U.S. Customs and Border Protection

Slip Op. 11–81

AWP INDUSTRIES, INC., ITC MANUFACTURING, INC., J&L WIRE CLOTH, INC., NASHVILLE WIRE PRODUCTS MFG. CO., INC., WIREWAY HUSKY CORPORATION, Plaintiffs, v. UNITED STATES, Defendants, – and – DALIAN EASTFOUND METAL PRODUCTS CO., LTD., DALIAN EASTFOUND MATERIAL HANDLING PRODUCTS CO., LTD., WORLDWIDE MATERIAL HANDLING PRODUCTS, LLC, Defendant-Intervenors.

Before: Pogue, Chief Judge
Court No. 10–00250
Public Version

[Plaintiffs' motion for judgment on the agency record is DENIED; judgment entered for Defendant.]

Dated: July 12, 2011

Kelley Drye & Warren LLP (*Kathleen W. Cannon* and *R. Alan* Luberda) for Plaintiffs.

James M. Lyons, General Counsel, U.S. International Trade Commission; Andrea C. Casson, Assistant General Counsel for Litigation; (*Charles A. St. Charles*), Office of the General Counsel, for Defendant.

DeKieffer & Horgan (*Gregory S. Menegaz* and *Marc E. Montalbine*) for Defendant-Intervenors.

OPINION

Pogue, Chief Judge

INTRODUCTION

In this action, Plaintiffs seek review of the International Trade Commission's ("the Commission") finding of no material injury, or threat thereof, to the domestic industry, as a result of imports of wire decking from China. Plaintiffs challenge, as unsupported by substantial evidence in the record, the following five factual determinations (the "subsidiary findings") relevant to the Commission's ultimate negative determination: 1) the Commission's choice of questionnaire response data to determine subject import market share; 2) the Commission's determination that subject imports were not suppressing domestic prices to a significant degree; 3) the Commission's conclusion that the domestic industry's declining performance was largely due to a decline in demand for wire decking; 4) the Commission's

reliance on Chinese producer questionnaire responses in its determination regarding Chinese capacity; and 5) the Commission's determination that the largest importer of wire decking had ceased operations.

As explained below, the court concludes that the Commission's five subsidiary findings do not reflect an unreasonable reading or analysis of the record evidence regarding the economic conditions affecting the domestic industry during the Commission's 2006–2009 period of review. Accordingly, the Commission's decision is affirmed.

JURISDICTION

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c).[1]

BACKGROUND

The economic conditions affecting the domestic industry are, of course, the critical focus for a Commission's determination of whether a U.S. industry is being materially injured, or threatened with material injury, by reason of subject imports. *See* 19 U.S.C. § 1671d(b).[2] Specifically, in making its final determination, the Commission is required to consider the volume of subject imports, their effect on prices in the United States for the domestic like product, and the impact on domestic producers within the context of U.S. production, *see* 19 U.S.C. § 1677(7)(B). Additionally, in examining the impact of subject imports, the Commission "evaluate[s] all relevant economic factors which have a bearing on the state of the industry in the United States[.]" 19 U.S.C. § 1677(7)(C)(iii).[3]

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[1] 28 U.S.C. § 1581(c)(2006) grants this court "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930[,]" including the review of a negative injury determination made by the Commission. *See* 19 U.S.C. § 1516a(a)(2)(A)(ii)(I), (a)(2)(B)(ii). All further citations to the Tariff Act of 1930 are to Title 19 of the United States Code,2006 edition.

[2] Under the "by reason of" standard of causation, subject imports must have more than an "incidental, tangential or trivial" effect on the industry. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003); *see also Gerald Metals, Inc. v. United States*, 132 F.3d 716, 721–22 (Fed. Cir. 1997); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 873 (Fed. Cir. 2008).

[3] In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to-

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

The Commission's review of the economic conditions affecting the domestic industry covers the three-year period prior to the request or petition for an investigation ("POI").[4] The investigation at issue here was initiated on June 5, 2009, when AWP Industries, Inc. ("AWP"), ITC Manufacturing, Inc. ("ITC"), J&L Wire Cloth, Inc. ("J&L"), Nashville Wire Products Mfg. Co., Inc. ("Nashville Wire") and Wireway Husky Corp. ("Wireway"), (collectively the "Domestic Industry," "Petitioners," or "Plaintiffs"), filed petitions with both the U.S. Department of Commerce ("Commerce") and the Commission, alleging that the U.S. wire decking[5] industry was being materially injured or was threatened with material injury by reason of Chinese imports. The Domestic Industry also alleged that Chinese producers were selling their wire decking product at less than fair value ("LTFV") while receiving subsidies from the Chinese government, thus causing material injury to the U.S. industry.[6]

Generally, to put the investigation in context, during this POI, from 2006–2009, "nonresidential construction activity slumped . . . , w[ith] industrial production bottom[ing] out in mid-2009." Final Views at 15. Thus, the Commission was faced with determining the effects of the subject imports in a generally declining economic environment that reduced demand. Nonetheless, during the preliminary investigation, the Commission found "a causal nexus between the subject

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping. The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycleand conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

[4] *See Frontseating Service Valves from China*, USITC Pub. 4073, Inv. No. 731-TA-1148, at 10 n.44 (April 2009) (Final). The Commission extended the POI from three to four years for this investigation at the request of Petitioners. Pet'rs Comments on Draft Questionnaires (Dec. 29, 2009) (CL 85); *see also* Def.'s Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. 4 n.2 ("Def.'s Br."); Mem. by Def.-Intervenors in Opp'n to Mot. for J. on the Agency R. 5 n.3 ("Def.-Int.'s Br."). Thus, the POI at issue included the four years 2006–2009.

[5] Wire decking is a fabricated decking assembly used as a shelf surface in a rack storage system for warehouse, commercial or industrial storage. *Wire Decking from China*, USITC Pub. 4172, Inv. Nos. 701-TA-466 and 731-TA-1162, at 5 (July 2010) ("Final Views"); Def.'s Br. 4. The Commission defined the domestic like product as consisting of all wire decking and the domestic industry to include all domestic producers of wire decking. Final Views 7, 10; Def.'s Br. 4.

[6] Plaintiffs participated in the Commission's administrative proceedings, as did Nucor Corporation ("Nucor"), another domestic producer. Defendant-Intervenors, Respondents Dalian Eastfound Metal Products Co., Ltd. and Dalian Eastfound Material Handling Products Co., Ltd. (collectively, "Eastfound") and Worldwide Material Handling Products, LLC ("Worldwide") (collectively, "Respondents" or "Defendant-Intervenors") also participated.

imports and the deteriorating condition of the domestic industry." Views of the Commission in the Preliminary Investigation 27 (CR 70)(PR 47) ("Prelim. Views"). In the final phase of its investigation, however, the Commission – after receiving questionnaire responses from foreign producers, domestic producers, importers and purchasers, in addition to evidence submitted by Petitioners – determined that the domestic industry was not being materially injured or threatened with material injury by reason of wire decking from China. Rather, to the Commission, the industry's difficulties were due to other economic factors or conditions.[7]

Notably, the Commission sent questionnaires to ten domestic wire decking producers identified by Petitioners, and received eight responses, seven of which provided usable information. Petitioners estimated that the seven usable responses accounted for approximately 99 percent of U.S. wire decking production in 2008. Confidential Staff Report for the Final Investigation III-1 n.1 (June 17, 2010) (CR 180) ("Final Staff Report"). In addition, for the final phase of the investigation, the Commission sent questionnaires to thirty-six U.S. wire decking importers, and again received seven usable responses from firms reporting wire decking imports. The Commission stated that these responses were reported to account for "the majority" of imports during the relevant period. Final Views 3–4; *see also* Final Staff Report at IV-1. Further, the Commission received twenty-six purchaser responses and sent forty-eight final questionnaires to foreign producers believed to produce wire decking in China during the POI, receiving four responses.[8] Final Staff Report at VII-2. The Commission believed that these responses accounted for the vast majority of Chinese production and exports to the U.S. in 2009. Final Views 4.[9]

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[7] Commissioners Lane and Williamson dissented, finding thatthe United States industry was being materially injured by reasonof the subject imports. *Dissenting Views of Commissioners Charlotte R. Lane and Irving A. Williamson*, at 1–16 (CR 187) ("Dissenting Views"). The dissent concluded that "if subject imports had been fairly traded[,] there would have been a beneficial impact on the domestic industry, either in price increases, volume increases, or both," and that therefore the domestic industry's difficulties were, to a sufficient degree, due to subject imports. *Id*. at 16. To the dissent, the domestic industry was able to maintain its position during declining economic conditions only by keeping its prices low. *Id.* at 6.

The notice of the Commission's final determination was published on July 30, 2010. *Wire Decking from China*, 75 Fed. Reg. 44,988 (July 30, 2010) (PR 131).

[8] One of these responses came from Eastfound.

[9] Specifically, the Commission believed that these responses accounted for approximately [[ ]] percent of Chinese production and [[ ]] percent of Chinese exports to the U.S. in 2009. Final Views 4; Final Staff Report VII-2-VII-5. The staff report contains no explanation for the fact that the reported percentage of Chinese production is higher than the percentage of Chinese exports.

After briefly summarizing the court's familiar standard of review, this decision will discuss each of the Commission's subsidiary findings that Plaintiffs challenge here.

STANDARD OF REVIEW

Where an action is brought under 19 U.S.C. § 1516a(a)(2) seeking review of a final determination of the Commission under 19 U.S.C. § 1673d,"[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). The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting *SSIH Equip. S.A. v. U. S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983)), "tak[ing] into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Commission steps outside of its authority when:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983).

DISCUSSION

I. Volume & Market Share

In considering the economic conditions facing the domestic industry, the Commission relied on data from importer questionnaire responses, finding that, while the volume of subject imports was significant both in absolute terms and as a share of apparent U.S. consumption, the subject imports' market share increase – less than two percentage points from 2006 to 2009 – was not significant. Final Views 19–20; Def.'s Br. 13.[10]

[10] *See* 19 U.S.C. § 1677(7)(C)(i) ("In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.")

Plaintiffs argue that the Commission's reliance on the data from those importers who submitted questionnaire responses and its failure to consider wire decking imported from non-responding companies, in order to determine import volumes and sales, was unreasonable when considered in light of the evidence in the entire record. Plaintiffs claim that the questionnaire responses that the Commission received from importers were insufficient as a data set and thus "understated and mischaracterized import volumes and market share trends." Pl.'s Rule 56.2 Mem. of Law in Support of Mot. for J. on the Agency R. 12 ("Pl.'s Br.").[11]

Particularly, Plaintiffs assert that the questionnaire response data failed to account for a shift in marketing of subject imports, including the fact that those non-responding firms were the same new importers that had begun importing directly from China in 2008–2009. Pl.'s Br. 13; Pl.'s Reply Br. 2.

The Commission asserts that the questionnaire responses accounted for the largest importers and a majority of subject imports and that the questionnaire responses were certified on submission. Def.'s Br. 14. As the Commission found questionnaire data to be the most reliable, it credited this data set. *Id.*

Countering the Commission's claims, Plaintiffs provide data estimates for imports missing from the Commission's data set.[12] Plaintiffs state that, due to these omissions from key importers, the Commission's data set showed "declining volumes and a relatively steady import market share" as opposed to increasing imports that had a detrimental effect on the U.S. wire decking industry. Pl.'s Br. 16.[13]

The Commission responds that even by Plaintiffs' calculations, the responses still account for the great majority of subject imports. Def.'s Br. 15.[14] In addition, the Commission addressed Petitioners' concern regarding importers, stating that three of the importers that provided responses in the preliminary, but not the final phase of investigation, accounted for only a minor number of subject imports. Final Views 20 n.89.[15] In addition, Respondents stated that three of the firms that reported data to the Commission[16] made up 90 percent of U.S. im-

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[11] Plaintiffs do not take issue with using a data set of less than 100%, but rather with what they *see* as evidence on the record that the responses were not indicative of actual market conditions. Pl.'s Br. 14.

[12] Plaintiffs claim that almost [[ ]] percent of import data, from twelve companies alone, was missing from the Commission's calculations. Pl's Br. 15.

[13] Plaintiffs contend that the Commission's calculation that import market shares were steady affected its entire determination. *Id.* at 21–22.

[14] At least [[ ]] percent of all 2009 subject imports.

[15] Only [[ ]] percent.

[16] [[ ]]

ports during the POI, Final Staff Report IV-1 n.1, thus "account[ing] for a large majority of subject imports." Def.'s Br. 15.

The Commission adds that it did not supplement its data with official statistics "because official import statistics are based on basket categories of the HTS that are too broad to provide import data specifically for wire decking." Final Views 20.[17] Thus, of the thirty-six importers to receive questionnaires, not all of them necessarily imported the subject merchandise because wire decking is classified under a broad, or "basket" HTSUS category. Def.'s Br. 16; *see also* Final Staff Report at I-8-I-9[18]

The Commission also asserts that it did not use Plaintiffs' import estimates because those estimates "do not distinguish between imports and import shipments[.]" Final Views 21; Def.'s Br. 19. Petitioners themselves had recognized this distinction. Def.'s Br. 19; *see also* Pet'rs Posthr'g. Br. at 6 n.14 (June 4, 2010)(CR 175). The Commission states that import shipments can be more reliable because they include only those imports that actually enter the market as opposed to those that are stored in inventory. Def.'s Br. 19–20; *see also Comm. for Fair Coke Trade v. United States*, 28 CIT 1140, 2004 WL 1615600, at *15 (2004). The Commission notes that Petitioner's constructed import tables were also unpersuasive, as they appeared to overstate the total subject imports during the POI. Def.'s Br. 20.

Reiterating its finding that official import statistics based on "basket categories" do not provide accurate data on wire decking imports alone because they include other products, the Commission concluded that it could not corroborate the Plaintiffs' estimates. Final Views 22.

* * *

It is clear to the court that the Commission did address Plaintiffs' concerns about the limitations of questionnaire response data from importers. First, the Commission acknowledged the data gap. *Id.* at 21, n.90.[19] The Commission credited the fact that, notwithstanding the lack of complete response data, the sworn statements of the

[17] Further, the Commission notes that it is common to not receive a full set of responses, and the normal practice is to rely on the response data, particularly when, as here, the Harmonized Tariff Schedule of the United States ("HTSUS") does not provide a "statistical breakout" that would allow for relying on official import statistics. Def.'s Br. 1–2.

[18] HTSUS 9403.90.80.40. Defendant notes that there currently exists a specific statistical breakout for wire decking, but that the breakout did not exist during the POI. Def.'s Br. 16 n.3.

[19] "Although the ITC concedes its information was not complete, e.g., that 20% of U.S. imports from China were not accounted for by the questionnaire responses, the ITC 'is not required to gather 100% coverage in the questionnaire responses before it can make a determination.' *United States Steel Group v. United States*, 18 CIT 1190, 1203, 873 F. Supp. 673, 688 (1994) (in context of final determination); *Torrington Co. v. United States*, 16 CIT

responding importers were still the most reliable information on the record, as they accounted for the majority of subject imports and certified as accurate. Final Views 20–21.[20] The fact that information has been certified is a reasonable explanation for using that information in lieu of relying upon other evidence, and the Commission's decision to us certified information over other "reported figures" is a reasonable exercise of its discretion. *See Timken Co. v. United States*, 28 CIT 277, 321 F. Supp. 2d 1361, 1365–67 (2004).

Second, the Commission addresses Plaintiffs' concern that the questionnaires, without Petitioners' additional estimates, do not accurately show the trends over the relevant period. In addition to obtaining four additional responses from importers, the Commission states that many of the initial thirty-six importers did not import the subject merchandise, had stopped doing so, or did so in nominal quantities. Def.'s Br. 16–17,19; Final Staff Report IV-1 n.2; Final Views 20 n.89.

The Commission concludes that any potential for skewed data was actually overstated – because Atlas[21] remained the importer of record even when firms that purchased wire decking from Atlas were identified as consignees. Final Views 22 n.95; Final Staff Report IV-1 n.1; Hr'g Tr. 159–160; Resp'ts Posthr'g Br. 7 & App. 2, at 14–16 (Decl. of Victor Kedaitis[22])(CR 176)(June 4, 2010). In particular, Respondents provided evidence regarding two firms[23] – accounting for a large amount of what Petitioners claim to be missing data. This evidence indicated that firm one was always a customer of Atlas (and Nashville Wire) was never an importer of record; the other is believed to be out of business. Final Views 22 n.95. Two other firms mentioned by

220, 223–24, 790 F. Supp. 1161, 1166 (1992), *aff'd* 991 F.2d 809 (Fed. Cir. 1993) (finding in the context of a preliminary determination that the ITC did not abuse its discretion by using questionnaire responses that 'represented a substantial majority of domestic production')." *Comm. for Fair* Coke Trade v. United States, 28 CIT 1140, 2004 WL 1615600, at *15–16 (2004).

[20] Plaintiffs state that information they submitted was based on first-hand knowledge, as well as certified and sworn under oath. The court reads the Commission's preference in this case for certified data over other evidence to refer to the Petitioners' import estimates, recognizing that Plaintiffs' submitted information from producers and declarations includes sworn documents and testimony given under oath. Pl.'s Reply Br. 5–6; *see also* Pet'rs Posthr'g Br. Ex. 6 (Petitioners' import estimates table); Hr'g Tr. 21–22, 35, 80–81 (May 27, 2010) (PR100) (producers' information); Pet'rs Posthr'g Br. Exs. 7, 8, 12,13 & 16 (declarations).

[21] Atlas was the largest U.S. importer of wire decking during the relevant period. The issue of whether Atlas has ceased operations is discussed further below.

[22] Mr. Victor Kedaitis is President and CEO of Worldwide and a former Atlas general manager and vice president.

[23] [[ ]]

Petitioners[24] likely do not exist anymore. *Id.*; *see also* Resp'ts Posthr'g Br. App. 2, at 14–15 (Decl. of Victor Kedaitis). As such, Atlas reported those imports in its questionnaire. Def.'s Br. 18; Final Views 22 n.95.

In addition, the Commission argues that Plaintiffs' evidence is not as reliable as Respondents' documentation, including the Kedaitis declaration, indicating that Petitioners' volumes are overstated. Def.'s Br. 21–22. Thus, the Commission decided to credit this sworn witness testimony in lieu of Petitioners' estimates in making its determination. *Id.* at 18, 22.

Plaintiffs argue that this explanation was insufficient and add that their reported evidence of importation was more valid. Pl.'s Br. 14, 19–20 n.5. However, it is not within the court's purview to weigh the evidence presented, but rather to assess whether the Commission reasonably considered the record in making its determination. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996)(maintaining that the Commission, as the trier of fact, has broad discretion in assigning relative weight weight to each piece of evidence). The possibility of drawing two inconsistent conclusions from the evidence does not render the agency's determination unreasonable, *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); where "[s]ubstantial evidence exists on both sides of the issue[,] . . . the statutory substantial evidence standard compels deference to the [agency]." *Nippon Steel Corp. v. United States*, 458 F.3d 1354, 1354 (Fed. Cir. 2006).

Here, the Commission reasonably addressed Plaintiffs' concerns regarding the importers' questionnaire response rate, gave a reasonable explanation for why it used the questionnaire data set as opposed to Petitioners' recommended information, and reasonably considered the relevant factors and evidence in the record. Therefore, the Commission's determination regarding import volumes and market shares, based on importer questionnaires, was supported by substantial evidence on the record.[25]

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[24] [[

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[25] Plaintiffs also attempt to claim that, as a matter of law, the Commission conducted an inadequate investigation because it failed to 1) follow its unanswered questionnaires with either emails or telephone calls in order to corroborate the response data on the record, Pl.'s Br. 25; 2) utilize its subpoena power, *see* 19 U.S.C. § 1333; *see also* 19 C.F.R. § 207.8 (2010); 3) or draw adverse inferences against or otherwise penalize noncooperative respondents.

But there is no indication here that the Commission failed to conduct a diligent and adequate investigation or failed to consider a crucial issue. *See Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1561 (Fed. Cir. 1984) ("Nothing in the best information rule or its legislative [sic] history defines a standard of investigative thoroughness."); *see also Hercules, Inc. v. United States*, 11 CIT 710, 743, 673 F. Supp. 454, 482(1987) ("There appears to be no recognized or statutorily set minimum standard by which the thoroughness of the investigation is measured.").

II. Price Suppression & Underselling

In evaluating the price effects of subject imports, the Commission must consider whether significant underselling and price depression has occurred.[26] Here, the Commission found significant underselling by subject imports,[27] but did not find that the subject imports caused the suppression of domestic like product prices. Final Views 24–25.

Plaintiffs claim that the Commission's determination that subject imports did not significantly suppress U.S. prices is not supported by the record, arguing that the influx of subject imports into the U.S. market led to a price suppression and corresponding financial losses for the domestic industry. Pl.'s Br. 28.

Plaintiffs specifically point to evidence that six responding purchasers reported that U.S. purchasers have lowered their prices since January 1, 2006, in order to compete with subject imports, Pl.'s Br. 27; Final Staff Report V-28, that only three purchasers stated that they did not reduce prices, and that two reported that falling prices were due to the general decline in steel product prices. Final Staff Report V-28.

On the other hand, the Commission found that, while margins of underselling ranged from .9 to 54.4 percent, only a limited number of lost sales and lost revenue allegations were confirmed. Final Views 24 & n.106.[28] The Commission attributed the falling price of wire deck-

To the extent that the Plaintiffs suggest that adverse inferences should have been drawn, under the statute, the Commission is not required to make adverse inferences in this circumstance, where no finding of a failure to cooperate has been made, and it is unusual in any case for the Commission to do so. *GEO Specialty Chems., Inc. v. United States*, Slip Op 09–13, 2009 WL 424468, at *6 (CIT Feb. 19, 2009) ("The Commission is not required to draw an adverse inference against a party who 'has failed to cooperate by not acting to the best of its ability to comply with a request for information,' although it may do so." (citing 19 U.S.C. § 1677e(b)). Rather, the Commission "draw[s] reasonable inferences from the evidence it finds most persuasive." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 869, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4198 ("SAA").

[26] **(ii) Price**

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price underselling by the imported merchandise as compared with the price ofdomestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

[27] The Commission found that imports undersold the domestic like product in 85 out of 93 quarterly price comparisons. Final Views 23–24.

[28] Plaintiffs argue that the reason for this lack of confirmation is that "most purchasers simply did not respond to the ITC at all." Pl.'s Reply Br. 12. Plaintiffs also point to their own evidence which they interpret as confirming lost sales.

ing in 2009 to declining demand, the availability of substitutes and the significance of non-price factors, rather than the effect of subject imports. Def.'s Br. 2,29–30. Thus, the Commission concluded that the subject imports did not significantly affect domestic prices during the relevant period. Final Views 25.

As support for its conclusion, the Commission points to the fact that the domestic industry's unit cost of goods sold ("COGS") was only slightly higher in 2009 than 2006 and that the evidence did not show that the subject merchandise prevented price increases which would have occurred otherwise. Final Views 24; Def,'s Br. 29. The Commission explained that, despite the volume of subject imports, domestic producers were able to raise prices to cover a large amount of the increase in unit COGS in 2008 which had resulted from the increased cost of raw materials, and that even as demand declined sharply they were able to cover a large share of COGS in 2009. Final Views 24–25; Def.'s Br. 30.[29] Thus, the Commission relied on the domestic industry's apparent success in increasing prices during a market decline in relation to the COGS.

More generally, the Commission determined that the record did not show that subject imports prevented prices from increasing, but rather that declining demand[30] and the availability of substitute products[31] limited price increases. Final Views 24.

The court will consider, in turn, each aspect of the factors the Commission found important on this issue.

A. Declining Demand

No party challenges the Commission's finding that declining demand had an effect on the domestic industry and its ability to raise prices during the POI. *See* Final Views 24–25; Pl.'s Br. 31; Def-Int. Br. 21.

B. Substitutes

Plaintiffs contend that, contrary to the Commission's assertions that substitute products for wire decking exist, "fire codes, insurance requirements and building codes did not generally permit use of such products." Pl.'s Br. 29. The domestic industry testified that "[t]here

[29] Defendant-Intervenors argue that producers were able to "fully cover increases in raw material costs," Def.-Int. Br. 22-24, 26, noting that the Domestic Industry's margins of per-unit sales values over raw material costs stayed steady or increased over the POI. Def.-Int. Br. 9 (table and citations for the data included therein).

[30] The decline in demand limited the volume of sales across which producer's could allocate costs. *See* Final Views at 24 n.109.

[31] "[A] substantial share of producers, importers and purchasers reported" the availability of substitute products for wire decking. Final Views 24 n.110.

are no real practical substitutes for wire decking in the U.S. market . . . wire decking is duly required by insurance companies and building codes for use in commercial storage systems." Hr'g Tr. 16–17; Pet'rs Prehr'g Br. 6 & Ex. 2 (CR 166, 170) (PR 91); Dissenting Views 4 & n.20. Plaintiffs note that only ten percent of thirty-one responding purchasers reported price effects from the substitute products. *See* Pl.'s Br. 30; Dissenting Views 4; Final Staff Report II-12.[32]

The Commission states in its Final Views, however, that a "substantial" number of purchasers, producers and importers reported that there are substitutes available for wire decking products in some cases, making "aggregate demand for wire decking moderately elastic" and limiting the amount that the price of wire decking could be raised to cover increased COGS. Final Views 24 & n.110.

The Commission states that, contrary to the Plaintiffs' reference to testimony regarding fire codes, insurance requirements and building codes, a large number of producers, importers and purchasers reported a variety of products that were in fact wire decking substitutes. Def.'s Br. 32; Final Views 17 n.76, 24 n.110.[33] The Commission argues that it did not overstate the significance of substitute products, admitting that substitutes were only available in some applications. Final Views 24 n.110; Def.'s Br. 32. Rather, evidence of substitutes was one of the factors in its determination, considering the evidence on the record. Def.'s Br. 32–33.

As Plaintiffs mention in their brief, there is record evidence that these products may not have been substitutable in practice, and a vast majority of questionnaire responses indicated that a change in the price of substitute products does not affect wire decking prices. Final Staff Report II-12. However, the standard is whether a reasonable mind, considering all of the record evidence, could have made the same determination as the Commission. In light of the record evidence cited by the Commission, it was not unreasonable for it to give some weight to the affect of substitute products on prices charged by the domestic industry. Although the record would have permitted the opposite conclusion, it did not mandate such an opposite result.

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[32] Specifically, only [[ ]], and only [[ ]] of thirty-one responding purchasers reported price effects from the substitute products. Pl.'s Br. 30; Dissenting Views 4; Final Staff Report II-12. Moreover, one of these purchasers was reported to have identified a wire decking substitute; but the product that was apparently identified, [[ ]], is an input into [[ ]] wire decking, not an actual substitute product. Dissenting Views 4 n.18; Pl.'s Br. 30 n.9.

[33] Including: pallet rack supports, warehouse shelving, non-supported wire mesh, wood, metal/steel decking, cross bars, expended metal corrugated decking, bard grading and rack dex-perforated decking. Final Staff Report II-12.

C. Price

Regarding price, the Commission argues that while Plaintiffs did point to six instances of purchasers that responded that they had reduced prices in order to compete with subject imports, there were also two purchasers that stated that falling prices were due to the decrease in all steel product prices; one purchaser also stated that domestics sell "for the same or for less" than the imported wire decking. Final Staff Report V-28; Def.'s Br. 30. In addition, the Commission notes that it did consider these responses, but that other evidence – indicating that general steel price decreases were to blame and that domestic purchasers were selling for equal or lower prices – weighs against Plaintiffs' argument.

The Commission adds that the majority of purchasers did not report switches to imports due to lower pricing and that a majority of purchasers also reported that differences aside from price were frequently important in their purchasing decisions. Def.'s Br. 30; Final Views 17; Final Staff Report Table II-19.

Despite evidence of price sensitivity, the Commission noted that a majority of purchasers reported that non-price factors were frequently significant in their purchasing choices, bolstering its claim that the significance of underselling was limited. Final Views 25 n.113.

The Commission acknowledges that subject imports and domestic like products were highly interchangeable, and that the record showed that price was an important factor in purchasing decisions. *Id.* at 23. The Commission also recognizes the significant underselling (margins up to 54.4 percent) and that subject imports undersold U.S. producers in 85 out of 93 comparisons. The Commission nonetheless explains that these factors are less important than demand declines and substitutes products. Def.'s Br. 31.

In response, Plaintiffs reiterate that their evidence was consistent with reports by U.S. producers that imports were suppressing prices in the domestic industry, including reports that U.S. producers had to lower prices to keep pace with Atlas's low selling price. Pl.'s Br. 27–28 n.8. Plaintiffs argue that the domestic industry suffered financial losses because it could not keep its prices in line with costs. *Id.* at 28; Pl.'s Reply Br. 10. This logic is supported by evidence indicating that wire decking, as "a commodity product, [is] sold largely on the basis of price." Dissenting Views 3.

In the final analysis, however, the Commission chose to attribute substantial weight to the fact that the domestic industry continued to be able to raise prices sufficiently to cover much, if not all, of its increasing costs. Although the record evidence could have supported

a different conclusion,[34] the court cannot find that the Commission's conclusion was unreasonable. The Commission did not ignore the contrary evidence nor did it fail to consider the important factors relevant to this issue. On the contrary, it assessed the economic conditions and chose to place weight on particular evidence in the record.[35] Again, the role of this court is not to re-weigh the evidence presented to the Commission, but rather to assess if its determination was reasonable given the evidence on record.

The Commission must reasonably consider all of the evidence on the record, make a conclusion based on a reasonable reading of all that evidence, and reasonably explain its reasoning for finding underselling but not price suppression. The Commission did so here.

[34] The court notes that the dissenting Commissioners found "clear and consistent evidence of price suppression[,]" such as the ratio of COGS to net sales, which moved against the domestic industry during the POI. Dissenting Views 8–9.

[35] The parties dispute the significance of the statistical and price variance evidence on the record. Pl.'s Br. 28–29; *see also* Final Staff Report VI-8-VI-9; Def.-Int. Br. 24–25; Eastfound/Worldwide Final Comments 3–6 (CR 183). Variance analysis is a tool that the Commission may use during an investigation. *See Hynix Semiconductor, Inc. v. United States*, 30 CIT 1828, 1834 n.5, 474 F. Supp. 2d 1338, 1344 n.5 (2006) (noting that the Commission "routinely utilizes a variance analysis to isolate the effects of changes in price, volume, and unit cost"). The Commission states that it addressed Plaintiffs' remarks regarding the variance analysis and its connection with price suppression by stating in its Final Views that "[a]lthough the ratio of COGS to net sales increased between 2006 and 2009, the record does not establish that subject imports prevented price increases that otherwise would have occurred." Final Views 24;Pl.'s Br. 28; Final Staff Report IV-8–9; Def.-Int. Br. 24–25.

III. Decline in Demand and its Impact on the Domestic Industry [36]

The Commission acknowledges that domestic industry performance declined during the POI, but concludes that subject imports, while having a "significant presence in the market," were not responsible "in any significant degree" for this decline. Final Views 27; Def.'s Br. 33. Rather, declining demand during the POI was largely responsible for the decrease in domestic sales and revenues, while the subject imports' market share remained steady during the examined period. Final Views 27, 30. Specifically, the industry's declining performance was the result of "[[ ]]" declining revenues that illustrated a decline in demand, moderate demand elasticity and increases in the COGS/sales ratio. *Id.* at 27; Def.'s Br. 33.

The Commission observes that U.S. shipments of subject imports declined at a rate comparable to the rate of decline of domestic producers' shipments during the POI and that subject imports did not take significant market share from the domestic industry. Final Views 27. The Commission notes that, contrary to Plaintiffs' claim that the decline of subject imports coincides with the investigations, the decline began in 2008, and the data does not show that the decline

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[36] The statute places the following requirements on the Commission's consideration of the:

> **(iii) Impact on affected domestic industry**
> In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices,
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive toe affected industry.
>
> 19 U.S.C. § 1677(7)(C)(iii).

Plaintiffs state their claim on this issue as follows: "The Commission erred in concluding that the injury suffered by the domestic industry was attributable entirely to demand and not to subject imports." Pl.'s Br. 30. The answer to this claim, as stated, is that it fails to address a flaw the Commission's determination. The Commission's determination was that "the declines in the domestic industry's sale volumes and revenues are ***largely*** explained by declining demand over the period examined." Final Views at 27 (emphasis added). The difference is significant because Plaintiffs' exaggerated statement disregards the analysis the Commission actually followed; Plaintiffs' statement therefore cannot be sustained. Accordingly, the court will assume *arguendo* that the Plaintiffs intended to challenge the agency's actual analysis on this issue.

in imports correlates with an improvement in the industry's financial condition. Final Views 19 n.85. In addition, during the investigation, "[p]etitioners and respondents agreed that U.S. consumption of wire decking is tied closely to total U.S. industrial output and the growth of big-box retailing and that the current recession has certainly dampened these activities." Final Staff Report IV-6. Thus, while industry conditions were "unfavorable," the Commission concluded that the evidence did not show the "requisite causal nexus between the subject imports and the condition of the domestic industry." Final Views 28.

Objecting to the Commission's conclusion, Plaintiffs reiterate their claim that the Commission failed to connect the subject imports to the decline in the U.S. wire decking industry because it did not account for all of the imports and their displacement of domestic market share, especially in 2009. Pl.'s Br. 31. Plaintiffs do not believe that the recession can account for the entirety of the industry's declining condition.[37]

Plaintiffs state that had the Commission properly accounted for all imports, it would have found that subject imports were in fact significantly displacing U.S. producers' sales and market share. Pl.'s Br. 31.[38] Plaintiffs contend further that once antidumping duties were imposed against importers in 2010, imports of their products ceased and the U.S. industry saw improvement in its profits despite a lack of increase in demand. Pl.'s Br. 33; *see also* Pet'rs Posthr'g Br. Ex. 1, at 37–42, Ex. 3 (CR 175,178).

As support for their argument, Plaintiffs rely on other instances where the Commission found that a decline in demand was only partially to blame for the declining financial situation of a United States industry. In one example, Plaintiffs cite to an investigation in which a decline in demand may have explained performance declines only partially, but not fully. *See Commodity Matchbooks from India*, USITC Pub. 4117, Inv. Nos. 701-TA-459 and 731 TA-1155, at 18 (Dec. 2009) (Final). As Defendant indicates, however, the Commission's determinations are *sui generis*, and the particular facts and evidence of each case will determine the outcome.[39] The issue here is whether the Commission reasonably interpreted the record evidence. Just because the Commission found a decline in demand to be insufficient to explain the industry condition in a previous case does not mean

[37] Plaintiffs argue that in 2008–2009 consumption declined by [[ ]] percent, but operating profits declined by [[ ]] percent. Pl.'s Br. 32; *see also* Final Staff Report at C-3.

[38] The court has, of course, rejected this specific claim in its discussion of Issue I above.

[39] Both Defendant and Defendant-Intervenors distinguish *Commodity Matchbooks from India* from the present matter. Def.'s Br. 34; Def.-Int. Br. 28.

that it must do so here. Rather, the Commission reasonably states that those investigations involved improved performance during the POI, when there was a more extensive data set; they are therefore inapplicable to the present matter. Def.'s Br. 35.

According to Plaintiffs, the fact that the subject imports largely ceased after the imposition of preliminary duties in 2010 and the industry condition improved thereafter proves a causal nexus between the subject imports and the domestic industry's condition. In response, the Commission notes that because the data set ends in 2009, no such trend is indicated during the POI. Final Views 19 n.85; Def.'s Br. 35.

The Commission is correct. While it has the discretion to use post-POI data to bolster POI data or to further support its decision,[40] there is no requirement to include such post-POI data, as the POI is the centerpiece of the investigation's time frame.[41]Thus, the 2010 data, while a potential factor, is not fatal to the Commission's determination. Moreover, the fact that a preliminary antidumping or countervailing duty order assisted the domestic industry does not, by itself, mandate the conclusion that the subject imports were a significant cause of injury.

In sum, because the Commission gives a reasonable explanation for its decision, based on a reasonable reading of the record evidence, it is not the court's place to re-weigh the evidence or to suggest that another alternative was the only appropriate choice. Under the statute, in order to find a causal nexus between the subject imports and the domestic industry's condition, the Commission must find that the subject imports had more than a tangential, trivial or incidental effect on the industry. *See supra* note 2.[42] In making its determination, the Commission should "examine all relevant evidence" and

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[40] *Bratsk Aluminum Smelter v. United States*, __ CIT __, 533 F. Supp. 2d 1348, 1353 (2008) ("The Court finds therefore that the ITC has addressed the causation issue specifically and in detail as required by *Gerald Metals* and *Bratsk CAFC* and that the POI price data when taken together with the post-POI data adequately supports the conclusions that the ITC has made."); *see also* 19 U.S.C. § 1677(7)(I).

[41] The Commission is mandated however to consider whether data submitted after the filing of a petition has been distorted by the filing of trade actions and the imposition of preliminary duties. 19 U.S.C. § 1677(7)(I); *see also* SAA at 853–54, 1994 U.S.C.C.A.N. at 4186; *Nucor Corp. v. United States*, 414 F.3d 1331, 1341 (Fed. Cir. 2005).

[42] "*Bratsk* did not read into the antidumping statute a Procrustean formula for determining whether a domestic injury was 'by reason of' subject imports. It simply required the Commission to consider the 'but for' causation analysis in fulfilling its statutory duty to determine whether the subject imports were a substantial factor in the injury to the domestic industry, as opposed to a merely 'incidental, tangential, or trivial' factor." *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 879 (Fed. Cir. 2008) (citing *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003)).

"need not isolate the injury caused by other factors from injury cased by unfair imports...[r]ather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." SAA at 851–52. It has done so here.

Here, as was concluded in the discussion of Issue I above, the Commission appropriately relied on import questionnaire data in its analysis of the impact of the subject imports on the domestic industry. Plaintiffs point to other investigations and data that, they argue, shows the requisite causal nexus between the subject imports and the industry conditions. However, the Commission found, based on a reasonable reading of the record, including a reasonable response to Plaintiffs' preferred data from after the POI, that demand declines were largely to blame. The court will not re-weigh the evidence to reach a contrary conclusion.

IV. Capacity

In analyzing any possible threat of future injury from subject imports, the Commission found that "there appears to be only limited excess capacity to increase production of wire decking in China." Final Views 31.[43]

In response, again raising the issue of the Commission's reliance on questionnaire response data, Plaintiffs claim that the Commission erred by relying on insufficient responses from Chinese producers in making its determination regarding Chinese capacity. Out of forty-eight firms that received the Commission's questionnaires, only four Chinese producers, including Eastfound, the largest, provided responses.

The Commission states that these four responses accounted for "a substantial majority of Chinese production and Chinese exports of wire decking to the United States in 2009[.]" Def.'s Br. 36.[44] The Commission also notes in its Final Staff Report that Petitioners and Respondents disagreed over the number of Chinese firms that actually produce wire decking, and that Respondents believed they had "virtually all of the major producers" in the response data, and that some of the firms claiming that they could produce wire decking are actually unable to do so. Final Staff Report VII-2-VII-3 at nn.3–4.

The Commission concedes that the producers in China are "export oriented" but states that, since 2008, an increasing share of these exports have been shifting to third country markets as opposed to the

[43] The Commission also concluded that the importers' inventories of the subject imports were at a "relatively [[ ]][.]" Final Views 31.

[44] *See supra* note 9.

United States. Final Views 30.[45] The Commission notes that while "there appears to be substantial capacity to produce wire decking in China," such capacity declined over the examined period and was already declining before this investigation began and before U.S. demand declined "steeply" in 2009. Final Views 30.

