U.S.C. § 1677(24)) and whether imports should be cumulated for purposes of its material injury analysis (19 U.S.C. § 1677(7)(G)); and even if [ITC] cumulate[s] imports that are the subject of different investigations from different countries for purposes of its present material [injury] analysis, if it reaches a negative present injury determination, it must then decide anew whether to cumulate imports as a discretionary matter (19 U.S.C. § 1677(7)(H)) for purposes of its threat of material injury analysis.

Defendant's Reply to JBL Canada's Response Regarding JBL Canada's Proposed Intervention at 6–7.

The material injury provision, which was part of the URAA, was drafted in the context of the existing administrative approach to an "investigation." *Cf. generally* SAA at 807–896, 1994 U.S.C.C.A.N. at 4151–4218 (explaining the URAA and proposed administrative action in relation to existing antidumping and countervailing duty law). Although Commerce and ITC do not define this term in their respective regulations, their longstanding practice was and is to limit each investigation to a single country and a single type of allegation (*i.e.*, dumping or subsidization). *See, e.g., Elkem Metals Co. v. United States*, 24 CIT 1395, 1396, 126 F. Supp. 2d 567 (2000); *Citizen Watch Co. v. United States*, 14 CIT 173, 173, 733 F. Supp. 383 (1990); *American Spring Wire Corp. v. United States*, 8 CIT 20, 21, 590 F. Supp. 1273 (1984); *City Lumber Co. v. United States*, 61 Cust. Ct. 448, 453–54, 290 F. Supp. 385 (1968); *see also* U.S. International Trade Commission's Response to Motion of Jungbunzlauer Technology GmbH & Co. KG ("JBL Canada") to Intervene in This Proceeding ("Defendant's Response") at 9. *But see* U.S. International Trade Commission, Antidumping and Countervailing Duty Handbook (13th Edition), Publication 4056 (December 2008) at II-11 ("Then, each Commissioner announces his or her vote on the country(ies) involved in the investigation.").[7] Rather than alter this practice, Congress enacted a provision that is wholly consistent with it.

Commerce and ITC followed this practice with respect to citric acid imports from Canada and China. Commerce initiated, and ITC insti-

[7] The longstanding practice of Commerce and ITC is more persuasive than this potentially divergent characterization of such practice.

tuted, three distinct investigations. *See* Notice of AD Investigations, 73 Fed. Reg. at 27,492; Notice of CVD Investigation, 73 Fed. Reg. at 26,960, 29,960; ITC Notice of Investigations, 73 Fed. Reg. at 21,650.[8] As JBL acknowledges, Commerce segregated the investigations through "separate administrative protective orders, separate hearings, and separate notices of [its] preliminary and final determinations." Response of Jungbunzlauer Canada Inc. to the U.S. International Trade Commission's Opposition to JBL Canada's Motion to Intervene ("JBL's Reply") at 4 n.14. In contrast, as Defendant acknowledges, ITC "conducted concurrent investigations of, issued a single set of views explaining its determinations concerning, and for purposes of its material injury analysis even cumulated imports of [citric acid] from Canada and China." Defendant's Response at 13. Nonetheless, ITC did not combine—and could not have unilaterally combined—the three joint Commerce-ITC investigations. Rather, it combined its analysis and administration of certain elements within its portions of these investigations. ITC consistently identified the three individual investigations in its public notices, *see* ITC Notice of Investigations, 73 Fed. Reg. at 21,650, and ultimately announced multiple "determinations" in the Final Report, Final Report at 1.

Accordingly, for the purpose of deciding JBL's Motion, the court recognizes the administrative delineation of the citric acid investigations. The antidumping duty investigation of citric acid imports from Canada is statutorily distinct from the antidumping and countervailing duty investigations of citric acid imports from China.

Plaintiffs challenge only ITC's determinations of material injury in the investigations of citric acid imports from China. *See* Complaint ¶¶ 1 ("This action is an appeal of the final affirmative injury determination of [ITC] concerning imports from China of citric acid . . . from [China]."), 3 ("Plaintiffs are Chinese producers and exporters of citric acid from China."). P&G's challenge to ITC's determination of material injury in the investigation of citric acid imports from Canada has been dismissed. *See* October 1, 2009 Order Dismissal, Docket No. 39.

JBL describes itself as "the sole producer of citric acid in Canada." JBL's Motion at 1. It has never claimed to be, or participated in the administrative proceedings as, a foreign manufacturer, producer, or exporter of citric acid from China. *See* JBL's Reply at 5 ("[JBL] is not seeking relief for imports from China. Rather, [JBL] is seeking relief,

[8] The three investigation numbers assigned by Commerce differ from the three investigation numbers assigned by ITC. *Compare* Notice of AD Investigations, 73 Fed. Reg. at 27,492 *and* Notice of CVD Investigation, 73 Fed. Reg. at 26,960, 29,960 *with* ITC Notice of Investigations, 73 Fed. Reg. at 21,650. Nonetheless, for statutory purposes, a single investigation encompasses both the Commerce component and the ITC component. *See generally* 19 U.S.C. §§ 1673a-1673d.

if warranted, with respect to imports from Canada."); Notice of AD Orders, 74 Fed. Reg. at 25,704. Accordingly, it does not qualify as an interested party to either investigation of citric acid from China and cannot intervene in the instant action.

B

JBL Could Not Obtain Relief Even If It Could Intervene

Because the court lacks jurisdiction over citric acid imports from Canada, JBL could not obtain the relief that it seeks even if it could intervene pursuant to 28 U.S.C. § 2631(j)(1)(B). The inability to obtain relief does not necessarily preclude a party from intervening. *See NSK Corp. v. United States*, 577 F. Supp. 2d 1322, 1328 n.1 (CIT 2008) (noting that the plaintiff-intervenors were "limited to seeking relief on orders covering ball bearings from the United Kingdom"); *cf. Canadian Wheat Bd. v. United States*, 637 F. Supp. 2d 1329, 1338–42 (CIT 2009) (concluding that a permissive intervenor does not need independent Article III standing). However, this lack of jurisdiction further illustrates why an interpretation of "interested party" that excludes JBL is appropriate in the instant action.

"To establish the Court's jurisdiction over merchandise covered by a particular determination, a claimant must specify in its pleadings the individual determination that covers those entries . . . . [T]he fact that the ITC undertakes a review and cumulates merchandise from several countries to evaluate [the] aggregated effect on the domestic industry does not change a collection of individual injury determinations into a single determination for purposes of judicial review." *NSK Corp. v. United States*, 547 F. Supp. 2d 1312, 1319 (CIT 2008) (declining to enjoin the liquidation of entries from Italy and Germany because the plaintiffs' original complaint did not challenge ITC's sunset review injury determinations with respect to imports from these countries); *see Chefline Corp. v. United States*, 26 CIT 878, 878–80, 219 F. Supp. 2d 1303 (2002) (affirming remand determinations that were limited to Korea even though ITC had originally cumulated imports from Korea and Taiwan); *Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1027, 27 F. Supp. 2d 1351 (1998) (affirming a remand determination that was limited to Ukraine even though ITC continued to cumulate imports from Ukraine, Russia, and China); *see also* Defendant's Response at 11–12 (discussing these cases).[9]

[9] JBL argues that none of these decisions "addresses the issue before the Court — that is, whether the Canadian respondent can intervene in an appeal of [ITC's] final determination that cumulated imports from Canada and China have caused material injury to the domestic citric acid industry." JBL's Reply at 7. It would be surprising if these decisions

Plaintiffs in this action have challenged only ITC's final determinations of material injury in the investigations of citric acid imports from China. *See* Complaint ¶¶ 1, 3; 19 U.S.C. § 1516a(a)(2)(B)(i). Because they have not challenged ITC's final determination in the investigation of citric acid imports from Canada, the court lacks jurisdiction over these imports. *See NSK Corp.*, 547 F. Supp. 2d at 1320.

The involvement of merchandise from a free trade area country such as Canada, *see* 19 USC § 1516a(f)(10)(A), raises an additional jurisdictional consideration. A determination that is "made in connection with a proceeding regarding a class or kind of free trade area country merchandise" is generally reviewable "only if the party seeking to commence review has provided timely notice of its intent to commence such review" and "neither the United States nor the relevant [free trade agreement] country request[s] review by a binational panel." 19 U.S.C. § 1516a(g)(1), (3); *see also* 19 U.S.C. § 1516a(a)(5).

If ITC had made only one determination of material injury with respect to citric acid imports from Canada and China, then Plaintiffs would presumably have been required to comply with the special requirements of 19 U.S.C. § 1516a(g). Absent evidence that they had so complied, the court could not review that single material injury determination at all. In other words, rather than enabling JBL to seek relief with respect to imports from Canada, acceptance of JBL's argument could preclude Plaintiffs from seeking relief with respect to imports from China.

To invoke the court's jurisdiction over citric acid imports from Canada, JBL should have provided notice pursuant to 19 U.S.C. § 1516a(g)(3)(B) and then filed its own summons and complaint pursuant to 19 U.S.C. § 1516a(a). Because neither JBL nor any other interested party to the investigation of citric acid imports from Canada complied with these requirements, the court lacks jurisdiction over these imports.

V
Conclusion

For the reasons stated above, JBL's Motion is DENIED.

Dated: May 14, 2010
New York, New York

addressed that specific issue. They instead demonstrate that this court exercises jurisdiction over only those imports that are covered by a determination that is specified in the pertinent complaint.

/s/ *Evan J. Wallach*
EVAN J. WALLACH, JUDGE

Slip Op. 10–57

SKF USA INC., SKF FRANCE S.A., SKF AEROSPACE FRANCE S.A.S., SKF INDUSTRIE S.P.A., SOMECAT S.P.A., SKF GMBH, AND SKF (U.K.) LIMITED, Plaintiffs, UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 09–00392

[Denying defendant's motion to dismiss Count I of plaintiffs' complaint challenging as unlawful the policy, rule, or practice of the United States Department of Commerce to issue liquidation instructions fifteen days after the publication of the final results of an administrative review]

Dated: May 17, 2010

Steptoe & Johnson LLP (*Herbert C. Shelley*, *Alice A. Kipel*, and *Laura R. Ardito*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Stewart and Stewart (*Geert M. De Prest*, *Terence P. Stewart*, *William A. Fennell*, and *Lane S. Hurewitz*) for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

On August 31, 2009, the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") published a determination to conclude the nineteenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom (the "Final Results"). *See Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Revocation of an Order in Part*, 74 Fed. Reg. 44,819 (Aug. 31, 2009) ("*Final Results*"). Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF Industrie S.p.A., Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited (collectively, "SKF" or "plaintiffs") brought this action contesting the Final Results on September 15, 2009. Compl. ¶ 1. One of the claims in their complaint ("Count I") contests the Department's

decision to apply its policy of issuing duty assessment and liquidation instructions to United States Customs and Border Protection ("Customs" or "CBP") fifteen days after the publication of the final results of the administrative reviews (the "fifteenday policy"). Compl. ¶¶ 14–18 ("Count I"). Defendant moves to dismiss Count I for alleged lack of standing. Def.'s Mot. to Dismiss 1 ("Def. Mot."). Because defendant's argument that plaintiffs lack standing is meritless, the court denies the motion.

II. Background

Pursuant to 19 U.S.C. § 1675(a) (2006), Commerce initiated the nineteenth administrative reviews of the antidumping duty orders on imports of ball bearings and parts thereof from France, Germany, Italy, Japan, and the United Kingdom, for the period May 1, 2007 through April 30, 2008 (the "period of review"). *See Initiation of Antidumping & Countervailing Duty Admin. Reviews, Requests for Revocation in Part & Deferral of Admin. Review*, 72 Fed. Reg. 35,690, 35,691–93 (June 29, 2007). On April 27, 2009, Commerce published the preliminary results of the administrative reviews. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews & Intent To Revoke Order In Part*, 74 Fed. Reg. 19,056 (Apr. 27, 2009) ("*Prelim. Results*"). On August 31, 2009, Commerce issued the contested determination. *Final Results*, 74 Fed. Reg. 44,819.

In the Federal Register notice announcing the Final Results, Commerce stated that "[w]e intend to issue appropriate assessment instructions directly to CBP 15 days after publication of these final results of reviews." *Id*. at 44,821. In the Issues and Decision Memorandum, which is incorporated by reference in the Final Results, Commerce explains that "[o]ur practice of issuing liquidation instructions 15 days after publication of the final results is based upon administrative necessity, namely that we must provide CBP with sufficient time to liquidate all entries, particularly in large and complex cases like the instant reviews, before the entries are deemed liquidated." *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2007, through April 30, 2008*, at 12 (Aug. 25, 2009) ("*Decision Mem.*"); *Final Results*, 74 Fed. Reg. at 44,822.

After commencing this action on September 15, 2009, fifteen days after publication of the Final Results on August 31, 2009, plaintiffs moved for a preliminary injunction on September 16, 2009 to prohibit Customs from liquidating entries of subject merchandise produced by

or on behalf of plaintiffs that were made during the period of review. Summons; SKF's Consent Mot. for a Prelim. Inj. to Enjoin Liquidation of Entries. The court granted plaintiffs' motion for preliminary injunction upon defendant's consent. Order, Sept. 21, 2009.

On November 19, 2009, defendant, the United States, filed the instant motion to dismiss Count I of the complaint. Def. Mot. 1. On December 21, 2009, plaintiffs filed their response and on January 11, 2010, defendant filed its reply. Pls.' Opp'n to Def.'s Mot. to Dismiss ("Pls. Opp'n"); Def.'s Reply in Supp. of Mot. to Dismiss ("Def. Reply").

