U.S. Customs and Border Protection

Slip Op. 11–91

CONSTANTINE N. POLITES, Plaintiff, v. UNITED STATES, Defendant, and THE AD HOC COALITION FOR FAIR PIPE IMPORTS FROM CHINA, & THE UNITED STEELWORKERS, Defendant-Intervenors

Before: Pogue, Chief Judge
Court No. 09–00387

[Department of Commerce's Remand Results are sustained]

Dated: July 28, 2011

Peter S. Herrick, PA (*Peter S. Herrick*) for Plaintiff Constantine N. Polites;

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera* and *John J. Todor*); *Reid P. Swayze*, of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce;

King & Spalding LLP (*Gilbert B. Kaplan*, *Brian E. McGill*, & *Daniel L. Schneiderman*) for Defendant-Intervenors Ad Hoc Coalition for Fair Pipe Imports from China; and

Schagrin Associates (*Roger B. Schagrin*) for Defendant-Intervenors United Steelworkers

OPINION

Pogue, Chief Judge:

INTRODUCTION

This matter returns to court following remand in *Constantine N. Polites v. United States*, __ CIT __, 755 F. Supp. 2d 1352 (2011)("*Polites I*"). At issue is whether Plaintiff Polites's imports of steel tubes, intended for use as scaffolding, are exempt from countervailing and antidumping duties, under an exclusion for "finished scaffolding."[1]

[1] *See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't Commerce July 22, 2008) (notice of antidumping duty order); and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg 42,545 (Dep't Commerce July 22, 2008) (notice of amended final affirmative countervailing duty determination and notice of Countervailing Duty Order) (collectively, "CWP Orders" or "orders").

On remand, the United States Department of Commerce ("Commerce" or the "Department") re-opened the record to obtain evidence in support of its claim that "finished scaffolding" refers to "scaffolding kits" that are or may be imported into the United States. Polites now seeks review of Commerce's evidentiary determination. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).[2]

After a brief review of the relevant background and the applicable standard of review, the court will explain why it concludes that Commerce's definition of "finished scaffolding" as scaffolding kits is a reasonable interpretation of the CWP Orders, and that Commerce's factual finding that such kits are or may be imported into the United States is supported by the record. Accordingly, Commerce's conclusion that Polites's scaffolding tubes are within the scope of the Orders must be sustained.

BACKGROUND

This matter began with Plaintiff Constantine N. Polites's ("Plaintiff" or "Polites") request that Commerce issue a scope determination as to whether the steel tubes Polites imports are subject to countervailing and antidumping duties.[3] Polites Req. For Scope Ruling 2, A-570–910 (February 3, 2009), Admin. R. Pub. Doc. 1. Specifically, Polites urged Commerce to find that his steel pipes, which he claimed are used exclusively as scaffolding, are excluded from the scope of the Orders under the exemption for "finished scaffolding."

In its original scope determination,[4] Commerce provided two definitions for "finished scaffolding:" 1) completed, fully assembled scaffolding, or 2) scaffolding kits. *Final Results of Redetermination Pursuant to Voluntary Remand* 8–9, June 25, 2010, ECF No. 50 ("2010 Remand").

Polites sought review of Commerce's definition, and the court held in *Polites I* that the first definition, which encompassed fully assembled scaffolding, was not in accordance with the law because it rendered the exclusion a nullity as there was no evidence which could demonstrate that fully assembled scaffolding was or could be im-

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[2] Commerce issues the Final Results pursuant to Section 705 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671d (2006). Further citation to the Tariff Act of 1930 is to Title 19 of the U.S. Code, 2006 edition. In addition, of course, the court has jurisdiction to enforce its remand orders. *Amanda Foods (Vietnam) Ltd. v. United States*, 2011 WL 1423125 at *3 (CIT Apr.14, 2011)

[3] Plaintiff appeared in the administrative proceedings under the name of his company, Constantine N. Polites & Co., though he filed his complaint under his own name.

[4] Commerce obtained a voluntary remand of its first scope determination for the express purpose of defining "finished scaffolding." *See Polites I*, 755 F. Supp. 2d at 1353–54. For our purposes, the scope determination pursuant to this voluntary remand will be referred to as the original scope determination.

ported into the United States. The court also held there was no evidence on the record that scaffolding kits were or could be imported into the United States. *Polites I*, 755 F. Supp. 2d at 1357–58. Accordingly, the court remanded for Commerce to obtain evidence that scaffolding kits "are or may be imported into the United States" or, alternately, to consider the factors listed in 19 C.F.R. § 351.225(k)(2) when defining "finished scaffolding." *Polites I*, 755 F. Supp. 2d at 1359.

On remand, Commerce chose the first option and modified its definition of "finished scaffolding" to be "component parts of . . . final, finished scaffolding that enter the United States unassembled as a 'kit'" which is a "packaged combination of component parts that contains, at the time of importation, all of the necessary component parts to fully assemble a final, finished Court No. 09–00387 Page 5 scaffolding." *Final Results of Redetermination Pursuant to Remand* 9, Mar. 23, 2011, ECF No. 63 ("Remand Results").[5]

In addition, Commerce has placed evidence on the record which it claims establishes that scaffolding kits are or may be imported into the United States. Commerce's evidence consists of 1) at least eight web-site excerpts from Chinese manufacturers offering scaffolding kits for sale and claiming the United States as a primary export market, 2) import data from ship manifests showing that Eternal Star International Industry Company Limited ("Eternal Star") imported scaffolding kits into the United States in 2009, and 3) a tariff classification ruling from the United States Customs and Border Protection in which the importer states its intention to import scaffolding rollers "both alone and with the complete unassembled steel scaffolding."[6] Remand Results 5–7. Commerce also asserts that evidence of "substantial entries" of Chinese origin goods, classified in the Harmonized Tariff Schedule of the United States ("HTSUS") category which includes scaffolding kits, establishes that scaffolding kits are or may be imported into the United States. Remand Results 7–9.

Consequently, Commerce continues to find that the steel tubes Polites imports meet the physical description of the merchandise covered by the Orders and do not fall under the "finished scaffolding" exemption.[7] Remand Results 10–11. While Commerce concedes that a scaffolding tube could be one component of a kit, it asserts that the

[5] Commerce also removed fully assembled scaffolding from the "finished scaffolding" definition. Remand Results 8–9.

[6] The Eternal Star evidence and the tariff classification ruling were among evidence submitted to the record by Defendant-Intervenors. Commerce relied on and incorporated these two evidentiary submissions in its remand results. Remand Results 7.

[7] The parties do not dispute whether the size and chemical composition of the tubes that Polites imports fall within the scope of the CWP Orders. The size of Polites's tubes falls

Polites's tubes still fail to meet the definition of a "scaffolding kit" because they require the addition of other components after importation before they can be used as scaffolding. *See* Remand Results 10. Commerce therefore finds that the tubes Polites imports are subject to antidumping and countervailing duties. *See* Remand Results 10–11.

STANDARD OF REVIEW

The Department, in its remand redetermination must comply with the terms of the court's remand order. *See Amanda Foods (Vietnam) Ltd. v. United States*, 2011 WL 1423125 at *3 (Apr. 14, 2011). In addition, the court "shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Koyo Seiko Co. v. United States*, 20 F.3d 1160, 1164 (Fed.Cir. 1994).

Substantial evidence is relevant evidence that, given the record as a whole, "a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (citations omitted). Commerce's factual conclusions in a scope ruling are not precluded from being supported by substantial evidence when two different conclusions may be drawn from the same evidence and need only be reasonable to be upheld. *See id.*; *Novosteel SA v. United States*, 25 CIT 2, 12, 128 F. Supp. 2d 720, 730 (2001).

DISCUSSION

Commerce's definition of "finished scaffolding."

The primary issue here is whether the record supports Commerce's claim that scaffolding kits are or may be imported into the United States. Polites asserts that the court should disregard the lone "fugitive" sale of scaffolding kits to the United States which Commerce identified because the entry for the kit was not placed on record. Pl.'s Reply to the Department of Commerce's Final Results of Redetermination Pursuant to Remand 2, May 20, 2011, ECF No. 65 ("Polites Reply"). Polites also argues that Commerce has found multiple websites offering sales, but no substantial evidence that sales have actually taken place.

The evidence placed on the record, however, shows that scaffolding kits have been and may be imported into the United States. This evidence consists, in part, of 1) import data from ship manifests showing that Eternal Star imported scaffolding kits from China into

within the specified diameter and wall thickness requirements, and the steel used to construct them is no more than 2% carbon, 1.8% manganese, and 2.25% silicon, by weight, which also places them within the scope of the Orders. *See* 2010 Remand Results 14.

the United States in 2009, and 2) a tariff classification ruling wherein the importer states its intention to import scaffolding rollers "'both alone and with the complete unassembled steel scaffolding.'"[8] Remand Results 5–7 (citing Def.-Int. Letter 2, April 6, 2011, ECF No. 64–4).

Polites argues that the Eternal Star evidence should be disregarded because the entry document for the scaffolding kit sale was not produced.[9] Polites Reply 2. However, there is nothing on the record to suggest that the ship manifests are inaccurate or misleading. In the absence of any evidence showing irregularity in the ship manifests, Commerce's decision that the data contained therein is accurate and that Eternal Star did, indeed, bring scaffolding kits into the United States is reasonable. *See*, *e.g.*, 19 U.S.C. § 1431(b).[10]

As further evidence, Defendant-Intervenors provided a tariff ruling in which the importer stated its intention to import scaffolding rollers with "complete unassembled steel scaffolding." Remand Results 7 (citing Def.-Int. Letter 2, April 6, 2011, ECF No. 64–4). The stated intent of an importer to import scaffolding kits supports the reasonable inference that scaffolding kits may be imported into the United States. *See Consol. Edison*, 305 U.S. at 229. Therefore, the tariff ruling provided by Defendant-Intervenors is further evidence that scaffolding kits are or may be imported into the United States.

Together, these two pieces of evidence support the conclusion that scaffolding kits have been imported in the past and that some importers at least intend to import scaffolding kits into the United States.[11] Commerce's definition of "finished scaffolding" to incorporate scaffolding kits is therefore supported by the record.

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[8] Defendant-Intervenors submitted additional evidence in support of Commerce's argument that scaffolding kits are or maybe imported into the United States. Because Commerce did not rely on or incorporate this evidence into the remand results, the court will not address its sufficiency.

[9] The entry document referred to is the documentation required by Customs before imported merchandise will be released from Customs' custody. *See* 19 C.F.R. § 141.0a(a).

[10] Commerce's directions on remand were to provide substantial evidence that scaffolding kits are or may be imported into the United States and this is evidence that at least one company brought scaffolding kits from China into the United States.

[11] Commerce argues that web-page excerpts from Chinese companies claiming to export scaffolding kits primarily to the United States, support its assertion that scaffolding kits may be imported. *See* Remand Results 5–7. While it is possible that these companies produce and export scaffolding kits, the court need not decide whether copies from an internet web-site, put up to advertise and solicit business, are substantial evidence that scaffolding kits may be imported into the United States. There is, at the least, a possibility that the statements on these advertising web-sites, claiming the United States as a "primary export market," constitute mere puffery and not actual fact. *See* Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection *Service, Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (defining "puffing" as generalized advertising claims that cannot be relied upon).

Polites's merchandise

Although the parties do not contest whether the steel tubes imported by Polites fit the physical description of the merchandise covered by the Orders, *see* 2010 Remand Results 8–9. Polites makes several remaining arguments. None are availing.

First, Polites asserts that a change in wording, between the petition and the CWP Orders, demonstrates Commerce's intent to exclude his merchandise from the scope of the final Orders. The petition stated that "pipe used for the production of scaffolding . . . are included within the scope of this investigation." *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 Fed. Reg. 36,663 (Dep't Commerce July 5, 2007) (initiation of antidumping duty investigation); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 Fed. Reg. 36,668 (Dep't Commerce July 5, 2007) (notice of initiation of countervailing duty investigation). Polites argues that his merchandise is outside the scope of the CWP Orders because Commerce removed this language which would have otherwise incorporated his merchandise. Commerce responds that it removed the identified language because of its longstanding preference against relying on end-use in the CWP Orders.

Commerce's explanation is sufficient. While Polites notes correctly that countervailing duty and antidumping investigations are initiated by Commerce based on petitions filed by a domestic interested party, 19 C.F.R. § 351.202(a), Commerce is responsible for determining the language in the final order. *See* 19 C.F.R. § 351.211(a). When determining whether merchandise falls within the scope of an antidumping or countervailing duty order, Commerce first examines the language of the order. If the terms of the order are dispositive, then the order governs. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed.Cir. 2005) (The "predicate for the interpretive process is language in the order that is subject to interpretation"). The petition and investigation may inform Commerce's determination, but

Commerce also claims that because scaffolding kits are classified under HTSUS 7308.40.00.00 and a "significant quantity" of Chinese products classified under this HTSUS number have been imported into the United States, there is substantial evidence that scaffolding kits are imported into the United States. Remand Results at 7–8. Commerce's reasoning is not entirely convincing. HTSUS 7308.40.00.00 is not limited to scaffolding kits, but rather, by its own definition, encompasses "equipment for scaffolding, shuttering, propping or pit-propping." Remand Results at 8 (citing HTSUS 7308.40.00.00). Commerce apparently ignores the other items classified under HTSUS 7308.40.00.00 and infers that all or most of the items imported under this classification code are scaffolding kits, despite the absence of evidence showing that these imports actually were scaffolding kits. The court need not address whether Commerce's inference is reasonable because it has already determined, based on other evidence, that the record supports Commerce's finding.

"they cannot substitute for language in the order itself." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002).

In addition, here, Commerce stated in the notice of investigation that it has a preference for relying on physical characteristics, as opposed to end-use, when determining the scope of product coverage. *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 Fed. Reg. 36,663 (Dep't Commerce July 5, 2007) (initiation of antidumping duty investigation); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 Fed. Reg. 36,668 (Dep't Commerce July 5, 2007) (notice of initiation of countervailing duty investigation). Subsequently, Commerce modified the language in the final orders to reflect this preference, removing all reference to end-use. *See* Final Orders. This determination was not unreasonable; the language of the petition cannot prevail over the language in the final order.[12] *Duferco*, 296 F.3d at 1097.[13]

Conclusion

For the reasons stated above, Commerce's final redetermination on remand is sustained. Judgment will be entered accordingly.

Dated: July 28, 2011
New York, New York

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

Slip Op. 11–92

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

Before: Timothy C. Stanceu, Judge
Consol. Court No. 06–00250

[Affirming in part and remanding in part a remand redetermination in an administrative review of an antidumping duty order on ball bearings]

[12] Polites further contends that Commerce should take the factors listed in 19 C.F.R. § 351.225(k)(2), particularly end-use, into consideration. This argument is unavailing because consideration of the § 351.225(k)(2) factors is a last step that Commerce uses only if it cannot otherwise determine whether merchandise fits within the scope of an order. *See* 19 C.F.R. § 351.225(k)(2); *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F.Supp. 883, 889 (1983). Here, as the record contains substantial evidence supporting Commerce's definition of "finished scaffolding," the Department need not proceed to the § 351.225(k)(2) factors. *Id.*

[13] Polites finally asserts that his merchandise is properly classified under HTSUS 7308.40.00.00 along with scaffolding kits. However, as the court held in *Polites I*, the classification of Polites's merchandise is not currently before the court. *Polites I*, 755 F. Supp. 2d at 1358 n.8.

Dated: July 29, 2011

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Baker & McKenzie, LLP (Washington, District of Columbia and Chicago, Illinois) (*Kevin M. O'Brien, Christine 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.

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

OPINION AND ORDER

Stanceu, Judge:

Introduction

Before the court is the redetermination ("Remand Redetermination") issued by the United States Department of Commerce ("Commerce," or the "Department") pursuant to the court's remand order in *JTEKT Corp. v. United States*, 33 CIT __, 675 F. Supp. 2d 1206 (2009) ("*JTEKT*"). Final Results of Redetermination ("Remand Redetermination"). In *JTEKT*, the court ordered reconsideration of certain decisions in the Department's published determination ("Final Results") concluding the sixteenth administrative reviews ("AFBs 16") of antidumping duty orders on ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom. *See JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1263–64; *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 40,064 (July 14, 2006) ("*Final Results*"). The reviews applied to entries of subject merchandise made during the period of May 1, 2004 through April 30, 2005 ("period of review"

or "POR"). *Final Results*, 71 Fed. Reg. at 40,064. This action concerns the review of the antidumping order pertaining to subject merchandise from Japan, in which Commerce assigned weighted-average dumping margins to Japanese respondents JTEKT Corporation ("JTEKT"), Nachi-Fujikoshi Corporation ("Nachi"), Nippon Pillow Block Company, Ltd. ("NPB"), NSK Ltd. ("NSK"), and NTN Corporation ("NTN"), all of which are plaintiffs in this case. *Id*. at 40,066. Because the Remand Redetermination complies only in part with the remand order in *JTEKT* and with applicable law, the court affirms the Remand Redetermination in part and issues a second remand order.

In the Remand Redetermination, Commerce addressed the five issues the court identified in its remand order in *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1263–64. Remand Redetermination 1. On three of those issues, Commerce did not change its positions but provided additional explanation. Those issues arose from NPB's proposal during the review to expand the choice of months for sampled transactions, NTN's proposal to incorporate additional bearing design types in the Department's model match methodology, and the claim of petitioner The Timken Company ("Timken"), a plaintiff and defendant-intervenor in this consolidated action, that Commerce should have used U.S. interest rates, not Japanese interest rates, to calculate a portion of certain respondents' inventory carrying costs. *Id.* On the remaining two issues, Commerce made changes to the Final Results in response to the court's remand order. *Id*. at 26–31. Commerce redetermined the weighted-average antidumping duty margin for NTN after recalculating NTN's freight expense to base the expense on rate rather than value, and it redetermined the margin for Nachi upon limiting its previous application of facts otherwise available and adverse inferences to instances of errors in certain reporting occurring during the review. *Id.*

Challenging the Remand Redetermination are NPB and NTN. Pls. Nippon Pillow Block Co. Ltd. and FYH Bearing Units USA, Inc.'s Comments on the Final Results of Redetermination ("NPB Comments"); Comments of NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp., NTN-BCA Corp., NTN-Bower Corp., and NTN Driveshaft, Inc. on Final Results of Redetermination ("NTN Comments").

Also before the court is NTN's motion for a stay pending further administrative action on, or alternatively for further briefing on, the issue of whether or not it was lawful for Commerce to apply its "zeroing" procedure in the calculation of a weighted-average dumping margin, under which Commerce assigned to U.S. sales made above

normal value a dumping margin of zero, instead of a negative margin, when calculating weighted-average dumping margins. Pl.'s Mot. to Stay Further Proceedings Pending the Finality of New Antidumping Margin Methodology or, in the Alternative, Mot. to Allow Further Briefing ("NTN Mot. to Stay"). The court construes NTN's motion as a motion for reconsideration of the court's decision in *JTEKT* affirming the Department's use of the zeroing procedure in the Final Results. Defendant and defendant-intervenor oppose NTN's motion. Def.'s Opp'n to Mot. to Stay; The Timken Co.'s Opp'n to NTN's Mot. for Stay, or, Alternatively, Further Briefing. NTN filed a motion to reply to defendant's and defendant-intervenor's opposition. Pl.'s Unopposed Mot. for Leave to File a Reply to Def.'s Opp'n to the Mot. to Stay ("NTN Mot. to Reply").

