U.S. Customs and Border Protection

Slip Op. 12–23

SGL Carbon LLC and Superior Graphite Co., Plaintiffs, v. United States, Defendant, and Fushun Jinly Petrochemical Carbon Co., Ltd., et al., Defendant-Intervenors

Fushun Jinly Petrochemical Carbon Co., Ltd., et al., Plaintiffs, v. United States, Defendant, and SGL Carbon LLC and Superior Graphite Co., Defendant-Intervenors.

Consol. Court No. 11–00389

[Motion for reconsideration granted; U.S. Department of Commerce granted leave to publish amended final results correcting ministerial errors]

Dated: February 22, 2012

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OPINION

RIDGWAY, Judge:

I. *Introduction*

In this consolidated action, the U.S. Department of Commerce's Final Results in the first administrative review of the antidumping duty order on small diameter graphite electrodes from the People's Republic of China are under assault from both directions. *See generally* Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the

Antidumping Duty Order and Final Rescission of the Administrative Review, in Part, 76 Fed. Reg. 56,397 (Sept. 13, 2011) ("Final Results").[1]

Two domestic producers of electrodes – SGL Carbon LLC and Superior Graphite Co. ("Domestic Producers") – commenced Court No. 11–00389, asserting that the Final Results understate the extent of the dumping by Fushun Jinly Petrochemical Carbon Co., Ltd. ("Fushun Jinly") and the "Fangda Group" companies (including Beijing Fangda Carbon Tech Co., Ltd., Fushun Carbon Co., Ltd., Fangda Carbon New Material Co., Ltd., Chengdu Rongguang Carbon Co., Ltd., and Hefei Carbon Co., Ltd.), among others. On the other side, Fushun Jinly and the Fangda Group brought Court No. 11–00407, challenging the dumping margins reflected in the Final Results as overstated.

Pending before Commerce at the time the Domestic Producers commenced their action were comments from Fushun Jinly, the Fangda Group, and Xinghe County Muzi Carbon Co., Ltd. ("Muzi")[2] requesting that the agency correct certain alleged "ministerial errors" in the Final Results. The Government sought leave of the Court to permit Commerce to correct some of those alleged ministerial errors – a motion that was opposed by the Domestic Producers, and denied in a brief order stating no reasons for the decision. *See* Order (Oct. 26, 2011). Thereafter, Fushun Jinly and the Fangda Group intervened in the Domestic Producers' action, and the case was assigned to these chambers. In addition, as noted above, Fushun Jinly and the Fangda Group initiated their own action (Court No. 11–00407), which was then consolidated with the Domestic Producers' action.

Now before the Court is a Motion for Reconsideration filed by Fushun Jinly and the Fangda Group, neither of which were parties to the Domestic Producers' action at the time the Government's original motion for leave to correct ministerial errors was denied. *See* Defendant Intervenors' Motion for Reconsideration of the Court's Order Dated October 26, 2011 Denying Defendant's Motion for Leave to Publish Amended Final Results Correcting Ministerial Errors ("Def.-Ints.' Motion for Reconsideration").

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[1] According to the Commerce Department, the electrodes covered by the antidumping duty order at issue are typically used in "primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations." *See* Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Results of the First Administrative Review of the Antidumping Duty Order; Partial Rescission of Administrative Review; and Intent To Rescind Administrative Review, in Part, 76 Fed. Reg. 12,325, 12,326 (March 7, 2011) ("Preliminary Results").

[2] Muzi is a separate rate company that was not selected for individual examination in the administrative review at issue here.

The Government supports the Motion for Reconsideration, and, indeed, renews its own motion seeking leave to publish amended final results correcting the specified alleged ministerial errors. *See* Defendant's Response to Defendant-Intervenors' Motion for Reconsideration at 12 ("Def.'s Renewed Motion for Correction of Ministerial Errors"). In contrast, the Domestic Producers oppose the Motion for Reconsideration, asserting that Commerce should not now be permitted to make the corrections. *See* Plaintiffs' Opposition to Defendant-Intervenors' Motion for Reconsideration of the Court's Order Denying Defendant Leave to Publish Amended Final Results Correcting a Ministerial Error ("Pls.' Opposition to Motion for Reconsideration").

For the reasons outlined below, the Motion for Reconsideration must be granted, and Commerce permitted to publish amended final results correcting the specified ministerial errors.

II. *Background*

Commerce's correction of ministerial errors in agency determinations is expressly authorized both by statute and by regulation. *See generally* 19 U.S.C. § 1675(h) (2006); 19 C.F.R. § 351.224 (2008).[3] The legislative history underscores the *raison d'etre* for the ministerial errors statute and regulation, emphasizing Congress' desire to have Commerce correct such errors in order to preempt needless litigation and thereby promote judicial economy:

> It has come to the Committee's attention that certain final determinations contain clerical and other errors which are not corrected, under current procedures, unless the parties to the proceedings resort to judicial review of the final determination. *The result is expensive litigation that unnecessarily burdens the court system*, *in order to correct essentially unintended errors*. Therefore, the Committee has adopted this provision to allow for the correction of ministerial errors in final determinations within a limited time period after their issuance.

H.R. Rep. No. 100–40, Pt. 1, at 144 (1987) (emphasis added); *see generally NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (Fed. Cir. 1995) (discussing legislative history of statutory provision concerning correction of ministerial errors).

To that end, Congress directed Commerce to establish procedures for the agency's correction of "ministerial errors" in final determinations "within a reasonable time after the determinations are issued."

[3] All statutory citations herein are to the 2006 edition of the United States Code, and all citations to regulations are to the 2008 edition of the Code of Federal Regulations.

See 19 U.S.C. § 1675(h). As defined by statute, "ministerial errors" include "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which [Commerce] considers ministerial." *See id*.; *see also* 19 C.F.R. § 351.224(f) (defining "ministerial error" in language virtually identical to that of the statute).

The statute requires that Commerce "ensure opportunity for interested parties to present their views regarding any such [ministerial] errors." *See* 19 U.S.C. § 1675(h). Commerce's regulation thus provides, in sum and substance, that, in cases such as this, any allegations of ministerial errors in a final determination are to be filed with Commerce within five days after the agency discloses the calculations underpinning the agency's determination, and that "[r]eplies to comments . . . must be filed within five days after the date on which the comments were filed." *See* 19 C.F.R. §§ 351.224(b), 351.224(c)(1)-(3). The regulation further provides that Commerce "will analyze any comments received and, if appropriate, . . . correct any ministerial error by amending . . . the final results of review." *See* 19 C.F.R. § 351.224(e).

The Final Results at issue here were published in the Federal Register on September 13, 2011. *See* Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review, in Part, 76 Fed. Reg. 56,397 (Sept. 13, 2011) ("Final Results"). Thereafter, Fushun Jinly, the Fangda Group, and Muzi each submitted timely comments to Commerce alleging various ministerial errors in the Final Results. *See* Letter from Fushun Jinly to Commerce (Sept. 19, 2011); Letter from Fangda Group to Commerce (Sept. 19, 2011); Letter from Muzi to Commerce (Sept. 19, 2011). Four days later, the Domestic Producers submitted comments to Commerce objecting to correction of some of the alleged errors. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011).

Before Commerce could publish amended Final Results addressing the alleged ministerial errors, the Domestic Producers filed their summons and complaint challenging the Final Results. *See* Domestic Producers' Summons (Sept. 28, 2011); Domestic Producers' Complaint (Sept. 28, 2011).[4] The commencement of the Domestic Producers'

[4] The Domestic Producers emphasize that, in issuing the Final Results in this case, Commerce stated that it intended to issue liquidation instructions to Customs "15 days after the publication date of the final results of these reviews." *See* Final Results, 76 Fed. Reg. at 56,400 (*quoted in* Pls.' Opposition to Motion for Reconsideration at 5 n.1). Because the issuance of such instructions allows Customs to liquidate entries, parties to the

action vested the court with jurisdiction over the administrative proceeding in this case, precluding Commerce from correcting any ministerial errors absent leave of court. *See Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 560–62 (Fed. Cir. 1989) (explaining that "once [the Court of International Trade's] exclusive jurisdiction has been invoked, Commerce may correct clerical errors [in an agency determination] only with the court's prior authorization").

Accordingly, on October 6, 2011, the Government filed a Motion for Correction of Ministerial Errors. *See* Defendant's Motion for Leave to Publish Amended Final Results Correcting A Ministerial Error ("Def.'s Motion for Correction of Ministerial Errors"). In its motion, the Government stated that Commerce had reviewed the allegations of ministerial error, as well as the Domestic Producers' comments thereon, and that the agency had determined that the Final Results should be amended to correct certain of the alleged errors in accordance with the "ministerial errors" statute and regulation. *See id*. at 2.

Specifically, the Government's Motion for Correction of Ministerial Errors explained that Commerce intended to correct two of the three errors alleged by Fushun Jinly – (1) the unintentional miscalculation of Fushun Jinly's selling, general, and administrative ("SG&A") ratio, and (2) the unintentional miscalculation of Fushun Jinly's profit ratio. *See* Def.'s Motion for Correction of Ministerial Errors at 2.[5] Similarly, the Government's motion explained that, of the three errors alleged by the Fangda Group, Commerce intended to correct one – the inadvertent application of a freight surrogate value measured in metric tons to the Fangda Group's packing factors of production (which were measured in kilograms). *See id*.[6] In addition, the Government's motion explained that Commerce intended to correct the spelling of Muzi's company name in the margin chart in the Final

administrative review generally must file a summons and complaint, and obtain a preliminary injunction to enjoin liquidation, in order to preserve their right to judicial review.

[5] The Government's Motion for Correction of Ministerial Errors thus implicitly indicated that Commerce rejected Fushun Jinly's claim that the agency's application of partial adverse facts available to Toller # 2 (Liaoning Fuan) was a ministerial error subject to administrative correction. *Compare* Letter from Fushun Jinly to Commerce (Sept. 19, 2011) at 3–6 *and* Def.'s Motion for Correction of Ministerial Errors at 2.

[6] As such, the Government's Motion for Correction of Ministerial Errors implicitly indicated that Commerce rejected the Fangda Group's claim that Commerce's treatment of graphitized metallurgical coke scrap as a material input (rather than a by-product) was a ministerial error subject to administrative correction. *Compare* Letter from Fangda Group to Commerce (Sept. 19, 2011) at 2 *and* Def.'s Motion for Correction of Ministerial Errors at 2. Likewise, the Government's motion indicated that Commerce also implicitly rejected the Fangda Group's claim concerning Commerce's treatment of certain costs incurred by one of the Group's tollers, Fushun Fuxin. *Compare* Letter from Fangda Group to Commerce (Sept. 19, 2011) at 4–5 *and* Def.'s Motion for Correction of Ministerial Errors at 2.

Results. *See id*. The Government's motion noted that the specified corrections would affect the margin calculations for Fushun Jinly and the Fangda Group. *See id*. The Government further noted that the corrections would also affect the rate for Muzi (the non-selected separate rate respondent), because Muzi's rate is based on the weighted-average of the rates of the respondents that were selected for individual examination (*i.e.*, Fushun Jinly and the Fangda Group). *See id*.

In the Domestic Producers' September 23, 2011 comments submitted to Commerce concerning the allegations of ministerial error filed by Fushun Jinly and the Fangda Group, the Domestic Producers had opposed only one of the four corrections that Commerce ultimately proposed to make. *See* Letter from Domestic Producers (Sept. 23, 2011) (expressing no objection to correction of Fushun Jinly's SG&A and profit ratios, and expressing no objection to correction of the spelling of Muzi's company name; objecting to correction of Fangda Group's freight surrogate value (where Commerce applied a freight surrogate value measured in *metric tons* to packing factors of production which were measured in *kilograms*)). But the Domestic Producers took a very different tack when the Government sought leave of court to allow Commerce to make certain proposed corrections. In response to the Government's motion, the Domestic Producers objected broadly to Commerce's correction of any ministerial errors, asserting that the motion should be denied outright. *See* Plaintiffs' Opposition to Defendant's Motion for Leave to Publish Amended Final Results Correcting a Ministerial Error at 7 (Oct. 25, 2011) ("Pls.' Opposition to Def.'s Motion for Correction of Ministerial Errors") (urging the court to "deny the Defendant's Motion . . . in its entirety").[7]

Because Fushun Jinly and the Fangda Group had not yet intervened in the Domestic Producers' action, the court did not have the benefit of their views in ruling on the Government's original Motion for Correction of Ministerial Errors. Nor did the court have before it the comments that Fushun Jinly and the Fangda Group had filed with Commerce alleging ministerial error and the Domestic Producers' response thereto, which would have made it clear to the court that

[7] In essence, the Domestic Producers opposed the Government's Motion for Correction of Ministerial Errors on four grounds. Specifically, the Domestic Producers argued that the Government's motion was "vague and unclear," that Commerce's inability to make the corrections at issue without leave of court was attributable to the agency's policy of issuing liquidation instructions to Customs within 15 days of the publication of final results (necessitating parties' swift commencement of any court action challenging final results), that the Government's motion did not address the Domestic Producers' claim that the corrections could have been identified and addressed at the preliminary results stage of the administrative review, and that Commerce would suffer no hardship as a result of a denial of the Government's motion. *See generally* Pls.' Opposition to Def.'s Motion for Correction of Ministerial Errors at 4–7.

the Domestic Producers had not previously objected to three of the four ministerial errors that were the subject of the Government's motion – a critical fact that the Domestic Producers failed to disclose.[8]

In an order of one-and-one-half pages, entered before the case was assigned to a judge, the Government's Motion for Correction of Ministerial Errors was denied. *See* Order (Oct. 26, 2011). The order stated no reasons for the decision, and, in particular, did not address either the underlying purpose of the statutory and regulatory framework specifically designed to permit Commerce's correction of ministerial errors (and thus streamline judicial review) or the substantial body of case law interpreting and applying the ministerial errors statute and the regulation. *See id*. Nor did the order address the fact that the Domestic Producers' comments to Commerce had made no objection to three of the four corrections that Commerce proposed to make. *See id*.