III. Discussion

The court exercises subject matter jurisdiction under 28 U.S.C. § 1581(i) over plaintiffs' claim in Count I challenging the Department's decision to apply the fifteen-day policy. *See* 28 U.S.C. § 1581(i) (2006); *SKF USA Inc. v. United States*, 31 CIT 405, 409–10 (2007) ("*SKF I*") (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004), and *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002–03 (Fed. Cir. 2003)).[1]

Defendant moves to dismiss Count I on the basis that "SKF lacks standing to maintain Count I, which asserts only hypothetical harm." Def. Mot. 2. Plaintiffs were able to obtain an injunction against liquidation of its entries and, under the court's order, liquidation of entries of plaintiffs' merchandise will remain enjoined during the pendency of this litigation, including all remands and appeals. Order, Sept. 21, 2009. Pointing to plaintiffs' success in obtaining an injunction, Order, Sept. 21, 2009, defendant argues that "SKF cannot demonstrate that Commerce's instruction to Customs resulted in any concrete injury in fact. . . . [a]s SKF must concede, no entries were actually liquidated; therefore, Commerce's instructions to Customs did not harm SKF in any way." Def. Mot. 3.

In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, the court assumes all factual allegations to be true and draws all reason-

[1] The court held in *SKF USA Inc. v. United States* that jurisdiction over a claim challenging the previous fifteen-day policy does not fall under 28 U.S.C. § 1581(c), explaining that

> [t]he language in the Federal Register notice to which plaintiffs direct the court's attention is a statement of a *present* intention on the part of Commerce to take, within fifteen days of the publication of the Final Results, the *future* action of instructing Customs to liquidate, in accordance with the Final Results, the affected entries.

SKF USA Inc. v. United States, 31 CIT 405, 409 (2007) ("*SKF I*"). The court reached the same conclusion regarding a claim challenging the Department's revised fifteen-day policy in two subsequent decisions. *SKF USA Inc. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1338, 1342–43 n.2 (2009) ("*SKF III*"); *SKF USA Inc. v. United States*, 33 CIT __, __, Slip Op. 09–148, at 5 (Dec. 21, 2009) ("*SKF IV*").

able inferences in plaintiffs' favor. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & 1584 n.13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (setting forth the standard for determining subject matter jurisdiction). The applicable pleading requirement for plaintiffs' claim in Count I is set forth in USCIT Rule 8(a), which provides that a complaint shall contain "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." USCIT Rule 8(a)(2) (2010). Rule 8(a) "requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Although a complaint need not contain detailed factual allegations, the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the complaint's allegations are true." *Id*.

In two previous cases, the Court of International Trade has held that SKF has standing to challenge Commerce's fifteen-day policy as applied in prior reviews, despite plaintiffs' having obtained an injunction against liquidation. *SKF USA Inc. v. United States*, 31 CIT 405, 409 (2007) ("*SKF I*"); *SKF USA Inc. v. United States*, 33 CIT __, __, 611 F. Supp. 2d 1351, 1362–63 (2009) ("*SKF II*"); *SKF USA Inc. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1338, 1347–48 (2009); *SKF USA Inc. v. United States*, 33 CIT __, __, Slip-Op. 09–148, at 27–29 (Dec. 21, 2009) ("*SKF IV*").[2] In *SKF III* and *SKF IV*, the court held that not only did SKF have standing to challenge Commerce's policy of issuing liquidation instructions fifteen days after publication of the Final Results even though plaintiffs did not suffer harm caused by liquidation of its entries, but that the policy, rule, or practice of the Department was contrary to law. *SKF III*, 33 CIT at __, 659 F. Supp. 2d at 1348, 1352; *SKF IV*, 33 CIT at __, Slip-Op. 09–148, at 29, 35.

The circumstances of this case are directly analogous to those in *SKF III* and *SKF IV*. As those cases concluded, "a claim may present an actual case or controversy if the action originally complained of is

[2] In *SKF II*, the court held that Commerce's previous 2002 policy of issuing liquidation instructions *within* fifteen days of publication violated 19 U.S.C. § 1516a(c)(2) "because that policy allows liquidation to occur almost immediately upon publication rather than providing a minimally reasonable time during which a party may seek to obtain an injunction against liquidation." *SKF USA Inc. v. United States,* 33 CIT __, __, 611 F. Supp. 2d 1351, 1367 (2009) ("*SKF II*"). The court determined that the previous 2002 policy "induces an absurd, and unnecessary, 'race to the courthouse' that burdens impermissibly the right of a prospective plaintiff to seek the injunction that Congress contemplated in enacting § 1516a(c)(2) and frustrates the purpose of that provision." *Id.* at __, 611 F. Supp. 2d at 1365. In *SKF III*, the court held that the Department's adherence to its current policy, rule, or practice, under which it waits fifteen days before issuing liquidation instructions was contrary to law because the Department failed to consider the relevant factors in adopting that policy, rule, or practice. *SKF III*, 33 CIT at __, 659 F. Supp. 2d at 1350–51.

capable of repetition, yet evading review." *SKF III*, 33 CIT at __, 659 F. Supp. 2d at 1347–48; *SKF IV*, Slip-Op. 09–148, at 27; *see also*, *SKF II*, 33 CIT at __, 611 F. Supp. 2d at 1363 n.9; *SKF I*, 31 CIT at 411–12. In this action, the court takes judicial notice that, despite the court's prior holding that the fifteen-day policy was contrary to law, Commerce has continued to apply its fifteen-day policy in multiple administrative reviews in 2010. *See Certain Preserved Mushrooms from the People's Republic of China: Am. Final Results Pursuant to Final Ct. Decision*, 75 Fed. Reg. 17,376, 17,377 (Apr. 6, 2010); *Certain Pasta from Italy: Notice of Am. Final Results of the Twelfth Antidumping Duty Admin. Review,* 75 Fed. Reg. 11,116, 11,117 (Mar. 10, 2010); *Circular Welded Carbon Steel Pipes & Tubes From Thailand: Final Results of Antidumping Duty New Shipper Review*, 75 Fed. Reg. 4529, 4530 (Jan. 28, 2010). The adverse effect of the new fifteen-day policy, as the court found to exist in *SKF III* and *SKF IV*, is, therefore, capable of repetition.

Defendant argues, further, that the court's decision in *SKF IV*, which concluded that the judgment issued in *SKF III* declaring the fifteen-day policy contrary to law "cannot ensure that Commerce will not apply its liquidation policy to SKF," supports its position that SKF cannot demonstrate standing. Def. Reply 5. According to this argument, Count I seeks an advisory opinion because the relief being sought in Count I could not prevent the application of the fifteen-day policy to SKF in future reviews. *Id.* The court finds no merit in this argument.

Defendant is correct that the judgments granted in *SKF III* and *SKF IV* were declaratory judgments. *SKF III*, 33 CIT at __, 659 F. Supp. 2d at 1352; *SKF IV*, 33 CIT at __, Slip Op. 09–138, at 35. In a declaratory judgment, a court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006). It may not be presumed that SKF will never be able to obtain any remedy based on the declaratory judgments it obtained in *SKF III* and *SKF IV* challenging the fifteen-day policy. Nor is SKF precluded in this litigation from seeking relief other than declaratory relief, and that relief could affect Commerce's future ability to apply its unlawfully promulgated fifteen-day policy to SKF. Commerce twice has applied to SKF a policy that the court has declared to be contrary to law and has given no indication that it will modify that policy or otherwise remedy the continuing harm the court identified in *SKF III*. Rather than attempt to obtain an advisory opinion, Count I rests on a justiciable case or controversy that continues to exist between Commerce and SKF.

IV. Conclusion

Plaintiffs have established standing to bring the claim asserted in Count I of the complaint challenging as unlawful the policy, rule, or practice of Commerce to issue liquidation instructions fifteen days after the publication of the final results of an administrative review. Accordingly, defendant's motion to dismiss Count I must be denied.

Order

Upon review of plaintiffs' complaint, defendant's motion to dismiss Count I of the complaint, plaintiffs' opposition to defendant's motion to dismiss, defendant's reply in support of its motion to dismiss, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that defendant's motion to dismiss be, and hereby is, DENIED.

Dated: May 17, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–58

AMERICAN SIGNATURE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 09–00400

[Judgment for Plaintiff.]

Dated: May 18, 2010

Mowry & Grimson, PLLC (*Jeffrey S. Grimson*, *Kristin H. Mowry*, *Jill A. Cramer*, *Jodi B. Herman*, *Susan E. Lehman*) for Plaintiff American Signature, Inc.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*, Senior Trial Attorney); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Thomas Beline*), of counsel, for Defendant United States.

King & Spalding LLP (*Joseph W. Dorn*, *J. Michael Taylor*) for Defendant-Intervenors American Furniture Manufacturers Committee For Legal Trade and Vaughan-Bassett Furniture Company, Inc.

OPINION

Gordon, Judge:

Introduction

This action involves a ministerial error that went undetected during an administrative review of the antidumping duty order covering wooden bedroom furniture from the People's Republic of China. The U.S. Department of Commerce ("Commerce") committed the error in its SAS margin calculation program, yielding assessment rates for certain exporters of subject merchandise that were lower than if the SAS program had been correct. The net effect was a rather significant under-collection of antidumping duties for these exporters.

Commerce discovered the error 99 days *after* a judicial action challenging the administrative review had been voluntarily dismissed. Rather than address and interpret the statutory provision and regulation governing ministerial errors (19 U.S.C. § 1675(h); 19 C.F.R. § 351.224) to determine whether the error could be corrected at such a late date, Commerce instead characterized the error as one within its liquidation instructions, outside the purview of the final results, and thus correctable. Although most of the subject entries had already been liquidated, Commerce instructed U.S. Customs and Border Protection ("Customs") to await revised liquidation instructions for the remaining unliquidated entries. For the subject entries already liquidated, Commerce requested that Customs reliquidate them pursuant to 19 U.S.C. § 1501 in accordance with the revised liquidation instructions.

American Signature, Inc. ("ASI") then commenced this action seeking a declaratory judgment that Commerce's attempted ministerial error correction was unlawful, and a permanent injunction to enjoin Commerce and Customs from reliquidating ASI's liquidated entries, or from altering the assessment rates for ASI's remaining unliquidated entries. In addition, ASI sought a preliminary injunction to maintain the status quo while the court addressed the merits. Although this court agreed with ASI that Commerce's attempted ministerial error correction via an amendment to liquidation instructions was suspect, the court could not at that stage of the litigation conclude that Commerce could never correct the error:

> At this stage of the litigation, the court does not have before it the agency's considered interpretation of 19 U.S.C. § 1675(h) or 19 C.F.R. § 351.224 (2007). To properly apply the standard of review operating in this Administrative Procedure Act ("APA")

> action, . . ., the court must give the agency the opportunity to review the statute and regulations and determine whether the error can be lawfully corrected.

American Signature, Inc. v. United States, No. 09–00400, (CIT Oct. 26, 2009) (Mem. and Order Den. Stay Pend. Appeal) at 9 ("Oct. 26, 2009 Order"). The court denied Plaintiff's request for a preliminary injunction. *See American Signature, Inc. v. United States*, No. 09–00400, (CIT Oct. 13, 2009) (Mem. and Order Den. Prelim Inj.); *American Signature, Inc. v. United States*, No. 09–00400 (Oct. 26, 2009 Order).

On appeal of this court's denial of the preliminary injunction, the Federal Circuit held that Commerce's error was not in the liquidation instructions, but within the final results of the administrative review. *American Signature, Inc. v. United States*, 598 F.3d 816, 823–25 (Fed. Cir. 2010) ("*American Signature*"). On the question of whether Commerce had the authority to correct the error given the tardiness with which it was discovered, the Federal Circuit deferred to Commerce's interpretation of 19 U.S.C. § 1675(h) and 19 C.F.R. § 351.224, which the Federal Circuit received through a supplemental request. *American Signature*, 598 F.3d at 823, 826–27 & n. 14. The Federal Circuit held that "Commerce's *sua sponte* corrections must be made before the final [results of an administrative review are] no longer subject to judicial review." *Id.* at 827–28. Applying this standard to the facts of this case, the Federal Circuit concluded that because Commerce did not correct the error before the time for judicial review had expired, "the error cannot now be corrected" and that ASI demonstrated a "certainty of success." *Id.* at 828. The Federal Circuit, in turn, reversed this court's denial of ASI's motion for a preliminary injunction and directed this court to grant ASI's "preliminary injunction prohibiting Customs or Commerce from taking any action to liquidate or reliquidate ASI's import entries that are the subject of this action, and for further proceedings consistent with this opinion." *Id.* at 830.

As ASI's success in this action is now certain, entry of a preliminary injunction is unnecessary because the merits have been resolved. A pending cross-claim by the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Basset Furniture Company, Inc. (the "domestic producers") seeking an affirmative injunction to direct Commerce to correct the error must fail because, as noted, the error cannot be corrected as a matter of law. *Id.* at 828.

Judgment will be entered accordingly.

Dated: May 18, 2010
New York, New York

/*s*/ *Leo M. Gordon*

JUDGE LEO M. GORDON

Slip Op. 10–59

ADVANCED TECHNOLOGY & MATERIALS CO., LTD., BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, AND GANG YAN DIAMOND PRODUCTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 10–00012

[Plaintiffs' Motion to Supplement the Administrative Record is denied.]

Dated: Dated May 18, 2010

Barnes, Richardson & Colburn (*Jeffery S. Neeley*) for Plaintiffs.

Tony West, Assistant AttorneyGeneral; *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Hardeep K. Josan*), Of Counsel, for Defendant United States.

Wiley Rein, LLP (*Daniel B. Pickard*) for Defendant-Intervenor.

OPINION AND ORDER

Musgrave, Senior Judge:

Introduction

Plaintiffs Advanced Technology & Materials Co. Ltd., Beijing Gang Yan Diamond Products Company, and Gang Yan Diamond Products, Inc. ("Plaintiffs"), move to supplement the administrative record compiled by Defendant International Trade Administration, United States Department of Commerce ("Commerce" or "the Department") in regard to Plaintiffs' challenge of the Department's December 27, 2009 decision not to conduct a changed-circumstances review. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2006). For the reasons set forth below, Plaintiffs' Motion to Supplement the Administrative Record will be denied.

Background

On May 22, 2006, the Department issued a determination that imports of diamond sawblades from the People's Republic of China are being sold, or likely to be sold, at less-than-fair-value ("LTFV"). *See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of*

China, 17 Fed. Reg. 29303 (May 22, 2006) ("*Final Determination*"). Although delayed by several legal challenges, the Department ultimately issued antidumping duty orders in accordance with the *Final Determination* on November 4, 2009. *See Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145 (Nov. 4, 2009).