The Commission maintains, as was the case with the importer questionnaires, that even if the response rate was lower than reported estimates, it still accounts for a substantial majority of Chinese production and exports in 2009 and is comparable to rates received in other investigations. Def.'s Br. 36; Final Views 30 n.136. Thus, to the Commission, the questionnaire responses remain the "best available record source" for Chinese industry information. Final Views 31 n.136. The Commission again notes, correctly, that it is not required to receive 100% response compliance. *Id.* at 30–31 & n.136.

The Commission adds that, based on its data, product-shifting was not indicated as a significant factor, nor was there any indication that exports to the U.S. would increase in the imminent future. There were also no other import investigations pending in other countries at the time. *Id.* at 31. Based on this information, the Commission concluded that substantial increases in subject imports to the U.S. were not imminent. *Id.*

Plaintiffs contend that numerous other producers that did not respond were proven to export and sell wire decking, and possibly could have had excess capacity. They argue that the Commission did not conduct sufficient follow-up investigations to confirm the "voluminous" data Plaintiffs submitted, showing that these non-responders were in fact producing wire decking and exporting it to the United States. Plaintiffs present a summary of evidence regarding non-responders, including information regarding fifteen Chinese producers, that they contend proves that Chinese production of wire decking was much more substantial than the Commission claimed in its investigation. *See* Pl.'s Br. 35–37.[46] Plaintiffs believe that, had the Commission followed up to obtain the missing data from Chinese

[45] The subject producers' exports to the United States went from [[ ]] percent in 2006 to [[ ]] percent by 2009. Final Views 30 n.134.

[46] The summary of record evidence regarding non-responding Chinese producers includes five producers who submitted responses to Commerce reporting wire decking exports, but who did not submit responses to the Commission; two additional producers named by U.S. importers as their source of Chinese wire decking; four additional Chinese producers identified by respondents; two additional producers [[ ]]; one additional producer [[ ]]; one additional producer who submitted a preliminary but not a final response; and the Domestic Industry also submitted emails received from other Chinese producers who did not respond to questionnaires and who approached the Domestic Industry with offers to sell them wire decking products. *Id.* at 36–37.

producers, or had it considered data from other Chinese firms that Petitioners identified, then the Commission would have found greater capacity, and perhaps even excess capacity. *Id.* at 37. Plaintiffs argue that their identification of aggressive sales efforts, as well as foreign producers' incentive not to inform the Commission for their own financial gain,[47] are a valid basis for the conclusion that much more capacity existed than was considered by the Commission. *Id.* at 37–38.

Plaintiffs are correct that the Commission cannot ignore significant evidence that contradicts its claims. *See Mitsubishi Materials Corp. v. United States*, 17 CIT 301, 319, 820 F. Supp. 608, 624 (1993). The Commission is required to consider all "pertinent evidence" on the record of an investigation before reaching its final result. *Roses, Inc. v. United States*, 13 CIT 662, 665, 720 F. Supp. 180, 183 (1989) (citation omitted). Further, "[the Commission] must address significant arguments and evidence which seriously undermines its reasoning and conclusions." *Altx, Inc. v. United States*, 25 CIT 1100, 167 F. Supp. 2d 1353, 1374 (2001). The Commission must then disclose its reasoning, explaining how it has used its discretion in making its determination and "articulate a[ ] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68, 83 S. Ct. 239, 245–46 (1962).

Here, however, the Commission discusses various reasons for its determination regarding Chinese capacity, while it gives less weight to Plaintiffs' Chinese production data and more weight to witness testimony. Therefore, the court cannot conclude that the Commission's determination was unreasonable. The Commission relied in significant part on the Kedaitis testimony cited above. Specifically, Mr. Kedaitis testified, based on his years of industry experience, visits to the Chinese companies and meetings with their owners,[48] that while some Chinese companies claim they can produce wire decking, in actuality they cannot. Final Staff Report VII-3 n.4; *see also* Resp'ts Posthr'g Br. App. 1, at 35. Kedaitis listed the various alleged producers, and stated that these companies do not produce wire decking in reality, even if they claim to do so. He stated that Petitioners' claims greatly exaggerated what are in fact "minimal imports of subject decks." Resp'ts Posthr'g Br. App. 2, at 6–16. Also, Eastfound, the largest Chinese producer of wire decking, reported

[47] Plaintiffs contend, and the Commission affirmed, that even the four firms that did report data to the Commission exceeded 100% capacity rates.

[48] *See* Resp'ts Posthr'g Br. App. 2, at 8 & Attach. IX.

that in February of 2009 it closed one of its two factories, laid off more than 500 employees and reduced production capacity. Final Staff Report VII-4 n.6; Def.-Int.'s Br. 8.

Plaintiffs claim that their evidence is more reliable than the Commission's. But it is the Commission's duty to evaluate the record evidence and determine the credibility of the submitted evidence, *Nevinnomysskiy Azot v. United States*, __ CIT __, 565 F. Supp. 2d 1357, 1374 (2008), even where testimony comes from an interested party, *Negev Phosphates, Ltd. v. U.S. Dep't of Commerce*, 12 CIT 1074, 1091–92, 699 F. Supp. 938, 953 (1988).

> [W]hen the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert fact finder here the majority of the . . . Commissioners - to decide which side's evidence to believe. So long as there is adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade, and this [appellate] court, reviewing under the substantial evidence standard, must defer to the Commission.

Nippon Steel Corp. v. United States, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

V. Whether the Major Importer was No Longer Operating

Finally, the Commission stated in its Final Staff Report that Atlas "ceased operations...and sold its remaining assets to Worldwide in 2010. Worldwide reports that, to date, it has not imported subject merchandise and that wire decking is not the sole focus of its sales and service operations." Final Views 3132; Def.'s Br. 37. The Commission states that this factor made it unlikely that subject import levels would increase enough to injure the U.S. industry in the imminent future. *Id.*

Plaintiffs contend that Atlas ceased importing wire decking only because of the administrative action at issue here and that Worldwide has only stopped importing in order to avoid paying dumping duties. Pl.'s Br. 39. Plaintiffs add that Worldwide's statements indicate plans to resume selling wire decking in a fashion similar to its predecessor, Atlas, with similar staffing, management, locations and contact information. *Id.* at 39–40; *see also* Pet'rs Posthr'g. Br. at 15 & nn.25–26. Petitioners submitted record evidence that Kedaitis, the owner of Worldwide and former manager of Atlas, continued to use three of the same four Atlas warehouse locations and the same phone number. In addition, Worldwide listed wire mesh as a main product and signed

up for a 2011 trade show to promote the product.[49] Plaintiffs also submitted evidence of Worldwide's advertising that touted Worldwide as a "[new] [n]ame...but the people you know." Pet'rs Posthr'g Br. Ex. 2.

The Commission acknowledges the similar identities of Atlas and Worldwide, Def.'s Br. 37; Final Views 16, but points to evidence indicating that Atlas was paring down its operations, even before the change in ownership, and that Worldwide was not importing subject merchandise. Def.'s Br. 37; Final Views 16; Hr'g Tr. 141–44; Final Staff Report IV-1-IV-3; Resp'ts Posthr'g Br. App. 2, at 1–6. In addition, in its Final Views, the Commission refers to the Final Staff Report, which in turn cites Mr. Kedaitis's report at the Commission hearing that Worldwide had not imported from China since its inception and that its business model differed from Atlas's. Final Staff Report IV-2–3 (PR at IV-1–2); *see also* Hr'g Tr. at 143, 202.

Mr. Kedaitis testified further that Atlas was affected by the 2008 recession, closing locations, reducing staff and paring down operations. Hr'g Tr. 143; Final Staff Report IV-2. Kedaitis stated that Atlas Lift Truck and Sales, Inc., Atlas's parent company, decided to exit the wire decking business in order to focus on fork lift trucks and other mechanized handling equipment sales. Final Staff Report IV-2 n.4; Def.-Int. Br. 7. The Final Staff Report also indicates that, for Worldwide, wire decking would only be 20 percent of sales, compared to Atlas, for which wire decking was 90 percent of sales. Final Staff Report IV-3 n.8. Mr. Kedaitis stated that Worldwide is a much smaller company than Atlas with a new business model, Hr'g Tr. 143, and that Worldwide's focus was sales of pallet rack and repair equipment services. Hr'g Tr. 169; Resp'ts Posthr'g Br. App. 2, at 2. Mr. Kedaitis also explained that the advertisement referenced by Plaintiffs was intended to advertise decks inventory; however, it was out of context because Worldwide produces a new advertisement each month in order to move away from wire decking towards its new business model. Resp'ts Posthr'g Br. App.2, at 3–6. Further, Mr. Kedaitis supplemented his claim that the company was focusing more on pallet rack and repair equipment services by submitting corroborating advertisements, brochures and website information. *See* Resp'ts Posthr'g Br. App. 2, at Attachments VI- VII.

Faced with "potentially credible evidence on both sides of the issue[,]" the Commission has discretion in assigning weight and ultimately making a determination, as long as its reading of the record is

[49] Petitioners also stated that [[
]] *Id.* at n.26; *see also* [[
]].

reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358 (Fed. Cir. 2006). Here again, Plaintiffs claim that their evidence is more reliable than the Commission's. However, it is the Commission's duty to make the credibility determination. On this record, sufficient evidence exists to indicate that the Commission made a reasonable choice in its determination that a major importer of wire decking was no longer focusing on sales of wire decking.

CONCLUSION

For all of the foregoing reasons, the Commission's determination is AFFIRMED in all issues. Judgment will be entered accordingly.

It is **SO ORDERED**

Dated: July 12, 2011
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 11–86

JTEKT CORPORATION AND KOYO CORPORATION OF U.S.A., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 07–00377

[Denying defendant's motion for expedited reconsideration of court's prior decision and allowing additional time for submission of a remand redetermination in litigation contesting the final results of an administrative review of an antidumping duty order]

Dated: July 20, 2011

Sidley Austin, LLP (*Neil R. Ellis* and *Jill Caiazzo*) for plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Baker & McKenzie, LLP (Washington, District of Columbia) (*Kevin J. Sullivan* and *Kevin M. O'Brien*) for plaintiffs FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd.

Crowell & Moring, LLP (*Matthew P. Jaffe*) for plaintiffs NSK Corporation, NSK Ltd., and NSK Precision America, Inc.

Baker & McKenzie, LLP (*Kevin M. O'Brien, Christine M. Streatfeild,* and *Diane A. MacDonald*) for plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation.

Crowell & Moring, LLP (*Daniel J. Cannistra* and *Alexander H. Schaefer*) for plaintiffs Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc.

Riggle & Craven (*David A. Riggle* and *Shitao Zhu*) for plaintiff Asahi Seiko Co., Ltd.

O'Melveny & Myers, LLP (*Nausheen Hassan* and *Greyson L. Bryan*) for plaintiffs Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc.

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* and *Claudia Burke*); *Joanna Theiss*, *Aaron Kleiner*, *Thomas Beline*, *Brian Soiset*, and *Deborah R. King*, Office of 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 plaintiffs and defendant-intervenor The Timken Company.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

JTEKT Corporation and Koyo Corporation of U.S.A. (collectively, "JTEKT") brought an action under section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006), to contest a final determination (the "Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") in the seventeenth administrative reviews ("AFBs 17") of antidumping duty orders on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, Singapore, and the United Kingdom. Summons 1; *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews & Rescission of Review in Part*, 72 Fed. Reg. 58,053, 58,053 (Oct. 12, 2007) ("*Final Results*"). Upon the motion of defendant-intervenor The Timken Company ("Timken"), the court consolidated JTEKT's action with six other cases. Timken US Corporation's Mot. to Consolidate 1.

In *JTEKT Corp. v. United States*, 35 CIT __, 768 F. Supp. 2d 1333 (2011) ("*JTEKT*"), the court ruled on claims contesting various decisions in the Final Results pertaining to the antidumping duty order involving Japan asserted by plaintiffs Asahi Seiko Co., Ltd. ("Asahi"); Aisin Seiki Company, Ltd. and Aisin Holdings of America, Inc. (collectively "Aisin"); Nachi Technology, Inc., Nachi-Fujikoshi Corporation, and Nachi America, Inc. (collectively "Nachi"); FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB"); American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Bower Corporation, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation (collectively, "NTN"); and NSK Corporation, NSK Ltd., and NSK Precision America, Inc. (collectively, "NSK"). Five plaintiffs Aisin, JTEKT, Nachi, NPB, and NTN asserted claims challenging the Department's use of "zeroing" methodology, under which Commerce assigned to U.S. sales made above normal value a dumping margin of zero rather than a negative margin when calculating weighted-average dumping mar-

gins. In response to these claims, the court ordered Commerce on remand to reconsider its decision to apply the zeroing methodology in the Final Results "and change that decision or, alternatively, provide an explanation for its express or implied construing of 19 U.S.C. § 1677(35) inconsistently with respect to antidumping duty investigations and administrative reviews." *JTEKT*, 35 CIT at __, 768 F. Supp. 2d at 1364.

Before the court is defendant's motion for expedited reconsideration of the court's decision in *JTEKT* to order a remand on the zeroing claims. Def.'s Mot. for Expedited Reconsideration or Relief from J. ("Def.'s Mot."). JTEKT and NTN filed a joint memorandum in opposition to defendant's motion for reconsideration. Pls.' Joint Mem. in Opp'n to Mot. for Expedited Reconsideration or Relief from J. ("Pls.' Joint Mem."). Defendant-intervenor Timken supports defendant's motion for reconsideration. The Timken Company's Resp. in Supp. of the Def. United States' Mot. for Expedited Reconsideration or Relief from J. Also before the court are defendant's motions for leave to file a reply in support of the motion for expedited reconsideration and for enlargement of time to file the remand redetermination in response to the court's order in *JTEKT*. Def.'s Mot. for Leave to File Reply in Supp. of Mot. for Expedited Reconsideration or Relief from J. ("Def.'s Mot. to File Reply"); Def.'s Mot. for Enlargement of Time to File Remand Redetermination ("Def.'s Mot. for Time Extension").

The court grants defendant's motion for leave to file a reply in support of the motion for reconsideration and grants defendant's motion for an extension of the date for filing of the Department's remand redetermination. The court denies defendant's motion for reconsideration, concluding that it did not err in ordering the Department to reconsider, and to modify or further explain, its decision to apply zeroing in the Final Results.

II. BACKGROUND

JTEKT, 35 CIT at __, 768 F. Supp. 2d at 1339–41, recounts the procedural history of the administrative and judicial proceedings in general terms common to all plaintiffs and provides additional background information specific to the individual claims.

On May 5, 2011, the court issued its Opinion and Order in *JTEKT*. On June 2, 2011, defendant filed its motion for expedited reconsideration. Def.'s Mot. On June 16, 2011, plaintiffs JTEKT and NTN filed their joint memorandum in opposition to defendant's motion. Pls.' Joint Mem. On July 5, 2011, defendant filed its motion for leave to file a reply in support of its motion for expedited reconsideration. Def.'s Mot. to File Reply. On July 11, 2011, defendant filed its motion

for enlargement of time to file a remand redetermination. Def.'s Mot. for Time Extension. On July 18, 2011, NTN, although having earlier declined to consent to defendant's motion for enlargement of time, informed the court that in view of the Department's recent notice announcing revocation of the antidumping duty orders on ball bearings from Japan and the United Kingdom pursuant to remand determinations of the U.S. International Trade Commission in the second sunset reviews of those orders, "NTN now takes no position on the Government's motion." Pls.' Resp. to Def.'s Mot. for Enlargement of Time to File Remand Determination 2 (citing *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41,761 (July 15, 2011)).[1] On July 19, 2011, NPB, citing the recent notice, although also having earlier declined to consent to defendant's motion for enlargement of time, similarly informed the court that "NPB now takes no position on Defendant's motion." Pls.' Nippon Pillow Block Co. Ltd. and FYH Bearing Units USA, Inc. Resp. to Def.'s Mot. for an Enlargement of Time to File the Remand Redetermination 2.

III. DISCUSSION

A. Motion for Expedited Reconsideration

USCIT Rule 59 authorizes a rehearing after a nonjury trial "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." USCIT Rule 59(a)(1)(B). A decision to grant or deny a motion for reconsideration lies within "the sound discretion of the court." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336, 601 F. Supp. 212, 214 (1984). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Royal Thai Gov't v. United States*, 30 CIT 1072, 1074, 441 F. Supp. 2d 1350, 1354 (2006) (internal quotation marks and citation omitted). The purpose of reconsideration is "to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *Target Stores, Div. of Target Corp. v. United States*, 31 CIT 154, 159, 471 F. Supp. 2d 1344, 1349 (2007) (quoting *Agro Dutch Indus. Ltd. v. United States*, 29 CIT 250, 254 (2005)).

[1] Listing an effective date of July 16, 2011, the Department's revocation notice announces that "the Department is discontinuing all unfinished administrative reviews immediately and will not initiate any new administrative reviews of the orders." *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41,761, 41,762 (July 15, 2011).

Commerce applied its zeroing methodology in AFBs 17, assigning to U.S. sales made above normal value a dumping margin of zero, rather than a negative margin, when calculating weighted-average dumping margins. *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom for the Period of Review May 1, 2005, through April 30, 2006*, at 8 (Oct. 4, 2007) ("*Decision Mem*."). Aisin, JTEKT, Nachi, NPB, and NTN challenged the use of this zeroing methodology, arguing that use of the zeroing methodology in an administrative review violates the U.S. antidumping laws and is inconsistent with international obligations of the United States.[2]

As the court recounted in *JTEKT*, the Court of Appeals repeatedly had upheld the Department's use of zeroing in administrative reviews. *JTEKT*, 35 CIT at __, 768 F. Supp. 2d at 1342 (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) ("*SKF*"); *Koyo Seiko Co.*, 551 F.3d 1286, 1290–91 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007)). However, the Court of Appeals now has held in two cases that the final results of an administrative review in which zeroing was used must be remanded to direct Commerce to explain its interpreting the language of 19 U.S.C. § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. *JTEKT Corp. v. United States,* Court No. 2010–1516, 2011 WL 2557640, at *5–6 (Fed. Cir., June 29, 2011) ("*JTEKT Corp.*"); *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 13711373 (Fed. Cir. 2011) ("*Dongbu*").[3] On the lack of a satisfactory explanation for the inconsistent interpretations, the Court of Appeals held in both cases that the judgments of the Court of International Trade affirming the use of zeroing in the respective administrative reviews must be set aside. *JTEKT Corp*., 2011 WL 2557640, at *6; *Dongbu*, 635 F.3d at 1373.

[2] Asahi Seiko Co., Ltd. ("Asahi") also included in its complaint a claim challenging the use of zeroing. Asahi Compl. ¶¶ 12–16. Asahi declined to raise any issue as to zeroing in its Rule 56.2 motion for judgment upon the agency record but then attempted to raise the zeroing issue in its reply brief. Mem. in Supp. of a Mot. for J. on the Agency R. Submitted by Pl. Asahi Seiko Co., Ltd., Pursuant to Rule 56.2 of the Rules of the U.S. Ct. of Int'l Trade; Reply Br. in Supp. of the Mot. for J. on the Agency R. Submitted by Pl. Asahi Seiko Co., Ltd., Pursuant to Rule 56.2 of the Rules of the U.S. Ct. of Int'l Trade 5–6. In *JTEKT Corp. v. United States*, 35 CIT __, __, 768 F. Supp. 2d 1333, 1341 (2011), the court ruled that no motion for judgment on the agency record is before the court on the zeroing claim in Asahi's complaint and that Asahi's zeroing claim has been abandoned.

[3] *JTEKT Corp. v. United States,* Court No. 2010–1516, 2011 WL 2557640 (Fed. Cir., June 29, 2011) was issued after defendant filed its motion for expedited reconsideration on June 2, 2011.

In *Dongbu*, the Court of Appeals reasoned that "[a]lthough 19 U.S.C. § 1677(35) is ambiguous with respect to zeroing and Commerce plays an important role in resolving this gap in the statute, Commerce's discretion is not absolute" and that "Commerce must provide an explanation for why the statutory language supports its inconsistent interpretation." *Dongbu*, 635 F.3d at 1372. In *JTEKT Corp.*, the Court of Appeals directed that "in order to satisfy the requirement set out in *Dongbu*, Commerce must explain why these (or other) differences between the two phases [administrative reviews and investigations] make it reasonable to continue zeroing in one phase, but not the other." *JTEKT Corp.*, 2011 WL 2557640, at *6.

In *JTEKT*, the court concluded that a remand was appropriate in this case to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu*. *JTEKT*, 35 CIT at __, 768 F. Supp. 2d at 1342–43. The court directed Commerce to reconsider and modify its decision to apply zeroing or, alternatively, to set forth an explanation of how the language of the statute as applied to the zeroing issue permissibly may be construed in one way with respect to investigations and the opposite way with respect to administrative reviews. *Id.* at __, 768 F. Supp. 2d at 1364.

In support of its reconsideration motion, defendant argues that the court's Opinion and Order in *JTEKT*, as it relates to zeroing, is inconsistent with binding precedent of Court of Appeals. Def.'s Mot. 2. Defendant cites specifically *SKF*, 630 F.3d 1365, which "affirmed Commerce's explanation of zeroing in the very same issues and decision memorandum at issue in this case." *Id*. Defendant also argues that the decision of the Court of Appeals in *Dongbu* distinguished prior cases based on a lack of a satisfactory explanation, which defendant characterizes as circumstances "not present in this case." Def.'s Mot. 7. In its reply, which the court accepts for filing, defendant argues that *SKF*, not *Dongbu*, is controlling as precedent in this case because "the Federal Circuit has not overturned *SKF en banc*." Def.'s Reply in Supp. of its Mot. for Reconsideration or Relief from J. 2 (Def.'s Reply") (citing *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005)). The court disagrees with defendant's arguments.

Defendant's premise that the Court of Appeals affirmed the use of zeroing in *SKF* based on "the very same issues and decisions memorandum" that is at issue in this case, Def.'s Mot. 2, is misguided. As defendant acknowledges, Def.'s Mot. 6, the holding in *SKF* pertains to the administrative reviews of the antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy and the United Kingdom, which are different reviews than the one at issue in this case. The Court of Appeals, therefore, has not issued a decision on

the use of zeroing in the administrative review that is the subject of this litigation, which is the review of the antidumping duty order on ball bearings and parts thereof from Japan. More to the point, defendant overlooks that in *SKF*, the Court of Appeals did not uphold Commerce's use of zeroing based on a statutory construction set forth in the issues and decisions memorandum defendant identifies. Instead, the appellate court based its decision, in part, on its prior holdings upholding zeroing, including in particular *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007). *SKF*, 630 F.3d at 1375 ("Even after Commerce changed its policy with respect to original investigations, we have held that Commerce's application of zeroing to administrative reviews is not inconsistent with the statute." (citing *Corus Staal BV*, 502 F.3d at 1375)). The other reason the Court of Appeals gave in *SKF* for upholding the use of zeroing was its having held in the past that "WTO [World Trade Organization] decisions do not change United States law unless implemented pursuant to an express statutory scheme." *Id.* (citing *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007) and *Corus Staal BV v. United States*, 395 F.3d 1343, 1349 (Fed. Cir. 2005)).

The court also finds unconvincing defendant's argument that *Dongbu* presented circumstances not present in this case, namely, the lack of any explanation for the decision to apply zeroing. *See* Def.'s Mot. 7 (arguing that "in *Dongbu*, Commerce did not address the subject of zeroing in its final issues and decision memorandum at all, let alone discuss any differences between investigations and administrative reviews that might support its inconsistent interpretation of 19 U.S.C. § 1677(35) in each type of proceeding."). The distinction defendant draws is not meaningful. In this case, the explanation Commerce included in the issues and decisions memorandum associated with the Final Results, although addressing the arguments respondents raised against zeroing (including arguments based on the World Trade Organization decisions), does not provide the type of statutory construction-based analysis the Court of Appeals contemplated in *Dongbu*. *See Dongbu*, 635 F.3d at 1372; *Decision Mem*. 8–10. The only reference to a statutory construction argument in the zeroing analysis is the Department's conclusory statement, made in response to NSK's argument that zeroing produces inaccuracy in a weighted-average dumping margin, that "[b]y excluding such negative comparison results in this case, the Department is calculating the weighted-average dumping margin accurately in accordance with its reasonable interpretation of how that term [*i.e.*, the term "dumping margin"] is defined in the statute." *Decision Mem*. 9–10 (citing

Corus Staal BV, 395 F.3d at 1347; *Timken Co. v. United States*, 354 F.3d 1334,1341–42 (Fed. Cir. 2004)).

Defendant's contention that the court's remand order in *JTEKT* was unlawful because "the Federal Circuit has not overturned *SKF en banc*," Def.'s Reply 2, also fails to convince the court that the remand ordered in *JTEKT* was unlawful. Rather than conclude that the decision to apply zeroing to the review at issue in this case either was, or was not, permissible under the language of 19 U.S.C. § 1677(35), the court in *JTEKT* ordered Commerce to reconsider that decision and either to modify it or to provide the explanation sought by the Court of Appeals in *Dongbu*. *JTEKT*, 35 CIT at __, 768 F. Supp. 2d at 1364. *SKF*, which did not reach the statutory construction issue addressed in *Dongbu* and *JTEKT Corp*., does not compel a conclusion that the court erred in issuing that remand order. In addressing the zeroing issue in *Dongbu*, the Court of Appeals applied the two-step analysis outlined in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("*Chevron*"). *See Dongbu*, 635 F.3d at 1369. Drawing a distinction with its prior holdings, the Court of Appeals clarified that "while we have repeatedly upheld Commerce's use of zeroing in administrative reviews, we have never considered the reasonableness of interpreting 19 U.S.C. § 1677(35) in different ways depending on whether the proceeding is an investigation or an administrative review." *Id.* at 1370. Pointing to the fact that "Commerce is no longer using a consistent interpretation" of 19 U.S.C. § 1677(35), the Court of Appeals reasoned in *Dongbu* that "we are not bound by the prior cases and apply the *Chevron* step two analysis anew." *Id.* at 1371. Additionally, the Court of Appeals subsequently considered itself bound by its holding in *Dongbu*, concluding in *JTEKT Corp*. that "*Dongbu* requires us to vacate and remand" based on a conclusion that the explanation offered by Commerce was inadequate under step two of a *Chevron* analysis. *JTEKT Corp.*, 2011 WL 2557640, at *6. The court's modifying its decision as defendant urges would not accord with the reasoning the Court of Appeals recently employed in deciding the zeroing question presented by *JTEKT Corp*.

Upon considering all of defendant's arguments, the court concludes that it did not err in ordering Commerce to reconsider the decision to adhere to a zeroing methodology in the Final Results and also ordering Commerce either to modify that decision or provide a new explanation as required by the Court of Appeals in *Dongbu.* Therefore, the court will deny defendant's motion for expedited reconsideration.

B. Motion for an Extension of Time to File the Remand Redetermination

In *JTEKT*, the court ordered the Department to file its remand redetermination within ninety days of the court's Opinion and Order, and as a result the remand redetermination currently is due on August 3, 2011. *JTEKT*, 35 CIT at __, 768 F. Supp. 2d at 1364. Defendant has moved for an extension of time to file its remand redetermination because of its submission of a motion for reconsideration and because it desires additional time so that it may seek parties' comments on a draft version of the remand redetermination and address parties' comments in its final remand redetermination. Def.'s Mot. for Time Extension 2–3. Defendant seeks an extension until sixty days from the date the court issues a decision on the reconsideration motion. *Id*. at 2. Because the original due date for filing of the remand redetermination allowed Commerce a full ninety days, the court considers an additional sixty days to be more than sufficient. However, considering all circumstances, including in particular that no party now objects to the extension request, the court will grant defendant's motion for an extension of time.

IV. CONCLUSION

For the reasons discussed in the foregoing, the court, upon review of defendant's motion for reconsideration, determines that its decision in *JTEKT* to order a remand on the zeroing issue was not in error. Therefore, the court denies the motion for reconsideration but will allow an extension of time for the filing of the remand redetermination in these proceedings.

ORDER

Upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that defendant's motion for leave to file a reply in support of its motion for expedited reconsideration or relief from judgment, as filed July 5, 2011, be, and hereby is, GRANTED; it is further

ORDERED that defendant's motion for expedited reconsideration or relief from judgment, as filed June 2, 2011, be, and hereby is, DENIED; and it is further

ORDERED that defendant's motion for enlargement of time to file a remand redetermination, as filed July 11, 2011, be, and hereby is, GRANTED, and that Commerce shall have sixty (60) days from the date of this Opinion and Order in which to file its redetermination upon remand ("Second Remand Redetermination") in response to the

Opinion and Order in *JTEKT Corp. v. United States*, 35 CIT __, 768 F. Supp. 2d 1333 (2011).
Dated: July 20, 2011
New York, New York

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

Slip Op. 11–87

ATAR, S.R.L., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA CO., et al., Deft.-Ints.

Before: Richard K. Eaton, Judge
Court No. 08–00004

[Plaintiff's motion for judgment on the agency record is denied and the United States Department of Commerce's Final Results, as amended by the Final Remand Determination, are sustained.]

Dated: July 22, 2011

Riggle & Craven (*David J. Craven*), for plaintiff Atar, S.r.L.

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

Kelley Drye & Warren, LLP (*Paul C. Rosenthal* and *David C. Smith*), for defendant-intervenors American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company.

OPINION

Eaton, Judge:

INTRODUCTION

Before the court is plaintiff's motion for judgment on the agency record, challenging the United States Department of Commerce's (the "Department" or "Commerce") final results of the tenth administrative review of the antidumping duty order on pasta from Italy, covering the period of review ("POR") July 1, 2005 through June 30, 2006, as amended by a voluntary remand. *See* Certain Pasta from Italy, 72 Fed. Reg. 70,298 (Dep't of Commerce Dec. 11, 2007) (notice of final results of the tenth administrative review and partial rescission of review) (the "Final Results") and the accompanying Issues and Decision Memorandum (Dep't of Commerce Dec. 4, 2007) ("Issues & Dec. Mem."); Final Remand Determination (Dep't of Commerce May 6, 2010) (the "Remand Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii). For

the reasons set forth below, plaintiff Atar, S.r.L.'s ("Atar") motion for judgment on the agency record is denied, and the Final Results, as amended by the Remand Results, are sustained.

BACKGROUND

The principal issue before the court is plaintiff's status as a producer by tolling. In a tolling arrangement, a producer employs a subcontractor that provides processing services for, or material for incorporation into, the merchandise that is sold by the producer. *See United States v. Eurodif S. A.*, 129 S. Ct. 878, 885 (2009). Here, the question is whether Atar had a sufficient role in the manufacture and sale of the pasta for the company to be a producer for the purposes of the unfair trade laws. Atar's status as a producer is important because it is determinative of the antidumping duty rate assigned to the entries of pasta.

On January 15, 2009, Atar moved for judgment on the agency record pursuant to USCIT Rule 56.2, contending that in the Final Results, the Department wrongfully: (1) determined that Atar was not a producer by tolling; (2) rescinded the administrative review with respect to Atar; (3) issued instructions to liquidate entries resold by Atar at the "all others" rate; and (4) accepted American Italian Pasta's uncertified submission relating to Atar's questionnaire responses. Mot. For J. on the Agency Rec. Submitted Pursuant to R. 56.2 of the Rules of the USCIT ("Pl.'s Mot.") 2—4.

Defendant-intervenors American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company ("defendant-intervenors") opposed the motion and fully supported the Final Results. Commerce, however, asked for a voluntary remand to reconsider its decision to rescind the administrative review and to reexamine its conclusions with respect to the rate at which the entries would be liquidated. The court granted the voluntary remand on November 10, 2009, and Commerce filed the Remand Results on May 6, 2010. *See Atar, S.r.L. v. United States*, Court No. 08–00004, Order at 1 (Nov. 10, 2009) (granting "defendant's request for a full voluntary remand").

In the Remand Results, Commerce reversed its initial determination to rescind the review with respect to Atar, a reversal supported by both plaintiff and defendant-intervenors. The Department also reviewed the appropriate assessment rate for Atar's entries, and,

based on its reseller policy,[1] decided to use the duty rates applicable to Atar's subcontractors, rather than applying the "all others" rate to the entries.

Following the Remand Results, Atar (1) continues to argue that the court should find it was properly a producer by tolling, and (2) renews its objection to American Italian Pasta's submission relating to Atar's questionnaire responses. For their part, defendant-intervenors oppose the use of the reseller policy to set rates for the entries, contending that Commerce should have invoked its "facts available" authority and applied the "all others" rate to Atar's entries.

STANDARD OF REVIEW

The court must uphold a final determination by the Department in an antidumping proceeding 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. Atar's Status As a Producer by Tolling

A. Atar Argues that Past Practice Requires Commerce to Continue to Find It Is a Producer by Tolling

As plaintiff sees it, its history of producing pasta is one that reflects its status as a producer by tolling, a status accepted by Commerce as valid in a previous new shipper review and an administrative review. *See* Certain Pasta form Italy, 70 Fed. Reg. 30,083 (Dep't of Commerce May 25, 2005) (notice of final results of new shipper review of the antidumping duty order); Certain Pasta from Italy, 72 Fed. Reg. 7,011 (Dep't of Commerce Feb. 14, 2007) (notice of final results of the ninth administrative review of the antidumping duty order); *see also* Rep. of Pl. Atar, S.r.L. ("Pl.'s Rep.") 4–5 ("[B]y the time of THIS administrative review, Atar had been involved in the production of Pasta by means of tolling for more than a year. Atar had already been reviewed in a new shipper review and a regular administrative review. The history of THIS administrative review is that it reflects the continued tolling of a company which had been previously [] tolling and [whose] tolling had been accepted by the United States as valid.").

In addition to pointing to its specific history of having been found to be a producer by tolling, Atar points to the Department's previous

[1] Commerce relies on the reseller policy when producers, in this case Atar's subcontractors, have not made the final sale themselves, but are aware that their goods will eventually be sold in the United States. *See Parkdale Int'l, Ltd. v. United States*, 31 CIT 1229, 1231, 508 F. Supp. 2d 1338, 1343 (2007).

history in another pasta determination to make its arguments. Atar relies on what it characterizes as "the specific tests as to what constitutes a producer by tolling" found in the administrative decisions of Certain Pasta from Italy, 63 Fed. Reg. 53,641 (Dep't of Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review) and Certain Pasta from Italy, 64 Fed. Reg. 852 (Dep't of Commerce Jan. 6, 1999) (final results of new shipper antidumping duty administrative review) (collectively, "*Corex*").[2] Pl.'s Rep. 10. In doing so, the company contends that the determination relied upon by Commerce, Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. 32,810 (Dep't of Commerce June 16, 1998) (final results of antidumping duty administrative review) ("*PVA*"), is not pertinent. Pl.'s Rep. 10–11.

B. Commerce Distinguishes Atar from Past Practice

The Department claims that its determination that Atar was not a producer by tolling flows from its "totality of the circumstances" approach that Commerce suggests the United States Supreme Court endorsed by its focus on the "economic reality" of tolling contracts in *United States v. Eurodif S. A.*, 129 S. Ct. 878, 887 (2009). Def.'s Con. Supp. Mem. in Opp. to Pl.'s R. 56.2 Mot. for J. Upon the Agency Rec. and Resp. to Def.-Ints.' Comm. Upon the Remand Redetermination ("Def.'s Mem.") 9. The agency explains that the approach allowed it to examine the actual effect of Atar's tolling agreements, and not just the legal formalities employed by the parties. *See* Def.'s Mem. 9 ("Commerce's approach focuses upon the economic reality rather than the labels given within the tolling contracts.").

Specifically, Commerce considered: (1) the history of Atar's business relationships with the subcontractors; (2) the timing of Atar's decision to begin a toll production operation; (3) the close and continuing relationships between the U.S. importer and the pasta producers; (4) Atar's purchases of inputs from these producers; and (5) the claimed lack of meaningful value added to the production process by Atar, considering the overall arrangement through which the purchase and sale of pasta occurred. Def.'s Mem. 10.

[2] The Department argues that the court should disregard Atar's reliance on *Corex* in this litigation because "Atar did not raise any arguments regarding Commerce's examination of its circumstances based upon [*PVA*] in its case brief during the administrative proceeding." Def.'s Con. Supp. Mem. in Opp. toPl.'s R. 56.2 Mot. for J. Upon the Agency Rec. and Resp. to Def.-Ints.' Comm. Upon the Remand Redetermination 18. The court, however, agrees with Atar that its case brief "addressed the issues raised by *PVA* in its discussion of *Corex*." Pl.'s Rep. 12. Although Atar may not have cited the *PVA* case below, it nonetheless raised all its relevant arguments there, and preserved them for use again here.

First, the Department sets out Atar's business history, and the continuing business relationships of its subcontractors, to support its determination that Atar was not a producer of pasta. According to Commerce, Atar was originally founded as an electrical engineering firm, changed ownership multiple times, and is currently a trading company, selling pasta and various non-scope products. Def.'s Mem. 10–11. The company's tolling operation began shortly after some Italian pasta producers received high antidumping rates during the sixth administrative review of pasta from Italy for the POR July 1, 2001 through June 30, 2002. *See PAM, S.p.A. v. United States*, 582 F.3d 1336 (Fed. Cir. 2009) (affirming 45.49 percent adverse facts available rate).

In late 2003 or early 2004, an importer, adversely affected because its producers had received these high rates, approached Atar. Def.'s Mem. 12. As a result of the approach, the two companies entered into an agreement whereby the importer purchased the same brands of pasta from Atar that it had previously purchased from, what were now, Atar's subcontractors. Def.'s Mem. 12. Because Atar was a new shipper, the importer was able to secure the 11.26 percent "all others" cash deposit rate for its U.S. imports. Def.'s Mem. 12. This rate was lower than the rates the subcontractors would have received.

According to Commerce, little else changed as a result of the agreement. Thus, the same pasta factories manufactured the same brands of pasta and shipped them directly to the same U.S. importer. Def.'s Mem. 12. The Department further asserts that Atar took on little responsibility in this new arrangement. That is, it did not maintain a sales force in Italy or the United States, engage in marketing or advertising efforts, pay sales calls to customers, or provide any product support or product development services in any of its markets. Def.'s Mem. 14–15. Indeed, according to Commerce, Atar did not know which customers owned the various brands of pasta it purportedly produced, nor did it play any role in price negotiations or sales beyond issuing invoices and receiving payments. *See* Issues & Dec. Mem. at 7. Atar does not meaningfully quarrel with these findings.

Next, the Department claims that Atar did not add any significant value to the production process. As to the pasta ingredients, Commerce cites to record evidence it claims establishes that, in many instances, the subcontractors used ingredients from their inventories to produce the pasta. Def.'s Mem. 13. In this regard, the Department cites to Atar's questionnaire response that "the toll producer would be responsible for the shortage" if it did not receive all of the semolina Atar had ordered for it to process. Def.'s Mem. 20 (quoting Antidumping Supplement Questionnaire Sections A and D Response of Atar

S.r.L. (Apr. 12, 2007) ("Apr. 12, 2007 Resp.") 5). For Commerce, this indicates that "whatever value Atar purportedly contributed to the production process by purchasing semolina was not reflected in the total price Atar paid for pasta." Def.'s Mem. 14. In other words, Atar's purchase of semolina, or failure to purchase, did not affect the price it paid its subcontractors for the pasta. In addition, although Atar apparently purchased the bulk of the semolina, it purchased it from the subcontractors themselves and their suppliers, and "failed to demonstrate that it maintained control over this input." Def.'s Mem. 13. According to the Department, this is demonstrated by Atar's inability to match up the amount of claimed semolina purchases with the amount of finished product. Def.'s Mem. 21 (citing Antidumping 2nd Supplemental Questionnaire Sections D Response of Atar S.r.L. (May 25, 2007) Exhibit SSD-3) ("Ex. SSD-3"). Atar disputes these findings, insisting that record evidence supports its claim to having purchased the pasta inputs. Pl.'s Rep. 10.