In early November 2011, Fushun Jinly and the Fangda Group were granted leave to intervene in the Domestic Producers' action, and, thereafter, the case was assigned to these chambers. In the meantime, Fushun Jinly and the Fangda Group initiated their own action (Court No. 11–00407), including in their complaint as causes of action all six of the issues raised in the allegations of ministerial error that they filed with Commerce immediately following publication of the Final Results. *See* Fushun Jinly/Fangda Group Complaint (Nov. 9, 2011), Counts 1–5. The action commenced by Fushun Jinly and the Fangda Group was subsequently consolidated with the Domestic Producers' action. *See* Order (Dec. 2, 2011).

Fushun Jinly and the Fangda Group now seek reconsideration of the October 26, 2011 order denying the Government's original Motion for Correction of Ministerial Errors. *See* Defendant Intervenors' Motion for Reconsideration of the Court's Order Dated October 26, 2011

[8] Not only did the Domestic Producers' brief in opposition to the Government's Motion for Correction of Ministerial Errors fail to disclose that the Domestic Producers had not previously objected to three of the four ministerial errors at issue, but the Domestic Producers went so far as to affirmatively assert that they had argued to Commerce that each of the four alleged errors could, and should, have been raised in the Chinese producers/exporters' case briefs filed with Commerce following the issuance of the Preliminary Results. *See* Pls.' Opposition to Def.'s Motion for Correction of Ministerial Errors at 6 (criticizing the Government for not addressing the alleged "specific claim made by [the Domestic Producers] . . . that the [Chinese producers/exporters] should have identified and raised the[] errors in [their] case brief and thus failed to exhaust their administrative remedies"). In fact, however, the Domestic Producers had raised an "exhaustion" objection to the correction of only one of the four ministerial errors at issue; and, as noted above, they had raised no objections whatsoever to the correction of the other three ministerial errors in question. *See* Letter from Domestic Producers (Sept. 23, 2011) (expressing no objection to correction of Fushun Jinly's SG&A and profit ratios, and expressing no objection to correction of the spelling of Muzi's company name; objecting to correction of Fangda Group's freight surrogate value).

Denying Defendant's Motion for Leave to Publish Amended Final Results Correcting Ministerial Errors ("Def.-Ints.' Motion for Reconsideration"). The Government supports the Motion for Reconsideration, and takes the occasion to renew its own original Motion. *See* Defendant's Response to Defendant-Intervenors' Motion for Reconsideration at 12 ("Def.'s Renewed Motion for Correction of Ministerial Errors") (requesting that Court "treat [the Government's response to the Motion for Reconsideration] as a renewed motion [for leave to correct ministerial errors] . . . if appropriate"). The Domestic Producers argue that the Motion for Reconsideration should be denied. *See* Plaintiffs' Opposition to Defendant-Intervenors' Motion for Reconsideration of the Court's Order Denying Defendant Leave to Publish Amended Final Results Correcting a Ministerial Error ("Pls.' Opposition to Motion for Reconsideration").

III. *Analysis*

As outlined in greater detail below, notwithstanding the Domestic Producers' claims to the contrary, the four errors that Commerce here proposes to correct in amended final results are all clearly "ministerial." Further, where errors in final results are determined to be "ministerial" in nature, courts typically grant Commerce leave to publish amended final results correcting the errors, unless such action would result in prejudice or fundamental unfairness to a party. In the case at bar, the Domestic Producers cannot make such a showing.

As discussed below, permitting Commerce to publish amended final results correcting the ministerial errors at issue will not result in any cognizable prejudice or fundamental unfairness to the Domestic Producers. Indeed, permitting Commerce to publish amended final results will prevent the perpetuation of prejudice and unfairness to the Chinese producers/exporters, and, moreover, will promote judicial economy, will conserve the resources of the parties and the Court, and will ensure that the agency determination that is subject to judicial review in this proceeding is that which Commerce intended, and thus will be consonant with Congress' express intent as reflected in the statutory provision governing the correction of ministerial errors.

For all these reasons, the Motion for Reconsideration filed by Fushun Jinly and the Fangda Group, as well as the Government's Renewed Motion for Correction of Ministerial Errors, must be granted, and Commerce must be granted leave to publish amended final results correcting the four ministerial errors at issue.

A. *The "Ministerial" Nature of the Errors*

As a threshold matter, the Domestic Producers' Opposition to the Motion for Reconsideration argues that the Government's original Motion for Correction of Ministerial Errors "failed to provide clear guidance on how [Commerce] intended to address" the ministerial errors that Commerce proposes to correct. *See generally* Pls.' Opposition to Motion for Reconsideration at 4–5.[9] The Domestic Producers now contend that they therefore cannot ascertain whether the errors at issue are in fact "actually ministerial, rather than substantive." *See id*. at 4; *see generally id*. at 3–5.[10]

The Domestic Producers' argument has a very hollow ring. The comments that the Domestic Producers filed with Commerce concerning the Chinese producers/exporters' allegations of ministerial error expressed no such concern as to any of the alleged errors. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011). To the contrary, the Domestic Producers' comments to Commerce addressed the allegations of ministerial error squarely on the merits. *See id*. As such, the Domestic Producers obviously found the descriptions of the alleged errors that Fushun Jinly, the Fangda Group, and Muzi provided to be "detailed enough to provide substantive comments in response." *See* Def.'s Renewed Motion for Correction of Ministerial Errors at 11; *see also* Letter from Fushun Jinly to Commerce (Sept. 19, 2011); Letter from Fangda Group to Commerce (Sept. 19, 2011);

[9] *But see Shinhan Diamond Indus. Co. v. United States*, 34 CIT ____, ____, 2010 WL 850169 at * 5 (2010) (rejecting argument that error is not "ministerial," where argument "is more accurately characterized as a disagreement with the manner in which [Commerce] chose to correct the error"; explaining that means of correcting error "goes to the merits" of Commerce's determination, and that – in determining whether to grant Commerce leave to correct a ministerial error, "[t]he only question at issue . . . is whether the [alleged error] was an unintentional, ministerial error"); *Diamond Sawblades Mfgrs. Coalition v. United States*, 34 CIT ____, ____, 2010 WL 850158 at * 5 (2010) (same).

[10] As discussed above, the Domestic Producers' position on the "ministerial" nature of the errors has changed over time. Indeed, the Domestic Producers' exact position is difficult to pin down, even within their most recent brief.

In the caption for the relevant subsection of their Opposition to the Motion for Reconsideration, the Domestic Producers make the affirmative statement that the errors that Commerce proposes to correct are not "[s]imply [m]inisterial." *See* Pls.' Opposition to Motion for Reconsideration at 3. At the top of the following page, however, the Domestic Producers' position is watered down. The Domestic Producers state merely that they "*do not concede* that the errors alleged . . . are ministerial mistakes." *See id*. at 4 (emphasis added). And, in the following paragraph, the Domestic Producers argue that the subject errors have not yet been identified "in a way that would allow [the Domestic Producers] . . . to determine whether the errors were . . . actually ministerial." *See id*.

Thus, when push comes to shove, the Domestic Producers even now do not affirmatively assert that the errors that Commerce seeks to correct *are not* ministerial. Rather, the Domestic Producers simply decline to concede the point. The Domestic Producers' concerns come too late, however; and, in any event, they are unfounded.

Letter from Muzi to Commerce (Sept. 19, 2011).[11] The Domestic Producers' argument thus cannot carry the day.

Commerce is entitled to "substantial discretion in determining what types of unintentional or inadvertent errors qualify . . . [as] 'ministerial.'" *See Kaiyuan Group Corp. v. United States*, 28 CIT 698, 723, 343 F. Supp. 2d 1289, 1312 (2004) (*citing Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 847–48, 159 F. Supp. 2d 714, 727–28 (2001), *aff'd*, 60 Fed. Appx. 797 (Fed. Cir. 2003); *CEMEX, S.A. v. United States*, 19 CIT 587, 593 (1995), *aff'd*, 133 F.3d 897 (Fed. Cir. 1998)). Close analysis of the record discloses nothing to cast doubt on Commerce's determination here, rendered in the exercise of that "substantial discretion."

As noted in section I above, the Government's original Motion for Correction of Ministerial Errors explained that Commerce proposes to correct (1) the unintentional miscalculation of Fushun Jinly's selling, general, and administrative ("SG&A") ratio; (2) the unintentional miscalculation of Fushun Jinly's profit ratio; (3) the inadvertent application of a freight surrogate value measured in metric tons to the Fangda Group's packing factors of production (which were measured in kilograms); and (4) the misspelling of Muzi's company name in the margin chart in the Final Results. *See* Def.'s Motion for Correction of Ministerial Errors at 2. It is clear beyond cavil that these errors fall within the statutory and regulatory definition of "ministerial" errors, because they constitute "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which [Commerce] considers ministerial." *See* 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224(f).

As the Court of Appeals has explained, ministerial errors "are by their nature not errors in judgment but merely inadvertencies." *See NTN Bearing Corp.*, 74 F.3d at 1208. Errors within the scope of the

[11] *See generally NTN Corp. v. United States*, 32 CIT ____, ____, 587 F. Supp. 2d 1313, 131718 (2008) (rejecting objecting party's argument that it "cannot properly assess any suggested correction and that the court . . . cannot assess whether the ministerial error has occurred (even though [the parties] acknowledge that it has), whether the correction is appropriate, or whether the form of the correction will truly be ministerial"; emphasizing that "[c]ontrary to the premise of this argument, the court need not decide the merits of the . . . issue to rule on [the motion for leave to correct a ministerial error]," and the objecting party "need not assess the merits of [the] issue at this time because it will have the opportunity to do so after amended final results are published and the administrative record is supplemented as necessary. The merits of the issue may be litigated along with the other issues presented for judicial review."); *see also Federal-Mogul Corp. v. United States*, 16 CIT 975, 982–83, 809 F. Supp. 105, 111–12 (1992) (dismissing argument that Commerce "ha[d] not sufficiently described the alleged ministerial errors or explained exactly how [Commerce] propose[d] to fix those errors").

statute and regulation thus include "errors mechanical in nature, . . . and not involving an error of substantive judgment" or "mindless and mechanistic mistakes [and] minor shifting of facts." *Shinhan Diamond Indus. Co. v. United States*, 34 CIT ____, ____, 2010 WL 850169 at * 4 (2010).

In particular, ministerial errors include those that merely require Commerce to "mathematically adjust a particular rate." *See Mazak Corp. v. United States*, 33 CIT ____, ____, 659 F. Supp. 2d 1352, 1362 (2009). Ministerial errors also include calculations involving "quantity and value variables that were stated in inconsistent units of measure." *See Hyundai Elecs. Industries Co. v. United States*, 29 CIT 981, 992, 395 F. Supp. 2d 1231, 1243 (2005); *see also Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1102, 901 F. Supp. 353, 361 (1995) (holding that Commerce made "ministerial" error when agency failed to convert German marks and Japanese yen into Dutch guilders in Dutch-guilder denominated calculation); *Federal-Mogul Corp. v. United States*, 16 CIT 975, 978–79, 809 F. Supp. 105, 109–10 (1992) (holding that Commerce's failures to convert certain data from yen to dollars constituted "ministerial" errors).

In the case at bar, Commerce acknowledges that it made an unintentional arithmetic error in calculating the SG&A and profit ratios for Fushun Jinly. *See* Def.'s Motion for Correction of Ministerial Errors at 2; Def.'s Renewed Motion for Correction of Ministerial Errors at 3, 6, 8. Commerce further admits that it made an inadvertent error in its freight surrogate value calculation for the Fangda Group, because it mistakenly performed packing material cost calculations on a metric ton basis even though the Fangda Group reported its packing factors of production in units of kilograms. *See* Def.'s Motion for Correction of Ministerial Errors at 2; Def.'s Renewed Motion for Correction of Ministerial Errors at 3, 6, 8. In addition, Commerce concedes that it misspelled Muzi's corporate name in its Final Results. *See* Def.'s Motion for Correction of Ministerial Errors at 2; Def.'s Renewed Motion for Correction of Ministerial Errors at 3, 6, 8.

In taking the actions outlined above, Commerce simply "'made . . . error[s], not resulting from ill-considered judgment or wayward discretion, but from oversight.'" *See Geneva Steel v. United States*, 20 CIT 7, 60, 914 F. Supp. 563, 608 (1996) (citation omitted). The errors at issue are therefore purely "ministerial."

B. *The Domestic Producers' Allegations of Potential Prejudice*

Where errors in final results are determined to be "ministerial" in nature, the statutory and regulatory framework expressly contemplates Commerce's correction of those errors through administrative

process, rather than through the process of judicial review. *See generally* 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224(c)-(g). Where – as here – a court is already seized with jurisdiction, the appropriate course generally is to grant the agency leave to publish amended final results correcting the ministerial errors. *See generally American Signature, Inc. v. United States*, 598 F.3d 816, 825 (Fed. Cir. 2010) (acknowledging that "[t]he Court of International Trade has routinely exercised jurisdiction . . . to consider . . . requests to correct ministerial errors in assessment rates").

The sole exception to this general rule may be where the publication of amended final results would result in prejudice or fundamental unfairness to a party. *See generally Shinhan Diamond*, 34 CIT at ____, 2010 WL 850169 at * 4; *Diamond Sawblades Mfgrs. Coalition v. United States*, 34 CIT ____, ____, 2010 WL 850158 at * 4 (2010); *NTN Corp. v. United States*, 32 CIT ____, ____, 587 F. Supp. 2d 1313, 1316 (2008). The burden of demonstrating prejudice or fundamental unfairness lies with the party opposing the correction of ministerial errors. *See generally Shinhan Diamond*, 34 CIT at ____, 2010 WL 850169 at * 5; *Diamond Sawblades*, 34 CIT at ____, 2010 WL 850158 at * 5.

The Domestic Producers can make no such showing in this case. As detailed below, there is no merit to the Domestic Producers' reliance on the doctrine of exhaustion of administrative remedies. The Domestic Producers' criticism of Commerce's policy of issuing liquidation instructions within 15 days after publication of the final results also does not advance their case. And the Domestic Producers fail to explain why publication of amended final results in this case, together with the resulting amendments (if any) to their complaint, will consume time significantly in excess of that contemplated by Congress when it enacted the statutory provision authorizing Commerce's administrative correction of ministerial errors such as those at issue here.