Plaintiffs took action to dispute the *Final Determination* in three ways: (1) by intervening in the petitioner's challenge to that determination (Court No. 06–00246); (2) by filing their own challenge to the *Final Determination* pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (Court No. 09–00511); and (3) by officially requesting that the Department conduct a review of the *Final Determination* based on changed circumstances pursuant to 19 U.S.C. § 1675(b). In their request for review, Plaintiffs asserted that the Department should recalculate the *Final Determination* dumping margins to reflect the Department's official policy change, announced on December 27, 2006, that it would discontinue the practice of "zeroing" in dumping-margin calculations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006.) In a letter dated December 14, 2009, the Department informed Plaintiffs that it would not conduct a changed-circumstances review, stating that the policy change did not apply to *Final Determination* because the diamond sawblades investigation "was not pending before the Department" on the effective date of the policy change. *Changed Circumstances Determination* at 2 (internal quotes omitted).

Consequently, Plaintiffs filed the instant action in this Court seeking judicial review of the Department's decision not to conduct a review. As per the Court's Rules, the Department filed with the Clerk of the Court the administrative record for this action on March 8, 2010. The record submitted was comprised largely of three documents: (1) Plaintiffs' November 17, 2009 Changed Circumstances Request; (2) the *Changed Circumstances Determination* (a two-page letter), and (3) a letter from the Department rejecting Plaintiffs' prior (April 27, 2009) request for a changed-circumstances review of the *Final Determination*.

Plaintiffs object to the meagerness of the Department's submission and now move to supplement the administrative record by admitting all materials contained in the administrative record of Court No. 06–00246, as well as all information pertaining to the April 27, 2009 request for a changed circumstances review (which Commerce denied as premature). Pls.' Mot. at 4. Plaintiffs argue, *inter alia*, that these materials should be part of the record because, pursuant to USCIT

Rule 73.2(a)(1), "the 'administrative proceeding' at issue includes the changed circumstances requests that resulted from [the] order issued in the original investigation, as well as the earlier changed circumstances request of Plaintiff[s'] putting Commerce on notice of the zeroing issue prior to the issuance of the order." Pls.' Mot. at 2. Plaintiffs assert that their November 17, 2009 request for review "did not occur in a vacuum, but [is] part and parcel of the underlying investigation and the prior changed circumstances request," and that Commerce cannot "arbitrarily create a narrow record that ignores the underlying factual record that is the entire basis of the changed circumstances request." *Id*.

The Department opposes the motion and asserts that the administrative record as submitted contains all of the documents required by USCIT Rule 73.3,[1] and notes further that Plaintiffs' previous request for a changed circumstances review is already contained in the record. Def.'s Opp'n. at 3. The Department contends further that its designation of the administrative record is "entitled to the presumption of administrative regularity," and that the court must presume the current record is complete because, in the Department's view, Plaintiffs have failed to present "*clear evidence* to the contrary." *Id*.

Discussion

[1] Pursuant to statute and the Court's Rules, the administrative record must contain certain documents. 28 U.S.C. § 2635 (2006) provides that "in actions in which judicial review is to proceed upon the basis of the record made before the agency," the agency must file with the Court:

> (A) A copy of the contested determination and the findings or report on which such determination was based.
> (B) A copy of any reported hearings or conferences conducted by the agency.
> (C) Any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action. The agency must identify and file under seal any document, comment, or other information obtained on a confidential basis, including a non-confidential description of the nature of such confidential document, comment or information.
> (4) A certified list of all items specified in paragraphs (1), (2) and (3) of this subdivision (a).

28 U.S.C. § 2635 (2006). Similarly, USCIT Rule 73.3 provides that "in All Other Actions Based Upon the Agency Record" the agency must file with the Court:

> (a)(1) A copy of the contested determination and the findings or report upon which such determination was based.
> (2) A copy of any reported hearings or conferences conducted by the agency.
> (3) Any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action. The agency shall identify and file under seal any document, comment, or other information obtained on a confidential basis, including a non-confidential description of the nature of such confidential document, comment or information.
> (4) A certified list of all items specified in paragraphs (1), (2) and (3) of this subdivision (a).

USCIT R. 73.3.

Should it reach the merits of this case, the court's review is governed by the standards set forth in 5 U.S.C. § 706, which provides that the agency's decision must be upheld unless determined to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," and specifies that "[i]n making the foregoing determination," the court is limited to review of "the whole record or those parts of it cited by a party . . . ." 5 U.S.C. § 706.

Under section 706, "the whole record" means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Lower courts have further defined "the whole record" as including "everything that was before the agency pertaining to the merits of its decision," *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534,1548 (9th Cir. 1993), and "all documents and materials directly or indirectly considered by agency decision-makers." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

Plaintiffs' first dispute lies not with what constitutes the "whole record," but with the proper definition of "the administrative proceeding" as that term is used in USCIT Rule 73.2.[2] Plaintiffs contend that "the administrative proceeding" encompasses far more than the single decision under challenge, and, at the very least, must also include the original LTFV investigation, the *Final Determination*, as well as Plaintiffs' first changed-circumstances request. Plaintiffs explain that the changed-circumstances decision currently before the court cannot be viewed in isolation but is "part and parcel of the underlying investigation and the prior changed circumstances request." Pls.' Mot at 2. This being so, Plaintiffs argue, the record from the underlying investigation and the resulting determination (found in the record for Court No. 06–00246) as well as all records pertaining to the prior changed-circumstances request should be included in the administrative record here.

The court finds this argument problematic for several reasons. First, this action is not governed by Rule 73.2, but Rule 73.3, which contains no reference to "the administrative proceeding," but instead refers only to "the agency's action." Further, even if Rule 73.3 contained terminology more amenable to the expansive interpretation Plaintiffs advocate, arguments of this nature have been soundly re-

[2] Rule 73.2, which applies to "Documents in An Action Described in 28 U.S.C. § 1581(c) or (f)," does not govern this action. This action falls under 28 U.S.C. § 1581(i), which is governed by Rule 73.3 "Documents in All Other Actions Based Upon the Agency Record." *Cf.* USCIT R. 73.2 *with* R. 73.3.

jected by this Court. In *Beker Industries Corp., v. United States*, the Court determined that "the administrative proceeding" refers only to "the immediate administrative review in dispute" and nothing more. *Beker*, 7 CIT 313, 315 (1984). More specifically the court noted:

> The scope of the record for purposes of judicial review is based upon information which was "before the relevant decision-maker" and was presented and considered "at the time the decision was rendered." It is obvious in this case that the relevant decision-maker was the ITA (and not the Treasury Department). It is equally clear that plaintiff is not challenging the original anti-dumping finding, but rather the final decisions made relating to the administrative review at issue . . . .

Id. Although *Beker* involved a different Rule and a different statute, the analysis in that case was based on fundamental principles of administrative law and applies with equal force here. In this matter, as in *Beker*, it is clear that the relevant decision-maker was the Department and that Plaintiffs are not challenging the *Final Determination* but rather the Department's decision not to conduct a changed circumstances review. *See Complaint* at 1.[3] Hence, the administrative record in ths matter includes only those documents that were "directly or indirectly considered" by the Department's decision-makers at the time *that decision* was rendered. Accordingly, Plaintiffs' expansive interpretation of "the agency action" or "the administrative proceeding" must be rejected as contrary to the Court's caselaw and unsupported by the language of Rule 73.3. *See generally Fund for Animals v. Williams*, 245 F.Supp.2d 49, 57 (D.D.C. 2003) (finding that interpretation of the term "'before' so broadly as to encompass any potentially relevant document existing within the agency or in the hands of a third party would render judicial review meaningless.").

Plaintiffs next assert that supplementation of the record is necessary: (1) because Plaintiffs' arguments cannot be fully reviewed by this Court on the current record, supplementation is required to prevent frustration of judicial review; (2) in order to obtain background information necessary for the court to make an informed decision; and (3) "to explain the existing record and judge the adequacy of the procedures and facts considered." Pls.' Mot. at 3–4.

[3] The core function of the complaint is to "give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). *See DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1320 (Fed. Cir. 2006) (noting that an "essential purpose of the [complaint], as the initial pleading, is to put the Government on notice of what protest decisions are being contested in the Court of International Trade.").

It is "black letter law" that review in federal court must be confined to the agency's record; consideration of information outside of the record is deemed appropriate only in "the rare case." *See* Charles H. Koch, Jr., 3 Administrative Law and Practice § 8.27 (2d ed. 2010); *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (holding that "[i]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision"). However, most courts have recognized several "rare case" exceptions to the record rule, and will allow for consideration of extra-record evidence in certain compelling, narrowly defined circumstances. These exceptions include situations (1) where the movant has presented "a strong showing of bad faith or improper behavior by agency decision makers," *Overton Park*, 401 U.S. at 420; (2) where the court, at its discretion, wishes to obtain background information as an aid to understanding highly technical matters, *see Animal Defense Council v. Hodel,* 840 F.2d 1432, 1436 (9th Cir. 1988); or to judge the adequacy of the procedures and facts considered, *see Former Employees of Pittsburgh Logistics Sys., Inc. v. United States Sec'y of Labor*, 27 CIT 339, 343 (2003); and (3) when there is "such failure to explain administrative action as to frustrate effective judicial review . . . ." *Camp v. Pitts,* 411 U.S. 138, 142–43 (1973).

The courts will also supplement the record upon a showing that the administrative record is not complete. As noted by the government, the Department's designation of the record is entitled to a presumption of administrative regularity, and the court must presume that all of the materials considered in the decision-making process have been included. However, if that presumption is rebutted—by a party's presentation of "clear evidence" that the materials were considered by the decision-makers— the materials may be admitted to complete the record. *See Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *Ammex, Inc. v. United States,* 23 CIT 549, 556, 62 F. Supp.2d 1148, 1153 (1999). Although record supplementation on these grounds is often viewed as one of the "exceptions" to the record rule described above, it is described more accurately as "completing" the record because the material sought to be included is only that which (allegedly) should have been a part of the record to begin with. *See Pacific Shores Subdiv. Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp.2d 1, 4 (D.C. Dist. 2006).

Plaintiffs in this matter do not allege that the Department considered the materials they seek to admit, but instead focus on admission of the documents pursuant to the limited exceptions for consideration of extra-record evidence. However, these arguments fail. Plaintiffs'

contentions as to the need for "background information" or for information needed to "judge the adequacy of the procedures and facts considered" are essentially bare allegations with no reference as to how the Department's decision is lacking, what "procedures" could be inadequate, or which particular documents are needed for elucidation. Moreover, judicial review is not "frustrated" by the court's inability to fully review Plaintiffs 'arguments: the Department's *Changed Circumstances Determination* is before the court for review, not the Plaintiffs' arguments. It is that determination, not Plaintiffs' arguments, that the court must set aside if found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Finally, the court notes that the record, although sparse, does not appear incomplete on its face. The text of the decision itself indicates that Commerce rejected Plaintiffs request for review on the single, *purely legal*, premise that the original investigation was not "pending" before the Department on the effective date of the policy change. Arguments that attack the *Changed Circumstances Determination* for reasons other than the narrow grounds upon which the decision rests do not seem likely to assist the court in its merits review of this matter. The court has considered all other arguments presented by Plaintiffs and considers them to be without merit.

Conclusion

In consideration of the foregoing, the court is unable to conclude that the materials proffered by Plaintiffs were "before the agency decision-maker" at the time the agency rendered the decision under review, or that the record may be otherwise supplemented pursuant to any of the relevant exceptions that allow for the consideration of extra-record evidence. Motion denied.

SO ORDERED.

Dated: May 18, 2010
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 10–60

SEAH STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and BRISTOL METALS, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 09–00248

[*The Department of Commerce's final results are affirmed in part and remanded in part.*]

Dated: May 19, 2010

Troutman Sanders LLP (*Donald B. Cameron*; *Julie C. Mendoza*; *Jeffrey S. Grimson*; *R. Will Planert*; *Brady W. Mills*; *Mary S. Hodgins*) for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*; Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); *Scott D. McBride*, Office of the Chief Counsel for Import Administration, United States Department of Commerce; for Defendant.

Schagrin Associates (*Roger B. Schagrin*; *Michael J. Brown*) for Defendant-Intervenor.

OPINION

CARMAN, JUDGE:

Introduction

This matter comes before the Court, on a motion for judgment on the agency record brought by Plaintiff, SeAH Steel Corporation ("SeAH"), pursuant to Rule 56.2 of the Rules of the United States Court of International Trade ("USCIT").

Plaintiff, challenges numerous aspects of the United States Department of Commerce's ("Commerce" or "Department") administrative determination with respect to *Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 31,242 (June 30, 2009), Public Record Doc. No. 77 ("*Final Results*").[1] SeAH contends that certain findings made by Commerce are unsupported by substantial evidence or otherwise not in accordance with the law. (*See* Pl.'s R. 56.2 Mot. for J. Upon Agency Rec. ("Pl.'s Brief.").) SeAH's motion is opposed by Commerce, as well as Defendant-Intervenor, Bristol Metals. Whereas Defendant-Intervenor urges the Court to affirm, in their entirety, Commerce's *Final Results* (*see generally* Resp. Brief of Def.-Int. in Opp'n to Pl.'s Mot. for J. On the Agency R. ("Def.-Int.'s Brief")), Defendant requests that the Court sustain its findings with regard to

[1] Hereinafter all documents in the public record will be designated "PR," and all documents in the confidential record designated "CR."

its calculation of normal value and costs of production, but requests voluntary remand of its major input and transactions disregarded findings, (*see* Def.'s Mem. in Opp'n to Pl.'s Mot. for J. Upon the Agency R. at 39 ("Def.'s Brief")). For the reasons set forth below, the Court sustains Commerce's *Final Results* in part, and remands them in part.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c).[2]

Standard of Review

When reviewing the final results of antidumping administrative reviews, "[t]he 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." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (*quoting Consol. Edison Co.*, 305 U.S. at 229). In determining the existence of substantial evidence, a reviewing Court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin*, 322 F.3d at 1374 (*quoting Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The possibility of drawing two inconsistent conclusions from the evidence "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). There must be a "rational connection between the facts found and the choice made" in an agency determination if it is to be characterized as supported by substantial evidence and otherwise in accordance with law. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Background

Dumping takes place when goods are imported into the United States and sold at a price lower than their normal value. 19 U.S.C. § 1677(34). Under the statute, Commerce is required to impose duties on dumped merchandise to offset the effects of dumping. § 1673. The antidumping statutes provide for periodic administrative reviews of

[2] All citations to the United States Code refer to the 2006 edition.

antidumping duty orders—at the request of an interested party—to update the applicable antidumping duty rate.[3] § 1675. The case at bar challenges the results of such an administrative review.