The court affirms the decisions made in the Remand Redetermination to reject NPB's proposal to expand the choice of months for sampled transactions, to use U.S. rather than Japanese interest rates in calculating the inventory carrying costs, to recalculate NTN's freight expenses based on weight rather than value, and to limit the application of facts otherwise available and adverse inferences to instances in which Nachi made errors in reporting. The court remands the Remand Redetermination for reconsideration of the Department's decisions to reject NTN's proposal on additional bearing design types and to apply zeroing in determining the margins for JTEKT, Nachi, NPB, and NTN. Due to its ordered reconsideration of the zeroing decision, the court declines to order a stay or additional briefing on that issue.

I. Background

In *JTEKT*, the court remanded the Final Results, directing Commerce to address the five issues previously identified. *JTEKT*, 33 at CIT __, 675 F. Supp. 2d at 1263–64. The court's opinion and order associated with the remand provides detailed background information. *See id.* at __, 675 F. Supp. 2d at 1213–14. Commerce issued a draft version of the Remand Redetermination ("Draft Remand Results") on March 22, 2010, upon which NPB, NTN, and Timken commented. Remand Redetermination 2. Commerce submitted the Remand Redetermination to the court on May 17, 2010.

On January 28, 2011, NTN filed its motion for a stay pending further administrative action on, or for further briefing on, the zeroing issue, which defendant and defendant-intervenor oppose. NTN Mot. to Stay; Def.'s Opp'n to Mot. to Stay; The Timken Co.'s Opp'n to NTN's Mot. for Stay, or, Alternatively, Further Briefing. On February

18, 2011, NTN filed its motion for leave to reply to Timken's and defendant's opposition to its motion to stay or for further briefing. NTN Mot. to Reply.

II. Discussion

The court will affirm the Remand Redetermination if it complies with the remand order, rests on findings supported by substantial record evidence, and is otherwise in accordance with law. *See* Tariff Act of 1930 ("Tariff Act" or the "Act"), § 516A(b)(1)(B)(i), 19 U.S.C. § 1516a(b)(1)(B)(i) (2006); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1263–64.

A. Challenges to the Application of the Department's Zeroing Methodology

Commerce applied its "zeroing" methodology in AFBs 16, under which it assigned to U.S. sales made above normal value a dumping margin of zero, instead of 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, & the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005*, at 11–12 (July 14, 2006) ("*Decision Mem.*"). JTEKT, Nachi, NPB, and NTN challenged the use of this zeroing methodology in AFBs 16, 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. Mem. of P. & A. in Supp. of Mot. of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. for J. on the Agency R. 44–47 ("JTEKT Mem."); Mem. in Supp. of the Mot. for J. upon the Agency R. Submitted by Pls. Nippon Pillow Block Co. Ltd. & FYH Bearing Units USA, Inc. 28–30 ("NPB Mem."); Rule 56.2 Mot. & Mem. for J. on the Agency R. Submitted on behalf of Pls. NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp., NTN-BCA Corp., NTN-Bower Corp., & NTN Driveshaft, Inc. 5–11 ("NTN Mem."); Br. of Pls. Nachi-Fujikoshi Corp., Nachi America, Inc. & Nachi Technology, Inc. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 13–18 ("Nachi Mem.").

Referring to a Federal Register notice published in late 2010 by the Department on the discontinuation of zeroing in administrative reviews, NTN moves for a stay of this case pending a final notice of the Department's decision to eliminate zeroing in administrative reviews, or, alternatively, the opportunity to submit additional briefing on the

zeroing issue. NTN Mot. to Stay 1–2 (citing *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81,533 (Dec. 28, 2010) ("*Proposal*")). Defendant and defendant-intervenor oppose this motion on the grounds, *inter alia*, that the court is bound by precedents of the Court of Appeals for the Federal Circuit ("Court of Appeals") to uphold the Department's application of zeroing and that the modification contemplated by the Department's Federal Register notice will not affect, retroactively, the entries at issue in this case. Def.'s Opp'n to Mot. to Stay; The Timken Co.'s Opp'n to NTN's Mot. for Stay, or, Alternatively, Further Briefing.

In the Federal Register notice to which NTN refers in its motion, Commerce proposed certain changes to the method by which it calculates weighted-average margins in periodic and sunset reviews, in response to adverse World Trade Organization ("WTO") decisions concluding that zeroing is contrary to the WTO Antidumping Agreement. *Proposal*, 75 Fed. Reg. at 81,534–35. With respect to periodic reviews, the Department proposes to "modify its methodology for calculating weighted average margins of dumping and assessment rates to provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews in a manner that parallels the WTO-consistent methodology the Department currently applies in original investigations." *Id.* at 81,534. Commerce proposes to amend its regulations, codified at 19 C.F.R. § 351.414, to change its preference from the use of average-to-transaction comparisons in periodic reviews to the use of monthly average-to-average comparisons. *Id.* at 81,534–35. Commerce has not issued a final regulation on the zeroing issue.

In *JTEKT*, the court upheld the Department's use of zeroing. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1214–18 (citing *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379–80 (Fed. Cir. 2007); *Timken Co. v. United States*, 354 F.3d 1334, 1343–45 (Fed. Cir. 2004)). After the issuance of *JTEKT* and the Department's Remand Redetermination, and after the opportunity for the parties to comment on the Remand Redetermination, the Court of Appeals issued two decisions holding that the final results of an administrative review in which zeroing was used must be remanded for an explanation of the Department's 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,* 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) ("*JTEKT Corp.*"); *Dongbu Steel Co. v.*

United States, 635 F.3d 1363, 1371–73 (Fed. Cir. 2011) ("*Dongbu*"). Based on conclusions that Commerce had not provided a satisfactory explanation for the differing interpretations in the two contexts, the Court of Appeals in *JTEKT Corp.* and *Dongbu* held that the judgment of the Court of International Trade affirming the use of zeroing in the administrative reviews at issue in those cases must be set aside. *JTEKT Corp.*, 642 F.3d at 1384–85; *Dongbu*, 635 F.3d at 1372–73. 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 concluded 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 further directed that "in order to satisfy the requirement set out in *Dongbu*, Commerce must explain why these (or other) differences between the two phases [using zeroing in administrative reviews, but not in investigations] make it reasonable to continue zeroing in one phase, but not the other." *JTEKT Corp.*, 642 F.3d at 1385.

The court construes NTN's motion for a stay pending further administrative action on, or alternatively for further briefing on, the zeroing issue as a motion for reconsideration of the court's decision in *JTEKT*, 33 CIT __, 675 F. Supp. 2d 1206 to uphold the use of zeroing. Although only NTN has filed such a motion, the court, in its discretion and in consideration of the holdings in *JTEKT Corp.* and *Dongbu*, will reconsider *sua sponte* its decision upholding the Department's use of zeroing in the Final Results in determining the margins for JTEKT, Nachi, and NPB as well as NTN. In doing so, the court concludes that a remand is appropriate in this case to direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp*., both of which decisions questioned the legality of the Department's construction of 19 U.S.C. § 1677(35) and declined to affirm the judgment of the Court of International Trade upholding the use of zeroing. *See JTEKT Corp.*, 642 F.3d at 1383–85; *Dongbu*, 635 F.3d at 1371–73. The court on second remand will direct Commerce to reconsider its decision to apply zeroing when determining the margins for JTEKT, Nachi, NPB, and NTN. The Department, on remand, must alter that decision or set forth an explanation of how the language of 19 U.S.C. § 1677(35) 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. *See JTEKT Corp. v. United States*, 35 CIT __, 768 F. Supp. 2d 1333, 1364 (2011).

The court does not agree with the argument of defendant and defendant-intervenor that the court is bound by Court of Appeals precedent to uphold the use of zeroing in this case. 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 1369–73. Distinguishing prior holdings in which it had upheld the Department's use of zeroing, the Court of Appeals stated in *Dongbu* 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. Observing 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. In *JTEKT Corp.*, the Court of Appeals did, however, consider itself bound by its holding in *Dongbu*, concluding 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.*, 642 F.3d at 1384.

Because the court is remanding for further explanation the Department's decision to apply the zeroing methodology, the court sees no need for a stay as sought by NTN. Also, because the parties will have the opportunity to comment on the results the Department issues in response to the second remand, the court does not perceive the need for other, separate briefing on the zeroing issue at this time. For these reasons, the court also will deny, as moot, NTN's motion for leave to file a reply to defendant's and defendant-intervenor's opposition to that motion.

B. NPB's Proposal to Expand the Choice of Sample Months

In the review, Commerce resorted to sampling of transactions for NPB (and similarly situated respondents) because NPB entered into a relatively high volume (10,000 or more) of constructed export price sales in the United States and 10,000 or more transactions in the home market, during the POR. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1224 (citing *Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews*, 71 Fed. Reg. 12,170, 12,172–74 (Mar. 9, 2006)). For a respondent such as NPB, Commerce reviewed the individual U.S. sales occurring in six "sample weeks," each of which Commerce

chose from one of the six two-month periods in the POR, and endeavored to match these individual sales with home market transactions in "sampled months." *Id*. Commerce first chose as the sample month the month in which the sample week (and U.S. sale) occurred, but if no matches were found during that month, Commerce also looked to the preceding home market sample month and to the subsequent home market sample month. *Id*. at 1225. Because Commerce selected only eight sample months, the sample month for an individual U.S. sale was not in all cases the immediately previous or immediately subsequent month.[1] *Id*. In the Remand Redetermination, Commerce referred to the corresponding window period as "the 30/30-day sample window period." Remand Redetermination 4.

In its challenge to the Final Results, NPB claimed that Commerce impermissibly confined its search for possible matches to the designated sample months. *Id*. NPB objected that "the Department searched only in immediately adjacent sample months, so that a U.S. sale had only three potential months in which to find a normal value match." NPB Mem. 27. NPB argued that this method compares unfavorably to the method the Department uses absent sampling, which potentially examines home market sales during a period of up to three months prior to, or up to two months later than, the month in which the U.S. sale occurred. *Id.* In the Remand Redetermination, the Department refers to this normal period, established by 19 C.F.R. § 351.414(e)(2) (2009), as the "90/60-day window period."[2] Remand Redetermination 3. As NPB stated in their brief, "[t]o correct this, NPB suggested that the Department increase the search window around sampled sales by an additional month in either direction, for a total of two months on each side of the sampled month." NPB Mem. 27 (citing *Letter from Baker & McKenzie, LPP to Dep't of Commerce* 20–22 (Apr. 25, 2006) (Admin. R. Doc. No. 259)).

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[1] The home-market sample months in the administrative review were February, June, August, September, and November of 2004, and February, March, and May of 2005. Remand Redetermination 7.

[2] For purposes of comparing U.S. and home market sales, the regulation defines the "contemporaneous month" as follows:

> (2) Contemporaneous month. Normally, the Secretary will select as the contemporaneous month the first of the following which applies:
>
> (i) The month during which the particular U.S. sale under consideration was made;
>
> (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product.
>
> (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

19 C.F.R. § 351.414(e)(2) (2009). This regulation applies in the "average-to-transaction method" that Commerce normally employs in an administrative review. *See id.* § 351.414(c)(2).

Reasoning that § 351.414(e)(2), which defines the reasonably corresponding contemporaneous month as "*normally*" the 90/60-day window period, did not preclude Commerce from exercising discretion to select a month outside of the definition of "comparison month" should circumstances so require, the court held in *JTEKT* that Commerce erred in concluding that the regulation required rejection of NPB's proposal. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1226; *see Decision Mem.* 86 ("Given the fact that sample home-market months are separated by a month or more between each other in either direction, extending the window period by a month in each direction often results in extending the window period beyond the time period our regulation allows.").

In the Remand Redetermination, the Department takes the position that "[o]ur 30/30-day sample window period is a reasonable interpretation of section 773(a)(1)(A) of the Act and 19 C.F.R. [§] 351.414(e)(2) and NPB does not demonstrate otherwise." Remand Redetermination 12. Commerce defends its use of the 30/30-day sample window period in AFBs 16 as consistent with its practice in earlier AFBs reviews and as a reasonable method of reducing the administrative burden of calculating individual margins where large volume of transactions are involved. *Id.* at 11–12. As the Department explains,

> [d]ue to the extremely large number of transactions that occurred during the review period and the resulting administrative burden involved in calculating individual margins for all of the transactions in the proceedings concerning ball bearings and parts thereof from various countries, the use of the 30/30-day sample window period has been an established practice for two decades since *AFBs* 1.

Remand Redetermination 12 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Japan; Prelim. Results of Antidumping Duty Admin. Reviews & Partial Termination of Antidumping Duty Admin. Reviews*, 56 Fed. Reg. 11,186, 11,187 (Mar. 15, 1991) ("*AFBs 1*")).

NPB is correct that under the 30/30-day sample window period "a U.S. sale had only three potential months in which to find a normal value match." NPB Mem. 27. NPB draws a comparison with the ordinary 90/60-day window period, under which six, rather than three, comparison months potentially are available in which Commerce may search for a match. *Id.* However, NPB's objection does not suffice as a ground by which the court could hold the challenged methodology to be unreasonable and therefore contrary to law. As

Commerce correctly points out in the Remand Redetermination, "[t]he statute does not define the 'reasonably corresponding' contemporaneous period." Remand Redetermination 11 (citing section 773(a)(1)(A) of the Tariff Act, 19 U.S.C. § 1677b(a)(1)(A)). The statute affords the Department discretion in sampling transactions and in selecting a reasonably corresponding contemporaneous period. That discretion may have allowed Commerce to adopt a proposal such as that put forth by NPB, but the court cannot conclude that Commerce was required to use a different method of sampling than the one it used this case. Although NPB's proposal or a similar method of expanding the contemporaneous period could be expected to result in more numerous matches, the Department is also entitled to consider its past practice and the deleterious effect on its resources were it required to search additional months for home market sales. For these reasons, the court cannot agree with NPB that Commerce's method, when considered according to the new justification offered in the Remand Redetermination, was unreasonable.[3] Therefore, the court affirms the Remand Redetermination in regards to this issue.

C. Redetermination of NTN's Freight Expense

In *JTEKT*, the court set aside as unlawful the Department's decision to reallocate only NTN's freight cost as opposed to the freight cost of all similarly-situated respondents. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1263–64. The court held that Commerce's decision to reallocate only NTN's freight expense according to weight was impermissibly arbitrary because Commerce did not require any other respondent to comply with the Department's new position that value-based allocations are distortive per se and because Commerce postponed to a future administrative review its application of its new position to all respondents other than NTN who used a value-based allocation. *Id.* at __, 675 F. Supp. 2d at 1240. The court concluded, further, that Commerce erred in basing its decision to reallocate only NTN's freight expense on its finding that only NTN's data were suitable for conducting a reallocation even though other respondents also used value-based allocations, which Commerce no longer considered to satisfy its regulatory requirement, as set forth in 19 C.F.R. §

[3] Observing that the proposal of FYH Bearing Units USA, Inc. and Nippon Pillow Block Company Ltd. (collectively, "NPB") could result in the use of sample months outside of the ordinary 90/60-day window period, the Remand Redetermination also states that "we do not find that NPB's proposal satisfies the contemporaneity requirement in section 773(a)(1)(A) of the Act and 19 CFR 351.414(e)(2)." Remand Redetermination 13. The court finds questionable, but also superfluous, this additional rationale for rejection of NPB's proposal. The court affirms the Department's use of the 30/30-day window period for the reasons the court has stated.

351.401(g), that allocation methods not be distortive. *Id.* at __, 675 F. Supp. 2d at 1239–40. In addition, the court observed that, contrary to the Department's statements, Commerce did not have on the record for NTN a complete set of product weight data with which to reallocate NTN's freight expense according to weight. *Id.* (observing that Commerce ignored the record fact that Commerce had weight data for only some of NTN's models and resorted to its own methodology of estimating shipping weights for others of NTN's models (citing *Mem. from Financial Analyst, AD/CVD Operations, Office 5, to The File* 7–9 (Mar. 2, 2006) (Admin. R. Doc. No. 222))).

In the Remand Redetermination, Commerce stated that it disagreed with the court's order "to calculate NTN's freight expenses in a manner consistent with [Commerce's] treatment of other respondents' reported freight allocations where, different from other respondents, [Commerce] had certain weight information for NTN on the record." Remand Redetermination 27. Commerce, however, did reallocate NTN's freight expense "in a manner consistent with our treatment of other respondents' reported freight allocations" and recalculated NTN's margin using the freight expense data as reported originally by NTN. *Id*. at 27, 31. NTN's margin was revised from 9.32% to 8.02%. *Id*. at 31.

No party commented on the Department's revised calculation of NTN's freight expense in the Department's Draft Remand Results, nor did any party comment on the issue before the court. *See id*. at 27, 31. Under these circumstances, the court reasonably may infer that the parties concur in the Remand Redetermination. *See Wuhan Bee Healthy Co. v. United States*, 32 CIT __, __, Slip Op. 08–61, at 12 (May 29, 2008) ("Under such circumstances, Commerce 'may well be entitled to assume that the silent party has decided, on reflection, that it concurs in the agency's [remand results],' and the court will uphold the parties' concurrence." (quoting *AL Tech Specialty Steel Corp. v. United States*, 29 CIT 276, 285, 366 F. Supp. 2d 1236, 1245 (2005))). Accordingly, the court affirms this aspect of the Remand Redetermination.

D. Nachi's Errors in Reporting Physical Bearing Characteristics

In *JTEKT*, the court set aside as unlawful the Department's decision to apply facts otherwise available and adverse inferences to all of Nachi's sales based on the Department's finding that Nachi erred in reporting physical characteristics for certain sampled sales. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1252–54. The Remand Redetermination characterized the court's order as requiring it to "revise [its] analysis to use facts available only for the portion of Nachi's reported

information that is the subject of a finding that is supported by substantial evidence on the record i.e., those models for which the physical characteristics we found to have been misreported and to redetermine Nachi's margin accordingly." Remand Redetermination 27. In the Remand Redetermination, the Department stated that it "ceased using facts otherwise available for Nachi in connection with physical characteristics that the Department did not examine and re-calculated the margin for Nachi using the reported data as corrected for specific verification findings." *Id*. at 31.

No party commented on the Department's revised calculation of Nachi's antidumping duty margin in AFBs 16 in the Draft Remand Results, nor did any party comment on this revised calculation before the court. *See id*. As stated above, under such circumstances, the court reasonably may infer that the parties concur in the Remand Redetermination. *See Wuhan Bee Healthy Co.*, 32 CIT at __, Slip Op. 08–61, at 12. Accordingly, the court affirms this aspect of the Remand Redetermination.

E. Use of Japanese Interest Rates to Calculate a Portion of the Adjustment for Imputed Interest Carrying Costs When Determining Constructed Export Prices for NTN and Nachi

In *JTEKT*, the court directed that Commerce reconsider its decision to use Japanese interest rates when calculating U.S. inventory carrying costs with respect to Nachi and NTN. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1262–63. Although rejecting various grounds upon which Timken challenged that decision, the court concluded that the Decision Memorandum did not respond to Timken's argument, made during the review, that the use of Japanese interest rates instead of U.S. interest rates was a departure from a practice or established methodology. *Id.* at __, 675 F. Supp. 2d at 1262. On remand, the court directed Commerce "to provide an analysis responding to Timken's argument concerning a departure from an alleged practice or methodology." *Id.* at __, 675 F. Supp. 2d at 1264.

In the Remand Redetermination, the Department did not change its calculation methodology for Nachi's and NTN's inventory-carrying costs incurred in the United States. Instead, the Department, citing various past administrative decisions, explained that its use of Japanese interest rates conformed with its long-standing practice and did not constitute a departure from an established practice or methodology. Remand Redetermination 25–26. The Department stated as follows:

> [w]hile we recognize that there may be exceptions, it has generally been our long-standing practice that, if the payment

> terms that the parent company extends to its U.S. subsidiary, in combination with the time the merchandise remains in the U.S. subsidiary's inventory, indicates that the parent company bears the cost of carrying the merchandise for a portion of time the merchandise is in inventory in the United States, we use the parents company's short-term interest rate to calculate that portion of the inventory-carrying cost.