Finally, the Department claims that no evidence exists on the record that Atar conducted independent product testing, independently made arrangements for warehousing, performed quality control, received deliveries of inputs for the finished pasta, oversaw the state of the products, or prepared the pasta at any phase for delivery to the customers. Issues & Dec. Mem. at 7. Atar does not challenge some of these conclusions as a matter of fact, but rather questions the relevance of any of these activities to its status as a producer by tolling. *See* Pl.'s Mot 29 ("[S]uch analysis does not include an evaluation as to what a producer by tolling would do.").

Taken altogether, then, Commerce concludes the "totality of the circumstances" indicates that Atar had no significant role in the production or selling of the pasta entries. *See* Issues & Dec. Mem. at 7 ("Based upon our analysis of the totality of circumstances, we continue to find that Atar is not properly treated as a toll producer.").

Looking at its previous tolling determinations, the Department believes Atar's circumstances are most like those of the respondent Perry Chemical Corporation ("Perry") in *PVA*. 63 Fed. Reg. at 32,811. Perry was a U.S. importer and reseller of polyvinyl alcohol and, like Atar, entered into a production arrangement after a producer was found to be dumping and assigned a high antidumping margin. Def.'s Mem. 16. Prior to the imposition of this high dumping margin, Perry was not in the business of producing or manufacturing any chemical. Def.'s Mem. 16. After entering into, what it characterized as, a tolling agreement, Perry purchased the major production input through its purported subcontractor's affiliate, and the subcontractor retained possession and control of this input. Def.'s Mem. 16.

According to Commerce, the primary benefit of the tolling arrangements in *PVA* and this case is identical: it "allowed importers to purchase the same products made from the same factories without having to pay the cash deposits applicable to the producers." Def.'s Mem. 17. Based on these facts, Commerce concluded that Perry was not a producer by tolling. *See PVA*, 63 Fed. Reg. at 32,813 ("We find the mere rearrangement of Perry's contractual relationship with [its subcontractor] insufficient to establish Perry as a producer . . . ."). Thus, the Department maintains that, here, it has acted in a manner consistent with its previous methodology for determining the validity of tolling arrangements, and insists that Atar is being treated in a manner consistent with its previous determinations.

The Department further argues that plaintiff's heavy reliance on the grant of toll producer status in *Corex* to be mistaken. The *Corex* administrative review involved another Italian pasta exporter that the Department ultimately found to be a producer by tolling, based on evidence that it purchased all of the pasta inputs, paid the subcontractor a processing fee, maintained ownership at all times of the inputs as well as the final product, conducted product testing, and marketed the pasta. *Corex*, 63 Fed. Reg. at 53,642. The Department claims that Atar does not meet all of the material factors set forth in *Corex*. Def.'s Mem. 19–20. In particular, Commerce stresses that, unlike the *Corex* producer, Atar: (1) did not purchase all the pasta ingredients; (2) did not maintain the ownership of inputs from purchase to the sale of the subject merchandise; and (3) conceded that it failed to conduct independent product testing and marketing research. Def.'s Mem. 20–21.

Finally, the Department maintains that its previous determinations finding that Atar was a producer by tolling provide no support for the company's contention that it is a producer. First, as to the new shipper review, "Atar was the only participating party and its tolling arrangement was not challenged." Def.'s Mem. 17. With respect to the one previous administrative review in which Atar was a participant (the ninth), Commerce insists, that there, it was unable to rule on the tolling arrangements because the record contained insufficient evidence. Def.'s Mem. 17–18 (citing Issues and Decisions for the Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part (Dep't of Commerce Feb. 5, 2007) ("Ninth Review Issues & Dec. Mem.") at Comm. 1 ("[T]he Department has serious concerns with respect to the overall nature of Atar's operation and its claim to be a producer of pasta under the tolling regulation. While in the new shipper review of Atar and in this current administrative review the

Department has accepted Atar's claim to be the producer of subject merchandise and foreign like product under the tolling regulation, after having reviewed the record of this case and Department precedent cited below, we are concerned with respect to this conclusion.")).

C. Substantial Evidence Supports Commerce's Determination that Atar is Not a Producer by Tolling

At the heart of plaintiff's challenge to Commerce's determination is, what it sees as, inconsistent treatment by the Department of (1) the same facts that were before it in prior reviews of Atar, and (2) the same facts in determinations relating to other companies. As the Federal Circuit recently reiterated, "an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011) (citation omitted). The court, however, is not convinced that Commerce has acted arbitrarily here.

It is well-established that "[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change." *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)). As long as an adequate explanation is provided, "Commerce is entitled to change its views," even if it is "changing [a] longstanding policy only in the present case." *Saha Thai Steel Pipe (Pub.) Co. Ltd. v. United States*, 635 F.3d 1335, 1342, 1341 (Fed. Cir. 2011).

Here, Commerce has reached a different conclusion as to Atar's producer status from the new shipper review and previous administrative review. The Department, however, explains that in the new shipper review "Atar was the only participating party and its tolling arrangement was not challenged," meaning "Commerce had no reason to question Atar's tolling arrangement upon the basis of the record." Def.'s Mem. 17. Put another way, a challenge to Atar's producer status was not before it when Commerce made its new shipper determination, and so the Department did not question Atar's assertion of that status.

As to the previous administrative review, Commerce states that it "was unable to rule upon petitioners' challenge to Atar's toll producer status because the record contained insufficient evidence regarding this issue." Def.'s Mem. 17. Nonetheless, despite lacking "sufficient information to conduct a full analysis of Atar's tolling operation" in that review, Commerce stated that it "intend[ed] to fully pursue this issue and analysis in the subsequent, ongoing review . . . ." Ninth Review Issues & Dec. Mem. at Comm. 1. In other words, the Depart-

ment concluded that it had insufficient information to reverse its position in the ninth review, but stated that it intended to make a record sufficient to make a determination in the next succeeding review, which it has now done.

Thus, in both the new shipper review and the ninth administrative review, it is apparent that Commerce did not make a determination based on all the facts concerning the various questions that were presented relating to Atar's status as a producer by tolling. Commerce now has made its determination based on a fully-developed record. That being the case, the court holds that Commerce has provided sufficient reasons for making its new finding, and that the company cannot rely on these previous reviews to preclude a change in Commerce's determination. *See Nakornthai Strip Mill Pub. Co. Ltd. v. United States*, 32 CIT __, __, 587 F. Supp. 2d 1303, 1308 (2008) (finding Commerce had "adequately distinguished and reasonably explained its departure" from previous case when agency "demonstrated several key distinguishing facts between the two cases").

Moreover, Commerce has marshalled sufficient evidence from Atar's questionnaire responses to distinguish it from the producer by tolling in *Corex.* In the original Federal Register notice for *Corex*, Commerce noted that the company "purchase[d] all of the inputs," "maintain[ed] ownership at all times of the inputs as well as the final product," and "conduct[ed] independent product testing and marketing research," facts that led Commerce to determine that Corex was the producer of the tolled merchandise. *Corex*, 63 Fed. Reg. at 53,642; *see also Corex*, 64 Fed. Reg. at 852 (stating that the "final results do not differ from the preliminary results").

Accordingly, Commerce did not confront the same factual situation in *Corex* as in this case. "[U]nlike *Corex*, Atar did not maintain ownership of the inputs from the time of purchase to the time of sale to United States customers. Specifically, Atar was unable to connect the purchase of inputs to the corresponding sale of the finished product." Def.'s Mem. 20–21; *see, e.g.*, Ex. SSD-3 (illustrating that Atar's ordered and delivered quantities of semolina failed to correspond to the ordered and delivered quantities of pasta). "Additionally, Atar conceded that the pasta factories commingled the semolina purchased by Atar with their own semolina." Def.'s Mem. 21 (citing Pl.'s Mot. 21). While Atar disputes some of this evidence, an examination of the record does not support the conclusion that Atar maintained ownership of the semolina at all times. *See, e.g.*, Response of Atar S.r.L. to Section D Antidumping Questionnaire (Nov. 13, 2006) 3 (describing that raw material inputs are "shipped by the vendors directly to the processors' facilities and maintained by the processors

in inventory" before "the pasta is shipped directly from the unaffiliated processor to Atar's customers").

In addition, Atar noted in its April 12, 2007 response that "the toll producer would be responsible for [a] shortage" if it did not receive all of the semolina Atar had ordered for it to process. Apr. 12, 2007 Resp. 5. This response indicates that Atar had not and did not necessarily intend to purchase all of the semolina its subcontractors used to make the pasta. The agreements show that "the factories bore the risk of the short fall or loss of raw materials and the finished product." Def.'s Mem. 20 (citing Apr. 12, 2007 Resp. 4–5 (noting that the factory was responsible for shortfalls in the inputs).

Finally, Atar conceded that it did not conduct product testing or marketing research, stating instead that such activities are "wholly unnecessary" because "pasta is a mature product." Pl.'s Mot. 27. As the Department notes, though, the producer in *Corex* was selling the same product, and its product testing and marketing research were significant to Commerce's determination. Def.'s Mem. 21–22. Thus, Commerce concluded that one of the factors that was important to its finding that Corex was a producer by tolling was missing here.

Commerce, however, did support with substantial evidence its finding that the facts in Atar's arrangements were strikingly similar to those addressed in *PVA*. "[S]imilar to the respondent in *PVA*, Atar, Atar's subcontractors, and their customers merely restructured their relationship to avoid payment of antidumping duties." Issues & Dec. Mem. at 8. Atar, like Perry, entered a new market after Commerce assigned producers high antidumping duty rates. Additionally, Atar purchased its major production input through its subcontractors' previous vendors, and the subcontractors maintained control over the input. Putting these factors together, then, it was reasonable for Commerce to conclude that "Atar is more similar to the respondent in *PVA* where the Department determined that the respondent was not a toll manufacturer, rather than to the respondent in *Corex*." Issues & Dec. Mem. at 9.

Indeed, in addition to the differences between this case and *Corex* and the similarities to *PVA*, Commerce had a variety of evidence to support its conclusion that Atar was not a producer by tolling. For instance, (1) Atar's decision to enter into the pasta market directly after Commerce imposed a high antidumping duty rate on its subcontractors, a move that brought a much lower cash deposit rate for the entries as a result of Atar's new shipper status, (2) the company's relationship with the subcontractors and its purchase of inputs from them, (3) its failure to contribute any meaningful value to the production process because it did not purchase or control all the inputs,

(4) its ignorance as to which customers owned the various brands of pasta produced by the subcontractors, and (5) Atar's lack of any sales, price negotiating, marketing, or product development efforts on behalf of its new venture. Moreover, the continuing relationships between the subcontractors and the U.S. importer, before and after tolling allegedly began, indicate the true nature of the business arrangements, i.e., the same factories produced the same brands of pasta and shipped them directly to the same importer.

As noted, Commerce believes that these facts make up a totality of the circumstances that lead to the conclusion that Atar was not a producer by tolling. The court agrees that, taken as a whole, Commerce has supplied the substantial evidence necessary to sustain its determination that Atar was not a producer by tolling. Notably, the Department adequately explained its departure from its conclusions in earlier reviews, demonstrated that it had acted in a manner consistent with its reviews of other claimed producers by tolling, and highlighted evidence indicating Atar's attenuated connection with the production and sales of the entries.

II. Applicable Duty Rates

A. Defendant-Intervenors Insist Circumstances Demand Use of Commerce's "Facts Available" Authority

While Atar takes issue with Commerce's tolling findings, defendant-intervenors challenge Commerce's application of its reseller policy to Atar's subcontractors to determine the various applicable duty rates for Atar's entries. Based on this policy, Commerce applied to Atar's entries previously calculated rates for the subcontractors that produced the pasta. *See* Remand Results at 13 ("In light of our findings during the proceeding that entities other than Atar were producers of the subject pasta and had knowledge that pasta was destined for the United States, our task is to determine an appropriate rate for these entries.").

Defendant-intervenors describe this change as affording Atar "the opportunity to significantly lower its dumping liability, by providing information it withheld during the original administrative proceeding." Deft.-Ints.' Comm. In Opp. to Portions of Commerce's May 5, 2010 Final Remand Det. ("Deft.-Ints.' Comm.") 3. Thus, defendant-intervenors insist that Atar was given an unlawful opportunity to put information on the record relating to the subcontractors' rates. According to defendant-intervenors, Atar withheld this information while it pursued the "charade" that it was a manufacturer under a tolling operation it had arranged with the actual producers. Deft.-

Ints.' Comm. 4. Therefore, they ask the court to reject the Remand Results insofar as they apply producer-specific cash deposit rates to some of Atar's entries, and direct Commerce to continue to apply the "all others" rate to all of Atar's entries. Deft.-Ints.' Comm. 4.

In making their argument, defendant-intervenors rely on Commerce's "facts available" authority,[3] arguing that it was "designed specifically to allow the agency to address situations such as the one at bar." Deft.-Ints.' Comm. 6. According to defendant-intervenors, in administering its reseller policy, Commerce typically "would have sent its questionnaires to the actual producers." Deft.-Ints.' Comm. 4. Here, however, the questionnaires were sent to Atar, not the subcontractors, so the record contained no information as to the production costs and sales prices of the actual manufacturers, information necessary for the reseller policy to be used. Saying the statute directs Commerce to use "facts available" when needed information is not available, defendant-intervenors insist that Commerce should have "filled the gaps" resulting from the missing information by using facts otherwise available on the original record. Deft.-Ints.' Comm. 5. For defendant-intervenors, by allowing Atar to first make its claim that it was a producer by tolling, and only having failed to make this case, then allowing it to provide information relating to its subcontractors, the Department gave the company a second chance at a lower rate.

Ultimately, defendant-intervenors *see* the findings resulting from the Remand Results as serving to "undermine all applicable statutory and regulatory deadlines by permitting Atar the opportunity to submit actual producer information on an entry-by-entry basis, when the company claimed such information was not available—and more importantly failed to provide it—during the course of the administrative review." Deft.-Ints.' Comm. 7–8. For defendant-intervenors, Atar's behavior places the company squarely within the facts available provisions of the statute. *See* Deft.-Ints.' Comm. 6 ("[T]he agency strives to wrap its [invocation of the reseller policy] in the cloak of accuracy, while assiduously avoiding invocation of its statutory "facts available" authority, which was designed specifically to allow the agency to address situations such as the one at bar (where necessary information is missing from the record).").

B. Commerce Relies on Reseller Policy

The Department argues that its modification on remand to producer-specific duty rates is supported by substantial evidence and

[3] *See* 19 U.S.C. § 1677e(a) ("If . . . necessary information is not available on the record, . . . the administering authority . . . shall . . . use the facts otherwise available in reaching the applicable determination under this subtitle.").

in accordance with law. Def.'s Mem. 23. Commerce states that, under its reseller policy, if a producer is aware of the destination of a sale by a reseller, the Department will find that the producer set the price of sale into the United States and will assess the antidumping duty based on that producer's rate. *See Parkdale Int'l, Ltd. v. United States*, 31 CIT 1229, 1231, 508 F. Supp. 2d 1338, 1343 (2007) ("By identifying the party that had knowledge of the destination of the subject merchandise, Commerce determines which entity was the 'price discriminator' that engaged in the dumping, and hence which company's dumping margin should apply to a given entry.") (citation omitted). In other words, on remand Commerce looked behind Atar's claims that it was a producer by tolling, found them wanting, and then, using its reseller policy, applied rates previously calculated for the subcontractors Atar hired.

Commerce argues that it decided to apply producer-specific rates to the pasta entries because the subcontractors were the real producers of the pasta and had knowledge that the goods were destined for the United States. Def.'s Mem. 23. Responding to defendant-intervenors' insistence that Commerce should have assessed duties upon the pasta entries at the "all others" rate as "facts available," the Department answers that there was no factual gap in the record to fill. Commerce claims that it obtained all necessary information on remand to assess producer-specific duty rates. Def.'s Mem. 24–25. The Department further states that it has "broad discretion to determine the extent of investigation and the information it needs." Def.'s Mem. 25 (citing *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394–95 (Fed. Cir. 1997); *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992)). , 978 F.2d 1232, 1238 (Fed. Cir. 1992)).

C. Commerce Did Not Err in Declining to Invoke Its "Facts Available" Authority

The relevant section of the antidumping duty statute, 19 U.S.C. § 1677e, governs Commerce's decision to use facts otherwise available. Importantly, "[t]he use of facts otherwise available . . . is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record." *Zhejiang Dunan Hetian Metal Co., Ltd. v. United States*, No. 2010–1367, slip op. at 26 (Fed. Cir. June 22, 2011).

Defendant-intervenors insist that the use of facts available is warranted here because the "necessary information" to use the Department's reseller policy "is missing from the record." Deft.-Ints.' Comm. 5. In other words, they assert that Commerce exceeded its discretion by obtaining additional information during a voluntary remand, in-

stead of using the existing record. In *PPG Industries, Inc. v. United States*, 978 F.2d 1232 (Fed. Cir. 1992) ("*PPG*"), however, the Federal Circuit held that Commerce has the "discretionary authority to determine the extent of investigation and information it needs." *PPG*, 978 F.2d at 1238; *see also id.* at 1239 ("[F]or this court to reverse and remand for further investigation, PPG would have to show that the ITA abused its discretion in not conducting further investigation.").

The court finds that Commerce did not err in declining to invoke its "facts available" authority. Having found that Atar was not a producer by tolling, the Department was confronted with the question of what rate to apply to the entries. Commerce examined this question in the context of a full voluntary remand during which it was within its authority to put new evidence on the record. *See Union Camp Corp. v. United States*, 23 CIT 264, 282, 53 F. Supp. 2d 1310, 1327 (1999) ("[I]t is Commerce, and not this Court, which is in the best position to initially decide whether it should consider new evidence [on remand]"). In addition, the Department's duty on remand continued to be to set the most accurate rate for the entries. *See U.S. Steel Corp. v. United States*, 34 CIT __, __, Slip Op. 10–104 at 8 n.9 (Sept. 13, 2010) (not reported in the Federal Supplement) ("The Court generally affords the Department reasonable discretion to establish the breadth of its review of a particular issue on remand so that the agency may reach the most accurate results.") (citation omitted), *aff'd*, No. 2011–1074, 2011 WL 2648708 (Fed. Cir. July 7, 2011).

Defendant-intervenors cite no authority for this Court to prevent Commerce from seeking new information on remand or from using this new information to close any gaps in the record.

As to the record evidence itself, the court finds that Commerce has offered the substantial evidence needed to justify the Department's reliance on producer-specific rates via its reseller policy. *See* Remand Results at 7 ("[A]t our request, Atar provided information to link specific producers to specific pasta products and explained how this information could be tied to specific entries."). Thus, Commerce was able to determine which company produced which pasta and who it was sold to. Since these producers were aware that their product would be sold in the United States and had participated in earlier reviews under the order, Commerce was able to apply more accurate, company-specific rates to their entries.

As the Department notes, this meant avoiding liquidating "at the incorrect rate, . . . rather than at the rates applicable to the producers that produced the pasta and knowingly shipped it to the United States." Remand Results at 6–7. Because, on remand, Commerce closed any gaps in needed information and because it further consid-

ered information to assign more accurate rates for the entries, the court rejects defendant-intervenors' request that Commerce use facts available and apply, on remand, the "all others" rate to Atar's entries.

III. Uncertified Submission

In the initial administrative review, the Department accepted for placement on the record a twenty page letter submitted on July 9, 2007 by defendant-intervenor American Italian Pasta. Atar cites 19 C.F.R. § 351.303(g) (2010), which requires a party to file "with each submission containing factual information the [proper] certification," to challenge the Department's acceptance of the letter. Plaintiff insists that placement of factual information on the record without certification, and over the objection of the other party, cannot be allowed, and is more than simply a procedural defect. Pl.'s Mot. 39.

For its part, Commerce states that it did not rely on the submission and therefore, the issue is moot. Def.'s Mem. 26–27.

This Court faced an identical question in *GSA, S.r.L. v. United States*, 23 CIT 920, 77 F. Supp. 2d 1349 (1999) ("*GSA*"). Relying on *Intercargo Insurance Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996), the *GSA* Court analyzed the uncertified submissions under the "harmless error" rubric applicable to agency proceedings. *See Sea-Land Service, Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990) ("[C]ourts will not set aside agency action for procedural errors unless the errors 'were prejudicial to the party seeking to have the action declared invalid.'") (citation omitted), *aff'd*, 923 F.2d 838 (Fed. Cir. 1991). As "none of the facts submitted by the domestic producers were considered by Commerce in drawing its conclusions" and the plaintiff "failed to allege that such information was actually used in Commerce's decision or even that [it] was somehow prejudiced," the *GSA* Court concluded that "Commerce's error was harmless." *GSA*, 23 CIT at 930, 77 F. Supp. 2d at 1357.

With *GSA* in mind, the court holds that this case's facts compel the same result. Like the plaintiff in *GSA*, Atar does not allege that Commerce used the information in this submission or that it was prejudiced. Moreover, Commerce denies that it used information from the submission in its final analysis. Therefore, the court finds that any procedural error on Commerce's part in accepting the submission was harmless, and does not require the relief requested by plaintiff.

CONCLUSION

Based on the foregoing, the court sustains Commerce's Final Results, as amended by the Remand Results. Therefore, plaintiff's motion is denied. Judgment shall be entered accordingly.

Dated: July 22, 2011
New York, New York

/s/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 11–88

TAIAN ZIYANG FOOD COMPANY, LTD., ET AL., Plaintiffs, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, ET AL., Defendant-Intervenors.

Consol. Court No. 05–00399

[Sustaining in part U.S. Department of Commerce's second remand determination in administrative review of antidumping duty order covering fresh garlic from the People's Republic of China]

Dated: July 22, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Mark E. Pardo*), for Plaintiffs Zhengzhou Harmoni Spice Co., Ltd., Jinan Yipin Corporation, Ltd., Linshu Dading Private Agricultural Products Co., Ltd., and Sunny Import & Export Co., Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jane C. Dempsey* and *Richard P. Schroeder*); *Reid Swayze*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

I. *Introduction*

In this consolidated action, the plaintiff Chinese producers and exporters of fresh garlic ("the Chinese Producers") challenged the final results of the U.S. Department of Commerce's ninth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China. *See generally Taian Ziyang Food Co. v. United States*, 33 CIT ____, 637 F. Supp. 2d 1093 (2009). *Taian Ziyang* analyzed each of the 10 issues that the Chinese Producers raised, sustaining Commerce's determination as to three of the issues, and remanding the remaining seven to the agency for further consideration. *See generally id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1100–02, 1166.

Now pending before the court is Commerce's Second Remand Determination, filed pursuant to *Taian Ziyang*. *See generally* Final Results of Redetermination Pursuant to Court Remand ("Second Re-

mand Determination").[1] Although they raise no objections to Commerce's redeterminations as to four of the issues addressed in the Second Remand Determination, Plaintiffs Zhengzhou Harmoni Spice Co., Ltd. ("Harmoni"), Jinan Yipin Corporation, Ltd. ("Jinan Yipin"), Linshu Dading Private Agricultural Products Co., Ltd. ("Linshu Dading"), and Sunny Import & Export Co., Ltd. ("Sunny") – collectively referred to as the "GDLSK Plaintiffs" – continue to contest the agency's treatment of three issues. *See generally* GDLSK Plaintiffs' Comments Regarding the Department's Remand Redetermination ("GDLSK Comments"); GDLSK Plaintiffs' Reply Comments Regarding the Department's Remand Redetermination ("GDLSK Reply Comments"). The Government seeks a voluntary remand to allow Commerce to recalculate the surrogate value for the Chinese Producers' labor costs, but contends that the Second Remand Determination should be sustained in all other respects. *See* Defendant's Response to Comments Upon the Remand Redetermination ("Def. Response") at 1–2, 19.

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[2] For the reasons detailed below, Commerce's Second Remand Determination is sustained in part, and this matter is remanded to the agency for further consideration not inconsistent with this opinion.

II. *Background*

Seven Chinese producers and exporters of fresh garlic (the "Chinese Producers") brought this action to contest various aspects of the Final Results of Commerce's ninth administrative review of the antidumping duty order on fresh garlic from China, which covered the period from November 1, 2002 through October 31, 2003. *See generally Taian Ziyang*, 33 CIT ____, 637 F. Supp. 2d 1093; Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 Fed. Reg. 34,082 (June 13, 2005) ("Final Results"); Notice of Amended Final Results of Antidumping Duty Administrative Review: Garlic from the People's Republic of China, 70 Fed. Reg. 56,639 (Sept. 28, 2005) ("Amended Final Results"); Final

[1] The Government was granted a voluntary remand at the outset of this action, to give Commerce the opportunity to correct its omission of certain data from its labor wage rate calculation. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1104. The result of that process was Commerce's First Remand Determination. *See* Final Results of Redetermination Pursuant to Court Remand (Dec. 5, 2005) (First Remand Pub. Doc. 10) ("First Remand Determination").

[2] All citations to federal statutes are to the 2000 edition of the United States Code. Similarly, all citations to federal regulations are to the 2002 edition of the Code of Federal Regulations.

Results of Redetermination Pursuant to Court Remand (Dec. 5, 2005) (First Remand Pub. Doc. 10) ("First Remand Determination").[3]

Taian Ziyang sustained Commerce's use of "adverse facts available" in calculating the dumping margins for Taian Ziyang Food Company, Ltd. ("Ziyang") and Taian Fook Huat Tong Kee Foodstuffs Co., Ltd. ("FHTK"). *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1124, 1166. *Taian Ziyang* similarly sustained Commerce's valuation of cold storage (challenged by the GDLSK Plaintiffs), as well as Commerce's calculation of surrogate financial ratios (challenged by Jinxiang Dong Yun Freezing Storage Co., Ltd. ("Dong Yun")). *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1166. In contrast, *Taian Ziyang* remanded for further consideration Commerce's valuation of certain "factors of production" necessary for the cultivation and export of fresh garlic – specifically, (1) garlic seed, (2) irrigation water, (3) labor, (4) leased land, (5) cardboard cartons, (6) plastic jars and lids, and (7) ocean freight. *See id*., 33 CIT at ____, ____, ____, ____, ____, ____, ____, ____, 637 F. Supp. 2d at 1127, 1133, 1138, 1141, 1151–52, 1157, 1162, 1166.

In its Second Remand Determination, Commerce revalued irrigation expenses, leased land, ocean freight, and labor. *See* Second Remand Determination at 1–2, 11–16, 16–40, 40–41, 50–53, 6073, 78–79. On the other hand, Commerce continued to value garlic seed, cardboard cartons, and plastic jars and lids as it did in the Final Results. *See id*. at 1–2, 4–11, 41–46, 46–50, 54–60, 73–76, 76–78.

As a result of its reconsideration in the course of the second remand, Commerce recalculated the weighted-average antidumping duty margin for Harmoni as 0.00% (down from 8.79%), for Jinan Yipin as 1.04% (down from 13.21%), for Linshu Dading as 4.34% (down from 7.97%), for Sunny as 4.22% (down from 9.17%), and for Dong Yun as 15.49% (down from 31.26%). *See* Second Remand Determination at 79; Final Results, 70 Fed. Reg. at 34,085; First Remand Determination at 19. FHTK's margin remains unchanged at 15.75%. *See* Second Remand Determination at 79; First Remand Determination at 19.[4]

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[3] In the Amended Final Results, Commerce corrected certain ministerial errors. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1103–04. In addition, as explained in note 1 above, the First Remand Determination corrected Commerce's omission of certain data from its labor wage rate calculation. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1104; n.1, *supra*.

[4] The sole issue that Ziyang raised in this action was its challenge to Commerce's use of "adverse facts available," which was resolved in favor of the Government in *Taian Ziyang*. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1100–01, 1124. Ziyang thus had no stake in the most recent remand proceeding, and its dumping margin remains 12.58%. *See* First Remand Determination at 19.

The GDLSK Plaintiffs contend that Commerce's wage rate calculation and its valuation of cardboard cartons and plastic jars and lids do not comply with the instructions in *Taian Ziyang*. *See generally* GDLSK Comments; GDLSK Reply Comments. The GDLSK Plaintiffs maintain that this matter therefore should be remanded to the agency for further consideration. *See* GDLSK Comments at 2–3, 9, 14; GDLSK Reply Comments at 7. The Government seeks a voluntary remand to allow Commerce to recalculate the labor wage rate, but maintains that the Second Remand Determination otherwise should be sustained. *See* Def. Response at 1–2, 19.[5]

III. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is 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); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same). Moreover, any evaluation of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (*quoting Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Finally, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319. Nevertheless, "the path of Commerce's decision must be

[5] Plaintiffs Ziyang, FHTK, and Dong Yun filed no comments on the Second Remand Determination at issue here. The domestic producers of fresh garlic who intervened as defendant-intervenors – the Fresh Garlic Producers Association, and its individual members Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (the "Domestic Producers") – also filed no comments.

reasonably discernable," to support judicial review. *Id*. (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (explaining that "it is well settled that an agency must explain its action with sufficient clarity to permit 'effective judicial review,'" and that "[f]ailure to provide the necessary clarity requires the agency action be vacated") (*quoting Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

IV. *Analysis*

Dumping occurs when goods are imported into the United States and sold at a price lower than their "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See* 19 U.S.C. §§ 1673, 1677(34), 1677b(a). The difference between the normal value of the goods and the U.S. price is the "dumping margin." *See* 19 U.S.C. § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See* 19 U.S.C. § 1673.

Normal value is typically calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods, when the exporting country is a market economy country. *See generally* 19 U.S.C. § 1677b.[6] However, where – as here – the exporting country has a non-market economy ("NME"), there is often concern that the factors of production used to produce the goods at issue are under state control, and that home market sales may not be reliable indicators of normal value. *See* 19 U.S.C. § 1677(18)(A).

In cases such as this, where Commerce concludes that concerns about the sufficiency or reliability of the available data do not permit the normal value of the goods to be determined in the typical manner, Commerce "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production," including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See* 19 U.S.C. § 1677b(c)(1); *see gen-*

[6] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See*, *e.g.*, *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1338 (Fed. Cir. 2002) (*discussing* 19 U.S.C. §§ 1677b(a)(1)(B)(ii), 1677b(a)(1)(C)); *see also Ningbo Dafa Chem. Fiber Co., Ltd. v. United States*, 580 F.3d 1247, 1251 n.1 (Fed. Cir. 2009) (explaining exception).

erally Ningbo Dafa Chem. Fiber Co., Ltd. v. United States, 580 F.3d 1247, 1250–51 (Fed. Cir. 2009) (briefly summarizing "factors of production" methodology).[7] The antidumping statute requires Commerce to value factors of production "based on the *best available information* regarding the values of such factors" in an appropriate surrogate market economy country – in this case, India. *See* 19 U.S.C. § 1677b(c)(1) (emphasis added); *see also Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *Ningbo*, 580 F.3d at 1254 (emphasizing that statute mandates that Commerce "shall" use "best available information" in valuing factors of production).

In determining which data constitute the "best available information," Commerce generally looks to the criteria set forth in its "Policy Bulletin 04.1," also known as the "NME Surrogate Country Policy Bulletin." Policy Bulletin 04.1 explains:

> In assessing data and data sources, it is [Commerce's] stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.

See Import Administration Policy Bulletin 04.1, "Non-Market Economy Surrogate Country Selection Process," at "Data Considerations" (March 1, 2004)[8]; *see also* Second Remand Determination at

[7] Factors of production "include, but are not limited to . . . hours of labor required, . . . quantities of raw materials employed, . . . amounts of energy and other utilities consumed, and . . . representative capital cost, including depreciation." *See* 19 U.S.C. § 1677b(c)(3); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010) (discussing factors of production).

[8] The stated purpose of Policy Bulletin 04.1 is to "provide[] guidance regarding [Commerce's] selection of surrogate market economy countries in non-market economy ('NME') cases." *See* Policy Bulletin 04.1, at "Statement of Issue." The language on which Commerce relies in this and many other cases appears in a section captioned "Data Considerations." *See* Policy Bulletin 04.1, at "Data Considerations." The policy bulletin expressly states that the criteria outlined in that section are for Commerce's use in winnowing the agency's list of potential surrogate countries "if more than one country has survived the selection process to this point" (*i.e.*, if more than one country on the list of potential surrogates are economically comparable, produce comparable merchandise, and are "significant" producers of such merchandise). *Id*. Thus, the policy bulletin explains, "a country that perfectly meets the requirements of economic comparability and significant producer is not of much use of as a primary surrogate if crucial factor price data from that country are inadequate or unavailable." *Id*. Accordingly, pursuant to the policy bulletin, Commerce decides from among two or more countries that are economically comparable and significant producers of the merchandise by "assessing data and data sources" in the respective candidate countries in accordance with the criteria outlined in the section of the bulletin at issue. *Id*.

42 (quoting Policy Bulletin, and stating that it reflects agency's "well-established practice for determining the reliability and appropriateness of surrogate values"); *id*. at 47, 53; Issues and Decision Memorandum for the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (June 6, 2005) (Admin. Record Pub. Doc. 348) ("Issues and Decision Memorandum") at 26, 39, 41.[9]

Within this general framework, the statute "accords Commerce wide discretion in the valuation of factors of production in the application of [the statute's] guidelines." *See Shakeproof*, 268 F.3d at 1381 (internal quotation marks and citation omitted)); *see also Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316, 1320 (Fed. Cir. 2010) (same); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (same). Commerce is recognized as the "master of antidumping law." *See The Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999); *see also Shakeproof*, 268 F.3d at 1381 (acknowledging "Commerce's special expertise"). And "[t]he process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise." *Shakeproof*, 268 F.3d at 1381.

Nevertheless, Commerce's discretion is not boundless. In exercising its discretion, Commerce is constrained by the purpose of the antidumping statute, which is "to determine antidumping margins 'as accurately as possible.'" *See Shakeproof*, 268 F.3d at 1382 (*quoting Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)). And, Commerce's discretion notwithstanding, "a surrogate value must be as representative of the situation in the [non-

In short, the criteria outlined in the section of Policy Bulletin 04.1 captioned "Data Considerations" were developed to serve as a "tie-breaker," if necessary, in Commerce's identification of a surrogate country. The criteria were not promulgated for the purpose of guiding Commerce's selection from among alternative data sources *after* a surrogate country has been identified. Nevertheless, Commerce has used the criteria for that purpose here and in many other cases.

[9] Because this action has twice been remanded to Commerce, three administrative records have been filed with the court: the initial administrative record (comprised of the information on which the agency's Final Results were based), the supplemental administrative record compiled in the course of the first remand, and the supplemental administrative record compiled in the course of the most recent remand (*i.e.*, the remand following *Taian Ziyang*).

Because confidential information is included in the administrative records, there are two versions of each: a public version and a confidential version. The public versions of the administrative records consist of copies of all documents in the record, with confidential information redacted. The confidential versions of the administrative records consist of complete, unredacted copies of only those documents that include confidential information. All citations to the administrative records herein are to the public versions, which are cited as "Admin. Record Pub. Doc. ____," "First Remand Pub. Doc. ____," and "Second Remand Pub. Doc. ____," respectively.

market economy] country as is feasible." *See Nation Ford*, 166 F.3d at 1377 (internal quotation marks and citation omitted). Thus, "[i]n determining the valuation of . . . factors of production, the critical question is whether the methodology used by Commerce is based on *the best available information* and establishes antidumping margins *as accurately as possible*." *See Ningbo*, 580 F.3d at 1257 (emphases added) (*quoting Shakeproof*, 268 F.3d at 1382) (internal quotation marks omitted).

In the present case, pursuant to the instructions in *Taian Ziyang*, Commerce reconsidered various aspects of the agency's valuation of the factors of production in the final results of the ninth administrative review of the antidumping duty order covering fresh garlic from China. As discussed in greater detail below, Commerce's valuation of garlic seed (including retained garlic seed), irrigation costs, land lease costs, and ocean freight costs must be sustained. On the other hand, Commerce's valuation of labor expenses, cardboard cartons, and plastic jars and lids must be remanded to the agency for further consideration.

A. *Valuation of Garlic Seed*

Taian Ziyang sustained challenges by FHTK and the GDLSK Plaintiffs to the data that Commerce selected to value garlic seed in its Final Results. *See generally Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1124–27, 1166. Two of the GDLSK Plaintiffs – Harmoni and Jinan Yipin – went even further. Specifically, Harmoni and Jinan Yipin asserted that it was improper for Commerce to assign to them any surrogate value for purchased garlic seed, because they do not use purchased seed and instead use seed retained from their prior years' harvests. *Taian Ziyang* addressed that claim as well. *See generally id.*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1124–27, 1166.

In the Final Results, Commerce had rejected two sources of data provided by the respondent Chinese producers – (1) prices reflected in Indian import data published by the World Trade Atlas ("WTA")[10] for the Indian Harmonized Tariff Schedule ("HTS") subheading covering "Garlic Fresh or Chilled," and (2) price data from the Indian Agricultural Marketing Information Network ("Agmarknet"). Instead, the Final Results valued garlic seed using prices for varieties of Indian garlic as listed in newsletters of the Indian National Horticultural

[10] The World Trade Atlas is "a database of commodities using all levels of the Harmonized Tariff Schedule," which "enables users to determine the value of a specific product and identify countries to or from which the product is being exported or imported." *See Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT ____, ____ n.20, 617 F. Supp. 2d 1281, 1296 n.20 (2009) (internal quotation marks and citation omitted).

Research and Development Foundation ("NHRDF"). *See generally Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1124–27; Issues and Decision Memorandum at 14–22.

In the Final Results, Commerce concluded, in essence, that the NHRDF data were the best available information for valuing the respondent Chinese producers' garlic seed, because – according to Commerce – the NHRDF data are more product-specific than the other two potential sources of data on the record. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1125; Issues and Decision Memorandum at 19–21. However, *Taian Ziyang* faulted Commerce's determination, emphasizing that "[n]either Commerce nor the Domestic Producers [who supplied the NHRDF data to the agency] . . . provided a complete description of the 'high-yield' varieties [of garlic] represented in the NHRDF data" for comparison to the respondent Chinese producers' garlic seed input. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1126. *Taian Ziyang* therefore remanded the matter to Commerce, instructing the agency to reconsider which of the three data sets constitutes the best available information. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1127.

On remand, in accordance with *Taian Ziyang*, Commerce re-evaluated all three data sets on the record and reaffirmed its determination that the NHRDF data are the most product-specific, and therefore the best available information with which to value the Chinese producers' garlic seed. *See generally* Second Remand Determination at 4–8, 54–58. In reaching its Second Remand Determination, Commerce again dismissed both the Indian import statistics and the Agmarknet data as insufficiently product-specific, pointing to the general, non-descriptive nature of categories used in the Agmarknet data, and explaining that the tariff heading used for the Indian import statistics is "extremely broad, encompassing all garlic imported into India." *See generally id*. at 7–8.[11]

[11] Commerce also expressed other concerns about the Indian import statistics, asserting that the administrative record is devoid of "any substantive information [on] the manner in which such garlic is shipped [into India], be it as whole bulbs or loose cloves," as well as lacking in information concerning "the quality, size, or number of cloves in the garlic imports from the market economy countries" reflected in the Indian import data. *See* Second Remand Determination at 7. But Commerce's statement appears to be somewhat at odds with the administrative record as it now exists.