In January 2008, at the request of Bristol Metals, Commerce initiated a periodic administrative review of the antidumping duty order currently in place for welded stainless steel pipes ("WSSP")[4] from Korea for the period December 1, 2006 through November 30, 2007. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 4,829 (Jan. 28, 2008); *see also Antidumping Duty Order and Clarification of Final Determination: Certain Welded Stainless Steel Pipes From Korea*, 57 Fed. Reg. 62,301 (December 30, 1992). In the *Preliminary Results*, Commerce followed its conventional methodology of using SeAH's period of review annual weighted-average costs of production to determine the appropriate dumping margin, and preliminarily calculated a rate of 4.10%. *Preliminary Results*, 73 Fed. Reg. at 79,052, 79,054. Shortly thereafter, the Department requested that SeAH provide quarterly cost information "in order to analyze the magnitude of cost changes throughout the POR" to determine whether it was appropriate to use shorter cost averaging periods for the *Final Results*.

On April 29, 2009, Commerce issued its post-preliminary calculations of SeAH's cost of production and constructed value information, which was based on an analysis of SeAH's quarterly cost information. (Memorandum from Gina Lee, to Neal M. Halper, Proposed Adjustments to the Cost of Production and Constructed Value Information, PR 63, CR 31 ("Proposed Cost Adjustments Memo").) The decision to proceed with a quarterly cost analysis had implications beyond Commerce's normal value calculations, and affected how the Department conducted its price-to-price comparisons between home market and U.S. sales, as well as its statutorily mandated cost recovery methodology. Based on its evaluation of the quarterly cost information, Commerce made an upward adjustment of SeAH's dumping margin prior to completion of the *Final Results*.[5] (*Id.*)

Following publication of the post-preliminary calculations, SeAH's advocacy before Commerce focused principally on the issues in dis-

[3] Absent an administrative review, merchandise is liquidated at the cash deposit rate established in the previous administrative review, or, if no such review exists, at the rate established in the original antidumping investigation. 19 C.F.R. § 351.212(a).

[4] WSSP is a commodity product generally used as a conduit to carry liquids or gases, and is produced by forming stainless steel flat-rolled products into "a tubular configuration and welding along the seam." *Certain Welded Stainless Steel Pipes from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 79,050, 79,051 (Dec. 24, 2008) ("*Preliminary Results*").

[5] SeAH's dumping margin increased to 8.92%. (Proposed Cost Adjustments Memo at 6.)

pute in this action: (1) whether Commerce erred in using quarterly cost information rather than annual period of review average costs in the agency's normal value calculations; (2) whether Commerce erred in its decision not to apply its normal "90/60" day window period for comparing U.S. and home market sales, and instead to make comparisons within a given quarter; (3) whether Commerce's adjusted cost-recovery methodology was consistent with its statutory mandate; and (4) whether Commerce erred in its application of the "transactions disregarded" and "major input" rules.[6] (*See generally* Brief from Law Firm of Troutman Sanders ("Case Brief"), PR 68, CR 34.) In the *Final Results*, Commerce rejected SeAH's arguments on all the issues, and further adjusted its dumping margin to 9.05%. *Final Results*, 74 Fed. Reg. at 31,243. This action followed, contesting the Department's determination in the *Final Results*.

Plaintiff asserts that calculating its production costs on a quarterly basis results in an improper inflation of its dumping margin. (*See* Pl.'s Brief at 12.) SeAH further contends that the Department's application of the major input and transactions disregarded provisions of the statute had a similar effect. (*Id.* at 10.) As a result, Plaintiff requests that this matter be remanded to Commerce with instructions to recalculate SeAH's dumping margin using annual weighted average costs, and to conduct its major input analysis on a grade and specification basis. (Pl.'s Brief at 50.)

Discussion

1. *Commerce's Use of Quarterly Costs Versus Period of Review Average Costs for the Cost of Production Analysis*

A Statutory Scheme

In an administrative review, Commerce determines the antidumping duties to be imposed by first calculating the dumping margin for each of a foreign producer or exporter's individual U.S. transactions, which is the amount by which the normal value of the imported subject merchandise in the exporter's home market exceeds the export price or the constructed export price of that merchandise. *See* 19 U.S.C. § 1677(35)(A). Normal value is the basic conceptual focus in deriving the foreign benchmark value for the subject merchandise. The relevant portions of the statute require normal value to be calculated as follows:

> In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair

[6] These rules are found at 19 U.S.C. § 1677b(f)(2) and (3), respectively.

> comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:
>
> (1) Determination of normal value
>
> (A) In general
>
> The normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed price . . . .
>
> (B) Price
>
> The price referred to in subparagraph (A) is —
>
> (i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

§ 1677b(a). The preferred, and by far most common, method for making the determination of normal value is through the use of sales of the subject merchandise in the home market of the exporter/producer. *See* 19 C.F.R. § 351.404(a). Sales made in the home country for less than the cost of production, however, may be disregarded in the calculation of normal value. 19 U.S.C. § 1677b(b). This exclusion may significantly raise the ultimate normal value established by Commerce since, when it is applied, it eliminates the lowest of the producer's home market sales from the data used. A higher normal value, of course, results in an increased dumping margin. The "sales below cost" provision of § 1677b(b) thus assumes an important role in many dumping determinations.

The statute permits Commerce to disregard home market sales below cost only under certain circumstances:

> Whenever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. If the administering authority determines that sales made at less than the cost of production—

> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

19 U.S.C. § 1677b(b)(1). The statute further provides that the "cost of production" should be an amount equal to the cost of materials, fabrication, general and administrative expenses, and packaging during a period of time which would "ordinarily permit the production of the foreign like product in the ordinary course of business." § 1677b(b)(3). If the Department determines that sales below the cost of production should be excluded, the remaining sales will be used to determine normal value in the foreign market.[7] § 1677b(b)(1).

In establishing whether a particular sale was made at less than the cost of production, "Commerce's normal practice is to use annual averages when conducting its cost of production analysis." Def.'s Brief at 8. That is to say that Commerce applies a "cost test" that involves a comparison of the home market sales price of a particular model to that model's annual weighted average cost of production for the period of review. *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment*, 73 Fed. Reg. 26,364 (May 9, 2008) ("Request for Comment"). Commerce, however, also has a long-standing practice of departing from annual averaging and employing shorter (usually quarterly) cost-averaging periods when two factors are present: (1) consistent and significant cost variation during the period of review, and (2) evidence of linkage between the cost variation and changes in sales prices within the shorter averaging period. *Id*. Here, Plaintiff contests the manner in which Commerce conducted the two-prong test, arguing that Commerce abruptly (1) changed the manner in which it determined that cost variation

[7] If no remaining sales exist, the Department will use the constructed value methodology for determining normal value. 19 U.S.C. § 1677b(b)(1).

was significant, and (2) allowed the requirement for direct linkage between cost variation and price changes to be satisfied on a much looser correlation standard.

B. Parties' Arguments

SeAH argues that Commerce traditionally uses shorter cost averaging periods only when record evidence clearly shows (1) a significant and consistent increase in costs during the period of review and (2) that rising costs can be "directly linked" to sales in the shorter cost averaging period. (Pl.'s Brief at 10–11.) Plaintiff alleges that Commerce departed from this established practice and thus its decision to apply quarterly cost averaging was "unreasonable and not in accordance with law." (*Id.* at 11.) Plaintiff maintains that Commerce's two prong test for use of shorter cost averaging periods, in effect at the time SeAH's administrative review began, should have been used in this review.[8] (*Id.* at 14.) SeAH references the Department's *Request for Comment* as evidence of its long-standing practice with regard to the use of quarterly cost averaging.[9] (*Id.* at 17 n.9 (*citing Request for Comment*, 73 Fed. Reg. at 26,366.)

The Department's change in practice, Plaintiff asserts, results in a test that no longer requires the change in costs to be consistent, but simply requires the costs to increase significantly (i.e., greater than

[8] SeAH illustrates that Commerce has followed a consistent policy of using this two-prong test when determining whether to use shorter cost averaging periods, citing a long line of determination employing the test between 2000 and 2009. *See Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands*, 65 Fed. Reg. 742 (Jan. 6, 2000) ("*Brass Sheet and Strip*"); *Notice of Final Results of Antidumping Duty Administrative Review and Determination to Revoke the Antidumping Duty Order in Part: Certain Pasta from Italy*, 65 Fed. Reg. 77852 (Dec. 13, 2000) ("*Pasta from Italy*"); *Certain Steel Concrete Reinforcing Bars from Turkey*, 70 Fed. Reg. 67,665 (Nov. 8, 2005) ("*Turkish Rebar 2005* "); *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 Fed. Reg. 3,822 (Jan. 24, 2006) ("*Wire Rod from Canada*"); *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France*, 71 Fed. Reg. 6,269 (Feb. 7, 2006) ("*Stainless Steel Sheet from France*"); *Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review and Determination to Revoke in Part*, 73 Fed. Reg. 66,218 (Nov. 7, 2008) ("*Turkish Rebar 2008* "); *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 75,398 (Dec. 11, 2008) ("*Plate from Belgium*"); *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 6,365 (Feb. 9, 2009) ("*Sheet from Mexico*").

[9] SeAH points to Commerce's declaration that "we believe it is necessary for a respondent to provide evidence on the administrative record of a *direct linkage* between resulting costs and sales prices before we consider using a cost-averaging period that does not extend throughout the entire POI/POR." (Pl.'s Brief at 17 n.9 (*quoting Request for Comment*, 73 Fed. Reg. at 26,366) (emphasis added).)

25%) between any two quarters of the period of review.[10] (Pl.'s Brief at 21.) SeAH's objection is that "even if the significant change in COM represented just a temporary spike between two quarters . . . quarterly costs would be applied to the entire POR, i.e., even as to quarters not impacted by significant changes." (*Id.*) The Department's new test, argues SeAH, contradicts the rationale underlying Commerce's previous practice, which was "based on the fact that short-term cost fluctuations are mitigated by the use of annual average costs and that resorting to quarterly or monthly costs in cases where the cost changes were not consistent across the POR could cause aberrations." (*Id.* at 22.)[11] This, says Plaintiff, constitutes an abrogation of the consistency requirement, for which Commerce failed to offer an adequate explanation. (*See id.*)

SeAH further complains that Commerce has "abandoned its direct linkage requirement in favor of a watered-down test" that is met so long as costs and prices in a given quarter generally trend in the same direction. (*Id.* at 24.) SeAH claims, once again, that the explanation offered by Commerce is insufficient and runs counter to the Department's prior concerns about direct linkage. (*See id.*)

Finally, SeAH characterizes as flawed the Department's analysis of quarterly average price and cost changes for the five largest U.S. and home market control numbers ("CONNUMs").[12] Plaintiff maintains that Commerce's examination of the CONNUMs demonstrates that there is no correlation between the raw material costs and the directly related sales transactions occurring in the third quarter (the only quarter with significant cost variation). (*See id.* at 25.) Therefore, without a clear link between changes in third quarter costs and changes in sales prices within that same quarter, Commerce's deci-

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[10] Here, for example, the Department analyzed the percentage difference between the low quarterly average cost of manufacture and the high quarterly average cost of manufacture, stating "[i]f the percentage difference exceeds 25 percent, we will normally consider the significant cost change threshold to be met." Issues and Decision Memorandum for the Final Results at 9, PR 74 ("Issues & Decision Memo").

[11] Commerce has argued in the past that "to deviate from our normal, predictable, and consistent approach every time costs temporarily increase or decrease would create a situation in which we no longer have a practice, and which no longer allows for a predictable result." (Pl.'s Brief at 22 (*quoting Habas Sinai v. United States*, Ct. No. 05–00613, Final Results of Redetermination Pursuant to Remand, at 29 (March 3, 2008)).)

[12] In order to establish a dumping margin, whether in an initial investigation or in an administrative review, Commerce must first identify the foreign like product which will form the basis for comparison to merchandise imported into the U.S. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1375–76 (Fed. Cir. 2001); *see also* 19 U.S.C. § 1677b(a)(1)(B). The statute defines "foreign like product" as either identical merchandise or similar merchandise. 19 U.S.C. § 1677(16). Determinations of similar (i.e., non-identical) merchandise are made using a model match methodology developed by Commerce. All materially identical products are assigned one CONNUM, a unique numeric code distinguishing them from non-identical products.

sion to use quarterly costs in place of annual average costs is unsupported by substantial evidence and otherwise not in accordance with law. (*See id.* at 25–26.)

In response, Commerce acknowledges that its general practice is to use annual averages when conducting its cost of production analysis. The Department goes on to note, however, that it has departed from this practice in cases where the agency has concluded that, because of significant cost or home market price changes during the period of review, application of an annual average cost period would be distortive.[13] (Def.'s Brief at 9–10.) As a result, both Defendant and Defendant-Intervenor challenge SeAH's assertion that Commerce has deviated from its previous practice. (*Id.* at 10; Def.-Int.'s Brief at 8.) According to Commerce, it has

> consistently determined that it may depart from its normal methodology and review shorter cost periods when two factors exist: 1) the cost changes throughout the period of review are significant, and 2) sales during the shorter cost averaging period could be accurately linked with the cost of production during the same averaging period.

(Def.'s Brief at 10.) In this review, as in prior administrative reviews, the agency's determination of whether a cost change was significant was made by calculating the difference between the low quarterly average cost of manufacture and the high quarterly average cost of manufacture. (*Id.* at 12.) If this figure exceeds 25 percent, as is the case here, Commerce considers the significant cost change threshold to be met. (*Id.*) For example, the Department points to the "dramatic fluctuations" in the prices of nickel and hot-rolled coils during the period of review as evidence of the significant increase in respondent's cost of manufacturing.[14] (*Id.* at 13.)