Id. at 25 (footnote omitted). Further, the Department explained that in previous administrative reviews of the antidumping duty orders on ball, cylindrical roller, and spherical plain bearings from Japan, it used Japanese yen-based interest rates for the portion of the inventory-carrying period in which the parent company bore on behalf of its U.S. subsidiary the cost of carrying the inventory in the United States. *Id.* (footnote omitted).

No party commented on the Department's explanation. *Id*. at 26. Here also, the court reasonably may infer that the parties concur in the resolution of the interest rate issue as set forth in the Remand Redetermination. *See Wuhan Bee Healthy Co.*, 32 CIT at__, Slip Op. 08–61, at 12. Accordingly, the court affirms the resolution of this issue in the Remand Redetermination.

F. NTN's Proposal for Additional Ball Bearing Design Types

NTN claimed that Commerce erred in refusing to recognize and apply the additional ball bearing design types that NTN proposed for use in the model matching process. NTN Mem. 26–30. NTN argued that the seven ball bearing design types that Commerce identified, *i.e.*, angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, and insert, are overly broad and fail to account for significant physical characteristics.[4] *Id.* at 27. NTN also objected that "Commerce's design codes do not take into account bearings, which fall into more than one category, such as bearings that are both

[4] In the AFBs 16 reviews, Commerce adopted, in response to NTN's objection, only one additional design type, "hub units incorporating angular contact bearings." *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005*, at 77 (July 14, 2006) ("We do find, however, that NTN provided evidence . . . that demonstrates that NTN's hub units incorporating angular contact bearings are significantly different from standard angular contact bearings as well as housed bearings to warrant a bearing-design designation distinct and separate from the seven bearing-design types we identified in our questionnaire."). Commerce took the position that to include an additional design type in its model matching process, it had "to be satisfied that the classification is substantially different from each of the design types" already included. *Id*.

'angular contact' and 'deep groove'." NTN Mem. 28. In *JTEKT*, the court observed that the Decision Memorandum did not address, and defendant did not discuss in its briefs, NTN's objection that some bearings are described by more than one design type. *JTEKT*, 33 CIT at __, 675 F. Supp. 2d at 1229. The court directed Commerce to explain how Commerce applied its model-matching methodology to those of NTN's bearings that appear to fall within more than one design type. *Id*. (concluding that "the answer to this question is relevant to the court's consideration, in the entirety, of Commerce's decision to reject all of NTN's proposed design types other than the design-type category for hub units incorporating angular contact bearings.").

Commerce discussed in the Remand Redetermination the question of whether a design type category was needed for combination bearings comprised of two angular contact bearings or an angular contact bearing and a deep groove bearing. Remand Redetermination 16–19. Commerce decided against the need for additional design types for combination bearings because it found, first, that NTN reported combinations of two angular contact bearings as an angular contact bearing, and, second, that NTN did not have any reported combination bearings comprised of an angular contact bearing and a deep grove bearing. *Id.* at 17. NTN did not contest these findings in its comments to the court. *See* NTN Comments. The court concludes, therefore, that Commerce did not err on remand in concluding that no additional design type categories were needed for combination bearings.

In the Draft Remand Results, Commerce concluded that it should add two new design types, "thrust ball/angular contact" and "housed/deep groove," to "prevent product overlap." Remand Redetermination 17. However, in the Remand Redetermination, Commerce concluded "in light of comments [Commerce] received in response to [its] draft remand results" that "the current model-match methodology already has ways to handle the bearings that NTN reported may fall within more than one design-type category" and that "[a]ccordingly, there is no need to add additional design types." *Id.* at 17–18.

Commerce acknowledged in the Remand Redetermination that, as NTN claimed, "there is an 'overlap' between the 'thrust ball' and 'angular contact' design types that we have established in our questionnaire . . ." but concluded that no new design type was necessary because record evidence supported a finding that the two groups of products as reported by NTN, angular contact thrust ball bearings and plain thrust ball bearings, "have different load directions" and therefore would not be compared with each other under the model-

match methodology. *Id.* at 18–19. In its comments on the Remand Redetermination, NTN does not contest this specific finding, nor does it demonstrate that, despite the finding, a new design type for angular contact thrust ball bearings is needed for the review at issue in this case. *See* NTN Comments. The court concludes that Commerce, although failing in the Final Results to address the problem NTN identified as to angular contact thrust ball bearings, has offered on remand an explanation to support its decision not to adopt angular contact thrust ball bearings as a new design type for purposes of the Remand Redetermination. Because NTN's comments do not contest the Department's finding as to load direction and do not demonstrate why this finding and explanation should not support a decision to decline to adopt the proposed new design type, the court affirms that decision.

In the Remand Redetermination, Commerce also reversed its plan, as described in the Draft Remand Results, to create a design type for "housed/deep groove" ball bearings. Commerce stated therein that "NTN claims that there is an overlap in the 'housed bearing' and 'deep groove' design types because certain bearings can be characterized as both a 'housed bearing' design type and a 'deep groove' design type" but concluded that "[t]his is, in fact, not the case." Remand Redetermination 18. In support of this conclusion, Commerce asserts in the Remand Redetermination that, in accordance with instructions at page V-6 of its questionnaire dated July 5, 2005, respondents were to report as housed bearings any housed bearings that are also deep groove bearings and that only deep groove bearings that were not housed bearings or insert bearings were to be reported as deep groove bearings. *Id.* The court finds this explanation inconsistent with the record evidence to which Commerce cites, *i.e.*, page V-6 of the July 5, 2005 questionnaire. Contrary to the Department's characterization, that page of the cited document sheds no light on what a respondent is to do when confronted with the task of classifying a housed deep groove ball bearing according to the Department's established design type categories. *See United States Dep't of Commerce Import Admin., Request for Information, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom,* V-6 (July 5, 2005). As NTN points out in its comments on the Remand Redetermination, the questionnaire "does not include directions for a reporting hierarchy among design types." NTN Comments 5. The record evidence on which the Department relies fails to support the finding in the Remand Redetermination that "there is no overlap between the 'deep

groove' design type and the 'housed bearing' design type." Remand Redetermination 18 (footnote omitted).

Commerce made a finding in the Remand Redetermination, which NTN does not contest in its comments to the court, that bears on the issue of whether housed deep groove ball bearings should be recognized as a separate design type for purposes of this review. Commerce found that NTN, in reporting its bearings to Commerce for model-match purposes, applied the Department's "housed bearing" designation to the bearings NTN described as falling into both the housed and deep groove design type categories. Remand Redetermination 17. Commerce also noted that it found no record evidence that NTN sold housed bearings that were not housed deep groove bearings. *Id.* at 18 n.2. The court concludes from the record evidence and NTN's comments on the Remand Redetermination that Commerce erred in concluding that there was no overlap between housed and deep groove bearings, but the court is not able to conclude from the record evidence that this error actually caused NTN's housed deep groove ball bearings to be matched with any bearings that were not housed deep groove ball bearings or whether a related error occurred in the matching of NTN's bearings.[5] However, it is not the role of the court to reach a finding that no such mismatches occurred. Because Commerce's analysis of the housed deep groove bearing issue is flawed for the reason the court has identified, a remand is appropriate on this issue.

In summary, the court concludes that Commerce acted reasonably in resolving the issue, as raised in *JTEKT*, of NTN's bearings that may be described by more than one design type, with the exception of the housed bearing/deep-groove bearing issue discussed above. On remand, Commerce must review the relevant record evidence to determine whether any of NTN's housed deep groove bearings were matched with bearings other than housed deep groove bearings, and whether any other error involving matching of housed or deep groove bearings occurred, such as matching of any NTN non-housed deep groove bearings that may have been included in the review with housed bearings or with any bearings that were not non-housed deep groove bearings. If any mismatches are revealed by this analysis, Commerce must address them through addition of one or more new design type categories or another appropriate remedy.

[5] NTN does not contend in its comments that any bearings it may have classified for reporting purposes as deep groove bearings (rather than as housed bearings) actually were housed bearings, and the court finds no record evidence that this occurred. *See* NTN Comments.

III. Conclusion

For the reasons discussed in the foregoing, the court will affirm in part, and remand in part, the Remand Redetermination.

ORDER

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

ORDERED that the Final Results of Redetermination ("Remand Redetermination"), submitted by the United States Department of Commerce ("Commerce" or the "Department") on May 17, 2010, be, and hereby is, affirmed in part and remanded to Commerce in part; it is further

ORDERED that, for the reasons set forth in this Opinion and Order, the following decisions and determinations by Commerce in the Remand Redetermination, be, and hereby are, affirmed: (A) the Department's decision not to adopt NPB's proposal to expand the choice of sample months; (B) the Department's decision to use Japanese interest rates to calculate a portion of the adjustment for imputed interest carrying costs when calculating constructed export prices for NTN and Nachi; (C) the redetermination of NTN's freight expense based on weight rather than value; and (D) the Department's decision not to apply facts otherwise available and adverse inferences to substitute for information that Nachi submitted on physical bearing characteristics, except for the specific information submitted by Nachi that Commerce determined during its verification procedure to be incorrect; it is further

ORDERED that Commerce, on remand, shall reconsider its decision to apply its zeroing methodology in determining the margins for JTEKT, Nachi, NPB, and NTN and either alter that decision or set forth an explanation of how the language of 19 U.S.C. § 1677(35) 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; it is further

ORDERED that NTN's Motion to Stay Further Proceedings Pending the Finality of New Antidumping Margin Methodology or, in the Alternative, Motion to Allow Further Briefing be, and hereby is, DENIED and NTN's Motion for Leave to File a Reply to defendant's and defendant-intervenor's opposition to NTN's Motion to Stay be, and hereby is, DENIED as moot; it is further

ORDERED that Commerce, on remand, shall reconsider NTN's proposal to incorporate into the model-match methodology additional design-type categories to the extent necessary to correct any errors revealed by the Department's review of the record evidence to determine whether any of NTN's housed deep groove bearings were matched with bearings that were not housed deep groove bearings

and whether any other error involving matching of housed or deep groove bearings occurred during the review; it is further

ORDERED that Commerce shall redetermine the weighted-average dumping margins of plaintiffs, as appropriate, in complying with this Opinion and Order; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination upon remand ("Second Remand Redetermination"), which shall comply with all directives in this Opinion and Order; it is further

ORDERED that plaintiffs shall have thirty (30) days from the filing of the Second Remand Redetermination in which to file comments thereon; and it is further

ORDERED that defendant and defendant-intervenor may file comments within have thirty (30) days from the filing of plaintiffs' comments.

Dated: July 29, 2011
New York, New York

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

Slip Op. 11–93

ISAAC INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Chief Judge
Court No. 07–00178

[Defendant's motion for summary judgment is granted.]

Dated: August 2, 2011

Peter S. Herrick, PA (*Peter S. Herrick*) for Plaintiff Isaac Indus.

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 (*Edward F. Kenny*); *Sheryl A. French*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection for Defendant United States.

OPINION

Pogue, Chief Judge:

INTRODUCTION

In this matter, Plaintiff Isaac Industries ("Isaac") seeks review of the Defendant United States Customs and Border Protection Ser-

vice's ("Customs") denial of Isaac's claims for drawback.[1] Plaintiff filed drawback claims and related protests during a transitional period within which Customs closed the Drawback Center at the Port of Miami ("Miami office") and gradually transferred claim processing to the Drawback Center at the Port of Los Angeles ("Los Angeles office"). Plaintiff alleges that the Los Angeles office had no authority to make drawback determinations denying its claims.

Before the court are Defendant's motion for summary judgment and Plaintiff's cross-motion for a stay of the proceedings and remand to the Miami office. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

After a brief review of relevant background and the standard of review, the court will explain below that there is no genuine dispute as to any material fact, Customs properly denied Plaintiff's drawback entries and protests, and Plaintiff's summons is untimely filed. Accordingly, Defendant's motion for summary judgment is granted.

BACKGROUND

Prior to July 2002, Isaac imported polyether polyol into the United States, later re-exported it, and filed three separate drawback entries[2] ("entries") for this merchandise with Customs's Miami office.

Shortly thereafter, Customs adopted and published a final rule announcing the planned closure, on July 23, 2003, of the Miami office for processing drawback claims. Consolidation of Customs Drawback Centers, 68 Fed. Reg. 3381, 3381 (Dep't Treasury Jan. 24, 2003). The rule promulgated a "phased-in" closure plan, requiring the Miami office to continue processing unliquidated claims for twelve months following the date of effective closure, i.e., until July 23, 2004.[3] *Id.* After July 23, 2004, the Miami Office would forward all unprocessed claims to the Los Angeles drawback center. *Id.* at 3383.

Customs ultimately denied all three of Isaac's drawback claims, on December 22, 2004, and, in a January 21, 2005 letter from the Los Angeles office, notified Isaac of the denial and liquidation of the three entries without any drawback. *Letter from John S. Beck to Isaac Industries*, Jan. 21, 2005, ECF No. 392 at 2 ("*Drawback Denial Letter*"). Furthermore, Customs posted a bulletin notice, detailing the

[1] A drawback is the refund of duty paid on an import that is subsequently re-exported. 19 U.S.C. § 1313(a) (2006). Further citations to Title 28 of the United States Code are to the 2006 edition.

[2] Plaintiff filed AGK-4509025–7 on July 17, 2002; and AGK-0613025–8 and AGK-1234567–6 on July 31, 2002. Def.'s Mot. Summ. J. 2.

[3] An initial error in the parties' motions contended that the Miami office closed in November 2004, which would have extended its jurisdiction accordingly until November 2005. Pl.'s Mot. Opp. Def.'s Mot. Summ. J. 2; Def.'s Mot. Summ. J. 3. Both parties corrected the error in a conference call with the court and agreed that the Miami Office closed on July 23, 2003.

liquidation, at the Port of Miami on February 5, 2005.[4] *Customs Bulletin Notice of Entries Liquidated for February 4, 2005*, ECF No. 39–2 at 14 ("*Bulletin Notice*").

On April 18, 2005, Plaintiff filed a protest of Customs's drawback denial. *Protest No. 2704–05–100868 regarding Drawback Entry No. AGK-4509025–7, AGK-0613025–8, and AGK-1234567–6*, Apr. 18, 2005, ECF No. 39–2 at 16–18 ("*First Protest*"). Customs later sent Isaac a letter stating that "[d]rawback protest[s] can no longer be filed in the Miami Port. Please submit protest to a port where drawbacks are filed." Decl. of Peter S. Herrick, Jun. 8, 2005, ECF No. 42–2 at 11, ("*Resolution Request*"). The record contains copies of Isaac's protest forms stamped "Received" by the Los Angeles Office. Pl.'s Mem. Opp. Def.'s Mot. Summ. J. 5; *First Protest* 16. The Los Angeles office denied Isaac's protest on November 9, 2005, reasoning that the protest "had no support and no amendment [was] received within 180 days."[5] *First Protest* 15–18.

Plaintiff commenced this action on May 24, 2007 to contest the denial of its protests.[6] Ct. Summons 1–2. Defendant moves for summary judgment, claiming entitlement to judgment as a matter of law because the court lacks jurisdiction over Plaintiff's untimely complaint.

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[4] "The bulletin notice of liquidation will be posted for the information of importers in a conspicuous place in the customhouse at the port of entry . . . . This posting or lodging will be deemed the legal evidence of liquidation. For electronic entry summaries, the date of liquidation will be the date of posting of the bulletin notice[.]" 19 C.F.R. § 159.9(b) - (c)(1) (2011).

[5] According to the relevant regulations, "[a] protest may be amended at any time prior to the expiration of the period within which the protest may be filed . . . . [It] may assert additional claims pertaining to the administrative decision . . . relating to the same category of merchandise that is the subject of the protest." 19 C.F.R. § 174.14(a) (2011).

[6] On April 18, 2006, a year after the first set of protests, but before filing suit, Plaintiff filed a second set of protests, this time with the Los Angeles office. Def.'s Mot. Summ. J. 4. Customs denied this second set of protests on July 20, 2006, stating that it was untimely filed. *Protest No. 2704–06–101358 regarding Drawback Entry No. AGK-4509025–7* (Jul. 20, 2006); *Protest No. 2704–06–101359 regarding Drawback Entry No. AGK0613025–8* (Jul. 20, 2006); *Protest No. 2704–06–101360 regarding Drawback Entry No. AGK-1234567–6* (Jul. 20, 2006) (ECF No. 39–2 at 19–22). During this second round of protest evaluation, Isaac's counsel sent a June 5, 2006 letter to Customs, in which he explained that he "did not file an amendment [during the original protest evaluation] because [he] did not have the protest number[.]" *Letter from Peter S. Herrick to Port Director, Long Beach Drawback Branch Office*, June 5, 2006, ECF No. 39–2 at 24. Plaintiff's counsel further claimed that he had originally sought the protest number via a June 7, 2005 letter, and in turn, now requested "the opportunity to amend the protest." *Id.* Customs thus labeled the June 7, 2005 letter as a "§ 1520(c) claim," which it denied on January 19, 2007 as untimely filed. *Letter from John Beck, Drawback Specialist, U.S. Customs and Border* Protection, to Isaac Industries, Jan. 19, 2007, ECF No. 39–2 at 26–27); Def.'s Mot. Summ. J. 5. Isaac, however, does not rely on or raise its second set of protests here.

STANDARD OF REVIEW

The court may grant a party's motion for summary judgment when "there is no genuine issue as to any material fact," and "the movant is entitled to judgment as a matter of law." USCIT R. 56(c). Genuine issues entail "[m]aterial issues [that] arise when 'facts . . . might affect the outcome of the suit under governing law[.]'" *Trumpf Med. Sys., Inc. v. United States*, __ CIT __, 753 F. Supp. 2d 1297, 1305 (2010) (citations omitted).

Whether jurisdiction exists is a question of law. *See Sky Techs. LLC v. SAP AG*, 576 F.3d 1374, 1378 (Fed. Cir. 2009). Plaintiff, "[the] party seeking the exercise of jurisdiction in its favor[,] has the burden of establishing that . . . jurisdiction exists." *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)).

DISCUSSION

Plaintiff's alleged issues of material fact

In opposing summary judgment, Plaintiff alleges four disputed material facts: (1) its awareness of the drawback authority transfer to Los Angeles; (2) the timing of the port of Miami's retention and transfer of jurisdiction; (3) the controlling nature of Customs's bulletin posting in Miami; and (4) the location and timing of Plaintiff's first set of protests. Each is discussed, in turn, below.

First, Plaintiff claims that it was unaware of Customs's decision to close its Miami office, generating a "misleading" process that culminated in this case. Pl.'s Mem. Opp. Def.'s Mot. Summ. J. 5–6.[7] This argument is unavailing. "The publication of rules . . . in the Federal Register gives legal notice of their contents to those subject to, or affected by, them, 'regardless of actual knowledge . . . or of the hardship resulting from innocent ignorance.'" *Higashi v. United States*, 225 F.3d 1343, 1349 (2000) (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)).[8] Isaac therefore cannot rely on its unawareness of the Miami office's planned closure to argue that the Los Angeles office lacked jurisdiction over drawback claims.

Plaintiff's second factual contention asserts that the Federal Register notice mandated that the Port of Miami would retain drawback jurisdiction during the period in question. Pl.'s Mem. Opp. Def.'s Mot.