Even more fundamentally, the Domestic Producers were afforded the opportunity to comment on all allegations of ministerial error that were submitted by the Chinese producers/exporters and considered by Commerce, in accordance with the statute and regulations – an opportunity that the Domestic Producers took. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011). Further, the Domestic Producers will have the right to review the amended final results, as corrected, and to file an amended complaint, should they so choose. *See, e.g., Diamond Sawblades*, 34 CIT at ____, 2010 WL 850158 at * 7 (expressly granting plaintiff leave to file amended

summons and amended complaint); *NTN Corp.*, 32 CIT at ____, ____, 587 F. Supp. 2d at 1316–17, 1319 (rejecting claim that allowing Commerce to correct ministerial error will be procedurally unfair, noting that plaintiffs "may contest the amended final determination . . . and thereby raise any new issues related to [Commerce's] new calculation"; expressly granting plaintiffs leave to file amended summons and amended complaint); *see also Federal-Mogul Corp.*, 16 CIT at 982, 809 F. Supp. at 112 (explaining that "[a]llowing all parties . . . freedom to file amended pleadings to take into account any changes made in the Final Results will prevent prejudice to any party").

Under these circumstances, granting Commerce leave to publish amended final results correcting the ministerial errors at issue plainly will not harm the Domestic Producers.

1. *The Domestic Producers' Interest in "Finality"*

The Domestic Producers assert broadly that permitting Commerce to make the proposed corrections and publish amended final results will infringe upon the Domestic Producers' "strong interest in the finality of [Commerce's] results for purposes of challenging such results on appeal." *See* Pls.' Opposition to Motion for Reconsideration at 7. Specifically, the Domestic Producers argue that Fushun Jinly and the Fangda Group failed to exhaust their administrative remedies, because – according to the Domestic Producers – the ministerial errors at issue here could have been raised in the case briefs that Fushun Jinly and the Fangda Group filed with Commerce following issuance of the Preliminary Results, but were not. *See id*.[12]

This is a classic case of the proverbial "pot calling the kettle black." In the September 23, 2011 comments that the Domestic Producers filed with Commerce concerning the Chinese producers/exporters' allegations of ministerial error, the Domestic Producers argued "exhaustion" as to only one of the four ministerial errors that Commerce here seeks to correct – specifically, the Fangda Group's allegation that Commerce inadvertently performed certain cost calculations on a metric ton basis even though the Fangda Group reported its packing factors of production in units of kilograms. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011) at 2–3 (asserting that "[e]ven

[12] The Domestic Producers point to 19 C.F.R. § 351.224(c)(1), which provides, in relevant part:

> A party to the proceeding to whom [Commerce] has disclosed calculations performed in connection with a preliminary determination may submit comments concerning a significant ministerial error in such calculations. . . . Comments concerning ministerial errors made in the preliminary results of a review should be included in a party's case brief.

19 C.F.R. § 351.224(c)(1).

though the same issue[] existed with the preliminary results, the Fangda Group remained silent on the[] issue[] in [its] case brief").

The Domestic Producers plainly did not raise an "exhaustion" objection – or, for that matter, any other objection – as to the allegations that Commerce unintentionally miscalculated Fushun Jinly's SG&A and profit ratios. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011) at 3–4 (as to Fushun Jinly's ministerial error allegations, challenging only the allegation that Commerce's application of partial adverse facts available to Toller # 2 (Liaoning Fuan) was based on a misidentification of that toller). Similarly, the Domestic Producers raised no objection at all to Muzi's allegation that Commerce misspelled the company's name in the margin chart in the Final Results. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011) (silent as to Muzi's allegation of ministerial error). The Domestic Producers do not even acknowledge that their comments filed with Commerce argued "exhaustion" as to only one of the four ministerial errors at issue, much less cite any grounds (and supporting authority) for allowing them to belatedly raise that objection as to other ministerial errors that Commerce here seeks to correct. Certainly the Domestic Producers provide no citations to the record in an effort to support their claim that other ministerial errors at issue could and should have been identified and corrected before the Final Results.

There is therefore no need to further consider the Domestic Producers' "exhaustion" argument, except as to the Fangda Group's allegation that Commerce inadvertently performed packing material cost calculations on a metric ton basis, rather than a per kilogram basis. [13] As to that allegation, the Court of Appeals has squarely held that, a party's failure to exhaust its administrative remedies notwithstanding, Commerce "has discretion to fix . . . [a 'late-identified' ministerial] error," although it is not required to do so. *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1376–77 (Fed. Cir. 2010).[14] The *Dorbest* line of authority alone suffices to dispose of what remains of the Domestic Producers' "exhaustion" argument. But that argument fails for other reasons as well.

Thus, for example, the Court of Appeals has held that where – as here – a case must be remanded for other reasons (in this case, for the

[13] *See generally Hyundai Elecs.*, 29 CIT at 992–93, 395 F. Supp. 2d at 1242–43 (holding that, where comments that party submitted to Commerce did not object to correction of ministerial error, party will not be heard to take contrary position in court proceedings).

[14] *See also Dorbest Ltd. v. United States*, 32 CIT ____, ____, 547 F. Supp. 2d 1321, 1348 (2008), *aff'd in part*, *vacated in part*, *and rev'd in part*, 604 F.3d 1363 (Fed. Cir. 2010) (emphasizing that, where allegation of ministerial error is not timely raised, Commerce in its discretion nevertheless *may* – but is not *required* to – correct the error).

agency's correction of three other ministerial errors), it is not improper to also permit Commerce to correct a ministerial error that might have been raised earlier in the course of the administrative proceeding. *See CEMEX*, 133 F.3d at 904; *NTN Bearing Corp.*, 74 F.3d at 1208 (stating that it is particularly appropriate to permit Commerce to correct clerical errors where court is already remanding for other reasons); *see also Federal-Mogul Corp. v. United States*, 18 CIT 1168, 1172–74, 872 F. Supp. 1011, 1014–1016 (1994) (same).

Finally, the Court of Appeals has emphasized that, ultimately, the decision as to whether to require "exhaustion" in a situation such as this is a matter committed to the sound discretion of the court, because Congress did not "require" exhaustion in these circumstances. *See CEMEX*, 133 F.3d at 905 (explaining that "the remand for correction of the error was not improper merely because the [party advocating for correction of the error] did not exhaust its administrative remedies"; emphasizing that Congress has not required exhaustion, such that whether to require exhaustion is entrusted to the trial court's discretion).

For all these reasons, there is no merit to the Domestic Producers' broadbrush objections invoking the doctrine of exhaustion of administrative remedies. Even with respect to the one ministerial error at issue as to which the Domestic Producers timely preserved their objection, the doctrine of exhaustion does not bar the relief that the Government and the Chinese producers/exporters seek, particularly given the facts of this case.

2. *The Domestic Producers' Concerns About Delay*

The Domestic Producers' remaining assertions of possible harm are variations on the theme of potential delay. These claims are equally unavailing.

The Domestic Producers argue at some length, for example, that Commerce "could have and should have made the proposed corrections *in a timely fashion*," and that Commerce should not "be permitted to issue amended final results *belatedly*." *See* Pls.' Opposition to Motion for Reconsideration at 5–6 (emphases added). The Domestic Producers thus intimate that the timing of Commerce's actions in this case somehow violated the ministerial errors statute or regulation. But any such implication would be false. The actions of Commerce, Fushun Jinly, and the Fangda Group complied fully with the statute and regulation, in every respect. *See generally* Def.-Ints.' Motion for Reconsideration at 7, 12 (detailing the "scrupulous[]" adherence in this case to the procedure and timetable set forth in the ministerial errors regulation).

As detailed above, Fushun Jinly, the Fangda Group, and Muzi each submitted timely comments to Commerce alleging various ministerial errors in the Final Results. *See* Letter from Fushun Jinly to Commerce (Sept. 19, 2011); Letter from Fangda Group to Commerce (Sept. 19, 2011); Letter from Muzi to Commerce (Sept. 19, 2011). Four days later, the Domestic Producers submitted comments to Commerce objecting to correction of some of the alleged errors. *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011). Commerce was prevented from publishing amended final results correcting the ministerial errors at issue only by the filing of the Domestic Producers' lawsuit. *See* Domestic Producers' Summons (Sept. 28, 2011); Domestic Producers' Complaint (Sept. 28, 2011). Commerce then promptly sought leave of court to correct certain of the ministerial errors and publish amended final results, as the agency has routinely done in other cases in the past. *See*, *e.g.*, *American Signature*, 598 F.3d at 820 (explaining that, after court actions were commenced challenging Final Results, "Commerce twice sought and received leave of the Court of International Trade to amend the Final Results to correct ministerial errors," leading to issuance of Second Amended Final Results).

Contrary to the Domestic Producers' suggestion, nothing about the procedure that Commerce followed in this case was in any way the least bit out of the ordinary. Consistent with Congress' intent, the statute and regulations clearly contemplate authorizing Commerce to correct the ministerial errors and publish amended final results in the circumstances of this case. *See generally* 19 U.S.C. § 1675(h); 19 C.F.R. § 351.224.

The real target of the Domestic Producers' ire is Commerce's policy of issuing liquidation instructions to Customs within 15 days after publication of the final results of administrative reviews, which generally makes it necessary for parties to file summonses and complaints and seek preliminary injunctions enjoining the liquidation of entries shortly after final results are published. *See* Pls.' Opposition to Motion for Reconsideration at 5–6. According to the Domestic Producers, "[b]ecause [Commerce's] own policy requires action of the parties that divests [the agency] of jurisdiction over the case only 15 days after publication of final results, [Commerce] should be prepared to correct any alleged ministerial errors in the final results" within the same 15-day timeframe. *See* Pls.' Opposition to Motion for Reconsideration at 5.

Distilled to its essence, the Domestic Producers' argument is thus a collateral attack on Commerce's standard 15-day policy. The Domestic Producers emphasize that the 15-day policy came under criticism

in *NTN*. *See* Pls.' Opposition to Motion for Reconsideration at 5–6 (*discussing NTN Corp.*, 32 CIT at ____, 587 F. Supp. 2d at 1318). But the Domestic Producers concede, as they must, that – notwithstanding the language in the *NTN* decision discussing the effects of the 15-day policy – the *NTN* court granted Commerce's motion for leave to publish amended final results correcting ministerial errors in that case. The Domestic Producers point to nothing that might counsel a different outcome here.

Moreover, the Domestic Producers' argument takes no account of the fact that the true parties in interest here are Fushun Jinly, the Fangda Group, and Muzi. *See* Def.-Ints.' Motion for Reconsideration at 12 (noting that the Chinese producers/exporters are "the parties who alleged the presence of . . . ministerial errors in the final results and the parties who would be most directly affected" absent the relief requested). Any dissatisfaction with *Commerce's* 15-day policy cannot be used to justify the continued imposition on the *Chinese producers/exporters* of erroneous, inflated duty deposit rates that Commerce itself has repudiated. *See* Def.-Ints.' Motion for Reconsideration at 11, 12–13 (highlighting ongoing prejudice to Chinese producers/exporters if the "imposition of *manifestly incorrect* antidumping duty deposit rates" is allowed to continue) (emphasis added); *see generally NTN Bearing Corp.*, 74 F.3d at 1208 (*quoting Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), underscoring Commerce's duty "to determine dumping margins 'as accurately as possible'"; noting that "the antidumping laws are remedial, not punitive"; and emphasizing that "[t]he affected U.S. industry is not entitled to [an excessive] remedy").[15]

Finally, the logic of the Domestic Producers' emphasis on the 15-day policy is entirely unclear. The Domestic Producers' implication is that permitting Commerce to publish amended final results correcting ministerial errors *now* will cause the Domestic Producers some harm that they would have been spared if Commerce had published the

[15] It is no answer to say – as the Domestic Producers do here – that all excess cash deposits will be refunded at the end of the judicial proceedings. *See* Pls.' Opposition to Motion for Reconsideration at 7 (arguing that "the cash deposit rates are only deposits and do not represent a final duty assessment rate"). Similarly, the courts have made short work of any suggestion that correction of ministerial errors is unnecessary because the effect of such errors may be offset by changes to the dumping margin that may ultimately result from the adjudication of other issues on the merits. *See*, *e.g.*, *Shinhan Diamond*, 34 CIT at ____, 2010 WL 850169 at * 3, 5 (rejecting argument that "allowing correction of . . . errors would not increase the accuracy of the dumping margins, but only distort them further," as well as arguments that "the merits of the case will reveal that the cash deposit rate is 'already lower than it should be' and that even if it is determined otherwise, any excess cash deposits would ultimately be returned"); *Diamond Sawblades*, 34 CIT at ____, 2010 WL 850158 at * 3, 5 (same).

amended final results *before* the Domestic Producers' lawsuit was commenced. However, apart from any potential implications for the litigation schedule (which are discussed immediately below), the Domestic Producers have failed to identify any such harm.