With regard to the second of the two inquiries, the Department claims that the agency's definition of linkage does not require direct

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[13] Commerce cites to several agency decisions in which it determined that the use of shorter cost averaging periods were appropriate. (*See* Def.'s Brief at 9–10 (*citing Final Determination of Sales at Less Than Fair Value; Erasable Programmable Read Only Memories from Japan*, 51 Fed. Reg. 39,680 (Oct. 30, 1986); *Notice of Final Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia*, 64 Fed. Reg. 73,164 (Dec. 29, 1999); *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands*, 65 Fed. Reg. 742 (Jan. 6, 2000).

[14] Nickle is a major input consumed in the production of hot-rolled stainless steel coil, which in turn is a major input in the production of WSSP. (*See* Post-Preliminary Comments at 2.)

traceability between specific sales and specific production costs. (*Id.* at 16.) Rather, the standard is whether Commerce identifies pricing data which indicate "that both prices and costs were trending in the same direction" throughout the period of review. (*Id.* at 17.) The Department cites to its examination of the top five CONNUMs sold in the U.S. market and home country market and states that, because in "every instance but three, the change in the average quarterly cost trended consistently with the change in the average quarterly prices . . . a reasonable correlation can be found between rising costs of manufacturing and sales prices." (*Id.* at 19–20 (citation omitted).) Moreover, Commerce claims, these data demonstrate SeAH's ability to revise its prices in response to the fluctuations in material costs, and points to SeAH's reported inventory turnover periods for raw materials and finished goods being within the quarterly cost averaging period used by Commerce. (Adjustments to the Cost of Production and Constructed Value Information for the Final Results ("Final Cost Adjustments Mem.") at 3–4, PR 75, CR 37.) From this, Commerce concluded that SeAH was able to respond to the volatility in material costs and adjust its sales prices accordingly within a given quarter. (Def.'s Brief at 19.)

Commerce denies that the agency changed its methodology, but argues that it was, nonetheless, permitted to do so by virtue of its legislative mandate. Because § 1667b(b)(3) does not dictate the method for calculating the cost of production, nor does it provide a definition of the term "period," Commerce was permitted to revise its methodology as long as it complied with the statute's notice provisions. (*See* Def.'s Brief at 12–13 (*citing SKF USA v. United States*, 537 F.3d 1373 (Fed. Cir. 2008); 19 U.S.C. §§ 1677b *and* 1677m(g)).) In so arguing, the Department relies on the deference a court must afford an agency's reasonable interpretation of a statute, if that statute is silent on a particular methodology to be employed. (*See* Def.'s Brief at 12; *SKF USA*, 537 F.3d at 1381–82.) Moreover, the Department asserts, SeAH was given more than adequate notice that a shortened review period for costs might be used, and cites as evidence of this notice Plaintiff's ability to comment before the *Final Determination* was made. (Def.'s Brief at 12–13.)

Defendant-Intervenor refutes Plaintiff's assertion that there is no correlation between raw material costs and the sales transactions occurring within the same quarter, and offers as support for this position SeAH's ability to quickly pass on changes in the cost of manufacturing to its buyers through higher prices. (Def.-Int.'s Brief at 18–19.) This, according to Bristol Metals, was in large part due to

the manner in which SeAH purchased its inputs, which permitted SeAH to easily identify its increases in costs and quickly pass such costs on to its customers. (*Id.* at 19.) The ease with which SeAH was able to respond to cost increases, says Defendant-Intervenor, is proof of a "near lockstep correspondence" between costs and prices. (*Id.*)

C. Analysis

Commerce is generally at liberty to discard one methodology in favor of another when necessary to calculate a more accurate dumping margin, subject to two important considerations. *See SKF USA Inc. v. United States*, 31 CIT 951, 491 F. Supp. 2d 1354, 1362 (2007) ("[I]t is within Commerce's expertise and discretion to update its methodology for both increased accuracy and ease of use"). The first restriction is that Commerce may not alter its methodology where a respondent has detrimentally relied on an old methodology used in previous reviews. *See Fujian Mach. & Equip. Import & Export Corp. v. United States*, 25 CIT 1150, 1169–70, 178 F. Supp. 2d 1305, 1327 (2001). Second, Commerce must explain the basis for its change of methodology and demonstrate that its explanation is in accordance with law and supported by substantial evidence. *See id.*

Plaintiff's challenge to Commerce's use of quarterly cost averages in place of the longer annual averages fails for several reasons. In the first instance, SeAH has not presented nor attempted to present an argument based on detrimental reliance. While Commerce "may not make minor disruptive changes in methodology where a respondent demonstrates its specific reliance on the old methodology," *id.*, the party claiming the benefit of this rule must show detrimental reliance on the previous methodology, *see NSK Ltd. v. United States*, 21 CIT 617, 639, 969 F. Supp. 34, 56 (1997), *aff'd in part, rev'd in part on separate grounds sub nom. NSK Ltd. v. Koyo Seiko Co., Ltd.*, 130 F.3d 1321 (Fed. Cir. 1999). Instead, Plaintiff's argument focuses on the second of the two requirements, specifically that Commerce failed to adequately explain its change in practice. This, however, ignores the Court's previous rulings, and vitiates a wealth of controlling authority. Even assuming that Plaintiff's argument was properly framed, SeAH's contention that the application of Commerce's quarterly cost methodology was unlawfully retroactive, is similarly flawed. There is an inherent retroactivity to antidumping administrative review determinations, and "[c]hanges in methodology, like all other antidumping review determinations, permissibly involve retroactive effect." *SKF USA*, 537 F.3d at 1381 (internal citations and quotation marks omitted); *see also American Permac, Inc. v. United States*, 10 CIT 535, 539, 642 F. Supp. 1187, 1191 (Fed. Cir. 1986) (stating that "19 U.S.C.

§ 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations"). Having failed to establish detrimental reliance on Commerce's previous practice, and given the inherently retroactive nature of the antidumping statutory scheme, Plaintiff's arguments fail to establish that Commerce improperly changed its cost production methodology.

As a threshold matter, it is hardly clear that Commerce has in fact changed its methodology at all. As the Defendant-Intervenor notes, Commerce has applied quarterly costs in the same manner as used in the present case in several other administrative reviews. (Def.-Int.'s Brief at 6–7.) The Department's approach in these past proceedings are representative of the agency's long-standing and well-recognized test for use of alternative cost averaging periods. What is significant, however, is the Department's interpretation of the central terms of the test's two requirements. Commerce explained in the Issues & Decision Memo that:

> The Department has articulated in several past proceedings that the use of an alternative cost averaging period may be appropriate in situations where a reliance on our normal annual weighted average cost method would be distortive due to significant cost changes . . . . [W]e recognize the importance of having a consistent and predictable approach to analyzing the issue and determining when to deviate from our normal annual average cost methodology . . . . The Department conducted a careful review of the comments received in response to the [*Request for Comment*]. We also considered interested party comments on the same issue in [*Turkish Rebar 2008*], [*Sheet from Mexico*] and [*Plate from Belgium*], and reaffirmed in the final results of these cases that the two most important factors in considering whether to deviate from our normal average cost methodology are 1) whether the cost changes throughout the POI or POR were significant, and 2) whether sales during the shorter cost averaging period could be accurately linked with the COP during the same averaging period.

(Issues & Decision Memo at 5–6.) In these prior determinations, Commerce established a presumption that costs are deemed to vary significantly when the range between the quarterly costs of manufacture of the subject merchandise exceeds 25 percent. (*Id.* at 9.) More importantly, however, Commerce computed (on a CONNUM specific basis) the percentage difference between the low quarterly average cost of manufacture and the high quarterly average cost of manufacture. (*Id.*) If the percentage difference exceeded 25 percent, Com-

merce deemed "the significant cost change threshold to be met." (*Id.*) In two of the cases cited by Commerce, the agency also introduced, under the linkage requirement, its "reasonable correlation" analysis. (*Id.* at 12 (*citing Sheet from Mexico*, and *Plate from Belgium*).) Thus, Commerce's methodology had now begun to rely on cost changes that were measured through differences between quarters and were linked to prices by way of a reasonable correlation.

Plaintiff characterizes Commerce's approach as one that has "abandoned the requirement that changes in costs be consistent over the POR and . . . eliminated the requirement of a direct link between costs and prices." (Pl.'s Brief at 18.) The Court disagrees. While it is true that the Department has shifted position as to the requisite relationship between production costs and sales prices, it has consistently rejected a direct traceability requirement since early 2008. (*See* Def.'s Confidential App. Tab F, *Nucor Corp. v. United States*, Final Results of Redetermination Pursuant to Court Remand, at 14 ("There is no requirement of direct traceability between specific sales and their specific production costs to prove linkage in the Department's practice."), *available at* http://ia.ita.doc.gov/remands/09–20.pdf (last visited May 3, 2010); Def.'s Confidential App. Tab G, *Habas Sinai v. United States*, Final Results of Redetermination Pursuant to Court Remand, at 13 (same), *available at* http://ia.ita.doc.gov/remands/0955.pdf (last visited May 3, 2010); *Plate from Belgium* Issues & Decision Memo at 18, *available at* http://ia.ita.doc.gov/frn/summary/belgium/E8–29410–1.pdf (last visited May 3, 2010) ("Our definition of linkage in the instant case does not require direct traceability between a specific sale and its specific production cost, but rather relies on whether there are elements which would indicate a reasonably positive correlation between the underlying costs and the final sales prices"); *Sheet from Mexico* Issues & Decision Memo at 21 (same), *available at* http://ia.ita.doc.gov/frn/summary/mexico/E9–2667–1.pdf (last visited May 3, 2010); Issues & Decision Memo at 13 ("As noted, our definition of linkage does not require direct traceability between specific sales and their specific production costs.").)

As Commerce noted in the Issues & Decision Memo, "the Department has approached its consideration of linkage between sales and costs in various ways and to varying levels of precision." (Issues & Decision Memo at 13.) The statute "does not dictate the method by which Commerce may calculate costs of production, nor . . . define the term 'period,'" and Commerce is afforded considerable discretion in formulating its practices in this regard. (Def.'s Brief at 9.) Commerce has not deviated from the application of its two-prong test for deciding whether to resort to shorter cost averaging periods. All it has

done, in this case, is exercise its discretionary authority to more clearly define the significance and linkage thresholds—factors for which the Department elicited suggestions in the *Request for Comment*.[15] (*See* 73 Fed. Reg. at 26,367.) Even had Commerce changed its methodology, the statute only requires the agency to provide the affected parties with notice and an opportunity to comment before the final determination is made. *See Shikoku Chem. Corp. v. United States*, 16 CIT 382, 388–89, 795 F. Supp. 417, 421–22 (1992) (finding that principles of fairness can prevent Commerce from changing its methodology without adequate notice). The Department was only obligated to notify Plaintiff prior to its final determination in this matter, and it did. *Koyo Seiko Co. v. United States*, 31 CIT 1512, 1520, 516 F. Supp. 2d 1323, 1334 (2007).

In sum, Plaintiff has failed to establish that Commerce's use of an alternative cost averaging period was unreasonable, or constituted an abrupt change in methodology. For the reasons stated above, the Court finds that Commerce's decision to depart from its general practice of using an annual cost averaging period, and to instead rely on quarterly costs, was supported by substantial evidence and otherwise in accordance with law.

2. *Commerce's Cost Recovery Methodology*

A. Statutory Scheme

As previously noted, below cost sales may be excluded from the calculation of normal value only if they "have been made within an extended period of time in substantial quantities," and "were not at prices which permit recovery of all costs within a reasonable period of time." 19 U.S.C. § 1677b(b)(1)(A), (B). In determining whether such sales are at prices which permit the recovery of costs, the statute further provides:

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[15] SeAH offers the *Request for Comment* as evidence of the agency's reliance on a linkage standard requiring direct traceability between costs and prices. This mistates both the object and effect of the *Request for Comment*. Nowhere does Commerce associate the direct linkage requirement with the necessity to establish a lock-step correlation between sales and prices. In fact, the Department consistently uses terms such as "accurately linked" and "closely linked" in the description of past analyses on this matter. More importantly, however, Plaintiff may not presume that the *Request for Comment* necessitates an application of the methodology or practice described therein. *Laizhou Auto Brake Equip. Co. v. United States*, 32 CIT ___, 2008 WL 2562915 at *8 (2008). A new methodology or practice is only made effective when finalized, and until then Commerce must be granted some discretion to assess the advantages and disadvantages of a proposed change. *See id.*

> If prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for the recovery of costs within a reasonable period of time.

19 U.S.C. § 1677b(b)(2)(D). It is normally the case that Commerce calculates a weighted average per unit cost on an annual basis in order to make this comparison. As long as the respondent's sales price is above that annual weighted average per unit cost, the costs are considered to be recovered, and thus, included in the calculation of normal value. In this way, the cost recovery test accounts for fluctuations in costs throughout the period of review (which covers one year).

In the underlying administrative review, however, Commerce determined that the calculation of an unadjusted annual weighted average per unit cost would not smooth out the fluctuations in costs, but would result in significant distortions in the cost recovery test. (Issues & Decision Memo at 19.) At issue is the indexing methodology Commerce employed in calculating the weighted average per unit cost of production for the period of review.

B. Parties' Arguments

SeAH alleges that Commerce ignored the requirements of section 1677b(b)(2)(D) when it "calculated a distinct CONNUM-specific COP for each quarter of the POR and then compared home market sales prices to the COP for the quarter in which the sale was made," after which Commerce excluded from the calculation of normal value those sales "whose prices were below that quarterly weighted average per-unit COP," regardless of whether such prices were above the weighted average per-unit cost for the period of review. (Pl's Brief at 30 n.12.) The failure to apply a weighted average per unit cost for the entire period of review resulted in the exclusion of "*all* sales that were found to be below cost based on a comparison of the selling price to the restated quarterly weighted-average per unit costs calculated by Commerce." (*Id.* at 30 (emphasis in original).) This, according to Plaintiff, is contrary to the clear and unambiguous statement by Congress that the cost recovery test must compare prices to a weighted average cost for the entire period of review. (*See id.* at 31.) As support for this position, Plaintiff cites to the relevant portions of the legislative history which Plaintiff claims confirm "Congress's

intent that the cost recovery test is to be based exclusively on POR weighted average costs."[16] (*Id.* at 30.)