[7] Because of this lack of awareness, Isaac argues, it filed its protests with the Port of Miami, thereby leading Plaintiff to allege that the Miami office, not the Los Angeles office, had jurisdiction over its drawback claim. Pl.'s Mem. Opp. Def.'s Mot. Summ. J. 5–6.

[8] *See also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT 1541, 1549 n.10, 285 F. Supp. 2d 1371, 1378 n.10 (2003) ("[T]he publication of an item in the Federal Register constitutes constructive notice of anything within that item") (citations omitted).

Summ. J. 6 ("the Port of Miami was to retain unliquidated drawback entries until November, 2005, or July, 2005"). This argument, however, relies on a flawed reading of the Federal Register notice. The notice explicitly states that the Miami office would retain jurisdiction over all unprocessed drawback claims for a year after its effective closure date of July 23, 2003; after July 23, 2004, the Los Angeles office would assume jurisdiction over all of the Miami office's unprocessed claims. Consolidation of Customs Drawback Centers, 68 Fed. Reg. at 3381–83. Thus, Plaintiff erroneously claims that the Miami office still had authority to assess drawback claims through July or November 2005.[9] It is clear that at all times during the period in question,[10] the Los Angeles office had jurisdiction to assess drawback entries. *See* Consolidation of Customs Drawback Centers, 68 Fed. Reg. at 3381–83.

Plaintiff's third contested factual issue turns on the bulletin notice posted at the Port of Miami. Plaintiff contends that "Miami had the authority to act on these entries which it did on February 5, 2005 by liquidating [them with] no change." Pl.'s Mem. Opp. Def.'s Mot. Summ. J. 3. While February 5, 2005 was the legal date of the liquidation, Plaintiff's argument builds upon a misunderstanding of this posting.[11] Just because a notice of liquidation is posted at a particular port does not mean that the port itself possesses drawback authority. Granted, Isaac filed its claims in Miami when the Miami office was still open, but the claims were properly transferred, along with jurisdiction, to Los Angeles.[12] Therefore, the existence of a Miami bulletin notice posting does not preclude the Los Angeles office's authority to review Plaintiff's drawback claim. *See* 19 C.F.R. § 191.61; Consolidation of Customs Drawback Centers, 68 Fed. Reg. at 3381–83.

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[9] July 2005 represents an incorrect calculation based on the original Federal Register notice, which effectively transferred jurisdiction in July 2004. Consolidation of Customs Drawback Centers, 68 Fed. Reg. at 3381–83; Pl.'s Mot. Opp. Def.'s Mot. Summ. J. 2. The mention of November 2005 can be attributed to the parties' earlier erroneous assertion that the Miami office closed in November 2004. *See infra* note 5 (highlighting the parties' initial confusion over the Miami office's actual closing date).

[10] Plaintiff originally filed the claims with the Miami office in 2002, when that office was still open, but Customs did not make the drawback determination until the period from December 22, 2004 to February 5, 2005, during which it denied Plaintiff's drawback entries, formally notified it of the denial (with extensive documentation of the reasons), and then posted the liquidation results. Bulletin Notice at 14; Drawback Denial Letter at 2; Drawback Entry Forms at 3–14.

[11] The bulletin must be posted at the customhouse at the port of entry of the goods in question. 19 C.F.R. § 159.9(b). As such, Customs was legally required to post the bulletin at the Port of Miami because that is where the goods in question were entered.

[12] 19 C.F.R. § 191.61(a)(2) also enables "[t]he port director selecting the claim for verification [to] forward" the claim "to other drawback offices when deemed necessary.". 19 C.F.R. § 191.61(a)(2). Clearly, the closure of a port's drawback office would qualify as such a necessary situation.

In Plaintiff's fourth basis for its cross motion, it claims that the Miami office should have made the drawback determination because Isaac filed its protests with the Port of Miami on April 29, 2005. Pl.'s Mem. Opp. Def.'s Mot. Summ. J. 2. The legal authority to process the claims, however, lay with the Los Angeles Drawback Center. In addition, the initial denial of Plaintiff's drawback claim, which came from the Los Angeles office, and the June 8, 2005 Customs letter related thereto both clearly indicate that the Los Angeles office had taken over processing Plaintiff's claim.[13] *See* Resolution Request at 11; Drawback Denial Letter at 2. As noted earlier, the Miami Office closed in July, 2003 and transferred all remaining claims to the Los Angeles office by July, 2004. Plaintiff has no basis for claiming that the Miami Office should have made the drawback determination, especially when that office had been closed for two years.

Therefore, there is no genuine issue of material fact in dispute, and the court will consider Defendant's motion for summary judgment. USCIT R. 56(c).

Defendant's motion for summary judgment

Customs properly asserts that this court may not hear Plaintiff's claim because it is untimely filed. 28 U.S.C. § 2636(a) requires that an action contesting the denial of a protest must be filed within one hundred and eighty days after the date of denial. 28 U.S.C. § 2636(a). Customs argues that because Isaac filed its summons on May 24, 2007, long after Customs's November 9, 2005 denial of its April 29, 2005 protests, the court cannot consider Plaintiff's complaint.[14] Def.'s Mot. Summ. J. 11. Plaintiff correctly responds that the protests themselves were timely, having been filed fewer than 180 days after Customs's liquidation. 19 U.S.C. § 1514(c)(3)(A); Pl.'s Mot. Opp. Def.'s Mot. Summ. J. 7–8. However, the timely filing of a protest does not change the fact that Isaac filed its complaint more than a year and a half after Customs's protest denial and well past the 180 day statutory time limit for such a filing. *See* 28 U.S.C. § 2636(a).

Thus, because Isaac filed this action outside of the statutory time limits, the court may not hear this case. *See Computime, Inc. v. United States*, 8 CIT 259, 261, 601 F. Supp. 1029, 1030 (1984)

[13] The record reflects this change of authority. While Isaac's counsel avers that he faxed the protests to the Port of Miami on April 29, 2005, Defendant's copies of the same forms suggest that they were first received by the Los Angeles office. *See* First Protest at 16 (highlighting the fact that Customs has submitted copies of Plaintiff's protests marked as "RECEIVED" by the Los Angeles office).

[14] Customs further argues that Isaac's second set of protests were invalid and that this court has no jurisdiction over the rejection of Isaac's § 1520(c) claim. Because Isaac has not addressed these issues, the court need not consider them.

("[P]laintiff's remedy was to file an action in this court within 180 days of notice of the denials . . . not file another set of protests").

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is granted, and Plaintiff's cross-motion for a stay of the proceedings is denied.

Dated: August 2, 2011
New York, N.Y.

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

Slip Op. 11–94

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

Before: Timothy C. Stanceu, Judge
Court No. 10–00284

[Denying defendant's motion to dismiss two of plaintiffs' four claims in action brought to contest final determination in review of an antidumping duty order on ball bearings and parts thereof]

Dated: August 2, 2011

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

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

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

OPINION AND ORDER

Stanceu, Judge:

Introduction

Plaintiffs SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF Industrie S.p.A., Somecat S.p.A., SKF GmbH, and SKF (U.K.) Limited (collectively "SKF") contest the final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the twentieth administrative reviews of antidumping or-

ders on imports of ball bearings and parts thereof ("subject merchandise") from France, Germany, Italy, Japan, and the United Kingdom for the period May 1, 2008 through April 30, 2009. Compl. ¶¶ 13–35; *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Final Results of Antidumping Duty Admin. Reviews, Final Results of Changed-Circumstances Review, & Revocation of an Order in Part*, 75 Fed. Reg. 53,661 (Sept. 1, 2010) ("*Final Results*"). Of the four claims plaintiffs bring in this action, defendant moves to dismiss two: plaintiffs' challenge to the application of the Department's policy, rule, or practice of issuing liquidation instructions to United States Customs and Border Protection ("Customs" or "CBP") fifteen days after the date on which the Final Results were published ("15-day rule"), and plaintiffs' challenge to the Department's use of the "zeroing"[1] methodology in the reviews. Def.'s Mot. to Dismiss ("Def.'s Mot.").

Defendant advocates dismissal of plaintiffs' 15-day-rule claim under USCIT Rule 12(b)(1) for lack of standing, on the ground that plaintiffs incurred no injury in fact, having obtained an injunction against liquidation that has prevented liquidation of any of the entries at issue in this case. *Id.* at 5–8. Defendant seeks dismissal under USCIT Rule 12(b)(5) of plaintiffs' claim challenging zeroing, arguing that relief on this claim is foreclosed by binding precedent established by the United States Court of Appeals for the Federal Circuit ("Court of Appeals"). *Id.* at 3–5.

The court concludes that plaintiffs have standing to bring their claim challenging the application of the 15-day rule, having alleged concrete injury from an agency action that is capable of repetition yet evading review. On the zeroing claim, the court concludes, based on the holdings in two recent Court of Appeals decisions, that plaintiffs have stated a plausible claim for relief that should not be dismissed for failure to state a claim on which relief can be granted. Therefore, the court denies defendant's motion.

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[1] To calculate a weighted-average dumping margin in an administrative review, the International Trade Administration, United States Department of Commerce ("Commerce") first determines two values for each entry of subject merchandise falling within the period of review: the normal value and the export price ("EP") (or the constructed export price ("CEP") if the EP cannot be determined). Tariff Act of 1930, § 751, 19 U.S.C. § 1675(a)(2)(A)(i) (2006). Commerce then determines a margin for each entry by taking the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). If normal value is less than EP or CEP, Commerce assigns a value of zero, not a negative value, to the entry. Finally, Commerce aggregates these values to calculate a weighted-average dumping margin. *Id.* § 1677(35)(B).

I. Background

Commerce initiated the administrative reviews on June 24, 2009. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 74 Fed. Reg. 30,052 (June 24, 2009). On April 28, 2010, Commerce published its preliminary determination. *Ball Bearings & Parts Thereof From France, Germany, Italy, Japan, & the United Kingdom: Prelim. Results of Antidumping Duty Admin. Reviews, Prelim. Results of Changed-Circumstances Review, Rescission of Antidumping Duty Admin. Reviews in Part, & Intent To Revoke Order In Part*, 75 Fed. Reg. 22,384 (Apr. 28, 2010). On September 1, 2010, Commerce issued the Final Results of the reviews, stating in the Federal Register notice that "[we] intend to issue liquidation instructions to CBP 15 days after publication of these final results of reviews." *Final Results*, 75 Fed. Reg. at 53,663.

On September 15, 2010, fourteen days after Commerce published the Final Results, plaintiffs filed their summons, their complaint, and a consent motion for an injunction against liquidation of entries of their subject merchandise, which motion the court granted on September 21, 2010. Summons; Compl.; Order (Sept. 21, 2010), ECF No. 13. No entries were liquidated. Pls.' Opp'n to Def.'s Mot. to Dismiss 4–5 ("Pls.' Opp'n").

Defendant filed the instant motion to dismiss on November 19, 2010. Def.'s Mot. Plaintiffs filed their response to this motion on January 7, 2011, Pls.' Opp'n, and defendant replied on January 26, 2011, Def.'s Reply in Supp. of Mot. to Dismiss ("Def.'s Reply"). On April 5, 2011, plaintiffs filed a letter directing the court's attention to the decision of the Court of Appeals in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011), which, plaintiffs stated, "pertains to the issues before the Court regarding the government's pending motion to dismiss the zeroing count in SKF's complaint in this action." *Letter from Plaintiffs to the Court* (Apr. 5, 2011), ECF No. 47.

II. Discussion

A. Plaintiffs Have Standing to Bring Their 15-Day-Rule Claim

In ruling on a motion to dismiss, the court, as a general matter, assumes all uncontested factual allegations in the complaint to be true but may look beyond the pleadings to resolve any disputes as to jurisdictional facts. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993). Here, defendant argues that the Department's application of the 15-day rule did not cause plaintiffs any harm that constitutes an "injury in fact" under Article III of the United States Constitution and the Administrative Procedure Act ("APA"). Def.'s Mot. 5. Defendant maintains that SKF "asserts only

hypothetical harm" and that "[as] SKF must concede, no entries were actually liquidated; therefore, Commerce's instructions to Customs did not harm SKF in any way." *Id.* at 5–6.

Under defendant's apparent view of the standing issue this case presents, a plaintiff may challenge the 15-day rule only if it incurs the harm of liquidation of entries of its subject merchandise. The court does not agree. Liquidation, which would moot any claim for relief on the assessment rate applied to those entries, undoubtedly is a form of harm, and a severe one at that. But it does not logically follow that no other form of injury could suffice. A plaintiff's hurried compliance with the need to file a summons, complaint, motion for preliminary injunction (and an application for a temporary restraining order ("TRO") should it appear that consent to a preliminary injunction may not be obtained), all within fifteen days following publication of the final results of an administrative review, is *per se* a compliance burden that a litigant would not experience absent the 15-day rule. That SKF successfully met the burden, and thus avoided the most severe form of harm, does not mean SKF experienced no injury in fact from the 15-day rule. In sum, defendant views the effort of complying with the 15-day rule as a matter of no significance. The court rejects defendant's overly narrow conception of the standing requirement, which, by requiring liquidation of entries before standing could be obtained, as a practical matter would place the 15-day rule beyond judicial review.

Defendant argues, further, that the harm allegedly incurred by SKF is "entirely speculative" and not sufficiently supported by record evidence, objecting that "SKF proffers no evidence that it suffered any harm from filing its summons and complaint when it did." *Id.* at 6. The uncontested facts, as revealed by the pleadings and the docket in this case, require the court to reject this argument. Plaintiffs allege that the 15-day rule unlawfully caused them to incur "unnecessary costs and burdens" in having to file their summons, complaint, and injunction motion "within an arbitrarily truncated 15 day time period." Compl. ¶ 16. They submit that had they failed to obtain the injunction and had Customs liquidated entries of their subject merchandise, they would have lost their right to obtain judicial review of the assessment rate for those entries. *Id*. ¶¶ 15–16. There can be no dispute that plaintiffs filed a summons, complaint, and motion for preliminary injunction against liquidation, all within the fifteen-day period following the publication of the Final Results. The pleadings and docket entries identify expedited actions taken as a consequence of the 15-day rule and belie any finding that the burdens plaintiffs

incurred in satisfying the 15-day rule are merely "speculative." These burdens, therefore, suffice as an injury in fact for purposes of Article III and the APA. *See* 5 U.S.C. § 702 (2006).

Defendant also argues that SKF's claim is "non-justiciable because Commerce never issued any liquidation instructions regarding SKF's entries." Def.'s Mot. 6 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 324 (1936)). This argument, which appears to be defendant's "injury in fact" argument in another guise, misconstrues the true nature of SKF's claim. SKF is not challenging the Department's issuance of liquidation instructions, which could have resulted in the liquidation of entries of SKF's subject merchandise. Instead, SKF is challenging the Department's 15-day rule and, specifically, the application of that rule in implementing the Final Results.

Finally, defendant takes issue with the court's rulings in prior cases that a challenge to the 15-day rule is not moot in circumstances such as those present here.[2] Def.'s Mot. 7. This case is not moot because the established exception for unlawful activity capable of repetition but evading review, *see, e.g.*, *Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995), applies on the facts of this case. *See SKF USA Inc. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1264, 1280–85 (2009); *SKF USA Inc. v. United States*, 33 CIT __, __, 611 F. Supp. 2d 1351, 1363–65 (2009); *SKF USA Inc. v. United States*, 34 CIT __, __, Slip Op. 10–57, at 6–8 (May 17, 2010). SKF's challenge would evade judicial review absent the established exception. The compliance costs a party incurs in challenging the application of the 15-day rule in a single review cannot be redressed after the fact because monetary damages to recover those costs are not available against the United States. The consequences of the 15-day rule for plaintiffs are "capable of repetition" because Commerce continues to apply the rule in each administrative review and because SKF routinely participates in administrative reviews of ball bearing orders. Import Administration, U.S. Department of Commerce, "Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews," (Nov. 9, 2010), *available at* http://ia.ita.doc.gov/download/liquidation-announcement-20101109.html. The court takes judicial notice of the Department's many published decisions demonstrating that SKF, through its various companies,

[2] Defendant characterizes its argument as pertaining to whether plaintiffs have standing, but the exception for actions "capable of repetition yet evading review" applies to mootness. *See* 13C Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 3533.8, at 376 (3d ed. 2008)

routinely participates in administrative reviews and is thus likely to be affected by the Department's continued invoking of the 15-day rule.[3]

Defendant argues that "the capable of repetition yet evading review exception to standing does not apply here because SKF has the ability to obtain injunctive relief to prevent any harm from occurring . . . and, indeed, acted in this case to prevent any harm . . . ." Def.'s Reply 3–4 (citing *Minnesota Humane Society v. Clark*, 184 F.3d 795 (8th Cir. 1999)). This argument relies on defendant's incorrect premise that plaintiffs suffered no injury in fact because entries of their subject merchandise were not liquidated. The 15-day rule causes recurring injury in fact by repeatedly forcing plaintiffs to file the summons, complaint, and motion for a preliminary injunction within fifteen days of publication of the Final Results. This injury in fact cannot be avoided by enjoining liquidation.

Defendant also appears to argue that judicial review is not available because plaintiffs could, in future reviews, seek an injunction or TRO that would prevent Commerce from issuing liquidation instructions fifteen days after publishing final results. Def.'s Mot. 7 ("SKF's challenge would only evade review as a result of SKF's own conduct. That is, SKF has 15 days to obtain an injunction and any failure to do so would be the result of its own inaction."). But such an injunction or TRO would not be followed by judicial review that reaches the merits of a challenge to the 15-day rule. Although SKF possibly could succeed in obtaining a preliminary injunction or TRO that would prevent Commerce from issuing liquidation instructions against SKF for a period of fifteen days or more after publication of final results, the issue of whether the 15-day rule lawfully could be applied would become moot as to the particular review involved once fifteen days had passed, and, therefore, the Court of International Trade would not reach the merits of the claim as applied to that review.

Defendant cites *Minnesota Humane Society v. Clark* in arguing that the exception for unlawful activity capable of repetition yet evading review should not apply, but that case involved different circumstances and is not informative on the issue presented here. *Minnesota Humane Society* held that the challenged action, a state plan to "round up 7,000 geese and kill up to 2,500 of them," did not evade review because plaintiffs potentially could have prevented the state

[3] The antidumping order pertaining to exports from the United Kingdom has been revoked. *Ball Bearings & Parts Thereof From Japan & the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41,761 (July 15, 2011). SKF's merchandise is likely to remain subject to orders pertaining to ball bearings and parts thereof from France, Germany, and Italy.

from carrying out the plan, and thus preserved their right to judicial review, by seeking an injunction pending appeal after the district court denied a motion for a preliminary injunction. *Minnesota Humane Society*, 184 F.3d at 797.

Finally, defendant argues that any decision by the court on the 15-day-rule claim would be an advisory opinion because a declaratory judgment, standing alone, would not prevent the Department's applying the 15-day rule in subsequent reviews. Def.'s Reply 4–5. But, as the court previously has determined in ruling on similar arguments, it may not be assumed that SKF will be entitled only to declaratory relief or that, if declaratory relief is granted, SKF will be unable to obtain any remedy based on that relief. *See SKF USA Inc.*, 34 CIT at __, Slip Op. 10–57, at 7–8.

The court concludes that plaintiffs' 15-day-rule claim satisfies Article III and APA standing requirements and, therefore, that dismissal for lack of jurisdiction is not warranted.

B. Plaintiffs' Zeroing Claim May Not Be Dismissed for Failure to State a Claim on Which Relief Can Be Granted

Plaintiffs allege that "Commerce failed to demonstrate that use of the zeroing methodology is a reasonable interpretation of the statute." Compl. ¶¶ 33–34. Defendant argues that this claim must be dismissed because "[t]he Federal Circuit has repeatedly sustained Commerce's zeroing methodology, and therefore, SKF's claim against Commerce's methodology is foreclosed by well-established and binding precedent." Def.'s Mot. 3. The court does not agree that binding precedent compels the dismissal of plaintiffs' zeroing claim, concluding instead that it is proper for the court to adjudicate this claim on the administrative record.

In deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim on which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in a plaintiff's favor. *See Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). As required by USCIT Rule 8(a)(2), a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." USCIT Rule 8(a)(2). Rule 8(a)(2) requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Although a complaint need not contain detailed factual allegations, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." *Id.* (citations omitted).

Although the Court of Appeals previously had upheld the Department's use of zeroing in administrative reviews, *see, e.g.*, *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011); *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290–91 (Fed. Cir. 2008), in two more recent cases the Court of Appeals has held that the final results of administrative reviews in which zeroing was used must be remanded so that Commerce may explain its interpreting the language of section 771 of the Tariff Act of 1930, 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*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011); *Dongbu*, 635 F.3d at 1371–73. Basing its holdings on the lack of a satisfactory explanation for the differing statutory interpretations, the Court of Appeals in *JTEKT Corp.* and *Dongbu* held that the judgments of the Court of International Trade affirming the use of zeroing in the administrative reviews at issue in those cases must be set aside. 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 concluded 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 "[i]n 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.*, 642 F.3d at 1385.

The court concludes that plaintiffs' allegations "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The Court of Appeals reasoned that the Department's use of zeroing in administrative reviews may be unlawful if it rests on an inconsistent interpretation of 19 U.S.C. § 1677(35) and is not supported by an adequate explanation. *See JTEKT Corp.*, 642 F.3d at 1384; *Dongbu*, 635 F.3d at 1371–73; *NSK Ltd. v. United States*, 35 CIT __, Slip Op. 11–76 (July 5, 2011) (denying motion to dismiss, for failure to state a claim on which relief can be granted, a complaint challenging only the Department's use of the zeroing methodology). The cases prior to *Dongbu* and *JTEKT Corp.* in which the Court of Appeals upheld zeroing did not confront the statutory construction issue that this case presents.

In a reply filed prior to the decisions in *Dongbu* and *JTEKT Corp.*, defendant argued that because the Court of Appeals had already determined it permissible for Commerce to use zeroing in adminis-

trative reviews but not in investigations, any subsequent decisions holding to the contrary would not be binding unless made by the Court of Appeals *en banc*. Def.'s Reply 7 (citing *SKF USA*, 630 F.3d 1365; *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007)). However, the Court of Appeals clarified in *Dongbu* that it was not acting contrary to its prior precedents in setting aside the judgment affirming zeroing and in holding that a remand was required. The Court of Appeals stated in *Dongbu* that it had "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." *Dongbu*, 635 F.3d at 1370. *SKF USA*, decided prior to *Dongbu*, did not reach the issue of whether the Department's using zeroing in administrative reviews but not investigations could be based on a permissible interpretation of 19 U.S.C. § 1677(35). *SKF USA*, 630 F.3d at 1375. Finally, in its opinion in *JTEKT Corp.*, the Court of Appeals considered itself bound by its prior holding in *Dongbu*, stating therein that "*Dongbu* requires us to vacate and remand." *JTEKT Corp.*, 642 F.3d at 1384.

Based on the conclusions its draws from recent decisions of the Court of Appeals on zeroing, the court determines that dismissal of plaintiffs' claim challenging the zeroing methodology would not be appropriate.

III. Conclusion and Order

After considering the arguments of the parties and all submissions herein, and after due deliberation, it is hereby

ORDERED that Defendant's Motion to Dismiss be, and hereby is, DENIED; and it is further

ORDERED that the parties shall confer and present to the court a proposed briefing schedule within seven (7) days from the date of this Opinion and Order.

Dated: August 2, 2011
New York, New York

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

Slip Op. 11–95

DORBEST LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Pogue, Chief Judge
Consol. Court No. 05–00003

[Commerce's remand determination affirmed.]

Dated: August 3, 2011

Mowry & Grimson PLLC (*Kristin H. Mowry*, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Susan E. Lehman*, and *Sarah M. Wyss*) for Plaintiffs Dorbest Limited et al.;

King & Spalding LLP (*Joseph W. Dorn*, *Stephen A. Jones*, *Jeffrey M. Telep*, *J. Michael Taylor*, *Daniel L. Schneiderman*, and *Ashley C. Parrish*) for Defendant-Intervenors American Furniture Manufacturers Committee for Legal Trade, *et al.*;

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*, *Carrie A. Dunsmore*, and *Brian A. Mizoguchi*); *Rachael E. Wenthold*, Senior Attorney, Of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce; and

Trade Pacific PLLC (*Robert G. Gosselink*) on behalf of Defendant-Intervenors Dongguan Lung Dong/Dong He, *et al*.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This matter concerns the selection of "surrogate" countries as a source for data with which to calculate the labor wage rate in an antidumping investigation involving wooden bedroom furniture from China, a non-market economy ("NME"). The case now returns to the court after the Department of Commerce's ("Commerce") redetermination, *Final Results of Redetermination Pursuant to Remand*, (Apr. 27, 2011)("*2011 Redetermination*"), following a partial remand order in *Dorbest Ltd. v. United States*, __ CIT __, 755 F. Supp. 2d 1291 (CIT 2011)("*Dorbest V*").[1]

Plaintiff/Respondent, Dorbest Ltd. ("Dorbest"), seeks review of Commerce's data choices in the 2011 Redetermination. Dorbest claims that Commerce's methodology for selecting the endpoint or "bookend" countries, which form the range of countries available for consideration as a data source, was contrary to established agency precedent and unsupported by substantial evidence, and that Commerce should have used absolute numerical differences in per-capita Gross National Income ("GNI") for the identification of "bookend" countries. *Dorbest Comments on Fifth Remand Redetermination* 2–4, (May 18, 2011)("*Dorbest Comments*"). Dorbest further asserts that Commerce's inclusion of Equatorial Guinea in the initial list of countries available for consideration, and Commerce's determination that

[1] *Dorbest V* was a review of Commerce's prior 2010 remand determination. *Final Results of Redetermination Pursuant to Remand*, (Nov. 10, 2010) ("*2010 Redetermination*"). There is substantial history in this matter. *See Dorbest V*, 755 F. Supp. 2d at 1294–97. Familiarity with that history, and the court's prior opinions, is presumed.

Guinea was a significant producer of the subject merchandise, are unsupported by substantial evidence.[2] *Id.* at 5.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006). After a brief review of the agency's methodology and the applicable standard of review, the court will explain why it concludes that Commerce's methodology for selecting its initial bookend countries, as adopted in the 2011 Redetermination, is reasonable in the context here, and supported by a reasonable reading of the record evidence. The court also concludes that Dorbest has waived its other arguments. Commerce's final redetermination pursuant to remand is therefore affirmed.

BACKGROUND

When determining surrogate labor rates, Commerce is required by statute to use data from countries that are both "economically comparable" to the nonmarket economy at issue, and "significant producers" of comparable merchandise. 19 U.S.C. § 1677b(c)(4); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010)("Dorbest IV").

In its 2010 Redetermination, following the Court of Appeals for the Federal Circuit's ("Federal Circuit" or "CAFC") invalidation of the regulation which previously governed surrogate labor rate calculation, Commerce created a new methodology to calculate surrogate labor rates. *2010 Redetermination* 1–2. Under this new methodology, to select economically comparable countries, Commerce first chose a pair of countries to act as endpoint or "bookend" countries. In making this "bookend" selection, Commerce turned to the surrogate country memorandum from the original 2003 investigation and chose the two

[2] Dorbest also challenges Commerce's 2011 redetermination on the grounds that this court made a factual error in *Dorbest V. Dorbest Comments* 3. Citing the court's use of 2002 per-capita GNI for China as supplied by Petitioners and apparently downloaded during the court's review of the 2010 remand determination – rather than the 2002 data available at the time of the original investigation – Dorbest notes that the data used by Commerce resulted in an upper bookend country that was above China's GNI and that Commerce should therefore not have recalculated the surrogate wage rate using different bookend countries. *Dorbest Comments* 6–7. However, Commerce was correct in reading *Dorbest V* as expressing the court's concern with the overall imbalance in Commerce's data set, an imbalance which remained uncorrected even when using the 2002 data available at the time of the original investigation. *See 2011 Redetermination* 15. The court recognizes that China's per-capita GNI, using data available at the time of the original investigation, was USD 940, rather than the 1100 USD supplied by Petitioners and cited by the court in *Dorbest V*. The court also notes, however, that Dorbest did not object to the Petitioner's data in the proceeding leading to *Dorbest V*. *See* Dorbest Comments on 2010 Remand, Dec. 2, 2010, ECF No. 452, ("*Dorbest 2010 Comments*").

countries listed therein that had the highest and lowest GNI.[3] *Id.* at 12–13. Commerce then identified the countries with GNIs in the range between the GNI of the two bookend countries, including those two bookend countries. *Id.* at 13. These identified countries then became the universe or "basket" of countries available for consideration as a source of surrogate labor wage rate data.[4]

The result in the 2010 Redetermination was a group of countries with GNIs which were largely skewed toward a spectrum below China's GNI. Upon review of that decision, in *Dorbest V*, the court held that Commerce must either reconsider its selection of that significantly unbalanced pair of endpoint or "bookend" countries, or provide a reasonable explanation as to why it selected these countries as its starting point. *Dorbest V*, 755 F. Supp. 2d at 1299.

In its 2011 Redetermination, responding to *Dorbest V*, Commerce has amended its methodology by expanding the range of countries available for initial consideration as the source of surrogate labor rate data. Under this amended methodology, Commerce has selected a pair of "bookend" countries so that the range includes a number of countries with GNIs higher than China's GNI equal to the number of countries with GNIs lower than China's. *2011 Redetermination* at 6.[5]

The next step in Commerce's methodology is to ascertain which countries in this "basket" are also significant producers of wooden bedroom furniture.[6] Commerce has defined "significant producer" as any country which "had exports of comparable merchandise between 2001 and 2003." *Id.* at 8–9. From the resulting 30 countries, Commerce then determines which countries reported the necessary wage rate data. *Id.* at 9. In this case, only 17 countries reported "reliable

[3] Commerce asserted in the 2010 Redetermination that it placed the most emphasis on GNI as an indicator of economic comparability. *2010 Redetermination* 12. It used the surrogate country memorandum as a starting point because it had already been created (albeit not for surrogate labor rate calculation) and contained a list of countries which were deemed economically comparable to China. *See id.*

[4] In the 2010 Redetermination, none of the parties challenged Commerce's initial choice to use a "bookend" methodology for selecting an initial basket of countries; nor did the parties challenge whether the initial basket of countries are truly economically comparable to China. Rather, Petitioners challenged the data that Commerce used in its subsequent selection and calculations. *See Dorbest V*, 755 F. Supp. 2d at1293–94.

[5] The lower bookend country remains the same. *Id.* at 6–7. Commerce has selected the upper bookend such that it obtains a number of countries with GNIs above that of China's equal to the number of countries with GNIs below that of China's. 2011 Redetermination at 6–7. This approach is sometimes called the "country count methodology." *See e.g.*, *id.* The result is a list, or "basket," of 46 countries with GNIs that that fall between the low and high "bookends," Pakistan (GNI 410 USD) and Colombia (GNI 1,830 USD), respectively. *Id.* at 6–7.

[6] The remainder of Commerce's methodology remains unchanged from the 2010 redetermination.

wage data." *Id.* at 9–10. Finally, as before, Commerce further refines its list by applying a filtering step to determine which countries reported industry-specific wage data under ISIC Rev. 2, Sub-Classification 33.[7] *Id.* at 12.

Based on this analysis, Commerce has identified Colombia, India, Indonesia, Pakistan and Macedonia as countries economically comparable to China which are significant producers of wooden bedroom furniture, and from which the preferred wage data is available. Using the data from these five countries, Commerce has calculated an average wage rate of 0.44 USD/hour. Using that average wage rate as a surrogate for the cost of labor in the production of Dorbest's merchandise, Commerce has determined that Dorbest has an antidumping margin of 2.40 percent. *Id.* at 24.

STANDARD OF REVIEW[8]

The court will find Commerce's remand redetermination unlawful if 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). Substantial evidence is that which, given the record as a whole, "'a reasonable mind might accept as adequate to support a conclusion[,]'" when evaluating the agency's findings. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 491 (1951) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

The court notes further that, in presenting its findings, the agency must explain its standards and "rationally connect them to the conclusions drawn from the record." *U.S. Steel Corp. v. U.S.*, Slip Op 10–104, 2010 WL 3564705 at *1 (CIT 2010)(citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The conclusion Commerce reaches need not be the best or only possible conclusion, merely a reasonable one. *See Lifestyle Enterprise, Inc. v. United States*, __ CIT __, 768 F. Supp. 2d 1286, 1305 (2011).

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[7] This aspect of Commerce's methodology was affirmed in *Dorbest V*. *Dorbest V*, 755 F. Supp. 2d at 1303. Here, as in the prior remand results, Commerce properly explains that ISIC Rev. 2 Sub-Classification 33 was more specific to wooden bedroom furniture than ISIC Rev. 3 Sub-Classification 36. *See 2011 Redetermination* at 12; *2010 Redetermination* at 28–29.

[8] No party claims that Commerce's 2011 Redetermination fails to comply with the court's remand order in *Dorbest V*. *See Amanda Foods (Vietnam) Ltd. v. United States*, Slip Op 11–39, 2011WL 1423125 at *3 (CIT Apr. 14, 2011)

DISCUSSION

Commerce's country-count methodology.

Dorbest asserts that Commerce's determination was contrary to its established agency practice in counting upwards from China's per-capita GNI to ensure a more balanced set of bookends from which to select economically comparable countries. *Dorbest Comments* at 10–11. Dorbest further asserts that this method is results-oriented and arbitrary and that using a range based on numerical difference in GNI would have resulted in a more reasonable set of results. Specifically, Dorbest advocates placing Egypt (GNI 1,470 USD) as the upper bookend country. *Id.* at 17. Dorbest claims that because Egypt's GNI is USD 530 above China's and Pakistan's is USD 530 below China, this is a more appropriate way to achieve balanced bookends. *Id.* at 19. Accordingly, Dorbest claims, Commerce's bookend choices are unsupported by substantial evidence in the record.[9] *Id.* at 21.

Where Commerce adopts a practice that substantially deviates from precedent, it must at least acknowledge the change and show that there are good reasons for the new policy.[10] *Pakfood Pub. Co. Ltd. v. United States*, ___ CIT ___, 753 F. Supp. 2d 1334, 1341–42 (2011)(citations omitted). The new practice must also be within the scope of authority granted to Commerce by the relevant statute. *Id.* Commerce may depart from an established practice so long as it does so in the manner required by law. *Id.*

Here, Commerce clearly explains that the methodology employed is "appropriate only in this unique instance." *2011 Redetermination* at 8. Conceding that the set of bookends used in the 2010 redetermination resulted in a basket of countries that was "largely unbalanced," Commerce has applied a methodology explicitly designed to address the problem as identified by the court in *Dorbest V*. *Id.* at 8, 16–17. Commerce further explains that, given the inherent imbalance in the

[9] The court notes that Commerce recently announced a new methodology for calculating surrogate wage rate in proceedings initiated on or after June 21, 2011. *See* Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011). Under the new methodology, Commerce will no longer use multiple countries to calculate surrogate wage rate, and will instead rely on data from the primary surrogate country. *Id.* at 36,093. While Dorbest urges the court to hold that Commerce's current methodology is unlawful when considered in light of Commerce's recent announcement, the court cannot do so because Commerce's change in methodology is not retroactive. *Id.*

[10] "This is not to say that Commerce's prior determinations are legally binding in subsequent administrative proceedings . . . . Nevertheless, Commerce must comply with the basic principle of law that, absent a rational explanation for acting to the contrary, like cases should be decided alike." *Pakfood Pub. Co. Ltd. v. United States*,___ CIT ___, 753 F. Supp. 2d 1334, 1342 n.20 (2011)(citations omitted).

first set of bookend countries and the "uniqueness of the data in this investigation," this methodology constitutes the "best option in this instance." *Id.* at 17 & n.42 (noting other instances where the bookend countries based on surrogate country memoranda resulted in an "initial basket of economically comparable countries [that] was more equitably distributed around [China]").[11]

In response to Dorbest's assertion that Commerce should have used a specific numerical difference in per-capita GNI to calculate the number of countries, with Egypt as the upper bookend, Commerce responds that, in the global context, it finds countries with GNIs as high as Colombia's to be economically comparable to China's and that its decision is consistent with the CAFC's holding in *Dorbest IV*. *2011 Redetermination* 7, 18 (noting that the CAFC held in *Dorbest IV* that countries with GNIs "between one and two times that of China" could be found economically comparable). Furthermore, Commerce has not established a practice of using absolute differences in per-capita GNI to select bookend countries and has in the past rejected a strict adherence to that approach. *See* Def-Int. Br. at 6 (citing *Certain Aluminium Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,524 (Dep't Commerce Apr. 4, 2011), and accompanying Issues & Decision Memorandum at Comment 1E). Finally, Commerce argues that this approach is consistent with its long-standing preference for drawing data from a broader dataset. *2011 Redetermination* 8.

Commerce has provided sufficient reasonable explanation for choosing the country count methodology in this instance. Here, the parties have not objected to Commerce's approach of using some "bookends" to frame its initial selection. Given that the agency is using "bookends" to make such an initial selection, it is not obligated to choose the best methodology, but merely one that is reasonable given the circumstances and supported by a rational connection to the record. *See Natl. Fisheries Inst. v U.S. Bureau of Customs & Border Prot.*, 637 F. Supp. 2d 1270, 1286 (2009). Faced with the task of replacing an unbalanced and invalidated selection based on a surrogate country memorandum compiled for other purposes, Commerce has explicitly chosen a methodology in response to the court's con-

[11] Dorbest incorrectly asserts that the administrative decisions to which Commerce cites do not support Commerce's assertion that the countries in those surrogate country memoranda are more equally distributed than those here. Dorbest Comments at 18. To the contrary, the Issues and Decision Memoranda for the two decisions cited by Commerce both clearly provide GNI data for the upper and lower bookend countries. *See Certain Chlorinated Isocyanurates from the People's Republic of China*, A-570–898, Comment 2 at 9–10, (Nov 10, 2010) (noting 1,040–3,990USD as the GNI range used); *Certain Steel Nails from the People's Republic of China*, A-570–909, Comment 2 at 5, (Mar. 23, 2011) (noting 1,070–3,990 USD as the GNI range used).

cerns. It has also provided a reasonable explanation for its selection in this context, and it has selected bookend countries based on a reasonable reading of the record evidence. The fact that Dorbest can suggest other reasonable methods does not alter this result. *See Lifestyle Enterprise, Inc. v. United States*, __ CIT __, 768 F. Supp. 2d 1286, 1305 (2011).

Commerce's inclusion of Equatorial Guinea in the dataset.

Dorbest next asserts that Commerce erred in including data from Equatorial Guinea because that data was from a different time period than other GNI data. Dorbest Comments 21–22.