As discussed in greater detail below, in the course of the most recent remand, Commerce placed on the record of this proceeding a Market Research Report compiled by the Domestic Producers, which was previously submitted for inclusion in the records of the eighth and tenth administrative reviews. *See* Second Remand Determination at 5; Market Research Report on Fresh Whole Garlic in India (June 2003) (Second Remand Pub. Doc. 2) ("Market Research Report"). The Market Research Report expressly states (in bold) that "[i]t should

The Second Remand Determination observed that "with a bulb size well in excess of 5 cm in diameter, the garlic bulb grown by respondents is far larger than typical native Indian garlic strains, which usually have bulb diameters between 2 and 4 cm." *See* Second Remand Determination at 5; *see also id*. at 5–6 (surveying individual respondents' questionnaire responses, reporting bulb diameters ranging from 5 cm to 7 cm). To establish the similarity of the relevant NHRDF varieties, Commerce placed on the administrative record for the first time a June 2003 Market Research Report on Fresh Whole Garlic in India, which was compiled by the Domestic Producers and included in the records of the eighth and tenth administrative reviews. *See id*. at 5; Market Research Report on Fresh Whole Garlic in India (June 2003) (Second Remand Pub. Doc. 2) ("Market Research

be noted that garlic is imported [into India] in bulb form itself (*i.e.*, *not* cracked)." *See* Market Research Report at 27. Thus, contrary to Commerce's assertion, the administrative record in this action in fact now does include some "substantive information [on] the manner in which . . . garlic is shipped" into India – and the agency either overlooked or ignored that information in its Second Remand Determination.

Commerce was criticized for essentially these same failings in a related case concerning the same antidumping duty order. During the eighth administrative review, Commerce placed on the record the same Market Research Report at issue here for the very same purpose – that is, to prove the physical characteristics of the NHRDF garlic varieties and thus to demonstrate product-specificity. *See Jinan Yipin Corp. v. United States*, 31 CIT 1901, 1927, 526 F. Supp. 2d 1347, 1370 (2007) ("*Jinan Yipin I*"). Reviewing challenges to the agency's valuation of garlic seed in that administrative review, *Jinan Yipin I* found that, as in the present case, "Commerce . . . made no mention of certain factual information that is inconsistent with its findings," specifically "factual information [that] concerns the characteristics of Indian garlic imports . . . [which] is set forth in the very market research report upon which Commerce relies." *See id*., 31 CIT at 1927, 526 F. Supp. 2d at 1370. As *Jinan Yipin I* explains, the Market Research Report "presents factual evidence – which Commerce did not reference or discuss . . . – that Chinese garlic imports constitute the overwhelming majority of all garlic imported in India, that Chinese garlic is imported in the form of whole bulbs, not loose cloves, and that these imports are comparable to the subject merchandise with respect to bulb diameter and number of cloves per bulb." *See id*., 31 CIT at 1928, 526 F. Supp. 2d at 1370. Thus, here – as in *Jinan Yipin I* – the Market Research Report may supplement and inform the interpretation of the Indian import data submitted by the respondent Chinese producers, and contradicts (at least to some extent) "Commerce's assumption that the garlic represented by the import data differs significantly from the subject merchandise." *See id*., 31 CIT at 1929, 526 F. Supp. 2d at 1372.

Nevertheless, Commerce's ultimate conclusion is not undermined. Reading between the lines of the Second Remand Determination, it appears that – as in the eighth administrative review – Commerce here "chose the NHRDF data over the import data for two principal reasons: its finding . . . that there is insufficient record information to establish what type of garlic was being imported *from countries other than China* and its conclusion that the prices . . . [of] the garlic imports from China are not based on market principles and therefore are less reliable than are prices of imports *from market economy countries*." *See Jinan Yipin Corp. v. United States*, 35 CIT ____, ____, 2011 WL 1399811 * 4–7 (2011) (emphases added) ("*Jinan Yipin III*") (critiquing thoroughness of Commerce's analysis of Market Research Report data, but nevertheless sustaining agency's use of NHRDF data).

Report").[12] Relying on the Market Research Report, Commerce explained in the Second Remand Determination that "the typical bulb diameter of the Agrifound Parvati and Yamuna Safed-3 high yield garlic varieties [that Commerce] used to value respondents' inputs falls within a similar range with a bulb diameter of 3.5 to 6.5 cm." *See* Second Remand Determination at 5–7 (*citing* Market Research Report at 14); *see also id*. at 56–57.[13]

By supplementing the administrative record with the Market Research Report, Commerce has now "directly tie[d] the physical characteristics of respondents' input [*i.e.*, the Chinese producers' garlic] to those of particular NHRDF varieties," demonstrating that "[Commerce's] surrogate value data source [*i.e.*, the NHRDF data] approximates the large, high-quality bulb grown by respondents." *See* Second Remand Determination at 7. Commerce has thus responded to the concerns raised in *Taian Ziyang*. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1124–27. Moreover, no party has filed comments on the Second Remand Determination on this issue. *Cf*. Recording of Oral Argument at 32:05–32:22 (explaining that the GDLSK Plaintiffs are "now happy with [Commerce's garlic seed valuation], or at least [they are] not challenging it further"). As to the surrogate value for purchased garlic seed, Commerce's Second Remand Determination therefore must be sustained.

Taian Ziyang granted the Government a voluntary remand to permit Commerce to respond to the request of Jinan Yipin and Harmoni that, in calculating their dumping margins, the agency value garlic seed based on their reported company-specific growing factors of production for garlic seed (rather than using the surrogate value for purchased garlic seed that the agency employed for the other respon-

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[12] *See also Zhengzhou Harmoni*, 33 CIT at ____, 617 F. Supp. 2d at 1297–98 (discussing June 2003 Market Research Report, in context of review of tenth administrative review); *Jinan Yipin I*, 31 CIT at 1926–29, 526 F. Supp. 2d at 1369–72 (discussing June 2003 Market Research Report, in context of review of eighth administrative review).

[13] Although Commerce's overall analysis appears to rely upon the NHRDF price information for three varieties of garlic (*i.e.*, the Agrifound Parvati, Yamuna Safed-3, and Agrifound White varieties), Commerce's conclusion expressly mentions only "the typical bulb diameter of the Agrifound Parvati and Yamuna Safed-3 high yield garlic varieties," omitting reference to the Agrifound White variety. *Compare* Second Remand Determination at 4 *and id*. at 7. However, Commerce's conclusion also states that the bulb diameters of the relevant NHRDF varieties range from "3.5 to 6.5 cm." *See id*. According to the Market Research Report, the typical bulb diameters of the Agrifound Parvati and the Yamuna Safed-3 varieties are 50 to 65 millimeters and 50 to 60 millimeters, respectively, while the typical bulb diameter of the Agrifound White variety is 35 to 45 millimeters. *See* Market Research Report at 14–15. Thus, Commerce's conclusion apparently addressed the Agrifound White variety (which has a bulb diameter of 35 to 45 millimeters), even if the agency failed to mention that variety in its conclusion.

dent Chinese producers), to properly reflect the fact that Jinan Yipin and Harmoni grow their garlic crop using seed retained from harvests in prior years. *See Taian Ziyang*, 33 CIT at ____ & n.33, ____, ____, 637 F. Supp. 2d at 1124 & n.33, 1127, 1166. In the Final Results, Commerce had rejected the approach advocated by Jinan Yipin and Harmoni. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1127; Issues and Decision Memorandum at 21–22. But, in the Second Remand Determination, Commerce reversed course and has now acceded to their request. *See generally* Second Remand Determination at 8–11, 58–60.

The Second Remand Determination reaffirmed Commerce's practice of "valu[ing] self-produced inputs by valuing the inputs used to create the relevant self-produced inputs," and stated that, in the present case, the agency "is again using its standard 'inputs-to-inputs' methodology in valuing self-produced garlic seed based upon the actual inputs used to create Jinan Yipin's and Harmoni's self-produced garlic seed." *See* Second Remand Determination at 59. Under that methodology, Commerce calculated surrogate values for the two respondents' reported inputs for growing garlic seed (*e.g.*, fertilizer; herbicide; pesticide; plastic film; skilled, unskilled, and indirect labor; and electricity), multiplying each factor by the per metric ton consumption rates for that factor, and adding up the results. *See id*. at 59–60. Commerce thus valued Jinan Yipin's and Harmoni's retained garlic seed based on the costs that they incurred to grow the retained seed, reasoning that "this method more accurately reflects Jinan Yipin's and Harmoni's production methodology and, thus, results in a more accurate normal value calculation." *See id*. at 59–60; *see also id*. at 11.

Because no party has filed comments on the Second Remand Determination on the issue, and because Commerce's valuation of the garlic seed retained by Jinan Yipin and Harmoni is supported by substantial evidence and is otherwise in accordance with law (as well as *Taian Ziyang*), this determination by Commerce also must be sustained.

B. *Valuation of Irrigation Costs*

Taian Ziyang sustained challenges by the GDLSK Plaintiffs and Dong Yun to the surrogate value that Commerce assigned for the irrigation water used in cultivating their garlic crops. *See generally Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1101–02, 1127–33, 1166. As *Taian Ziyang* explained, the undisputed record evidence shows that the GDLSK Plaintiffs and Dong Yun did not pay for irrigation water (because they drew water from nearby rivers or wells on the land that they farm), and further indicates that the

situation of Indian garlic growers was no different. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1128–29, 1131. In addition, *Taian Ziyang* acknowledged the concerns expressed by Dong Yun, among others, who asserted that separately valuing irrigation water resulted in double-counting because the cost of water is already reflected in the financial statements that Commerce used to calculate the surrogate financial ratios in this case. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1128, 1132. *Taian Ziyang* further noted that, in the Final Results, Commerce not only assigned a value to irrigation water, but, in doing so, actually relied upon higher "industrial" water rates, rather than "agrarian" rates (which the agency determined were highly subsidized by the Indian government). *See id.*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1128, 1132–33; *see generally* Issues and Decision Memorandum at 22–26.

Taian Ziyang rejected Commerce's claim that, as a legal matter, *Pacific Giant* required the agency to assign a value for irrigation water in the Final Results, without regard to whether or not Indian garlic growers actually pay for such water. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1129–31 (discussing, *inter alia*, *Pacific Giant, Inc. v. United States*, 26 CIT 894, 896, 904–05, 223 F. Supp. 2d 1336, 1339, 1346 (2002) (addressing agency's treatment of water usage in production of freshwater crawfish tail meat in China)). *Taian Ziyang* criticized the Final Results for failing to "reconcile [Commerce's] reading of *Pacific Giant*, and [the agency's] determination on the valuation of water in this case, with the plain language of [the statute]," which requires, among other things, that factors of production be valued based upon "the prices or costs of [the] factors" of production in the relevant surrogate market economy country, and on "the best available information regarding the values of such factors" in the surrogate market economy country. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1129–30 (emphases omitted; alteration in original). *Taian Ziyang* also observed that, even if (as the agency's interpretation of *Pacific Giant* suggests) Commerce is required to value irrigation water in a case such as this, there is nothing in *Pacific Giant* to indicate that the value assigned must necessarily be a *positive* value. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1130.

Taian Ziyang concluded that, as a matter of law, "[i]f the record establishes that farmers in India – like the Chinese garlic producers in this case – do not pay for irrigation water drawn from nearby rivers or wells on their land, it is not clear how Commerce here can assign to water a surrogate value greater than zero. Any other outcome would appear to contravene both the plain language and the basic intent of the statute." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp.

2d at 1130; *see generally id*., 33 CIT at ____, 637 F. Supp. 2d at 1130–31. In addition, *Taian Ziyang* found that "Commerce failed to adequately evaluate the record evidence on the cost of water in India – including the evidence on the nature and extent of government subsidization, if any." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1133. *Taian Ziyang* therefore remanded the issue to Commerce, with instructions to "reconsider [the agency's] surrogate value analysis for water use . . . , . . . [to] detail its rationale for selecting from among the possible methods of valuing this factor (as supported by substantial evidence in the record), [and to] explain[ ] why the valuation method [chosen] . . . yields the most accurate dumping margin possible." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1133.

In the most recent remand, Commerce has changed its fundamental approach to calculating the costs that the GDLSK Plaintiffs and Dong Yun incurred in irrigating their garlic crops. *See generally* Second Remand Determination at 11–16. Specifically, Commerce has determined that "valuing the pumping cost of water, rather than valuing the water itself, yields the most accurate [dumping] margins because it most closely matches the irrigation practices of producers in the surrogate country [*i.e.*, India]," and because it fulfills the agency's obligation to value factors of production based on the prices or costs of the factors in the surrogate market economy country and based on "the best available information." *See id*. at 15–16.

In reaching its decision on remand, Commerce reviewed the undisputed record evidence, which indicates that Jinan Yipin used diesel fuel to pump irrigation water into its fields, and that Dong Yun, Harmoni, Linshu Dading, and Sunny used electricity for that purpose. *See* Second Remand Determination at 13. Commerce similarly surveyed the ample and uncontroverted record evidence demonstrating that – much like the GDLSK Plaintiffs and Dong Yun – Indian farmers also do not pay for irrigation water that is drawn from their own wells. *See id*. at 14.[14] Based on the record evidence, Commerce determined that "farmers in India who have access to wells on their

[14] The undisputed record evidence on expenses incurred for irrigation in India included (1) information provided in a letter and exhibit submitted by Dong Yun indicating "that Indian companies do not have to pay for irrigation water drawn from their own wells"; (2) a 1995 World Bank study "showing that [Indian] farmers who pump water from their own wells do not pay for the water they use to irrigate their crops"; (3) a 2001 statement from the International Water Management Institute ("IWMI") indicating that, as of that time, "in the Indian province of Uttar Pradesh, farmers that own their own wells do not pay for water to irrigate their land, and that self-owned wells are the largest source of water" in that province; (4) excerpts from the IWMI Annual Report (2000–01) stating that "India is one of the largest users of groundwater (wells), and that the use of groundwater (from wells) is uncontrolled and unregulated"; (5) an excerpt from a book on rural development (Krishna, Uphoff, & Esman, eds., *Reasons for Hope*: *Instructive Experiences in Rural Development* (West Hartford, CT: Kumarian, 1996)) explaining that "most irrigation in India is

property do not pay for irrigation water." *See id*. at 15. As a result, Commerce further determined that – as to the Chinese garlic producers here – "it is not reasonable to separately value the consumption of water for farmers who, having access to well or river water, are not otherwise obligated to pay either civil or private authorities for irrigation water." *See id*.

Based on the record evidence and the legal analysis as summarized above, Commerce's Second Remand Determination does not calculate a surrogate value for irrigation water itself, but – instead – calculates a surrogate value for the energy used to pump the irrigation water from its source into the field (*i.e.*, diesel fuel for Jinan Yipin, and electricity for the other GDLSK Plaintiffs and Dong Yun), and then applied that surrogate value to the actual quantity of diesel fuel or electricity consumed in pumping irrigation water as reported by each of the companies. In addition, Commerce accounted for freight expenses incurred in transporting the diesel fuel from the diesel supplier to Jinan Yipin. *See* Second Remand Determination at 16; *see also Jinan Yipin Corp. v. United States*, 35 CIT ____, ____, 2011 WL 1399811 * 1–2 (2011) ("*Jinan Yipin III*") (in eighth administrative review, sustaining agency's surrogate valuation of irrigation costs as calculated in second remand determination in that case, where agency adhered to same basic approach used here). No party has filed comments on the Second Remand Determination on this issue.

As discussed above, the Second Remand Determination's valuation of the irrigation costs incurred by the GDLSK Plaintiffs and Dong Yun is supported by substantial evidence and is otherwise in accordance with law. In addition, the Second Remand Determination on this issue complies with the remand instructions in *Taian Ziyang*. Commerce's determination therefore must be sustained.

C. *Valuation of Labor Expenses*

The antidumping statute provides that, in non-market economy cases such as this, the surrogate data used to calculate the value of factors of production must, to the extent possible, come from market economy countries that are at "a level of economic development comparable to that of the non-market economy country" at issue – in this

performed by wells that are fed by rainwater"; and (6) a statement from the office of the Agriculture Attache at the U.S. Embassy in New Delhi, stating that "Indian farmers who use water from their own wells do not pay any fee for it." *See* Second Remand Determination at 14.

On remand, Commerce also reviewed the surrogate financial statements, and determined that they were of no assistance in "determin[ing] the irrigation practices of . . . Indian farmers" or in "ascertain[ing] whether or not separately valuing water . . . would result in double counting this expense." *See* Second Remand Determination at 14–15.

case, China. *See* 19 U.S.C. § 1677b(c)(4)(A). The antidumping statute further provides that, in such cases, the surrogate data must, to the extent possible, come from market economy countries that are "significant producers of comparable merchandise." *See id*.

For most factors of production, Commerce typically uses values from a single market economy country (known as the "surrogate country" – here, India) that Commerce has determined to be both (a) economically comparable to the non-market economy country in question and (b) a significant producer of the goods at issue. *See* 19 C.F.R. § 351.408(c)(2). But *Taian Ziyang* explained that Commerce treats the cost of labor quite differently than other factors of production. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1134; *see generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010).

Concerned about "wide variances in wage rates between comparable economies," Commerce historically has valued the cost of labor in an NME country case by using a regression-based wage rate "reflective of the observed relationship between wages and national income in a variety of market economy countries." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1134 (internal quotation marks and citations omitted); *see also id*., 33 CIT at ____ n.44, 637 F. Supp. 2d at 1134 n.44 (summarizing history of 19 C.F.R. § 351.408(c)(3)). Thus, "[u]nlike its valuation of other factors of production in [a non-market economy country] case, Commerce [has based] its surrogate wage rate on data from a broad 'basket' of countries, and [has] not limit[ed] itself to market economy countries at a level of economic development comparable to the NME country in question." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1134.

In the Final Results, Commerce calculated the respondent Chinese producers' labor costs using the agency's regression-based wage rate calculation methodology, as set forth in the agency's regulations, to establish a surrogate wage rate for China. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1134–35; 19 C.F.R. § 351.408(c)(3). After correcting several clerical errors in the initial calculations in the Final Results (which yielded a surrogate wage rate of $0.93), Commerce's First Remand Results recalculated the applicable wage rate at $0.85. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1135. The GDLSK Plaintiffs and Dong Yun challenged both the facial validity of Commerce's regression-based methodology and the agency's application of that methodology in the instant administrative review. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1133–35.

Specifically, the GDLSK Plaintiffs and Dong Yun argued, *inter alia*, that Commerce designated India as the primary surrogate market economy in this case, but – rather than using the Indian surrogate

wage rate – Commerce used the regression-based methodology established in its regulations to calculate a wage rate that is "more than 500 percent higher than that of India." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1135 (internal quotation marks and citation omitted). The GDLSK Plaintiffs and Dong Yun asserted, *inter alia*, that Commerce's regulation and its application in this case were in conflict with the statutory requirement that Commerce value factors of production using surrogate values from market economy countries that are both economically comparable and significant producers of the goods comparable to those at issue. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1133–34, 1135; *see generally id*., 33 CIT at ____, 637 F. Supp. 2d at 1133–38.

Relying heavily on *Allied Pacific II* (which held Commerce's regulation to be inconsistent with the statute), *Taian Ziyang* remanded the issue of the valuation of the labor factor of production to Commerce for further consideration. *See Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1134, 1135–36, 1138; *Allied Pacific Food (Dalian) Co. v. United States*, 32 CIT ____, ____, 587 F. Supp. 2d 1330, 1351–61 (2008) ("*Allied Pacific II*"). On remand, Commerce nevertheless continued to use a regression-based methodology, albeit one that was slightly revised. *See generally* Second Remand Determination at 16–40, 60–73.[15] According to Commerce, the agency "analyzed all of the information on the administrative record, revised its methodology to be consistent with its [then-]current practice, concluded that its revised methodology [produced] the 'best available information' on the record," and sought to "explain[] how its methodology [was] consistent with the requirements of [the statute]." *See* Second Remand Determination at 17. Besides limiting the data set to just two years of wage data (2001 and 2002), Commerce also modified the data set on remand "to include all countries for which suitable data are available, rather than limiting the[] data to the fifty-six countries utilized in the Final Results." *See id*. at 17 n.18. The resulting calculation produced a regression-based surrogate wage rate of $0.77 for China. *See id*.

[15] In the most recent remand, Commerce used a somewhat updated version of the regression-based methodology that it had previously employed in this administrative review, pursuant to the agency's so-called "Revised Methodology Notice." *See* Second Remand Determination at 17 n.18; Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 Fed. Reg. 61,716, 61,719–23 ("Revised Methodology Notice"). Among other things, while the prior methodology considered a total of six years of wage data, the revised methodology considered only two years of data, in an effort to enhance the accuracy of Commerce's calculation of non-market economy wages. *See* Revised Methodology Notice, 71 Fed. Reg. at 61,721; *see also* Second Remand Determination at 17 n.18.

Commerce's Second Remand Determination also took strong exception to *Taian Ziyang* 's conclusion that the agency's regulation prescribing the regression-based wage rate calculation methodology was inconsistent with the statute. *See* Second Remand Determination at 18 n.19. Indeed, the agency devoted more than 30 pages of the Second Remand Determination to attempts to explain and defend the agency's regression-based methodology and its resulting determination in this case. *See generally id*. at 17–40, 63–69, 70–73.

In the meantime, however, the Court of Appeals handed down its decision in *Dorbest*, striking down Commerce's regulation as inconsistent with the plain language of the statute. *See generally Dorbest*, 604 F.3d at 1366, 1369–73. The Court of Appeals concluded that the agency's regulation "improperly requires using data from both economically comparable and economically dissimilar countries, and . . . improperly uses data from both countries that produce comparable merchandise and countries that do not." *See Dorbest*, 604 F.3d at 1372 (discussing 19 C.F.R. § 351.408(c)(3)). The Court therefore held Commerce's regulation to be invalid on its face:

> To the extent that 19 C.F.R. § 351.408(c)(3) requires or at least permits the use of labor value data from countries that are not economically comparable to the non-market economy country in question or are not significant producers of merchandise comparable to the merchandise in question when data from countries meeting both criteria are available, the regulation is facially invalid as noncompliant with [the statute].

Dorbest, 604 F.3d at 1377.[16]

Armed with *Dorbest*, the GDLSK Plaintiffs have renewed their plea for the court to "reject Commerce's continued use of the invalidated regression-based wage rate calculation and remand this issue to Commerce with instructions to use available wage rate information that satisfies both requirements of 19 U.S.C. § 1677b(c)(4)." *See* GDLSK Comments at 2–3. The Government generally concurs, requesting a voluntary remand to allow Commerce to recalculate the surrogate value for labor expenses in a manner consistent with

[16] *Dorbest* did not completely foreclose Commerce's use of data from countries that are not economically comparable and/or are not significant producers of the subject merchandise. The Court of Appeals explained that, if Commerce were to "show in an appropriate situation that using the data Congress has directed Commerce to use is impossible," then "Commerce would be free to use whatever data it felt were appropriate to use to determine labor rates, presuming that Commerce remained within the bounds of 19 U.S.C. § 1677b(c)(1), which requires Commerce to use the 'best available information regarding the values of' the factors of production." *See Dorbest*, 604 F.3d at 1372.

Dorbest. *See* Def. Response at 18. No other party has filed comments on this issue.

In light of the arguments of the GDLSK Plaintiffs and the Government's request for a voluntary remand, this matter must be remanded. On remand, Commerce shall recalculate labor expenses in accordance with *Dorbest* and the plain language of the statute; and Commerce shall allow sufficient time for the submission of comments on the agency's draft results of the remand.

D. *Valuation of Leased Land*

Taian Ziyang sustained Dong Yun's challenge to Commerce's decision to calculate a separate surrogate value for leased land. *See generally Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1101–02, 1138–41, 1166. *Taian Ziyang* explained that, in the Final Results, Commerce had determined that "land lease costs were not accounted for in the surrogate financial ratios in this case because the [Indian surrogate companies'] financial statements [used to calculate those ratios] included a line item for land in their 'fixed assets' schedules, and because the surrogate companies listed zero depreciation for land" – indications which Commerce interpreted to mean that the Indian surrogate companies did not lease land but, rather, cultivated their crops on land that they owned. *See id.*, 33 CIT at ____, 637 F. Supp. 2d at 1140–41; *see generally* Issues and Decision Memorandum at 26–29.

As *Taian Ziyang* noted, however, Dong Yun maintained that Commerce was, in effect, double-counting land lease costs. According to Dong Yun, the Indian surrogate companies' financial statements already included rent and lease payments as part of "selling, general, and administrative" expenses. *See Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 113839, 1140, 1141. Highlighting several line items in the Indian companies' financial statements that would appear to indicate that those companies in fact did lease at least some portion of the land that they cultivated (reflecting costs for, *inter alia*, "leasehold land" and "Land (leasehold) and Development"), *Taian Ziyang* faulted Commerce for failing to reconcile its determination that the Indian companies did not lease land with record evidence to the contrary. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1140, 1141. In addition, *Taian Ziyang* questioned Commerce's failure to acknowledge and explain its apparent departure from past agency practice. *See id.*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1139, 1141. *Taian Ziyang* therefore remanded the matter to the agency for further consideration. *See id.*, 33 CIT at ____, 637 F. Supp. 2d at 1140–41.

In the Second Remand Determination, Commerce reversed course and determined that – as Dong Yun has maintained – land lease costs indeed already were accounted for in the "selling, general and administrative" costs of the surrogate financial companies. *See generally* Second Remand Determination at 40–41. Specifically, upon reconsideration, Commerce found record evidence "in the form of certain broad line items [in the financial statements of the Indian surrogate companies], such as 'rent,' 'leasehold land,' and 'lease rent,' that indicates that the surrogate companies may have leased land." *See* Second Remand Determination at 41. The Second Remand Determination also conceded that, as *Taian Ziyang* observed, "prior decisions by [Commerce] have assumed that, where a surrogate's financial statements contain a broad line item encompassing a [factor of production], that [factor of production] is accounted for, and valuing the [factor of production] separately would result in double-counting the cost." *See* Second Remand Determination at 41 (*citing Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1140). Commerce therefore "[did] not use a separate calculated surrogate value for leased land" in its Second Remand Determination. *See* Second Remand Determination at 41. No party has filed comments on this matter.

Because Commerce's Second Remand Determination on this issue complies with the remand instructions in *Taian Ziyang*, and because it is supported by substantial evidence and is otherwise in accordance with law, Commerce's determination must be sustained.

E. *Valuation of Cardboard Packing Cartons*

In *Taian Ziyang*, the GDLSK Plaintiffs prevailed on their challenge to Commerce's surrogate value for the cardboard cartons that the Chinese producers used to pack and ship garlic. *See generally Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1101–02, 1144–52, 1166. *Taian Ziyang* explained that, in the Final Results, Commerce valued cardboard cartons based on Indian import statistics taken from the World Trade Atlas ("WTA") for Indian HTS subheading 4819.1001, covering cartons, boxes, and cases made of corrugated paper and paperboard. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1147–52; *see generally* Issues and Decision Memorandum at 37–41. In so doing, the Final Results rejected the other alternative source of data on the record – four domestic price quotes submitted by the GDLSK Plaintiffs, which were obtained within the period of review from four different Indian box vendors in four different cities for basic cardboard packing cartons like those used by the Chinese producers. *See Taian Ziyang*, 33 CIT

at ____, 637 F. Supp. 2d at 1144; *see generally* Issues and Decision Memorandum at 37–41; GDLSK Respondents' Surrogate Value Submission (Admin. Record Pub. Doc. 157), Exh. 16 (domestic price quotes for cardboard packing cartons). The Final Results rejected the domestic price quotes because they do not constitute "publicly available information" and because, according to Commerce, they do not reflect prices throughout the period of review. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145–46; Issues and Decision Memorandum at 39–40.

As *Taian Ziyang* noted, however, although the price quotes are "not without problems," the Final Results significantly "overstated any potential concerns as to the reliability of the domestic Indian box price quotes that the agency rejected, [and] significantly understated the patent flaws and defects in the Indian import statistics on which the agency relied." *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1144, 1151 (emphases omitted).

1. *The Final Results' Treatment of the Domestic Price Quotes*

Taian Ziyang explained that Commerce's concerns about the lack of "public availability" of the price quotes are based on the potential for manipulation. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146; Issues and Decision Memorandum at 39 (referring to "possible manipulation"). But, as *Taian Ziyang* pointed out, the administrative record does not include even a scintilla of evidence of distortion or manipulation, or evidence of any affiliation tainting the price quotes at issue here. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146–47. Thus, in the Final Results, Commerce – in effect – presumed distortion and affiliation, based on nothing more than speculation and conjecture. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1147. Moreover, most of the concerns that the Final Results raised vis-a-vis the price quotes in this case are inherent in price quotes, as well as other types of non-publicly available information. Yet, as *Taian Ziyang* observed, Commerce does not reject such information across the board. To the contrary, Commerce has relied on non-publicly available information – including price quotes – in numerous other cases in the past. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1147.[17]

[17] As a practical matter, public data simply may not be available for all factors of production. In *Vinh Quang*, for example, the domestic producers submitted two price quotes, explaining that they were "unable to obtain public prices for [the input at issue] because that item is not widely traded in commercial markets." *See Vinh Quang Fisheries Corp. v. United States*, 33 CIT ____, ____, 637 F. Supp. 2d 1352, 1355 (2009). In the case at bar, there is no indication that price lists, price bulletins, or other public pricing information was available but was ignored by the GDLSK Plaintiffs.

Taian Ziyang was equally skeptical about Commerce's second basis for rejecting the domestic price quotes. *Taian Ziyang* noted that the Final Results indicated that all four domestic price quotes are dated "within one week of one another" and referred to Commerce's general preference for price data that "reflect broad market averages" covering "a substantial period of time" rather than price data that reflect a more limited period of time, due to concerns about "temporary market fluctuations." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145; *see also* Issues and Decision Memorandum at 38, 40. However, as *Taian Ziyang* pointed out, the two cases that the Final Results cited to support Commerce's preference – Shrimp from Vietnam and Synthetic Indigo from the PRC – are readily distinguished from this case. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145–46 (discussing Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 Fed. Reg. 42,672 (July 16, 2004); Synthetic Indigo From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 Fed. Reg. 53,711 (Sept. 12, 2003)); Issues and Decision Memorandum at 40.

Specifically, in Shrimp from Vietnam, Commerce rejected price quotes for shrimp which were from only one week of the period of investigation. But the record in that case included affirmative evidence of price fluctuations. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146 (discussing Shrimp from Vietnam, 69 Fed. Reg. at 42,684). As *Taian Ziyang* noted, the record here is devoid of any such evidence. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146. Similarly, in Synthetic Indigo from the PRC, Commerce rejected price quotes for plastic bags that were dated anywhere from seven to ten months after the end of the period of review. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1146 (*citing* Issues and Decision Memorandum at 40); Issues and Decision Memorandum for Final Results of the Antidumping Duty Administrative Review on Synthetic Indigo from the People's Republic of China – June 1, 2001, through May 31, 2002, 2003 WL 24153859 (ITA), at Comment 11 (Sept. 12, 2003). In contrast, as *Taian Ziyang* explained, the price quotes in this case are contemporaneous, entirely from within the period of review. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146; *see also* Issues and Decision Memorandum at 40.

Even more to the point, *Taian Ziyang* noted that, as the GDLSK Plaintiffs observed, *all other things being equal*, it makes sense for Commerce to privilege prices that reflect broad market averages and cover a substantial period of time over price data from a more limited time frame. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145. But, here, all other things clearly are not equal. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1145. As the GDLSK Plaintiffs put it, Commerce here was faced with a choice between, on the one hand, "four domestic, product-specific, contemporaneous price quotes" and, on the other hand, "overly broad trade data which is inclusive of air freight." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1145 (quoting GDLSK Plaintiffs' brief) (internal quotation marks omitted).

2. *The Final Results' Treatment of the Indian Import Statistics*

Taian Ziyang observed that the Final Results not only sought to emphasize the potential shortcomings of the domestic price quotes (as discussed above), but, in addition, sought to minimize the evident and admitted flaws in the Indian import statistics on which the Final Results relied (as set forth in greater detail below).

As a threshold matter, *Taian Ziyang* highlighted Commerce's long-standing policy favoring the use of domestic data, rather than import statistics (all other things being equal) – a general policy that the agency did not honor here. *See Taian Ziyang*, 33 CIT at ____ & nn. 60–61, 637 F. Supp. 2d at 1148 & nn.60–61. And *Taian Ziyang* also took note of two basic problems specific to the Indian import statistics that Commerce used, which have the effect of distorting the surrogate value for cardboard cartons in this case.

Taian Ziyang first noted that it is undisputed that the domestic price quotes are much more "product specific" than the Indian import statistics on which Commerce here relied. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1149, 1151–52. HTS subheading 4819.1001 – the subheading for which Commerce has import statistics – covers gift, specialty, and many other types of non-packing boxes, in addition to the sort of plain cardboard packing cartons that the Chinese producers here use to ship their garlic. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1149.

Taian Ziyang noted that the Final Results acknowledged that the Indian import statistics include "many different types of boxes." *See* Issues and Decision Memorandum at 38. But, rather incredibly, the Final Results then asserted that "that fact alone does not undermine the use of the value." *See id*. As *Taian Ziyang* pointedly observed,

Commerce's statement "simply defies logic." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1149. It is beyond cavil that the inclusion of these other more expensive products drives up the price data captured in the Indian import statistics that Commerce used in this case. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1149. The only question is the extent of that inflation.

The Final Results attempted to address the over-breadth of the Indian import statistics, asserting that "the total quantity of gift boxes was less than ten percent of the total carton imports," and that "more than fifty percent of the entries . . . [made under HTS subheading 4819.1001] are simply categorized as boxes or cartons, with no other specifications." *See* Issues and Decision Memorandum at 38–39. But, as *Taian Ziyang* noted, trade intelligence data from Infodrive India and other information submitted by the GDLSK Plaintiffs belies Commerce's efforts to downplay the many products included in the Indian import statistics that are much more expensive than the cardboard packing cartons at issue here. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1149–50 (and authorities cited there).[18] The trade intelligence data indicate, for example, that the vast majority of entries reflected in the Indian import statistics on which Commerce relies are, in fact, more expensive gift and specialty boxes – products that are not comparable to the basic cardboard packing cartons used by the Chinese producers here. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1149–50. As such, *Taian Ziyang* rejected "Commerce's glib conclusion – that 'the fact that different boxes for different purposes have entered . . . under [HTS subheading 4819.1001] does not, in and of itself, call this value into question'" – as a determination that "simply cannot be credited." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1150 (*quoting* Issues and Decision Memorandum at 39) (alteration in original).

Quite apart from the fact that the Indian import statistics are distorted by apparently vast quantities of gift and specialty boxes that are clearly more expensive than the basic cardboard packing

[18] As *Taian Ziyang* explained, "Infodrive India is a service that 'compile[s] and disseminate[s] official import statistics.'" *Taian Ziyang*, 33 CIT at ____ n.56, 637 F. Supp. 2d at 1144 n.56 (*quoting Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. v. United States*, 32 CIT ____, ____ n.7, 2008 WL 2410210 * 6 n.7 (2008)).

Although Commerce's Second Remand Determination states that the trade intelligence data was drawn from Eximkey.com, the documentation submitted by the GDLSK Plaintiffs indicates that the information was taken from Infodrive India. *Compare* Second Remand Determination at 42 *with* GDLSK Respondents' Second Surrogate Value Submission (Admin. Record Pub. Doc. 258), Exh. 2; *see also Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1144 (discussing GLDSK Plaintiffs' submission of "trade intelligence data" from Infodrive India).

cartons that the Chinese garlic producers used, *Taian Ziyang* explained that the Indian import statistics are even further distorted by the inclusion of boxes that were shipped by air. *See generally Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1150–51. As *Taian Ziyang* noted, the Final Results failed to directly confront this issue. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1150. The analysis in the Final Results totaled a single brief paragraph, which was silent on the substantive merits of the effect of the inclusion of air freight charges in the Indian import statistics on which Commerce relied:

> Some companies may import cartons in to the PRC by air, others may not . . . . This point alone, however, does not undermine the [agency's] rationale . . . . Furthermore, the respondents have not submitted on the record of this review anything that demonstrates that their own domestic carton suppliers did not import some [cartons] into the PRC by air.

See Issues and Decision Memorandum at 40 (*quoted in Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1150).

Taian Ziyang observed that, "[r]ather than grappling with the merits of the GDLSK Plaintiffs' concerns about the distortive effects of air freight charges," the Final Results "summarily dismissed them" by stating that "[m]ere allegations of facts, absent any record evidence for support of such claims, cannot be a basis for undermining the use of publicly available, contemporaneous valuation data from Indian HTS categories in this case." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1150 (*quoting* Issues and Decision Memorandum at 40). But, as *Taian Ziyang* noted, nothing in the record supports the Final Results' suggestion that the Chinese garlic producers or their Indian counterparts "used packing cartons that were *imported* – much less imported *by air*." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1150.[19]

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[19] *Taian Ziyang* explained that, "[m]uch as in *Yantai Oriental*," it is difficult to fathom (and Commerce has failed to explain) "why the [Chinese producers] would have used imported packing cartons (much less cartons imported by air), when such basic packaging materials were available domestically." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1151 (*citing Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617 (2002)). And *Taian Ziyang* noted that, indeed, the GDLSK Plaintiffs have stated that they source their cardboard packing cartons domestically, and that, by the same token, Indian garlic producers similarly have no reason to buy more expensive imported boxes since such boxes can be supplied domestically. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1151.

Relying on *Hebei Metals II*, *Taian Ziyang* explained that Commerce's policy favoring the use of domestic data (rather than import statistics) is "'most appropriate where [– as here –] the circumstances indicate that a producer in a hypothetical market would be unlikely to use an imported factor in its production process.'" *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1150 (*quoting Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*,

3. *The Remand in Taian Ziyang*

Taian Ziyang concluded that the Final Results "failed to explain how the Indian import data is the 'best available information,' particularly in light of the domestic Indian price quotes which represent 'values [that] are much more specific to the cartons used for garlic packing.'" *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1151–52 (*quoting* GDLSK Plaintiffs' brief); *see also id*., 33 CIT at ____, 637 F. Supp. 2d at 1144. In addition, *Taian Ziyang* concluded that the Final Results "failed to support [Commerce's] selection of the Indian import statistics by reference to substantial evidence in the record." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1152; *see also id*., 33 CIT at ____, 637 F. Supp. 2d at 1144. *Taian Ziyang* therefore remanded this issue to Commerce for further consideration. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1152, 1166.

Unfortunately, however, Commerce's Second Remand Determination is wholly unresponsive to *Taian Ziyang*.

4. *The Second Remand Determination's Treatment of the Domestic Price Quotes*

The Second Remand Determination adds virtually nothing to this case; and, in fact, it is incorrect as to at least one key finding. Specifically, the Second Remand Determination states (in two different places) that the four price quotes at issue were "not contemporaneous" with the period of review – a statement that is patently false. *See* Second Remand Determination at 43 (stating that price quotes are "not contemporaneous"); *id*. at 75 (stating that "[t]he price quotes . . . do not reflect prices during the [period of review]").[20] The magnitude of Commerce's error calls into question the agency's "bottom line" on this issue (*i.e.*, the agency's determination that the Indian import statistics are the "best available information" for use in determining the surrogate value for cardboard cartons), and, taken alone, is sufficient to necessitate another remand.

In other words, the Second Remand Determination reflects a determination by Commerce that the four domestic price quotes were not the "best available information" because the price quotes (1) were not "publicly available," and, according to Commerce, (2) were not

29 CIT 288, 300, 366 F. Supp. 2d 1264, 1274 (2005)) ("*Hebei Metals II*"); *see also Taian Ziyang*, 33 CIT at ____ & nn.6061, 637 F. Supp. 2d at 1148 & nn.60–61 (discussing Commerce policy favoring use of domestic data, rather than import statistics).