Plaintiff further argues that, as correctly interpreted, the statute provides for only one cost recovery test "in all circumstances." (Pl.'s Brief at 31 (*citing Acciai Speciali Terni S.P.A. v. United States*, 25 CIT 245, 274, 142 F. Supp. 2d 969, 997 (2001).) In addition, SeAH points to earlier administrative proceedings in which Commerce "expressly and routinely recognized that the statute required Commerce to conduct the cost recovery test using POR (or POI) weighted average costs even when it had determined to otherwise calculate COP using quarterly (or even monthly) weighted-average costs." (Pl.'s Brief at 32 (*citing Dynamic Random Access Memory Semiconductors of One Megabit or Above from Taiwan*, 64 Fed. Reg. 28,983, 28,988 (May 28, 1999).) Therefore, because Commerce has failed to apply the cost recovery test in a manner consistent with the plain language of the statute, its quarterly cost determination is unsupported by substantial evidence and otherwise not in accordance with law. (Pl.'s Brief at 33.)

Essentially, Defendant does not disagree with Plaintiff's interpretation of the statute's requirements, but rather contests Plaintiff's characterization of its methodology as one that deviates from the statutory mandate. (Def.'s Brief at 35.) According to Commerce, because of the significant changes in SeAH's costs during the period of review, and its determination to use a quarterly cost averaging period, the Department concluded that "it must adjust its normal cost-recovery methodology to account [for] the distortive effect of significant cost changes." (*Id.* at 33.) Commerce insists, however, that this change in methodology did not alter the "weighted average per unit cost required by the statute." (*Id.*) The Department explains that if it were to use "an unadjusted weighted average per unit cost for the POR for purposes of the cost recovery test, sales prices which were determined to be below cost may be erroneously considered to have recovered costs based simply on the timing of the sale."[17] (Issues &

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[16] The Statement of Administrative Action, accompanying the statute, explains in part:

> In addition, new section 773(b)(2)(D) specifies when particular prices provide for cost recovery within a reasonable period of time. . . . Under the amended law, if prices which are below costs at the time of sale are above weighted-average costs for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.
>
> The determination of cost recovery is based on an analysis of actual weighted-average prices and costs during the period of investigation or review . . . .

Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4170.

[17] For illustrative purposes, Commerce provides a hypothetical scenario in which the first three quarters of the review period average $2 each in costs. The last quarter averages $42

Decision Memo at 19.) While Commerce concedes that, in most instances, application of an unadjusted weighted average is proper, Commerce determined that the volatility in SeAH's cost of manufacturing required a quarterly indexing of SeAH's costs in order to "neutralize" the distortive effects of these fluctuations. (Def.'s Brief at 33–34.) This, Commerce claims, was entirely consistent with the terms of the statute in that the Department continued to apply a period-wide weighted average per unit cost, although within that framework it incorporated a quarterly indexing methodology. (*Id.* at 35.)

As argued by Commerce, the statute does not limit the agency's calculations "to a simple weighted annual average that fails to take into consideration significant changes in the cost of production." (*Id.* at 37.) Rather, it provides for the "rehabilitation" of sales below cost if those sales prices are above a weighted average per unit cost of production for the period of review. (*Id.*) Commerce interprets section 1677b(b)(2)(D) as providing the Department with the authority to "consider relevant factors during the period of review that would result in the use of costs that 'reasonably reflect' SeAH's costs of production." (*Id.*)

C. Analysis

The nature of the parties' disagreement focuses not on divergent interpretations of the antidumping statute, but rather on whether or not Commerce's actions comport with the statute's substantive requirements. Both parties agree that section 1677b(b)(2)(D) requires that below cost prices, found to be above the weighted average costs for the period of review, are considered to provide for the recovery of costs within a reasonable period time. (*See* Pl.'s Brief at 29; Def.'s Brief at 35.) Thus, those sales are to be used in the calculation of normal value. However, whereas Commerce describes its practice of applying an indexed weighted average per unit cost of production for the period of review as being consonant with this provision, Plaintiff characterizes the quarterly indexing methodology as unlawful.

In order for the Court to make a determination on this issue, it must do so solely on the grounds invoked by the agency. "If those

in costs, bringing the annual average for each quarter to $12. Therefore, all costs in the last quarter exceeding $12 would be recovered as provided by 19 U.S.C. § 1677b(b)(2)(D). Because the average for the last quarter is $42, the annual average would not be an accurate representation of the respondent's actual cost of production. (Def.'s Brief at 33.) This example, while illustrative of a problem that could feasibly arise during a review, does not in any way reflect the scale of cost changes under consideration in this case. Commerce's hypothetical involves a grossly exaggerated cost increase of 2,100%; the cost increase at issue in the current review was in the range of 1/100th that amount.

grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Further, if "the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Id*. Thus, the Court cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 197.

Applying this rule and its corollary, the Court cannot sustain the Department's use of a quarterly-based indexing adjustment of SeAH's weighted average costs for the cost recovery test. The Court is unable to discern from the record here the precise manner in which Commerce "adjusted" its cost recovery methodology to comply with both the statute's requirement of weighted average costs for the period of review and Commerce's belief that such an analysis, left unadjusted, would distort the cost recovery test results. To be sure, both parties place great emphasis on the effect of Commerce's quarterly-based adjustment process, but neither provides an adequate explanation of its underpinnings. It is, however, up to Commerce to justify its determination with a reasoned explanation that is supported by substantial evidence on the record. While Commerce has asserted that its adjusted cost recovery methodology fully complies with the requirements of § 1677b(b)(2)(D), the Court must examine the basis upon which this conclusion was drawn. In other words, the Court must determine whether Commerce is correct in arguing that its quarterly indexing methodology conforms to the statute's requirement of a "weighted average per unit cost of production for the period of investigation or review." 19 U.S.C. § 1677b(b)(2)(D). As Commerce explains the methodology, the agency:

> first computed indices for each quarter of the period of review that reflected the relative cost of the hot-rolled coils for each grade that SeAH used to produce stainless steel pipe. These indices were ratios comparing the weighted-average cost of hot-rolled coils used in each quarter to a base quarter during the period of review.
>
> Using the calculated indices, Commerce then restated each reported quarter's CONNUM-specific average hot-rolled coil cost to a single quarter's "constant cost level." After this restatement of costs, Commerce extended the four quarters' restated costs by SeAH's respective quarterly production quantities and calculated a "restated annual average direct material cost," by weight-averaging the "constant cost levels" on an annual basis. Once again using the computed quarterly indices, Commerce

> then restated the calculated "constant cost level" annual weighted-average cost of hot-rolled coils back to each quarter's calculated "cost levels."

(Def.'s Brief at 34 (citations omitted).)

1. *Cost Recovery Analysis*

The core question as to cost recovery appears to be this: did Commerce's quarterly indexing adjustments produce a "weighted average per unit cost of production for the period of . . . review" as required by 19 U.S.C. § 1677b(b)(2)(D)? The Court finds itself unable to answer this core question on the record here. The problem is two-fold.

a. Inadequate Explanation of Cost Recovery Test

First, the Court finds Commerce's explanation of its methodology lacking. Although Commerce explained broadly that the methodology "addressed, and attempted to neutralize, the distortive affect [sic] of significantly changing hot-rolled coil costs," Commerce did not adequately explain why it implemented this methodology via the particular "multi-part analysis" employed here. (*See* Def.'s Brief at 33–34.) For example, using quarterly indices, Commerce restated each quarter's CONNUM-specific average materials costs into a "constant cost level," then weighted those restated figures by quarterly production quantities to produce a "restated annual average direct material cost," then restated those figures "back to each quarter's calculated 'cost levels.'" (*Id.* at 34.) Commerce has failed to describe *how* this specific, rather complex, mechanism of calculating the benchmark weighted average per unit cost of production "addressed" and served to "neutralize" the distortion caused by significant changes in hot-rolled coil costs. (*Id.* at 33–34.) Not only that, but Commerce has simply asserted, without adequate explanation, that the chosen methodology did not effectively substitute quarterly weighted averages for the period of review-wide weighted average required[18] by the statute. Without an explanation as to why and how this particular methodology reconciles Commerce's preferred quar-

[18] Because 19 U.S.C. § 1677b(b)(2)(D) states in mandatory language that prices below "the weighted average per unit cost of production for the period of . . . review . . . *shall be considered to provide for the recovery of costs within a reasonable period of time*" (emphasis added), the statute does not give Commerce discretion to compare prices to a weighted average per unit cost for a different time span. Indeed, what is clear from the statute's plain language is confirmed by the legislative history already discussed *supra*: Congress intended the cost recovery statute to limit Commerce's ability to exclude certain home market sales from normal value calculations. If the cost recovery statute engineers "absurd results" by mandating comparison of prices to a period of review-wide weighted average cost of production (Def.'s Brief at 37), the proper remedy would be amendment of the statute by Congress.

terly cost of production examination with the period of review-wide cost of production examination called for in 19 U.S.C. § 1677b(b)(2)(D), the Court cannot ensure that Commerce conducted the cost recovery test in accordance with law.

b. Inadequate Record of Calculations Used

Commerce's failure to adequately explain its methodology was compounded by the inclusion in the record of only a limited amount of the underlying data resulting from its calculations. For example, Commerce cites the Proposed Cost Adjustments Memo for support of its methodology. (*See* Def.'s Brief at 33–34.) While that document describes the functions used in Commerce's quarterly indexing methodology, it does not provide a complete record of the representative calculations. (*See* Proposed Cost Adjustments Mem. at 3–5 (describing the proposed methodology later employed by Commerce), Att. 3 (containing only samples of the results produced by the methodology); *compare* Final Cost Adjustments Mem. at 5–6 (methodology unchanged) and Atts. 1 & 2 (spreadsheets of results of methodology not provided).)

Insofar as the Department has acknowledged a deviation from its "standard cost-recovery test" (Def.'s Brief at 37), the sparse record here does not allow the Court to determine whether Commerce's application of the new cost recovery test in fact complied with the statute. While the data in the record *illustrates* Commerce's methodology, the record does not contain the data for each CONNUM that resulted from Commerce's calculations of a "quarterly indexed" "adjusted" weighted average cost of production for the period of review. (*See* Proposed Cost Adjustments Mem., Att. 3 (containing "sample" results of various steps of the methodology, but not complete data for the five CONNUMS used in the calculation of normal value).) Without disclosing the totality of the evidence upon which Commerce relied, no adequate explanation is presented. The Court declines to read into the record a justification which Commerce itself did not provide.

2. *Proper Explanation of the Cost Recovery Test*

It seems to the Court that Commerce, to adequately explain its cost recovery methodology, should provide clear descriptions and data that compare the results obtained using its standard cost-recovery test to the results obtained via the adjusted quarterly indexed methodology used in the *Final Results*.

The Court's need to compare the results of the two methods comes from the cost recovery statute. The statute limits the Department's

discretion in disregarding belowcost-of-production sales by mandating that, for sales made at a price "above the weighted average per unit cost of production for the period of . . . review, such prices *shall be* considered to provide for recovery of costs within a reasonable period of time." 19 U.S.C. § 1677b(b)(2)(D) (emphasis added). Such sales, consequently, cannot meet the statutory criteria for exclusion from NV calculations. 19 U.S.C. § 1677b(b)(1) (stating that Commerce may disregard sales made at less than cost of production if the sales "were not at prices which permit recovery of all costs within a reasonable period of time"). The disregarded sales statute, on the other hand, is worded permissively: it states that, for sales meeting its criteria, "such sales *may be* disregarded in the determination of normal value." *Id.* (emphasis added). This is consistent with the cost recovery statute, which only limits Commerce's discretion to disregard sales priced above the statutory price floor, but leaves Commerce with the discretion to determine whether a sale priced below the floor might provide for recovery of costs within a reasonable time. § 1677b(b)(2)(D).

The cost recovery statute, then, creates a price floor, above which home market sales "shall be" recovered and considered in establishing normal value. § 1677b(b)(2)(D). Because § 1677b(b)(2)(D) is nondiscretionary, that price floor must be calculated in a manner that is consistent with the statutory language. The specified manner is by calculating the "weighted average per unit cost of production for the period of . . . review[.]" *Id*. The Court must invalidate as contrary to law any cost recovery test that excludes home market sales prices that are above that price floor. *Id.*

In essence, Plaintiff argues that the Department's quarterly indexing methodology has erected an artificial floor—a raised stage—above the statutory price floor, and excluded sales that are above the floor but underneath the stage established by the methodology. The argument is compelling, because it is difficult to *see* how Commerce's quarterly indexing would be useful except as a means to exclude certain sales despite the fact that they are priced above the statutory floor of the ordinary weighted average per unit cost of production. Indeed, Defendant comes close to saying as much, stating that "comparing prices that failed the below-cost test on a quarterly basis, with an unadjusted weighted average per-unit cost for the period of review, might result in below-cost prices erroneously considered to have recovered costs based simply on the timing of the sale. This is because comparing costs on a quarterly basis, and then comparing them a second time on an annual basis would produce anomalous results." (Def.'s Brief at 33 (internal quotes and citations omitted).)

The cost recovery statute explicitly constrains where the price floor for cost recovery may be set. Commerce apparently faced the dilemma of reconciling what the cost recovery statute *actually* requires with what Commerce *wishes* the statute required. To resolve this dilemma, it appears that Commerce's quarterly indexing methodology built a stage above the statutory cost recovery price floor. Commerce then apparently excluded any home market sales that fell below the artificial floor set by Commerce's methodology even if those sales were priced above the statutory price floor (and thus recoverable pursuant to the statute).