The court need not address Dorbest's concerns regarding the inclusion of Equatorial Guinea because Dorbest waived its right to challenge this Commerce finding, which first appeared in the 2010 Redetermination. *Bond Street, Ltd. v. United States*, 2011 WL 1398770 at *9 n.4 (CIT Apr. 12, 2011)

In that 2010 Redetermination, Commerce used the 2002 GNI figures, as reported in the 2004 World Development Report, to generate a list of 24 countries with GNIs between USD 410 and USD 1,020. 2010 Redetermination 12. Equatorial Guinea, with a GNI of USD 700, is on that list. *Request for Comment Regarding Wage Rate Data*, 2010 PR Doc. 1 Attach. 1 (August 11, 2010). In its comments on those remand results, Dorbest raised a general concern with the use of multiple countries to generate a surrogate wage rate, but did not object to, or even address, the inclusion of Equatorial Guinea. *See* Dorbest 2010 Comments ("Dorbest concurs with the result of the U.S. Department of Commerce remand redetermination filed on November 10, 2010"); *Dorbest 2010 Remand Comments on Wage Rate Data* 2, 2010 Remand PR Doc. 4 (Aug. 16, 2010) (arguing in part that wage rates from one country, India, should be used and failing to raise the issue of 2002 Equatorial Guinea data) ("Dorbest 2010 Wage Rate Data Comments"); *Dorbest 2010 Remand Rebuttal to AMFC Raw Data Comments* 8, 2010 Remand PR Doc. 5 (Aug. 18, 2010) (reiterating the argument that only India should be used to provide surrogate wage rate and failing to raise the issue of 2002 Equatorial Guinea data) ("Dorbest 2010 Rebuttal"); *Dorbest 2010 Remand Comments on Draft Remand Redetermination* 3, 2010 Remand PR Doc. 12 (Oct 22, 2010 (stating which arguments are preserved in the event that the margin rises above de minimis) ("Dorbest 2010 Draft Comments"). Dorbest has thus waived this argument.[12]

[12] Because Dorbest also failed in the underlying 2010 administrative proceeding to challenge Commerce's inclusion of Equatorial Guinea, it has also failed to exhaust its administrative remedies on this issue. 28 U.S.C. § 2637(d).

Accordingly, any arguments that Dorbest may have with regards to the inclusion of Equatorial Guinea are not properly raised before the court.

Guinea as a "substantial producer."

Finally, Dorbest correctly argues that Commerce erred in including Guinea because its reported export figure, USD $308 over the course of three years, cannot possibly be sufficient, by itself, to support a determination that Guinea is a significant producer of wooden bedroom furniture. Dorbest Comments 24 (citing *Shandong Rongxin Import & Export Co. v. United States*, Slip Op 11–45, 2011 WL 1542651 at *8, (CIT Apr. 21, 2011)); *Analysis Memorandum for the Redetermination*, 2011 PR Doc. 2, ECF Doc. 475–1, Attach. 3 at 85, (Mar. 14, 2011).

As with its Equatorial Guinea claim, however, Dorbest's arguments with regards to Guinea are waived. Guinea was first identified as a significant producer in the 2010 Redetermination, *see* 2010 Redetermination at 13, and Dorbest failed to timely contest this decision. *See* Dorbest 2010 Comments ("Dorbest concurs with the result of the U.S. Department of Commerce remand redetermination filed on November 10, 2010"); Dorbest 2010 Wage Rate Data Comments 2 (failing to raise the issue of data from Guinea); Dorbest 2010 Rebuttal 8; Dorbest 2010 Draft Comments 3 (stating which arguments are preserved in the event that the margin rises above de minimis). Dorbest has thus waived its argument in this regard.

CONCLUSION

The court finds that Commerce's methodology for calculating surrogate labor rate is **affirmed**.

Judgment will be entered accordingly.

Dated: August 3, 2011
New York, New York

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

Slip Op. 11–96

LIBERTY FROZEN FOODS PVT., LTD., et al., Plaintiffs, – v – UNITED STATES, Defendant, – and – AD HOC SHRIMP TRADE ACTION COMMITTEE, et al.,

Before: Pogue, Chief Judge
Consol.[1] Court No. 10–00231

[1] This action was consolidated with Court No. 10–00237, which has been dismissed. Order,

[Remanding to the Department of Commerce for reconsideration of Plaintiffs' dumping margin calculation in administrative review of antidumping duty order.]

Dated: August 3, 2011

Kutak Rock LLP (*Lizbeth R. Levinson* and *Ronald M. Wisla*) for the Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Particia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Joshua E. Kurland*) for the Defendant.

Picard, Kentz & Rowe, LLP (*Nathaniel J. M. Rickard*, *Andrew W. Kentz*, *Jordan C. Kahn* and *Kevin M. O'Connor*) for Defendant-Intervernor Ad Hoc Shrimp Trade Action Committee.

Stewart and Stewart (*Geert M. De Prest* and *Elizabeth J. Drake*) and *Leake & Andersson, LLP* (*Edward T. Hayes*) for Defendant-Intervenor American Shrimp Processors Association.

OPINION

Pogue, Chief Judge:

INTRODUCTION

In this action, Plaintiffs seek review of the United States Department of Commerce's ("Commerce" or the "Department") Final Results in the fourth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from India.[2] Specifically, Plaintiffs challenge Commerce's inclusion of, and method of calculation for, their bad debt expenses in the cost of sales at issue in this review. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).[3]

As explained in detail below, the court concludes that, although Commerce correctly included the contested bad debt expenses in its determination, Commerce's calculation of Plaintiffs' specific expenses was arbitrary, and thus contrary to law. This issue is therefore remanded to the agency for reconsideration.

Ad Hoc Shrimp Trade Action Committee v. United States, No. 10–00237 (CIT Mar. 1, 2011) (USCIT Rule 41(a)(1)(A)(ii) dismissal).

[2] *See Certain Frozen Warmwater Shrimp from India*, 75 Fed. Reg. 41,813 (Dep't Commerce July 19, 2010) (final results of antidumping duty administrative review, partial rescission of review, and notice of revocation of order in part) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-533–840, ARP 08–09 (July 13, 2010), Admin. R. Pub. Doc. 310 ("*I & D Mem.*") (adopted in *Final Results*, 75 Fed. Reg. at 41,815). Plaintiffs were respondents in the review.

[3] Jurisdiction under 28 U.S.C. § 1581(c) attaches where, as here, an action is brought under Section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (2006) (providing a cause of action for, *inter alia*, challenges to final determinations by Commerce in administrative reviews of antidumping duty orders). All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

BACKGROUND

Commerce calculates dumping margins by comparing export prices to the subject merchandise's normal value in the producer's home or comparison market.[4] Among the calculations used to arrive at the appropriate normal value is the Department's calculation of a mandatory[5] respondent's selling expenses during the period of review ("POR").[6]

Within the POR at issue here[7] – in March, 2008 – one of the companies comprising the Liberty Group, Liberty Frozen Foods, Pvt., Ltd.("LFF"), wrote off the value of a sale for which full payment had

[4] Goods are considered "dumped" when they are sold at less than fair value ("LTFV"), 19 U.S.C. § 1677(34) – that is, when "the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). "Normal value" is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price . . ., at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A) & (B)(i). "Export price" is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C. § 1677a(c)]." *Id.* at § 1677a(a). Constructed export price is not applicable here.

[5] *See* 19 U.S.C. § 1677f-1(c)(2)(B) ("If it is not practicable to make individual weighted average dumping margin determinations [ ] because of the large number of exporters or producers involved in the investigation or review, [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to. . . exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined."). When the Department limits its examination pursuant to 19 U.S.C. § 1677f-1(c)(2), the respondents selected for individual review are referred to as "mandatory respondents." *E.g.*, *Certain Frozen Warmwater Shrimp from India*, 75 Fed. Reg. 12,175, 12,176 (Dep't Commerce Mar. 15, 2010) (preliminary results of antidumping administrative review, partial rescission of review, notice of intent to rescind review in part, and notice of intent to revoke order in part) ("*Prelim.Results*").
The Department selected the Plaintiffs, collapsed into a single entity (the "Liberty Group"), for individual review as a mandatory respondent. *Final Results*, 75 Fed. Reg. at 41,813 & n.2.

[6] *See* 19 U.S.C. § 1677b(a)(6)(C)(iii) (Commerce may make adjustments to normal value to account for differences in the circumstances of sales in the U.S. and foreign markets); 19 C.F.R. § 351.410(b) (selling expenses relevant to determination of differences in circumstances of sales) & (c) (defining "direct selling expenses" as "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question"). *See also* 19 C.F.R. § 412(f)(2) (defining "indirect selling expenses" as "selling expenses, other than direct selling expenses or assumed selling expenses (see § 351.410), that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales").

[7] The POR was February 1, 2008 through January 31, 2009. *Final Results*, 75 Fed. Reg. at 41,814.

not been received (the "write-off").[8] The Liberty Group did not, however, report the value of this bad debt write-off as part of its POR costs. *See* Supplemental Section D Resp. Of [LFF], A-533–840, ARP 08–09 (Oct. 7, 2009), Admin. R. Con. Doc. 28 [Pub. Doc. 219] ("*LFF's Supp. Sec. D Resp.*") Ex. 3.2.6 (identifying the write-off as an exclusion from its reported costs). In explaining this omission, the Liberty Group stated that the write-off was "related to [an] earlier year." *Id.*

The Department then requested from the Liberty Group a detailed explanation regarding this write-off.[9] Responding to this request, the Liberty Group submitted an unsupported statement that the write-off relates to a quality claim from "[a] buyer" of "certain sales" in financial year 2003–2004. 2d Supplemental Section D Resp. of [LFF], A-533–840, ARP 08–09 (Feb. 4, 2010), Admin. R. Con. Doc. 49 [Pub. Doc. 270] 3.[10]

Based on this record, the Department determined it appropriate to treat the write-off as part of LFF's POR costs. *Prelim. Results*, 75 Fed. Reg. at 12,184 (citing Liberty Group Sales Calc. Mem., A-533–840, ARP 08–09 (Mar. 8, 2010), Admin. R. Con. Doc. 59 [Pub. Doc. 288]). The Liberty Group objected, arguing that the write-off should not be included in LFF's POR costs because it relates to sales made prior to the POR. *I & D Mem.* Cmt. 5 at 17. In the alternative, the Liberty Group argued that, because the POR spans over two of LFF's financial years,[11] the write-off should be pro-rated, such that only an amount proportionate to the overlap between the financial year in which it was recorded and the POR is included in the calculation of LFF's POR costs. *Id.* at 18.[12]

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[8] *See* Mem. of Points & Auths. in Supp. of Pls.' 56.2 Mot. for J. on Agency R. ("Pls.' Br.") 3–4.

[9] ITA 2d Supplemental Section D Questionnaire to Liberty Group, A-533–840, ARP 08–09 (Jan. 7, 2010), Admin. R. Con. Doc. 44 [Pub. Doc. 258] ¶ 2(b) ("With regard to [the write-off][,] you state that this expense was excluded because it relates to 'earlier year' (exhibit 3.2.6). Please explain in detail what this expense represents, how it was recorded in the earlier year, and why it should be excluded from the reported costs even though it was recorded on the current financial statements as [a] current period expense. Revise your response if necessary." (quoting *LFF's Supp. Sec. D Resp.*, Admin. R. Con. Doc. 28 [Pub. Doc. 219] Ex. 3.2.6)).

[10] ("The quality claim relates to financial year 2003–04. The buyer concerned did not make part of the payment on certain sales in that year on grounds of certain quality deficiencies. The company did not accept the claim; consequently the amount in dispute remained in receivables account. However after discussions and in order to sustain business relationship it was decided towards end of 2007–08 that the buyer's claim should be accepted. Therefore the amount was written off from receivables during 2007–08.").

[11] *See* [LFF's] Sections B & C Resp., A-533–840, ARP 08–09 (July 7, 2009), Admin. R. Con. Doc. 10 [Pub. Doc. 174] Ex. B-9 ("The POR spans over two financial years: 2007–08 and 2008–09. The sales for 2 months from 1st February 2008 to 31st March 2008 in first financial year and the sales for 10 months from 1st April 2008 to 31st January 2009 in second financial year are combined to arrive at sales for this POR.").

[12] *See also* [Liberty Group's] Comments on Preliminary Results, A-533–840, ARP 08–09

In its *Final Results*, the Department determined to continue to treat the entire write-off as part of LFF's POR costs. *See* 75 Fed. Reg. at 41,815; *I & D Mem.* Cmt. 5. The Liberty Group now challenges Commerce's decision.

STANDARD OF REVIEW

Under its familiar standard of review, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938); *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (same), "taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Thus, 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) (quoting *SSIH Equip. SA v. U.S. ITC*, 718 F.2d 365, 381 (Fed. Cir. 1983)).

A determination, finding, or conclusion is not in accordance with law if, *inter alia*, it is arbitrary. *Pakfood Pub. Co. v. United States*, __ CIT __, 724 F. Supp. 2d 1327, 1334–35 (2010) (citing *SKF USA Inc. v. United States*, 263 F.3d 1369, 1378, 1382 (Fed. Cir. 2001) and *Nat'l Fisheries Inst. v. United States*, __ CIT __, 637 F. Supp. 2d 1270, 1282 (2009)).

(Apr. 21, 2010), Admin. R. Con. Doc. 67 [Pub. Doc. 298] ("*Liberty Group Admin. Case Br.*"). Because the Liberty Group presented no other arguments to the agency with regard to this write-off, *see id.*, the court does not consider Plaintiffs' additional arguments, Pls.' Br. 17–19. *See* 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) ("[A]bsent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies."); *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 675 F. Supp. 2d 1287, 1300 (2009) ("The failure to include an argument in a case brief is a failure to exhaust administrative remedies with respect to that argument because it deprives Commerce of an opportunity to consider the matter, make its ruling, and state the reasons for its action.") (internal quotation and alteration marks and citation omitted).

DISCUSSION

I. Whether Commerce Should Have Excluded LFF's Write-Off From Plaintiff's Dumping Margin Calculation In This Review

Plaintiffs argue that, pursuant to the Department's practice, the cost of the write-off at issue should not have been included within the dumping margin calculation for this POR, because the write-off relates to sales made prior to the POR. Pls.' Br. 11–12. The court disagrees.

First, the prior Commerce determinations that Plaintiffs cite in support of this argument are inapposite – in no case did the Department exclude from its calculations the cost of an ordinary write-off recorded during the POR.[13] Second, in each case, the Department's dumping margin calculation included all ordinary expenses for bad debt written off during the POR.[14]

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[13] *See* Pls.' Br. 11–13 (citing *Stainless Steel Plate in Coils from the Republic of Korea and Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 66 Fed. Reg. 45,279 (Dep't Commerce Aug. 28, 2001) (notice of amendment of final determinations of sales at less than fair value) ("*Plate and Sheet from Korea*"); *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 66 Fed. Reg. 18,747 (Dep't Commerce Apr. 11, 2001) (final results of antidumping administrative review) ("*Pipe from Korea*"); *Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 64 Fed. Reg. 30,664 (Dep't Commerce June 8, 1999) (notice of final determination of sales at less than fair value) ("*Sheet from Korea*"); and *Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom*, 61 Fed. Reg. 51,411, 51,417 (Dep't Commerce Oct. 2, 1996) (notice of final determination of sales at less than fair value) ("*Stock from U.K.*")).

[14] *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, Issues & Decision Mem., A-589–809, ARP 98–99 (Apr. 5, 2001) (adopted in *Pipe from Korea*, 66 Fed. Reg. 18,747) ("*Pipe from Korea I & D Mem.*") Cmt. 10 (including bad debt expenses recorded during the relevant POR within the dumping margin calculation for that POR); *Sheet from Korea*, 64 Fed. Reg. at 30,674 (same); *Stock from U.K.*, 61 Fed. Reg. at 51,417 (same); *see also Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, Issues & Decision Mem., A-589–809, ARP 07–08 (June 14,2010) (adopted in 75 Fed. Reg. 34,980, 34,981 (Dep't Commerce June 21, 2010) (final results of antidumping duty administrative review) ("*Pipe from Korea II*") (relied on in Pls.' Br. 9 & 15)) ("*Pipe from Korea II I & D Mem.*") Cmt. 4 at 21 (same).

See also Plate and Sheet from Korea, 66 Fed. Reg. at 45,280 (amending certain prior determinations to exclude bad debt expenses in response to a World Trade Organization panel's ruling that "the extraordinary bad debt expenses in these cases could not reasonably have been anticipated"); *compare with Liberty Group Admin. Case Br.*, Admin. R. Con. Doc. 67 [Pub. Doc. 298] 3 (explaining that the write-off at issue was recorded in accordance with LFF's "normal accounting practices" for dealing with non-received payment, and noting that LFF has written-off similar bad debt "in a few cases").

See also Stephen M. Bragg, *GAAP 2011: Interpretation and Application of Generally Accepted Accounting Principles* 193 (2010) ("The recording of a valuation allowance for anticipated uncollectible amounts is almost always necessary. The *direct write-off method*, in which a receivable is charged off only when it is clear that it cannot be collected, is unsatisfactory since it overstates assets and also results in a mismatching of revenues and

Plaintiffs emphasize that, in two prior situations, the Department included the cost of certain write-offs within the margin calculation as direct, rather than indirect, selling expenses.[15] But Plaintiffs do not argue that their write-off should have been included in the margin calculation as a direct selling expense.[16] Instead, Plaintiffs contend that, notwithstanding the fact that the bad debt was a foreseeable expense written off during the POR,[17] the Department should have entirely disregarded this expense when calculating LFF's dumping margin. Pls.' Br. 7–8, 14.

Plaintiffs, however, have cited no statutory or regulatory provision, nor any agency practice – and the court is not aware of any – to support their contention that Commerce is required to exclude from its calculations ordinary costs recorded during the POR if they relate to pre-POR sales. To the contrary, the Department's prior practice has been that "expenses booked inside the [POR], but incurred before the [POR], are included in selling expenses if they are recurring expenses, as opposed to an extraordinary charge." *Saccharin from the People's Republic of China*, Issues & Decision Mem., A-570–878, Investigation (May 20, 2003) (adopted in 68 Fed. Reg. 27,530 (Dep't Commerce May 20, 2003) (final determination of sales at less than fair value)) ("*Saccharin from PRC I & D Mem.*") Cmt. 10 at 20.[18]

expenses."); *id*. at 396 ("The standard accounting treatment for uncollectible accounts is to accrue a bad debt loss in the year of sale by estimating the amount expected to be uncollectible.").

[15] Pls.'s Br. 11–12 (citing *Sheet from Korea*, 64 Fed. Reg. 30,664; *Stock from U.K.*, 61 Fed. Reg. 51,411).

[16] *See Liberty Group Admin. Case Br.*, Admin. R. Con. Doc. 67 [Pub. Doc. 298] 4 ("[The write-off] should not be included . . .in any calculation in this POR."); Pls.' Br. 7–8 ("The bad debt expense . . . should not have been attributed to this POR.") & 14 ("[T]he bad debt [expense] . . . should be excluded [from the dumping margin calculation] as a pre-POR direct expense."). Moreover, the Liberty Group "acknowledges that the write-off at issue could not be treated as a direct offset to any POR sales because it related to a sale made in [a] prior period." *I & D Mem.* Cmt. 5 at 18; *see also* Request for Information, A-533–840, ARP 08–09 (May 14, 2009), Admin. R. Pub. Doc. 145, App. I (Glossary of Terms) at I-6 (explaining that "direct expenses" are those that are traceable "to sales of the merchandise under review").

[17] *Compare with Plate and Sheet from Korea*, 66 Fed. Reg. at 45,280 (excluding bad debt write-offs from dumping margin calculation where the write-offs were not foreseeable); *Stainless Steel Sheet and Strip from the Republic of Korea*, Issues & Decision Mem., A-580–834, ARP 99–00 (Dec. 6, 2001) (adopted in 66 Fed. Reg. 64,950 (Dep't Commerce Dec. 17, 2001) (final results and partial rescission of antidumping duty administrative review)) Cmt. 2 (excluding bad debt write-off from dumping margin calculation where the write-off was recorded during the investigation underlying the antidumping duty order, prior to the POR in question).

[18] *See also I & D Mem.* Cmt. 5 at 20 ("[I]t is the Department's practice to include . . . a write-off of [bad] debt in [the dumping margin] calculations during the period in which the write-off was recorded in the company's accounting system." (citing *Saccharin from PRC I & D Mem.* Cmt. 10)); Def.'s Resp. to Pls.' Rule 56.2 Mot. for J. Upon Agency R. 9–10 ("[A]s

In this case, the Department concluded "that LFF's bad debt expense, which LFF identifies as part of its 'normal accounting practices' and similar to 'discounts [given] in a few other cases,' are not extraordinary expenses which the Department would disregard from its margin calculations." *I & D Mem.* Cmt. 5 at 21 (quoting *Liberty Group Admin. Case Br.*, Admin. R. Con. Doc. 67 [Pub. Doc. 298] 3). On the record of this case, this conclusion is not unreasonable.

Accordingly, because the Department's methodology applied to the bad debt write-off at issue was neither contrary to statute nor to the agency's regulations or prior practice; and because a reasonable reading of the record supports the Department's conclusions in applying its methodology to the facts of this case, the court upholds Commerce's decision not to exclude LFF's March 2008 write-off when calculating Plaintiffs' dumping margin for this POR.

As explained below, however, the court cannot uphold, in the absence of further explanation, Commerce's decision not to prorate the value of the write-off, so as to include in its calculations solely the amount proportionate to the overlap between the POR and the fiscal year in which the write-off was recorded. As explained below, under the circumstances of this case, and in light of the Department's prior

Commerce explained in the final results, the agency's practice is to include bad debt written-off during the period of review in its calculation of a respondent's dumping margin even if the bad debt relates to a sale that occurred before the review period." (citing *I & D Mem.* Cmt. 5 at 20; *Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, Issues & Decision Mem., A-580–825, ARP 03–04 (Mar. 6, 2007) (adopted in 72 Fed. Reg. 9,924 (Dep't Commerce Mar. 6, 2007) (final results of antidumping administrative review)) Cmt. 2 at 8 ("[I]t is the Department's normal practice to include bad debts written off during the POR in the indirect selling expense calculation because they are usually related to sales pertaining to all markets. Therefore, the Department finds it is appropriate to include [a respondent's] bad debt expenses as part of [its] selling expenses for the final results." (citing *Stainless Steel Bar from India*, Issues & Decision Mem., A-533–810, ARP 01–02 (Aug. 4, 2003) (adopted in 68 Fed. Reg. 47,543 (Dep't Commerce Aug. 11, 2003) (final results of antidumping administrative review)) Cmt. 7 & *Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, Issues & Decision Mem., A-580–834, ARP 00–01 (Feb. 2003) (adopted in 68 Fed. Reg. 6,713 (Dep't Commerce Feb. 10, 2003) (final results and partial rescission of antidumping duty administrative review)) Cmt. 7)) & *Glycine from India*, Issues & Decision Mem., A-533–845, Investigation (Mar. 28, 2008) (adopted in 73 Fed. Reg. 16,640 (Dep't Commerce Mar. 28, 2008) (notice of final determination of sales at less than fair value)) Cmt. 2 at 3 ("The Department normally classifies bad-debt expense as indirect selling expenses because those expenses relate to the sales of a company. . . . [Because] [the respondent] employed the direct write-off method for its doubtful accounts (i.e., it recognizes bad-debt expenses only when accounts are deemed uncollectible)[,] . . . [the Department is] including [the bad debt expenses] in the calculation of the rate for indirect selling expenses." (citing *Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60,630 (Dep't Commerce Oct. 25, 2007) (notice of final determination of sales at less than fair value)))).

practice under similar circumstances, the decision not to pro-rate the write-off is, in the absence of additional explanation, arbitrary and therefore contrary to law.

II. Whether LFF's Write-Off Should Have Been Pro-rated

Plaintiffs argue that, if included within LFF's selling expenses for this POR, the write-off at issue should have been pro-rated, on a monthly basis over the course of the fiscal year in which it was recorded, such that only the months in which LFF's fiscal year overlapped with the POR should have been considered in the dumping calculation for this POR. Pls.' Br. 14–18.

In response, the Department relies on *Saccharin from PRC* and contends that, "[a]bsent a provision for bad debt expense recorded by the company, it is the Department's practice to include the full amount of a write-off of such debt in [its] calculations during the period in which the write-off was recorded in the company's accounting system." *I & D Mem.* Cmt. 5 at 20 (citing *Saccharin from PRC I & D Mem.* Cmt. 10[19]) (footnote omitted). The court finds this explanation to be incomplete, and therefore concludes it to be insufficient.

The problem with the Department's line of reasoning here is that *Saccharin from PRC* – the sole example of agency practice that Commerce relies upon with regard to this issue – appears to have applied precisely the methodology that Plaintiffs asked the agency to apply in this case. In *Saccharin from PRC*, a respondent's fiscal year overlapped with the relevant POR by the fiscal year's first six months. Although the company recorded a certain bad debt write-off at the end of its fiscal year – outside of the POR – the Department determined that "this choice was made solely as a matter of completing the books for the year," *Saccharin from PRC I & D Mem.* Cmt. 10 at 20 n.5, and therefore "divide[d] these expenses by two and attribute[d] half to the [relevant POR] (the first half of the calendar year)." *Id.*

Thus it appears that the Department would like to have it both ways: If the bad debt expense is recorded at the end of a company's fiscal year, and that month falls within the POR, the Department includes the full amount of the expense as falling within the POR, regardless of overlap between fiscal year and POR. *See I & D Mem.* Cmt. 5 at 21. But if the bad debt expense is recorded at the end of a company's fiscal year, and that month falls outside the POR, the

[19] The Department's characterization of *Saccharin from PRC* notwithstanding, the court could find no evidence that "a provision for bad debt expense recorded by the company" played any dispositive role in *Saccharin from PRC*.

Department does not consider the full amount of the expense to fall outside the POR, but rather prorates it, and includes an amount proportional to the overlap between fiscal year and POR. *See Saccharin from PRC I & D Mem.* Cmt. 10 at 20 n.5.[20] Without more explanation from the agency, this is an unreasonable inconsistency in the Department's methodology.

Accordingly, because an unexplained inconsistency in the application of a methodology is unlawful agency action, *see SKF*, 263 F.3d at 1382; *Pakfood*, __ CIT at __, 724 F. Supp. 2d at 1334,[21] this case is remanded to the Department for reconsideration of its decision to not pro-rate LFF's March 2008 bad debt write-off so as to include solely such portion thereof as is properly attributable to the POR. On remand, the Department shall specifically explain why its failure to pro-rate this write-off is not arbitrary in light of its determination under apparently like factual circumstances in *Saccharin from PRC*, 68 Fed. Reg. 27,530; *Saccharin from PRC I & D Mem.* Cmt. 10 at 20 n.5, and *Pipe from Korea II*, 75 Fed. Reg. 34,980; *Pipe from Korea II I & D Mem.* Cmt. 4 at 21–22, or otherwise reconsider its decision.

CONCLUSION

For all of the foregoing reasons, the Department's *Final Results*, 75 Fed. Reg. 41,813, are remanded to the agency, for reconsideration and further explanation or amendment, in accordance with this opinion. Specifically, the Department shall reconsider, and further explain or amend, its decision to consider the full amount of LFF's March 2008 bad debt write-off when calculating Plaintiffs' dumping margin in this review.

Commerce shall have until October 3, 2011 to complete and file its remand redetermination. Plaintiffs shall have until November 2, 2011 to file comments. Defendant and Defendant-Intervenors shall have until November 17, 2011 to file any reply.

It is **SO ORDERED**.

Dated: August 3, 2011
New York, N.Y.

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

[20] *See also Pipe from Korea II I & D Mem.* Cmt. 4 at 21–22 (same).

[21] *See also Martin v. Franklin Capital Corp.*, 546 U.S. 132,139 (2005) ("[L]imiting [agency] discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.").

Slip Op. 11–97

TRUST CHEM COMPANY LIMITED, Plaintiff, v. UNITED STATES, Defendant, – and – NATION FORD CHEMICAL COMPANY and SUN CHEMICAL CORPORATION, Defendant-Intervenors.

Before: Pogue, Chief Judge
Court No. 10–00214

[Plaintiff's motion for judgment on the agency record granted in part; Commerce's determination remanded.]

Dated: August 3, 2011

Kutak Rock LLP (*Ronald M. Wisla* and *Lizbeth R. Levinson*) for Plaintiff Trust Chem.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; (*Patryk J. Drescher*), Attorney; (*Alexander V. Sverdlov*), Attorney, and, of Counsel, *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant United States.

Pepper Hamilton LLP (*Gregory C. Dorris*), for Defendant-Intervenors Nation Ford Chemical and Sun Chemical Corp.

OPINION

Pogue, Chief Judge:

INTRODUCTION

In this action, Plaintiff Trust Chem Co., Ltd. ("Trust Chem" or "Plaintiff") seeks review of the final results of the U.S. Department of Commerce's ("Commerce" or "the Department") fourth administrative review of the antidumping order covering Carbazole Violet Pigment 23 ("CVP-23") from the People's Republic of China.[1]

Specifically, Plaintiff claims that Commerce's choice of data to value the nitric acid used to produce the Plaintiff's merchandise is less specific than data Plaintiff submitted, and that Commerce's chosen data is aberrational or unrepresentative of the nitric acid used in producing Plaintiff's goods.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).

As explained below, the court concludes that Commerce's determination that its data is not aberrational requires reconsideration.

[1] *See Carbazole Violet Pigment 23 from the People's Republic of China*, 75 Fed. Reg. 36,630 (Dep't Commerce June 28, 2010) (final results of antidumping duty administrative review) ("*Final Results*") and accompanying *Issues & Decision Memorandum*, A-570–892, ARP 07–08 (June 21, 2010), Admin. R. Pub. Doc. 63 ("*I & D Mem.*"). The period of review ("POR") was December 1, 2007 to November 30, 2008. Commerce conducts administrative reviews of antidumping duty orders pursuant to Section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (2006). Further citation to the Tariff Act of 1930, as amended, is to Title 19 of the U.S. Code, 2006 edition.

BACKGROUND

This case arises out of Commerce's 2004 antidumping order on CVP-23 [2] from China. *Carbazole Violet Pigment 23 from the People's Republic of China*, 69 Fed. Reg. 77,987 (Dep't of Commerce Dec. 29, 2004) (antidumping duty order). Commerce considers China to be a nonmarket economy ("NME").[3]

In administrative proceedings involving goods from an NME, Commerce may approximate the normal value of the goods based on a "surrogate" for the value of their "factors of production" ("FOP"). 19 U.S.C. § 1677b(c); [4] *see also* 19 C.F.R. § 351.408. The statute provides, however, "that surrogate data used to calculate the value of factors of production . . . must, to the extent possible, come from market economy countries with 'a level of economic development comparable to that of the non-market economy country.[']" *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010) (quoting 19 U.S.C. § 1677b(c)(4)(A)).[5]

Within these statutory limitations, Commerce selects a specific surrogate value in each individual administrative proceeding, by choosing the "best available information," 19 U.S.C. § 1677b(c),[6] which is selected using criteria established by regulation and practice, generally referred to as "Commerce's methodology." Such surrogate values are at issue here.

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[2] CVP-23 is "identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of *diindolo [3,2–b:3',2'-m]triphenodioxazine, 8,18–dichloro–5, 15–diethy–5,15–dihydro-*, and molecular formula of $C_{34}H_{22}C_{12}N_4O_2$.[3] The subject merchandise includes the crude pigment in any form (*e.g.*, dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.*, pigments dispersed in oleoresins, flammable solvents, water) are not included within the scope of the investigation." *Carbazole Violet Pigment 23 from the People's Republic of China* 69 Fed. Reg. 67,304, 67,304 (Dep't Commerce Nov. 17, 2004) (notice of final determination of sales at less than fair value).

[3] More specifically, because the goods at issue come from China, Commerce employed its rules and practices for NMEs in these proceedings. *Carbazole Violet Pigment 23 from the People's Republic of China*, 74 Fed. Reg. 68,780, 68,781 (Dep't Commerce Dec. 29, 2009) (preliminary results of antidumping duty administrative review) ("*Prelim. Results*").

[4] FOPs include but are not limited to: hours of labor, quantities of raw materials, energy and other utilities and capital cost. 19 U.S.C. § 1677b(c)(3).

[5] Commerce selects surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1),(4). Here, Commerce selected India as the surrogate country. No party challenges this choice.

[6] *See also Zhejiang Dunan Hetian Metal Co. v. United States*, __ CIT __, 707 F. Supp. 2d 1355, 1360 (2010) ("The term 'best available' is one of comparison, *i.e.*, the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. The term 'best' means 'excelling all others.' This 'best' choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data.") (citations omitted).

Specifically, during the fourth administrative review of Commerce's antidumping order on CVP-23 from China, Trust Chem suggested that Commerce use a surrogate value for nitric acid, as published in the Indian periodical *Chemical Weekly*,[7] of 9.00 Rupees per kilogram ("INR/Kg."), or $215.31 per metric ton ("USD/MT"). *Pl.'s Prelim. Surrogate Value Sub for Prelim. Determination* 4 & Attach. 2, at 22–25 (Sept. 8, 2009) Admin. R. Pub. Doc. 22.[8] Defendant-Intervenors Nation Ford Chemical Company and Sun Chemical Corporation (collectively "Petitioners") proposed a surrogate value based on nitric acid data from the Indian Department of Commerce's Export Import Data Bank of 35.08 INR/Kg., or $839.44 USD/MT. *Pet'rs' Surrogate Value Data* Ex. 21 (Sept. 8, 2009) (PR 21).

In the preliminary results, Commerce rejected these surrogate values. Instead, it utilized data from the Indian Department of Commerce's Export Import Data Bank, compiled in the World Trade Atlas ("WTA data"),[9] for HTSUS 2808.00.10, with a POR value of $10,474.46 USD/MT. *Prelim. Surrogate Value Mem.* 5–6 (Dec. 22, 2009) (PR 34) ("*Prelim. Surrogate Value Mem.*"); *Prelim. Results*, 74 Fed. Reg. at 68,783; *see also Prelim. Results* at 68,782 ("In accordance with [19 U.S.C. § 1677b(a)(1)(C)] we calculated [normal value ("NV")] based on [FOPs] reported by Trust Chem for the POR. To calculate NV, we multiplied the reported per-unit factor consumption rates by publicly-available Indian surrogate values."). On the basis of that data, Commerce preliminarily assigned a dumping margin[10] of 29.57 percent to Trust Chem. *Prelim. Results* 74 Fed. Reg. at 68,785.

In the *Final Results*, again relying on WTA data, Commerce assigned Trust Chem a margin of 30.72 percent. *Final Results*, 75 Fed. Reg. at 36,632.

Trust Chem now challenges this decision, arguing that: (A) the data it proposed is more specific[11] to, and hence more representative of, the

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[7] The *Chemical Weekly* data includes weekly Indian prices for certain nitric acid sold in the Mumbai and Bangalore chemical markets during the POR. Mem. in Supp. of Pl.'s 56.2 Mot. for J. on the Agency R. 3 ("Pl.'s Br.").

[8] All references to the Admin. R. Pub. Doc. are hereinafter referred to as ("PR").

[9] WTA data is a secondary electronic source published by Global Trade Information Services, Inc., which reports the *Monthly Statistics of Foreign Trade of India. Volume II: Imports*, which in turn is published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India. *Prelim. Surrogate Value Mem.* 2–3 (referring to *http://www.gtis.com/wta.htm.*); *see also* Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 3 n.2 ("Def.'s Br.").

[10] Commerce calculates dumping margins by comparing export price or constructed export price to the subject merchandise's normal value in the producer's home or comparison market. *See* 19 U.S.C. § 1677(35)(A).

[11] Something that is specific is something "[s]et forth explicitly[.]" *Webster's II Dictionary* 1116 (2d ed. 1988).

nitric acid used in producing the subject CVP-23, and (B) the WTA data is aberrational or unrepresentative.

After summarizing the applicable standard of review, the court will address each of Trust Chem's arguments in turn.

STANDARD OF REVIEW

When reviewing the final results of an antidumping proceeding, the court assesses whether Commerce's decision is supported by substantial evidence on the record and in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is "more than a mere scintilla. . . .[and is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[,]" *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938),[12] "taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *see also Universal Camera*, 340 U.S. at 487. Thus, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency's action is reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

"Normally, an agency rule would be arbitrary and capricious [and therefore unreasonable] if the agency has relied on factors which Congress has not intended it to consider . . . [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) (Commerce "has an "obligation' to address important factors raised by comments from petitioners and respondents.").

DISCUSSION

A. Specificity of the Surrogate Value[13]

First, Plaintiff claims that Commerce's price determination is not supported by substantial evidence in the record because Commerce chose the "less specific" WTA data, which has "undetermined purity[.]" Pl.'s Br. 13.

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[12] *See also Universal Camera Corp. v. NLRB*, 340 U.S. 474,477 (1951); *Jinan Yipin Corp., v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009).

[13] Commerce concedes that the Department generally will rely upon *Chemical Weekly* data, as opposed to WTA data when: (1) a respondent reports the concentration level of its chemical input, (2) the WTA HTS category does not directly match that input (*i.e.*, the HTS category is not specific to the product itself), and (3) the concentration level is known for the prices reported for that chemical in *Chemical Weekly*. *I & D Mem.* Cmt. 3 at 8–9. Commerce also concedes that, because the first and third conditions are met, only the second condition is at issue here. Id. at 16.

Plaintiff argues that the *Chemical Weekly* data is more specific to its nitric acid, because the *Chemical Weekly* data is for nitric acid with a purity level of 60 percent, a level that is known and thus more product-specific than the unknown purity level of the WTA data. *Id.* at 9–10. Plaintiff adds that this value could have been "adjusted upward to at least partially account for the full costs of the higher purity level processing[.]" *Id.* at 28.

Commerce noted, however, that although the purity or concentration of the nitric acid included in the WTA data was unknown, the *Chemical Weekly* prices were for 60 percent or "weak" strength nitric acid, as opposed to the "high" strength 98 percent nitric acid used in the production of Trust Chem's merchandise. Because a simple conversion based on concentrations would not provide an accurate value, Commerce found that the *Chemical Weekly* prices were not the best available information, but rather the WTA data was the best option. *I & D Mem.* Cmt. 4 at 16.[14] Thus, Commerce argues that the WTA data is the appropriate choice, as it is "more specific" than the *Chemical Weekly* data. Def.'s Br. 5, 8–10.[15] Commerce suggests that Plaintiff bases its specificity argument on "speculation."

To the court, neither party can establish the precise relationship of its data to the 98 percent nitric acid used in the production of Plaintiff's merchandise. In fact, neither value is more "specific" than the other.

Nevertheless, as long as Commerce reasonably explains its choice between two appropriate but imperfect alternatives, the court will not reject the agency's determination, even if the court would have made a different one. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1676, 462 F. Supp. 2d 1262, 1269 (2006); *Goldlink Indus. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (The court

[14] Petitioners submitted comments regarding the content and use of nitric acid, elucidating the fact that weak and strong acids are quite different in their costs, value and usage. *Pet'rs' Cmts. on New Factual Information Placed on the Record by the Department*, 1–2 (May 17, 2010) (PR 57) ("*Pet'rs' Cmts.*"). As discussed in the record, higher production costs are due to the need for "sophisticated chemical process technology and high fixed cost equipment" to get the necessary purity. *Id.* at 1–2. The higher transport and storage costs are due to the need to use "high purity aluminum railcars and other specialized aluminum or glass containers." *Id.* at 2; Resp. Br. of Def.-Intervenors in Opp. to Pl.'s Mot. for J. on the Agency R. 4 n.2 ("Def.-Int. Br.").