[20] *But see* Issues and Decision Memorandum at 40 (acknowledging that "the price quotes fall within the [period of review]"); *Taian Ziyang*, 33 CIT at ____ n.57, 637 F. Supp. 2d at 1145 n.57 (same).

representative of "broad market averages" covering "a substantial period of time," and (3) were not contemporaneous with the period of review. *See*, *e.g.*, Second Remand Determination at 42–43 (rejecting the four price quotes because they "are not publicly available, not contemporaneous, and are not representative of prices throughout the [period of review]"); *see generally id*. at 41–46, 73–76. Because Commerce itself has yet to correct its error concerning the contemporaneity of the domestic price quotes, it cannot be said with certainty that the agency would not have reached a different conclusion as to the "best available information" for use in determining the surrogate value for cardboard cartons if the agency had recognized that the price quotes in this case in fact are contemporaneous with the period of review. At the very least, the agency's "calculus" presumably would have been considerably different.[21] Further, the gravity of Commerce's error raises serious questions about the degree of care taken in the preparation of the Second Remand Determination, and – even more importantly – the extent of the independence of the agency's review of individual issues both within this proceeding and vis-a-vis other related cases.[22]

[21] The Government's brief does not repeat Commerce's erroneous statement as to the contemporaneity of the four price quotes; but it also makes no effort to acknowledge or seek to correct the error either. *See* Def. Response at 3–13. Only at oral argument did the Government acknowledge that the four price quotes in fact are contemporaneous with the period of review, and that the Second Remand Determination's statements to the contrary are in error. *See* Recording of Oral Argument at 1:48:50–1:50:22.

Interestingly, in the previous stage of the proceeding, although Commerce's Final Results correctly noted that the four price quotes are contemporaneous, the Government's brief incorrectly stated that they were not. *See Taian Ziyang*, 33 CIT at ____ n.57, 637 F. Supp. 2d at 1145 n.57 (*quoting* Government's brief); Issues and Decision Memorandum at 40 (noting that price quotes are contemporaneous).

[22] In the case at bar, for example, Commerce's determination of a surrogate value for jars and lids (like its determination of a surrogate value for cardboard cartons) involves a choice between domestic price quotes and Indian import statistics. But, unlike the price quotes for cardboard cartons, the price quotes for jars and lids are somewhat outside the period of review. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153. Similarly, in *Jinan Yipin* – which involves the eighth administrative review of the same antidumping duty order at issue here (*i.e.*, the administrative review immediately preceding this one) – the surrogate valuation of cardboard cartons was also disputed. But, unlike the price quotes for cardboard cartons in this case, the price quotes for cardboard cartons in *Jinan Yipin* were more than eight months beyond the period of review. *See Jinan Yipin Corp. v. United States*, 33 CIT ____, ____, 637 F. Supp. 2d 1183, 1195 (2009) ("*Jinan Yipin II*").

Commerce's error in the Second Remand Determination concerning the contemporaneity of the four price quotes here raises the possibility that the agency may not be exercising sufficient care to consider each issue and each case separately and independently, on its unique facts. To be sure, the rule of law requires predictability, consistency, and uniformity in decisionmaking, and that similar cases be decided similarly. However, the rule of law also requires that Commerce take pains to ensure that each issue in each case is decided on the

As to Commerce's asserted concerns about the "public availability" and "representativeness" of the domestic price quotes, the Second Remand Determination does little more than rehash the exact same points that were made in the Final Results (and found wanting in *Taian Ziyang*). *Compare* Second Remand Determination at 41–46, 75–76 *with* Issues and Decision Memorandum at 39–40. As the GDLSK Plaintiffs aptly observe, the Second Remand Determination largely "reiterates [Commerce's] . . . concerns about the unreliability of the price quotes," and "is comprised of virtually the identical arguments that [*Taian Ziyang*] has already found to be unsupported and inadequate." *See* GDLSK Comments at 3, 6.

As discussed below, in the course of the most recent remand, notwithstanding the questions raised in *Taian Ziyang*, Commerce apparently took no action to attempt to substantiate its assumption that the domestic price quotes are not accurate or to otherwise obtain any further information to try to verify their reliability, in order to address the agency's concerns about the potential for "manipulation" which is the basis for the agency's preference for publicly available data. Similarly, in the course of the remand, notwithstanding the questions raised in *Taian Ziyang*, Commerce apparently took no action to obtain any further information to clarify the extent to which the domestic price quotes in fact reflect "broad market averages" and are sufficiently representative of prices over "a substantial period of time" – specifically, prices over the one-year period that constitutes the period of review. In addition, Commerce apparently took no action to attempt to ascertain the extent to which the price of basic cardboard packing cartons fluctuated during the period of review at issue here, or even the extent to which the price historically has fluctuated over time. As such, Commerce apparently took no action during the most recent remand to clarify the "representativeness" of the four domestic price quotes on the record.[23]

specific facts on the record of that case. "Cut-and-paste" decisionmaking and "cookie cutter" justice are not permissible.

[23] Like the Final Results, the Second Remand Determination too made no reference to Commerce's general preference for the use of domestic data, rather than import statistics, which was discussed in *Taian Ziyang*. *See Taian Ziyang*, 33 CIT at ____ & nn.60–61, 637 F. Supp. 2d at 1148 & nn.60–61 (discussing preference for domestic data); *see also* GDLSK Comments at 3, 5–6, 9. The Government seeks to remedy Commerce's omission by discussing the matter in its brief. *See* Def. Response at 8. But the Government's analysis constitutes impermissible *post hoc* rationalization. *See*, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (explaining that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *State Farm*, 463 U.S. at 50 (stating that "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). In weighing the merits of the domestic price quotes

a. *"Public Availability" and Potential "Manipulation" of Price Quotes of Price Quotes*

In the Second Remand Determination, Commerce reiterates its preference for "publicly available information," explaining once again that the purpose underlying that preference is "to reduce the possibility of manipulation." *See* Second Remand Determination at 43; *see also id*. at 46 (referring to "the potential for manipulation"); *id*. at 76 (same); Def. Response at 7 (referring to "the possibility that . . . data has been manipulated"). However, Commerce ignores *Taian Ziyang* 's observation that no party – not even the Domestic Producers – has even alleged, much less adduced any evidence to seek to prove, that the price quotes at issue here are distorted or are the product of any manipulation, or are tainted by any affiliation between the requester of the price quotes and the supplier, or any other potential conflict of interest or collusion. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146–47; *see also* GDLSK Comments at 4 (arguing that "unfounded speculation" concerning potential manipulation "remains an improper basis for Commerce's determinations").[24]

Moreover, as discussed above, much of the concern about price quotes expressed in the Final Results (and in the Second Remand Determination) is not specific to the price quotes in this case, but, rather, is inherent in the nature of price quotes in general (and even inherent in other types of information that is not publicly

(particularly as compared to the Indian import data), Commerce must acknowledge and address the agency's stated preference for domestic data and its implications for this case.

[24] It is, of course, the Domestic Producers that have the incentive to challenge the price quotes if they are not accurate. Presumably, if the price quotes did not fairly reflect the price of cardboard packing cartons throughout the period of review, the Domestic Producers would be the first to say so. Significantly, however, although the Domestic Producers placed the Indian import statistics on the record of this proceeding, they have not sought to present any evidence suggesting that the domestic price quotes on the record were manipulated or are in any way not representative. Nor have the Domestic Producers ever made any such claims. It is also telling that the Domestic Producers have not briefed this issue before the Court – not even in the prior stage of the proceeding. *See Taian Ziyang*, 33 CIT at ____ n.55, 637 F. Supp. 2d at 1144 n.55 (noting that Domestic Producers elected not to brief issue of valuation of cardboard cartons). The Domestic Producers' participation on this issue was similarly limited in the underlying administrative review. *See* Issues and Decision Memorandum at 38 (noting that the Domestic Producers filed no comments on issue of cardboard cartons).

Finally, the very nature of the four domestic price quotes at issue here should serve to assuage, at least to some degree, Commerce's concerns about "manipulation." If one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive – in other words, one would generate a greater number of price quotes, and those price quotes would span the full duration of the period of review. Viewed through this lens, the imperfections that Commerce sees in the price quotes are actually indicia of authenticity.

available).[25] Nevertheless, as *Taian Ziyang* observed, Commerce does not reject price quotes (and other information that is not publicly available) in all instances. To the contrary, Commerce has relied on non-publicly available information – including price quotes – in numerous other cases in the past. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1147. Depending on the state of the record, "price quotes may reasonably be the best available information . . . for surrogate valuation purposes." *See Vinh Quang Fisheries Corp. v. United States*, 33 CIT ____, ____, 637 F. Supp. 2d 1352, 1358 (2009) (rejecting respondent's argument that "a price quote never meets [Commerce's] standards and cannot be used because price quotes are inherently flawed and unreliable privately sourced data," in case where Commerce relied on two price quotes submitted by domestic producers, dated on two sequential days (rather than import statistics advocated by respondent)).

Yet, notwithstanding the points raised in *Taian Ziyang*, the Second Remand Determination fails to articulate a satisfactory explanation as to why the agency relies on price quotes and other information that is not publicly available in some cases, but not in others (and not in this case). Commerce has pointed to nothing that sets forth – for the benefit of domestic producers and respondents, as well as agency personnel, the courts, and the public at large – clear, established criteria that the agency consistently, uniformly, and systematically applies in determining when price quotes and other information that is not publicly available are acceptable for use in determining surrogate values in NME cases, and when they are not.[26]

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[25] *See* Second Remand Determination at 46 (referring to "the problems inherent with price quotes" in general).

[26] Like the Final Results, the Second Remand Determination includes a laundry list of documentation that Commerce purports to require to establish the reliability of price quotes – documentation that apparently is missing from the record here. *Compare* Issues and Decision Memorandum at 39 *with* Second Remand Determination at 42–43 (faulting lack of "information detailing the requestor of the price quotes and . . . information on the companies providing the price quotes," lack of information indicating whether the price quotes were "prepared specifically upon request and not generated in response to a request made by the GDLSK respondents in the normal course of business," lack of "information as to the relationship between the GDLSK respondents and the providers of the price quotes," lack of "information about who requested the price quotes and under what circumstances the price quotes were obtained," lack of information to "indicate where the price quotes fall in the spectrum of price quotes . . . offered by the[] companies," lack of information indicating whether the price quotes were "manipulated" in any way, lack of information indicating whether the GDLSK Plaintiffs "selectively decide[d] to submit only those price quotes that are favorable . . . while not submitting all price quotes . . . [they] received," lack of "information on how the [price quotes] were obtained (including the sources and any adjustments that may have been made)," and lack of information "demonstrat[ing] that the submitted price quotes are representative of carton prices during the [period of review]");

b. *"Representativeness" of Price Quotes and Potential "Temporary Market Fluctuations"*

The Second Remand Determination's treatment of the issue of the "representativeness" of the domestic price quotes is no more satisfying than its discussion of "public availability." *See* GDLSK Comments at 4 (noting, *inter alia*, that Second Remand Determination "makes the same assertion" of susceptibility to temporary market fluctuations as the Final Results, "without any factual basis"); *see generally* Second Remand Determination at 43–44, 75–76.

Once again, Commerce simply repeats the Final Results' broad, generalized pronouncements about the virtues of "surrogate values that reflect broad market averages" and "cover a substantial period of time," and then reiterates its position that the price quotes here "do not represent broad market averages" and "are not representative of prices throughout the [period of review]" – without even acknowledging the points and questions raised in *Taian Ziyang*. *See* Second Remand Determination at 43–44, 75–76; *compare* Issues and Decision Memorandum at 39–40 (same); *see generally Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145–46 (analyzing and criticizing Final Results' discussion of "representativeness" of four domestic price quotes at issue here).[27]

see also id. at 75–76 (faulting lack of information indicating whether the price quotes "represent an actual arm's length price for a completed order of these boxes between unaffiliated parties").

There are at least two salient points to be made. First, a cursory review of cases in which Commerce has relied on price quotes and other non-publicly available information suggests that Commerce's practice has not been as consistent as the agency here suggests, and that – contrary to its representations in this case – Commerce has not necessarily required documentation such as that outlined above in other cases in the past. As but one example, in *Vinh Quang*, Commerce deemed the two price quotes submitted by the domestic producers to be publicly available information, despite the respondent's claims to the contrary, and although the basis for Commerce's characterization is not clear from the record. *See*, *e.g.*, *Vinh Quang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1355, 1357. Even the domestic producers in that case did not claim that the price quotes were publicly available information. *See id*. at 1355 (noting that, in submitting price quotes, domestic producers explained that they were "unable to obtain public prices").

And, second, Commerce apparently made no effort in the course of the most recent remand to seek to obtain any of the information outlined above – information which, according to Commerce, would enable it to "assess the accuracy [and] completeness" of the quotes, and to "confirm that the submitted price quotes are representative of carton prices during the [period of review]," and thus would help resolve both the agency's concerns about the "representativeness" of the price quotes and the agency's reservations concerning the fact that price quotes in general – including the price quotes at issue here – are not information that is typically "publicly available." *See* Second Remand Determination at 43.

[27] The Second Remand Determination seems to reflect concern only about temporal representativeness (and the potential for "temporary price fluctuations"), which is also the focus of the analyses in most other judicial decisions and administrative determinations in which

In the Second Remand Determination, Commerce makes the claim that, because the four domestic price quotes in this case are dated within two days of one another, the price quotes are "*highly susceptible* to temporary market conditions." *See* Second Remand Determination at 43–44 (emphasis added); *see also* Def. Response at 5 (same); Issues and Decision Memorandum at 40 (expressing concern that price quotes might reflect "temporary market fluctuations").[28] In support of Commerce's position on the preferability of "surrogate values that reflect broad market averages and that cover a substantial period of time" over price quotes that may be "subject to temporary market fluctuations," the Second Remand Determination and the Government once again cite Shrimp from Vietnam. *See* Second Remand Determination at 44 (discussing Shrimp from Vietnam, 69 Fed. Reg. 42,672, 42,684, *unchanged in* Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam, 69 Fed. Reg. 71,005

representativeness has been an issue. *See*, *e.g.*, Second Remand Determination at 43 (stating that domestic price quotes were rejected because, *inter alia*, they are "not representative of prices throughout the [period of review]"); *id*. (stating that "the record does not demonstrate that the submitted price quotes are representative of carton prices during the [period of review]"); *id*. at 44 (stating that agency "has historically chosen to use surrogate values that reflect broad market averages and that cover a substantial time period over price data that are obtained from so isolated a time frame as to be subject to temporary market fluctuations"); *id*. at 46 (asserting that Indian import statistics are preferable to domestic price quotes because import statistics are "representative of a range of prices throughout the [period of review]"); *id*. at 75 (stating that price quotes "do not represent broad market averages and do not reflect prices during the [period of review]"). In the Final Results, however, Commerce asserted that the Indian import statistics "represent[] the best available information on the record" because, *inter alia*, the statistics "are not specific to one region within India." *See* Issues and Decision Memorandum at 38. Thus, while the analysis herein focuses on temporal representativeness, the record is unclear as to whether geographic representativeness is also at issue in this case (although the four domestic price quotes are from four different cities). *See* GDLSK Respondents' Surrogate Value Submission (Admin. Record Pub. Doc. 157), Exh. 16 (domestic price quotes for cardboard packing cartons).

[28] In the Second Remand Determination, Commerce has turned up the volume on its rhetoric. In the Final Results, Commerce stated simply that the price quotes "could easily be subject to temporary market conditions." *See* Issues and Decision Memorandum at 40. Now, in the Second Remand Determination, Commerce maintains that the price quotes in this case are "*highly susceptible* to temporary market conditions." *See* Second Remand Determination at 43–44 (emphasis added). As discussed herein, however, there is no apparent basis in logic – and clearly no basis in the evidentiary record – to support either of Commerce's assertions.

As *Taian Ziyang* noted, the record is devoid of any evidence of price fluctuation. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146. Commerce added nothing to the record in the course of the most recent remand to substantiate even its original assertion that the price of basic cardboard packing cartons "could easily be subject to temporary market conditions" or "temporary market fluctuations." *See* Issues and Decision Memorandum at 40. Certainly there is no evidence to support Commerce's claim that the price quotes here are "highly susceptible" to such fluctuation.

(Dec. 8, 2004)); Def. Response at 5 (same). As *Taian Ziyang* noted, however, the record in Shrimp from Vietnam included affirmative evidence of price fluctuations. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1146 (discussing Shrimp from Vietnam). In stark contrast, in this case, there is not even an *iota* of evidence that the price of basic cardboard packing cartons was subject to any significant fluctuation whatsoever over the course of the period of review – much less evidence that prices were (as Commerce now asserts) "highly susceptible" to such fluctuation. *See id*.[29] Commerce's statement in the Second Remand Determination is thus nothing more than bald speculation. It does not even necessarily comport with common sense.

In other words, it seems reasonable to assume that some commodities (or factors of production) fluctuate in price, seasonally and/or in response to established market forces such as supply and demand. It is common knowledge, for example, that agricultural produce prices generally tend to fluctuate based on seasonal availability, and that mineral prices may fluctuate in accordance with supply and demand. On the other hand, it is not at all obvious why the price of basic cardboard packing cartons would be subject to appreciable fluctuation over the course of a single year (*i.e.*, the period of review). And, contrary to Commerce's assertions in the Second Remand Determination, it is certainly not obvious why the price of basic cardboard packing cartons would be "*highly* susceptible" to fluctuation. *See* Second Remand Determination at 43–44 (emphasis added); *see also* Def. Response at 5.

As the "master of antidumping law" and the nation's institutional repository of expertise in the economics of trade, Commerce cannot here turn a blind eye to the realities of the business world, and make the unreasonable, wooden assumption that the prices of all commodities or factors of production are subject to significant fluctuation over

[29] In the Second Remand Determination, Commerce asserts for the first time that the notation on one of the four price quotes indicating that the quote is "only valid for a limited time" constitutes evidence that the price of cardboard packing cartons is subject to fluctuation. *See* Second Remand Determination at 44; *see also* Def. Response at 5, 7. However, there is nothing to indicate that the notation is anything more than standard contract "boilerplate." And, in any event, the notation is far too flimsy and far too little to constitute the "substantial evidence" required to support a Commerce finding that prices were subject to significant fluctuation.

The Second Remand Determination also asserts for the first time that only two of the four price quotes are "legible." *See* Second Remand Determination at 44; *see also* Def. Response at 5. But it is much, much too late in the day for Commerce to raise that concern. At this advanced stage of the proceeding, Commerce simply cannot now be heard to raise such a complaint, which, in any event, presents interesting questions as to exactly how the agency analyzed, and then rejected, evidence that it now claims it cannot read.

the period of review. Such a blanket presumption defies logic and common sense, and is at odds with the agency's fundamental obligation "to determine antidumping margins 'as accurately as possible.'" *See*, *e.g.*, *Jinan Yipin Corp. v. United States*, 31 CIT 1901, 1937, 526 F. Supp. 2d 1347, 1379 (2007) ("*Jinan Yipin I*") (holding that, "absent evidence of significant price fluctuation in a short time," Commerce not permitted to reject price quotes for cardboard cartons used to pack garlic as not sufficiently "representative," even though price quotes not only were all dated within a single month, but also post-dated period of review by more than eight months)[30]; *Thai Pineapple*, 187 F.3d at 1365; *Shakeproof*, 268 F.3d at 1382 (citation omitted).

Where, as here, Commerce admits that there are distortions in the price data that the agency seeks to use, Commerce cannot reasonably rely on mere assumptions alone (*i.e.*, the assumption that non-public price information is the product of manipulation, and the assumption that prices fluctuate significantly over the period of review) to establish that the alternative data are also distorted. In such cases, actual proof of distortion is required.

5. *The Second Remand Determination's Treatment of the Indian Import Statistics*

As outlined above, the Second Remand Determination's response to *Taian Ziyang's* analysis of the Final Results' treatment of the domestic price quotes is far from satisfactory. But, by comparison, the Second Remand Determination's response to *Taian Ziyang's* criticisms of the Indian import statistics is all but non-existent. The Second Remand Determination is almost entirely silent on the concerns that *Taian Ziyang* raised as to the serious problems that plague the Indian import statistics on which Commerce relied in the Final Results, and on which the agency continues to rely in the Second Remand Determination. *Compare* Second Remand Determination at 42, 45–46, 75 *with Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1147–52; *see* GDLSK Comments at 3 (noting that the Second Remand

[30] *See also*, *e.g.*, *Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1159 (explaining that "Commerce is not free to predicate its surrogate value determinations on unexplained and seemingly unreasonable assumptions"; remanding issue of surrogate value for ocean freight charges with instructions requiring agency to explain and provide record support for its "questionable assumption that the respondents used such a long, circuitous, and more expensive route to ship their garlic to the United States"); *Jinan Yipin I*, 31 CIT at 1933, 526 F. Supp. 2d at 1375 (holding that, absent record evidence to support the fact, Commerce cannot presume that Indian garlic producers "typically irrigate their garlic crops using water supplied by municipal utilities, at costs associated with such utilities"); *Yantai Oriental*, 26 CIT at 617 (holding that, absent supporting evidence and explanation, Commerce cannot presume that producers would use more expensive imported coal when domestic coal is available).

Determination "has largely ignored [*Taian Ziyang*'s] criticisms of the Indian import statistics values and has continued to rely upon the same reasoning and arguments . . . previously found to be unsatisfactory").

As the GDLSK Plaintiffs correctly point out, the Second Remand Determination "offers absolutely no new information or explanation as to why [Commerce's] continued use of the[] unrepresentative import prices should be found reasonable." *See* GDLSK Comments at 5; *see also* GDLSK Reply Comments at 2–3 (same). Nothing in the Second Remand Determination responds to the concerns expressed in *Taian Ziyang* about the Indian import statistics' lack of product specificity. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1149–50, 1152.[31] Commerce has made no attempt to address the trade intelligence data placed on the record by the GDLSK Plaintiffs, or to otherwise ascertain the extent to which the values reflected in the Indian import statistics are inflated by the inclusion of apparently vast quantities of more expensive specialty products that bear no resemblance to the basic cardboard packing cartons used by the Chinese producers here. *See* GDLSK Comments at 3 (noting that the Second Remand Determination "again fails to address adequately . . . the distortions caused by the lack of specificity of the import statistics"); *id*. at 9 (same); GDLSK Reply Comments at 3.[32]

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[31] In the Second Remand Determination, Commerce notes that the trade intelligence data submitted by the GDLSK Plaintiffs "indicat[e] that Indian HTS 4819.1001 included certain specialty packing products they [*i.e.*, the GDLSK Plaintiffs] *claim* not to have used." *See* Second Remand Determination at 42 (emphasis added). But that ship has long since sailed. It is too late for Commerce to equivocate on whether the Indian import statistics are distorted by the inclusion of gift and specialty boxes and other more expensive products that are unlike the basic cardboard packing cartons at issue here. That distortion is an undisputed record fact. The open questions are the extent and the significance of that distortion.

In the Final Results, Commerce acknowledged that, while the Chinese producers use "boxes within this Indian HTS category . . . (*e.g.*, 5-ply 10 by 14 cardboard)," the HTS subheading also encompasses "many different types of boxes," including gift and specialty boxes, in addition to basic cardboard packing cartons. *See* Issues and Decision Memorandum at 38–39; *see also Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1149 (noting that it is "undisputed" that Indian import statistics cover "gift, specialty, and other non-packing boxes" in addition to plain cardboard packing cartons). Indeed, elsewhere in the Second Remand Determination itself, Commerce concedes (as it must) that Indian import data "do not perfectly represent . . . [the basic cardboard packing cartons] of the GDLSK respondents because the import data include specialty boxes," and that the import data are thus "less specific" than the domestic price quotes. *See* Second Remand Determination at 45, 75. Commerce cannot now argue to the contrary.

[32] The GDLSK Plaintiffs also assert that Commerce's rejection of the much more "product specific" price quotes for cardboard packing cartons is undermined by Commerce's emphasis on the importance of product specificity in the agency's valuation of garlic seed. *See* GDLSK Comments at 6; *see also* Second Remand Determination at 4–8, 54–58 (discussing valuation of garlic seed); Issues and Decision Memorandum at 14–22 (same). According to the GDLSK

Similarly, nothing in the Second Remand Determination responds to the concerns expressed in *Taian Ziyang* about the air freight costs reflected in the values derived from the Indian import statistics on which Commerce relies. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1150–51; GDLSK Comments at 7, 9. Commerce now clearly concedes that the Indian import data are distorted by the inclusion of air freight costs. *See* Second Remand Determination at 75 (noting that the agency "acknowledges the fact that the [import statistics] do not perfectly represent the inputs of the GDLSK respondents because the Indian import data include . . . boxes transported by air").[33] Nevertheless, Commerce made no attempt on remand to ascertain the volume of merchandise reflected in the Indian import statistics that was imported by air, or to otherwise demonstrate that

Plaintiffs, "the two conflicting positions Commerce takes with respect to garlic seed and cartons cannot be reconciled and demonstrate that its findings [as to the valuation of cardboard cartons] . . . are arbitrary." *See* GDLSK Comments at 6. The Government contends that the GDLSK Plaintiffs "waived the right to raise this argument before this Court" because the argument was not made during the remand proceedings, although the Government concedes that the argument was raised in the course of the underlying administrative proceeding. *See* Def. Response at 13 & n.1; *see also* Issues and Decision Memorandum at 38 (noting GDLSK Plaintiffs' argument that Commerce "cannot select a domestic garlic seed surrogate value on the basis of being 'more product specific,' while at the same time rejecting another domestic price to value a different [factor of production]" – *i.e.*, cardboard cartons).

In any event, the antidumping statute "merely requires the use of the 'best available information' with respect to the valuation of a given factor of production; it does not require that a uniform methodology be used in the valuation of all relevant factors." *See Nation Ford*, 166 F.3d at 1378 (rejecting claim that, because Commerce used Indian domestic prices in its valuation of one factor of production, the agency was required to use Indian domestic prices for other values in the case). There is therefore no merit to the GDLSK Plaintiffs' suggestion that Commerce's emphasis on product specificity in the valuation of garlic seed governs the agency's valuation of cardboard packing cartons. On the other hand, as discussed in greater detail below, product specificity is clearly a key criterion in determining the "best available information" for use in valuing factors of production, including the cardboard cartons at issue here.

[33] In the Final Results, Commerce appeared to quibble about whether the cardboard cartons used by the Chinese producers were imported by air, or were sourced domestically as the GDLSK Plaintiffs have maintained. *See*, *e.g.*, Issues and Decision Memorandum at 40 (asserting that the GDLSK Respondents had not "demonstrate[d] that their own domestic carton suppliers did not import some products into the PRC by air"). And, even though (in the statement quoted above) Commerce has now clearly conceded that air freight charges inflate the values derived from the import statistics (*see* Second Remand Determination at 75), the Second Remand Determination elsewhere seems to try to continue to hedge. *See* Second Remand Determination at 46 (stating that "the data obtained through Indian import statistics *may not* perfectly represent the inputs used by the GDLSK respondents because the Indian import data include . . . boxes transported by air") (emphasis added); *see also id*. at 42 (stating that "the GDLSK respondents *claim* that [the Indian import statistics] include[] products that, unlike those that the GDLSK respondents used, were shipped by air") (emphasis added).

the values reflected in the Indian import statistics are not significantly inflated by the inclusion of air freight costs.

The entirety of the Second Remand Determination's defense of the Indian import statistics amounts to a series of conclusory assertions (discussed in greater detail below), coupled with Commerce's broad claim that "it is within [the agency's] discretion to choose Indian import data . . . over domestic, respondent-submitted price quotes." *See* Second Remand Determination at 44. To be sure, Commerce enjoys broad discretion in valuing factors of production and ascertaining the "best available information." *See*, *e.g.*, *Shakeproof*, 268 F.3d at 1381. However, that does not mean that the agency's choice between Indian import data and domestic price quotes is immune from judicial review. Commerce's discretion notwithstanding, "a surrogate value must be as representative of the situation in the [non-market economy] country as is feasible." *See Nation Ford*, 166 F.3d at 1377 (internal quotation marks and citation omitted). The role of the courts in a case such as this is to ask – and to answer – what the Court of Appeals has termed "the critical question": whether Commerce's valuation of the factors of production is "based on the *best available information* and establishes antidumping margins *as accurately as possible*." *See Ningbo*, 580 F.3d at 1257 (emphases added) (internal quotation marks and citation omitted). Thus, contrary to Commerce's implication in the Second Remand Determination, the agency's discretion here is by no means unfettered.

In an attempt to support its claim that "it is within [Commerce's] discretion to choose Indian import data . . . over domestic, respondent-submitted price quotes," the Second Remand Determination cites two authorities – Synthetic Indigo from the PRC, and *Jinan Yipin II*. *See* Second Remand Determination at 44–46 (discussing Synthetic Indigo from the PRC, 68 Fed. Reg. at 53,711, and *Jinan Yipin Corp. v. United States*, 33 CIT ____, ____, 637 F. Supp. 2d 1183, 1196 (2009) ("*Jinan Yipin II*")). But those authorities are inapposite.

The Second Remand Determination's citation of Synthetic Indigo from the PRC brings nothing new to the analysis in this case. As section III.E.1 above notes, Synthetic Indigo was discussed in both the Final Results and in *Taian Ziyang*. *See* Issues and Decision Memorandum at 40; *Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145–46; section III.E.1, *supra*. Moreover, the Second Remand Determination's discussion of Synthetic Indigo flatly misrepresents the facts of that case and ignores the discussion in *Taian Ziyang*. Specifically, in the Second Remand Determination, Commerce states that the price quotes in Synthetic Indigo "suffered from the same flaws as the price quotes in this review." *See* Second Remand Determination at

45. But, quite to the contrary, as *Taian Ziyang* explained (and as discussed above), the price quotes in Synthetic Indigo "were dated anywhere from seven to ten months after the end of the [period of review]" – while the price quotes at issue here are fully contemporaneous with the period of review. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1145–46 (*quoting* Issues and Decision Memorandum at 40).[34]

The Second Remand Determination's discussion of *Jinan Yipin II* is similarly misleading. In the Second Remand Determination, Commerce suggests that this case and *Jinan Yipin II* are close parallels, and intimates that the price quotes in that case were rejected in favor of Indian import statistics for the same reasons that Commerce has given in this case. *See* Second Remand Determination at 44–45. But what Commerce strategically fails to disclose is that the price quotes in *Jinan Yipin II* – like the price quotes in Synthetic Indigo from the PRC, but unlike the price quotes at issue here – were from outside the period of review. *See Jinan Yipin II*, 33 CIT at ____, 637 F. Supp. 2d at 1195 (noting that price quotes in that case "were eight months after the close of the period of review"); *see also* GDLSK Comments at 6–7. [35] In other words, without regard to the numerous other facts distinguishing the three cases from one another, the price quotes in Syn-

[34] Inexplicably, the Government states in its brief that, in Synthetic Indigo from the PRC, "Commerce rejected the price quotes [in that case] because it was unable to determine whether [the price quotes] were representative of the range of prices . . . during the period of review." *See* Def. Response at 9. The Government argues that "[s]imilarly in this case, Commerce rejected the price quotes because, in part, [the GDLSK Plaintiffs] failed to meet [their] burden of establishing that the price quotes represented a broad market average during the period of review." *See id*.

Either the Government did not read Synthetic Indigo from the PRC, or the Government is being less than fully candid with the court. The Issues and Decision Memorandum in Synthetic Indigo makes it clear that Commerce's foremost concern about the price quotes there was that the price quotes were "dated from seven to ten months after the end of the [period of review]" – a key fact that the Government significantly failed to note in its brief here. *See* Issues and Decision Memorandum for Synthetic Indigo from the PRC, 2003 WL 24153859 (ITA), at Comment 11. Thus, contrary to the Government's claims, this case is readily distinguished from Synthetic Indigo from the PRC.

[35] While the decision may be somewhat (as the Government puts it) "instructive," the significance of *Jinan Yipin II* for this case is limited for other reasons as well, in addition to those outlined above. *See* Def. Response at 11–13. As the GDLSK Plaintiffs emphasize, for example, "[e]ach proceeding has its own record," and Commerce's determination in this case must be judged solely on the record compiled here. *See* GDLSK Comments at 6. In addition, the GDLSK Plaintiffs correctly note that "the import data and the trade intelligence data from *Jinan Yipin II* corresponds to a different time period and, therefore, is based upon entirely different entries. Consequently, the degree to which the trade intelligence data demonstrates that the import data does not consist of the type of cartons used by the garlic producers for each case is entirely unrelated. For example, unlike this case, the trade intelligence data in *Jinan Yipin II* overlapped but did not correspond with the [period of review] exactly." *See* GDLSK Comments at 7.

thetic Indigo from the PRC and *Jinan Yipin II* differ from the price quotes at issue here in at least one respect – the price quotes in this case are contemporaneous, while those in the two cases that Commerce cites were not.

In an effort to defend the agency's reliance on the Indian import statistics, Commerce and the Government seek to cast the case at bar as a case where the agency is confronted with a choice between two imperfect sets of data. *See*, *e.g.*, Second Remand Determination at 44 (arguing that "it is within [Commerce's] discretion to choose between two imperfect data sources").[36] But that is not an accurate depiction of the current state of the administrative record here.

Commerce candidly admits that the Indian import statistics are "imperfect" – that is, that the import statistics reflect inflated values as a surrogate for the input in question here – both because the import statistics include more expensive gift and specialty boxes that are unlike the basic cardboard packing cartons used by the Chinese garlic producers in this case (such that the import statistics are not "product specific") and because, although garlic producers use domestic packing cartons, the import statistics include air freight charges for boxes imported by air. *See* Second Remand Determination at 75.[37] On the other hand, based on the record as it currently stands, the domestic price quotes are "imperfect" only in the sense that it has not been established to Commerce's satisfaction that the price quotes were not manipulated and that the price quotes are sufficiently "representative" of prices throughout the period of review. In other words, in contrast to the Indian import statistics (which are admittedly "imperfect"), there is no affirmative evidence that the domestic price quotes are in any way "imperfect."

Simply stated, Commerce here has chosen *admittedly* distorted data over data that the agency speculates may be *potentially* distorted. Or, to state it a little differently, Commerce here has chosen *admittedly distorted* Indian import statistics over *potentially "perfect"* price quotes. And Commerce apparently has done so without conducting any analysis (not even a qualitative analysis, much less a quantitative one) to determine the extent of the *actual* distortion of the import statistics, for comparison to the extent to which (according to

[36] *See also* Def. Response at 12 (analogizing instant case to *Jinan Yipin II*, in context of argument that Commerce has discretion to choose between "two imperfect data sets"); *id*. at 5–6.

[37] Commerce now "acknowledges the fact that the [import statistics] do not perfectly represent the inputs of the GDLSK respondents because the Indian import data include [1] specialty boxes, and [2] boxes transported by air." *See* Second Remand Determination at 75.

Commerce) the domestic price quotes might *potentially* be distorted. As such, Commerce's choice of the Indian import statistics over the domestic price quotes is not rational and lacks any basis in the record.

Other than Commerce's claim that the choice between import statistics and domestic price quotes is a matter of agency discretion, all that remains of the Second Remand Determination's defense of its decision to rely on the Indian import statistics in this case is a series of unsupported, conclusory assertions about the shortcomings of the domestic price quotes, and the relative merits of the two sets of data. The Second Remand Determination states, for example, that Commerce "considers the problems inherent with price quotes, and the specific deficiencies of the price quotes submitted for this review . . . to be *far more problematic*" than the Indian import data. *See* Second Remand Determination at 46 (emphasis added). To the same effect, elsewhere in the Second Remand Determination Commerce states that, "[a]s long as there are other data sources on the record that, overall, *better meet* [*Commerce's*] *criteria* . . . , [Commerce] is obliged to use *the better data source* over price quotes as a surrogate value." *See id*. at 45 (emphases added). The two statements, on their face, purport to be comparisons of the relative merits of the domestic price quotes *versus* the Indian import statistics. However, as discussed above, the record is devoid of any true comparative analysis of the two sets of data. Indeed, a line-by-line review of both the Second Remand Determination and the Final Results reveals that there is no basis whatsoever in the record for Commerce's statements.

The Second Remand Determination similarly reiterates the Final Results' determination that the Indian import statistics "are the *best available information* with which to value . . . cartons in this proceeding." *See* Second Remand Determination at 76 (emphasis added); *see also id*. at 46 (stating that Commerce "continues to find the import statistics to be the *best available information*") (emphasis added); Issues and Decision Memorandum at 38, 40. But, again, such statements are inherently relative assessments – conclusions that reflect a comparative analysis of the domestic price quotes and the Indian import statistics. As outlined above, however, Commerce has failed to conduct any true comparative assessment of the two sets of data. As such, Commerce's determination that the Indian import statistics constitute the "best available information" remains unexplained, and finds no support in the existing administrative record.[38]

[38] The Second Remand Determination's discussion of the valuation of cardboard packing cartons is replete with unsupported conclusory assertions. As yet another example, the Second Remand Determination states that "the product specificity of the price quotes does

Finally, as outlined above, Commerce's assertion that the situation here involves a choice between two "imperfect" sets of data does not fairly depict the administrative record as it currently stands; and it is more accurate at present to describe the two competing sources of information as *admittedly distorted* Indian import statistics versus *potentially accurate* domestic price quotes. But even if the record established conclusively that the price quotes were "imperfect," Commerce's Second Remand Determination nevertheless still could not be sustained.

Commerce is not permitted to select a surrogate value by default. In other words, the agency cannot justify its selection of one data source (*i.e.*, the Indian import statistics) merely by pointing to asserted problems with the other data source (*i.e.*, the domestic price quotes). As the GDLSK Plaintiffs correctly observe, Commerce "cannot support its findings merely by citing the perceived shortcomings of the value [that] it rejected while largely ignoring the infirmities of the value [that] it did select." *See* GDLSK Reply Comments at 5 (citation omitted). "Commerce's analysis must do more than simply identify flaws in the data sets it rejects." *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1417, 460 F. Supp. 2d 1365, 1369 (2006). "Even where a party opposing Commerce's position has submitted information that ultimately proves inadequate, Commerce is not relieved of the requirement that it support its antidumping duty calculation with substantial evidence." *Hebei Metals & Minerals Imp. & Export Corp. v. United States*, 28 CIT 1185, 1193 & n.3 (2004) ("*Hebei Metals I*") (*citing* 19 U.S.C. § 1516a(b)(1)(B)).[39]

Thus, contrary to the implications of Commerce and the Government, the agency is not free to simply choose at will between imperfect sets of data. *See* Second Remand Determination at 44; Def. Response at 5–6, 12. Even in situations where all potential sources of data on the record have flaws (a not uncommon occurrence), the law requires Commerce to make a reasoned decision as to the source on

not overcome the problems with this data source [*i.e.*, the price quotes]." *See* Second Remand Determination at 75. The Government's brief is full of similar unsupported and conclusory statements. For example, the Government asserts that "Commerce reasonably selected the *more reliable* evidence . . . to calculate . . . [the] surrogate value for cardboard cartons." *See* Def. Response at 8 (emphasis added). But nowhere does the Government explain how Commerce could possibly conclude on the existing record that *admittedly* distorted data (*i.e.*, the import statistics) are more reliable than the alternative data (*i.e.*, the domestic price quotes), which are (at worst) *potentially* distorted.

[39] *See also Hebei Metals II*, 29 CIT at 295 n.3, 366 F. Supp. 2d at 1270 n.3 (same); *Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154–55 (explaining that, "as the case law amply demonstrates, the mere fact that domestic data provided by a respondent are less than perfect does not necessarily warrant their rejection (in whole or in part). Nor do flaws in such data automatically justify resort to import statistics which are plagued by other infirmities which are equally, if not more, serious") (emphasis omitted).

which it chooses to rely, and to both adequately explain its rationale and support its decision by reference to substantial evidence in the record.[40] In short, as the GDLSK Plaintiffs note, Commerce's statutory obligation in this instance is no different than in any other investigation or review: Commerce must "calculate dumping margins as accurately as possible" by "making a fair and equal comparison of competing surrogate values," and by supporting its determination with valid findings supported by substantial evidence and an adequate rationale. *See* GDLSK Reply Comments at 5.[41]

6. *Additional Issues*

As explained above in the introduction to section III, Policy Bulletin 04.1 outlines certain criteria that Commerce considers in determining the "best available information" to use in determining surrogate values. *See*, *e.g.*, Second Remand Determination at 42; section III, *supra*. Specifically, Policy Bulletin 04.1 reflects Commerce's preference for the use of "investigation or review period-wide price averages ['representativeness'], prices specific to the input in question ['product specificity'], prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review ['contemporaneity'], and publicly available data." *See* Policy Bulletin 04.1. There are, however, several flaws in the way that Commerce and the Government have applied the criteria set forth in Policy 04.1 in determining a surrogate value for cardboard cartons in this case.