With respect to the litigation schedule, the Domestic Producers contend that "allowing [Commerce] to publish amended final results at this time would cause delay in this case because [the Domestic Producers] will have to review [Commerce's] amended final results, and then amend their complaint to include challenges to those revised results." *See* Pls.' Opposition to Motion for Reconsideration at 8. But empowering Commerce to administratively correct ministerial errors and to publish amended final results was the very purpose of the statutory and regulatory scheme enacted to fulfill Congress' intent; and the processes of correcting such errors and publishing amended final results necessarily consume some amount of time. The Domestic Producers have failed to explain how (if at all) the time consumed by those processes in this case will be greater than that which was contemplated by Congress. Moreover, to the extent that the Domestic Producers focus on the time required to "review [Commerce's] amended final results, and then amend their complaint to include challenges to those revised results," it is worth noting that the time required for that purpose in the instant case is a matter entirely within the Domestic Producers' control, and, indeed, is a right that they may waive, should they choose to do so.[16]

The Domestic Producers make only one argument concerning delay that is not inherent in the statutory and regulatory framework for the correction of ministerial errors. The Domestic Producers contend that Fushun Jinly and the Fangda Group should have filed their Motion for Reconsideration "when they were granted intervention in the case – over a month before they agreed to the current briefing schedule." *See* Pls.' Opposition to Motion for Reconsideration at 8. The Domestic Producers argue that permitting Commerce to publish amended final

[16] The Domestic Producers claim that permitting Commerce to issue amended final results correcting the ministerial errors will protract this proceeding by "inject[ing] new issues for litigation into this case." *See* Pls.' Opposition to Motion for Reconsideration at 8; *see also id*. at 9 (asserting that "protracted litigation . . . will inevitably result" if the Motion for Reconsideration is granted). The Domestic Producers assert that they "oppose many of the alleged errors that were identified by [Fushun Jinly and the Fangda Group]," such that permitting correction of the errors will "include several new and major issues to be litigated." *See id*. at 8. As discussed above, however, Domestic Producers in fact objected to only *one* of the four errors that Commerce proposes to correct – *i.e.*, the inadvertent application of a freight surrogate value measured in metric tons to the Fangda Group's packing factors of production (which were measured in kilograms). *See* Letter from Domestic Producers to Commerce (Sept. 23, 2011) at 2–3. It is therefore difficult to conceive how granting the Motion for Reconsideration could possibly result in an amended complaint that will include "several new and major issues."

results correcting ministerial errors now will require the parties "to abandon the current expedited briefing schedule and adopt a new one, with deadlines much farther out." *Id*.

The need to amend the scheduling order in this matter might well have been obviated entirely, however, if the Domestic Producers had been more forthcoming in their opposition to the Government's original Motion for Correction of Ministerial Errors.[17] In particular, if the Domestic Producers' response to the Government's original Motion for Correction of Ministerial Errors had candidly conceded that the September 23, 2011 comments that the Domestic Producers filed with Commerce had opposed only one of the four corrections that the Government's motion proposed to make, the court's October 26, 2011 order almost certainly would have granted the Government's motion – at least as to the correction of the three errors that the Domestic Producers' September 23, 2011 comments did not contest, and quite likely as to all four of the ministerial errors at issue. *See CEMEX*, 133 F.3d at 904; *NTN Bearing Corp.*, 74 F.3d at 1208 (stating that it is particularly appropriate to permit Commerce to correct clerical errors where court is already remanding for other reasons); *see also Federal-Mogul Corp.*, 18 CIT at 1172–74, 872 F. Supp. at 1014–1016 (same).

It follows that, if the court's October 26, 2011 order had granted the Government's Motion for Correction of Ministerial Errors, the briefing schedule in this matter would have been established *after* publication of the amended final results – and there would be no need to amend the briefing schedule now. In this sense, to the extent that any unusual delay in this case may flow from the delay in granting

[17] The Domestic Producers have continued to be less than completely forthcoming. For example, as detailed herein, the Domestic Producers' most recent brief never acknowledges that the Domestic Producers' September 23, 2011 comments to Commerce objected to only one of the corrections that Commerce here seeks to make. *See* Pls.' Opposition to Motion for Reconsideration, *passim*. Instead, the Domestic Producers flatly assert that their September 23, 2011 comments "request[ed] that [Commerce] reject [the Chinese producers/exporters'] proposal to amend the final results." *See id*. at 2. Elsewhere, the Domestic Producers cast their arguments in this forum as a recitation and repetition of what they said in their opposition to the Government's Motion for Correction of Ministerial Errors – with no hint that those objections were not raised in their September 23, 2011 comments submitted to Commerce. *See*, *e.g.*, *id*. at 7 (stating that Domestic Producers "argued in their opposition to the [Government's] motion for leave to publish amended final results that [Fushun Jinly and the Fangda Group] should have identified and raised the alleged errors . . . in their case brief[s] before the final results were issued"). Moreover, as discussed elsewhere, at least one statement in the Domestic Producers' most recent brief is outright false. *See id*. at 9 (stating that Domestic Producers "have never opposed correction to the spelling of . . . Muzi's name"); *but see id*. at 10 (arguing that the Motion for Reconsideration – which, *inter alia*, seeks to permit Commerce to correct the spelling of Muzi's name – should be denied "in its entirety"); *see also* Pls.' Opposition to Def.'s Motion for Correction of Ministerial Errors at 7 (same). The effect, if not the intent, of such advocacy is to mislead.

Commerce leave to publish amended final results, the Domestic Producers have only their own lack of candor to blame.[18]

The Domestic Producers' final argument is that "the delay that amendment to the final results would cause is unnecessary because [Commerce] can and should make its proposed corrections in the process of judicial review, allowing the parties to review a draft remand." *See* Pls.' Opposition to Motion for Reconsideration at 8–9. This claim amounts to nothing less than a full frontal assault on Congress' statutory and regulatory framework enacted for the precise purpose of avoiding the use of the judicial review process to correct what are purely mere "ministerial errors." *See* H.R. Rep. No. 100–40, Pt. 1, at 144 (1987) (explaining that "ministerial errors" statute is intended to allow Commerce to administratively correct "essentially unintended errors," in order to avoid "expensive litigation that unnecessarily burdens the court system"). Accordingly, like the Domestic Producers' other claims, this argument too must be rejected.

C. *The Prejudice to Fushun Jinly, the Fangda Group, and Muzi*

As set forth immediately above, permitting Commerce to publish amended final results correcting the specified ministerial errors will result in no cognizable prejudice or harm to the Domestic Producers. On the other hand, as outlined below, refusing leave to publish the amended final results would perpetuate ongoing prejudice to Fushun Jinly and the Fangda Group, through the end of the judicial review process.

Because Fushun Jinly and the Fangda Group have included in their complaint counts challenging the three ministerial errors at issue related to their dumping margins (*see* Fushun Jinly/Fangda Group Complaint (Nov. 9, 2011), Counts 2–3), it is true that – as the Domestic Producers suggest – those errors conceivably could be litigated in this action and the errors ultimately corrected through the judicial process. Under such a scenario, however, the corrected duty deposit rates would not go into effect until judicial review was concluded. That outcome would directly contravene Congress' intent in enacting the ministerial errors statute, and, more concretely, would (as a practical matter) continue to subject imports of Fushun Jinly and Fangda Group merchandise to the excessive duty deposit rates that

[18] It bears noting that Fushun Jinly and the Fangda Group have offered no explanation as to why they did not file their Motion for Reconsideration earlier in this action. Under other circumstances, a failure to seek reconsideration at the earliest reasonable opportunity could be fatal to such a motion, particularly if another party suffered prejudice as a result of the delay.

are reflected in the existing Final Results – duty deposit rates that are artificially and mistakenly inflated by the ministerial errors that Commerce seeks to correct.

Prompt correction of the ministerial errors, via the administrative mechanism designed for that purpose by Congress, will result in a meaningful reduction in the duty deposit rates applicable to Fushun Jinly and the Fangda Group. Specifically, correction of the miscalculated SG&A and profit ratios applied to Fushun Jinly is projected to reduce Fushun Jinly's rate from the current 56.63% to approximately 39%. *See* Def.-Ints.' Motion for Reconsideration at 11.[19] Similarly, correcting the packing material cost calculations for the Fangda Group by using consistent units of measurement (whether kilograms or metric tons) is expected to reduce the Fangda Group's rate from the current 2.75% to approximately 1.5%. *See id*. As the Fangda Group notes, the effect of that error has been to "overstat[e] the freight component of the surrogate value of [the relevant] inputs *by a factor of 1,000*." *See id*. at 7–8 (emphasis added). By any measure, these corrections are significant.

Finally, one of the four ministerial errors that Commerce proposes to correct – *i.e.*, the spelling of Muzi's name in the Final Results – could never be corrected through the process of judicial review, because Muzi did not bring an action in this court appealing the misspelling of the company's name (or challenging any other aspect of the Final Results). The statutory process for the administrative correction of ministerial errors is therefore the sole avenue by which Muzi can be correctly identified in published final results.[20] *See generally NTN Corp.*, 32 CIT at ____, 587 F. Supp. 2d at 1316 (noting that

[19] Absent Court authorization, Fushun Jinly's duty deposit rate would not be reduced until the judicial review process is complete – even though the September 23, 2011 comments that the Domestic Producers filed with Commerce expressed no objection to Commerce's correction of Fushun Jinly's SG&A and profit ratios. *See* Letter from Domestic Producers (Sept. 23, 2011) (expressing no objection to correction of Fushun Jinly's SG&A and profit ratios).

[20] The Domestic Producers now state that they have never opposed Commerce's correction of the spelling of Muzi's name. *See* Pls.' Opposition to Motion for Reconsideration at 9. As explained above, however, the Government's original Motion for Correction of Ministerial Errors sought leave to correct the same four ministerial errors that are the subject of the motion here at bar – specifically, the misspelling of Muzi's name and the three other errors discussed herein. *See* Def.'s Motion for Correction of Ministerial Errors at 2. And, as discussed above, the Domestic Producers flatly opposed the Government's motion. *See* Pls.' Opposition to Def.'s Motion for Correction of Ministerial Errors at 7 (urging that the Government's Motion for Correction of Ministerial Errors be denied "in its entirety").

Moreover, the Domestic Producers have failed to explain how Commerce would be expected to correct the spelling of Muzi's name, other than by granting the agency leave to publish amended final results – a course that the Domestic Producers have continued to oppose. *See* Pls.' Opposition to Motion for Reconsideration at 10 (urging that the pending Motion for Reconsideration be denied "in its entirety").

correction of error "will affect the margins and deposit rates of producers/exporters who are not parties" to litigation challenging final results).

In short, the continued application of patently inaccurate duty deposit rates would work a substantial hardship on the Chinese producers/exporters and confer a windfall on the Domestic Producers. No party has the right to opportunistically exploit ministerial errors in Commerce's calculations to the detriment of other parties. That is precisely the type of administrative "evil" that Congress sought to prevent by authorizing the extra-judicial correction of ministerial errors in final results via the administrative process that Commerce properly seeks to use here. *See generally*, *e.g.*, *NTN Bearing Corp.*, 74 F.3d at 1208 (holding that Commerce abused its discretion in refusing to correct ministerial error, and noting, *inter alia*, that "[t]he affected U.S. industry is not entitled to [an excessive] remedy").

D. *The Interest of Judicial Economy*

As outlined above, permitting Commerce to publish amended final results correcting the ministerial errors at issue here will not result in any cognizable prejudice or fundamental unfairness to the Domestic Producers. Indeed, quite to the contrary, permitting Commerce to issue amended final results will prevent the perpetuation of prejudice and unfairness to the Chinese producers/exporters, and, moreover, will promote judicial economy, will conserve the resources of the parties and the Court, will ensure that the agency determination that is subject to judicial review in this proceeding is that which Commerce intended, and thus will be consonant with Congress' express intent as reflected in the statutory provision governing the correction of ministerial errors. *See generally* Def.-Ints.' Motion for Reconsideration at 12; Def.'s Renewed Motion for Correction of Ministerial Errors at 5, 9–10.

As section I above explains, Congress' rationale underlying the statutory and regulatory scheme designed specifically to permit Commerce to correct ministerial errors is Congress' desire to obviate the need for "expensive litigation that unnecessarily burdens the court system." *See* H.R. Rep. No. 100–40, Pt. 1, at 144 (1987). "The ministerial error provisions in the statute signify the importance Congress attached to Commerce's correcting ministerial errors promptly after issuance of final determinations in antidumping proceedings." *See NTN Corp.*, 32 CIT at ____, 587 F. Supp. 2d at 1315.

Congress' establishment of this special mechanism for the administrative correction of ministerial errors indicates "[a] legislative pref-

erence for determinations that are factually correct." *Koyo Seiko Co. v. United States*, 14 CIT 680, 683, 746 F. Supp. 1108, 1111 (1990). That preference reflects the fact that "fair and accurate determinations are fundamental to the proper administration of our dumping laws." *See id*., 14 CIT at 682, 746 F. Supp. at 1110; *see also NTN Bearing Corp.*, 74 F.3d at 1208 (stressing importance of accuracy in antidumping determinations); *Shandong Huarong*, 25 CIT at 848, 159 F. Supp. 2d at 727 (holding that restricting Commerce's power to correct ministerial errors would undermine the agency's "underlying obligation to calculate the most accurate dumping margins possible"). Thus, courts have, with only the rarest exceptions, "'uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination.'" *See Diamond Sawblades*, 34 CIT at ____, 2010 WL 850158 at * 3 (*quoting Koyo Seiko Co.*, 14 CIT at 682, 746 F. Supp. at 1110).[21]

In granting a similar motion for leave to publish amended final results, the court has previously pointed out that "time and effort will be saved if the subject of the judicial challenges . . . before this Court are what [Commerce] considers to be the true and accurate final results from the . . . administrative review[]." *See Federal-Mogul Corp.*, 16 CIT at 982, 809 F. Supp. at 112. The court further observed that "allowing the correction[] [of the ministerial errors in question] may eliminate many of the issues raised in . . . the complaints which have been filed . . . challenging the[] Final Results." *See id*.

In the instant case, Commerce's publication of amended final results will enhance the accuracy of the agency's determination, as well as promote the interests of judicial economy and conserve the resources of both the court and the parties. Specifically, two of the six counts in the complaint filed by Fushun Jinly and the Fangda Group relate to the ministerial errors which Commerce seeks to correct. *See* Fushun Jinly/Fangda Group Complaint (Nov. 9, 2011), Counts 2–3. According to Fushun Jinly and the Fangda Group, "[those] two causes of action in [their] complaint will be eliminated" if Commerce is granted leave to publish amended final results. *See* Def.-Ints.' Motion for Reconsideration at 12. In short, permitting Commerce to address the subject errors now, through the publication of amended final

[21] *See generally*, *e.g.*, *Shinhan Diamond*, 34 CIT at ____, 2010 WL 850169 at * 1–5; *NTN Corp.*, 32 CIT at ____, 587 F. Supp. 2d at 1315–18; *Hyundai Elecs.*, 29 CIT at 992–93, 395 F. Supp. 2d at 1242–43; *Peer Bearing Co. v. United States*, 23 CIT 454, 456, 57 F. Supp. 2d 1200, 1202–03 (1999); *Aramide*, 19 CIT at 1102–03, 901 F. Supp. at 360–62; *Koyo Seiko Co. v. United States*, 19 CIT 873, 882, 893 F. Supp. 52, 59 (1995), *aff'd*, 95 F.3d 1094 (Fed. Cir. 1996); *Federal-Mogul Corp.*, 18 CIT at 1171–76, 872 F. Supp. at 1014–17; *Federal-Mogul Corp.*, 16 CIT at 980–83, 809 F. Supp. at 111–12; *Asociacion Colombiana de Exportadores de Flores*, 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989).

results, can be expected to obviate a number of the issues currently before the Court, streamlining the litigation while reducing the costs and other burdens borne by the parties and the Court. The interests of judicial economy therefore weigh in favor of granting the requested relief.

IV. *Conclusion*

For all the reasons set forth above, the Motion for Reconsideration filed by Fushun Jinly and the Fangda Group, as well as the Government's Renewed Motion for Correction of Ministerial Errors, must be granted, and Commerce granted leave to publish amended final results correcting the ministerial errors discussed herein.

An order will enter accordingly.

Dated: February 22, 2012
New York, New York

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

Slip Op. 12–24

UNION STEEL and DONGBU STEEL CO., LTD., Plaintiffs, LG HAUSYS, LTD. and LG HAUSYS AMERICA, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, NUCOR CORPORATION and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00083

[Discretionary practice of weighted average dumping margin to include zeroing in administrative reviews of antidumping duty order upheld.]

Dated: February 27, 2012

Donald B. Cameron, Morris, Manning & Martin, LLP, of Washington, D.C., argued for plaintiffs and plaintiff-intervenors. With him on the brief were *Julie C. Mendoza*, *Mary S. Hodgins*, *Brady W. Mills*, and *R. Will Planert*.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, D.C., argued for defendant-intervenor Nucor Corporation. With him on the brief was *Alan H. Price*, *Lori E. Scheetz, Robert E. DeFrancesco, III*, and *Tessa V. Capeloto*. *Ellen J. Schneider*, Skadden, Arps, Slate Meagher & Flom, LLP, of Washington, D.C., argued for defendant-intervenor United States Steel Corporation. With her on the brief were *Jeffrey D.*

Gerrish, *Robert E. Lighthizer*, and *Ying Lin*.

OPINION

Restani, Judge:

INTRODUCTION

This consolidated antidumping duty matter is before the court following remand to the United States Department of Commerce ("Commerce") requiring it to explain its "zeroing" practice. *See Results of Redetermination Pursuant to Remand* at 3 (Oct. 13, 2011) (Docket No. 49) ("*Remand Results*"). The court has jurisdiction under 28 U.S.C. § 1581(c) because it is reviewing a final antidumping duty determination and it reviews such determinations for substantial evidence and, as in this matter, to decide if the agency determination complies with the applicable law. 19 U.S.C. § 1516a(b)(1)(B)(i).

Two relevant appellate decisions post-dated the original determination at issue here, *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*: *Notice of Final Results of the Sixteenth Administrative Review*, 76 Fed. Reg. 15,291 (Dep't Commerce Mar. 21, 2011) ("*Final Results*"). Those decisions are *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("Dongbu") and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) ("JTEKT"). Most pertinately, the court in *JTEKT* stated that Commerce there

> failed to address the relevant question – why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations? It is not illuminating to the continued practice of zeroing to know that one phase uses average-to-average comparisons while the other uses average-to-transaction comparisons. In order to satisfy the requirement set out in *Dongbu*, Commerce must explain why these (or other) differences between the two phases make it reasonable to continue zeroing in one phase, but not the other.

642 F.3d at 1384–85. Commerce has provided the explanation in the *Remand Results* and the court finds it sufficient to uphold the determination here.

Both *Dongbu* and *JTEKT* came as a surprise to many[1] because a long-line of cases seemed to allow Commerce great discretion in making the calculation at issue. It is necessary to discuss this line of

[1] Apparently, not to all. *See Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, Slip Op. 11–30, 2011 Ct. Intl. Trade LEXIS 28, *6–8 (CIT Mar. 22, 2011) wherein Judge Musgrave, in granting a stay pending an appellate resolution, opined that the precise issue now before the court was not settled.

precedent in order to address the first argument raised by Commerce and defendant-intervenor, i.e., that the appellate court was bound by its prior decision, and *Dongbu* and *JTEKT* cannot be followed. *See Remand Results* at 9–10; Def.'s Reply to Pls.' Cmts. upon the Remand Redetermination 15–16; Cmts. of Def.-Intervenor U.S. Steel Corp. on the Results of Redetermination Pursuant to Remand Issued by the Dep't of Comm. 7–8. It is also necessary to describe exactly what the essentially mathematical issue is that has caused so much consternation, so that the zeroing issue may be addressed on the merits. So we begin.

BACKGROUND[2]

As explained in the House Report and in the Statement of Administrative Action ("SAA") to the Uruguay Round Agreements Act ("URAA"), Commerce had a practice of calculating the amount of dumping by comparing an average of normal (or fair) values to individual export transaction prices both in investigations, which establish an antidumping duty order, and in subsequent administrative reviews of the order. H.R. Rep. No. 103–826, pt. 1, at 98 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773; Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177. That changed in 1995 because of the URAA. To quote the SAA:

> Section 229 of the bill adds new section 777A(d) [19 U.S.C. § 1677f–l(d)] to implement the provisions of the Agreement regarding the use of average normal values and export prices for purposes of calculating dumping margins. Although current U.S. law permits the use of averages on both sides of the dumping equation, Commerce's preferred practice has been to compare an average normal value to individual export prices in investigations and reviews. In part, the reluctance to use an average-to-average methodology has been based on a concern

[2] The Court of Appeals has recently concisely explained the basics of antidumping duty law in *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, Appeal No. 11–1040, 2012 U.S. App. LEXIS 2399, at *4–9 (Fed. Cir. Feb. 7, 2012). To quote one paragraph:

> Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market. Such a product can be described as being sold below "fair value." Dumping presents unfair competition concerns because foreign companies selling goods below fair value can undercut domestic producers selling those same goods at market prices. Congress attempted to offset the harmful effects of dumping by enacting the Tariff Act of 1930. This statute, in combination with other statutes and regulations, provides a complex framework for determining the extent to which an imported product is being dumped, and for calculating a duty rate that offsets the dumping.

Id. at *4.

> that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.
>
> Consistent with the Agreement, new section 777A(d)(1)(A)(i) provides that in an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices.

1994 U.S.C.C.A.N. at 4177. Thus, Commerce was forced to abandon the methodology it favored, and which it continued to use in reviews, and it switched to an average-to-average price comparison methodology in investigations.[3]

The parties' understandings of the methodologies at issue seem to be in agreement. Because Commerce is aiming for one weighted-average dumping margin to be applied to the imports of a producer/exporter, it has to deal in some way with the various forms of a product. Commerce gives each unique product a control number. As explained by plaintiffs in their post-argument submission:

> A "CONNUM" is a contraction of the term "control number," and is simply Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as "identical" merchandise for purposes of the price comparison. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the merchandise under investigation. The definition of the CONNUM in the instant corrosion-resistant steel sheet review consisted of 12 physical characteristics (e.g., grade, specification, thickness, width, etc.) and may be found in the record at PR Doc. 36 at Appendix IV. In the instant review Union Steel alone reported 690 unique CONNUMs in its home market and U.S. sales databases.

[3] The court is not going to distinguish among all the various ways of establishing a normal value, for which the paradigm is a price in the exporting/producing country, and some of which are not price based, or among the various ways of establishing the dumped price to the United States, either as export price or a constructed export price. For these purposes, the terms "normal value" and "export price" suffice to describe what is being compared.

Response of Pls. Union Steel, Dongbu Steel, LG Hausys, Ltd. and LG Hausys America, Inc. to the Ct.'s Invitation to Provide a Numerical Example of the Calculation of Dumping Margins ("Pls.' Example") 2 n.1 (citation omitted).

Thus, in an average-to-average comparison, Commerce takes average normal value for the CONNUM, or averaging group, and compares it to the average export price. The average margin for the averaging group is multiplied by the quantity of export price sales to derive an absolute dumping margin for the averaging group. Without zeroing, the absolute dumping margins for each averaging group are added together, and negative numbers may offset positive ones. The total dumping amount is divided by the total export price to achieve a weighted-average dumping margin, expressed as a percentage, for a specific exporter or producer. This is generally reflected in the definitional provision, 19 U.S.C. § 1677(35)(B). After a World Trade Organization ("WTO") decision holding that zeroing in average-to-average comparisons in antidumping investigations was contrary to U.S. international obligations, Commerce explained its abandonment of zeroing in average-to-average comparisons in *Antidumping Proceedings*: *Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*; *Final Modification*, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) ("*Final Modification*").

Prior to the *Final Modification*, Commerce "zeroed" in average-to-average comparisons. That is, after it computed an average dumping margin for each averaging group, if that averaging group (CONNUM) product did not have a positive dumping margin, Commerce set the margin at zero rather at a negative number that would offset a positive margin for another averaging group. Commerce did not remove the sales from the calculation to obtain the single aggregated weighted dumping margin. It simply did not permit the offset.

The average-to-average method is indeed inexact and may mask dumping of some unique products, as the SAA noted. *See* SAA, 1994 U.S.C.C.A.N. at 4177. It is further inexact because the averages in the CONNUM are based on the whole period of investigations. *See* 19 C.F.R. § 351.414(d)(3). The price comparisons in reviews are based on monthly averages for normal values. *See* 19 U.S.C. § 1677f–l(d)(2).

Now for the review methodology at issue here, which Commerce did not change in the *Final Modification*. For each CONNUM, Commerce uses the average normal value and on a month-to-month basis compares it to the individual United States transaction prices in that month. *Id.* If the result is a transaction which is not dumped, i.e., there is no margin, Commerce sets the margin for that transaction at

zero. *See Remand Results* at 12–13. Nonetheless, the sale price for the transaction goes into the denominator in calculating the final weighted-average dumping margin percentage, thereby lowering the percentage margin.[4]

Has this been approved by judicial precedents? The answer is "yes." Looking only at Court of Appeals for the Federal Circuit ("Court of Appeals") decisions, the court begins with *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004) ("*Timken*"). In considering a challenge to zeroing in an administrative review of an antidumping duty order on Japanese roller-bearings, the court stated that at a minimum, the statute "allow[s] for Commerce's construction" and that Commerce's methodology "makes practical sense." *Id.* at 1342. In *Corus Staal BV v. Dep't of Commerce*, with regard to an investigation of Dutch hot-rolled steel products, the Court of Appeals opined that there was insufficient distinction between investigations and reviews to *mandate* the elimination of zeroing based merely on the new post-Uruguay round methodology for averaging on both sides of the comparison. 395 F.3d 1343, 1347–48 (Fed. Cir. 2005) ("*Corus I*"). Zeroing in investigations thus was found permissible.

Next, in *NSK Ltd. v. United States*, zeroing was upheld in a bearings review, despite a WTO decision that had found the practice inconsistent with the governing international agreements. 510 F.3d 1375, 1379–80 (Fed. Cir. 2007). Then, in *Corus Staal BV v. United States*, upon Commerce's announcement of the elimination of zeroing in investigations in the *Final Modification*, the court stated that "our previous determination that Commerce's policy of zeroing is permissible under the statute applies to the challenged administrative review." 502 F.3d 1370, 1375 (Fed. Cir. 2007) (footnote omitted) ("*Corus II*"). After the United States formally changed its methodology in investigations to discontinue zeroing, the Court of Appeals upheld the change in methodology as reflecting "Commerce's reasonable interpretation of an ambiguous statute." *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1360 (Fed. Cir. 2010). It concluded further that "none of the cited statutory provisions speaks to the precise issue of zeroing – or offsetting – methodology." *Id.* "[T]he statute is silent." *Id.* Finally, "[w]e are bound by our previous decisions in *Timken* [review] and *Corus II* [investigation]" that the antidumping duty statute "does not unambiguously preclude – or require – Commerce to use zeroing methodology." *Id.* at 1361 (citation omitted).

[4] There is an Appendix to this opinion that demonstrates the two scenarios for investigations and the one for reviews. It was provided by plaintiffs, *see* Pls.' Example, and dramatically demonstrates the percentage differences that hypothetically may result. It is not a representation of any values in this matter.

The coffin finally appeared to be sealed by *SKF USA, Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011). This was another bearings review. Commerce was actively taking steps to eliminate zeroing in investigations. The court noted that in *Corus II*, 502 F.3d at 1375, it had been aware that the investigation methodology had changed, and that it was adhering to its approval of zeroing in reviews. *SKF*, 630 F.3d at 1375.

That leads to *Dongbu*. The court there noted many of its decisions on zeroing, but not specifically its holding on the issue in the latest *SKF* decision, just discussed. *See Dongbu*, 635 F.3d at 1365–68. The court stated that "we agree with Union that this court has never addressed the reasonableness of Commerce's interpretation of 19 U.S.C. § 1677(35) with respect to administrative reviews now that Commerce is no longer using a consistent interpretation. Accordingly, we are not bound by the prior cases and apply the *Chevron* [5] step two analysis anew." *Id.* at 1371. The court observed:

> The government argues, without explanation, that Congress contemplated that inconsistent interpretations might occur through the process of complying with adverse WTO decisions. We are not persuaded that Congress's intent is so clear. In addition, the government has not pointed to any basis in the statute for reading 19 U.S.C. § 1677(35) differently in administrative reviews that in investigations. Indeed, as noted above, it has previously argued the opposite. In the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is arbitrary.

Id. at 1372–73. This leads to the final case in the line, *JTEKT*, which echoed *Dongbu* and specifically asked for an explanation from Commerce, as set forth previously.

STATUTES AND REGULATIONS

19 U.S.C. § 1673. Imposition of antidumping duties

If –

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that –

(A) an industry in the United States –

(i) is materially injured, or

(ii) is threatened with material injury, or

[5] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall –

. . . . . .

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty,

. . . . . .

and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

(2) Determination of antidumping duties

(A) In general

For the purpose of paragraph (1)(B), the administering authority shall determine –

(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and

(ii) the dumping margin for each such entry.

19 U.S.C § 1677f–l. Sampling and averaging; determination of weighted average dumping margin and countervailable subsidy rate

(d) Determination of less than fair value

(1) Investigations

(A) In general

In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value –

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise,

. . . . . .

(2) Reviews

In a review under section 1675 of this title, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

19 U.S.C. § 1677. Definitions; special rules

(34) Dumped; dumping

The terms "dumped" and "dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

(C) Magnitude of the margin of dumping

The magnitude of the margin of dumping used by the Commission shall be–

(i) in making a preliminary determination under section 1673b(a) of this title in an investigation (including any investigation in which the Commission cumulatively assesses the volume and effect of imports under paragraph (7)(G)(i)), the dumping margin or margins published by the administering authority in its notice of initiation of the investigation;

(ii) in making a final determination under section 1673d(b) of this title, the dumping margin or margins most recently published by the administering authority prior to the closing of the

Commission's administrative record;

(iii) in a review under section 1675(b)(2) of this title, the most recent dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title, if any, or under section 1673b(b) or 1673d(a) of this title; and

(iv) in a review under section 1675(c) of this title, the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.

19 C.F.R. § 351.414 Comparison of normal value with export price (constructed export price).

(a) Introduction. The Secretary normally will average prices used as the basis for normal value and, in an investigation, prices used as the basis for export price or constructed export price as well. This section explains when and how the Secretary will average prices in making comparisons of export price or constructed export price with normal value. (See section 777A(d) of the Act.)

(b) Description of methods of comparison– (1) Average-to-average method. The "average-to-average" method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) Transaction-to-transaction method. The "transaction-to-transaction" method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) Average-to-transaction method. The "average-to-transaction" method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(c) Preferences. (1) In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made. [This is even less used than implied and is not relevant here.]

(2) In a review, the Secretary normally will use the average-to-transaction method.

(d) Application of the average-to-average method – (1) In general. In applying the average-to-average method, the Secretary will identify those sales of the subject merchandise to the United States that are comparable, and will include such sales in an "averaging group." The Secretary will calculate a weighted average of the export prices and the constructed export prices of the sales included in the averaging group, and will compare this weighted average to the weighted average of the normal values of such sales.

(2) Identification of the averaging group. An averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. In identifying sales to be included in an averaging group, the Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as the Secretary considers relevant.

(3) Time period over which weighted average is calculated. When applying the average-to-average method, the Secretary normally will calculate weighted averages for the entire period of investigation or review, as the case may be. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation or review, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.

(e) Application of the average-to-transaction method– (1) In general. In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.

(2) Contemporaneous month. Normally, the Secretary will select as the contemporaneous month the first of the following which applies:

(i) The month during which the particular U.S. sale under consideration was made;

(ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product.

(iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the

month of the U.S. sale in which there was a sale of the foreign like product.[6]

DISCUSSION

The first issue raised by the parties is whether the court should disregard *Dongbu* and *JTEKT* as contrary to binding Court of Appeals precedent. *See Newell Companies, Inc. v. Kenny Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1989) (holding that if panel decisions conflict, the earlier case controls); *U.S. Steel Corp.*, 621 F.3d at 1361 (applying the rule that earlier decisions prevail unless overturned en banc) (citation omitted). One might argue that the *JTEKT* court might have followed the last *SKF* case, instead of *Dongbu*, but the *Dongbu* court clearly stated it had a new issue before it, 635 F.3d at 1371, and *JTEKT* agreed, 642 F.3d at 1384–85.[7] Thus, the Circuit apparently has decided that *Dongbu* is not to be disregarded as a failure to follow *stare decisis*. Whatever the Court of Appeals decides on this issue, if it is squarely before it, it would appear that this court should conclude for this case that it is bound by *JTEKT* 's view of the issue. That is, *stare decisis* does not apply. Thus, what is the new issue?

Perhaps, more background will assist in presenting the problem. Domestic industry interests, which favor zeroing, have argued in the past that the word "exceeds," which is found in the basic antidumping provision, 19 U.S.C. § 1673 (dumping occurs when "the normal value exceeds the export price . . ."), and in the definitional provision, 19 U.S.C. § 1677(35), mandates zeroing. *See, e.g.*, *Timken*, 354 F.3d at 1341. That is, "exceeds" must mean that when making the comparisons in the averaging groups, the negative results must be disregarded or, as stated otherwise, normal value does not exceed export price so the sales are not dumped, and must not be counted. *Id.* This absolute view has been rejected time and again, as demonstrated. Furthermore, why does "exceeds" refer just to one way of computing a dumping margin, and beyond that, one particular step is the one way? Why does "exceeds" require a particular calculation for the

[6] The court notes that the United States has reached an agreement with other WTO members to limit or end zeroing in reviews. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Dep't Commerce Feb. 14, 2012). Completed reviews such as is before the court are unaffected. The agreement will result in a new 19 C.F.R. § 351.414 that permits monthly average-to-average calculations in reviews. As in investigations, average-to-average calculations will not be zeroed. The court expresses no opinion on whether use of average-to-average calculations in reviews is permissible.

[7] Examination of the appellate briefs in *SKF* reveal that the focus was on the impact of WTO decisions and not the statutory language. *See, e.g.*, Brief for Plaintiffs–Appellants, *SKF*, (No. 10–1128), 2010 WL 894953, at *32–40; Brief for Defendant–Appellee, *SKF*, (No. 10–1128), 2010 WL 2320599, at *24–25.

aggregate? The Court of Appeals does not appear to have concluded anything like that. Furthermore, "exceeds" is not found in just the definitions in 19 U.S.C. § 1677(35), describing dumping margins and weighted-average dumping margins. It is used in 19 U.S.C. § 1673, in a very general way to describe the basic inquiry at issue, and in the same words as are used in 19 U.S.C. § 1677(35). As stated by the Court of Appeals, specific antidumping calculation methodology is not set forth in the statute. *See U.S. Steel Corp.*, 621 F.3d at 1361.

In a masterful about face, plaintiffs want the court to mandate "exceeds" to mean "not zeroing," exactly the opposite of what the domestic industry has attempted. That is, plaintiffs essentially argue that if Commerce now reads "exceeds" as leading to a non-zeroing methodology in investigations, it must read it as requiring non-zeroing in reviews. *See* Cmts. of Pls. Union Steel, Dongbu Steel and LG Hausys on Comm.'s Remand Results 3, 11 n.7. In other words, the court must mandate not zeroing. As plaintiffs specifically argue that having two methods is arbitrary, they likely must admit that zeroing in both types of proceedings is acceptable. Of course, they would be safe in making such an admission because Commerce had committed to not zeroing in average-to-average comparisons used in investigations in order to satisfy international commitments.

Whether or not Commerce, in the past, has agreed with the domestic industry and used "exceeds" as one justification for zeroing, it is no more right when it does that, than if it were to attempt the opposite, as plaintiffs do here. In this context, "exceeds" decides nothing. So, it was understandable for the Court of Appeals to ask Commerce, what are you doing? Are you interpreting the word "exceeds" to mean opposite things? This is the new issued raised by these plaintiffs and addressed by *Dongbu* and *JTEKT*. The court will turn to it now.

Plaintiffs argue that "dumping margin" is defined in 19 U.S.C. § 1677(35)(A) to refer specifically to the first step in Commerce's calculation methodology, comparisons within a CONNUM, and that "dumping margins" has this one particularly meaning. But "dumping margin" is itself a very general term that sometimes means "dumping margin" as a comparison and sometimes actually means "weighted-average dumping margin" as a percentage, plaintiffs' "step two." *See* Pls.' Example at 3. In other words, the term defined in 19 U.S.C. § 1677(35)(A), in some contexts, has the meaning expressed in 19 U.S.C. § 1677(35)(B). One example that comes to mind is found in 19 U.S.C. § 1677(35) itself, that is, in part (C) thereof.

The International Trade Commission ("ITC"), in performing the injury determination referred to in 19 U.S.C. § 1673, may examine

the magnitude of the margin of dumping. *See* 19 U.S.C. § 1677(7)(B). 19 U.S.C. § 1677(35)(C) defines "magnitude of the dumping margin" with reference specifically to "dumping margin." But, as plaintiffs agreed at oral argument, Commerce does not publish the individual margins found in the CONNUM comparisons, which is what plaintiffs say is defined by 19 U.S.C. § 1677(35)(A). Rather, Commerce provides for ITC's purposes, among others, the weighted-average dumping margin percentage calculated for specific companies. If "dumping margin" in 19 U.S.C. § 1677(35)(A) were meant to be as specific as plaintiffs argue, the practice under § 1677(35)(C) would be impossible and the statute would not make sense. For example, some of the comparison numbers are likely proprietary and would not be useful for this purpose.

Furthermore, turning to 19 U.S.C. § 1675(a)(2), the statute refers to a "dumping margin" for each entry. In a typical review, there is no "dumping margin," in the sense plaintiffs use the term, for each entry. There are weighted-average dumping margin percentages, which eventually are translated into assessment rates to be applied to each entry. *See* 19 C.F.R. § 351.212(b). Once again, if the statute had one common meaning for the words which define "dumping margin," the statute could not function.

This is the court's understanding of essentially why the Court of Appeals has never read "exceeds" to mandate anything, particularly "not zeroing," and why plaintiffs' attempt to mandate "not zeroing" is futile. Commerce is not reading "exceeds" to mean two things. It is reading it as basically irrelevant to the calculation methodology, whether it expresses its view in that manner or not.

The court now turns to Commerce's attempt to answer the Court of Appeals' question as to why as a matter of discretion and reasonable practice, it chose to continue zeroing in reviews, but ceased doing so in investigations. Commerce offers three reasons. The first has been summarized by the court and it is essentially that zeroing has been the preferred method and it has been upheld as permissible. *See Remand Results* at 3–9. Reading *Dongbu* and *JTEKT*, the court concludes that this reason is insufficient to satisfy the inquiry of the Court of Appeals.

The second reason is that Commerce decided upon the various procedures implicated here as a result of a decision by the United States to accede to WTO dispute settlement opinions. *See Remand Results* at 9–10; *see also Final Modification*, 71 Fed. Reg. at 77,722. Commerce's view is that, if the statute is silent, it is free to make a limited change to its practice in investigations. *Remand Results* at

9–10. The court agrees. While *Dongbu* rejected this as a reason "standing alone" to support the two different approaches, 635 F.3d at 1372, it is at least part of a total rationale for Commerce's choice. The court concludes that because the statute is silent, it is within Commerce's discretion to adopt a new reasonable methodology to meet international obligations. Because apparently the Court of Appeals focused on the one word that has been used obsessively by all sides, it likely viewed this as a pure statutory interpretation problem, and the parties did not argue otherwise. *See JTEKT*, 642 F.3d at 1384–85. This, however, is not a simple statutory interpretation issue.

Commerce has wide latitude to bring its practices into WTO compliance. If Commerce needs a statutory change to comply, it must seek that change before it acts. *See* 19 U.S.C. §§ 3533, 3538 [URAA §§ 123, 129]. Commerce may, however, change its practices to comply, if they do not violate the statute. *See id.* §§ 3533(g), 3538(b). It was just this type of change permitted by 19 U.S.C. § 3533 and § 3538 that the court approved for investigations in *United States Steel Corp.*, 621 F.3d at 1354–55, 1363.[8] The court concludes that whether the partial change is permitted is best looked at as whether Commerce abused its discretion in coming into compliance. Because this may not be how the Court of Appeals concludes the issue should be analyzed, the court further examines the issue under all potentially applicable forms of inquiry. It is likely that in this context, the standards are indistinguishable. Thus, to determine whether adherence to the prior zeroing practice in reviews is acceptable, reasonable, not an abuse of discretion, and not arbitrary, the court turns to Commerce's third reason.

While the court does not conclude that Commerce's methodologies, as applied, give any particular words in the statute contrary meanings, terms may be interpreted differently in different contexts. *See FAG Kugelfischer George Schafer AG v. United States*, 332 F.3d 1370, 1373 (Fed. Cir. 2003) (different interpretations of "foreign like product" upheld). Thus, the third reason focuses on the differences in proceedings, specifically, the inherent differences in investigations and reviews, which provide the context for different calculation methodologies. *See Remand Results* at 11–14. There was no explanation of record at all before the court in *Dongbu* and the explanation of the significance of the differences was missing in *JTEKT*. *See Dongbu*,

[8] Commerce relies on *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) to bolster its changes in practice. That precedent may or may not support the view that Commerce acts reasonably when it conforms itself to international norms, but it does not answer the question of whether Commerce should also move further and change its practice in reviews. Moreover, there is no binding precedent applying *Charming Betsy* to efforts to comply with WTO decisions, as opposed to customary international law.

635 F.3d at 1372; *JTEKT*, 642 F.3d at 1384. While these differences have never been found sufficient to mandate different approaches, *see, e.g.*, *Corus I*, 395 F.3d at 1346–47, they are sufficient to permit different approaches.

Commerce now states that its new investigation approach focuses on overall pricing behavior of an exporter in order to establish an antidumping duty order. *Remand Results* at 13. Thus, positive margins in one CONNUM may be offset by negative margins in another. *Id.* As indicated, this approach was upheld in *United States Steel Corp.*, 621 F.3d at 1360–61, and is supported by the statute.

When the statutory change following the Uruguay Round forced Commerce to switch to the average-to-average approach, there was much less reason remaining to look for a particular type of specificity in the investigation calculation. As a result, Commerce might have abandoned zeroing for investigations at that time. Commerce, however, generally moves incrementally in changing its practices.[9] Specificity is less important in investigations in that CONNUM averages in investigations are not even monthly averages, as they are in reviews. Rather, they are averages over a broad time period compared to all other broad averages. *See* 19 U.S.C. § 1677f–l(d); 19 C.F.R. § 351.414(d)(3), (e). On the other hand, when it comes to setting the final rates to be used for actual assessment, i.e., the review rates, it is reasonable for the agency to look for more accuracy, which it achieves in some measure through monthly averaging, and also for the agency to look for the full measure of duties resulting therefrom, which it better achieves through zeroing.

The parties who are marginally dumping or not dumping may be excluded from the order pursuant to the looser standards of the investigation, particularly after zeroing is eliminated. *See, e.g.*, 19 U.S.C. §§ 1673d(a)(4), 1673b(b)(3) (providing in investigations *de minimis* treatment for margins of less than 2%). Once a party's overall selling behavior has led it to be placed under the discipline of the antidumping duty order, however, it is not unreasonable for Commerce to attempt to counteract as much dumping behavior as it can. *See, e.g.*, 19 C.F.R. § 351.106(c) (providing in reviews for a 0.5% *de minimis* rate). Thus, Commerce continued to zero in reviews.

Of course, it is true that sometimes rates in the investigation can become part of the final assessment rates. That is, the parties may forego an administrative review. *See* 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.212(a). The court has no problem with parties, both domestic

[9] Some permissible, but not mandatory, changes from extant practices that would be of benefit to foreign producers might not be made immediately for positioning in future multilateral negotiations.

and foreign, giving up rights to more specific calculations. The court also understands that parties who want reviews do not always get them. That is, they may not be chosen as mandatory respondents and a voluntary request for review may be rejected if Commerce decides it is too burdened. *See, e.g.*, *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, Slip Op. 12–09, 2012 Ct. Int'l Trade LEXIS 9, *47–56 (CIT Jan. 18, 2012) (remanding for explanation of rejection of voluntary review.) Whether Commerce is too stringent in rejecting requests for reviews has no particular bearing on this inquiry. That is a matter to be resolved in other cases. Here, the court concludes that when it comes to reviews, which are intended to more accurately reflect commercial reality, Commerce is permitted to unmask dumping behavior in a way that is not necessary at the investigation stage.

CONCLUSION

In sum, the statute does not dictate a particular manner of calculating a weighted-average dumping margin percentage. Neither does it specify, for average-to-average comparisons in investigations or for average-to-transaction comparisons in reviews, how to find the numbers that are weight averaged to get a usable percent dumping margin. The statute does restrict the comparison in reviews to monthly averages. That is essentially all it does in this regard. The statute does not say whether to use or not use a zeroing methodology in computing the weighted-average dumping margin percentage.

Commerce did not abuse its discretion in changing its investigation methodology, but not its review methodology, in the *Final Modification* in response to WTO decisions. Commerce acted reasonably in applying the antidumping statute to conform to the different purposes of investigations and reviews. Commerce's practices are not arbitrary in this regard.

The court takes no position as to whether Commerce may forego zeroing in reviews going forward, in average-to-transaction or average-to-average comparisons. The court holds that the methodology at issue here is permissible, not that any particular methodology is required.

The determination of Commerce is SUSTAINED.

Dated this 27th day of February, 2012.

New York, New York.

/s/ Jane A. Restani

JANE A. RESTANI JUDGE

APPENDIX

Average-to-Average Comparisons (without Zeroing)

	Home Market					U.S. Market							
Month	Sale #	Quantity A	Unit Price B	Total Price C=A*B	POI Average Price D=C/A	Sale #	Quantity E	Unit Price F	Total Price G=E*F	POI Average Price H=G/E	Absolute Dumping Margin (1677(35)(A)) I=(D-H)*E	Zeroing of Negative Margins	Weighted-Average Dumping Margin (1677(35(B))
Product 1													
June	1	50	1200	60,000		1	250	1000	250,000				
June	2	100	1000	100,000		2	100	1100	110,000				
June	3	150	800	120,000		3	150	900	135,000				
November	4	250	1100	275,000		4	250	1100	275,000				
November	5	150	800	120,000		5	150	900	135,000				
November	6	200	700	140,000		6	200	900	180,000				
		900		815,000	905.56		1,100		1,085,000	986.36	**-88,889**	N/A	
Product 2													
April	7	100	800	80,000		7	100	700	70,000				
April	8	150	700	105,000		8	150	600	90,000				
April	9	200	600	120,000		9	200	500	100,000				
September	10	100	700	70,000		10	250	700	175,000				
September	11	50	700	35,000		11	150	600	90,000				
September	12	150	600	90,000		12	200	500	100,000				
		750		500,000	666.67		1,050		625,000	595.24	75,000	N/A	
Product 3													
March	13	75	1600	120,000		13	75	1500	112,500				
March	14	25	1400	35,000		14	150	1400	210,000				
March	15	50	1200	60,000		15	50	1300	65,000				
October	16	125	1500	187,500		16	125	1400	175,000				
October	17	50	1300	65,000		17	50	1200	60,000				
October	18	75	1100	82,500		18	75	1000	75,000				
		400		550,000	1,375.00		525		697,500	1,328.57	24,375	N/A	
								Total	2,407,500 J		10,486 K		**0.44%** L=K/J

Average-to-Average Comparisons (with Zeroing)

	Home Market					U.S. Market							
Month	Sale #	Quantity A	Unit Price B	Total Price C=A*B	POI Average Price D=C/A	Sale #	Quantity E	Unit Price F	Total Price G=E*F	POI Average Price H=G/E	Absolute Dumping Margin (1677(35)(A)) I=(D-H)*E	Zeroing of Negative Margins	Weighted-Average Dumping Margin (1677(35(B))
Product 1													
June	1	50	1200	60,000		1	250	1000	250,000				
June	2	100	1000	100,000		2	100	1100	110,000				
June	3	150	800	120,000		3	150	900	135,000				
November	4	250	1100	275,000		4	250	1100	275,000				
November	5	150	800	120,000		5	150	900	135,000				
November	6	200	700	140,000		6	200	900	180,000				
		900		815,000	905.56		1,100		1,085,000	986.36	**-88,889**	**0**	
Product 2													
April	7	100	800	80,000		7	100	700	70,000				
April	8	150	700	105,000		8	150	600	90,000				
April	9	200	600	120,000		9	200	500	100,000				
September	10	100	700	70,000		10	250	700	175,000				
September	11	50	700	35,000		11	150	600	90,000				
September	12	150	600	90,000		12	200	500	100,000				
		750		500,000	666.67		1,050		625,000	595.24	75,000	75,000	
Product 3													
March	13	75	1600	120,000		13	75	1500	112,500				
March	14	25	1400	35,000		14	150	1400	210,000				
March	15	50	1200	60,000		15	50	1300	65,000				
October	16	125	1500	187,500		16	125	1400	175,000				
October	17	50	1300	65,000		17	50	1200	60,000				
October	18	75	1100	82,500		18	75	1000	75,000				
		400		550,000	1,375.00		525		697,500	1,328.57	24,375	24,375	
								Total	2,407,500 J			99,375 K	**4.13%** L=K/J

Average-to-Transaction Comparisons (without Zeroing)

	Home Market				U.S. Market						
Month	Sale #	Quantity A	Unit Price B	Total Price C=A*B	Monthly Average Price D=C/A	Sale #	Quantity E	Unit Price F	Total Price G=E*F	Absolute Dumping Margin (1677(35)(A)) H=(D-F)*E	Zeroing of Negative Margins	Weighted-Average Dumping Margin (1677(35(B))
Product 1												
June	1	50	1200	60,000		1	250	1000	250,000	**-16,667**	N/A	
June	2	100	1000	100,000		2	100	1100	110,000	**-16,667**	N/A	
June	3	150	800	120,000		3	150	900	135,000	5,000	N/A	
		300		280,000	933.33		500		495,000			
November	4	250	1100	275,000		4	250	1100	275,000	**-52,083**	N/A	
November	5	150	800	120,000		5	150	900	135,000	**-1,250**	N/A	
November	6	200	700	140,000		6	200	900	180,000	**-1,667**	N/A	
		600		535,000	891.67		600		590,000			
Product 2												
April	7	100	800	80,000		7	100	700	70,000	**-2,222**	N/A	
April	8	150	700	105,000		8	150	600	90,000	11,667	N/A	
April	9	200	600	120,000		9	200	500	100,000	35,556	N/A	
		450		305,000	677.78		450		260,000			
September	10	100	700	70,000		10	250	700	175,000	**-12,500**	N/A	
September	11	50	700	35,000		11	150	600	90,000	7,500	N/A	
September	12	150	600	90,000		12	200	500	100,000	30,000	N/A	
		300		195,000	650.00		600		365,000			
Product 3												
March	13	75	1600	120,000		13	75	1500	112,500	**-5,000**	N/A	
March	14	25	1400	35,000		14	150	1400	210,000	5,000	N/A	
March	15	50	1200	60,000		15	50	1300	65,000	6,667	N/A	
		150		215,000	1,433.33		275		387,500			
October	16	125	1500	187,500		16	125	1400	175,000	**-7,500**	N/A	
October	17	50	1300	65,000		17	50	1200	60,000	7,000	N/A	
October	18	75	1100	82,500		18	75	1000	75,000	25,500	N/A	
		250		335,000	1,340.00		250		310,000			
								Total	2,407,500 I	18,333 J		0.76% K=J/I

Average-to-Transaction Comparisons (with Zeroing)

	Home Market					U.S. Market						
Month	Sale #	Quantity A	Unit Price B	Total Price C=A*B	Monthly Average Price D=C/A	Sale #	Quantity E	Unit Price F	Total Price G=E*F	Absolute Dumping Margin (1677(35)(A)) H=(D-F)*E	Zeroing of Negative Margins	Weighted-Average Dumping Margin (1677(35(B))
Product 1												
June	1	50	1200	60,000		1	250	1000	250,000	**-16,667**	**0**	
June	2	100	1000	100,000		2	100	1100	110,000	**-16,667**	**0**	
June	3	150	800	120,000		3	150	900	135,000	5,000	5,000	
		300		280,000	933.33		500		495,000			
November	4	250	1100	275,000		4	250	1100	275,000	**-52,083**	**0**	
November	5	150	800	120,000		5	150	900	135,000	**-1,250**	**0**	
November	6	200	700	140,000		6	200	900	180,000	**-1,667**	**0**	
		600		535,000	891.67		600		590,000			
Product 2												
April	7	100	800	80,000		7	100	700	70,000	**-2,222**	**0**	
April	8	150	700	105,000		8	150	600	90,000	11,667	11,667	
April	9	200	600	120,000		9	200	500	100,000	35,556	35,556	
		450		305,000	677.78		450		260,000			
September	10	100	700	70,000		10	250	700	175,000	**-12,500**	**0**	
September	11	50	700	35,000		11	150	600	90,000	7,500	7,500	
September	12	150	600	90,000		12	200	500	100,000	30,000	30,000	
		300		195,000	650.00		600		365,000			
Product 3												
March	13	75	1600	120,000		13	75	1500	112,500	**-5,000**	**0**	
March	14	25	1400	35,000		14	150	1400	210,000	5,000	5,000	
March	15	50	1200	60,000		15	50	1300	65,000	6,667	6,667	
		150		215,000	1,433.33		275		387,500			
October	16	125	1500	187,500		16	125	1400	175,000	**-7,500**	**0**	
October	17	50	1300	65,000		17	50	1200	60,000	7,000	7,000	
October	18	75	1100	82,500		18	75	1000	75,000	25,500	25,500	
		250		335,000	1,340.00		250		310,000			
								Total	2,407,500 I		133,889 J	5.56% K=J/I

Slip Op. 12–25

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

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

[Commerce's remand determination affirmed.]

Dated: February 29, 2012

Ronald M. Wisla and *Lizbeth R. Levinson*, Kutak Rock LLP, of Washington, DC, for Plaintiff.

Patryk J. Drescher and *Alexander V. Sverdlov*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington DC.

Gregory C. Dorris, Pepper Hamilton LLP, of Washington, DC, for Defendant-Intervenors.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This action returns to court following the remand ordered by *Trust Chem. Co. v. United States*,__ CIT __, 791 F. Supp. 2d 1257 (2011) ("*Trust Chem I*"). *Trust Chem I* required that the Department of Commerce ("Commerce" or "the Department") reconsider data it had selected to value the nitric acid used to produce Plaintiff's merchandise.

In Commerce's *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 51("*Remand Results*"), the Department continues to value nitric acid using the data selected prior to the court's remand order. Plaintiff again challenges Commerce's data selection.

The court has jurisdiction pursuant to 28 U.S.C. § 1581 (c)and § 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (2006). [1]

As explained below, the court concludes that, on the basis of the record here, a reasonable mind could find that Commerce's choice constitutes the best data available. Commerce's *Remand Results* are therefore affirmed.

[1] All subsequent citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

BACKGROUND

Facts necessary to the disposition of the Remand Results are the following:[2]

The data at issue comes from the World Trade Atlas ("WTA data").[3] Using this database, in the final results of the fourth administrative review of the antidumping order covering Plaintiff's merchandise imported from the People's Republic of China,[4] Commerce selected, for nitric acid, a value of $10,474 USD/MT.[5]

Plaintiff sought review of Commerce's choice, arguing that: (A) alternative data it proposed was more specific to, and hence more representative of, the nitric acid used in producing its merchandise, and (B) the WTA data was aberrational or unrepresentative.

In *Trust Chem I*, the court affirmed Commerce's rejection of Plaintiff's specificity claim. Although the record indicated that "'high' strength 98 percent nitric acid [was] used in the production of Trust Chem's merchandise[,]" *Trust Chem I* at 1262, and that "weak" and "high strength" nitric acid had different values, it did not establish the concentration level of the nitric acid for the values proposed by

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[2] Familiarity with the court's prior decision is presumed.

[3] 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.*, Original Admin. R. Pub. Doc. 34 at 2–3 (referring to *http://www.gtis.com/wta.htm.*); *see also* Original R. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 3 n.2, ECF No. 40 ("Original R. Def.'s Br.").

[4] *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), Original Admin. R. Pub. Doc. 63 ("*I & D Mem.*") (adopted in *Final Results*, 75 Fed. Reg. at 36,631.). The period of review ("POR") was December 1, 2007 to November 30, 2008. Commerce conducts administrative reviews of antidumping duty orders pursuant to 19 U.S.C. § 1675.

[5] Because the goods at issue come from China, Commerce employed its rules and practices for non-market economies ("NMEs") in these proceedings. In administrative proceedings involving goods from an NME, Commerce may approximate the normal value of the goods based on "surrogates" for the value of their "factors of production" ("FOP"). 19 U.S.C. § 1677b(c). 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.

Within certain statutory limitations, Commerce, using criteria established by regulation and practice, selects specific surrogate values in each individual administrative proceeding, by choosing the "best available information[.]" 19 U.S.C. § 1677b(c)(1)(B).

any party.[6] Consequently, based on the record as it then stood, the court rejected Plaintiff's claim that there was only one reasonable choice for the value to be selected for the nitric acid at issue. *Trust Chem I* at 1262–63. However, the court remanded the case for Commerce to more adequately demonstrate that the WTA data it did select was a reasonable, not aberrational, choice, when compared to other record data. *Trust Chem I* at 1268–69 ("Commerce's job is to compare the data on the record and provide an explanation that considers the important aspects of the problem presented." (citation omitted)).[7] The court also invited Commerce to re-open the record to obtain appropriate data for comparison.

> [T]he 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.

Trust Chem I at 1268 n.28.

On remand, Commerce re-opened the record, but Plaintiff chose not to submit evidence that would demonstrate the relationship between prices and concentration levels for nitric acid. *Remand Results* at 23 ("Trust Chem was free to place information on the record regarding nitric acid prices and concentration levels, but chose not to.").[8]

For its part, Commerce placed historical WTA data on the remand record (December 2003-November 2008) for India and other potential surrogate countries, and issued a letter requesting comments from the parties. This historical data showed a wide variation in the value of nitric acid for imports into the different countries.

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[6] *See Remand Results* at 10. Unlike the original investigation and the first administrative review, here the record indicated that "the producer used nitric acid with a concentration level of 98 percent to manufacture [Plaintiff's merchandise]." In the original investigation, Commerce found WTA data suggesting a value of more than $4,000 USD/MT to be aberrational. *See Trust Chem I* at 1267.

[7] In Trust Chem I, the court also noted that Commerce had failed to discuss the value for nitric acid originally submitted by Defendant-Intervenors ("Petitioners"), even though that value was substantially less than the WTA value Commerce selected. *Trust Chem I* at 1267–68. On remand, Petitioners revised their original submission.

> [P]etitioners contend their originally proposed surrogate value of $839.44 per MT from the Indian Department of Commerce's Export Import Data Bank was flawed because it was based on the only data available to them at that time, which were values from 2007–2008 and quantities from 2008–2009 (Apr-Dec). Petitioners also claim the conversion to U.S. dollars was not done properly. Petitioners argue that when the conversion to U.S. dollars is done properly, the AUV [Average Unit Value] is $10,211 per MT. . . .

Remand Results at 6.

[8] Plaintiff does not challenge this finding.

> [W]e examine the AUVs computed for each of those countries for the December 2007 through November 2008 POR, which are as follows: $457 per MT (Philippines); $508 per MT (Indonesia); $548 per MT (Peru); $1,556 per MT (Colombia); $3,894 per MT (Thailand); and $10,474 per MT (India)[the latter value being that used in Commerce's original *Final Results*].

Remand Results at 11.

Considering these alternatives, Commerce decided that "the WTA AUV used in the *Final Results* appears to be consistent with the higher price range one would expect for 98 percent nitric acid." Department of Commerce Draft Results of Redetermination Pursuant to Court Remand Carbazole Violet Pigment 23 from the People's Republic of China, Remand Admin. Pub. Doc. 9 at 14 ("*Draft Remand Results*"); *see also Remand Results* at 26 ("For the reasons stated above, the Department has not made any changes to its Draft Remand Results").

Commerce acknowledged that the record did not contain "specific evidence to demonstrate the actual concentration(s) of nitric acid imported into India and the other potential surrogate countries." *Id*. at 13. Commerce reasoned, however, that:

> information on the record indicates the safe storage and transport of higher concentrations of nitric acid, including 98 percent nitric acid, requires different, more stringent methods, leading to increased costs. . . . Petitioners also offer a monthly breakdown of the nitric acid import quantities for India and the other potential surrogate countries during the POR and argue the relatively smaller quantities and unit value of Indian imports are in line with concentrated nitric acid imports packed in Teflon or glass containers. . . . While these monthly data do not specify concentration levels, it is notable that [the other potential surrogate value countries, i.e.,] Peru, the Philippines, and Indonesia, the countries with relatively lower AUVs, imported relatively larger quantities on a monthly basis, whereas India, with its relatively higher AUV, imported comparatively smaller volumes on a monthly basis. Since the record indicates it is more difficult and costly to store and ship higher concentration nitric acid, the data suggest the larger volume of imports into Peru, the Philippines, and Indonesia likely would have consisted of lower concentrations of nitric acid.

Id. at 14 (citations omitted).

To corroborate its analysis, Commerce also:

> considered the [U.S.] price list data [submitted by the Petitioners] as a measure of how the concentration level of nitric acid reflects price. [footnote omitted] *See* the Draft Remand Determination at 13 (stating "the per-MT price of 98 percent nitric acid is $10,738 (based on the 30 gallon price quoted in the price list) and $13,907 (based on the 15 gallon price)" and noting that "we have considered {these prices} as a measure of how the concentration level of nitric acid affects price"). . . .

Remand Results at 24–25.

In addition, the Department determined that the Indian WTA value for nitric acid was not aberrational as it was stable over the five-year period examined. *Remand Results* at 14.

As noted above, Plaintiff now challenges Commerce's remand determination.

STANDARD OF REVIEW

Under the court's familiar standard of review, the Department must, in its remand redetermination, comply with the terms of the court's remand order. *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009). 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).

DISCUSSION

Plaintiff presents four objections to Commerce's *Remand Results*, claiming that A) they are not responsive to the remand order; B) they are not supported by substantial evidence; C) they improperly rely on U.S. nitric acid prices; and D) they produce absurd results. Pl.'s Cmts. to Commerce's Redetermination Pursuant to Remand 1–12, Dec. 19, 2011, ECF No. 54 ("Pl.'s Cmts."). The court will consider each objection in turn.

A. Compliance with the court's order.

Plaintiff argues that Commerce failed to comply with the remand order, and a second remand is necessary, because the remand results continue to lack usable surrogate value information that is specific to Trust Chem's supplier's nitric acid. Pl.'s Cmts. at 2.

But Plaintiff has only itself to blame for the weaknesses in the record – it was Plaintiff that failed to adequately respond to Com-

merce's decision to re-open the record. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("Although Commerce has authority to place documents in the administrative record that it deems relevant, 'the burden of creating an adequate record lies with [interested parties] and not with Commerce.'" (alteration in original) (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). Commerce is not required to find all conceivable data in order to comply with the law. *Makita Corp. v. United States*, 21 CIT 734, 753, 974 F. Supp. 770, 787 (1997). Def.'s Resp. to Pl.'s Cmts. Regarding the Remand Redetermination 7, ECF No. 58 ("Def.'s Resp."). Having reopened the record, Commerce's responsibility was to choose the best available information from the record. The remand order did not require otherwise. Thus, Plaintiff's objection does not provide a basis to reverse Commerce's choice.

B. Are the Remand Results supported by substantial evidence?

As long as Commerce takes the record evidence into account and provides an adequate explanation of its reasonable determination, it does not fail the substantial evidence standard just because there exists evidence that detracts from Commerce's decision. *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (internal citations omitted). "The specific determination we make is 'whether the evidence and reasonable inferences from the record support'" Commerce's findings. *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993)(citing *Matsushita Elec. Indus. Co., v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

Here, Commerce conceded both that the record evidence was imperfect and that the record revealed wide variation in potential surrogate values. Nonetheless, Commerce gave a reasonable explanation as to why other surrogate values were not appropriate for this matter and how the surrogate value it selected fit into the historical data scheme. Def.'s Resp. at 13–14. Commerce deduced that because the other potential surrogate countries have lower AUVs than India's, but larger monthly import quantities, the numbers are consistent with India's using higher strength nitric acid like that used to purchase Plaintiff's merchandise,[9] which is more costly to produce, store, and

[9] Plaintiff challenges as "dubious" Commerce's reliance on "98%" nitric acid pricing, arguing that 98% acid is not comparable to Trust Chem's 96%-98% nitric acid. Commerce responds that Trust Chem's reference to 96%-98% is confusing, because while Trust Chem initially reported use of 96%-98% nitric acid, in all subsequent references Trust Chem refers to 98% nitric acid. *Remand Results* at 23–24. Moreover, Commerce found that, even if Trust Chem's supplier did use 96% nitric acid, the cost differences between that and 98% would still be relatively small compared to the differences between weak and high strength nitric acid. *Id.* at 24; Pet'rs' Letter, Original Admin. R. Pub. Doc. 57 at 1–2.

transport. *Remand Results* at 14. Bolstering this claim is data regarding the extra chemical processing, costs and expensive shipping methods involved in producing the higher concentration nitric acid. Pet'rs' Cmts., Remand Admin. R. Pub. Doc. 5 at Attach. B and Ex. 1 ("Pet'rs' Cmts."). Based on this record evidence, Commerce's unrebutted explanation regarding nitric acid's pricing, storage and transportation costs or requirements is reasonable, and is therefore supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006), *citing SSIH Equipment SA v. United States ITC*, 718 F.2d 365, 381 (Fed. Cir. 1983).

C. The *Remand Results* do not improperly rely on U.S. nitric acid prices.

Plaintiff next contends that Commerce improperly used the U.S. price quotes submitted by Petitioners as benchmarks, directly contradicting Commerce's initial refusal to use U.S. benchmarks during the administrative review. Pl.'s Cmts. at 9. Plaintiff adds that Commerce is now comparing import statistics with a non-contemporaneous U.S. price list. *Id.* at 10.

Commerce acknowledges that the Petitioners submitted data with U.S. prices not specific to the POR. Nonetheless, Petitioners' publicly-available price list shows that higher strength nitric acid sells for much higher prices than the weaker nitric acid. Pet'rs' Cmts. at Attach. B, Ex. 2. Commerce considered this data for a "measure of how the concentration level of nitric acid affects price[,]" rather than as a benchmark for the price selected. *Remand Results* at 14 n.9.

Moreover, the record clearly indicates that lower import values with larger import quantities represent lower purity levels and higher values with smaller quantities reflect higher purity levels. *Remand Results* at 13–14, 18; Pet'rs' Rebuttal Cmts., Remand Admin. R. Pub. Doc. 11 at 3. *See Lifestyle Enterprise, Inc. v. United States*, __ CIT __, 768 F. Supp. 2d 1286, 1309 (2011)("Commerce cannot base its analysis on mere speculation, but may draw reasonable inferences from the record.") (citation omitted).

As we explained in *Trust Chem I*, "there is no statutory prohibition on using U.S. or other market economy data to corroborate record evidence." *Trust Chem I* at 1266 (citing *Peer Bearing Co.-Changshan v. United States*, __ CIT __, 752 F. Supp. 2d 1353 at 1372 (2011).

D. Exhaustion of Administrative Remedies

Finally, Plaintiff argues that a nitric acid price of $10,474 USD/MT is "patently absurd" because, in fact, low-strength nitric acid is actually used to produce the subject merchandise. Seeking to supplement the record evidence on this issue, Plaintiff now claims that its sup-

plier diluted the 96–98% strength nitric acid that it purchased to create 38% strength nitric acid that was then used to produce the subject merchandise. Pl.'s Cmts. at 12; *Trust Chem's July 31, 2009 Supp. Resp.*, Original Admin. R. Pub. Doc. 18 at 17, 24, App. S1–29, S1–33. Plaintiff asserts that the only reason a supplier would do this would be to save costs by transporting the small amounts of high strength nitric acid and minimizing water shipping costs. Pl.'s Cmts. at 12–13. Plaintiff thus claims that ultimately the surrogate value used for 96–98% nitric acid must be adjusted to reflect the 38% concentration of nitric acid used to produce the subject merchandise. Pl.'s Cmts. at 13.

Commerce and Petitioners correctly respond that because Plaintiff raises this issue for the first time here, after remand, Plaintiff has failed to exhaust its administrative remedies below. *See* 28 U.S.C. § 2637(d) ("In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

It is axiomatic that, to preserve Commerce's authority and judicial efficiency, a party, where appropriate, must present its arguments to the agency before bringing them to this court. *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Commerce must first have an opportunity to consider the issue and give a reasoned response to it. *Gerber Food (Yunnan) Co. v. United States*, __ CIT __, 601 F. Supp. 2d 1370, 1379 (2009). Because of the length of time this matter has been under consideration, requiring exhaustion is particularly appropriate here.

Plaintiff failed to provide Commerce the opportunity to address this issue. *Clearon Corp. v. United States*, __ CIT __, 800 F. Supp. 2d 1355, 1361–63 (2011)("Plaintiffs unfortunately did not present these arguments to Commerce when they had the opportunity"). Therefore, we decline to hear Plaintiff's argument on its supplier's shipping methodology. Def.'s Resp. at 22.[10]

CONCLUSION

Commerce's duty, as emphasized by *Trust Chem I*, is to compare the data on the record and provide an explanation that considers the

[10] Commerce notes that even if Plaintiff had exhausted its remedies below, this argument must still fail because the higher cost of manufacturing and shipping high strength nitric acid would not offset any savings in transportation of nitric acid with less water. In fact, Plaintiff offers no evidence that weak strength nitric acid could even substitute for high strength nitric acid, in light of the importance of chemical purity to the production process. Def.'s Resp. at 23–24.

important aspects of the problem presented. *SKF USA, Inc., v. United States*, 630 F.3d 1365, 1373–74 (Fed. Cir. 2011). As long as Commerce reasonably explains its choice between imperfect alternatives, the court will not reject the agency's determination. *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 evaluates "whether a reasonable mind could conclude that Commerce chose the best available information.").

Here Commerce complied with the court's remand instructions and gave a reasonable explanation that due to production and transportation costs and different pricing schemes for different concentrations of nitric acid, using the WTA data was appropriate on this administrative record. While it is more than unfortunate that the parties did not create a better record on the main issue presented, our review is based on this record.[11]

Therefore, for the reasons discussed above, Commerce's *Remand Results* will be AFFIRMED. Judgment will be entered accordingly. IT IS **SO ORDERED**.

Dated: February 29, 2012
New York, N.Y.

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

[11] "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).