[15] Commerce also states that "all other factors being equal, the Department's preference is to utilize the WTA data over the *Chemical Weekly* data, because the WTA data represent broader market averages." *I & D Mem.* Cmt. 3 at 10; Def.'s Br. 9; *see also Peer Bearing Co.-Changshan v. United States*, __ CIT __, 752 F. Supp. 2d 1353, 1372 (2011); *China Processed Food Import & Export Co. v. United States*, 614 F. Supp. 2d 1337, 1344–46 (2009).

evaluates "whether a reasonable mind could conclude that Commerce chose the best available information.").[16]

B. Aberrational Price

Plaintiff also argues that Commerce's surrogate value choice, based on WTA data, was "aberrational and distortive." Pl.'s Br. 11. As it did before the agency, Trust Chem asserts four considerations in support of this claim: (1) the extreme numerical differences between the WTA and Chemical Weekly data; (2) the low volume of nitric acid included in the WTA data; (3) the relationship between U.S. import data and the Chemical Weekly data; and (4) Commerce's decision in the original investigation and first administrative review of this order that other WTA data was aberrational. The court will consider each of these in turn.

1. Numerical Differences: First, Trust Chem avers that the fact that one surrogate value was "50 times greater" than the other should have signaled that the values needed more "careful scrutiny[.]" *Id.* at 8. Thus, Plaintiff argues that Commerce should have used Plaintiff's preferred surrogate value calculation, the *Chemical Weekly* data of $215.31, instead of the aberrational WTA data. *Id.* at 13. Plaintiff also contends that it was "absurd" to give nitric acid, "a basic industrial chemical . . . a surrogate value that is higher than such rare and expensive material inputs of carbazole violet pigment 23 such as chloranil, nekal and benzene sulfonyl chloride." *Id.* at 18.[17]

Commerce notes that, under its current methodology, "higher prices alone [do] not necessarily indicate that the price data are distorted or misrepresentative, and thus [are] not sufficient to exclude a particular surrogate value." *I & D Mem.* Cmt. 4 at 14; *see also Tapered Roller Bearings from the People's Republic of China*, Issues & Decision Memorandum, A-570–601, ARP 07–08 (Dec. 28, 2009) [(adopted in 75 Fed. Reg. 844) (Dep't Commerce Jan. 6, 2010) (final results of the

[16] *See Globe Metallurgical Inc. v. United States*, Slip Op. 11–72, WL 2456542, *7–8. (June 21, 2011) (Where Commerce used an "empirical formula" of matching "technical specifications" of inputs with the surrogate data source. Commerce used the Indian classification system for coal as opposed to the different Chinese classification system because the Indian system was sufficiently detailed, and because Globe's argument "reli[ed] exclusively on a vague definition of coking coal that lack[ed] the empirical rigor of Commerce's approach."). The specificity issue at present is distinguished in that there is one known purity level percentage and one unknown. However, the fact remains that Plaintiff, like Globe, "does not provide a basis for the court to conclude that Commerce's determination is unreasonable."

[17] Plaintiff cites to a chart showing the materials mentioned as well as their source prices and POR surrogate values, but does not provide other information to confirm the relative expense and rarity of the materials. *Surrogate Values for the Final Results* Ex. 2 (June 21, 2010) (PR 61).

2007–2008 administrative review of the antidumping duty order)] 18 ("*TRBs from the PRC*").

Commerce contends that under its practice, Trust Chem needed to provide "specific evidence" to show that the surrogate value was aberrational, but it failed to do so. *I & D Mem.* Cmt. 4 at 14. According to Commerce, a difference between WTA data and *Chemical Weekly* prices is insufficient proof that the WTA data is aberrational. Def.'s Br. 16; *I & D Mem.* Cmt. 4 at 14–16. Moreover, Commerce asserts that because Trust Chem did not provide data regarding the average unit values ("AUVs") for nitric acid for the other potential surrogate countries, Commerce did not have data to compare with the Indian WTA AUVs to determine if they were aberrational. *I & D Mem.* Cmt. 4 at 14–15[18]

The court will not disturb this aspect of Commerce's determination. While Plaintiff correctly notes the large discrepancy in price, the court agrees with Commerce that Plaintiff did not place sufficient comparative data on the record, such as data from other identified potential surrogate countries, to support its challenge based on numerical differences alone. Thus Commerce's decision not to place weight on the numerical differences between the WTA data and the *Chemical Weekly* data was not unreasonable.

2. Import Volume: Second, Plaintiff argues that the WTA import volume, upon which the average unit value was based – only 26.2 metric tons of nitric acid during the POR – was "infinitesimally small," rendering the data aberrational. Pl.'s Br. 8–9.[19] Plaintiff argues that the POR import volume of 26.2 metric tons cannot be considered representative "[o]n its face[.]" *Id.* at 24.

Commerce counters that "small quantities of imports . . . are not inherently" distortive. *I & D Mem.* Cmt. 4 at 15; *see also Less-Than-Fair Value Investigation of Certain Lined Paper Products from the People's Republic of China*, Issues & Decision Memorandum,

[18] To corroborate the WTA data, Commerce contends that it considered Petitioners' Global Trade Atlas data from the same HTS category for the same surrogate country over a span of several years (2004–2008). The data showed a total AUV of $10,700 USD/MT for the five years.

Plaintiff points to the range of AUVs, from a low of $8,690 USD/MT to a high of $17,780 USD/MT, to demonstrate that such a variance is much less steady than the *Chemical Weekly* data, which shows much less disparity between surrogate values over the years. Pl.'s Br. 16–17; Pl.'s Reply 10; *see also Pet'rs' Cmts.* Ex. 3.

Defendant-Intervenors note that Plaintiff failed to demonstrate that the price was aberrational, and that the year-to-year fluctuations of Indian import values for nitric acid could in fact also be in line with "normal market forces." Def.-Int. Br. 6.

[19] Plaintiff states that 26.6 metric tons is "slightly more than one container load," but does not provide any authority for this contention or provide other relative values for comparison. Pl.'s Br. 24–25.

A-570–901, ARP 6–05 (Aug. 30, 2006) [(adopted in 71 Fed. Reg. 57,079) (Dep't Commerce Sept. 8, 2006) (notice of final determination) ("*Lined Paper Products from the PRC*"). In addition, Commerce argues that Trust Chem did not place any information on the record to show that "the WTA data [was] not representative of commercial activity." *I & D Mem.* Cmt. 4 at 15; Def.'s Br. 17. *See e.g.*, *Sichuan Changhong Electric Co. v. United States*, 30 CIT 1481, 1501, 460 F. Supp. 2d 1338, 1356 (2006) ("Commerce [does] not ha[ve] a longstanding practice of omitting import values merely because they were the product of a small quantity of imported goods."); *Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, __ CIT __, 59 F. Supp. 2d 1354, 1360 (1999) (citations omitted) (Commerce's "administrative practice with respect to aberrational data is 'to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries.'").

In addressing Trust Chem's argument, Commerce states that the Indian import data the Petitioners put on the record showed that the POR import quantity (2008) was larger than the quantities for the years 2004–2007. Therefore, Commerce was not persuaded by Trust Chem's allegation regarding small import quantities. *I & D Mem.* Cmt. 4 at 16.

Notably, as Commerce points out, the question is whether the *relative* quantity of imports is distortive. Here, Plaintiff did not introduce evidence, for example, that the WTA volume was only a small fraction of India's domestic consumption. Def.'s Br. 18.[20] Therefore, on this record, Plaintiff's argument that the cumulative total for imports from 2004–2008 is too small must fail.[21]

3. U.S. Import Statistics: Third, Plaintiff refers to its submission of additional U.S. import surrogate value information, containing an AUV of $349.95 USD/MT. Plaintiff argues that this sum corroborates the *Chemical Weekly* price previously reported and is further proof that the WTA data is aberrational. Pl.'s Br. 4; Pl.'s Reply 2; *see also Pl.'s Surrogate Value Sub. for the Final Results* Attach. 1 (Jan. 19, 2010) (PR 38) ("*Pl.'s Surrogate Value Sub. for Final Results*").

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[20] Defendant-Intervenors also state that the WTA data Commerce used was comparable to prior years based on the Global Trade Atlas data on record, and thus reflects the "commercial reality[.]" Def.-Int. Br. 7.

[21] Defendant also notes that Plaintiff failed to comment on Petitioners' cumulative data when it was submitted and open for comment in May 2010. Def.'s Br. 19.

Commerce's current methodology, however, "no longer relies upon U.S. prices as an appropriate benchmark to determine whether surrogate values are aberrational." *I & D Mem.* Cmt. 4 at 15.[22]

Plaintiff responds, citing the plain language of 19 U.S.C. § 1677b(c)(2).[23] Plaintiff suggests that the statute "expressly contemplates the use of sale prices in the United States as a potential source for surrogate values" if available information is inadequate. Pl.'s Br. 21.

Commerce disagrees, arguing that the statute "explicitly allows Commerce to use United States pricing data *only* when that data pertains to imports from countries of 'comparable' economic development to China," as is delineated in § 1677b(c)(2)(B). Def.'s Br. 15. Commerce states that Trust Chem's claim that this import data was the only available data, and hence is the "best" information, is without merit because the statute provides that § 1677b(c)(2) is an exception to the best available information standard stated in § 1677b(c)(1). Commerce adds further that the statute does not require Commerce to use benchmarks, and thus Commerce was not obligated to use U.S. import data as a benchmark.

Commerce contends that its decision not to use the U.S. import data was consistent with both the plain language of the statute as well as the agency's established practice of rejecting U.S. import benchmark prices when the relevant imports do not originate from the designated surrogate countries [that are economically comparable to the NME at issue]. *Id.* at 13. Commerce contends that Trust Chem bore the burden of proving that the WTA surrogate value was aberrational by presenting data for the potential surrogate countries, and it failed to do so.[24] *Id.* at 13; *see also I & D Mem.* Cmt. 4 at 14–15.

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[22] No party challenges Commerce's current methodology or Commerce's determination that its current methodology must be applied in the fourth administrative review at issue here. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . [But] it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.") (emphasis in original).

[23] ("If [Commerce] finds that the available information is inadequate for purposes of determining the normal value of subject merchandise under paragraph (1), [Commerce] shall determine the normal value on the basis of the price at which merchandise that is (A) comparable to the subject merchandise, and (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, is sold in other countries, including the United States.").

[24] Plaintiff placed U.S. import data from Canada, Japan, Belgium, Germany, Mexico and the Netherlands on the record instead. *Pl.'s Surrogate Value Sub. for Final Results* Attach. 1.

The court agrees with Commerce that section 1677b(c)(2) provides an exception for NME cases, applicable where there is available but inadequate information on the record. *Ningbo Dafa Chemical Fiber Co. v. United States*, 580 F.3d 1247, 1254 (Fed. Cir. 2009). The exception allows Commerce to use pricing data pertaining to countries of comparable economic development to the country at issue. *Zhengzhou Harmoni Spice Co. v. United States*, __ CIT __, 617 F. Supp. 2d 1281, 1290 (2009); *Kerr-McGee Chemical Corp. v. United States*, 185 F.3d 884, 1999 WL 89033, at *1 (Fed. Cir. 1999). At the same time, there is no statutory prohibition on using U.S. or other market economy data to corroborate record evidence. *Peer Bearing Co.-Changshan*, 752 F. Supp. 2d at 1372.

Nonetheless, Commerce adequately explained that "while in the past the Department has used U.S. prices to benchmark surrogate values, the Department's current practice has been to benchmark surrogate values against imports from the list of potential surrogate countries for a given case." *Lined Paper Products from the PRC* Cmt. 5 at 30.

Although there is no prohibition on using U.S. import data, Commerce's preference for data from potential surrogate countries was not unreasonable.

4. Commerce's Prior Determinations: Fourth, Plaintiff states that in Commerce's original investigation, and in the first administrative review of the antidumping order in this matter, Commerce used *Chemical Weekly* data as the best surrogate value for nitric acid. Pl.'s Br. 9; *see also Pl.'s Surrogate Value Sub. for Final Results* at Attach. 2–3,(citing *Final Determination of Carbazole Violet Pigment 23 from the People's Republic of China*, Issues & Decision Memorandum, A-570–892, ARP 03–04 (Nov. 8, 2004) [(adopted in 69 Fed. Reg. 67,304) (Dep't Commerce Nov. 17, 2004) (notice of final determination of sales at less than fair value)] ("*Carbazole Violet Pigment 23 from the PRC*"). Specifically, in the investigation, Commerce agreed with Respondents that the Indian import statistics were aberrational, finding WTA data of $4,384.22[25] USD/MT to be aberrational, when compared to a WTA U.S. benchmark import value of $170 USD/MT and a WTA European Union value of $114.43 USD/MT. *See Pl.'s Surrogate Value Sub. for Final Results* Attach. 2 at 21. Therefore, Commerce used the *Chemical Weekly* value of $122.93 USD/MT for nitric acid.

[25] The court notes that in *Pl.'s Surrogate Value Sub. for Final Results* Attach. 2 and *Carbazole Violet Pigment 23 from the PRC* at 21, the price is quoted at $4,384.22; but in Pl.'s Br., the price is quoted at $4,383.22. Pl.'s Br. 15.

However, during this fourth administrative review, Commerce found the $10,474 USD/MT data, a number significantly higher than the calculation discarded in the earlier determination, to be the best available information for calculating normal value. Pl.'s Br. 15; *see also Pl.'s Surrogate Value Sub. for Final Results* Attach. 2, 20–21. To explain this deviation from its previous determination, Commerce argues that its "prior determination used a now-abandoned methodology that could not have been employed in this review." Def.'s Br. 15. Commerce claims that this new method is better aligned with the statute, and that altering its methodology is within Commerce's discretion. *Id.* 16.[26]

Accordingly, relying on its "strong preference for comparing statistics from the same source[,]" *I & D Mem.* Cmt. 4 at 15; *see also Lined Paper Products from the PRC* at 30, Commerce asserts that it could not determine that its chosen value (based on WTA data) in the current review was aberrational because the sources of comparison (*Chemical Weekly*) for the values were not the same. *I & D Mem.* Cmt. 4 at 15.

Commerce's premise, however – that the sources are not the same – is a description, not an explanation. Moreover, in a previous determination that Commerce cited to in the *I & D Mem.*, Commerce stated that, "[w]hile [it] agree[s] . . . that it is preferable to benchmark selected surrogate values against AUVs derived from the same data source, for benchmarking purposes, where [Commerce] had insufficient data from one source, [it] also compared the AUVs derived from COMTRADE, CAPMAS, and the WTA data to each other. CAPMAS trade data are specific to Egypt, therefore, [Commerce] had to benchmark these against data from COMTRADE and WTA." *Hot-Rolled Carbon Steel from Romania* Cmt. 2 at 19–20.

In addition, Plaintiff points out that Commerce's chosen surrogate value is "12 times higher than the inflated surrogate value [of $839.44 USD/MT] originally requested by the Petitioner[s] [Nation Ford

[26] Defendant-Intervenors add that in the original investigation and prior reviews, the strength or purity of the nitric acid was not made an issue. In contrast, in the present review, it was confirmed that the high strength nitric acid was used to produce the subject CVP-23 and that such high strength nitric acid would be priced at a substantial premium above low strength nitric acid. Def.-Int. Br. 5 n.3.

Defendant-Intervenors further contended during the proceedings below that Trust Chem's argument is "misleading" because Trust Chem did not explain what occurred during the intervening years since the original investigation in order to show that the price of nitric acid could not have risen, *Pet'rs' Rebuttal Br.* 2–4 (Feb. 3, 2010) (PR 43), citing increases in energy and petroleum prices and other factors affecting raw material prices. Def.-Int. Br. 6. Here, Defendant-Intervenors also reiterate Commerce's claim that Trust Chem failed to provide evidence that the WTA values were too high or that the WTA data could not be, as reported, based on accurate market conditions at the time these imports occurred. *Id.* at 3–5.

Chemical and Sun Chemical]." Pl.'s Br. 18.[27] This important fact does not appear in Commerce's extensive analysis. Rather, Commerce is silent, even though the Petitioners' submission of what it must regard as a representative value of the nitric acid at issue is necessarily an important aspect of the issue presented where Commerce itself has in the past declined to rely on the higher WTA data. Moreover, where Petitioners' able counsel presented as representative a value that is less than eight percent of the WTA value, it is hard to *see* how a reasonable mind could infer that the WTA value is not aberrational.

Consequently, the court cannot affirm Commerce's conclusion. Certainly, Commerce's new practice of comparing prices between countries of similar economic development is reasonable and is therefore entitled to deference. And, certainly a determination in one investigation is not binding in the subsequent reviews, as each determination is *sui generis*, consisting of a unique set of variables and relative factors, *U.S. Steel Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1199, 1218 (2009); *see also Nucor Corp. v. United States*, 414 F.3d 1331, 1340 (Fed. Cir. 2005).

Nonetheless, Commerce's job is to compare the data on the record and provide an explanation that considers the important aspects of the problem presented. *SKF USA, Inc., v. United States*, 630 F.3d 1365, 1373–74 (Fed. Cir. 2011) (stating that Commerce failed to

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[27] Plaintiff specifically argues that Commerce's determination yielded "absurd results" because the resulting value for nitric acid is higher than Petitioners' proposed value. Pl.'s Br. 18; Def.'s Br. 19. Commerce responds that this argument must fail because Plaintiff did not raise the argument during the administrative proceedings, and thus Plaintiff did not exhaust its administrative remedies. Def.'s Br. 20. Commerce points out that the opportunity to make this argument was in the February 1, 2010 case brief or the May 17, 2010 submission. *See Pl.'s Revised Case Br.*2 (Feb. 1, 2010) (PR 41); *Pl.'s Cmts. on May 4 thDOC Memo on Nitric Acid*1–4 (May 17, 2010) (PR 58).

Certainly Commerce is correct that, unless an appropriate exception applies, a party is not entitled to judicial relief until it has exhausted its administrative remedies. 28 U.S.C. § 2637(d); *see also Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84. (Fed. Cir. 2008). In addition, as Commerce notes, by bringing up a general issue, a Plaintiff has not necessarily exhausted all specific issues under that general umbrella. *Gerber Food (Yunnan) Co. v. United States*,__ CIT __, 601 F. Supp. 2d 1370, 1379 (2009).

The determinative question is whether Commerce was put on notice of the issue, not whether Plaintiff's exact wording below is used in the subsequent litigation. Here, Commerce was aware that Plaintiff was contesting the high surrogate value price of nitric acid. Moreover, the specific information upon which Plaintiff relies, having been submitted by the Petitioners, is necessarily before the agency. Thus, the argument is not barred by the doctrine of exhaustion of administrative remedies.

comply with its *State Farm* obligation to provide an adequate explanation when its explanation failed to consider an important aspect of the problem). It has not done so here.[28]

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion for Judgment on the Agency Record is granted in part. This matter is remanded for reconsideration and further explanation in accordance with this opinion.

Commerce shall have until October 3, 2011 to complete and file its remand redetermination. Plaintiffs shall have until November 2, 2011 to file comments. Defendant and Defendant-Intervenors shall have until November 17, 2011 to file any reply.

It is **SO ORDERED**.

Dated: August 3, 2011
New York, N.Y.

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

[28] The court notes that the record as it currently stands does not contain specific pricing data from the POR that is representative of the nitric acid used by the respondent. Such data could be used for comparison to the WTA data. It will therefore be appropriate, upon remand, for Commerce to re-open the record.