The Court cannot, however, conduct its review solely upon appearances. In order to evaluate whether Commerce's quarterly indexing methodology was in accordance with law, the Court requires Commerce to identify all of those sales that would be recoverable using the ordinary weighted average per unit cost of production for the period of review, but were excluded under the quarterly indexed version of the cost recovery test. Only then can the Court determine whether Commerce's methodology is consistent with 19 U.S.C. § 1677b(b)(2)(D).

3. *Remand*

Based on the concerns described above, the Court remands the cost-recovery component of the administrative review to Commerce for the following action. First, on remand Commerce shall calculate the normal value of Plaintiff's home market sales using both the quarterly-indexed cost recovery test employed in the *Final Results* and using the ordinary weighted average per unit cost of production for the period of review. Second, Commerce shall include in the record the specific figures used in and resulting from these calculations. Third, in its remand redetermination, Commerce shall identify all those sales that are recoverable using the ordinary weighted average per unit cost of production for the period of review, but subject to exclusion under the quarterly indexed version of the cost recovery test. Fourth, Commerce shall explain which of the two methodologies it adopts to conduct the cost recovery test, stating in clear terms why the particular steps of that methodology are appropriate in the context of the requirements of 19 U.S.C. § 1677b(b)(2)(D).

3. *Commerce's Decision to Compare U.S. and Home Market Prices on a Quarterly Basis and Eliminate the "90/60" Day Window Period*

A. Statutory Scheme

As discussed above, Commerce is obligated under the antidumping statute to determine the amount by which the normal value of the subject merchandise exceeds the export price or constructed export price. 19 U.S.C. § 1677(35). In most instances, the actual determination of an antidumping duty involves a comparison of the prices of the subject merchandise in the relevant home market of the foreign producer to those in the United States.[19] [20] While the basic price comparison may seem to be a simple mathematical exercise, the substantial body of law and practice which has developed in this regard demonstrates otherwise. In fact, the comparison of home market prices to U.S. prices involves a detailed and sometimes complex methodology designed to ensure that certain economic and business realities are considered. *See Smith-Corona v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983) ("[Normal value] and United States price represent prices in different markets affected by a variety of differences in the chain of commerce").

To ensure that these economic realities are properly considered, Commerce has promulgated regulations to guide its analysis. Specifically, 19 C.F.R. § 351.414(c)(2) identifies the Department's preference for use of the average-to-transaction method in making comparisons of export price with normal value in an administrative review. The application of this method is described under 19 C.F.R. § 351.414(e),[21] and is more commonly referred to as the "90/60" day rule. Under this

[19] Commerce relies on home market sales only if they are deemed to be in sufficient quantity to provide an adequate basis for establishing normal value. 19 U.S.C. § 1677b(a)(1)(C). Further, the Department may determine that home market sales are inappropriate if the particular market situation does not permit a proper calculation or the goods are not sold for consumption in the home market. *Id.*

[20] The Department first attempts to match U.S. sales of the subject merchandise with sales of identical merchandise in the home market. 19 U.S.C. § 1677(16)(A). In the absence of identical merchandise, Commerce attempts to match a U.S. sale of the product with a sale of similar merchandise in the home market. § 1677(16)(B)-(C). The means by which Commerce identifies similar merchandise is the model-match methodology.

[21] 19 C.F.R. § 351.414(e) reads as follows:

> (1) In general. In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.
>
> (2) Contemporaneous month. Normally, the Secretary will select as the contemporaneous month the first of the following which applies:
>
> > (i) The month during which the particular U.S. sale under consideration was made;
> > (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product.
> > (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

rule, Commerce will first attempt to compare U.S. sales of subject merchandise with weighted average home market sales within the same thirty day period. Where no sales of the like product are made in the exporting country in the month of the U.S. sale, Commerce will attempt to find a weighted average monthly price one month prior, then two months prior, and then three months prior to the month of the U.S. sale. (*See* Issues & Decision Memo at 16.) If unsuccessful, the Department looks one month after, and, finally, two months after the month of the U.S. sale.[22] (*See id.*)

At issue in the present case is the Department's decision to depart from the contemporaneity guideline in its margin analysis, and instead to match sales only within the same quarterly cost averaging period used in the cost test. Under Commerce's new approach, U.S. sales could only be compared to home market sales in the same quarter—as identified by Commerce—effectively limiting the potential matching period from six months to three.

B. Parties' Arguments

Plaintiff challenges the Department's elimination of the 90/60 day window period, asserting that Commerce's alternate approach created clear distortions in respondent's dumping margin. (Pl.'s Brief at 34–35.) As Plaintiff explains it, "[m]any U.S. sales were matched to less similar home market products—despite the fact that there were available above-cost sales of the identical or more similar products . . . in the normal 90/60-day window period." (*Id.* at 35.) SeAH attributes this to the fact that U.S. sales made in the first month of the four quarters defined by Commerce could only be compared to home market sales in the same month and the two following months even though the regulation assigns a higher preference to the two months prior to the month of the U.S. sale. (*Id.* at 34.) Thus, according to Plaintiff, this new methodology artificially inflated the company's dumping margin "for reasons having nothing to do with a more accurate matching of costs and prices." (*Id.* at 35 (internal quotation omitted).)

SeAH further alleges that Commerce's use of a quarterly time frame for the price-to-price comparisons is an unlawful deviation from the "contemporaneous month" requirement of 19 C.F.R. § 351.414(e)(2). (*Id.* at 38–39.) Recognizing that the regulation is qualified by the word "normally," Plaintiff argues that any notional authority this language may confer upon Commerce to depart from the definition of contemporaneous month is rendered nugatory by the

[22] If there are no home market sales transpiring within this framework, the constructed value of the subject merchandise becomes normal value. 19 U.S.C. § 1677b(a)(4).

methodology actually employed. (*Id.* at 40.) SeAH maintains that the record fails to support Commerce's decision to depart from the 90/60 day rule, specifically the agency's determination that a significant increase in costs made use of the 90/60 day matching period unsustainable. Plaintiff challenges the evidence on which Commerce relied in making this inference.[23] (*Id.* at 41–42.) At the core of Plaintiff's argument is the criteria Commerce used in its determination that costs had increased considerably. Because a cost increase of 25% between any two quarters is the threshold required for a departure from the use of annual averages in cost averaging, SeAH argues that price increases in the range reflected by the record "are *per se* insignificant and thus fail to support a departure from the 90/60-day rule." (*Id.* at 42.) SeAH avers that the Department failed to adequately explain, or support with record evidence, what numerical threshold it used in reaching the conclusion that costs had increased significantly. (*Id.*) Without such a baseline, Commerce's decision to deviate from the 90/60 day contemporaneity period is unsupported by substantial evidence.

In addition, Plaintiff attacks the cost data on which Commerce based its analysis. (*Id.* at 43.) Because SeAH was never asked to report its costs for the pre-period of review quarter, Commerce relied on surrogate production costs taken from an affiliate of SeAH.[24] However, other evidence on the record, asserts Plaintiff, indicated that SeAH's cost of manufacturing was not increasing. For instance, the surrogate's data included not just production costs but the prices at which the surrogate sold hot coil steel to SeAH. Inasmuch as this data demonstrates that the prices SeAH paid to its affiliate for hot coil steel remained the same from the pre-period of review quarter to the first quarter period of review, Plaintiff claims there was no need to consider the surrogate's costs because the surrogate's "selling prices to SeAH *are* SeAH's costs." (*Id.* at 44 (emphasis in original).) Thus, Commerce was in error to conclude that Plaintiff's costs were increasing at the start of the period of review. As a result, the premise on which Commerce based its decision to depart from the 90/60 day period was flawed. (*Id.* at 45.)

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[23] Commerce compared the average quarterly net prices of five selected CONNUMs in the first quarter of the period of review to the net prices of the quarter immediately preceding the period of review. (Final Cost Adjustments Mem. at 4.) As a result of this analysis, Commerce decided that it would conduct price-to-price comparisons within a quarterly time frame in order to "lessen the distortive effects of changes in sales prices which result from significantly changing costs." (*Id.*)

[24] SeAH purchased a majority of its input steel coils from the affiliate chosen as the surrogate, and those coils represented the vast majority of the overall cost of manufacturing WSSP. (Final Cost Adjustments Mem. at 4.)

Finally, Plaintiff challenges the Department's product matching methodology itself, averring that the process created massive distortions in the dumping margin calculation. (*See id.*) SeAH points to the fact that Commerce's use of quarterly costs resulted in lower costs in the first quarter of the period of review as compared to the annual average costs calculated by Commerce in the *Preliminary Results*. (*See* Case Brief at 26.) Although the lower costs resulted in a higher percentage of home market sales passing the cost test,[25] SeAH's dumping margin increased by almost 5 percent. (*Id.*) This, says Plaintiff, is a consequence of the Department's revised product matching methodology, which prevents sales made in the first quarter from being matched to home market sales in the pre-period of review window period. (Pl.'s Brief at 46.) SeAH claims that this forced "certain high-volume U.S. products to be matched to less similar home market products," even though more similar sales matches existed within the normal 90/60 day window period. (*Id.* at 6, 46.)

Defendant's counter-argument is, for the most part, based upon its interpretation of 19 C.F.R. § 351.414. Specifically, Commerce points to the regulation's inclusion of the terms "in general" and "normally." (Def.'s Brief at 21–22.) According to Commerce, the regulation only provides what the agency must do under "normal" circumstances, yet affords Commerce the discretion to decide "when the 'normal' situation 'is inapplicable.'" (*Id.* at 24 (*quoting KYD, Inc. v. United States*, 33 CIT ___, 613 F. Supp. 2d 1371, 1382 (2009)).) In other words, 19 C.F.R. § 351.414(e) qualifies its instructions for application of the average-to-transaction methodology. Therefore, Commerce argues, the Department is free to depart from the 90/60 day contemporaneity guideline in certain anomalous situations. (*Id.* at 23–24.) Recently, Commerce has eliminated the 90/60 day window period "where costs and prices [have] changed significantly due to high inflation." (*Id.* at 22–23 (*citing Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 61 Fed. Reg. 69,067 (Dec. 31, 1996) and *Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Admnistrative Review*, 62 Fed. Reg. 42,946 (Aug. 7, 1997)).) Here, Commerce concluded that use of the six month contemporaneity window would render distorted margin calculations because of the significant change in SeAH's costs and home market prices over the

[25] The percentage of home market sales passing the cost test in the first quarter increased nearly six-fold. (Case Brief at 26.)

period of review.[26] (*Id.* at 23.) The Department reasoned that comparing lower priced home market sales from the pre-period of review window with first quarter U.S. sales, when the unadjusted home market price does not reflect the contemporaneous price increases that have occurred through the date of the U.S. sale, would result in a distorted analysis. (Issues & Decision Memo at 16.) In this way, Commerce analogized its prior rationale for departing from the normal 90/60 day window period (i.e., cases involving hyper-inflationary economies) with those conditions present here. Thus, Commerce found that "price-to-price comparisons should be made over a shorter period of time to lessen the distortive effects of changes in sales price which result from significantly increasing costs." (*Id.*)

Consistent with its shortened cost averaging period, Commerce limited the extension of price comparisons to only the three months of a given quarter, effectively reducing the normal contemporaneity window by half. (Def.'s Brief at 24.) The Department maintains that "if six months is considered contemporaneous, then a shorter window period of three months must also be contemporaneous." (*Id.*) Curiously, however, the Department does not contradict Plaintiff's depiction of the magnitude of price changes as "*per se* insignificant" (Pl.'s Brief at 42), but rather characterizes its analysis of the data as one that merely demonstrates "a consistent increase in home market prices for all of the models reviewed," (Def.'s Brief at 26). Moreover, Commerce explains, it "did not rely on these numbers for its determination that it was necessary to use an alternative window period." (*Id.*) Instead, the Department "relied on the fact that there was a significant change in costs of production over the period of review." (*Id.*) Consequently, the affiliated coil supplier's cost data, which SeAH challenges, simply operated to establish "that there were links between changes in SeAH's costs and home market prices during the period of review." (*Id.* at 26.) Therefore, given the significant variance in costs and prices during the period of review, Commerce decided that the six month period of contemporaneity was not reasonably contemporaneous with sales in the U.S. Commerce further dismisses Plaintiff's challenge to the Department's use of the affiliated suppli-

[26] As evidence of the significant increase in costs and prices, Commerce points to the cost of manufacturing data it examined from SeAH's affiliated input supplier. (*See* Def.'s Brief at 25.) According to Commerce, this data shows a trend between the increases in the cost of manufacturing and prices from the pre-period of review quarter to the first quarter of the period of review. (*See* Final Cost Adjustment Mem. at 4.) Because SeAH's costs and prices were lower during the pre-Period of review window period, says Defendant, comparing U.S. prices during a higher cost period (first quarter period of review) to home market prices during a lower cost period (pre-period of review quarter) would result "in the appearance of less dumping simply due to the timing of the US versus the home market sales." (*Id.*)

er's cost of production data, arguing that "affiliated transactions are, at minimum, suspect and quite frequently are disregarded altogether pursuant to 19 U.S.C. § 1677b(f)(2)." (*Id.* at 25 n.5.) Thus, the Department depicts its use of the affiliated supplier's costs as "reasonable." (*Id.*)

With regard to Plaintiff's assertion that Commerce failed to explain what threshold or benchmark it used in deciding that costs were significant enough to require a departure from the contemporaneity window, Commerce cites to the lack of any legal authority for such a requirement. (*Id.* at 27.) According to Commerce, "[a]bsent any such restriction in the regulation, it is reasonable to assume that Commerce may exercise its own discretion on a case-by-case basis to determine if the facts in a given case warrant a finding that an alternative price-to-price comparison must be applied." (*Id.*)

Responding to Plaintiff's allegation that the product matching methodology Commerce employed forced certain high volume U.S. products to be matched to less similar products, the Department cites to the lack of any evidence on the record to support this claim. (*Id.* at 29.) Commerce admits that reducing price-to-price comparisons to only three months of home market sales instead of six results in an increase in the number of similar matches relative to the number of identical matches. (*Id.*) This, says Commerce, is not the result of a deviation in the agency's preference for identical matches within the relevant period, but is a reflection of the progressive change in SeAH's costs and prices over the period of review. (*Id.* at 30.)

C. Analysis

Preliminarily, because Congress has not precisely defined the methodology by which Commerce must identify the "foreign like product," it has implicitly delegated that authority to Commerce. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001). Therefore, Commerce has considerable discretion in constructing the methodology for identifying "foreign like product." *See SKF USA*, 537 F.3d at 1379; *SKF USA Inc. v. United States*, 263 F.3d 1369, 1381 (Fed. Cir. 2001); *see also* 19 U.S.C. § 1677(16). It does so by devising a hierarchy of commercially significant characteristics suitable to each class or kind of merchandise, and then utilizes these characteristics to compare U.S. sales to sales in the home market of the respondent. Although there is a statutory preference for comparison of identical or more similar goods, "the statute does not require Commerce to use a methodology that identifies the greatest number of matches of similar merchandise." *SKF USA Inc. v. United States*, 19 CIT 168, 171, 876 F. Supp. 275, 279 (1995).

Plaintiff does not dispute that Commerce, in the underlying administrative review, maintained its preference for identical matches in the relevant period. What SeAH does contest is the Department's use of a shortened window period for price-to-price comparisons which prevented sales in the first quarter of the period of review from being compared to home market sales in the pre-period of review quarter. Plaintiff alleges that this limited window period resulted in U.S. sales being matched to less similar products in respondent's home market.

The Court finds Plaintiff's argument unavailing for two reasons. First, the evidence on which Plaintiff relies is at odds with the conclusion it draws. SeAH references the data illustrating the match results from both the *Preliminary Results* and the amended *Preliminary Results*. (*See* Case Brief at 26.) Far from demonstrating a departure from the statutory preference for identical matches, the data reveals that identical matches actually greatly increased when the *Preliminary Results* were amended in part through use of a quarterly contemporaneity window.[27] (*Id.*) Hence, Plaintiff's argument that many U.S. sales were matched to less identical home market sales falls short. The Court does not doubt that Commerce's application of a smaller window period contributed to an increase in Plaintiff's antidumping duty margin; however, the modification to Commerce's price-to-price comparison methodology was prompted by the progressive changes in SeAH's costs and home market prices over the entire period of review. In an attempt to adhere to its statutory mandate of calculating dumping margins as accurately as possible, Commerce simply applied a methodology designed to account for these changes in costs and prices. In this way, Commerce was considering the factors necessary "to prevent dumping margins from being based on sales which are not representative of the home market." *Cemex, S.A. v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998) (internal quotation omitted).

Second, while the shortened contemporaneity window did not provide for every identical match that could have been made, Plaintiff has failed to identify a single instance of an unreasonable match resulting from the new methodology.[28] Thus, all Commerce did was maintain fidelity to the statute's preference for identical matches

[27] Identical matches increased significantly between the *Preliminary Results* and the amended *Preliminary Results*, and similar matches fell slightly. (*See* Case Brief at 26.)

[28] SeAH points to the matching of one particular CONNUM, sold in December 2006 and January 2007, with a different CONNUM sold in February 2007 as evidence of a less similar match under the reduced contemporaneity window. (Case Brief at 27–28.) SeAH points to a third CONNUM as a more suitable match and notes that this third CONNUM would have been matched under the traditional 90/60 day matching period. (*Id.*) However, SeAH fails to adequately explain why this is so, given the fact that the CONNUMs matched by Commerce are identical in four out of five product characteristics, as opposed to three out

within the framework of a reasonable methodology for price-to-price comparisons of U.S. and home market sales.

Plaintiff's argument that Commerce unlawfully deviated from the regulation's contemporaneous month requirement is similarly flawed. While noting the implications of the language in 19 C.F.R. § 351.414.(e), Plaintiff marginalizes its effect. Under the plain meaning of the regulation, Commerce is not precluded from choosing as the contemporaneous month a sampled month within the time span contemplated by section 351.414(e)(2). The regulation "allows for an atypical circumstance under which it may be reasonable or appropriate to depart from the *normal* procedure." *JTEKT Corp. v. United States*, 33 CIT ___, 675 F. Supp. 2d 1206, 1226 (2009) (emphasis added). It is well established that "[a]n administrative agency endowed with the authority to promulgate regulations is given broad discretion in the exercise of its expertise to interpret and implement those regulations." *Seattle Marine Fishing Supply Co. v. United States*, 12 CIT 60, 76, 679 F. Supp. 1119, 1131 (1988) (*quoting Hercules Inc. v. United States*, 11 CIT 710, 752, 673 F. Supp. 454, 488 (1987)). Inherent in this authority is the ability to determine whether or not the "normal" situation applies in any given circumstance.[29]

As for Plaintiff's assertion that the magnitude of changes in costs and prices from the pre-period of review quarter to the first quarter of the period of review fails to support a departure from the 90/60 day rule, the Court finds that this line of reasoning misses the point. Commerce's deviation from both the use of annual average costs and the 90/60 day window period was predicated on the significant change in SeAH's cost of manufacturing during the *entire* period of review. As Commerce explained:

> [W]e have determined that the changes in SeAH's COM throughout the POR due to fluctuating raw material input prices are significant enough to depart from our normal annual average costing methodology. . . . When significant cost changes have occurred during the POR, these same conditions are accompanied by changes in prices as the market reacts to changing economic conditions. In this situation, we find that price-to-price comparisons should be made over a shorter period of time to lessen the distortive effects of changes in sales price which result from significantly increasing costs.

of five for the alternative proposed by SeAH. (*See* Dep't of Commerce's Initial Antidumping Duty Questionnaire at 29–32, PR 8.)

[29] This same logic is applicable to Plaintiff's "benchmark" argument. (Pl.'s Brief at 44.) In the absence of any statutory or regulatory guidance, Commerce is free to determine on its own the degree to which changes in home market prices warrant the use of a shorter pricing window.

(Issues & Decision Memo at 16.) The Department went on to cite, as an example of the potential for a distorted outcome, the considerable increase in the cost of input coils from the pre-period of review quarter to the first quarter period of review. (*Id.*) From this, the Department concluded that "comparing lower priced home market sales from the pre-POR window period with U.S. sales during the first quarter of the POR, . . . results in a distorted analysis." (*Id.*) Therefore, Commerce did not rely on the significance of cost and price increases in the pre-period of review quarter to first quarter period of review analysis, but rather sought to demonstrate the negative effects of a strict adherence to § 351.414(e)(2). The identification of cost and price increases across the entire period of review explains why the Department decided not to limit application of the shortened window period to just the first quarter. Limiting the shortened contemporaneity period to only one quarter would have defeated the remedial purpose for which it was designed—avoiding distortions in the price-to-price comparisons.

In sum, the Court is unable to conclude that Commerce's deviation from the normal 90/60 day window is unreasonable, without sufficient evidence and adequate explanation to the contrary. Thus, the Court finds the Department's use of a shortened contemporaneity period to be supported by substantial evidence and otherwise in accordance with law.

4. *Commerce's Application of the Major Input and Transactions Disregarded Rule*

A. Statutory Scheme

In the calculation of a foreign respondent's cost of production, special rules exist which, in a transaction between affiliated parties as defined by 19 U.S.C. § 1677(33), permit Commerce to disregard either the transaction or the value of a major input in the production of subject merchandise. 19 U.S.C. §§ 1677b(f)(2)-(3). Section 1677b(f)(2) provides that Commerce may disregard an affiliated party transaction when "the amount representing [the transaction or transfer price] does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration," i.e., an arm's length or market price. 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," i.e. an arm's length or market value. 19 U.S.C. § 1677b(f)(2).

The "major input rule" directs that if (1) a transaction between affiliated companies involves the production by one such company of a "major input" to the merchandise produced by the other, and (2) Commerce has "reasonable grounds to believe or suspect" that the amount reported as the value of such input is below the cost of production, then Commerce may calculate "the value of the major input on the basis of the information available regarding such cost of production," if such cost exceeds the market value of the input as determined under § 1677b(f)(2). 19 U.S.C. § 1677b(f)(3). One of the mechanisms by which Commerce has chosen to administer §§ 1677b(f)(2)-(3) is 19 C.F.R. § 351.407(b), which provides that Commerce will value a major input supplied by an affiliated party based on the highest of (1) the actual transfer price for the input; (2) the market value of the input; or (3) the cost of production of the input.

B. Parties' Arguments

During the period of review, SeAH purchased hot-rolled coil steel, a major input in the production of subject merchandise, from a company that Commerce determined was an affiliate of SeAH.[30] (Issues & Decision Memo at 21.) Three different grades of hot coil steel were supplied by SeAH's affiliated supplier and reported on the basis of both grade and specification. (Def.'s Brief at 38–39; Pl.'s Brief at 47.) The prices of these different grades varied depending upon their specification, i.e., ASTM or KS/JIS. (Pl.'s Brief at 47; SeAH Steel Corporation's Response to Commerce's Supplemental Section D Questionnaire at 3–4, Exhibit D-22, PR 24, CR 7.) According to Plaintiff, Commerce failed to take into consideration "the importance of specification in its major input rule analysis and simply combined ASTM and KS/JIS specifications into one grade-specific weighted average value." (Pl.'s Brief at 47.) Furthermore, the stated reasons provided by Commerce for not including specification in its major input analysis are gainsaid by the record evidence. SeAH claims that, contrary to the Department's assertion otherwise, there is ample record evidence demonstrating that the hot coil inputs were reported on both a grade and specification basis. (Pl.'s Brief at 47–49.) Plaintiff points to pricing data supplied by both SeAH and its affiliated supplier which

[30] The affiliate supplied the vast majority of the grades of hot coil steel to SeAH. (*See* SeAH Steel Corporation's Response to Commerce's Supplemental Section D Questionnaire at 3–4, Exhibit D-22, PR 24, CR 7.)

confirm that "for [the relevant] grades . . . the price SeAH paid for KS/JIS specification was higher than what it paid for ASTM specification." (*Id.* at 49.) SeAH claims that, because Commerce did not account for the differences in cost related to the various specifications of WSSP, its "major input" and "transactions disregarded" analysis were unsupported by substantial evidence. (*Id.* at 48.)

Commerce concedes many of the points made by Plaintiff. Specifically, the Department recognizes that it "made little inquiry into the details pertaining to the 'specification' classification," and contrary to what Commerce stated in the *Final Results*, it now recognizes that SeAH's affiliated producer "did report its costs of production on an aggregate level by grade" and "'specification' basis." (Def.'s Brief at 38–39.) For these reasons, Commerce, without confessing error, requests that the Court order a partial voluntary remand to allow the agency to "collect and analyze additional information with respect to SeAH's and [its affiliated producer's] reported 'specification' data and redetermine whether it should use that data in its calculations." (*Id.*)

Bristol Metals, on the other hand, argues that the Department properly declined to consider the specification of the hot coil used by SeAH in its major input and transactions disregarded analysis. (Def.-Int.'s Brief at 33.) Defendant-Intervenor claims that because neither SeAH nor its affiliated supplier separated the costs of steel purchased by specification, and thus aggregated the two standards into a single average cost, Commerce is unable to derive specification-specific costs under its major input analysis. (*Id.*) Therefore, Bristol Metals alleges, Plaintiff's assertion that Commerce failed to consider the specification to which its affiliate sold hot coil steel to SeAH in its major input analysis is incorrect. (*Id.*)

C. Analysis

The Court considers Defendant's request for a voluntary remand under the framework established by the Federal Circuit in *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001). In *SKF*, the Court addressed the various types of voluntary remand situations that may arise. *Id.* at 1027–30. One such situation occurs when there are no intervening events, i.e., a new legal decision or the passage of new legislation, but when the agency nonetheless requests "a remand (without confessing error) in order to reconsider its previous position." *Id.* at 1029. The Court explained that, under these circumstances, a reviewing court has discretion over whether to grant a voluntary remand and that remand is generally appropriate "if the agency's concern is substantial and legitimate" but may be refused "if the agency's request is frivolous or in bad faith." *Id.*

Presently, the Court can identify no evidence of bad faith or frivolity on the record, and observes that Plaintiff has voiced no opposition to Defendant's request for voluntary remand. Although Defendant-Intervenor urges the Court to affirm Commerce's decision to disregard the importance of specification in its major input analysis, the Court cannot overlook the fact that Commerce itself has called into question an aspect of the *Final Results*. The Department recognizes that because it "did not request detailed information regarding SeAH's reported specification classifications," the "record is currently inadequate to allow Commerce to apply its expertise." (Def.'s Brief at 39.) Under these circumstances, the Court grants Defendant's request for a voluntary remand on this issue.

Conclusion

For the reasons stated above, the Court AFFIRMS *Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 31,242 (June 30, 2009) with respect to (1) the Department's use of a quarterly cost averaging period in its calculation of the costs of production and (2) the Department's decision to compare SeAH's home market sales and U.S. sales on a quarterly basis, rather than use its standard 90/60 day contemporaneity period.

The Court REMANDS the cost recovery component of the administrative review to Commerce for the following action. First, on remand Commerce shall calculate the normal value of Plaintiff's home market sales using both the quarterly-indexed cost recovery test employed in the *Final Results* and using the ordinary weighted average per unit cost of production for the period of review. Second, Commerce shall include in the record the specific figures used in and resulting from these calculations. Third, in its remand redetermination, Commerce shall identify all those sales that are recoverable using the ordinary weighted average per unit cost of production for the period of review, but subject to exclusion under the quarterly indexed version of the cost recovery test. Fourth, Commerce shall explain which of the two methodologies it adopts to conduct the cost recovery test, stating in clear terms why the particular steps of that methodology are appropriate in the context of the requirements of 19 U.S.C. § 1677b(b)(2)(D).

The Court also REMANDS the major input component of the administrative review pursuant to Commerce's request for a voluntary remand on that issue.

The Court ORDERS that Commerce file with the Court a remand redetermination that is consistent with this opinion by July 19, 2010.

Plaintiff shall file any comments on the remand redetermination by August 9, 2010. Defendant and Defendant-Intervenor may file responses to Plaintiff's comments by August 30, 2010. Plaintiff's comments, and the responses of Defendant and Defendant-Intervenor, shall be limited to 15 pages in length.

Dated: May 19, 2010
New York, NY

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GREGORY W. CARMAN, JUDGE