For example, the Government states in its brief that the Indian import statistics are the "best available information" for use in valuing cardboard cartons because the import statistics "met more of Commerce's surrogate value selection criteria." *See* Def. Response at 5. The Government thus seems to suggest that the Indian import statistics constitute the "best available information" because – ac-

[40] Moreover, "Commerce has certain core investigatory duties, which cannot be avoided." *See Hebei Metals II*, 29 CIT at 295, 366 F. Supp. 2d at 1270. Thus, if the record in a case is such that none of the data sources on record is sufficient to permit Commerce to *reasonably* rely on it, Commerce is not permitted to choose "the lesser of the evils." The statute "does not permit Commerce to choose between two *unreasonable* choices, *i.e.*, two surrogate values that have an unexplained relation" to the input that the agency is valuing. *See id*. (emphasis added). Instead, in such a situation, Commerce is required to further develop the record – by, for example, supplementing the record with data from another source, if necessary.

[41] *See also*, *e.g.*, *Jinan Yipin II*, 33 CIT at ____, 637 F. Supp. 2d at 1196 (explaining that "it is for Commerce to decide between two imperfect data sets, *provided that decision is supported by valid findings and adequate reasoning*") (emphasis added); *Allied Pacific Food (Dalian) Co. v. United States*, 30 CIT 736, 757, 435 F. Supp. 2d 1295, 1313–14 (2006) ("*Allied Pacific I*") (stating that Commerce is required to "conduct a fair comparison of the data sets on the record" to select surrogate value data that yield most accurate dumping margin).

cording to Commerce – the import statistics are "publicly available, contemporaneous with the [period of review], representative of a range of prices throughout the [period of review], and sufficiently specific to the product" (and therefore, according to Commerce, satisfy *four* criteria), while the domestic price quotes (although contemporaneous and more "product specific" than the import statistics) are – according to Commerce – "not publicly available" and "not representative of prices throughout the [period of review]" (and thus, according to Commerce, satisfy only *two* criteria). *See* Second Remand Determination at 43, 45, 46. Contrary to the Government's implication, however, determining the "best available information" is not a straightforward exercise in basic arithmetic. The analysis is much more complex than simply tallying up the number of criteria satisfied by each potential data source, and then declaring the data source with the higher number the "best available information."

An even more serious flaw seems to pervade the Second Remand Determination, as well as the Final Results. Just as the Government errs to the extent that it suggests that the "best available information" in a case is necessarily the data source that satisfies the most criteria, it appears that Commerce errs in according equal weight to each of the criteria – or, at least, in giving far too little weight to "product specificity." All of the criteria outlined in Policy Bulletin 04.1 may be important. But they are not equally important. As a matter of pure logic, first among them must be "product specificity" (or, in the parlance of the Policy Bulletin, "prices specific to the input in question").

To illustrate the point with an extreme example, Commerce here could not reasonably base its surrogate value for cardboard packing cartons on Indian import statistics for fishing rods (for instance),[42] even if those import statistics – in the words of Policy Bulletin 04.1 – unquestionably reflected "review period-wide price averages" and were indisputably "publicly available data" that were fully "contemporaneous with the period of . . . review" and "net of taxes and import duties." Commerce could not do so because, even if the Indian import statistics for fishing rods were absolutely perfect in every other way, the import statistics would not be sufficiently "product specific." On the other hand, Commerce in the past has, on occasion, relied on data that were, for example, not "contemporaneous with the period of . . . review," or that did not satisfy some other criterion set forth in Policy Bulletin 04.1. *See*, *e.g.*, *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1503–04, 460 F. Supp. 2d 1338, 1358–59 (2006) (sustaining Commerce's selection of non-contemporaneous data, in lieu of

[42] Indian HTS heading 9507 covers fishing rods.

contemporaneous data from another source, where non-contemporaneous data were more accurate than contemporaneous data).

In sum, "product specificity" logically must be the primary consideration in determining "best available information." If a set of data is not sufficiently "product specific," it is of no relevance whether or not the data satisfy the other criteria set forth in Policy Bulletin 04.1. *See*, *e.g.*, *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1273–74 (2005) ("*Hebei Metals II*") (explaining that, where agency failed to demonstrate Indian import statistics were sufficiently "product specific," it was irrelevant whether statistics satisfied other criteria, such as "contemporaneity").

As noted above, the Second Remand Determination asserts that the Indian import statistics here are "sufficiently specific to the product" – that is, "sufficiently specific" to the basic cardboard packing cartons used by the Chinese producers. *See* Second Remand Determination at 46; *see also* Issues and Decision Memorandum at 38, 40 (same). However, neither the Second Remand Determination nor the Final Results provides any explanation for that conclusory assertion. Nor is the assertion supported by the administrative record as it presently exists.

Another significant underlying issue in this case is the parties' respective burdens of proof. The Government argues that the GDLSK Plaintiffs bear the burden of "provid[ing] record evidence establishing that the price quotes met Commerce's selection criteria for surrogate values." *See* Def. Response at 6 (*citing NTN Bearing Corp. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993)). It is true that, as a general principle, "[t]he burden of creating an adequate record lies with respondents and not with Commerce." *See*, *e.g.*, *Longkou Haimeng Mach. Co. v. United States*, 33 CIT ____, ____, 617 F. Supp. 2d 1363, 1372 (2009). However, what Commerce and the Government do not acknowledge is that the general principle that the respondent bears the burden of proof is somewhat in tension with (and must be interpreted so as to be consistent with) the obligations imposed on Commerce by the antidumping statute.

The general principle that the respondent bears the burden of proof in no way relieves Commerce of the requirements that it value factors of production based on the "best available information" and that it establish antidumping margins "as accurately as possible." *See Ningbo*, 580 F.3d at 1257 (internal quotation marks and citation omitted). Further, while Commerce may not be obligated to help a

respondent obtain information to support the surrogate value that the respondent advocates, "Commerce [is] required to obtain adequate evidence for the value it select[s]." *See Hebei Metals II*, 29 CIT at 296, 366 F. Supp. 2d at 1271. And Commerce cannot select a surrogate value by default. *See*, *e.g.*, *Guangdong Chems.*, 30 CIT at 1417, 460 F. Supp. 2d at 1369; *Hebei Metals I*, 28 CIT at 1193 & n.3.

In sum, a respondent is not absolved of the responsibility to make the case for the set of data that it favors. Thus, the GDLSK Plaintiffs here cannot wash their hands of all responsibility to adduce evidence showing that the domestic price quotes are not the product of manipulation and that they are generally representative of prices throughout the period of review. But, at the same time, Commerce's "core investigatory duties" require the agency to demonstrate affirmatively that each surrogate value that it selects satisfies the agency's statutory obligations to value factors of production based on the "best available information" and to establish antidumping margins "as accurately as possible," by providing a reasoned explanation for the agency's determination, anchored by substantial evidence in the administrative record. *See Hebei Metals II*, 29 CIT at 29596, 366 F. Supp. 2d at 1270.

Here, it is not at all clear how Commerce can establish that the Indian import statistics are the "best available information" if there are serious unanswered questions about the extent to which the import statistics are distorted by the inclusion of gift and specialty boxes and other products that are not comparable to the cardboard packing cartons at issue and about the extent to which the import statistics are distorted by the inclusion of charges for air freight. Similarly, depending on the extent of the distortion reflected in the Indian import statistics, Commerce may or may not be able to establish that the Indian import statistics are the "best available information" without determining whether, in fact, the domestic price quotes were the product of manipulation and the extent to which they are representative of prices throughout the period of review.[43]

[43] Just as Commerce and the Government have failed to confront the agency's obligation "to obtain adequate evidence for the value [the agency] select[s]," so too the GDLSK Plaintiffs have failed to respond directly to the Government's argument on burden of proof. *See Hebei Metals II*, 29 CIT at 296, 366 F. Supp. 2d at 1271; Def. Response at 6–7 (criticizing GDLSK Plaintiffs for lack of "record evidence establishing that the price quotes met Commerce's selection criteria for surrogate values"). Nothing in *Taian Ziyang* (and, for that matter, nothing herein) should be read as relieving the GDLSK Plaintiffs of their burden of proof.

Optimally, the record as supplemented by the parties on remand will allow all issues to be resolved on the merits and based on affirmative evidence (rather than sorting out the issues of assumptions and burdens of proof). However, if that is not possible, the GDLSK Plaintiffs, as well as Commerce and the Government, will have to address the state of the record

7. *Conclusion*

As detailed above, and as discussed at greater length in *Taian Ziyang*, Commerce has failed to adequately explain the agency's determination that the Indian import statistics constitute the "best available information" for use in calculating the surrogate value of basic cardboard packing cartons, in light of the acknowledged infirmities in the import statistics. Nor has Commerce adequately explained why the Indian import statistics are preferable to the domestic price quotes, the other source of information on the existing record. *See generally State Farm*, 463 U.S. at 43 (explaining that agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (citation omitted); *see also Timken*, 421 F.3d at 1355 (stating that agency "must explain its action with sufficient clarity to permit 'effective judicial review'") (citation omitted); *Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1151–52 (concluding that "Commerce failed to explain how the Indian import data is the 'best available information'"). The Second Remand Determination has done nothing to remedy the flaws in the Final Results outlined in *Taian Ziyang*. Similarly, as detailed above and as discussed at greater length in *Taian Ziyang*, Commerce's determination that the Indian import statistics constitute the "best available information" (as compared to the domestic price quotes) is not supported by substantial evidence in the administrative record. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1152 (concluding that "Commerce failed to support its selection of the Indian import statistics by reference to substantial evidence in the record"). Thus, as to this issue, Commerce's Second Remand Determination cannot be sustained.

Because the Second Remand Determination's treatment of the valuation of cardboard packing cartons simply recycles the arguments that Commerce made in its Final Results, the GDLSK Plaintiffs urge "that this issue be remanded to Commerce with instructions

as it then exists, including any potential issues such as the legitimacy of assumptions, and the parties' respective burdens of proof.

If Commerce could establish on remand that the inclusion of the more expensive products and the air freight charges have no significant distortive effect on the Indian import statistics, it might be possible to sustain the agency's determination that the import statistics constitute the "best available information" even without evidence on the potential for manipulation and the representativeness of the domestic price quotes. Based on the breadth of the Indian HTS subheading and the existing record evidence on the Indian import statistics, that prospect seems unlikely at this time. It is nevertheless worth underscoring that, on remand, both Commerce and the GDLSK Plaintiffs have incentives to develop the record on the domestic price quotes, as well as the import statistics. Any party that ignores its burden of proof does so at its peril.

to use the domestic price quotes for cartons." *See* GDLSK Comments at 9. Instead, the issue is remanded for further consideration not inconsistent with the analysis herein and in *Taian Ziyang*. Commerce is forewarned, however, that – having squandered this most recent remand – it is unlikely to get another bite at the apple on this issue.

On remand, Commerce shall reopen the record to evidence concerning the domestic price quotes and the Indian import statistics (as well as alternative sets of data, if any, that may be appropriate). Commerce shall accept further evidence from the GDLSK Plaintiffs, in addition to any information that the agency wishes to place on the record; and Commerce shall allow the GDLSK Plaintiffs sufficient time to submit further evidence, to respond to any information that the agency may place on the record, and to provide comments on the agency's draft results of the remand.

F. *Valuation of Plastic Jars and Lids*

In *Taian Ziyang*, the GDLSK Plaintiffs prevailed on their challenge to the Final Results' surrogate valuation of the plastic jars and lids used to pack garlic, on grounds that parallel the rationale on which the GDLSK Plaintiffs prevailed on cardboard packing cartons (discussed above) in several key respects. *See generally Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1101–02, 1152–57, 1166; *see also* section III.E, *supra* (summarizing the treatment of cardboard packing cartons in the Final Results and in *Taian Ziyang*).

As *Taian Ziyang* explained, the Final Results valued plastic jars and lids using a surrogate value derived from WTA import statistics for two broad "basket" provisions of the Indian HTS – specifically, HTS subheading 3923.3000 (covering "carboys, bottles, flasks and similar plastic items") and HTS subheading 3923.5000 (covering "stoppers, lids, caps and other closures of plastics"). *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1152–53, 1155; *see generally* Issues and Decision Memorandum at 41–43.[44] As with the Final

[44] As they did with cardboard packing cartons, the Domestic Producers also placed the Indian import statistics on the record for use in valuing plastic jars and lids. Significantly, however, the Domestic Producers have not sought to present any evidence directly challenging the domestic price quotes. Nor have the Domestic Producers ever even claimed that the domestic price quotes are inaccurate or are not representative of prices throughout the period of review. It is also telling that the Domestic Producers have not briefed this issue before the Court – not even in the prior stage of the proceeding. *See Taian Ziyang*, 33 CIT at ____ n.63, 637 F. Supp. 2d at 1152 n.63 (noting that Domestic Producers elected not to brief issue of valuation of plastic jars and lids). The Domestic Producers' participation on this issue was similarly limited in the underlying administrative review. *See* Issues and Decision Memorandum at 41 (noting that Domestic Producers filed no comments on issue of plastic jars and lids). Presumably, if the price quotes submitted by the GDLSK Plaintiffs did not fairly reflect the price of plastic jars and lids throughout the period of review, the Domestic Producers would be the first to say so.

Results on cardboard packing cartons, the Final Results on plastic jars and lids found the use of Indian import statistics preferable to domestic price quotes submitted by the GDLSK Plaintiffs, which were obtained from three different Indian vendors in three different cities and are comparable to the jars and lids used by the Chinese producers here. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1152–53; *see generally* Issues and Decision Memorandum at 41–43; GDLSK Respondents' Second Surrogate Value Submission (Admin. Record Pub. Doc. 258), Exh. 3 (domestic price quotes for jars and lids).[45]

The Final Results rejected the domestic price quotes because they assertedly do not constitute "publicly available information" and are not contemporaneous with the period of review,[46] and because, according to Commerce, they do not "reflect broad market averages and . . . cover a substantial period of time throughout the [period of review]" and thus, Commerce suggests, may reflect "temporary market fluctuations." *See* Issues and Decision Memorandum at 41–43; *see also Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153–54.[47]

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[45] There is some confusion concerning the number of domestic price quotes for jars and lids on the administrative record. The Second Remand Determination asserts that the administrative record includes "*three* price quotes for plastic jars obtained from *three* Indian vendors." *See* Second Remand Determination at 47 (emphases added); *see also* Def. Response at 14 (stating that "Commerce rejected three price quotes for Indian plastic jars and lids"); GDLSK Comments at 9–10 (stating that "[t]here are two possible surrogate values: (1) . . . and (2) three price quotes . . ."). However, the Final Results indicate that the GDLSK Plaintiffs submitted *four* price quotes from *three* Indian suppliers. *See* Issues and Decision Memorandum at 41 (stating that "[t]wo of the four price quotes appear to be obtained from two Indian companies in direct response to a request for such prices, . . . and the remaining two quotes are taken directly from a price list from a third Indian company"); *see also id*. at 42 (referring to "[f]our price quotes from three different companies"); *Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1152–53; GDLSK Respondents' Second Surrogate Value Submission (Admin. Record Pub. Doc. 258), Exh. 3 (domestic price quotes for jars and lids).

[46] The domestic price quotes are dated October 8, 2004, November 6, 2004, and November 22, 2004. *See* Issues and Decision Memorandum at 42; GDLSK Respondents' Second Surrogate Value Submission (Admin. Record Pub. Doc. 258), Exh. 3 (domestic price quotes for jars and lids); *see also Taian Ziyang*, 33 CIT at ____ n.64, 637 F. Supp. 2d at 1153 n.64 (*citing* Issues and Decision Memorandum at 42).

[47] Although Commerce has expressed concern about the temporal "representativeness" of the domestic price quotes for jars and lids (*i.e.*, concern that the price quotes "are obtained from so isolated a time frame as to be subject to temporary market fluctuations"), nothing in the Second Remand Determination or the Final Results indicates a concern about the geographic representativeness of the price quotes, which are from vendors in three different cities – Delhi, Bangalore, and Mumbai. *See* Second Remand Determination at 48; *see generally id*. at 46–50, 76–78 (expressing no concern about geographic representativeness); Issues and Decision Memorandum at 41–43 (same); GDLSK Respondents' Second Surrogate Value Submission (Admin. Record Pub. Doc. 258), Exh. 3 (domestic price quotes for jars and lids).

Taian Ziyang analyzed all of the grounds cited in the Final Results as a basis for rejecting the domestic price quotes, and found each of them lacking. As to the public availability of the price quotes, *Taian Ziyang* noted that – as with the administrative record on cardboard packing cartons – the administrative record on plastic jars and lids includes "no evidence whatsoever to suggest that [the price quotes obtained by the GDLSK Plaintiffs] were in any way subject to manipulation or tainted by affiliation." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153.

In addition, *Taian Ziyang* explained that, although the domestic price quotes for plastic jars and lids fall well outside the period of review, "[t]he contemporaneity of data is not as critical as Commerce has suggested in this case." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153. In support of that proposition, *Taian Ziyang* found *Yantai Oriental* "instructive." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1153 (*citing Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 61618 (2002)). In *Yantai Oriental*, neither the domestic price statistics data nor the import statistics data were contemporaneous with the period of review; but the domestic data were less contemporaneous by more than a year. *See Yantai Oriental*, 26 CIT at 616–18. As *Taian Ziyang* noted, however, the *Yantai Oriental* court nevertheless rejected Commerce's decision to rely on the more contemporaneous import statistics data. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153 (*citing Yantai Oriental*, 26 CIT at 616–18).[48]

Taian Ziyang also questioned the Final Results' emphasis on "representativeness." *Taian Ziyang* reiterated that, while a preference for price data reflecting a substantial period of time (rather than data from a shorter period of time) may be reasonable where Commerce is deciding between two equally accurate surrogate values, the overall "calculus" is different where – as here – the data that are assertedly more "representative" are plagued with other infirmities. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154. In addition, *Taian Ziyang* criticized the Final Results' reliance on Shrimp from Vietnam

[48] *Taian Ziyang* also pointed to *Hebei Metals II*, which stated that, "[w]hile the contemporaneity of data is one factor to be considered by Commerce . . . , three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the [period of investigation]," and that contemporaneity is "insufficient to explain why an import price is the best available information." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153 (*quoting Hebei Metals II*, 29 CIT at 301, 366 F. Supp. 2d at 1275). And, to the same general effect, *Taian Ziyang* quoted *Dorbest I*, which observed that "contemporaneity, in and of itself[,] should not be viewed as the sole reason to discard data; rather the quality of the data needs to be viewed in its totality." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1153 (*quoting Dorbest Ltd. v. United States*, 30 CIT 1671, 1695 n.14, 462 F. Supp. 2d 1262, 1284 n.14 (2006), *aff'd in part*, *vacated in part*, *and remanded on other grounds*, 604 F.3d 1363 (2010)).

on this point. *See id.*, 33 CIT at ____, 637 F. Supp. 2d at 1154 (*citing* Issues and Decision Memorandum at 42 (discussing Shrimp from Vietnam, 69 Fed. Reg. 42,672)); *see also* section III.E, *supra*. Specifically, *Taian Ziyang* noted that, among other things, there was affirmative evidence of price fluctuations in that case. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154 (discussing Issues and Decision Memorandum at 42 and Shrimp from Vietnam, 69 Fed. Reg. at 42,684); *see also* section III.E, *supra*. In contrast, *Taian Ziyang* emphasized, "no party points to any such evidence" in the case at bar. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154.

Taian Ziyang recognized that "[n]o doubt the various concerns that Commerce outlined in the Final Results diminish, at least to some limited extent, the utility of the domestic Indian price quotes for jars and lids." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154. [49] However, *Taian Ziyang* concluded that the Final Results failed to adequately analyze the relative merits of the domestic price quotes and the seemingly much more seriously flawed Indian import statistics on which Commerce relied. *See id.*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1152, 1157.

Specifically, *Taian Ziyang* noted that, besides failing to acknowledge Commerce's well-established general preference for domestic data over import statistics, the Final Results on plastic jars and lids (much like the Final Results on cardboard packing cartons) similarly failed to adequately address the fact that the Indian import statistics for plastic jars and lids not only are not "product specific," but, moreover, capture products that are imported by air. *See generally Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1155–57; *see also* Issues and Decision Memorandum at 41–43. As such, *Taian Ziyang* explained, "the import data are distorted by air freight charges," as well as by "other plastic products 'completely different from the plas-

[49] As *Taian Ziyang* noted, in addition to concerns about the public availability, contemporaneity, and representativeness of the domestic price quotes, the Final Results also indicated that the price quotes did not clearly distinguish between the price of jars and the price of lids. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154 (discussing Issues and Decision Memorandum at 42). However, it appears that Commerce now has resolved whatever concerns it might have had. Reference to the issue is conspicuously missing from the Second Remand Determination. *See* Second Remand Determination at 46–50, 76–78; *see also* Def. Response at 14–18 (similarly silent on the matter); *Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1154 (summarizing GDLSK Plaintiffs' proposal to address agency questions as to price of jars *versus* price of lids).

In any event, as discussed below, the issue of the valuation of plastic jars and lids is being remanded to Commerce yet again. To the extent that any further price information is placed on the record on remand, the parties should ensure that the record is clear as to whether the stated prices are for jars or lids, or for both.

tic jars used by the GDLSK [Plaintiffs] to pack . . . peeled garlic,'" as demonstrated by trade intelligence data from Infodrive India that the GDLSK Plaintiffs submitted for Commerce's consideration. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1155–56 (quoting GDLSK Plaintiffs' brief); *see also* Issues and Decision Memorandum at 41–43.

Taian Ziyang concluded that the Final Results both "failed to adequately explain how the admittedly non-representative Indian import statistics constituted the 'best available information,' particularly in light of the availability of product-specific, domestic Indian price quotes for plastic jars and lids comparable to those actually used [by the Chinese producers] in this case," and, in addition, failed to "support [Commerce's] selection of the Indian import statistics by reference to substantial evidence in the record." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1157. The issue was therefore remanded to the agency for further consideration. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1157.

Regrettably, much like the Second Remand Determination's treatment of cardboard packing cartons (discussed above), the Second Remand Determination's treatment of plastic jars and lids does virtually nothing to advance the ball. *See generally* Second Remand Determination at 46–50, 76–78; GDLSK Comments at 9–14; GDLSK Reply Comments at 6–7; *see also* section III.E, *supra* (analyzing Second Remand Determination on cardboard packing cartons). On remand, Commerce reiterated its determination that the Indian import statistics are the "best available information" for use in valuing the GDLSK Plaintiffs' plastic jars and lids. *See* Second Remand Determination at 50, 78. However, as the GDLSK Plaintiffs correctly observe, "[s]imilar to the valuation of cartons, Commerce's Remand Redetermination [on plastic jars and lids] ignores the Court's instructions [in *Taian Ziyang*] and simply repeats the same reasoning previously found to be unpersuasive by the Court." *See* GDLSK Comments at 10; *see also id*. at 13–14 (same); GDLSK Reply Comments at 6 (same).

There is no need to here restate in full the critique of the Second Remand Determination's treatment of cardboard packing cartons that is set forth above, which applies to the Second Remand Determination's treatment of plastic jars and lids with equal force. *See generally* section III.E, *supra*. It is enough to note that, notwithstanding the detailed analysis in *Taian Ziyang*, the Second Remand Determination indicates that Commerce took no action on remand to seek to determine the reliability of the domestic price quotes, in order to address the agency's concerns about potential "manipulation," which is the basis for the agency's preference for "publicly available"

data. *See* Second Remand Determination at 47, 77 (discussing domestic price quotes and criterion of "public availability"); *see also id*. at 48, 50, 77 (referring to "the potential for manipulation inherent in accepting price quotes").[50] Similarly, Commerce apparently took no action on remand to obtain any further information to address the issues of the "contemporaneity" and "representativeness" of the domestic price quotes, by (for example) clarifying whether or not the prices of plastic jars and lids in fact do fluctuate significantly in India over relatively brief periods of time (or, more specifically, whether they did so during the period of review, and in the year or so thereafter). *See generally* Second Remand Determination at 47–48, 77 (discussing "contemporaneity" and "representativeness" of domestic price quotes, and referring to agency's concern about potential "temporary market fluctuations").

While the Second Remand Determination paraphrases the Final Results' criticisms of (and says little else about) the domestic price quotes, it is virtually mum on the serious flaws in the Indian import statistics that were detailed in *Taian Ziyang*. *Compare* Second Remand Determination at 4650, 76–78 *and Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1152, 1155–57. Thus, nothing in the Second Remand Determination responds to the concerns expressed in *Taian Ziyang* about the Indian import statistics' lack of product specificity. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1152, 1155–57. Commerce made no attempt on remand to address the trade intelligence data placed on the record by the GDLSK Plaintiffs, or to otherwise ascertain the extent to which the values reflected in

[50] The Final Results state that, of the domestic price quotes on the administrative record, two are "taken directly from a price list from a[n] . . . Indian company," and were not "obtained . . . in direct response to a request for such prices." *See* Issues and Decision Memorandum at 41; *see also id*. at 42 (same). But the Second Remand Determination fails to recognize that fact, and indicates that all of the price quotes were obtained in the same way. *Compare* Issues and Decision Memorandum at 42 (stating that only "*two of the four price quotes* that were submitted appear to be in response to a specific request for . . . prices") (emphasis added) *with* Second Remand Determination at 47 (indicating that *all of the price quotes* were "prepared specifically upon request"); *id*. at 77 (same). Further, neither the Final Results nor the Second Remand Determination ever explains why prices on price lists do not constitute publicly available information.

Moreover, to the extent that Commerce's preference for publicly available information is based on concerns about the potential for manipulation and collusion that is inherent in price quotes generally, the nature of the instant price quotes for jars and lids should help lay such concerns to rest, at least for purposes of this case. If one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive – in other words, one would generate a significant number of price quotes from throughout the period of review. *See generally* n.24, *supra*. As discussed herein, however, there are no more than four price quotes on the administrative record of this case – and all of them post-date the period of review by at least 11 months.

the Indian import statistics on plastic jars and lids are inflated by the inclusion of a vast array of "plastic products that do not resemble at all" the "simple, basic plastic jars at issue in this case." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1155–56 (quoting GDLSK Plaintiffs' brief, and listing a "sampling" of the "myriad specialty products" reflected in the Indian import statistics); GDLSK Comments at 12 (noting that Second Remand Determination "has failed to adequately address the . . . concern" that Indian import statistics "reflect prices for jars and lids that are not at all representative of the jars and lids used by the GDLSK Plaintiffs"); *see also* Second Remand Determination at 49–50, 77 (acknowledging, without analyzing, Indian import statistics' lack of product specificity, and distortive effect of inclusion of products unlike plastic jars and lids at issue here).

Similarly, nothing in the Second Remand Determination responds to the concerns expressed in *Taian Ziyang* about the air freight costs reflected in the values derived from the Indian import statistics on which Commerce relies. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1155–57; GDLSK Comments at 12. Commerce apparently made no attempt on remand to determine the volume of merchandise reflected in the Indian import statistics that was imported by air, or to otherwise demonstrate that the values reflected in the Indian import statistics are not significantly inflated by the inclusion of air freight costs. *See* Second Remand Determination at 49–50, 77 (acknowledging, without analyzing, distortive effect of inclusion of air freight charges in Indian import statistics).

The Second Remand Determination candidly concedes (as it must) that – like the Indian import statistics for cardboard cartons – the Indian import statistics on plastic jars and lids are "imperfect." *See* Second Remand Determination at 49–50, 77. In other words, the Second Remand Determination admits that the Indian import statistics reflect inflated values as a surrogate for the plastic jars and lids at issue here – both because the import statistics "include a broad range of products that are different from the plastic jars used to pack garlic," and because the import statistics "include[] products that, unlike those the GDLSK [Plaintiffs] used, were shipped by air." *See id*. at 77; *see also id*. at 49–50 (same).[51]

[51] As noted above, Commerce now unequivocally acknowledges the distortive effect of the air freight charges included in the Indian import statistics, just as it acknowledges the distortive effect of the inclusion of products that are not comparable to the plastic jars and lids used by the Chinese garlic producers. *See* Second Remand Determination at 77 (conceding that the Indian import statistics are distorted because, *inter* alia, they "include[] products that, unlike those the GDLSK [Plaintiffs] used, were shipped by air"). However, the Final Results did not concede that fact. *See* Issues and Decision Memorandum at 43 (arguing that "[s]ome companies import jars and lids into the PRC by air, others do not" and

On the other hand, apart from Commerce's previously expressed concern about differentiating between price quotes for lids and price quotes for jars (which the agency apparently has now resolved),[52] the domestic price quotes for jars and lids are "imperfect" only in the sense that it has not been established to Commerce's satisfaction that the price quotes were not manipulated and that the price quotes (which are not "contemporaneous," and, according to Commerce, may not be "representative") fairly reflect prices throughout the period of review.

In sum, here – as with the cardboard packing cartons – Commerce continues to choose *admittedly* distorted data over data that the agency speculates may be *potentially* distorted. Or, to make the point slightly differently, Commerce continues to choose *admittedly distorted* Indian import statistics over *potentially "perfect"* price quotes. And, as with cardboard packing cartons, Commerce apparently made its decision on jars and lids without conducting any analysis (not even a qualitative analysis, much less a quantitative one) to ascertain the extent of the *actual* distortion of the import statistics, for comparison to the extent to which (according to Commerce) the domestic price quotes might *potentially* be distorted. As such, the Second Remand Determination's conclusions that the Indian import statistics are "sufficiently specific" and constitute the "best available information" for use in valuing plastic jars and lids are unexplained, are not rational, and lack any sound basis in the existing administrative record, and therefore cannot be sustained. *See* Second Remand Determination at 50, 78.

The GDLSK Plaintiffs contend that this issue should be "remanded . . . to Commerce with instructions to use the domestic price quotes for the valuation of jars and lids." *See* GDLSK Comments at 14. Instead, much like cardboard packing cartons, the issue will be remanded for further consideration not inconsistent with the analysis herein and in *Taian Ziyang*, and with the caution that no further remands are likely.

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that "the respondents have not submitted any documents . . . demonstrating that their own domestic plastic jar and lid suppliers did not import the products into the PRC by air"). Indeed, at one point, even the Second Remand Determination appears to hedge a bit. *See* Second Remand Determination at 49–50 ("acknowledg[ing] that the data obtained through Indian import statistics *may not* perfectly represent the inputs used by respondent because the Indian import data include . . . products shipped by air") (emphasis added). In contrast, Commerce has never disputed that the Indian import statistics are distorted by the inclusion of products that are not comparable to the plastic jars and lids used by the Chinese producers. *See*, *e.g.*, Issues and Decision Memorandum at 43 (asserting that Indian import statistics are *sufficiently* specific to the plastic jars and lids at issue here).

[52] As explained in note 49 above, Commerce is no longer pressing this issue.

On remand, Commerce shall reopen the record to evidence concerning the domestic price quotes and the Indian import statistics (as well as alternative sets of data, if any, that may be appropriate). Commerce shall accept further evidence from the GDLSK Plaintiffs, in addition to any information that the agency wishes to place on the record; and Commerce shall allow the GDLSK Plaintiffs sufficient time to submit further evidence, to respond to any information that the agency may place on the record, and to provide comments on the agency's draft results of the remand.

G. *Valuation of Ocean Freight*

Taian Ziyang sustained the GDLSK Plaintiffs' challenge to the surrogate value that Commerce calculated for the respondent Chinese producers' ocean freight costs, which was based on rate quotes taken from the website of Maersk Sealand for shipment in refrigerated containers. *Taian Ziyang* therefore remanded the matter to the agency, with instructions to reconsider the issue. *See generally Taian Ziyang*, 33 CIT at ____, ____, ____, 637 F. Supp. 2d at 1101–02, 1157–62, 1166.

Taian Ziyang noted that the Chinese Producers placed two alternative sources of data on the administrative record. One data set consists of public versions of the actual market economy ocean freight rates paid by two of the Chinese Producers (specifically, Harmoni and Linshu Dading) that made multiple shipments using a number of different market economy carriers throughout the period of review. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1158, 1161. Because the exact prices paid by the two Chinese Producers are proprietary information, the publicly available prices on the record are ranged within (plus or minus) 10% of the exact prices. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1158, 1161. The second data set on the record is taken from the Descartes database (an online, fee-based subscription service), and reflects shipping rates for multiple carriers covering the entire period of review. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1158, 1159–61.[53]

In the Final Results, Commerce stated that the Maersk data were the "best available information," asserting that they were "the only publicly-available information to value ocean freight" on the administrative record. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at

[53] The Descartes Carrier Rate Retrieval database is a web-based service similar to the World Trade Atlas (another online, fee-based database), which publishes the ocean freight charges of numerous carriers to destinations worldwide. *See Taian Ziyang*, 33 CIT at ____ n.68, ____, 637 F. Supp. 2d at 1158 n.68, 1160; *see also* Second Remand Determination at 51 (describing the Descartes database as "a web-based service, accessible via paid subscription, which publishes the ocean freight rates of numerous carriers").

1158 (*quoting* Issues and Decision Memorandum at 51); *see generally* Issues and Decision Memorandum at 49–51. In reaching that conclusion, the Final Results dismissed as "imprecise" the publicly available "ranged" data on the actual shipping expenses incurred by the two Chinese Producers, stating that the agency lacked sufficient information to adjust the ranged prices to reflect the exact prices that the two Chinese Producers paid. *See Taian Ziyang*, 33 CIT at ____, ____, 637 F. Supp. 2d at 1158 (citation omitted), 1161. The Final Results also rejected the Descartes data, asserting that those data could not be corroborated because Commerce does not subscribe to the Descartes service. *See id*., 33 CIT at ____, ____, 637 F. Supp. 2d at 1158, 1159–60.

As *Taian Ziyang* observed, however, the Maersk rates are significantly inflated, (1) by "the Qingdao-to-Hong Kong-to-U.S. shipping route that no respondent in this review actually used" and (2) by "the significant 'inland arbitrary charges'" – a charge of $1200 per container, also known as the "PRC arbitrary charge," that is imposed on cargo that is transported through Hong Kong – "that no respondent in this review actually incurred." *See Taian Ziyang*, 33 CIT at ____ & n.71, 637 F. Supp. 2d at 1158 & n.71 (citation omitted); Second Remand Determination at 50. In addition, the Maersk data reflect the rates of only a single freight carrier – and one of the most expensive carriers, at that. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1158–59; *see also id*., 33 CIT at ____, 637 F. Supp. 2d at 1161. Moreover, the Maersk data set is the only one of the three data sets on the record that is not specific to the transportation of fresh garlic. *See id*. at 33 CIT at ____, ____, 637 F. Supp. 2d at 1159, 1161–62.

Taian Ziyang further observed that Commerce's grounds for rejecting the two alternative data sources were "just as flawed as the agency's bases for selecting the Maersk data" for use in the Final Results. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1159. For example, *Taian Ziyang* noted that, contrary to the Government's assertions, Commerce has relied on Descartes data in the past to value international freight expenses in non-market economy cases. *See id*., 33 CIT at ____ & n.73, 637 F. Supp. 2d at 1160 & n.73. *Taian Ziyang* also noted that the Descartes data cover the entire period of review. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1159. In addition, *Taian Ziyang* emphasized that – in stark contrast to the Maersk data used in the Final Results – the Descartes data reflect the rates of multiple freight carriers, the Descartes data are specific to the shipment of fresh garlic, and, perhaps most importantly, the Descartes data are not distorted by either the aberrant Qingdao-to-Hong Kong-

to-U.S. routing that none of the respondent Chinese producers actually used or the "inland arbitrary charges" that none of the respondent Chinese producers ever paid. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1159.

To the extent that Commerce expressed concern about the "public availability" of the Descartes data, *Taian Ziyang* pointed out that ocean freight carriers use the Descartes database for the express purpose of complying with a Federal Maritime Commission ("FMC") regulation that requires all carriers to maintain *a public record* of their actual tariff rates for all routes. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1160. And, to the extent that Commerce's underlying concern was the reliability of the Descartes data, *Taian Ziyang* noted that FMC regulations require that carriers' published rates be accurate to the best of their knowledge. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1160–61.

Taian Ziyang similarly criticized Commerce's rejection of the publicly available "ranged" versions of the actual rates paid by the two Chinese Producers. *Taian Ziyang* noted that, contrary to the Government's claim that Commerce has "consistently" used Maersk rates in cases like this in the past, the agency in fact used publicly available "ranged" rates (rather than Maersk data) in the administrative review immediately preceding the review at issue here. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1159. *Taian Ziyang* further pointed out that, "[l]ike the Maersk data, the public, ranged versions of the rates reported by Harmoni and Linshu Dading encompass[] the entire period of review." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1161. However, unlike the Maersk data, the ranged data (like the Descartes data) reflect the rates of multiple freight carriers, are specific to the shipment of fresh garlic, and, perhaps most significantly, reflect not only the respondent Chinese producers' actual routing, but, in fact, reflect the shipping costs that they actually incurred. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1161.[54]

[54] *Taian Ziyang* criticized Commerce for its decision to use the Maersk data (rather than the "ranged" rates) based on the agency's alleged inability to adjust the "ranged" rates to reflect the exact prices paid by the two Chinese Producers. *Taian Ziyang* noted that, contrary to Commerce's implications, it is simply not possible for the Maersk rates to be more accurate even if they are compared only to the unadjusted, publicly available "ranged" versions of the rates paid by the two Chinese Producers. *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1161.

As *Taian Ziyang* explained, "even assuming that the actual rates paid by the respondents were *10% higher than* (rather than, for example, 10% lower than) the ranged Harmoni/Linshu Dading rates, it is immediately evident that Commerce's selected surrogate freight rates [– *i.e.*, the Maersk rates –] are far in excess of a potential 10% distortion of the publicly ranged prices." *See Taian Ziyang*, 33 CIT at ____, 637 F. Supp. 2d at 1161 (internal quotation marks and citation omitted). *Taian Ziyang* further observed that, unlike

Taian Ziyang concluded that, in the Final Results:

> Commerce . . . failed to adequately explain its reliance on the Maersk data as the "best available information," or to justify its selection of those data by reference to substantial evidence in the record, particularly in light of indications that the Maersk data reflect a route that no respondent used, that the Maersk data reflect additional charges that no respondent incurred, that the Maersk data are limited to a single freight carrier, and that – unlike the other rates available on the record – the Maersk data are not specific to the shipment of fresh garlic. Commerce similarly failed to adequately consider the alternative sources of data on the record.

Taian Ziyang, 33 CIT at ____, 637 F. Supp. 2d at 1162.

On remand following *Taian Ziyang*, Commerce re-evaluated all three sets of data on the record – that is, the Maersk data, the Descartes data, and the publicly available "ranged" data on the prices paid by two of the Chinese Producers – and determined that "the best available information with which to value ocean freight is price data obtained from the Descartes database for routes between [China] and both the East and West coasts of the United States." *See* Second Remand Determination at 50–51; *see generally id*. at 50–53, 78–79.

In the course of the remand, Commerce learned that government agencies may access the Descartes database without charge, assuaging the agency's earlier concerns about its ability to verify the Descartes data. *See* Second Remand Determination at 51. In addition, the Second Remand Determination notes that "the Descartes routes avoid Hong Kong altogether, and, as such, . . . are free of any additional fees or charges not incurred by respondents." *See id*. The Second Remand Determination concedes that the Descartes data therefore "are based on routes that more closely correspond to those used by respondents," as compared to the Maersk data on which the agency relied in the Final Results. *See id*. The Second Remand Determination also notes that the Descartes data are specific for refrigerated garlic, and that they reflect "a broad based market rate" because they "reflect rates for multiple carriers" and "for every month throughout the [period of review]." *See id*. at 51–52.

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the Maersk data, "the Descartes quotes are *within* 10% of the public versions of the actual ocean freight costs on the record [*i.e.*, the "ranged" rates]." *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1161 (internal quotation marks and citation omitted). *Taian Ziyang* summed up the situation thusly: "The Maersk rates that Commerce used in the Final Results are by far the highest of the three available surrogate values, and are patently aberrational by comparison to the other two" – including the actual rates paid by the Chinese Producers. *See id*., 33 CIT at ____, 637 F. Supp. 2d at 1161.

In the Second Remand Determination, Commerce acknowledges that – contrary to its findings in the Final Results – "the Maersk data are not sufficiently specific to the shipment of fresh garlic" and do not "reflect a broad based market rate," because "Maersk provides a general cargo rate from only a single carrier without any indication as to the type of cargo being shipped." *See* Second Remand Determination at 51–52. The Second Remand Determination further recognizes that, as *Taian Ziyang* emphasized, the Maersk data includes "a Qingdao-to-Hong Kong-to-U.S. route and the accompanying 'PRC arbitrary fee,'" both of which inflate the Maersk rates. *See id*. at 52. Commerce determined that, because the Descartes data constitute "a publicly available source for ocean freight rates . . . that features routes more representative of those used by respondents," there is "no need to resort to the Maersk data to value ocean freight" here. *See id*. Commerce thus concluded that, given "the public availability, contemporaneity, and representativeness of the Descartes data, . . . the lack of specificity in the Maersk data leaves the Descartes database as the best source on the record for ocean freight surrogate values." *See id*.

In the Second Remand Determination, Commerce continues to decline to use the publicly available "ranged" versions of the market economy ocean freight rates actually paid by Harmoni and Linshu Dading. *See generally* Second Remand Determination at 52–53, 78–79. The Second Remand Determination acknowledges that the "ranged" prices are contemporaneous with the period of review and specific to the shipment of garlic. *See id*. at 52. However, Commerce states that the agency "prefers to draw its surrogate value sources from public information whenever possible," and that it is therefore the agency's "long-standing policy" to "use[] ranged data only when no better alternatives can be found." *See id*. at 53 (*citing* Policy Bulletin 04.1); *see also* Second Remand Determination at 78–79.

Having found the Descartes data to be "publicly available, specific to the costs incurred by respondents, and contemporaneous with the period of review," Commerce concludes in its Second Remand Determination that "there is no need to resort to the use of the ranged data from other respondents." *See* Second Remand Determination at 53; *see also id*. at 78–79. No party has filed comments on Commerce's Second Remand Determination on this issue.

Because Commerce's redetermination on remand is consistent with *Taian Ziyang*, and is supported by substantial evidence and otherwise in accordance with law, the Second Remand Determination on the valuation of ocean freight costs must be sustained.

V. *Conclusion*

For all the reasons set forth above, Commerce's Second Remand Determination is sustained as to the surrogate value for garlic seed for the GDLSK Plaintiffs and FHTK, the surrogate value for irrigation costs for the GDLSK Plaintiffs and Dong Yun, the surrogate value for Dong Yun's land lease costs, and the surrogate value for the GDLSK Plaintiffs' ocean freight expenses. In contrast, Commerce's valuation of cardboard packing cartons and plastic jars and lids for the GDLSK Plaintiffs must be remanded to the agency for further action not inconsistent with this opinion; and, in accordance with the Government's request for a voluntary remand on the issue, the surrogate value for the labor expenses of the GDLSK Plaintiffs and Dong Yun must also be remanded.

A separate order will enter accordingly.

Dated: July 22, 2011
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY JUDGE

Slip Op. 11–89

KAHRS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 07–00343

[*Plaintiff's motion for summary judgment on the eighth cause of action and request for oral argument denied; Defendant's motion for summary judgment on the fifth and eighth causes of action granted*]

Dated: July 26, 2011

Law Offices of George R. Tuttle, A.P.C. (*Michael J. Tonsing*, *Carl D. Cammarata*, *George R. Tuttle*, *Stephen S. Spraitzer*), for Plaintiff.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mikki Cottet*, *Beverly A. Farrell*); *Yelena Slepak*, Senior Trial Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

INTRODUCTION

This action is before the Court on more motions for summary judgment—the sixth and seventh such motions filed in this case.

Plaintiff brought this case disputing the classification of its imported merchandise, engineered hardwood flooring, under tariff subheadings for plywood. Plaintiff has two remaining claims by which it seeks reclassification. In the "fifth cause of action," Plaintiff asserts a "commercial designation" claim, alleging that the term plywood has a meaning in the wholesale plywood trade that is different than its common meaning, and that the commercial designation excludes engineered hardwood flooring. In the recently added "eighth cause of action," Plaintiff alternatively asserts that its goods do not fall within the common meaning of the term plywood. For the reasons set forth below, the Court finds that there is no genuine issue of any material fact with respect to these two claims, and that Defendant is entitled to judgment as a matter of law on both. Judgment will enter accordingly.[1]

PROCEDURAL AND FACTUAL BACKGROUND

This case has been aggressively litigated. The court has previously issued three opinions totaling 135 pages, in the process of resolving multiple procedural and substantive motions. Familiarity with these previous opinions[2] is assumed. While the issues remaining in this case have diminished greatly, the amount of paper dedicated to arguing over them has increased exponentially. In particular, Plaintiff filed over 2,600 pages of exhibits in support of its motion for summary judgment on the eighth cause of action, and in opposition to Defendant's motion for summary judgment on the fifth and eighth causes of action. (*See* Docket Nos. 178–187, 200–238, and 241.)

At issue in this case is the classification of three types of engineered hardwood flooring imported by Plaintiff: 14mm, 2-strip 15mm, and 3-strip 15mm.[3] (Mem. of Law in Supp. of Def.'s Mot. for Summ. J. on the Fifth and Eighth Causes of Action in the Compl. ("Def.'s Mot.") 1; Pl.'s Mot. for Summ. Adjudication on the Eighth Cause of Action in the Compl. ("Pl.'s Mot.") I-2.) U.S. Customs and Border Protection ("CBP" or "Customs") classified Plaintiff's merchandise under HT-

[1] Plaintiff also requested the opportunity to make an "oral presentation" pursuant to USCIT R. 7(c) and 56(c). (Pl.'s Mot. for Summ. Adjudication on the Eighth Cause of Action in the Compl. ("Pl.'s Mot.") 6.) The court treats this request as a request for oral argument, finds that oral argument is not warranted, and denies Plaintiff's request.

[2] *Kahrs Int'l. Inc. v. United States*, 33 CIT __, 602 F. Supp. 2d 1352 (2009) (*"Kahrs I"*), *Kahrs Int'l. Inc. v. United States*, 33 CIT __, 2009 WL 2985942 (*"Kahrs II"*), and *Kahrs Int'l. Inc. v. United States*, 33 CIT __, 645 F. Supp. 2d 1251 (2009) (*"Kahrs III"*).

[3] Plaintiff asserts that the classification of its 7mm and 11mm flooring is also in dispute, but the United States has conceded that these products are "classifiable in HTSUS Heading 4412, subheading 4412.29.56, the provision for 'other' plywood, veneered panels and similar laminated wood, free of duty." (Def.'s Resp. 3.) Seeing no dispute as to the classification of this merchandise, the Court focuses on the arguments made with respect to the 14mm and 15mm flooring.

SUS Subheading 4412.14.31 and 4412.29.36, *eo nomine* provisions for plywood, at a duty rate of 8% *ad valorem*. (Def.'s Mot. 1; Pl.'s Mot. II-1.) Kahrs asserts that its merchandise is appropriately classified under HTSUS Subheading 4412.29.56, a basket provision encompassing "veneered panels and similar laminated wood," free of duty. (Pl.'s Mot. II-1.)

In *Kahrs III*, the Court held that Plaintiff's 14mm and 15mm flooring fell within the common meaning of the term plywood, and was therefore appropriately classified under the government's preferred tariff subheading. *Kahrs III*, 645 F. Supp. 2d. at 1277–78 (*citing Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262 (Fed. Cir. 2004) ("*Boen*")). In so doing, the Court relied upon the definition of the term plywood as set out in Webster's Third New International Dictionary, the Explanatory Notes to heading 4412, and *Boen*. *Id.* at 1277.

Following *Kahrs III*, Plaintiff was left with one remaining claim that, if successful, could result in its preferred classification: the commercial designation claim set out in the fifth cause of action. (Compl. ¶¶ 48–62.) In this claim, Plaintiff alleges that at the time the HTSUS was enacted into law in 1988, there was a commercial designation for the term plywood that differed from the common meaning of plywood, that was general, definite, and uniform throughout the United States at that time, and that did not encompass plaintiff's engineered hardwood flooring. (*Id.*) Any commercial designation claim, including this one, rests on the theory that "the trade designation [was] so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." *Timber Products Co. v. United States*, 515 F.3d 1213 (Fed. Cir. 2008) (*quoting Jas. Akeroyd & Co. v. United States*, 15 Ct. Cust. 440, 443 (1928)); *see also* Compl. ¶ 51 ("Congress intended to incorporate the commercial meaning of the term 'plywood' in Heading 4412.").

Once *Kahrs III* was issued, this case appeared headed for trial on Plaintiff's commercial designation claim. (*See* Docket No. 120 (scheduling order permitting Plaintiff to withdraw its previously filed motion for summary judgment on the fifth cause of action, permitting additional discovery, and setting dates for the submission of a pretrial order, and for trial).) The Court received what amounted to a proposed pretrial order in a series of filings made throughout July and August, 2010. (Docket Nos. 128–129, 132–135, 138–143.) As the Court was reviewing these myriad submissions, on October 11, 2010, Plaintiff sought leave of the Court to amend its Complaint to assert a claim that its goods were not properly classifiable under any HTSUS

subheading for plywood, because the common meaning of that term does not encompass Plaintiff's product. (Docket No. 147.)

Initially, the Court was disinclined to grant Plaintiff's motion to amend its complaint. Not only was the motion made at an unusually late stage of the proceeding, but it appeared that the motion might have been deniable on grounds of futility. The meaning of a term in an HTSUS heading or subheading is a pure question of law. *Medline Industries Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995). In this instance, the common meaning of the term plywood had been conclusively and unambiguously established by the Court of Appeals for the Federal Circuit ("CAFC") in *Boen*. *Boen*, 357 F.3d at 1265. The definition of plywood for purposes of tariff classification is thus binding precedent on this Court, and, one might think, not subject to revision by this court.

Moreover, the question of fact—whether the imported items fall within the scope of a specific tariff subheading—had already been resolved by the Court in this case. *See Medline Indus.*, 62 F.3d at 1409 (explaining that where in the HTSUS item is classified is a question of fact); *Kahrs III*, 645 F. Supp. 2d at 1277–78 (deciding the question of fact in this case). Because Plaintiff has not alleged changed facts, the only basis for the Court to change its determination that Plaintiff's merchandise is classifiable as plywood would be if the legal determination in *Boen* as to the common meaning of the term plywood was incorrect. As explained above, this appeared to be a tough row to hoe.

Ultimately, however, the Court granted Plaintiff's motion to amend its complaint out of an abundance of caution. In doing so, the Court found instructive a series of cases under the name *Schott Optical Glass, Inc. v. United States*, which bore many similarities to the matter at hand. *See Schott Optical Glass, Inc. v. United States*, 7 CIT 36, 587 F. Supp. 69 (1984) ("*Schott II*"), *rev'd* 750 F.2d 62 (Fed. Cir. 1984) ("*Schott III*"). In *Schott II*, the plaintiff had filed suit in the Court of International Trade ("CIT") to dispute the classification of its goods under a tariff subheading for "other optical glass," claiming that its goods did not fall within the common meaning of the term "optical glass." *Schott II*, 587 F. Supp. at 69–70. In that case, as here, there was a preceding opinion from the Court of Appeals construing the common meaning of the relevant term in the tariff subheading—in that case, "optical glass." *See Schott Optical Glass Inc. v. United States*, 612 F.2d 1283 (CCPA 1979) ("*Schott I*"). The CIT concluded in *Schott II* that the CAFC had decisively resolved the legal question of the common meaning of "optical glass" in *Schott I,* and determined that *stare decisis* precluded the CIT from reaching a

different conclusion about the common meaning of the term. *Schott II*, 587 F. Supp. at 70–71. Applying that apparently straightforward precedent, the CIT entered judgment for Defendant. *Id.* at 73.

In *Schott III*, the CAFC reversed the judgment of this court, citing "a well-recognized exception to *stare decisis*" requiring that "[a] court will reexamine and overrule a prior decision that was clearly erroneous." *Schott III*, 750 F.2d at 64 (*citing cases*). The CAFC faulted this court for refusing to permit the plaintiff to introduce evidence that might have shown that the interpretation of the common meaning of "optical glass" established by the Court of Appeals in *Schott I* had been clearly erroneous. *Id.* The CAFC found that by refusing to consider such evidence, this court had improperly borrowed from the doctrine of *res judicata,*[4] which is inapplicable in customs classification cases. *Id.* (*citing United States v. Stone & Downer Co.*, 274 U.S. 225 (1927) ("in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties.").) Therefore, the holding of *Schott III* instructs that when the CAFC has ruled on a question of law, such as the common meaning of a tariff term, although such a ruling may constitute binding precedent and may serve as the basis for *stare decisis*, this court errs when it prevents a party from attempting to show that the ruling of the CAFC is clearly erroneous. *Id.* at 65 ("The Court of International Trade has not given any convincing explanation why Schott should be denied the opportunity to introduce additional evidence that it believes will establish that [*Schott I*] was clearly erroneous.").

In light of the *Schott* cases, the Court decided to grant Plaintiff's motion to amend its complaint. (Order of December 8, 2010 (Dkt. 158), accepting Plaintiff's (Proposed) Amendment to Complaint as docketed on December 2, 2010 ("*8th COA*") (Dkt. 157).) Plaintiff explicitly represented to the Court that it sought to amend its complaint in order to introduce testimony of certain expert witnesses that it hoped would "conclusively establish that the definition of plywood arrived at in [*Boen*] was erroneous." (*Letter to the Court Requesting Permission to File a Motion for Leave to Amend its Complaint* at 5, Docket No. 147.) Consequently, despite the fact that *Boen* is binding precedent that has resolved the salient legal question of the common meaning of plywood for purposes of tariff classification, and notwithstanding that this Court has already ruled as a matter of fact that Plaintiff's merchandise falls within that common meaning of ply-

[4] *Res judicata* "bars litigation by the same parties of the same issues previously adjudicated." *Schott III*, 750 F. 2d at 64.

wood, this Court concluded that justice required Plaintiff be given an opportunity to demonstrate that these decisions were clearly erroneous. *See Schott III*, 750 F.2d at 65.

Following a brief period of additional discovery, Plaintiff moved for summary judgment on the eighth cause of action, and defendant moved for summary judgment on the eighth and fifth causes of action.

JURISDICTION & STANDARD OF REVIEW

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate when "there is no genuine issue as to any material fact" and the Court determines that the movant is "entitled to judgment as a matter of law." USCIT R. 56(c). The CIT reviews CBP protest denials "upon the basis of the record made before the court," which is to say, *de novo*. 28 U.S.C. § 2640(a)(1); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003).

DISCUSSION

I. *Eighth Cause of Action – Common Meaning*

In the eighth cause of action, Plaintiff aims to establish what the common meaning of the term plywood is, and to demonstrate that this definition does not encompass its product. However, because the CAFC already established the common meaning of plywood in *Boen*, the only way for Plaintiff to prevail on this cause of action is to prove, as per *Schott III*, that the *Boen* definition is clearly erroneous, and that this Court therefore should not be bound by *stare decisis*. There is no dispute between the parties as to the nature of Plaintiff's merchandise, only as to the meaning of the term plywood for purposes of tariff classification. Accordingly, on the eighth cause of action, there is no genuine issue as to any material fact, and this claim is ripe for summary judgment.

In order to evaluate whether Plaintiff has succeeded in this endeavor, the Court will first review the sources upon which the CAFC and this Court previously relied in establishing the common meaning of plywood. Then, the court will consider the arguments Plaintiff makes to change that definition, the sources it relies upon to justify doing so, and the arguments Defendant makes in response. Finally, the Court will assess whether Plaintiff has shown that the earlier decisions were clearly erroneous.

A. The Common Meaning of Plywood Established In *Boen*

The term plywood is not defined in the HTSUS, and as such should be given its common meaning. *See Boen*, 357 F.3d at 1264; *Kahrs III*,

645 F. Supp. 2d at 1277. In *Boen*, the court primarily relied upon the definition of plywood found in two industry publications, the "Voluntary Product Standards PS 1–95" ("VPS") and "Terms of the Trade," as well as the definition in Merriam Webster's Collegiate Dictionary. *Boen*, 357 F.3d at 1264–65. The court concluded that

> [t]here are three common characteristics of "plywood" found in the definitions provided [in these sources]: (1) there must be at least three layers; (2) each layer must be arranged at a right angle to its adjacent layer; and (3) the layers must be bonded together.

Id. at 1265. The court considered arguments regarding whether each layer in a piece of plywood needs to be comprised of a continuous expanse. Upon further consultation with the VPS, the court rejected that notion. The CAFC concluded that the definition of plywood "encompasses a product whose middle layer is composed of slats or strips with minor spacing between them." *Id.*

In *Kahrs III*, this court relied upon the definition of plywood as determined in *Boen*. Additionally, the Court consulted the definition of plywood in Webster's Third New International Dictionary and Explanatory Note 44.12, and contrasted these definitions with the meaning of "engineered flooring" according to the National Wood Flooring Association. *Kahrs III*, 645 F. Supp. 2d at 1277. These sources confirm the tripartite definition arrived at in *Boen* —plywood is comprised of at least three layers, the grain of each layer arranged at right angles to the adjacent layers, and glued, cemented, or otherwise bonded together. *See generally*, *id.* On the basis of the definition of plywood compiled from the aforementioned sources, the Court concluded that engineered flooring of the type imported by Plaintiff was properly classifiable under the HTSUS subheading for plywood. *Id.*

B. Plaintiff's Arguments – 8th Cause of Action

In support of the eighth cause of action, Plaintiff levels two main arguments aimed at dislodging the common meaning of plywood established in *Boen* and *Kahrs III*, First, Plaintiff contends that a product cannot be considered plywood unless it is manufactured with "balanced construction." Second, Plaintiff attempts to revive an argument explicitly considered and rejected by the court in *Boen*: that a product cannot be plywood when the core layer is not a continuous expanse. Plaintiff also advances an argument that even if its product was once plywood, it has been further manufactured and substantially transformed into a product with a different name, character

and use. To justify all of these contentions, Plaintiff would have the Court rely primarily on the sworn declarations of several expert witnesses.

1. *Whether Balanced Construction is a Requirement of Plywood*

First, Plaintiff asserts that the common meaning of the term plywood includes a requirement that the product be manufactured with a "balanced construction," which it claims to mean "that the corresponding layers on each side of the core must be made of the same thickness and be made of the same category of wood species." (Pl.'s Mot. VI-2.) Plaintiff asserts that neither its 14mm nor 15mm flooring has balanced construction, and therefore it cannot fall within the common meaning of the term plywood. (*Id.*) In support of this contention, Plaintiff offers the sworn declarations of six expert witnesses. (*Id.*)

Plaintiff's experts attempt to justify their opinions about balanced construction through citation to various textual sources. Experts Long and Forholt each cite two publications from the U.S. International Trade Commission: the *Summary of Trade and Tariff Information on Softwood Veneer and Plywood*, USITC Pub. 841 (Feb. 1981) and the *Summary of Tariff and Trade Information on Hardwood Plywood*, USITC Pub. 841 (Apr. 1978) (the "USITC Publications"). (Pl.'s Annexation of Concise Stmt. of Relevant Facts as to Which There Is No Genuine Dispute[5] ("CSF") ¶¶ 5, 6.) These publications describe softwood and hardwood plywood as having "balanced construction," which is parenthetically described as "**an equal number of comparable plies on both sides of a central ply**." (Forholt Decl. ¶¶ 22, 23 (emphasis added).) Experts Long, Holt and Kreamer all quote from a book by John G. Shea, entitled *Plywood Working for Everybody*, which states: "[b]ecause of the balanced construction of plywood—**with the grain of one ply bonding and crossing the grain of another** —it has much less tendency to warp than solid wood." (CSF ¶ 7; Long Decl. ¶ 30 (emphasis added).) Expert Long also notes that the primary industry standard for hardwood plywood, despite not including the term "balanced construction" in its glossary, does state in Section 3.10 that "[a]ll plies shall be **combinations of species, thickness, and moisture content to produce a balanced panel**." (CSF ¶ 8; Long Decl. ¶ 35 (emphasis added).) These appear to be the only textual sources that any of Plaintiff's expert witnesses cite in support of the concept that balanced construction is a requirement for plywood. (Pl.'s Mot. VI-1 – VI-3.)

[5] By citing to Plaintiff's statement of facts as "CSF" the Court does not endorse Plaintiff's characterization of its statement as either concise or undisputed.

Plaintiff's experts also cite copious sources that contradict their opinions that balanced construction is a requirement for plywood. All six of Plaintiff's experts reference the definitions of hardwood plywood included in the 1983 and 2004 versions of the voluntary standards established by the Hardwood Plywood and Veneer Association and the American National Standards Institute ("HPVA/ANSI"). (*See*, *e.g.*, Long Decl. ¶¶ 26–27.) These definitions make no mention of balanced construction. Similarly, five of Plaintiff's experts cite the definitions of softwood plywood from the 1983 and 1995 industry standards produced by the American Plywood Association ("APA"). These definitions are similarly silent on the issue of balanced construction. (*See*, *e.g.*, *id.* ¶¶ 24–25.) Because none of these textual sources invoke balanced construction in their definitions, each expert takes the remarkable position that the industry standard definitions of hardwood and softwood plywood are deficient. (*See e.g.*, *id.* ¶ 28 ("these separate definitions . . . are reasonably complete except for one important aspect . . . that plywood must be made of 'balanced construction.'")

Moreover, all six experts cite

- the definition of plywood found in Webster's Third International Dictionary,
- the definition of plywood established by the CAFC in *Timber Products Co. v. United States*, 515 F.3d 1213 (Fed. Cir. 2008),
- the description of plywood found in the *Explanatory Note* to Heading 4412,
- the definition of plywood found in *Terms of the Trade*, Random Lengths Publications, Fourth Edition (2000), and
- the definitions of plywood found in the 1987 and 2000 publications of *Wood Handbook*, published by the Forest Products Laboratory, USDA.

A plurality of Plaintiff's experts cite the definition of plywood found in *McGraw-Hill Dictionary of Technical Terms*, and more than one expert explicitly tackles the definition of plywood established by the CAFC in *Boen*, as well as the definition of plywood found in *Plywood Working for Everybody*, Van Nostrand Reinhold Company (1981). This diverse and exhaustive list of nine further textual sources defining or describing plywood share two things in common: they are uniformly silent on the alleged requirement that plywood have balanced construction, and they are uniformly criticized or dismissed by Plaintiff's experts for that reason.

In sum, while Plaintiff's experts were able to identify four textual sources making some reference to "balanced construction" or the "balanced" nature of a panel of plywood, they also collectively identified 13 textual sources that contradict their opinions.

2. *Whether the Core Layer of Plywood May Contain Gaps*

Plaintiff alleges further error in the common meaning of plywood established in *Boen*, claiming that a product with engineered gaps in its core cannot be plywood. Specifically, Plaintiff asserts that its 15mm flooring does not qualify as either "lumber core" or "veneer" plywood, because the "gaps that are designed, engineered, and built into the core," do not meet the requirements of any standard commonly used in the U.S. plywood industry since September 7, 1995, precluding it from being plywood.[6] (*8th COA* ¶¶ 7–9.) Also, on account of this design feature, Plaintiff claims its 15mm flooring is not bought and sold as plywood, and is not recognized as lumber core plywood by "[t]hose experienced in the buying and selling of plywood in the plywood trade." (*8th COA* ¶ 6.) In support of this argument, Plaintiff would once again have the Court rely on the sworn declarations of its expert witnesses. (Pl.'s Mot. VI-3 – VI-5.)

For these contentions, Plaintiff cites no new source, but rather argues that the CAFC misinterpreted Section 5.8.1 of Voluntary Product Standard 1–95, which permits gaps in the crossbands of plywood. (*Id.* at VI-3.) The standard reads, in relevant part:

> Crossband gaps or center gaps, except as noted for plugged crossband and jointed crossband, shall not exceed 25 mm (1 inch) in width for a depth of 205 mm (8 inches) measured from panel edge.

Voluntary Product Standard PS 1–95: Construction and Industrial Plywood § 5.8.1 (*See* Ex. 10 to Pl.'s Resp., Forholt Decl., Attach. G). While the standard states a specific distance limiting the depth of any crossband or center gaps (8 inches), Plaintiff reasons that because 8 inches is about 16% of the total width of a 4' by 8' panel of plywood, what this standard really **means** is that any gap in the core of a piece of plywood is limited to 16% of the width of that piece of plywood. (*Id.* at VI-4.) Plaintiff experts Griede, Holt and Forholt all agree that this standard does not permit gaps to run across the full width of a piece of plywood, as the gaps do in Plaintiff's 15mm flooring, but cite no textual authority in support of their opinions. (CSF ¶ 27.)

[6] The middle layer of Plaintiff's 14mm flooring is not comprised of slats, so Plaintiff does not make this argument with respect to that product.

Additionally, Plaintiff argues that the gaps in its 15mm flooring do not satisfy the requirements of Section 5.8.1. on the basis of their length alone. (Pl.'s Mot. VI-4.) Plaintiff asserts that while the standard permits gaps of up to 8 inches, "[t]he length of those gaps in the 15mm flooring extends to 9 inches, including the edgework." (*Id.*)

3. *Whether Plaintiff's Product Was Substantially Transformed*

Plaintiff also contends, directly and simply, that its product does not fall within the *eo nomine* provision for plywood. Plaintiff argues that even if its product "ever remotely were plywood," it has "advanced beyond plywood" and has been "substantially transformed" into a new and different product. (*Id.* at VI-5.) Plaintiff describes the manufacturing process by which its goods are produced, which involves cutting layers of wood for the face, bottom and core,[7] gluing and laminating these layers together under heat and pressure, trimming, sanding, finishing, and cutting edgework.[8] (*Id.* at VI-7.) Plaintiff does not identify at which step in this process its product may have been plywood, but suggests that the step of cutting edgework is the step that might have effected substantial transformation. (*Id.* ("The unique edging of Kahrs flooring indicates that it is not intended to be fungible . . . .").) This argument rests on Plaintiff's insistence that its product is only bought, sold and marketed as flooring, and never as plywood. (*Id.* at VI-8–9.)

C. Defendant's Arguments

Defendant responds to Plaintiff's arguments both by criticizing the sources Plaintiff relies upon to support its claim, and by disputing Plaintiff's claim on the merits.

1. *Whether Plaintiff May Use Expert Witness Declarations in Support of the 8th Cause of Action*

First, Defendant contends that Plaintiff should be prohibited from using expert declarations to prove the common meaning of plywood, because (1) the experts were not properly disclosed during the period of additional discovery that was provided for the eighth cause of action, and (2) opinion testimony is an impermissible basis for resolving a question of law, such as the meaning of a tariff term. (Def.'s Resp. 4–10.) Even if the Court considers the expert declarations, however, Defendant maintains that Plaintiff's 14mm and 15mm

[7] The 15mm flooring has a core made of "fingers," also known as slats; the 14mm flooring has a core made of a "5-ply poplar panel." (Pl.'s Mot. VI-7.)

[8] The 15mm flooring utilizes a "patented Woodloc™" mechanism, whereas the 14mm flooring has "tongue and grooving edgework." (*Id.* at VI-7.)

flooring falls within the common meaning of the term plywood. (*Id.* 11–28; Def.'s Mot. 8–20.) Finally, Defendant argues that the position taken by CBP that Plaintiff's flooring is plywood is entitled to *Skidmore* deference. (Def.'s Mot. at 5–8.)

a. Whether Plaintiff Committed a Discovery Violation

In regards to the alleged discovery violation, Defendant points out that the scheduling order that permitted limited discovery on the eighth cause of action required the parties to make expert disclosures by January 28, 2011 and to identify all witnesses each party intended to depose by February 2, 2011. (Def.'s Resp. 4.) Defendant also points to USCIT Rule 26(a)(2), which requires the disclosure of a person who may be used at trial to present opinion testimony. (*Id.*) Defendant alleges that Plaintiff did not comply with the requirements of the scheduling order or USCIT R. 26(a)(2) because no expert witness reports related to the eighth cause of action were produced until the end of discovery, between February 25, 2011 and March 22, 2011. (*Id.* at 5.) Defendant claims it could not conduct depositions of Plaintiff's experts until it received these declarations, but once it had received them, the time allotted for discovery had elapsed. (*Id.* at 6.) To remedy this violation, Defendant requests that the Court refuse to consider Plaintiff's expert witness reports insofar as they apply to the eighth cause of action. (*Id.* at 6–7.)

Plaintiff responds to this alleged discovery violation by explaining that the court's scheduling order only required the parties to disclose experts that had "not been previously identified in this case," and that because all of Plaintiff's witnesses were previously disclosed in regards to the fifth cause of action, no discovery violation occurred. (Pl.'s Rep. to Def.'s Resp. to Pl.'s Mot. for Summ. J. on the Eighth Cause of Action ("Pl.'s Rep.") 2–3, 6–7.)

b. Whether Testimony is Properly Considered When Resolving a Question of Law

Defendant also seeks the exclusion of Plaintiff's expert witness reports on the grounds that opinion testimony is an inappropriate basis for resolving a pure question of law, such as the common meaning of a term in an HTSUS heading or subheading. (Def.'s Resp. 7–10.) Defendant cites the general proposition that "[e]xperts are prohibited from opining on the law or its application in a particular scenario," and points out that expert witness testimony necessarily relates to fact questions, of which there should be none, if the case is to be resolved by summary judgment. (*Id.* at 7 (*citing* cases).) Defendant acknowledges that the CIT and its predecessor (the Customs

Court) have occasionally considered expert testimony to establish the common meaning of a tariff term, but have done so only under limited circumstances not present here. (*Id.* at 8–9 (*citing Toyota Motor Sales, U.S.A., Inc. v. United States*, 7 CIT 178, 182, 585 F. Supp. 649, 653 (1984) (relying on lexicographic sources to construe tariff term and finding that the testimony regarding industry usage of a term in issue may serve as an aid, but is not binding), *aff'd based on opinion below*, 753 F.2d 1061 (Fed. Cir. 1985); *and Tropical Craft Corp. v. United States*, 45 CCPA 59, 61, C.A.D. 673 (1958) (testimony as to common meaning advisory only, and insufficient to overcome contrary dictionary definitions).)

Plaintiff responds to this argument by citing instances in which courts have considered affidavits containing expert opinion testimony when granting summary judgment, and by arguing that rather than opining on the meaning of a tariff term, its experts merely seek to provide their opinions on the meaning of terms within their professional experience. (Pl.'s Rep. 4–7.)

2. *Defendant's Contentions on the Merits of the 8th Cause of Action*

Defendant also asserts that even if Plaintiff is permitted to use expert witness reports to support the eighth cause of action, Plaintiff's 14mm and 15mm flooring is nonetheless properly classifiable as plywood, within the common meaning of that term. (Def.'s Resp. 10–28; Def.'s Mot. 8–20.) Defendant cites *Kahrs III*, *Boen*, and no fewer than ten textual sources, each of which provides a definition of plywood consonant with the definition established by the courts in these cases. (*Id.*) Defendant notes that the CAFC considered and rejected the argument that gaps in the center layers of a sheet of plywood prevent an otherwise qualifying product from constituting plywood. (Def.'s Resp. at 16–18.) Defendant points out that while the HTSUS includes certain requirements for the plywood classifiable under the subheadings in question (such as having no ply thicker than 6mm, and having at least one outer ply of nonconiferous wood), there is no requirement in the HTSUS that plywood have "balanced construction," as that term has been defined by Plaintiff. (*Id.* at 19.) Moreover, Defendant was unable to locate a single definition of plywood that requires it to be of a "balanced construction," and the only located sources which utilize the term "balanced" to describe plywood appear to do so in reference to characteristics present in Plaintiff's flooring. (*Id.* at 19–21.)

Defendant's last argument with respect to the eighth cause of action is that CBP has taken a position that engineered wood flooring

such as Plaintiff's is properly classifiable as plywood, and that this determination "is entitled to deference or some high measure of respect from the Court." (Def.'s Mot. 5 (*citing United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (finding that CBP classification rulings are entitled to deference as established by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).) Defendant refers to multiple ruling letters which set out this position, and notes that the CAFC in *Boen* affirmed this very position. (*Id.* at 7.) Plaintiff responds by trying to make the case that *Skidmore* deference should not be given to a CBP classification ruling when the Court is deciding a question of law. (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. on the Fifth and Eighth Causes of Action ("Pl.'s Resp.") 5–8.) In turn, Defendant notes that the Supreme Court has held that "deference is not inconsistent with *de novo* review or with this Court's obligation to reach the correct" result, as described in *Jarvis Clark v. United States*, 733 F.2d 873 (Fed. Cir. 1984). (Rep. to Pl.'s Opp. to Def.'s Mot. for Summ. J. on the Fifth and Eighth Causes of Action ("Pl.'s Rep.") 7 (*citing United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999)).)

D. Analysis

1. *Plaintiff May Use Expert Witness Declarations*

The Court will not prohibit the use of Plaintiff's expert witness declarations in support of the eighth cause of action. First, Defendant has not persuaded the Court that there was a discovery violation in regards to expert disclosure. The Court's scheduling order of December 22, 2010 states in relevant part:

> [i]f an expert witness, **who has not been previously identified in this case**, is designated for use at trial regarding the Eighth Cause of Action, disclosure shall be made in accordance with USCIT Rule 26(a)(2) as soon as practicable, and no later than Friday, January 28, 2011.

(Dkt. 169 (emphasis added).) Because all of Plaintiff's expert witnesses had been previously identified in this case, the obligation imposed by this paragraph was never triggered, and USCIT R. 26(a)(2) (which requires disclosure of witnesses) was not violated. While it might have been helpful for Defendant to depose Plaintiff's experts for a second time, in order to plumb their testimony about the common meaning of plywood, the Court is not persuaded that Defendant was prevented from doing so—at least by any overt action of Plaintiff. Moreover, Defendant acknowledges that "the substantive portions of the testimony of Kahrs' 'experts,' . . . were initially offered in support of Kahrs' motion for summary judgment on the fifth cause

of action." (Def.'s Rep. 5.) As such, Defendant cannot claim that it was blind-sided by any argument Plaintiff now makes regarding the eighth cause of action. Even if Plaintiff was less than forthcoming during the most recent period of discovery, it is clear to the Court, upon careful consideration of the substance of Plaintiff's expert witness declarations, that Defendant will not be prejudiced by their admission.

Defendant also has not persuaded the Court that it is improper to consider the opinions of expert witnesses when establishing the common meaning of a tariff term. To the contrary, for nearly a century, the courts have permitted the use of testimony to establish common meaning, but have uniformly held that any such testimony should be subordinate to reliable textual sources. *United States v. Crosse & Blackwell, Inc.*, 22 C.C.P.A. 214, 217–18, T.D. 47,141 (1934) ("While the opinions of witnesses as to the common meaning . . . [are] proper to be considered . . . the usual rule is to consult standard lexicographers to determine the common meaning of statutory words."); *United States v. May Department Stores Co.*, 16 Ct. Cust. Appls. 353, 355–56, T.D. 43,090 (1927) ("[I]n determining the common meaning of a term, testimony is only advisory and has no binding effect upon the court, since the common meaning of a term is ordinarily within the cognizance of the court, and the court may further obtain knowledge of the common meaning of a term from the dictionaries, lexicons [or] written authorities . . . .").[9] Accordingly, the Court will treat the opinions of Plaintiff's expert witnesses pertaining to the common meaning of plywood as advisory and nonbinding, and will credit such testimony only to the extent that it is supported, and not contradicted, by reliable textual sources.[10] *See Toyota Motor Sales*, 585 F. Supp. at 654 (permitting testimony on common meaning, but noting that such testimony may only serve as an aid, and is not binding); *United States v. John B. Stetson Co.*, 21 C.C.P.A. 3, 9 (1933) (same); *see also United States v. Tropical Craft Corp.*, 42 C.C.P.A. 223, 223–28 (1955) (holding that the Customs Court should have discounted testimony on common meaning that was contrary to the definitions provided in authoritative sources).

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[9] The court in *May Department Stores* saw this conclusion as so axiomatic that "it requires no citation of authority." 16 U.S. Cust. App. at 355. Unfortunately, this Court has no such luxury.

[10] "Suppose the question before the court was, is a horse an animal, and the proof would show that a horse was not an animal. It is doubtful if the testimony in this kind of supposed case would be regarded by any court as any evidence at all. But, certainly . . . [such testimony] would not control as against the judicially known fact and judicially decided fact, that a horse is an animal." *United States v. Flory & Co.*, 15 Ct. Cust. Appls. 156, 160, T.D. 42,219, 1927 WL 29495 at *4 (1927).

2. *Plaintiff Has Failed To Demonstrate that the Definition of Plywood Established in Boen Was Clearly Erroneous*

After carefully considering the arguments and textual sources cited by the parties, along with the opinions espoused in Plaintiff's expert witness declarations, the Court concludes that there is no genuine issue as to any material fact on the eighth cause of action, and Defendant is entitled to judgment as a matter of law.

For the reasons described previously, *supra* at 6–9, the only scenario under which this Court would disturb its prior ruling would be if Plaintiff demonstrated that the common meaning of plywood arrived at in *Boen* was clearly erroneous.[11] *See Schott III*, 750 F.2d at 64–65; *see also* 20 Am. Jur. 2d *Courts* § 132 (offering a survey of cases enunciating the grounds for deviating from precedent). Not only has Plaintiff failed to do so, the Court finds that Plaintiff has not even been able to articulate a viable alternative definition for plywood. To the contrary, the testimony of Plaintiff's expert witnesses is so extensively and uniformly contradicted by the very textual sources **they cite** , as well as those relied on in *Boen* and *Kahrs III*, that the Court finds Plaintiff's expert witness testimony unpersuasive.

a. Balanced Construction Is Not Part of the Definition of Plywood

On the issue of balanced construction, Plaintiff has failed to establish precisely what the phrase "balanced construction" means, and has failed to identify a single textual **definition** of plywood that explicitly includes "balanced construction" as a requirement. The USITC Publications, which describe "balanced construction" in a manner akin to Plaintiff's suggested meaning of the phrase, though with considerably less specificity, provide the best support for Plaintiff's arguments on this issue. However, Plaintiff's assertion that layers on either side of the core of a piece of plywood "must be made of the same thickness and be made of the same category of wood species" is only tangentially supported by the USITC Publications, which simply require that such plies be "comparable." *Compare* Pl.'s Mot. VI-2 *with* USITC Publications (*see supra* at 13). On the other hand, *Plywood Working for Everybody* suggests that "balanced construction" refers not to the comparability of plies on either side of the core, but to the stability created by layering of adjacent plies at right angles—a characteristic of plywood that is both consistent with the

[11] The Court's obligation to follow binding precedent is stronger than any *Skidmore* deference the Court might extend to CBP classification rulings. Accordingly, because of the existence of binding precedent in this case, the Court does not consider the extent to which *Skidmore* deference might compel a similar outcome in this case.

Boen definition and descriptive of Plaintiff's flooring. Plaintiff's only other textual source, the ANSI/HPMA, is at best inconclusive about the meaning of the term "balanced construction" and does not indicate that all plywood must be made with balanced construction. Taken together, these sources do not provide sufficient justification for the court to disregard roughly a dozen textual definitions of plywood that make no mention of "balanced construction," and do not demonstrate that the *Boen* definition is clearly erroneous.

Furthermore, the plain language of the HTSUS *eo nomine* provisions for plywood appear to contemplate plywood in which different veneers have been applied to the face and backside of the panel. If a piece of plywood was manufactured with one outer ply of coniferous wood, and the corresponding ply on the opposite side of the core was made from nonconiferous wood, such a product would not, by virtue of this feature, fail to be classifiable within HTSUS 4412 as plywood, even though it fails to fit within Plaintiff's proffered definition of balanced construction. (*See* HTSUS 4412.14 (providing for plywood containing "at least one outer ply of nonconiferous wood."); *see also* HTSUS 4412.13 (providing for plywood containing "at least one outer ply of tropical wood").) Accordingly, Plaintiff's argument about balanced construction is unavailing.

b. The Gaps In Plaintiff's 15mm Flooring Do Not Prevent It from Being Plywood

The Court is similarly unpersuaded by Plaintiff's argument that the common meaning of the term plywood includes the requirement that each ply be comprised of a continuous expanse. This argument was embraced by this court in an earlier stage of the *Boen* litigation, only to be rejected by the CAFC. The CIT concluded

> [t]he definitions indicate that "plywood" is composed of thin sheets of wood glued together with the grains of adjacent layers at right angles. The definitions of "veneer" and "sheet" indicate that the layers forming plywood are "continuous expanses" of material of a constant thickness.

Boen Hardwood Flooring, Inc. v. United States, 27 CIT 40, 254 F. Supp. 2d 1349, 1361 (2003). As described above, *supra* at 11, the CAFC refused to accept that the definition of plywood was as narrow as the CIT had determined:

> None of the definitions of "plywood" . . . are nearly so restrictive. The [CIT's] interpretationof "plywood," which imports the requirement that each layer be composed of a single, continuous

> sheet of wood, ignores the reality of the product and defies the accepted commercial meaning of the term.

Boen, 357 F.3d at 1265. Plaintiff has failed to demonstrate that this conclusion of the CAFC is clearly erroneous, and therefore has failed to provide this Court with any legitimate grounds to depart from *stare decisis*.

The Court does not accept the theory floated by Plaintiff's expert witnesses that although VPS Section 5.8.1 provides explicit measurements for the maximum width and length of crossband gaps, it really intends to restrict the measurements of such gaps as a percentage of the width of a "typical" piece of plywood. Such a standard would be easy enough to craft, and the Court finds it reasonable to infer that the measurements in this standard have been intentionally specified. Furthermore, Plaintiff's experts cite to no new textual definitions of plywood to support the contention that the product must be comprised only of layers that are each a continuous expanse. In the absence of such new or different textual sources, the Court has no basis upon which it could reject the binding precedent of the CAFC in *Boen*.

The Court is also unpersuaded by Plaintiff's argument that because the length of the gaps in Plaintiff's 15mm flooring are "beyond the [8 inch] limitation imposed by Section 5.8.1 [of the VPS]," Plaintiff's flooring therefore cannot be plywood. (Pl.'s Mot. VI-4.) The longest measurement of the width of Plaintiff's 15mm flooring (i.e., including all edge work) is eight and five eighths inches. If this measurement is taken to be the length of the gaps,[12] Plaintiff's product indeed may not comply with VPS Section 5.8.1. However, even with over-long gaps, the Court finds Plaintiff's product is still perfectly described by the common meaning of plywood established in *Boen*: it is comprised of at least three layers of wood that have been bonded together, with each layer arranged at a right angle to its adjacent layer. Even if Plaintiff's 15mm flooring is plywood that does not conform to VPS Section 5.8.1, it is classifiable as plywood nonetheless.

[12] The Court also notes that the "length" of the gaps could also be measured by the distance such gaps are completely enclosed (*i.e.*, excluding all edge work), seven inches, or by the width of the surface of the panel, seven and seven eighths inches. Under either of these measurements, the gaps in Plaintiff's plywood would appear to conform with VPS Section 5.8.1. Because the Court finds it has no bearing on the appropriate classification of Plaintiff's merchandise, the Court need not resolve which measurement is appropriate for gauging the length of the crossband gaps.

c. Plaintiff's Substantial Transformation Argument Is Irrelevant

The Court also regards Plaintiff's third argument in support of the eighth cause of action—that its products may have once been plywood, but have been substantially transformed—to be a red herring. It is well established that goods shall be classified in the HTSUS "in their condition as imported." *Dell Products LP v. United States*, 642 F.3d 1055, 1059 (Fed. Cir. 2011) (*citing Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)). In this case, there is no dispute as to the condition of Plaintiff's goods as imported; physical samples have been provided to and examined by the Court. Consequently, it matters not what previous incarnations these products have been through, nor what alchemy was performed to bring them to their current state. The argument about substantial transformation is irrelevant.

3. *CamelBak Products Does Not Affect the Outcome of This Case*

On July 8, 2011, Plaintiff filed a letter to bring to the Court's attention a recent CAFC decision that it claims "set[s] forth very important new guidelines on the analytical tools to be used for determining the scope of an *eo nomine* provision under GRI 1." (Letter of July 8, 2011 1 (*citing CamelBak Products, LLC v. United States*, __ F.3d __, 2011 WL 2410736 (Fed. Cir. 2011) (Dkt. 245).) Plaintiff claims that *CamelBak* requires the Court to consider certain factors that will demonstrate that its merchandise falls beyond the scope of the *eo nomine* provision for plywood. (*Id.* at 2.) Plaintiff argues that in the wake of *CamelBak*, "an *eo nomine* analysis must now incorporate" a review of the design, use and function of the product in question, as well as how it is regarded in commerce, and "whether the additional component is a substantial part of the whole product." (*Id.* at 4 (internal quotation omitted).) Plaintiff claims that the fact that its product is not sold or used as plywood "take[s] on new significance under *CamelBak*." (*Id.* at 5.)

Defendant responds by arguing that CamelBak did not introduce new criteria for all *eo nomine* classification cases, but simply highlighted factors that have long been considered by the courts. (Government's Response to Plaintiff's July 8, 2011 Letter 1.) Defendant also distinguishes *CamelBak* by pointing out that Kahrs' merchandise falls entirely within the *eo nomine* provision for plywood, whereas the article in *CamelBak* was comprised of two components that may have been classifiable under two different tariff provisions. Naturally, Plaintiff seized the opportunity to file an additional letter,

in which it insists, among other things, that its 14mm flooring **really is** a composite article, comprised of a plywood core with front and back veneers.[13] (Pl.'s Rep. to Def.'s Resp. to Pl.'s July 8, 2011 Letter 2–3.)

The Court finds that *CamelBak* does not affect the holding in this case. The CAFC stated in *CamelBak* that, "[i]f the subject articles fall within the scope of [a given] *eo nomine* . . . provision then, under *Mita Copystar*, GRI 1 mandates that the subject articles be classified [under that provision.]" *CamelBak* at *5. The "analytical tools or factors" from *CamelBak* are only provided to help assess whether a product is "beyond the reach of the *eo nomine*" provision. *Id.* Plaintiff's merchandise is encompassed entirely by the definition of plywood. The Court finds that Plaintiff's merchandise does not possess an "additional component," alien to plywood, much less "possess features substantially in excess" of the common meaning of plywood. *CamelBak* at *6 (*quoting Casio, Inc. v. United States*, 73 F.3d 1095 (Fed. Cir. 1996)). Accordingly, the classification question may be resolved without resort to the *CamelBak* factors, and its classification will not be disturbed. *See id.*

For the foregoing reasons, then, the Court finds that it continues to be bound to accept the common meaning of plywood set out in *Boen*, just as it was in *Kahrs III*. The Court grants summary judgment to Defendant on the eighth cause of action.

II. *Fifth Cause of Action – Commercial Designation*

In the fifth cause of action, Plaintiff aims to prove that at the time the HTSUS was enacted into law in 1988, there was a commercial designation of the term plywood within the plywood wholesale trade, which differed from the common meaning, and was general, definite and uniform throughout the United States. (Compl. ¶¶ 48–62.) Plaintiff alleges that this commercial meaning does not encompass its engineered hardwood flooring, and seeks a judgment from this Court that its merchandise is instead classifiable as "veneered panels and similar laminated wood," free of duty. (*Id.* ¶ 62.) For the reasons set forth below, the Court finds there is no genuine issue of material fact with respect to the fifth cause of action, and Defendant is entitled to judgment as a matter of law.

A. Defendant's Contentions

Defendant argues that even if the factual assertions made by Plaintiff's expert witnesses are accepted as true, Plaintiff is unable to prove the uniformity and definiteness prongs of its commercial des-

[13] In its second letter, Plaintiff also requests the opportunity to file additional briefing on *CamelBak*, which the Court declines.

ignation claim as a matter of law. (Def.'s Mot. 23–26.) Regardless of what Plaintiff's experts may claim about the commercial designation of plywood that existed in the trade prior to 1988, Defendant points to "publications of industry-wide trade organizations, authoritative publications which are voluntarily utilized and relied upon by the wholesale plywood industry," which confirm that at that time, the industry regarded plywood according to its common meaning, rather than any special commercial designation. (*Id.* at 23.) Defendant cites *Timber Products* for the proposition that "[c]ontradiction is a sufficient, but not necessary, condition for finding inconsistency, rather than uniformity throughout the trade, precluding commercial designation of a tariff term for classification under the HTSUS." (*Id.* at 25–26 (*citing Timber Products*, 417 F.3d at 1221–22).)

Specifically, Defendant cites the ANSI/HPMA standards for hardwood plywood from 1983, which defines plywood as

> [a] panel composed of an assembly of layers or plies of veneer (or veneers in combination with lumber core, particleboard core, MDF core, hardboard core, or of special core material) joined with an adhesive. Except for special constructions, the grain of alternate plies is always approximately at right angles, and the face veneer is usually a hardwood species.

(*Id.* at 23 (*quoting* ANSI/HPMA HP 1983 at p. 12, § 5, Definitions, PLYWOOD, HARDWOOD).) Plaintiff also cites the VPS PS 1–83 *Construction and Industrial Plywood (With Typical APA Trademarks*) (December 30, 1983), which defines plywood as

> a flat panel built up of sheets of veneer called plies, united under pressure by a bonding agent to create a panel with an adhesive bond between plies as strong as or stronger than, the wood. Plywood is constructed of an odd number of layers with grain of adjacent layers perpendicular. Layers may consist of a single ply or two or more plies laminated with parallel grain direction oriented parallel to the long dimension of the panel.

(*Id.* at 24.)[14] These definitions are consistent with the common meaning of plywood, now well established by the courts, and serve to rebut Plaintiff's claims that prior to 1988 everyone in the plywood industry, throughout the United States, meant something different by the term 'plywood.' *See Arthur J. Humphreys, Inc. v. United States*, 764 F. Supp. 188, 193 (CIT 1991) (noting that while "[i]ndustrial or commer-

[14] Defendant cites several other industry publications that provide similar definitions for plywood, however these are the only textual industry sources from prior to 1988, the year in which the HTSUS became U.S. law.

cial standards are useful in ascertaining the commercial meaning of a tariff term," when the tariff statute predates the commercial standard, the commercial standard "does not reflect the congressional understanding of the term [in question] at the time the [tariff statute] was enacted" and cannot support a claim of commercial designation).

B. Plaintiff's Contentions

In its response brief, Plaintiff claims that the commercial designation of plywood is

> a panel composed of an assembly of layers or plies, typically at right angles to each other, all joined together with an adhesive bonded under heat and pressure, and the product is typically bought, sold by, manufactured to, and/or referenced to, well-recognized plywood veneer grades set forth in standards established by industry associations and/or government entities, or by standards agreed upon between the parties.

(Pl.'s Resp. 25–26.) While Plaintiff claims that plywood is **defined** as a product which is bought and sold according to "well-recognized" veneer grades, Plaintiff acknowledges that "a buyer might agree with a wholesale seller that he or she would purchase plywood products that are not bought and sold according to recognized grading standards," in which case the buyer and/or seller would probably have "internal standards and an understanding as to the quality of the product that is being sold." (*Id.* at 26.) Plaintiff acknowledges that VPS PS 1–83, cited by Defendant, was "[t]he plywood industry standard in effect in 1988," and points out that this standard prescribed "letter grades . . . to designate the quality of the veneers" used to manufacture the plywood. (*Id.*) Plaintiff rounds out its arguments by insisting that its experts have put forth a uniform, general and definite rendition of the commercial designation of plywood. (*Id.* at 28–30.)

C. Analysis

1. *Whether Plaintiff's Fifth Cause of Action States a Claim Upon Which Relief Can Be Granted*

In its complaint, Plaintiff provides little more than a rudimentary description of the commercial designation that it contends generally, definitely and uniformly existed throughout the United States in 1988. The closest Plaintiff comes to actually proffering a commercial designation is found in paragraph 55, where Plaintiff alleges that plywood

> is bought and sold based on the grades of the face, back, and often the core of the plywood sheets. It is a commodity, component, multipurpose or structural material used to make other items.

(*Id.* ¶ 55.) While it is not clear whether Plaintiff intended for these sentences to set out the commercial designation of plywood, it is clear that this excerpt differs significantly from what Plaintiff now claims is the commercial designation. (*See* Pl.'s Resp. 25–26 (claiming the commercial designation of plywood is "a panel composed of an assembly of layers or plies, typically at right angles to each other, all joined together with an adhesive bonded under heat and pressure, and the product is typically bought, sold by, manufactured to, and/or referenced to, well recognized plywood veneer grades").) In any event, the Court sees no other portion of Plaintiff's complaint that could be characterized as setting forth an alleged commercial designation.

In light of the vagueness of the commercial designation that is set out in the complaint, the Court has deep reservations about whether Plaintiff has alleged enough facts in support of the fifth cause of action to state a claim upon which relief can be granted. The Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), roughly four months before Plaintiff commenced this case; therefore, any motion to dismiss Plaintiff's complaint pursuant to USCIT R. 12(b)(5)[15] would have been decided under the *Twombly* pleading standard. In relevant part, *Twombly* held that

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level[.]

Twombly, 500 U.S. at 555 (citations omitted).

In light of Plaintiff's failure to set out clearly what the alleged commercial designation **is**, the Court has some concern about whether Plaintiff's fifth cause of action constitutes more than a "formulaic recitation of the elements" of a commercial designation claim, and whether the factual allegations Plaintiff does make "raise a right to relief above the speculative level." *See id.* However, as Defendant did not move to dismiss the fifth cause of action for failure to state a

[15] USCIT R. 12(b)(5) is the CIT's equivalent of Fed. R. Civ. P. 12(b)(6), and the Supreme Court's holding in *Twombley* applies to it with equal force.

claim, and because Defendant's motion for summary judgment on the fifth cause of action is now fully briefed before the Court, the Court will assume the sufficiency of Plaintiff's pleading and proceed to an evaluation on the merits.

2. *Plaintiff Cannot Prove the Uniformity of its Alleged Commercial Designation*

The Court finds that the definitions of plywood found in the industry standard publications for hardwood and softwood plywood in 1983 preclude Plaintiff from proving a uniform commercial designation. Even if the Court credits the statements of Plaintiff's expert witnesses as true, and accepts that, in their experience, plywood was always commercially **defined** as a product that is bought and sold on the basis of the grades of the veneers used in its construction, the textual definitions demonstrate a lack of uniformity on that point. The Court notes that the 1983 ANSI/HPMA hardwood plywood standard and the 1983 APA softwood plywood standard include abundant information about grading, **but neither includes a definitional requirement that a product must be bought and sold by grade in order to constitute plywood.** To the contrary, the definition of plywood found in each standard is fully consistent with the (now well established) common meaning of plywood. Because "[i]n order for a commercial designation to be uniform, it must be the same throughout the trade," the Court finds that Plaintiff is incapable of proving uniformity in this case. *Timber Products Co.*, 515 F.3d at 1221.

3. *Plaintiff Cannot Prove the Definiteness of its Alleged Commercial Designation*

The Court also finds that Plaintiff's commercial designation lacks definiteness. Plaintiff's proffered commercial designation of plywood is identical to the common meaning of plywood as established by the courts, with one additional requirement: the proviso that plywood "is **typically** bought, sold by, manufactured to, **and/or** referenced to, well-recognized plywood veneer grades . . . **or** by standards agreed upon between the parties." (Pl.'s Resp. 26 (emphasis added).) It is not clear to the Court from this string of disjunctive possibilities just how essential this added requirement is to Plaintiff's alleged commercial designation. Plaintiff further clarifies (or, perhaps, obfuscates) that a buyer and a seller of plywood could freely agree that the plywood in a given transaction **does not need** to be linked to "recognized grading standards," and that under such circumstances "the buyer and/or seller would **typically** have their own internal standards and an understanding as to the quality of the product being sold." (*Id.* (emphasis added).) The Court finds that Plaintiff's assertion regarding the necessary connection between plywood and "well-recognized ply-

wood veneer grades" is equivocal and lacking in definiteness.[16] It does not spell out with precision the relationship that plywood has with grading, and it is perfectly conceivable that a product not linked to any grading standard could fall within the ambit of Plaintiff's commercial designation.

The lack of definiteness of Plaintiff's proffered commercial designation stands in stark contrast to the commercial designations in successful commercial designation cases. In *Florsheim Shoe Co. v. United States*, 71 Cust. Ct. 187 (1973), for instance, the court found that while water buffalo calfskin leather fell within the common meaning of the term "calf leather," there was a commercial designation for the term that excluded this product. Namely, in the wholesale trade, "calf leather" referred "to the leather of young domesticated cows or cattle within the genus Bos," which excluded water buffalo. *Florsheim*, 71 Cust. Ct. at 191. In *Interocean Chemical & Minerals Corp. v. United States*, 715 F. Supp. 1093 (CIT 1989), the court found that while the common meaning of the term "crabmeat" would seem to be "the meat of a crab," the term is commercially used only to refer to a product that "has first been cleaned, shelled and fully cooked." *Interocean*, 715 F. Supp. at 1096. The precise, succinct, and **definite** nature of these commercial designations contrast starkly with the vague, lengthy, and ambiguous commercial designation of plywood here advanced by Plaintiff. In 1928, the United States Court of Customs Appeals remarked that "[c]ommercial designation is a thing often claimed in customs litigation and rarely established." *Jas. Akeroyd*, 15. Ct. Cust. App. at 443. This maxim has once again proven true.

CONCLUSION

For the foregoing reasons, the Court concludes that there is no genuine issue as to any material fact on either of the remaining

[16] The Court identifies the following as a partial list of products that would fit within Plaintiff's proffered commercial designation:

1. Products that meet the common meaning of plywood, and are bought and sold according to well-recognized plywood veneer grades, or
2. Products that meet the common meaning of plywood, and are "manufactured to" well-recognized plywood veneer grades, or
3. Products that meet the common meaning of plywood, and are "referenced to" well-recognized plywood veneer grades, or
4. Products that satisfy some combination of (1) – (3), or
5. Products that meet the common meaning of plywood, and are bought and sold according to standards agreed upon by the parties, or
6. Products that meet the common meaning of plywood, and are manufactured according to standards agreed upon by the parties, or
7. Products that meet the common meaning of plywood, and are referenced to standards agreed upon by the parties, or
8. Products that meet the common meaning of plywood, with no reference to grading whatsoever.

causes of action in this case, and Defendant is entitled to judgment as a matter of law on both the fifth and eighth causes of action. It is therefore

ORDERED that Defendant's motion for summary judgment on the fifth and eighth causes of action is GRANTED, and it is further

ORDERED that Plaintiff's motion for summary judgment on the eighth cause of action is DENIED, and it is further

ORDERED that the parties shall confer and submit to the court, no later than Tuesday, August 16, 2011, a proposed judgment in accordance with the opinions issued in this case, to be entered by the Court.

Dated: July 26, 2011
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE

Slip Op. 11–90

YANGZHOU BESTPAK GIFTS & CRAFTS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Court No. 10–00295

[The court grants in part and denies in part Plaintiff's Motion for Judgment upon the Agency Record and remands for further proceedings.]

Dated: July 26, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell, Mark E. Pardo,* and *Andrew T. Schutz*), for Plaintiff Yangzhou Bestpak Gifts & Crafts Co., Ltd.

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

Pepper Hamilton LLP (*Gregory C. Dorris*), for Defendant-Intervenor Berwick-Offray LLC.

OPINION & ORDER

Barzilay, Senior Judge:

I. Introduction

Plaintiff Yangzhou Bestpak Gifts & Crafts Co., Ltd. ("Plaintiff" or "Bestpak") challenges a certain methodology used by the U.S. Department of Commerce ("the Department" or "Commerce") to calculate the

separate rate margin in *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41,808 (Dep't of Commerce July 19, 2010) ("*Final Determination*"), as amended *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 75 Fed. Reg. 51,979 (Dep't of Commerce Aug. 24, 2010) (amended final determination). First, Plaintiff avers that the methodology used by Defendant does not accord with law. Pl.'s Br. 8–22. Bestpak next argues that Commerce did not support with substantial evidence the calculated separate rate, where the agency used a simple average of the adverse facts available rate and the *de minimis* rate assigned, respectively, to the two mandatory respondents. Pl.'s Br. 8–22. Defendant counters that the Department reasonably interpreted the relevant statutory provisions and that the selected methodology comports with law.[1] Def.'s Br. 8–22. For the reasons below, the court finds that Commerce's use of a simple average of a zero or *de minimis* rate with a rate based on adverse facts available to calculate a separate rate accords with law. Nevertheless, the court also holds that in this instance the agency did not support with substantial evidence the separate rate calculated for Bestpak.

II. Background

On August 6, 2009, Commerce initiated an antidumping duty investigation of narrow woven ribbons from the People's Republic of China and Taiwan for the period spanning January 1 to June 30, 2009. *See Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China and Taiwan*, 74 Fed. Reg. 39,291, 39,292 (Dep't of Commerce Aug. 6, 2009) (initiation of investigations). At that time, Commerce issued quantity and data value questionnaires to all known Chinese exporters and producers for the purpose of selecting mandatory respondents. *Id*. at 39,296. After Commerce received responses from nineteen companies, including Bestpak, Commerce decided that "it would not be practicable to determine individual dumping margins for each known exporter and/or producer . . . ." Resp't Selection Mem. (Sept. 11, 2009), Pub. Doc. 94 at 3. Accordingly, Commerce selected the two largest exporters and producers of the subject merchandise as mandatory respondents: Ningbo Jintian Import & Export Co., Ltd. ("Ningbo Jintian") and Yama Ribbons & Bows Co., Ltd. ("Yama"). Pub. Doc. 94 at 3. Ningbo Jintian's former counsel withdrew their appearance on September 17, 2009, and shortly thereafter informed Commerce that the antidumping questionnaire had

[1] Defendant-Intervenor devotes its argument principally to reciting the relevant standard of review and requests that the court find the agency's construction of the statute to be reasonable. Def.-Intervenor's Br. 7–17.

been forwarded to Ningbo Jintian. Mem. to the File re: Antidumping Duty Investigation on Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Ningbo Jintian (Oct. 6, 2009), Pub. Doc. 109 at 1 (discussing Ningbo Jintian telephone conversation). The company "failed to submit responses to any section of the Department's antidumping questionnaires." *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 75 Fed. Reg. 7,244, 7,245 (Dep't of Commerce Feb. 18, 2010) ("*Preliminary Determination*"). Yama, the other mandatory respondent, participated fully throughout the investigation. *See id*. Bestpak filed a separate rate application to establish its de jure and de facto independence, since Commerce presumes government control of entities in non-market economy investigations. *See* Bestpak Separate Rate Application (Oct. 5, 2009), Pub. Doc. 102 at 1–21. Notably, Bestpak did not apply to be a voluntary respondent at any time during the investigation. *Issues and Decision Mem.* (July 12, 2010), Pub. Doc. 382 at 21–22.

Commerce issued its preliminary determination on February 18, 2010. *Preliminary Determination*, 75 Fed. Reg. at 7,244. Commerce assigned Yama a *de minimis* margin and determined that Ningbo Jintian operated as part of the China-wide entity because the company "failed to demonstrate that it operates free of government control." *Id*. at 7,250, 7,253. Additionally, because Ningbo Jintian failed to provide the required information, Commerce applied adverse facts available to calculate the company's dumping margin. *Id* at 7,250–51. Commerce corroborated Ningbo Jintian's adverse facts available rate by comparing it to "model-specific margins" found for Yama to ensure that it fell within the purportedly acceptable range of selected weighted-average margins.[2] *Id.* at 7,251; Final Corroboration Mem. (July 12, 2010), Pub. Doc. 376 at 2, Conf. Doc. 375 at 2. With respect to the separate rate, Commerce averaged the *de minimis* rate of Yama and the adverse facts available rate assigned to Ningbo Jintian. *Preliminary Determination*, 75 Fed. Reg. at 7,249. In effect, the resulting separate rate equaled one half of the adverse facts available rate. *Id*.

Commerce issued its final determination on July 19, 2010. *See Final Determination*, 75 Fed. Reg. at 41,808. In the final results, Commerce confirmed the *de minimis* rate and the adverse facts available rate previously assigned to Yama and Ningbo Jintian, respec-

[2] Because the model-specific margins determined for Yama during the period of investigation varied greatly, Commerce randomly selected a certain number of margins within this wide range to corroborate the adverse facts available rate. Final Corroboration Mem., Pub. Doc. 376 at 2, Conf. Doc. 375 at 2. Commerce based the margins on a very small percentage of Yama's total sales of the subject merchandise during the period of investigation. Final Corroboration Mem., Pub. Doc. 376 at 2, Conf. Doc. 375 at 2.

tively. *Id.* at 41,811–12. Commerce calculated a final adverse facts available rate of 247.65% for Ningbo Jintian. *Id.* at 41,812. Commerce once again calculated the separate rate by averaging Ningbo Jintian's adverse facts available rate and the *de minimis* rate calculated for Yama, which resulted in a separate rate of 123.83% for Bestpak. *Id*. The Department explained its justification for assigning such a rate to Bestpak by noting that the statute and legislative history "explicitly permit[] such averaging." *Issues and Decision Mem.*, Pub. Doc. 382 at 19. Commerce also noted that it could not investigate an additional respondent due to time restraints and limited resources, and that alternative calculations suggested by Bestpak did not more accurately reflect potential dumping margins. *Issues and Decision Mem.*, Pub. Doc. 382 at 21–23.

III. Subject Matter Jurisdiction & Standard of Review

The Court has exclusive jurisdiction over any civil action commenced under section 516A of the Tariff Act of 1930, codified and amended as 19 U.S.C. § 1516a(a)(2)(B)(i). 28 U.S.C. § 1581(c). In reviewing Commerce's antidumping duty determination, the court will hold unlawful any determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i).

To ascertain whether Commerce's determination accords with law, the court turns to the two-part test articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S 837 (1984). First, the court must determine whether Congress directly spoke to the precise question at issue and clearly expressed its purpose and intent in the governing statute. *Id*. at 842–43. In so doing, the Court employs traditional tools of statutory construction, looking first to the plain meaning of the statutory text. *See id.* at 843 n.9. The court also may look to the statute's structure and legislative history. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998).

If the statute does not clearly answer the relevant question, then the court must turn to the second step and decide whether the agency's interpretation amounts to a permissible construction of the statute. *Chevron, U.S.A., Inc.*, 467 U.S. at 843. In deciding whether the agency acted within its discretionary authority to interpret the intention and purposes of the law, the court must discern whether the Department offered a "sufficiently reasonable" interpretation of the statute. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450–51 (1978) (citing *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 75

(1975)); *accord Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) ("Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.'" (citation omitted)). To survive judicial scrutiny, Commerce's interpretation need not be "the only reasonable interpretation or even the most reasonable interpretation." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). Importantly, the Court will defer to a reasonable interpretation even where the Court might have adopted a different interpretation. *Chevron,* 467 U.S. at 843 n.11.

In deciding whether Commerce supports its determination with substantial evidence, the court must look to whether the agency offered "more than a mere scintilla" of relevant proof. *Univ. Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (citation omitted). Substantial evidence amounts to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" in light of the entire record, including whatever "fairly detracts from the substantiality of the evidence." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (quotation marks & citations omitted). This standard requires the Department to thoroughly examine the record and "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). That the Court may draw two inconsistent conclusions "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Commc'n*, 383 U.S. 607, 620 (1966) (citation omitted).

IV. Discussion

A. Commerce Reasonably Interpreted the Relevant Statute When It Used the Subject Methodology to Calculate the Separate Rate for Bestpak

In non-market economy investigations, the Department presumes that respondent companies operate under foreign government control. *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997); *Qingdao Taifa Grp. Co. v. United States*, 33 CIT __, ___, 637 F. Supp. 2d 1231, 1240 (2009). In the course of its investigations, Commerce affords respondents the opportunity to establish an absence of de jure and de facto government control and thereby secure a separate rate. *Sigma Corp.*, 117 F.3d at 1405; *Qingdao Taifa Grp. Co.*, 33 CIT at ___, 637 F. Supp. 2d at 1240–41. To calculate the separate rate

for non-individually investigated respondents in non-market economy investigations, Commerce normally relies on the statutory provision in 19 U.S.C. § 1673d(c)(5)(A), which describes the all-others rate used in market economy investigations. *Bristol Metals L.P. v. United States,* 34 CIT __, ___, 703 F. Supp. 2d 1370, 1378 (2010) (citation omitted); *see Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT __, ___, 647 F. Supp. 2d 1368, 1379 (2009). The statute instructs the Department to weight-average the rates calculated for the investigated parties, excluding *de minimis* or zero rates and rates based on facts available, to determine the separate rate. § 1673d(c)(5)(A). However,

> [i]f the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under [19 U.S.C. § 1677e], the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

§ 1673d(c)(5)(B). According to the Statement of Administrative Action of the Uruguay Round Agreements Act, when Commerce's investigation results entirely in zero or *de minimis* rates, or rates calculated under § 1677e, the agency should weight-average the zero and *de minimis* margins and margins determined pursuant to facts available. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 ("Statement of Administrative Action"). If this "expected methodology" does not prove feasible, however, Commerce may use any other reasonable method. *Id*. Importantly, any methodology used by Commerce must reasonably reflect the potential dumping margins for non-investigated exporters or producers. *Id.*

The relevant statutory text does not directly address the precise question at issue: whether it is permissible to use a simple average to calculate separate rates in a non-market economy investigation where one respondent receives an adverse facts available rate and the other receives a *de minimis* rate. § 1673d(c)(5)(A). Therefore, the Court must determine whether Commerce reasonably interpreted the statute under the second step of *Chevron*. 467 U.S. at 843.

Bestpak argues that Commerce's method does not accord with law or constitute a permissible interpretation of the statute. Pl.'s Br. 8–14. Bestpak contends that distinct circumstances in market and

non-market economy investigations render the methodology unlawful, Pl.'s Br. 14–16, and that the statute does not permit Commerce to include the adverse facts available rate in the calculation of a separate rate, Pl.'s Reply 3. Defendant and Defendant-Intervenor Berwick Offray, LLC ("Berwick Offray") counter by arguing that Commerce's reasonable interpretation of the statute compels *Chevron* deference. Def.'s Br. 10–12; Def. Intervenor's Br. 7–17. Moreover, Defendant avers that the methodology comports with the relevant statutory language, the legislative history, and Commerce's past practices. Def.'s Br. 10–19.

The court finds that the methodology used by Commerce reasonably accords with the relevant statutory language and legislative history. The statutory exception to the general rule for determining non-investigated respondents allows Commerce to use any reasonable method, and explicitly states that the administering authority may average the "estimated weighted average dumping margins determined for the exporters and producers individually investigated." § 1673d(c)(5)(B). The legislative history reinforces this interpretation: the Statement of Administrative Action provides that Commerce should use the expected methodology when the record contains only zero and *de minimis* margins, and margins determined pursuant to adverse facts available. H.R. Doc. No. 103–316 at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201.[3] Therefore, because the agency employed a reasonable methodology derived from the relevant statutory language, the court affords the appropriate deference due to Commerce. *See Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) ("The methodologies relied upon by Commerce in making its determinations are presumptively correct."); *Hynix Semiconductor, Inc. v. United States*, 29 CIT 995, 1000, 391 F. Supp. 2d 1337, 1342 (2005).

B. Commerce Did Not Support with Substantial Evidence the Separate Rate Assigned to Bestpak

Bestpak argues that the separate rate does not reasonably reflect potential dumping margins, especially given that Commerce essentially halved the rate assigned to Ningbo Jintian, which itself was determined by use of adverse facts available. Pl.'s Br. 14–22. Plaintiff contends that the calculated separate rate belies the overriding purpose of the legislation — to calculate antidumping duties accurately,

[3] In Section 3512(d) of Title 19 of the United States Code, Congress recognized that the Statement of Administrative Action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

fairly, and realistically. Pl.'s Br. 8–22; Pl.'s Reply 4. Consequently, Bestpak maintains that no rational connection supports the agency determination and that the company should receive the same *de minimis* rate as Yama. Pl.'s Br. 14–22. Conversely, Defendant alleges that Commerce reasonably averaged an adverse facts available rate with a *de minimis* rate and that the resulting separate rate reasonably reflects Bestpak's potential dumping margins. Def.'s Br. 19–22. Additionally, Berwick Offray avers that Bestpak could have applied for voluntary respondent status and that the company's failure to do so diminishes its claims. Def.-Intervenor's Br. 13–14. Berwick Offray notes that a separate rate of one-half of an adverse facts available rate falls within the range of rates for this industry and subject merchandise, when compared to Yama's model-specific margins. Def.-Intervenor's Br. 14–15. Finally, Berwick Offray contends that no evidence supports the claim that Bestpak and other separate rate respondents would more likely receive a *de minimis* rate than the corroborated adverse facts available rate. Def.-Intervenor's Br. 14–16.

The court finds that Commerce failed to support with substantial evidence how, under the unique circumstances of this investigation where the agency selected only two mandatory respondents,[4] a simple average of a *de minimis* rate and a rate based on adverse facts available reasonably reflects Bestpak's potential dumping margins. Commerce does not explain how the separate rate of 123.83% relates to Bestpak's commercial activity. The agency has not provided information suggesting that Bestpak dumps its sales at such levels or that the calculated separate rate represents the company's potential pricing practices. *See Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 558, 779 F. Supp. 1364, 1373 (1991) (excluding "best information available" rate to calculate estimated dumping margins because it does not reasonably reflect pricing practices for subject merchandise). Moreover, the calculated separate rate is exceptionally larger than the rate calculated for the lone cooperative mandatory respondent, s*ee Final Determination*, 75 Fed. Reg. at 41,811, and without a more rigorous explanation the court cannot accept that the separate rate reflects Bestpak's commercial activity, *see Nat'l Knitwear & Sportswear Ass'n*, 15 CIT at 558, 779 F. Supp. at 1372–73. Finally, that the Statement of Administrative Action allows for the use of a simple average of an adverse facts available rate and zero or *de minimis* rates does not absolve the agency from ensuring that a separate rate reasonably reflects potential dumping margins, H.R.

[4] While the statute allows Commerce to select mandatory respondents based on the largest exporters and producers by volume, 19 U.S.C. § 1677f-1(c)(2)(B), Commerce put itself in a precarious situation when it selected only two mandatory respondents.

Doc. No. 103–316 at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201, or from rationally connecting the record evidence with the final conclusion, *see Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S. at 43.

Even more troubling to the court, Commerce associates a certain level of government control with Bestpak even though the company clearly has established an absence of de jure or de facto control. *See generally* Bestpak Separate Rate Application (Oct. 5, 2009), Pub. Doc. 124. The Department's approach in this investigation has transformed the remedial antidumping duty laws into a form of punishment, whereby Bestpak, whose only failure lies in the agency not selecting it for individual examination, must pay a separate rate tainted by adverse data associated with a government-controlled, uncooperative mandatory respondent. *See Nat'l Knitwear & Sportswear Ass'n*, 15 CIT at 558, 779 F. Supp. at 1373 (noting that antidumping duty law "is intended to be remedial, not punitive" in nature); *accord Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("[T]he purpose of the statutory provisions is to determine antidumping margins 'as accurately as possible.'" (citation omitted)).

The facts of the present action prevent the court from following *Laizhou Auto Brake Equip. Co. v. United States*, Slip Op. 08–71, 2008 WL 2562915 (CIT June 26, 2008). In that case, the Court upheld the agency's calculation of a separate rate where it "'weight-averag[ed] the individual rates of all five of the mandatory respondents, including two *de minimis* rates, one rate based on adverse facts available and two additional calculated rates.'"[5] *Id.* at *9 (internal quotation marks & citation omitted). Importantly, in that administrative proceeding, Commerce stressed that it did not apply adverse facts available to the voluntary respondents, but instead applied a statistically valid separate rate representative of producers as a whole. *Id*. In the subject investigation, however, Commerce selected only two mandatory respondents, one of which did not cooperate, thus presenting a substantially dissimilar factual scenario. Therefore, *Laizhou Auto Brake Equip. Co.* does not help the court's analysis.

The court also finds unavailing Defendant's reliance on *Changzhou Wujin Fine Chem. Factory Co. v. United States*, Slip Op. 10–85, 2010 WL 3239213 (CIT Aug. 5, 2010). The parties in that case disputed which data the agency should have used when calculating the ad-

[5] Equally of note, Commerce used a statistically valid sampling methodology in *Laizhou Auto Brake Equip. Co.*, whereas the agency in the instant case selected the largest exporters by volume in the subject proceeding. *Compare* 2008 WL 2562915 at *8–10, *with Preliminary Determination*, 75 Fed. Reg. at 7,245.

verse facts available and separate rates. *Id*. at *4. While some language of that decision seems tacitly to approve use of the simple average methodology at issue in this case, the court did not directly address the validity of the methodology. *Id* at *4. Nevertheless, while the court explains above that the methodology generally accords with law, that does not excuse Commerce from the task of articulating the requisite rational connection between the record facts and the conclusions when the agency employs the methodology in a particular agency proceeding. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S. at 43. Besides, Commerce knows well that even if the Court sanctioned use of the methodology in *Changzhou Wujin Fine Chem. Factory Co.*, "each agency determination is *sui generis*, involving a unique combination and interaction of many variables, and therefore a prior administrative determination is not legally binding on other reviews before this court." *U.S. Steel Corp. v. United States*, 33 CIT __, ___, 637 F. Supp. 2d 1199, 1218 (2009); *accord Nucor Corp. v. United States*, 414 F.3d 1331, 1340 (Fed. Cir. 2005).

Finally, the court does not find persuasive Defendant-Intervenor's position that Bestpak's failure to request voluntary respondent status undermines its claim. While the court agrees that filing a voluntary respondent application arguably may have helped Bestpak secure an individually investigated rate, the company had no guarantee that Commerce would in fact grant it such status, even though one of the mandatory respondents refused to participate in the proceeding. *Preliminary Determination*, 75 Fed. Reg. at 7,245, 7,249. Regardless, that Bestpak declined to submit voluntary respondent information does not undercut Commerce's duty to calculate antidumping duty rates as accurately as possible, *see Shakeproof Assembly Components, Div. of Ill. Tool Works*, *Inc.*, 268 F.3d at 1382, and to ensure that any separate rate reasonably reflects potential dumping margins, H.R. Doc. No. 103–316 at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201.

V. Conclusion

For the foregoing reasons, the court hereby

ORDERS that Plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART**; and further

ORDERS that the agency did not support with substantial evidence the separate rate assigned to Bestpak. The court **REMANDS** the issue to Commerce so that the agency may more thoroughly explain whether the separate rate reasonably reflects Bestpak's potential dumping margins, addressing the court's concerns stated in the opinion. If the agency cannot provide a reasonable explanation, then Commerce shall calculate a new separate rate that accurately reflects Bestpak's commercial activity.

Dated: July 26, 2011
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE