# U.S. Customs and Border Protection

Slip Op. 13–58

PUJIANG TALENT DIAMOND TOOLS CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 11–00146
**PUBLIC VERSION**

[Plaintiff's motion for judgment on the agency record is denied and the Department of Commerce's Rescission is sustained.]

Dated: May 3, 2013

*John M. Houkom*, Quintana Law Group, APC, of Calabasas, CA, argued for plaintiff. With him on the brief was *Andres F. Quintana*.

*Jane C. Dempsey,* Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

***OPINION***

**Eaton, Judge:**

## I.
## Introduction

Before the court is plaintiff Pujiang Talent Diamond Tools Co., Ltd.'s ("plaintiff" or "Pujiang") motion for judgment on the agency record pursuant to USCIT Rule 56.2, challenging the Department of Commerce's ("Commerce" or the "Department") rescission of Pujiang's new shipper review under the antidumping duty order on diamond sawblades and parts Court No. 11–00146 Page 2 thereof from the People's Republic of China ("PRC").[1] Pujiang is an exporter of diamond sawblades. Although required by the regulations, Pujiang did not provide the Department with the certification or certifications required to establish that none of the merchandise Pujiang exported

[1] The period of review is January 23, 2009 through April 30, 2010.

during the period of review ("POR") had been produced by a company that exported subject merchandise during the period of investigation ("POI"). *See* 19 C.F.R. § 351.214(b) (2010). Rather, in its new shipper review questionnaire responses, plaintiff acknowledged that it exported, during the POR, subject merchandise from a producer that exported subject merchandise to the United States during the POI. Based on this information, the Department determined that Pujiang did not meet the eligibility requirements for a new shipper review. *See* Diamond Sawblades and Parts Thereof From the PRC, 76 Fed. Reg. 20,317 (Dep't of Commerce Apr. 12, 2011) (final rescission of antidumping duty new shipper review) ("Rescission").

Despite never having withdrawn or amended its questionnaire responses, Pujiang nonetheless claims that the Rescission "was arbitrary, capricious, and an abuse of discretion, not otherwise in accordance with law, as well as unsupported by substantial evidence" and, further, claims for the first time here that its submissions to the Department contained errors that Commerce was required to correct. Pl.'s Br. in Supp. of Mot. for J. on the Agency R. ¶ 3 (ECF Dkt. No. 20–1) ("Pl.'s Br."). Defendant United States ("defendant") fully supports Commerce's determination because it was "supported by substantial evidence and is in accordance with the law." Def.'s Opp. to Pl.'s Mot for J. on the Agency R. 2 (ECF Dkt. No. 23) ("Def.'s Mem.").

## STANDARD OF REVIEW

"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) (2006).

## DISCUSSION

### I. Background

On November 4, 2009, Commerce issued an antidumping duty order on diamond sawblades and parts thereof from the PRC. *See* Diamond Sawblades and Parts Thereof From the PRC & the Rep. of Korea, 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4, 2009) (antidumping duty orders) ("Order").[2] The Order applies to companies identified by Commerce as having produced or exported diamond sawblades during the POI and to "all exporters of subject merchandise not specifically listed." *Id.* at 57,146.

[2] The Order covers "all finished circular sawblades" and "semifinished diamond sawblades, including diamond sawblade cores and diamond sawblade segments." Order, 74 Fed. Reg. at 57,145.

Because it had not been examined during the POI, Pujiang as an exporter was not assigned an individual rate during the investigation. On April 29, 2010, Commerce received a timely request for a new shipper review from Pujiang, by which the company sought an individual rate. On June 28, 2010, Commerce initiated the review. *See* Diamond Sawblades and Parts Thereof from the PRC, 75 Fed. Reg. 36,632 (Dep't of Commerce June 28, 2010) (initiation of antidumping duty new shipper review).

Between August and December 2010, as part of the new shipper review, Pujiang submitted responses to several questionnaires sent to it by the Department. Def.'s Mem. 3. In its August 5, 2010 and August 27, 2010 submissions, Pujiang stated that during the POR it had exported subject merchandise to the United States produced by an unaffiliated producer that had exported diamond sawblades to the United States during the POI.[3] Pl.'s Section A Resp. at A-38 (Pl. Conf. App'x 390) ("Pl.'s Sec. A Resp." and "Pl.'s App'x", respectively); Pl.'s Section C Resp. at 41 (Pl.'s App'x 787) ("Pl.'s Sec. C Resp.").

In December 2010, the Diamond Sawblades Manufacturers Coalition (the "Coalition"), comprised of U.S. domestic producers of diamond sawblades, submitted comments to the Department, contending that Commerce should terminate Pujiang's new shipper review because the company failed to meet the eligibility requirements set forth in 19 C.F.R. § 351.214(b)(2)(ii) (2010). Def.'s Mem. 3–4. In response, Pujiang explained that it "exported subject merchandise to the United States . . . [pursuant to a] specific request of an unaffiliated customer" and that those parts were manufactured by . . . a producer that had exported subject merchandise during the POI. Pl.'s Jan. 10, 2011 Resp. 2–3 (Def. Conf. App'x Tab 2) ("Pl.'s Jan 10, 2011 Resp."). Pujiang repeatedly stresses in its filings that the export of the unaffiliated producer's merchandise, was a "single instance . . . in parts, rather than as a finished product." Pl.'s Jan. 10, 2011 Resp. 2–3 (Def. Conf. App'x Tab 2) ("Pl.'s Jan 10, 2011 Resp.").

On March 9, 2011, Commerce issued its notice of intent to rescind the new shipper review based on its findings that: (1) Pujiang stated in its questionnaire responses that the unaffiliated producer supplied merchandise[4] that Pujiang exported to the United States, and (2) Pujiang, in response to the domestic producers' comments, did not

[3] [[ ]] is the name of the unaffiliated producer listed in Pujiang's questionnaire responses. In its briefs to the Department, Pujiang identifies the company as [[ ]]. It has been abbreviated [[ ]] in both instances.

[4] In particular, the unaffiliated producer provided "fifteen steel cores," which are component parts of diamond sawblades specifically identified as being within the scope of the Order. Mem. of Prelim. Intent to Rescind 1–2 (Def. Conf. App'x Tab 3); Order, 74 Fed. Reg. at 57,145 ("Within the scope of these orders are . . . diamond sawblade cores.").

contest that it shipped to the United States subject merchandise produced by the unaffiliated producer. Mem. of Prelim. Intent to Rescind 1– 2 (Def. Conf. App'x Tab 3).

In March 2011, Pujiang submitted comments contending that its shipment of the unaffiliated producers' merchandise was "de minimis" and "irrelevant." Pl.'s Mar. 16, 2011 Resp. 1–2 (Def. Conf. App'x Tab 4) ("Pl.'s Mar. 16, 2011 Resp."). Pujiang reiterated that it "does not deny that . . . it exported certain subject merchandise produced by [the unaffiliated producer] during the period of review," but maintained that Commerce's "position is overly harsh" because "where [Pujiang] exported subject merchandise to the United States . . . [it] was done at the specific request of an unaffiliated customer."[5] Pl.'s Mar. 16, 2011 Resp. at 3. Pujiang indicated that the unaffiliated United States customer wished to attach the saw segments to the core themselves, and" that it "delivered sawblades in parts, rather than as a finished product." Pl.'s Mar. 16, 2011 Resp. at 3. Pujiang urged Commerce to "exercise a modicum of discretion and find that the [ exported merchandise ] described in the Memorandum is irrelevant to the purpose of the inquiry at hand." Pl.'s Mar. 16, 2011 Resp. at 1. In response, the Coalition reasserted that "Pujiang should not be eligible for a new shipper review because it had shipped subject merchandise from the [unaffiliated producer] and was unable to certify otherwise." Def.'s Mem. 5.

On April 12, 2011, Commerce issued its Final Rescission Notice, terminating the new shipper review upon finding that Pujiang had exported subject merchandise produced by the unaffiliated producer, a company which had exported subject merchandise during the POI. Rescission, 76 Fed. Reg. at 20,318. Therefore, Pujiang failed to meet the eligibility requirements set forth in 19 C.F.R. § 351.214(b)(2). *Id.*

## II. Legal Framework

Under 19 U.S.C. § 1675(a)(2)(B), Commerce shall, upon request, conduct administrative reviews "for new exporters and producers." 19 U.S.C. § 1675(a)(2)(B). The purpose of these new shipper reviews is to determine whether exporters or producers, whose sales have not previously been examined, are (1) entitled to their own duty rates under an antidumping order, and (2) if so, to calculate those rates. *See Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005). Although the statute is silent

[5] Plaintiff appears to believe, without explanation, that the alleged unaffiliated status of its United States customer is, in some way, a mitigating factor as to whether Commerce should have terminated the new shipper review.

as to procedural issues other than time limits for agency action, the Department has promulgated regulations governing new shipper review procedures. *See* 19 C.F.R. § 351.214. If the interested party requesting a review "is the exporter, but not the producer, of the subject merchandise" the party "must" provide: (1) "a certification that the person requesting the review did not export subject merchandise to the United States . . . during the [POI]," and (2) "a certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States . . . during the [POI]." 19 C.F.R. § 351.214(b). While not without question, this requirement seems to be aimed at preventing a producer that received a high rate during the investigation or a later review from taking advantage of a newly reviewed exporter's lower rate.

III. Commerce's Determination that Pujiang Exported Merchandise from the Unaffiliated Producer is Supported by Substantial Evidence

The Department's determination that Pujiang exported the unaffiliated producer's merchandise, and was thereby ineligible for a new shipper review under 19 CFR 351.214(b)(2)(ii)(B), relied on the plaintiff's questionnaire responses. Those responses stated that Pujiang had exported subject merchandise manufactured by the unaffiliated producer. Plaintiff's Section A Response stated that "[b]esides self-produced diamond saw blades and segments, [Pujiang] also exported out-sourced cores to the United States . . . . [T]he export of cores supplied by [the unaffiliated producer] is very occasional during the POR." Pl.'s Sec. A Resp. at 390. Pujiang's Section C Response similarly indicated that "[e]xcept cores supplied by [the unaffiliated producer], all the other subject merchandises [sic] exported to the United States by [Pujiang] were manufactured by [Pujiang]." Pl.'s Sec. C Resp. at 787. Thus, plaintiff does not dispute that it represented to the Department that it exported subject merchandise made by a producer that had shipped subject merchandise to the United States during the POI.

Instead, plaintiff claims here, for the first time, that the Department acted unreasonably when it relied on plaintiff's "erroneous categorization" of a shipment as having been products of the unaffiliated producer. Pl.'s Reply to Def.'Opp. to Mot. for J. ¶ 21 (ECF Dkt. No. 28) ("Pl.'s Reply"). In making its argument, plaintiff maintains that Commerce should have both realized that plaintiff's submissions contained errors, and that the Department, on its own initiative,

should corrected those errors. Plaintiff insists that this is the case even though it made no effort to amend or withdraw its questionnaire responses during the administrative proceedings conducted by the Department.

Plaintiff contends that its questionnaire responses were erroneous because they "inaccurately stated the source of one specific shipment of goods." Pl's Br. ¶ 3, 4 ("Pujiang . . . did not export any goods from a producer not eligible for [a New Shipper Review]."); Pl.'s Reply ¶ 15 ("[T]he shipment at issue contained only products produced by Pujiang."). Specifically, Pujiang's new position is that it "did, in fact, produce [the goods previously identified as produced by the unaffiliated producer], as a special order, and then sell and ship them." Pl.'s Br. ¶ 23. Plaintiff now maintains that the unaffiliated producer was merely "a supplier of materials to Pujiang." Pl.'s Br. ¶ 25. The company's position appears to be that the unaffiliated producer's products were transformed into Pujiang-produced products as a result of modifications made by Pujiang. Pl.'s Br. ¶ 50. Specifically, according to plaintiff, "the [[ ]] underwent significant modification from their raw form . . . , including the tensioning and the creation of pinholes. . . , and the fact that the [[ ]] w[ere] sold as Pujiang . . . products, packaged in Pujiang . . . packaging when delivered to the unaffiliated customer, and imported into the United States as Pujiang . . . products." Pl.'s Br. ¶ 50.

Even if the court were to entertain an argument not made to Commerce,[6] the claim that the Department should have independently discerned that plaintiff's questionnaire responses were erroneous and corrected these errors is impossible to credit. In making its claim, Pujiang first points to the United States Customs & Border Protection entry summary form ("Form 7501") for the merchandise at issue, which identifies Pujiang as the manufacturer of the merchandise. Pl.'s Form 7501 (Pl's App'x 329).[7] Considering that the Form 7501 was prepared by plaintiff or on its behalf, it is hardly obvious

[6] The Department points out that Pujiang failed to exhaust its administrative remedies by not raising this issue before the Department. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) ("[P]arties are 'procedurally required to raise their issue before Commerce at the time Commerce is addressing the issue.'" (quoting *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)). Because plaintiff's argument fails on the merits, however, the court declines to reach the exhaustion issue.

[7] The company also maintains that its position is supported by the fact that the "multiple shipping documents" it included failed to identify "anyone [but] Pujiang . . . as the manufacturer or producer." Pl's Br. ¶ 21. Plaintiff, however, neglects to mention that, other than the Form 7501, none of those documents contain any field in which the manufacturer would be identified. *See* Pl's App'x 324–29. Indeed, those documents (two commercial invoices, a statement of origin, a bill of lading, and a packing list) would not ordinarily include such information.

that Commerce should have understood that the manufacturer field of the company's Form 7501 contained correct information and that the plaintiff's questionnaire responses contained incorrect information.[8]

Pujiang next points to the certification attached to its request for a new shipper review that incorporated by reference the representations made in that request.[9] According to plaintiff's submissions to this court, that certification stated "that none of the merchandise [Pujiang] exported during the POR had been produced by a company that had exported during the POI." Pl's Br. ¶ 21. For plaintiff, its certification, when contrasted with its questionnaire responses, should have alerted the Department to the presence of errors in the questionnaire responses. Pujiang, however, mischaracterizes its certification. *Compare* Pl's Br. ¶ 21, *with* Request for New Shipper Review 1–11 (Pl.'s App'x 1–11). The certificatory language actually reads:

> (1) [Pujiang] did not export diamond sawblades and parts thereof from the [PRC] (the "Subject Merchandise") to the United States during the [POI] which ran from October 1, 2004, through March 31, 2005;
> (2) [Pujiang] has never been affiliated with any producer or exporter that exported Subject Merchandise to the United States during the POI . . .

Request for New Shipper Review 2. Thus, Pujiang did not certify that it had not exported subject merchandise manufactured by a company that had exported to the United States during the POI. Rather, plaintiff only certified that neither it nor an affiliated producer had exported subject merchandise to the United States during the POI. Because the unaffiliated producer is not affiliated with Pujiang, nothing in the new shipper review request and its certification contradicts plaintiff's questionnaire responses, thereby failing to indicate that those responses were errors. *See* Pl.'s Sec. A Resp. A-4.

As to why its questionnaire responses were erroneous, Pujiang contends that Commerce should have "address[ed] the fact that the

---

[8] *See Ocean Harvest Wholesale, Inc. v. United States*, 26 CIT 358, 369 n.20 (2002) (noting that parties cannot expect their desired result when they proffer multiple options without guidance (citing *People v. Small*, 391 N.Y.S.2d 192, 194 (N.Y. App. Div. 1977))).

[9] The incorporation by reference contained in these two documents involves a troubling level of circularity. The request, dated April 29, 2010, indicates that the certifying Pujiang employee "makes the following certification, attached as '**Exhibit 1** '." Request for New Shipper Review 2. The undated certification, however, states only "that I have read the attached request for [the] new shipper review, and that the information contained therein, to the best of my knowledge, is complete and accurate." Pl's App'x 11.

[unaffiliated producer's merchandise] underwent significant modification from [its] raw form while in the possession of Pujiang Talent . . . and the fact that [the unaffiliated producer's merchandise] was sold as Pujiang Talent products [and], packaged in Pujiang Talent packaging when delivered to the unaffiliated customer." Pl's Br. ¶ 50. Here, Pujiang apparently argues that although it purchased subject merchandise from the unaffiliated producer it modified that merchandise enough to transform it into a new article for which Pujiang would qualify as the "producer" for antidumping review purposes. Pujiang, however, points to no record evidence documenting any additional manufacturing that the unaffiliated producer's merchandise underwent or the manner in which that merchandise was packaged. Pujiang's submissions before the Department, unsurprisingly, also fail make mention of any such additional processing.

Indeed, before the agency, Pujiang never expressly claimed that its submissions were inaccurate, nor did it ask to submit corrected responses to the questionnaires.[10] Pujiang's argument that it sought correction, but did so "inartfully" is unpersuasive.[11] Pl.'s Reply ¶ 8. Pujiang bases this claim on certain language in its March 16, 2011 response that the export of the unaffiliated producer's merchandise was done in an atypical manner. In particular, Pujiang claims the merchandise was sawblade parts which it would ordinarily have assembled before importation if not for the unaffiliated United States customer's request. Pl.'s Reply ¶ 29. Pujiang, however, never explains how these references would alert Commerce that it was claiming that the exported parts were, in fact, manufactured by Pujiang. That is, no reasonable reading of plaintiff's submissions during the underlying review supports the assertion that Pujiang argued before the agency that its questionnaire responses were inaccurate. In its briefs to the Department, plaintiff argued that its exportation of the unaffiliated producer's merchandise should be overlooked, not that its questionnaire responses indicating that the merchandise was produced by the unaffiliated producer were factually incorrect.

Moreover, plaintiffs submissions before the agency repeatedly reaffirm that its questionnaire responses were factually accurate. *See* Pl.'s Jan. 10, 2011 Resp. 3; Pl.'s Mar. 16, 2011 Resp. 3. In its letter of January 10, 2011, Pujaing stated that "[Pujiang] does not deny that

[10] Accordingly, this is not a case where corrective information was submitted to, and rejected by, the Department prior to issuance of the final determination. *Cf. Fischer S.A. Comercio, Industria & Agriacultura v. United States*, 471 Fed. App'x 892, 895 (Fed. Cir. 2012) ("Commerce is obliged to correct any errors in its calculations during the preliminary results stage to avoid an imposition of unjustified duties." (citation omitted)).

[11] Were the court to reach it, Pujiang's failure to clearly raise this issue before the Department also supports Commerce's position on exhaustion of administrative remedies.

in that one instance it exported certain subject merchandise produced by [the unaffiliated producer] during the period of review for this [New Shipper Review] — and [Pujiang] was completely upfront about that instance in its prior submissions to the Department." Pl.'s Jan. 10, 2011 Resp. 3. Again on March 16, 2011 it stated that

> [Pujiang] does not deny that in that one instance it exported certain subject merchandise produced by [the unaffiliated producer] during the period of review for this [New Shipper Review]. Nevertheless, termination of the [review] on this basis would result in the unfortunate elevation of form [over] substance. . . . Here, [Pujiang] is not acting as a regular exporter of [unaffiliated producer]-manufactured merchandise. . . . The sale of [unaffiliated producer]-manufactured merchandise [was] a single, isolated instance where [Pujiang] exported subject merchandise.

Pl.'s Mar. 16, 2011 Resp. 3

Therefore, the record on which Commerce made its determination contained two admissions in plaintiff's questionnaire responses, reinforced by Pujiang's briefs before the Department, on the one hand, and the manufacturer field of the Form 7501 and the certification, on the other. Nothing in the record indicates that Commerce was required to discredit Pujiang's questionnaire responses in favor of the Form 7501's manufacturer field. Nor does the certification actually contradict the answers to the questionnaires. Indeed, the record supports the conclusion that the questionnaire response were truthful, rather than erroneous. Those responses are substantial record evidence that Pujiang exported the unaffiliated producer's merchandise during the POR, rendering Pujiang ineligible for a new shipper review.

Moreover, even if the court were to find that the responses were errors, those errors would not be apparent and Commerce would not have been required to correct them. Errors not brought to the attention of the Department prior to the issuance of a final determination must be corrected by Commerce only where the error is apparent. *See Alloy Piping Prod., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292–93 (Fed. Cir. 2003).

## IV. Commerce's Issuance of the Rescission Was Not Arbitrary and Capricious

Pujiang also argues, as it did before the Department, that Commerce's issuance of the Rescission was so unfair as to render that determination arbitrary and capricious. Plaintiff states that "[o]ne

simple mistake by [a] small company shouldn't have the kinds of debilitating, long-range consequences as have arisen from the Final Rescission." Pl.'s Br. ¶ 46. In other words, Pujiang's position is that Commerce acted improperly when it decided to rescind the new shipper review because Pujiang is not a large company, the sale was a one-time only transaction making up a very small part of the company's sales, and the company will be now be subject to the high all-China rate. Thus, for plaintiff, Pujiang's concession—that it sold subject merchandise from a manufacturer who exported subject merchandise during the POI—should have been disregarded by the Department. Notably, Pujiang does not argue that the Department exceeded its authority when it promulgated 19 C.F.R. 351.214(b), or that the Department otherwise failed to comply with that regulation when it issued the Rescission. Pujiang maintains, instead, that Commerce's Rescission of the new shipper review has a practical effect that runs contrary to the overall purpose of the antidumping laws because the Rescission imposes an "almost punitive" rate "with no relationship to the evidence provided" during the review. Pl.'s Br. ¶ 46.

Before Commerce, Pujiang argued that the shipment was "*de minimis* activity" which should be ignored because Pujiang was "not acting as a regular exporter of [unaffiliated producer]-manufactured merchandise." Pl.'s Jan. 10, 2011 Resp. 2, 3; Pl.'s Mar. 16, 2011 Resp. 2 ("The Department . . . treats that *de minimis* activity as dispositive, when in equity, that [exportation] should not change [Pujiang's] status as an appropriate new shipper, subject to the current review."). Pujiang argues that it "did not make any sales of [the unaffiliated producer's] merchandise for the purpose of selling [the unaffiliated producer's] merchandise," but rather to accommodate a particular unaffiliated United States customer on a one-time basis. Pl.'s Jan. 10, 2011 Resp. 4; Pl.'s Mar. 16, 2011 Resp. 2. Thus, the Department should exercise discretionary authority to ignore that one sale. Pl.'s Jan. 10, 2011 Resp. 4; Pl.'s Mar. 16, 2011 Resp. 2 ("The Department should exercise its discretion and allow the [review] of [Pujiang] to proceed to conclusion, so that its ultimate purpose can be reached.").

Commerce declined to ignore the sale of the unaffiliated producer's merchandise because under the regulation "there is no requirement . . . to consider the relative volumes sourced . . . . [T]he relative volume of subject merchandise that [Pujiang] sourced from [the unaffiliated producer] is irrelevant to the certification requirement." Mem. of Prelim. Intent to Rescind 2 (Def. Conf. App'x Tab 3 at 4).

The court finds that Commerce did not err by refusing to ignore Pujiang's shipment of subject merchandise produced by the unaffili-

ated producer. The Department is not free to disregard regulatory requirements simply because a non-complying petitioner will suffer adverse consequences as a result of its non-compliance. "An agency must follow its own regulations." *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009) (citation omitted). Commerce interpreted the regulations at issue as providing "no basis for overlooking the requirements set forth in" 19 C.F.R. § 351.214(b)(2)(ii)(B), and it is difficult to *see* how the Department is wrong. Rescission, 76 Fed. Reg. at 20,318.

The regulation plainly requires that importers who are not the producers of subject merchandise "must" provide "[a] certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States . . . during the [POI]" as part of its request for a new shipper review. 19 C.F.R. § 351.214(b)(2)(ii)(B). Pujiang points to no statute or regulation giving Commerce discretion to ignore this requirement. The Department is bound by the "'familiar rule of administrative law that an agency must abide by its own regulations.'" *Since Hardware (Guangzhou) Co. v. United States,* 35 CIT __, __, Slip. Op. 11–146, at 24 (2011) (quoting *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990)).

The facts of this case are such that Pujiang did not and could not truthfully provide the certification required by 19 C.F.R. § 351.214(b)(2)(ii)(B). Moreover, because Pujiang made no effort to correct or withdraw its questionnaire responses, and made no effort before Commerce to argue that its responses were erroneous, the record is not in its favor. Accordingly, Commerce's determination that the new shipper review must be rescinded "because [Pujiang] could not produce a certification that none of the merchandise it exported during the POR had been produced by a company that had exported during the POI," and that it had "no basis for overlooking the requirements" of 19 C.F.R. § 351.214(b)(2)(ii)(B) was not arbitrary or capricious. Rescission, 76 Fed. Reg. at 20,318.

## CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is denied, Commerce's Final Rescission is sustained.

Dated: May 3, 2013
New York, New York

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

Slip Op. 13–63

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, and VINH HOAN CORPORATION, VINH QUANG FISHERIES CORPORATION, H&N INTERNATIONAL, AND VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00109

[Remanding sixth antidumping administrative review for reconsideration of certain aspects.]

Dated: May 23, 2013

*Valerie A. Slater*, *Jarrod M. Goldfeder*, *Natalya D. Dobrowolsky*, and *Nicole M. D'Avanzo*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

*Ryan Majerus*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White*, *Jr.*, Assistant Director, and *Courtney S. McNamara*, Attorney. Of Counsel was *David W. Richardson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

*Matthew J. McConkey*, *Dave M. Wharwood*, and *Jeffrey C. Lowe*, Mayer Brown LLP, of Washington DC, for defendant-intervenor Vinh Hoan Corporation.

*Robert G. Gosselink* and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington DC, for defendant-intervenors Vinh Quang Fisheries Corporation and H&N Foods International.

*Mark E. Pardo*, *Andrew Thomas Schutz*, and *Jeffrey O. Frank*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington DC, for defendant-intervenor Vietnam Association of Seafood Exporters and Producers.

## OPINION AND ORDER

**Musgrave, Senior Judge:**

This action contests the final results of the sixth administrative review of the antidumping duty order on three species of *Pangasius* fish[1] conducted by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department"). *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15941 (Mar.

[1] The antidumping duty order covers *Pangasius hypophthalmus* (also identified as *Pangasius pangasius*), *Pangasius bocourti*, and *Pangasius micronemus*. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47909 (Aug. 12, 2003) ("*Order*").

22, 2011), PDoc 246 ("*Final Results*" or "*Sixth Review*") and the issues and decision memorandum ("I&D Memo") accompanying those results, PDoc 242. The review period is August 1, 2008 through July 31, 2009.

The plaintiffs, domestic industry petitioners,[2] move for judgment on the administrative record. In opposition, the defendant-intervenors argue the *Final Results* should be sustained as is on matters affecting them. The defendant argues for remand of some of the issues and for sustaining the results in all other respects. The matter is accordingly remanded, as follows.

## Jurisdiction and Standard of Review

Jurisdiction is proper pursuant to 19 U.S.C. §1516a(a)(2)(B)(iii) and 28 U.S.C. §1581(c). Commerce's antidumping duty determinations are to be upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i).

## Discussion

The margin of dumping of subject merchandise is determined by comparing its export price or constructed export price with its "normal value" ("NV"), a calculation usually based upon home market or third-country sales, depending upon market viability. *See* 19 U.S.C. §1675(a)(2). For a producer or exporter subject to a non-market economy ("NME") such as Vietnam, the statute directs that NV shall be based on factors of production calculated by reference to an appropriate surrogate market-economy country or countries. *See* 19 U.S.C. §1677b(c)(1); *see*, *e.g.*, *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001). Commerce is required to use the "best available information" in the selection of surrogate data, and the surrogate country should be, to the extent possible, (1) at a level of economic development comparable to the non-market economy country and (2) a significant producer of comparable merchandise. 19 U.S.C. §l677b(c)(1)&(4).

The plaintiffs' claims mainly concern aspects of Commerce's surrogate valuation ("SV") methodology. That system normally relies on publicly available information and values all factors of production in,

[2] Plaintiffs are Catfish Farmers of America and individual U.S. domestic catfish processors America's Catch, Consolidated Catfish Companies, LLC d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, and Simmons Farm Raised Catfish, Inc. The *Final Results* cover, *inter alia*, the mandatory respondent Vinh Hoan Corporation ("VC"), voluntary respondent Vinh Quang Fisheries Corporation, as well as the separate rate respondents An Giang Fisheries Import and Export Joint Stock Company (Agifish), East Sea Seafoods Limited Liability Company (ESS LCC), and Southern Fishery Industries Company, Ltd. (South Vina).

or from, a single surrogate country. *See* 19 C.F.R. §351.408(c). First addressed below are matters on which voluntary remand is requested.

I. Voluntary Remand for Reconsideration of Certain Financial Data Included in Surrogate Financial Ratios

Commerce requests remand in order to reconsider including in its surrogate financial ratio calculations for the *Final Results* certain financial data for Gemini Sea Food, a Bangladeshi company, as Commerce had omitted to address the plaintiffs' argument that evidence in the record indicates Gemini received a potentially countervailable government subsidy, and such a circumstance is proper for remand. *See SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). The matter will be therefore be remanded (for reconsidering inclusion of Gemini's financial data).

II. Voluntary Remand for Reconsideration of Surrogate Value for Fish Waste

In the *Final Results*, Commerce selected surrogate values for fish waste based upon Philippine import statistics for Harmonized Tariff Schedule ("HTS") category 0304.90 (other fish meat of marine fish) maintained in the World Trade Atlas ("WTA"), and it rejected price quotes on the record the plaintiffs had obtained from Vitarich Corporation, a Philippine fish and seafood processor, consisting of an April 7, 2010 price list with per kilogram pickup prices of *Pangasius* fish waste (and trimmings, and fish skins) in Philippine pesos. *See Sixth Review* I&D Memo at 30–32. The plaintiffs contend these price quotes were accompanied by a supporting affidavit providing in substance the same information as that which accompanied two other price quotes, also of record, from Indian seafood processing companies, that Commerce had previously relied upon in prior proceedings, which reliance was upheld in *Vinh Quang Fisheries Corp. v. United States*, 33 CIT __, 637 F. Supp. 2d 1352 (2009). The plaintiffs contend: that it was unreasonable for Commerce to reject the Vitarich price quotes on the basis that they contained "no official company stamp" without explaining why this was relevant or the relevance of the quotes' provision on Vitarich company letterhead documentation, that Commerce did not elaborate its concerns over public availability or address that the quote had been obtained upon the request of a member of the public as stated in the affidavit, and that Commerce did not adequately explain why a price quote that slightly post-dated the POR precluded its use when Commerce has "frequently" relied on non-contemporaneous data in other antidumping cases. Pls' Br. at

32–36, referencing, *inter alia*, *Jinan Yipin Corp. v. United States*, 35 CIT ___, 800 F. Supp. 2d 1226, 1292 n.76 (2011) ("The ultimate question to be determined is: Do the price data accurately reflect prices throughout the period of review (whether or not those data are 'contemporaneous' and 'representative,' as Commerce defines those terms)?"); *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1504, 460 F. Supp. 2d 1338, 1359 (2006) ("Because the selected information appears to be more accurate, it cannot be said that Commerce was unreasonable in choosing it over a more contemporaneous, but less accurate alternative."); *see also* Petitioners' SV Submission (Apr. 8, 2010), PDoc 96, at Ex. 16.[3]

The plaintiffs argue Commerce's rejection of the Vitarich quote (as well as the two Indian price quotes) is contrary to Commerce's previous position and not adequately explained. Without admitting error, Commerce requests remand in order to reconsider its surrogate fish waste valuation. The matter will be remanded therefor, but upon remand Commerce will also address the plaintiffs' concerns as articulated in their briefs. If on remand Commerce continues to be inclined toward reliance upon HTS data, it will clearly explain why neither the Vitarich price quote nor the previously-relied-upon Indian price quotes for fish waste were not the best available information to value fish waste as compared with the HTS data. *See*, *e.g.*, PDoc 96 at Ex. 24; Petitioners' Case Brief (Jan. 7, 2011), PDoc 222, CDoc 61, at 25 & n.74.

III. Surrogate Values for Broken Meat, and Fish Skins

In the *Final Results*, Commerce also had to select surrogate values for broken fish meat and fish skin. *See Sixth Review* I&D Memo at 32–33. To value respondents' broken meat by-product, Commerce used import price statistics from the WTA for Philippine HTS category 0304.90, (other meat of marine fish). To value the fish skin

[3] The price quote was accompanied by the affidavit of a Philippine lawyer explaining that she was retained to obtain this price data. PDoc 96 at Ex. 16. The affidavit further explained the prices are on an *ex*-factory and tax-exclusive base. *Id*. Along with this information, the attorney also identified from whom she obtained the price quote at Vitarich and included a copy of the Vitarich employee's business card. *Id*. Commerce emphasized the facts that the quote "contains no official company stamp, was obtained outside the context of an actual business transaction, lists no terms of payment, does not list the person who provided the price, and was obtained after the POR," *Sixth Review* I & D Memo at 28, and it also expressed "concerns as to whether this price quote is truly publicly available, to the extent that anyone from the public could duplicate it," *id*., but the plaintiffs point out that Commerce did not address the fact that the affidavit identified the delivery terms and the party offering the price and explained precisely the manner in which the price quote was obtained. *See* PDoc 96 at Ex. 16.

by-product, Commerce selected WTA import price statistics for Bangladesh HTS category 2301.20 (flours, meals, and pellets, of fish or of crustaceans). *Sixth Review* I&D Memo, at 32–33. The plaintiffs here repeat that it was erroneous to rely upon such broad "basket" import statistics without considering the relative importance of product specificity in the process of surrogate valuation of the broken meat and fish skin by-products after they pointed out that HTS 0304.90 is a basket HTS category that by definition encompasses many types of meat from many species of fish and includes import data from countries that have no known production of *Pangasius*, PDoc 222 at 25 & n.75, and also that HTS 2301.20 includes a variety of fish and crustacean products and does not accurately reflect the value of the respondents' fish skin input, Petitioners' Rebuttal Brief (Jan. 18, 2010), PDoc 227, at 193. Rather, the plaintiffs contend, the price quote they obtained from Vitarich, *supra*, is reliable and "highly product-specific" to *Pangasius* "trimmings" and "skin." Pls' Br. at 36, referencing PDoc 96 at Ex. 16.

In determining what constitutes "best available information," Commerce must evaluate record evidence according to its surrogate value selection criteria. Commerce recognized that the Vitarich price quote "may be more specific," but in "considering the other criteria" Commerce found the Philippines import data superior because the "Vitarich price quote is not contemporaneous, does not represent a broad market average, and is not publicly available." *Sixth Review* I&D Memo at 29. Commerce therefore determined not to use that price quote for purposes of valuing the broken meat and fish skin. The defendant asks that this determination be sustained, but because Commerce's reasoning here appears intertwined with its rejection of the Vitarich price quote in the context of valuing the fish waste, it is appropriate that Commerce reconsider the broken meat and fish skin valuations from a clean slate, alongside its reconsideration of the proper valuation of fish waste, *supra*.

## IV. Surrogate Country Selection

The plaintiffs' main challenge is to Commerce's consideration of the data leading to its selection of Bangladesh as the primary market surrogate. *See Sixth Review* I & D Memo at 7–14.

### A. Background

The selection of a surrogate country involves four steps. *See* Import Administration Policy Bulletin 04.1 (Mar. 1, 2004) (Non-Market Economy Surrogate Country Selection Process), Commerce will (1) compile a list of countries that are at a level of economic development

comparable to the country being investigated, (2) ascertain which of those countries produce comparable merchandise, (3) determine which of those are significant producers of comparable merchandise, and (4) if the selection process retains more than one country at this point, determine which country has the "best factors data" based upon the data's quality (*i.e.*, their reliability, accessability and public availability). *See id*. at 3. Commerce generally chooses for the administrative proceeding the most appropriate surrogate country by reviewing these criteria, but on occasion economic comparability cannot be determined until after the significant producer requirement is met. *See id*. The plaintiffs do not complain of the general adherence to this process during the administrative review at bar.

During the *Sixth Review*, Commerce was faced with having to determine whether the record with respect to the Philippines or Bangladesh contained the best available information for valuing factors of production. At the preliminary stage, as it had in prior reviews, Commerce determined that whole live fish accounted for the largest percentage of subject merchandise NV and were therefore its most significant input. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Notice of Preliminary Results . . . of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 75 Fed. Reg. 56062, 56066 (Sep. 15, 2010) ("*Preliminary Results*") (concluding that the primary consideration must be "the availability and reliability of the surrogate values for whole live fish on the record"), PDoc 164. This is uncontested.

At this point, it is appropriate to summarize Commerce's surrogate selection process during the prior administrative review. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 75 Fed. Reg. 12726 (Mar. 17, 2010) (*inter alia* final review results) ("*Fifth Review*") and accompanying I & D Memo.[4] In that precedent *Fifth Review*, the plaintiffs argued for valuing the factors of production based on data they had submitted from the "Fish Pond Report" maintained by the Philippine Department of Agriculture, Bureau Agriculture of Statistics ("BAS") for the country's pangas fish production, as supported by the affidavit of an official of BAS. The respondents argued in favor of using the "FAO Report data" from *United Nations Food and Agriculture Report: Economics of Aquaculture Feeding Practices in Selected Asian Countries* for Bangladesh.

Commerce considered both contentions. Regarding the Fish Pond Report, although the supporting affidavit from the BAS official attested that the data in the report were finalized, Commerce voiced "concern with the quality and reliability of the chart and the data

[4] Available at http://ia.ita.doc.gov/frn/summary/VIETNAM/2010–5853–1.pdf

contained within it" due to the presence of "#DIV/0!" symbols in some of the data fields, the fact that it bore a handwritten title, and the fact that the affiant "affirms" that the data had yet to be finalized. Commerce found that the data had "yet to be presented in its normal publication" and thus found the data not yet publicly available, therefore not reliable, and therefore not the best available information with which to value the main input (fish). *See Fifth Review* I & D Memo at 8–10. Regarding the FAO Report, Commerce found that although it was not contemporaneous with the POR, it satisfied the other surrogate value selection criteria as to public availability, specificity to the input, and tax and duty exclusivity. Therefore, "taken as a whole," Commerce concluded the FAO Report remained the best information available to value the main input. *Id*. at 10.

For the review now at bar, the plaintiffs again submitted the Philippines Fish Pond Report data. *See* PDoc 96 at Ex. 5-A and Ex. B-9; *see also* Petitioners' Rebuttal Factor Value Data (Apr. 29, 2010 ), PDoc 110, and Petitioners' SV Submission (July 9, 2010), PDoc 132, at Att. 1. The submission passed preliminary muster in relevant part, and Commerce was again faced with the choice of either the Philippines or Bangladesh as surrogate after certain other data and possible surrogates had been rejected. *See Preliminary Results,* 75 Fed. Reg. at 56066–67. This time, Commerce found each sets of data from their respective countries to be publicly available, tax and duty free, representative of broad market averages, and indicative of country-wide *Pangasius* production. *See id*. at 56067.

The preliminary determination notes that the Bangladesh FAO Report data specified coverage of "*Pangasianodon hypothalmus*"[5] whereas the Philippines data identified the broader genus *Pangasius*, but Commerce concluded (and the parties do not appear to contest) there was nothing in the record from which to "determine that any difference between the two sources would necessarily generate a difference in price." *Id*. Commerce also looked at the contemporaneity of the data sets and found the Philippine data contemporaneous with the period of review because they were from 2008, whereas the Bangladesh FAO Report data were from 2005. *Id*. Largely on this distinction, Commerce selected the Philippines as the primary surrogate country for the preliminary *Sixth Review* results. *Id*. at 56066–67. This selection resulted, *ceteris paribus*, in antidumping duty rates of $4.22 per kg for Vinh Hoan, $2.44 per kg for Vinh Quang, and $0.93 per kg for CL-Fish. The rate for Vinh Hoan was also assigned to the separate rate respondents Agifish, ESS LCC, and South Vina. *See generally id.* at 56065–69.

[5] *I.e.*, *Pangasius hypothalamus. Cf*. note 1.

The parties thereafter submitted second and final surrogate country data. *E.g.*, PDocs 194–197, 199, 215, and rebuttal commentary thereon, *e.g.*, PDocs 210–212, 236. The plaintiffs' submission provided updated Philippine BAS data showing approximately 34 tons of *Pangasius* produced in 2009 in addition to approximately 12 tons produced in 2008. Petitioners' Factor Data, PDoc 196, at Ex. 1 (Table 51) ("FS 07–09"). The Vietnam Association of Seafood Exporters and Producers ("VASEP"), as an interested party before Commerce, also provided updating data that purportedly covered weekly wholesale prices gathered via "structured collection" methodology from all 70 regions of Bangladesh during the POR. These data consisted of spreadsheets VASEP had obtained from the Bangladesh Ministry of Agriculture's Department of Agricultural Marketing. *See* VASEP's SV Submission (Nov. 12, 2010), PDoc 195, at Ex. 7 ("DAM 08/09 data").

In their administrative case and rebuttal briefs, the plaintiffs asserted that their Philippine FS 07–09 data were relevant and representative of farm-gate prices for whole live *Pangasius*, and they argued: that Commerce should not rely on either the Bangladesh FAO Report data or the DAM 08/09 data, that the spreadsheets therefor refer only to "pangas" prices and not the specific species covered by the *Order*, that the DAM 08/09 data were not part of an official published government report and should be rejected for the same reasons Commerce had rejected the plaintiffs' submission of Philippine BAS data during the *Fifth Review*, that the DAM 08/09 data spreadsheets also contained the same missing-data symbols (*i.e.*, "#DIV/0!") that had informed Commerce's rejection of the BAS data in the *Fifth Review*, that the DAM 08/09 data were wholesale and not farm-gate prices and therefore at a different level in the chain of distribution, that even though the DAM data were supposedly collected based upon interviews with farmers there is no quantity associated with the prices, and that the data were generally unreliable based on an affidavit obtained from a Bangladeshi lawyer who had interviewed DAM officials responsible for their collection. *See generally* PDoc 227 at 39–150. That affidavit asserts that DAM officials purport to collect estimates of price averages from interviews with businessmen and customers but do not attempt to validate the data, and that the affiant was not provided, despite request, with a copy of the questionnaire used to collect the data. *See id.* at 56.

For the *Final Results* Commerce changed its preliminary determination and decided that the primary surrogate country should be Bangladesh on the basis of the DAM 08/09 data. Regarding the argument that the DAM 08/09 data should be rejected upon the same rationale Commerce had employed to reject the Fish Pond Report in

the *Fifth Review* (to wit, that the DAM 08/09 data set is not an official, published government source and cannot be considered publicly available), Commerce disagreed "that the attributes of the DAM 08/09 data are so similar to those of the Fish Pond Report" that they would warrant rejection as a viable source to value the whole fish. After acknowledging that the Fish Pond Report's lack of publication had been cause for concern in the *Fifth Review*, Commerce explained that this was "rooted in the fact that Petitioners claimed the data were to be published" or "source data to be used in a yet-to-be determined manner for official publication in the *Fisheries Situationer*," *i.e.*, the data may not have been finalized or were in draft form prior to publication. In contrast, Commerce noted the DAM 08/09 data were accompanied by a letter from a deputy director of the agency in the Bangladesh Ministry of Agriculture in charge of "collecting and disseminating the wholesale market price of various agricultural commodities, livestock, and fisheries, including Pangas."[6] *Sixth Review* I&D Memo at 12, quoting PDoc 195 at Ex. 7. The official in that letter declares that the DAM 08/09 "data can be provided to any member of the public upon request, free of cost" and that the price data contained within is "country-wide data" representing "all months of years 2008 and 2009, covering all districts of Bangladesh." Due to this "official certif[ication] as to the nature and breadth of the DAM 08/09 data, the completeness of the data, and the availability of the data to the public upon request," Commerce concluded that "the DAM 08/09 data does [*sic* ] not appear to be incomplete or not finalized" and thus found that they constitute publicly available information.

After rejecting the domestic petitioners' argument that the use of "pangas" among the DAM 08/09 data spreadsheets is non-specific to the *Order* and therefore renders them unuseable, Commerce turned to address their argument that the spreadsheets contain the same "#DIV/0!" symbols that were a large cause for rejection of the Fish Pond Report data in the *Fifth Review*. In this instance, having found, *a priori*, the data implicitly finalized, Commerce reasoned

> there is a clear distinction in this case, as the term appears in the DAM 08/09 data when there is no data for any given district of any given week for that month. In other words, if there were no Pangas pricing data available from [a particular] district for

[6] In the process, Commerce minimized the affidavit that had accompanied the Fish Pond Report as not an "official statement from the Government of the Philippines, but rather solely a personal affidavit by the statistician in charge of compiling the data." In this *Sixth Review*, Commerce does not directly fault the affidavit of this same person, averring in her (also apparently same) capacity as the "incumbent Chief of the Fisheries Statistics Division ("FSD")" of BAS.

> any of the weeks in a month, the monthly average column will show the term "#DIV/0!." In fact, in every instance where the term "#DIV/0!" appears there is no weekly price data for that district, thereby causing the monthly average column to generate the formulaic term "#DIV/0!." Therefore, it is reasonable to conclude that this term is generated simply as a function of the mathematical formula trying to perform a calculation on cells with no data in them. As such, we do not find the appearance of this term of any significance such that it would question the DAM data's quality or reliability as Petitioners have argued.

*Sixth Review* I&D Memo at 11.

Commerce then addressed the domestic petitioners' argument that the DAM 08/09 data are not be the best available information with which to value the whole fish input because those data are wholesale prices, not farm-gate level prices, and may thus include delivery costs, taxes and duties, and/or mark ups for wholesaler's profit. Commerce stated it is "unclear whether the DAM 08/09 data wholesale prices necessarily include other costs[.]" Commerce then declared that the prices in FS 07–09 "do not contain only farm[-]gate prices" based upon its "plain reading" of the affidavit of the aforementioned chief [7] of FSD, to wit, that the prices "quoted by the aqua farm farmers/operators (or other Respondents, as the case may be)" are "farm-gate or first-point-of-sale" prices. Commerce noted that the domestic petitioners at the public hearing "attempted to explain that what was meant . . . with respect to 'first point of sale' prices was a reference to the place of sale, not the format of the sale" but Commerce found "no record evidence to further clarify or corroborate" the domestic petitioners' explanation. Rather, Commerce found that the statements in the affidavit "suggest[ ] that the prices in the FS 07–09 include prices other than strictly farm-gate, *i.e.*, prices for different channels of distribution." Commerce therefore found "the issue of whether the DAM 08/09 data or whether the FS 07–09 data represents solely farm[-]gate prices sheds little, if any, light in our analysis because both sources can be considered equally to contain information which suggests the prices are not solely farm-gate prices."

Lastly, Commerce addressed the domestic petitioners' argument that the DAM 08/09 data are not better than the prices in the FS 07–09 because they do not contain information as to the quantities sold, and therefore it cannot be determined whether the prices are

[7] Commerce repeatedly deflates to "statistician". *E.g.*, *Sixth Review* I & D Memo at 11.

based on commercial sales volumes of whole *Pangasius* or based on estimates or isolated spot prices. Commerce pointed to the DAM official's affidavit, wherein is stated that "all the price information therein are in Bangladeshi Taka on a per Quintal basis, *i.e.*, per 100 kg", that the price data was "collected using a scientific method" and a "structured questionnaire", involving interaction "with a network of all leading aqua farmers and wholesale traders as well as through direct market enquiry by visiting mandi (marketplace)", that the weekly data are collected and forwarded to DAM, and that the monthly average price is based on such weekly price data points. Commerce characterized the domestic petitioners as "ultimately concerned with the overall reliability of the DAM 08/09 data due to the absence of volumes sold" and then it found that the DAM official's explanation on the data collection methods in part "addresses any concerns with respect to reliability." Commerce further explained that although it prefers to rely on data that contain volume and value information,

> we have also used sources for major inputs in other cases that do not contain specific volume or value data used to generate the prices. For example, in two recent antidumping duty investigations where wire rod is the main input used to produce the subject merchandise (steel wire garment hangers and steel nails), the Department relied on a source that did not contain volume data.[ ] Both of these cases cited to others involving similar fact patterns, *e.g.*, one relied on a publication the Department uses in cases involving chemical inputs and another involved frozen shrimp where the SV for the main input, raw shrimp, is derived from a source without quantity data.[ ] In other words, all other factors being equal, we found these data sources to be the best available information with which to value the major inputs, even in the absence of volume information.

*Id*. at 12 (footnote omitted). Thus Commerce found these "facts" rendered the absence of volumes with respect to the DAM 08/09 data "of lesser concern." In the end, Commerce found

> that both sources are publicly available, from a potential surrogate country, contemporaneous with the POR, broad market averages, are equally specific to the main input. Simultaneously, both can be considered equally to contain information which suggests the prices are not solely farm-gate prices. Given this degree of equivalence with respect to these factors, we examined the information upon which the Bangladeshi and Philippine potential surrogate whole live fish values were based, conclud-

> ing that the Bangladeshi data represent a fuller set of data more appropriate for use as an SV. Therefore, as a result of the totality of the information considered above, we conclude that the DAM 08/09 data represent the best available data on the record with which to value the whole live fish input. Given the significance of the whole live fish input in the calculation of NV, we therefore conclude that the choice of Bangladesh offers more reliable SV information and thus select Bangladesh as the primary surrogate country for purposes of these final results.

*Id.* at 13–14. This decision resulted in antidumping duty rates of $0.00 for Vinh Hoan, Vinh Quang, and CL-Fish, and $0.02 per kilogram for Agifish, ESS LCC and South Vina. 76 Fed. Reg. at 15944.

B. Analysis

The plaintiffs argue the defendant and defendant-intervenors have failed to demonstrate the legal viability of the DAM 08/09 data as the "best available information" because the determination was based on conclusions or assumptions contradicted by substantial record evidence and because Commerce did not, contrary to its stated policy and practice, consider the totality of available data for the full range of reported factors of production in its analysis.

1. Commerce's Preference For "Farm-Gate" Over Wholesale Prices

Attention drawn in the *Sixth Review* to distinguishing between farm-gate and wholesale prices reflects the relative importance of level of trade in the administrative analysis. Commerce's previously-stated preference is for farm-gate prices. *See*, *e.g.*, *Fifth Review* I&D Memo, *supra*, at 15 (stating that farm-gate prices are preferable to downstream "market" prices because market prices may reflect additional other expenses). The *Sixth Review* record shows that the respondents purchased their whole fish directly from fish farms at farm-gate prices. *See*, *e.g.*, Vinh Hoan's Section D response (Jan. 6, 2010), PDoc 70, at 5–6; QVD's Section A Response (Dec. 8, 2009), PDoc 53, at 20. The defendant argues (or admits) that this "record does not support a clear analytical distinction between farm gate and wholesale prices" but that "[b]oth are prices which a producer of fish fillets could pay for the whole live fish input." Def's Resp at 21 n.3. The contention veers into *post hoc* rationalization, given that Commerce stated as follows:

> it is uncertain the extent to which prices clearly identified as being farm-gate prices or wholesale prices are relevant in the

> surrogate valuation analysis most importantly because surrogate valuation seeks to determine the price a respondent would pay for an input if it were to be producing in the surrogate country, not necessarily what producers of that input in the surrogate country receive.

*Sixth Review* I&D Memo at 11 & n.37.

This does not adequately address deviating from Commerce's previously-expressed preference, *ceteris paribus*, for farm-gate prices. In the *Fifth Review*, for example, Commerce found farm-gate prices quite relevant when "determin[ing] the price a respondent would pay for an input if it were to be producing in the surrogate country[.]" In that review, Commerce rejected data pertaining to the "Pangas Thesis" precisely because it is "unclear whether [its] methodology relies on farm gate prices or market prices, *and if market prices, what movement or other expenses are included in those prices.*" *Fifth Review* I & D Memo at 15 (italics added). Deviation from practice may be upheld if the agency's reasons therefor are valid, *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003), but Commerce's determination does not adequately explain why the distinction between farm-gate pricing and wholesale pricing is now irrelevant to determining the price a respondent would pay for an input if it were producing in the surrogate country.

2. Contradictory Record Evidence

a. Commerce's Finding That The Philippines' Data and Bangladeshi Price Data "Equally" Contain "Not Solely Farm-Gate Prices"

Commerce concluded "the issue of whether the DAM 08/09 data or whether the FS 07–09 data represent[ ] solely farm[-]gate prices sheds little, if any, light in our analysis because both sources can be considered equally to contain information which suggests the prices are not solely farm-gate prices." *Sixth Review* I & D Memo at 11. This muddles the record. The defendant contends "Commerce meant that the DAM data are not farm-gate prices and [that] the BAS data contain some prices other than farm-gate prices." Def's Br. at 23. That is also *post hoc* rationalization. If it accurately portrays what Commerce meant, Commerce should have so stated. Even then, the explanation is artificial, as the uncontested record shows that the Bangladesh DAM 08/09 data solely reflect wholesale-level prices, which circumstance does not "suggest" the inclusion (or rather straw-man

disinclusion) of farm-gate prices whatsoever. Commerce's articulation thus disingenuously put the data sets on "equal" footing and detracted from the analysis.

b. Commerce's Interpretation of the Philippines Price Data

The conclusion that the Philippine FS 07–09 data "contain information which suggests that the prices are not solely farm-gate prices" depended upon interpreting the two affidavits pertaining to the FS 07–09 data. Considering the affidavit from the chief of the Philippines' BAS's Fisheries Statistics Division ("FSD"), Commerce found nothing of record to corroborate the petitioners' interpretation of it and stated that a "plain reading . . . suggests that the prices in the FS 07–09 include prices other than strictly farm-gate*, i.e.*, prices for different channels of distribution." *Sixth Review* I & D Memo at 11. The affidavit is indeed plain, but it leads to the opposite conclusion. Relevant statements therein are as follows:

> . . . Respondents must be aquafarm farmers, operators or caretakers. Other possible respondents are aquafarm traders and persons knowledgeable in the production of aquaculture in the locality.
>
> * * *
>
> . . . Among the information included in the data collection and gathering are the price/value of the product per kilogram, volume of production in metric ton[,] and harvest area in terms of hectarage. The prices quoted by aquafarrm farmers/operators (or other respondents, as the case may be) are also referred to as first-point-of-sale price or farm-gate price.
>
> . . . The price stated in the *Fisheries Statistics of the Philippines* and in the *Fisheries Situationer* is referred to as the farm-gate price or the price quoted by the aquafarm farmers/operators at their first point of sale. The price stated is also tax exclusive.
>
> * * *
>
> . . . The volume and value data for *Pangasius* in the attached schedule, entitled "Freshwater Fishpond, 2008," is the complete and final compiled information collected for *pangasius* produced in the in the Philippines for the year 2008. This report forms part of the Bureau's working papers and contains the statistical data used to prepare the official *Fisheries Statistics of the Philippines* and the *Fisheries Situationer* publications. . . .

> . . . The Freshwater Fishpond, 2008 Report includes the quantity, value and weighted-average unit price data for whole live *Pangasius* produced and sold in the Philippines in 2008. . . .

PDoc 132 at Att. 1, ¶¶ 9, 13–14, 18–19 (italics added).

Taking into account whatever in the record supports the agency's finding as well as fairly detracts, it cannot be concluded that interpreting this affidavit as referring to two different "channels of distribution" and implicit selling price points was reasonable. Contrary to the finding of no information of record to support the plaintiffs' interpretation, the BAS information of record provides that agency's clear definition of "farm-gate prices": they are equivalent to "first point of sale" prices, to wit, "prices received by farmers and livestock raisers for the sale of their produce at the first point of sale, net of freight costs." *See* Petitioners' SV Submission (Dec. 13, 2010), PDoc 210, at Ex. 8 (italics added). That describes not "two different channels of distribution" but the same price point -- for *production* -- that does not include the cost of a different (or further) channel of distribution. "The" price stated in the *Fisheries Statistics of the Philippines* and in the *Fisheries Situationer* is thus plain, and the "or" employed in the above affidavit is conjunctive, not disjunctive. To imply or conclude that "the" price stated therein and published is one of commingled, different price points from different channels of distribution is to ignore, unreasonably, BAS's stated statistical focus on "the" price of live, whole fish. Substantial record evidence thus does not support the contrary administrative interpretation of this affidavit.[8]

A second affidavit of record influenced the agency's opinion that "there is some evidence that the data for one of the Philippine Regions may include a small volume of further processed whole live fish which is meaningful to the analysis because prices of cleaned and cut fish are substantially higher than those for whole fish." This affidavit was

[8] BAS had also defined "traders" as "those who buy and sell goods or commodities" and "wholesalers" as "those who buy in bulk from farmers/raisers/fishermen and fellow traders." The only reasonable interpretation of "aquafarm trader" in the affidavit is for obtaining his or her knowledge of "*production* of aquaculture in the locality" (including "price/value of the product per kilogram, volume of production, in metric ton and harvest area in terms of hectarage") and quotation of first-point-of-sale price, *i.e.*, the farm-gate price. Even construing, *arguendo*, "other respondent" in the affidavit to encompass a fellow-trader "wholesaler," it is still plain that for purposes of FSD's statistical information gathering any "prices quoted by" such wholesaler would still have to be first point-of-sale prices (*i.e.*, the farm-gate price) based upon such wholesaler's knowledge of what he or she paid or would have paid to purchase product from an aquafarm farmer. That would be the only meaningful construction, because a price "quoted by" a wholesaler for a sale *from* that wholesaler, as defined by BAS, to another purchaser would not be a "first-point-of-sale" price, as defined by BAS.

procured from an official of the Philippines Bureau of Fisheries and Aquatic Resources ("BFAR"), which is wholly separate and distinct from the BAS that prepares and publishes the *Fisheries Statistics* that would include the FS 07–09, who attests that he was the project leader of *Pangasius* development in "Region 2" and that

> BFAR Region 2 demonstration farms produced 3200 kilograms of [*Pangasius*] fish in 2008 and 2009. This production was included in official government surveys and is accounted for in the *Fisheries Statistics of the Philippines, 2007–2009*.
>
> *Pangasius* prices in BFAR Region 2 were significantly higher than those in other parts of the Philippines in 2008 and 2009. The prices were higher because the region is land-locked and is otherwise isolated from sources of marine[ ] and brackish water fish, making fish relatively scarce and thus more expensive than other parts of the Philippines.
>
> Some 10–15 percent of *Pangasius* fish harvested in Region 2 in 2008 and 2009 were sold cleaned, cut or otherwise not live or in whole form. Prices of the cleaned cut fish are substantially higher than those for whole fish.

VASEP Second SV Rebuttal Submission, PDoc 211, at Att. I,¶¶ 2–6.

The plaintiffs admit the possibility that some *Pangasius* were sold in further processed forms in Region 2, but they argued to Commerce that the BFAR official did not claim he had knowledge of the data collection procedures of BAS or indicate that the prices included in the FS 07–09 data reflected any sales of cleaned, cut, or non-whole *Pangasius* for Region 2, as he stated only that "production" is accounted for in BAS's publication. The plaintiffs here contend Commerce simply connected two disparate statements and speculated that BAS included among the "substantially higher" prices of the *Pangasius* sold in Region 2 those that were "sold cleaned, cut or otherwise not in live or whole form" into its price reports.

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). Commerce concluded BAS included the prices of sales of "cleaned, cut or otherwise not in live or whole form" *Pangasius* from BFAR Region 2 into its price reports, since it noted that the inclusion of such (obviously dead) fish "may explain" the "observation of price volatility in the FS 07–09 data for Region 2." *Sixth Review* I&D Memo at 13. That conclusion runs counter to the BFAR official's expressed reason for why prices for

*Pangasius* for BFAR Region 2 as a whole were "significantly higher" as well as BAS's focus on the production and price of whole, live fish.

The court is very much aware that Commerce's mandate requires it to assess often conflicting or unclear evidence, that judicial review refrains from re-weighing the evidence leading to an administrative determination, *e.g.*, *Matsushita Elec. Indus. Corp. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984), and that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citation omitted) (*see*, *e.g.*, *American Silicon Technologies v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001), but speculation does not amount to reasonable inference, as it provides no factually-grounded basis for sustaining an agency's determination. *See*, *e.g.*, *Fifth Review* I&D Memo at 9 (wherein Commerce reasoned it would not be appropriate to "draw conclusions about the range of prices" from the Philippines Fish Pond Report "given the nature of the pool of respondents and the location and time period of the data collected"). While it is unclear from the record whether the BFAR official's and FSD's official's statements are even inconsistent, it is, however, clear that Commerce's conclusion impugns the stated focus of BAS's statistical reports in addition to the veracity of the FSD official's statements. If that was intentional, the issue, of whether the price-volatility finding is mere speculation or reasonable inference, fortunately need not be addressed at this time, because remand of the surrogate country determination as a whole is otherwise required. *See infra*.

On remand, the "observed price differential" for Region 2 may also need proper context. In addition to the foregoing, Commerce noted that the Philippines whole fish prices in 2008 ranged from 77.14 to 128.82 Php/kg, *i.e.*, by 67%, and it also noted that "similar volatility is not seen in the Bangladeshi data[.]" *Sixth Review* I&D Memo at 13. The plaintiffs point out that this latter observation is inaccurate, as the DAM worksheets show price variations that are even wider among different Bangladeshi districts than those of the Philippine BAS data: for example, in January 2008, the monthly average prices for "pangas--small" ranged from 2938 to 7100 Tk/quintal, *i.e.*, a range of 142%. *See* PDoc 195 at Ex. 7. If Commerce again reaches the issue of price volatility on remand, it should reasonably address the plaintiffs' concerns regarding such directly contradictory evidence. *See*, *e.g.*, *Huvis Corp. v. United States*, 570 F.3d 1347, 1351 (Fed. Cir. 2009). The court here again emphasizes it is not substituting judg-

ment for that of Commerce on these issues, it is merely observing;[9] Commerce's expressed preference for farm-gate prices may give way to a reasonable determination that they are not the "best" data for purposes of surrogate country selection if it provides a reasonable explanation for the choice, but thus far that explanation is lacking.

c. Commerce's Interpretation of Bangladeshi Price Data

After determining that the issue of whether the DAM 08/09 data or the FS 07–09 data represent "solely" farm-gate prices "sheds little . . . light . . . because both sources can be considered equally to contain information which suggests the prices are not solely farm-gate prices[,]" Commerce then concluded the price data reflected in the Bangladeshi DAM 08/09 data, reflecting a per-100 kilogram basis, represent "a fuller set" than the Philippines data and are reliable because they were "collected using a scientific method". This determination requires reconsideration and a fuller explanation.

The plaintiffs had argued, as described above, that the DAM 08/09 data do not indicate specific quantities associated with the prices indicated, or, for that matter, what type of prices are indicated (whether "actual", mere estimates, or isolated spot prices), and, further, that there is no basis in the record for ascertaining that the prices would reflect the type of normal commercial quantities producers or exporters of subject merchandise would require. Commerce agreed that its preference is to rely on data that contain volume and value information, but it determined that the instant review presented a "similar fact pattern[ ]" to certain of its precedents wherein Commerce had used sources for major inputs without such data.[10]The defendant adds that if "the factual circumstances warrant using prices that have no associated quantities, Commerce will do so."

[9] The plaintiffs also ask the court to take judicial notice of the fact that in the seventh administrative review Commerce rejected the worksheets as not publicly available, *see Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review*, 77 Fed. Reg. 15039 (Mar. 12, 2012) and accompanying I&D Memo. A court may do so (*e.g.*, *Borlem S.A.-Empreedimentos Industrais v. United States*, 913 F.2d 933, 940 (Fed. Cir. 1990)), and the plaintiffs have also submitted a "notice of supplemental authority" concerning the eighth administrative review covering the 2010–2011 period, *see* 78 Fed. Reg. 17350 (Mar. 21, 2013), but there is no need to refer to those determinations at this point.

[10]*Sixth Review* I&D Memo at 12, referencing *Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 33977 (June 16, 2008) (*inter alia*, final LTFV determination) and accompanying I & D Memo at cmt. 10, and *Steel Wire Garment Hangers from the People's Republic of China*, 73 Fed. Reg. 47587 (Aug. 14, 2008) (final LTFV determination) and accompanying I & D Memo at cmt 4.

Def's Br. at 28–29. But it does not elaborate on what those "factual circumstances" are, and neither does Commerce.

The plaintiffs, however, argue that in both of the referenced determinations, Commerce had valued steel inputs using a publicly available industry data bank that represented "national-level steel monitoring by a joint government/industry board" in India and which was used throughout the Indian steel industry as a market index for steel prices, whereas for this review no such "market" representation exists with respect to the DAM data, as is evident in the affidavits they submitted from Bangladeshi *Pangasius* farmers and from an attorney that had conducted interviews with those farmers and with the DAM official that supplied the wholesale price data to the respondents. *See* PDoc 210 at Ex. 13. Countering, but without addressing the purported farmer affidavits of record, the defendant contends the plaintiffs' Bangladeshi attorney's affidavit is "selfserving"[11] hearsay, whereas the "official letter" concerning the DAM data "is a direct representation from the Government of Bangladesh[, and a]s such, the data attains the status of being inherently objective data". Def's Br. at 31–32.

If an affidavit is made from personal knowledge and sets forth specific facts, then whether it is "self-serving" is beside the point. *See*, *e.g.*, *Caterpillar Inc. v. Sturman Industries, Inc.*, 387 F.3d 1358, 1374–75 (Fed. Cir. 2004); *Payne v. Pauley*, 337 F.3d 767 (7th Cir. 2003). On the charge of hearsay, Commerce's hearings are subject to neither the Administrative Procedure Act, *see* 19 C.F.R.§351.310(d)(2), nor, *e.g.*, the Federal Rules of Evidence.[12] The defendant's argument rather concerns credibility, and its latter point, for that matter, would be just as apt with respect to the affidavit of the Chief of FSD of BAS, concerning her government's "inherently objective data."

In any event, the explanation is not part of Commerce's determination. Commerce did not, in fact, address this affidavit at all. But if matter is in the record and relevant, it must be addressed, and the affidavit submitted by the plaintiffs, concerning DAM's price data

[11] The plaintiffs especially take issue with Commerce's disregard for the contents of the affidavit of the attorney, whom they had dispatched to interview the same DAM official that had supplied the wholesale price data to the respondents. The affidavit purports the DAM official's description of the "scientific method" as involving interviews of local wholesale businessmen who provide estimates, and then the DAM officials "just record the average price of pangas based on these estimates provided during these interviews" and without validation.

[12] Even then, and if pursuant thereto, one exception to Fed. R. Evid. 802's proscription against the admissibility of hearsay, of course, is "a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it". Fed. R. Evid. 803(1).

collection methodology, appears of record and relevant. It should, thus, have been addressed, including, at a minimum, notice of any concerns regarding its veracity. *See* 19 C.F.R. §351.301(c)(3)(iv) & (5)(i); *cf.*, *e.g.*, *Certain Color Television Receivers from the People's Republic of China*, 69 Fed. Reg. 20594 (Apr. 16, 2004) (final LTFV determination), I&D Memo at cmt. 9 (contacting Infodrive India, the company from which parties had obtained proposed surrogate value data, in order to better understand the company's data collection methods). A lack of attempted corroboration cannot, *ceteris paribus*, reasonably result in construal against the submitter.

While an agency's "decision of less than ideal clarity" may be sustained if its "path may reasonably be discerned", *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), the *Sixth Review* determination remains unclear as to what circumstances would permit reasonable reliance upon price data without associated volume or value information, or why the circumstances here so warrant. In essence, Commerce effectively states it has "done so in the past" in "similar" circumstances, and the reader is left unclear as to the parameters of what those similar factual circumstances are.[13] Since remand is otherwise required, if Commerce again reaches this issue on remand, it will need to explain with precision what those circumstances are, and state why the present ones are similar.

Commerce and the defendant also call attention to the fact that the DAM worksheets provided 2828 data points whereas the FS 07–09 data had only 12 price points, and that country-wide pangas production in Bangladesh during 2008–2009 totaled 59474 metric tons ("MT"), which compared favorably versus the total volume of pangas production covered by the Philippine FS 0709 during the same period: 47.14 MT as surveyed, or 2264 MT if sourced from *Status of the Pangasius Industry in the Philippines*. *See*, *e.g.*, Def's Br. at 28–29. The plaintiffs take issue with the fact that the figures for "country-wide pangas production for Bangladesh" stated in the *Sixth Review* came not from the DAM 08/09 data but from the *Statistical Yearbook of Bangladesh* published by the Bangladesh Department of Fisheries. The defendant admits there is "some uncertainty" as to the total production figures, but it argues that even taking the highest of the alleged Philippine production figures on the record, 2264 MT, and

[13] *See Sixth Review* I & D Memo at 12 & n.41, referencing *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 Fed. Reg. 52052 (Sep. 12, 2007) and accompanying I & D Memo at cmt. 1. As summarized, *supra*, Commerce simply states with respect to that determination: "the SV for the main input, raw shrimp, is derived from a source without quantity data."

comparing it with the lowest production figure of record for Bangladesh, 58474 MT, "it is clear that Bangladesh has a much larger pangas producing industry than the Philippines." Def's Br. at 16, referencing *Sixth Review* I & D Memo at 13–14. That may be true, but once again that is not quite what Commerce stated. *And cf*. *Sixth Review* I & D Memo at 6, quoting, in part, Policy Bulletin 04.1 ("The statute does not require that the Department use a surrogate country . . . that is the *most* significant producer of comparable merchandise. . . . The extent to which a country is a *significant* producer should not be judged against . . . the comparative production of the five or six countries on [the Office of Policy]'s surrogate country list.") (italics in original). Commerce only remarked that it "believe[d] these distinctions should be considered in the context of comparing these two competing data sources." *Sixth Review* I & D Memo at 13. On the other hand, if Commerce is only inclined to tailor a finding equivalent to the defendant's on remand, then remand would be futile. *Cf. Bowman*, *supra*, 419 U.S. at 286.

Be that as it may, Commerce's determination that the Bangladeshi DAM 08/09 are "fuller" relies on a comparison of the 2828 data points in that set that were obtained from 64 of the 70 reporting districts, versus, for the FS 07–09 set, 12 data points obtained from the 5 of the largest pangas-producing provinces out of 81 provinces in the Philippines. The plaintiffs argue that because the DAM data are weekly and the FS 07–09 are annual and at a higher level of aggregation, this is like comparing apples and oranges and therefore not meaningful. The court cannot agree that the comparison is not without some quantum of probative value on data set "fullness", at least of country-wide *wholesale* prices of *Pangasius* in Bangladesh; theoretical conversion of the FS 07–09 data to weekly data points would still result, at least in absolute terms, of a set approximately one-quarter the size of the DAM 08/09 set, assuming the court's back-of-the-envelope calculation is correct. The court can agree, however, that it would be illogical to infer from such observation that the DAM 08/09 are therefore "better" than the FS 07–09 data (*e.g.*, that the DAM 08/09 data are therefore more "comprehensive"), because the comparison does not prove that the Philippine sampling methodology does not provide statistically equivalent representation, in comparison with the DAM 08/09 data, of country-wide *farm-gate* prices for *Pangasius*. That does not address Commerce's implicit and additional consideration of *Pangasius* production as being greater in Bangladesh than in the Philippines, *supra*; it merely leads back to whether farm-gate or wholesale pricing are the "better" data in this instance -- concerning which Commerce found both data sets equivalent as far as being "publicly

available, from a potential surrogate country, contemporaneous with the POR, broad market averages, [and] equally specific to the main input" in any event.

With respect to the reliability of the data sets, for the DAM 08/09 price data Commerce gave credence to the representation of the Bangladeshi official that they were "collected using a scientific method . . . using a structured questionnaire". As indicated above, that would also appear true of the FS 08–09 data, but in any event, Commerce stated "this further explanation on the data collection methods provides additional information which, in part, addresses anyconcerns with respect to reliability," and that it has also used sources for major inputs in other cases that do not contain specific volume or value data. *See Sixth Review* I&D Memo at 12–14; *see also supra*, note 10. That may sound reasonable up to a point, but it does not address the plaintiffs' central contention that there is "no record evidence that links these two different Bangladeshi sources or any other basis for assuming that the Bangladesh worksheets cover more 'sales' or quantities than the Philippine national statistics." Pls' Reply at 11.

Statistics require proper context. To take the plaintiffs' example, "if each data point in the DAM internal worksheets represented 5 kgs --and nothing on this record indicates any quantities associated with each data point, or if there are any -- then the 2,828 data points would represent pricing for only 14.14 MT, which is less than the FS[ ]07–09 total quantity of sales." *Id*. at n.13 (italics omitted). This seems a primary reason the plaintiffs have been arguing that, *ceteris paribus*, the DAM 08/09 data are not necessarily "better" than the FS 07–09 data, and the court agrees that these aspects of the *Sixth Review* determination, concerning the meaning of the absence of volume information among the DAM 08/09, and whether that set's prices would be representative of commercial quantities of whole fish sales, also require re-examination or clarification. In that regard, while Commerce did not address the reliability of the FS 07–09 data similarly, it apparently deemed them, as above indicated, reliable. *See Sixth Review* I&D Memo at 12 ("we disagree . . . that the record evidence . . . is unreliable").

The plaintiffs also contend Commerce acted inconsistently with respect to determining that the DAM spreadsheets were "finalized" despite the numerous instance of "#DIV/0!" symbols in certain

fields,[14] when in the precedent *Fifth Review* Commerce had precisely pointed to the presence of those symbols among the data proffered by the plaintiffs, as obtained from the Government of the Philippines, as reason for not finding their data finalized. *See Fifth Review*, I&D Memo at 9–10. That was not, however, Commerce's sole reason for rejection in the *Fifth Review*. The defendant points out that in contrast to the *Fifth Review*, for the *Final Results* Commerce had before it an "official endorsement" from the Bangladeshi government, *i.e*, PDoc 195 at Ex. 7. The *Sixth Review* I&D Memo, beginning on page 9, restates that Commerce had "legitimate concerns" during the *Fifth Review* "that the data may not have been finalized or was in draft form prior to publication" and offers explanation of why, for this *Sixth Review*,

> the DAM 08/09 data do[ ] not appear to be incomplete or not finalized. Here, we have a Bangladeshi Government official certifying as to the nature and breadth of the DAM 08/09 data, the completeness of the data, and the availability of the data to the public upon request.

*Sixth Review* I&D Memo at 10. Commerce went on to interpret the presence of the #DIV/0! symbol in this review as "the function of the mathematical formula trying to perform a calculation on cells with no data in them" because "in every instance where the term '#DIV0!' [*sic* ] appears there is no weekly price data for that district." *Id*. at 11. The court considers that the presence of #DIV/0! symbols on a spreadsheet may reasonably be interpreted to indicate a lack of finality if other circumstances are present and likewise indicative. For that reason, the court cannot find unreasonableness in Commerce's consideration of the issue for this *Sixth Review*.[15]

3. Surrogate Country Selection in Light of Entire Record

The plaintiffs' broader argument is that because Commerce found a "degree of equivalence" between the DAM 08/09 and FS 07–09 data

[14] Specifically, in the review at bar, Commerce "d[id] not find the appearance of this term of any significance such that it would question the DAM data's quality or reliability," as "the term appears in the DAM 08/09 data when there is no data for any given district of any given week for that month." *Sixth Review* I&D Memo at 11.

[15] *I.e.*, the plaintiffs may be justified, as they argue, in complaining of goalpost-shifting at the hands of Commerce in a number of respects including this one, as, for example, in the *Fifth Review* the Philippines data they submitted were *also* accompanied by an "official endorsement," and the record may have involved inappropriate denigration (*cf.*, *e.g.*, notes 6 & 7, *supra*; *cf. also* Public Hearing Transcript (Jan 26, 2011), PDoc 234, at 51–52 (regarding unprofessional data set acronym creativity)), but the court cannot conclude that Commerce's conclusion on the issue for *this* administrative proceeding was unreasonable, given the standard of judicial review.

with respect to each of the key surrogate value selection criteria, Commerce's failure to consider the totality of the surrogate value record was an abuse of discretion.[16] The defendant argues that the silence in 19 U.S.C. §1677b(c)(l) as to what constitutes "best" available information provides Commerce "broad discretion to determine the definition of 'best available information' in a reasonable manner on a case-by-case basis". Def's Br. at 17, quoting *Goldlink*, 431 F. Supp. 2d at 1327 (citation omitted). In this instance, the defendant argues, "degree of equivalence" does not mean Commerce found the data "equivalent" but only with respect to certain factors, and that Commerce did, in fact, consider the entire record, ultimately finding the DAM 08/09 data a "fuller set" based on the number of data points as an indication of broader market coverage than the BAS data.

Generally speaking, the "fullness" of a data set does not address its suitability for the purposes sought by Commerce. *Cf. Laizou Auto Brake Equipment Co. v. United States*, 32 CIT 711, 717 (2008) ( "[i]t is clear that a larger data set, in and of itself, is not necessarily better in valuing factors of production than a smaller one"). The defendant adds, then, that the determination is also based on the fact that Bangladesh produced significantly more *Pangasius* than the Philippines during the POR. Def's Br. at 12–13, referencing *Sixth Review*

[16] In particular, the plaintiffs aver that the record contains the financial statements of Philippine companies who produce only frozen fish products and the financial statements for two Bangladeshi companies producing solely frozen shrimp products and one producing both frozen fish and frozen fish products, and that Commerce's "clear preference" for purposes of surrogate valuation is to select sources that are producers of identical merchandise. Pls' Br. at 24, quoting *Polyethylene Retail Carrier Bags from the People's Republic of China*, 74 Fed. Reg. 6857 (Feb. 11, 2009), I&D Memo at cmt. 2.10. They further aver that the record of Philippine data on secondary material inputs, energy factors, and packing materials is more contemporaneous to the POR than the Bangladesh data for those inputs. To the extent Commerce considered these arguments, it found the inclusion of frozen shrimp production among the available Bangladeshi data inconsequential to valuing the main factors involved in frozen fish production because "the production processes (capital structure) of which we believe to be similar [are] in terms of: cold processing area, freezing machines, and cold storage." *Sixth Review* I&D Memo at 22. This observation may not seem unreasonable in isolation, but it was made in the context of considering the suitability of those Bangladesh companies' financial statements, *i.e.*, after Commerce had determined that the DAM 08/09 data were the "better" data. The observation was not in the context of considering the record as a whole, including all relevant facts, when determining whether the Bangladesh data or the Philippines data were the best information of record available. *See* Policy Bulletin 04.1 ("the country with the best *factors* data is selected as the primary surrogate country") (italics added). Commerce also considered contemporaneity, but only in the context of the data for the "main input," *i.e.*, whole live fish. Commerce did not address the plaintiffs' argument that Philippine secondary material data were more contemporaneous because it "ha[d] selected Bangladesh as the primary surrogate" and its "practice is to rely on upon the surrogate country for all SVs whenever possible." *Sixth Review* I&D Memo at 21. That is, once again, putting the cart before the horse.

I&D Memo at 13–14; *see also supra*. Based upon these and other[17] significant differences, the defendant argues it was reasonable for Commerce to find the DAM 08/09 data the best information available without the need to examine other factor data as a "tie breaker" between the two data sets. The defendant-intervenors add that "the law does not oblige Commerce to preempt every possible riposte or to organize its determination according to a party's particular taste." Def-Ints' Br. at 5.

Commerce's finding of a "degree of equivalence" concerned purported farm-gate price data and wholesale price data. As above mentioned, Commerce determined along the path of equivalence as far as finding both sets "publicly available, from a potential surrogate country, contemporaneous with the POR, broad market averages, [and] equally specific to the main input[.]" Also as above mentioned, Commerce observed there is no specific evidence on the record as to what costs or expenses are included or not included in the DAM wholesale prices, *Sixth Review* I&D Memo at 11–12. That, however, is aside from Commerce's stated preference for using farm-gate pricing, as is the fact that the DAM 08/09 data provide, *arguendo*, broader market coverage than the BAS data, as well as the fact that Bangladesh produced "significantly," *arguendo*, more *Pangasius* than the Philippines during the POR. At the relevant point of "equivalence," it is unclear to the court why Commerce's analysis of the data for the main input did not, then, abide its policy of examining the totality of available data, as the plaintiffs argue. Commerce's Policy Bulletin 04.1 states that "if more than one country has survived the selection process to this point, the country with the best *factors* data is selected as the primary surrogate country" (italics added), and the data for each surrogate factor of production are supposedly accorded equal importance. *See*, *e.g.*, *Folding Metal Tables and Chairs from the People's Republic of China*, 76 Fed. Reg. 2883 (Jan. 18, 2011) (final review results), I&D Memo at cmt. 1C ("in selecting a surrogate country, we do not give more importance to financial ratios than to surrogate values for raw materials, but instead *equally* consider *all* surrogate data in selecting a surrogate country") (italics added). *Cf. Camau Frozen Seafood Processing Import Export Corp. v. United States*, 36 CIT ___, ___, 880 F. Supp. 2d 1348, 1360–61 (2012) ("Commerce's conclusion that Bangladesh's wage rate is the best available

[17] The defendant also points to Commerce's finding of price volatility in the BAS data that can be explained by the record indication of BAS data including cleaned and cut fish with "substantially higher" prices than whole and live fish. *See Sixth Review* I&D Memo at 13–14. As indicated above, this finding will be re-examined and/or may be rendered moot upon remand.

information for valuing the wage rate in Vietnam must be based on a reasonable reading *of the entire record*") (italics added).

Surrogate valuation is not an exact science, but Commerce must approximate the factors of production as accurately as feasible. Certainly Commerce has discretion as to what information in the record is "best," and there may be instances where data are clearly "better," but if information is "available" in the record, the statute does not confer discretion to avoid addressing it. *Cf. id.* Commerce in this instance avoided considering the factors data for secondary material inputs, energy, and packing materials by determining, *a priori*, that the DAM 08/09 data represented the "best" data, resulting in the selection of Bangladeshi as the primary surrogate country. That logic precluded a fair selection of "the country with the best *factors* data . . . as the primary surrogate country" in the context of the record as a whole, including whatever "fairly detracts" as well as supports the determination of what is the "best" available information. The analysis is thus marred.

As it is unclear what impact any particular factor has had on Commerce's analysis to this point, remand of the entire issue of surrogate country selection as a whole is appropriate, and without precluding reconsideration of the entire record for and against the selection of the primary surrogate country upon which to value the respondents' factors of production. If Commerce also deems it necessary to gather additional information, it has the discretion to reopen there record.

V. Use of Unadjusted Factor Useage Data

In the underlying review, the respondent Vinh Hoan submitted farming factor (input usage) data requested by Commerce, including for its affiliate, Van Duc. Vinh Hoan reported Van Duc's factor usage data for fish feed, labor, fingerlings, medicines and salts and lime upon the basis of Van Duc electronic books and records. *See*, *e.g.*, Vinh Hoan Verification Report (Dec. 20, 2010), PDoc 214, CDoc 60, at 11. At verification, Commerce noticed there had been no recording of feed for the first five months of the POR. *Id*.[18] Van Duc explained that the farms were new and the booking procedures had not been followed

[18] "Company officials explained that activity for the first five months of the POR was not recorded for feed until January 2009, as the farms were in their infancy, they did not know the procedures, and the records had not been delivered to [Van Duc headquarters]." PDoc 214, CDoc 60, at 11. When reviewing labor, it also found that "activity for the first six months of the POR was not recorded . . . until February 2009, as the farms were in their infancy, they did not know the procedures, and the records had not been delivered to [Van Duc headquarters]." *Id*. at 14. Verification exhibits showed similar problems for fingerlings, medicines, salt and lime. *See id*. at Exs 20–24.

but averred that all of the activity in those months was accounted for in the warehousing record system in the January 2009 records accounting for the usage for the preceding five months. *Id*. The plaintiffs requested that Commerce either reject Vinh Hoan's reported farming factors data outright or, pursuant to 19 U.S.C. §1677e, assume that the highest reported monthly usage of the inputs applied to the missing months. *See* CDoc 61 at 28–31 and Atts B and C. For the *Final Results*, Commerce accepted Vinh Hoan's arguments that it had "fully" reported its farming factors. The *Sixth Review* I&D Memo quotes from a portion of the verification report as follows:

> When asked, Van Duc officials provided us proof for January 2009 electronic warehouse-out slips. . . . Company officials explained that each of the warehouse-out slips for January 2009 for each pond for each farm has a note detailing how much of the total activity is attributable to prior months.

*Sixth Review* I&D Memo at 35. Commerce did not note any discrepancies with this explanation and the documents provided at verification, and found that "the company explained how consumption was accounted for in its normal books and records" and "verified the consumption reported by Vinh Hoan by tying the numbers to the general ledger and/or financial statements." *Id*.

The plaintiffs argue this shows only that Commerce verified some of Vinh Hoan's consumption amounts for those select months for which data were reported and does not explain why no adjustment was made to account for their "critical omission," or articulate how the margin calculation for Vinh Hoan is "as accurate as possible" given the verified evidence that Van Duc did not report full farming factors for the full POR, or explain why Van Duc's explanation "was an adequate remedy for the fact that *key consumption data remained unreported for multiple months of the POR*." Pls' Br. at 38 (emphasis in original). The plaintiffs contend Commerce failed to provide a reasoned and adequate explanation of why "some adjustment" on the basis of facts available to account for the missing data was unnecessary. *See* 19 U.S.C. §1677e(a) (providing that Commerce "shall" use facts available if "necessary information is not available on the record" or if submitted information "cannot be verified").

The two primary objectives of verification are to verify the accuracyof data submitted in a response, and to verify that relevant data were not omitted from the response. 15 *Antidumping Manual* §II.A. (Dep't Comm. 2009). When calculating Vinh Hoan's NV, Commerce relied upon Van Duc's farming factor usage rates without resorting to

facts available because it found that the allegedly "missing" data were not, in fact, missing, and Commerce did not find any discrepancy in Vinh Hoan's responses. *See Sixth Review* I&D Memo at 35, and Verification Report at 11, PDoc 214. According the general presumption of administrative regularity to which Commerce is entitled, the court cannot second-guess that Commerce did not properly verify how the usage data were accounted for in Vinh Hoan's books and records in the absence of specific contrary evidence of record. The determination is therefore supported by substantial record evidence and is otherwise in accordance with law.

VI. Ministerial Error Allegations

After publication of the final results, the plaintiffs alleged two ministerial errors, namely that Commerce should adjust the surrogate financial ratio calculations to account for inventory changes incorrectly excluded from the selling, general and administrative expenses ("SG&A") and profit calculations the changes in finished goods inventories derived from the financial statements of Apex, Gemini, and Fine Foods, and that Commerce had inadvertently failed to value the electricity and coal used to generate Vinh Hoan's by-products. PDoc 251. With respect to Fine Foods, Commerce responded that there had been no error.[19] With respect to the other alleged ministerial errors, Commerce admitted error, but declined to amend the *Final Results*, contending that correction would not affect the margins of any of the respondents. *Id*.

Regarding the plaintiffs argument on Commerce's calculation of SG&A and profit derived from Apex's and Gemini's financial statements, Commerce's practice is to account for inventory changes in the calculation of the denominators of surrogate financial ratios. *See*, *e.g.*, *Seamless Refined Copper Pipe and Tube from the People's Republic of China*, 75 Fed. Reg. 60725 (Oct. 1, 2010) (final less than fair value ("LTFV") determination), I&D Memo at cmt. 2 (explaining that Commerce's practice is to (1) adjust the materials, labor, and energy expenses for changes in work-in-process inventories, and (2) adjust

[19]*See* Ministerial Error Allegations Memorandum to Gary Taverman, Acting Deputy Assistant Secretary for AD/CVD Operations, dated April 13, 2011, PDoc 249, at 3. Commerce also stated that the plaintiffs' challenge was actually methodological, but that reason does not appear valid, as the only apparent avenue to raise the plaintiffs' claim was ministerial, given Commerce's departure from its *Preliminary Results* and its *sua sponte* decision to use Fine Food's financial statements for the purpose of calculating surrogate financial ratios. The plaintiffs contend they only submitted those statements for the purpose of valuing whole live fish, not for the purpose of calculating surrogate financial ratios, and Commerce's decision was without the benefit of briefing or argument from the parties. *See Sixth Review* I&D Memo at 22.

those expenses as well as factory overhead expenses included in the denominator of the SG&A and profit ratios "for changes in finished goods inventories"); *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 73 Fed. Reg. 55039 (Sep. 24, 2008) (final LTFV determination) and accompanying I&D Memo at cmt. 3.

Normally, *de minimis non curat lex*, and "the administering authority may. . . decline to take into account adjustments which are insignificant to the price or value of the merchandise." 19 U.S.C. §1677f-l(a)(2). Commerce's regulations define an insignificant adjustment as "any individual adjustment having an *ad valorem* effect of less than .33 percent or any group of adjustments having an *ad valorem* effect of less than 1 percent, of the export price, constructed export price or normal value, as the case may be." 19 C.F.R. §351.413. Here, except for Commerce's averment, the court has no basis for concluding what effect, if any, correction of the admitted ministerial errors, in addition to correction of any other identified errors, would have on the analysis. Given that even a "trifle" among the calculations in this instance may mean the difference between a finding of dumping and a finding of no dumping, it is appropriate that Commerce correct for error, particularly where remand is otherwise required. *Cf., e.g.*, *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995) ("where a remand is made to correct clerical errors made by the ITA, it would be paradoxical to deny consideration at the same time of similar errors of others"); *Brother Industries, Ltd. v. United States*, 15 CIT 332, 771 F. Supp. 374 (1991) ("court-ordered amendments of ministerial errors are not destructive of the ITA's ability to manage its proceedings" and "a party's ministerial or clerical errors have warranted correction where remand has been necessary on other grounds") (citations omitted). On remand, Commerce is requested to incorporate correction (depending, of course, upon Gemini's financial data's continued inclusion in the analysis; *see supra*) and also include the value of coal and electricity in the by-product analysis.

Also, in the *Sixth Review* results, Commerce regarded the plaintiffs' argument that it had not accounted for the increases in Fine Foods' inventories of fish and shrimp when calculating the denominators of Fine Food's surrogate overhead, SG&A and profit ratios, and Commerce denied error, taking the position (in contrast to the above) that "[t]he treatment of changes in inventory is done on a case-by-case basis". After determining that the company's statements lacked sufficient detail to account for work-in-progress inventory changes, Commerce intentionally excluded such incorporation into the denomina-

tor of its ratio calculations. *See* PDoc 249 at 3. Here, the plaintiffs repeat their contention that Fine Foods' financial statements contained specific and discreet line items that would allow accurate capture in the relevant financial ratio denominators Commerce employs to account for inventory changes, *e.g.*, the line items "Add: Opening Stock/Inventories" and "Less: Closing Stock/Inventories" in the cost of goods sold calculation. *See* PDoc 96 at Ex. 20, pp. 23. Note 1.18 to the financial statements ("Valuation of Inventories") indicates that the inventories were "of fisheries" as opposed to finished processed fish.[20] *Id*., p. 20. Note 7 thereto ("Inventories") itemizes the different materials included in inventory at the company's two separate locations and aggregates the total inventories under the row labeled "Total fish." *Id*., p. 23.

The defendant responds Commerce properly determined that the financial statement did not contain sufficiently detailed information to make the adjustment and that the plaintiffs are incorrect because the portions of the financial statement plaintiffs identify in their brief do not contain the necessary information. The defendant argues that in order to make the change in inventory adjustment, the financial statement must identify what type of inventory to which the numbers refer (raw materials, processing material, by-product, packing inventory, trade good inventory, and self-produced finished goods inventory) and that the Fine Foods financial statement does not identify the type of inventory to which the line items refer. The defendant further explains that the type of inventory is critical in determining where to include the inventory changes in the financial ratio calculations, *i.e.*, whether for overhead ("OH"), SG&A, and profit: if there is a change in *raw* materials inventory, it is included in the denominator of the OH calculation (as the plaintiffs argue should be the case here), but if there is a change in the *processing* material inventory, it is included in the numerator of the OH calculation, and if the inventory change is for trade goods or self-produced goods it is included in the SG&A and profit ratios. No adjustment is made if the change is in packing or by-product inventory.

The court can agree with Commerce that the Fine Foods financial statement does not have the degree of specificity that Commerce requires, as it is unclear what "trading stock" means, unless that is a term of art (of which the court has not been apprised), and there is no

[20] Specifically, Note 1.18 states that "management has valued inventories as mentioned in the subsequent paragraphs"; that "[a]ll the fishes except those kept and reared for breeding are listed in the inventory as Trading Stock of fisheries"; and that "[a]ll these Trading Stocks of fisheries have been valued at estimated net realized values as *per* management's best estimate considering various market factors like volatility, demand and supply and the choices of customers." PDoc 96 at Ex. 20, p. 20.

indication of the extent to which work-in-process is included in that term, or in the "break-up" of inventory into "pangas," "tilapia," "common carp," "fingerlings," *etc*., on page 23 of the financial statements of Fine Foods, whose principal activities include "processing fish and marketing the same products in local and foreign market," *see id.* at p. 17, note 1.3, and as there is no separate "finished goods" inventory itemization, especially of frozen processed finished goods, the summary might or might not be inclusive of a raw materials inventory itemization. *See id*. at p. 27, n. 22. Therefore, the figures under "Inventories," in note 7, could be finished product, or work-in-process, or some combination, as Commerce implicitly determined. That does not mean, however, that it was appropriate for Commerce to avoid the obligation to use facts available pursuant to 19 U.S.C. §1677e(a), given that Commerce's determination is that Fine Foods' financial statement offers appropriate surrogate values, that Commerce's indicated practice (to the extent the court has been able to discern it) is to account for inventory changes in the calculation of the surrogate financial ratios, that such practice is indicative of the necessity of that accounting, and that there are, clearly, changes in inventory indicated on Fine Foods financial statements. At a minimum, Commerce must address any viable substitute(s) therefor (or lack thereof) for its financial ratio calculations, and more clearly explain its reasoning.

**Conclusion**

For the above reasons, the matter must be, and hereby is, remanded for reconsideration and further explanation in accordance with the foregoing.

The results of remand shall be filed by September 3, 2013, comments thereon, if any, by October 3, 2013, and rebuttal commentary, if any, by October 18, 2013.

**So ordered**.

Dated: May 23, 2013
New York, New York

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

Slip Op. 13–64

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00110

[Remanding sixth antidumping new shipper review for reconsideration of certain aspects.]

Dated: May 23, 2013

*Valerie A. Slater*, *Jarrod M. Goldfeder*, *Natalya D. Dobrowolsky*, and *Nicole M. D'Avanzo*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

*Ryan Majerus*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White*, *Jr.*, Assistant Director, and *Courtney S. McNamara*, Attorney. Of Counsel was *David W. Richardson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

## OPINION AND ORDER

**Musgrave, Senior Judge:**

This action was brought to contest certain new shipper review aspects of *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15941 (Mar. 22, 2011), PDoc 246, as administered by the International Trade Administration of the United States Department of Commerce ("Commerce"). This opinion follows slip opinion 13–63, issued earlier this date, and presumes familiarity with that decision's discussion of the issues raised in the companion matter, Court No. 11–00109. Jurisdiction is here likewise proper pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), and, as in Court No. 11–00109, the plaintiffs have interposed a motion for judgment on the administrative record, which has now been fully briefed and argued.

The plaintiffs' respondent-specific challenge, and the papers in support and opposition, concern Vietnamese respondent CUU Long Fish Joint Stock Company (which has not intervened here) instead of Vinh Hoan Corporation, but the general claims and arguments raised herein are identical in substance to those raised in Court No. 11–00109, and the reasoning of slip opinion 13–63 readily applies; Now, therefore, the matter shall be, and hereby is, remanded to Commerce for further proceedings consistent with that opinion.

In the interests of judicial economy, commentary on the results of remand for Court No. 11–00109 filed in that case shall as well be deemed to address the pertinent issues of this Court No. 11–00110, unless the parties deem it necessary to provide separate commentary on those results as they specifically concern this Court No. 11–00110, in which case the timeline for such commentary shall be covered by,

due, and consistent with the timeline(s) docketed in Court No. 11-00109 and any extension(s) thereof.

**So ordered.**

Dated: May 23, 2013
New York, New York

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

Slip Op. 13–66

ARCHER DANIELS MIDLAND COMPANY, CARGILL, INCORPORATED, AND TATE & LYLE AMERICAS, LLC., Plaintiffs, v. UNITED STATES, Defendant, and YIXING-UNION BIOCHEMICAL CO., LTD., Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 11–00537
Public Version

[Plaintiffs' motion for judgment on the agency record is granted in part and denied in part. Consolidated Plaintiffs' motion for judgment on the agency record is granted in part and denied in part.]

Dated: May 28, 2013

*King & Spalding LLP* (*Joseph W. Dorn* and *Patrick J. Togni*) for Plaintiffs Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC.

*Barnes, Richardson & Colburn, LLP* (*Michael S. Holton, Jeffrey S. Neeley*, and *Stephen W. Brophy*) for Consolidated Plaintiffs RZBC (Juxian) Co., Ltd., RZBC Co., Ltd., and RZBC Imp. & Exp. Co., Ltd.

*Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Carrie A. Dunsmore*) for Defendant United States; *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel.

*Drinker Biddle & Reath LLP* (*Richard P. Ferrin* and *Douglas J. Heffner*) for Defendant-Intervenor Yixing-Union Biochemical Co., Ltd.

## *OPINION*

**BARZILAY, Senior Judge:**

This matter comes before the court on the motions for judgment on the agency record filed pursuant to USCIT Rule 56.2 by Plaintiffs Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas, LLC ("Petitioners") and Consolidated Plaintiffs RZBC Co., Ltd. ("RZBC Co."), RZBC Import & Export Co., Ltd., and RZBC (Juxian) Co., Ltd. ("RZBC Juxian") (collectively "RZBC"). The Petitioners and RZBC seek review of the final results of the U.S. Depart-

ment of Commerce's ("Commerce") first administrative review of the countervailing duty order on citric acid and certain citrate salts from the People's Republic of China ("PRC"). *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 Fed. Reg. 77,206 (Dep't Commerce Dec. 12, 2011) ("*Final Results*"). The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii).[1] For the reasons set forth below the court remands this matter to Commerce for a clearer explanation of its conclusion regarding the countervailability of steam coal and to address the effect of different grades of sulfuric acid when calculating a world market sulfuric acid benchmark price. The court sustains Commerce's other determinations.

## I. STANDARD OF REVIEW

The court will sustain the "determinations, finding, or conclusions" made by Commerce during an administrative review unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). In other words, when substantial evidence supports Commerce's findings the court may not substitute its judgment for that of the agency. *See Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999). For this reason the "party challenging [Commerce's] determination under the substantial evidence standard 'has chosen a course with a high barrier to reversal.'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (quoting *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001)).

To determine whether Commerce's actions were in accordance with law, the court applies the well-established framework set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). "The first step of the *Chevron* analysis is to determine 'whether Congress has directly spoken to the precise question at

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

issue.'" *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 763 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If it has, the agency and the courts must give effect to Congress's intent. *Id.* If Congress has not directly spoken to the precise question at issue, the agency has authority to fill the legislative gap, and its interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute." *Chevron*, 467 U.S. at 844.

## II. BACKGROUND

In 2009, Commerce issued a countervailing duty order on citric acid and certain citrate salts from the PRC. *See Citric Acid and Certain Citrate Salts from the People's Republic of China*, 74 Fed. Reg. 25,703 (Dep't Commerce May 29, 2009) ("*CVD Order*"). Approximately one year later, Commerce notified interested parties of the opportunity to request a review of the *CVD Order* for the period September 19, 2008 through December 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 75 Fed. Reg. 23,236 (Dep't Commerce May 3, 2010). After receiving multiple responses, Commerce initiated a review of the *CVD Order*, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 75 Fed. Reg. 37,759 (Dep't Commerce June 30, 2010), and selected RZBC and Defendant-Intervenor Yixing-Union Biochemical Co., Ltd. ("Yixing") as respondents. *See* Respondent Selection Memo (Aug. 17, 2010), Public Record 21, Confidential Record 4.[2]

There were three subsidies addressed by Commerce that are at issue in this appeal – the provision of both steam coal and sulfuric acid[3] for less than adequate remuneration ("LTAR"), and long-term loans to RZBC from government sources. After its initial review of the parties' submissions, Commerce issued preliminary results concluding that the respondents had received countervailable subsidies during the period of review. *Citric Acid and Certain Citrate Salts from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 76 Fed. Reg. 33,219 (Dep't Commerce June 8, 2011) ("*Preliminary Results*"). In reaching this conclusion, Commerce determined that RZBC failed to provide the identities of all the companies that produced and supplied it with sulfuric acid. Commerce further determined that the Government of China ("GOC") failed to provide ownership information for the companies producing and supplying sulfuric acid and steam coal. This informa-

[2] Citations to the Public Record will hereafter be designated as "PR" and citations to the Confidential Record will be designated as "CR."

[3] Steam coal and sulfuric acid are inputs used in the production of citric acid and citrate salts.

tion would have allowed Commerce to determine whether these producers were "authorities" within the meaning of 19 U.S.C. § 1677(5)(B). Concluding that RZBC and the GOC had failed to cooperate and that an adverse inference was warranted, Commerce assumed that the producers were, in fact, "authorities" who provided a financial contribution in the form of a provision of a good. *Id.* at 33,222–23, 33,231.

Next, Commerce compared the price paid for these GOC-supplied inputs with benchmarks derived from world market prices and concluded that the steam coal and sulfuric acid were provided for less than adequate remuneration. *Id.* at 33,232, 33,233–34. Finally, addressing the final requirement of a countervailable subsidy, Commerce determined that these benefits were specific under 19 U.S.C. § 1677(5A)(D) because they were conferred on a limited number of industries. *Id.* at 33,232, 33,234.

Commerce did not address loans received by RZBC in the *Preliminary Results* but subsequently issued a Preliminary Creditworthiness Determination (Dep't Commerce Sept. 29, 2011), PR 52, CR 42. In alleging that RZBC received loans as a subsidy, the Petitioners asserted that RZBC was uncreditworthy during the years of 2006 through 2009. *See* Petitioner's Allegations of RZBC's Uncreditworthiness (Apr. 26, 2011), PR 135, CR 43. In the Preliminary Creditworthiness Determination, Commerce first stated that due to ownership changes during the relevant period, it would treat all of the RZBC companies as separate entities for 2006 and 2007 and as a collective entity for 2008 and 2009. Turning to the merits of the Petitioners' allegations, Commerce concluded that, due to "unprofitability, illiquidity, and relatively high leverage," RZBC Juxian was uncreditworthy in 2006. Preliminary Creditworthiness Determination at 4–5. Next, Commerce concluded that RZBC Co. was uncreditworthy in 2007 "due to its [[

]]." *Id.* at 6. Finally, while finding that the financial health of the combined RZBC entities was improving in 2008 and 2009, Commerce ultimately determined that RZBC was uncreditworthy in those years because it "was [[ ]] and [[ ]] . . . ." *Id.* at 8.

Commerce subsequently received additional comments and submissions from the parties and ultimately issued the *Final Results*, which incorporated by reference a corrected Issues and Decision Memorandum for the Final Results in the First Administrative Review of the Countervailing Duty Order on Citric Acid and Certain Citrate Salts

from the People's Republic of China (Dep't Commerce Feb. 10, 2012), PR 90 ("Decision Memorandum"). Commerce also issued a separate Final Creditworthiness Determination (Dep't Commerce Dec. 5, 2011), PR 77, CR 63. In the *Final Results*, Commerce changed its determination regarding the specificity of the alleged steam coal subsidy. *Final Results* at 77,208. It noted that six industries purchase steam coal directly - (1) Mining, (2) Manufacturing, (3) Electric Power, Gas and Water Production and Supply, (4) Construction, (5) Transport, Storage and Post, and (6) Wholesale and Resale Trades, Hotels and Catering Services. Decision Memorandum at 50–51. While Commerce had also recounted these industries in the *Preliminary Results*, it now stated that upon a closer examination, it determined that the list included a larger and more diverse number of industries than originally thought. Decision Memorandum at 51. From this, Commerce concluded that the steam coal subsidy was not *de jure*[4] specific. *Id.* Commerce further stated that it did not have sufficient information to determine whether the alleged steam coal subsidy was *de facto*[5] specific so it would "defer a decision on the program's countervailability to a future administrative review." *Final Results* at 77,208.

Turning to the sulfuric acid subsidy, Commerce maintained its conclusion that the provision of sulfuric acid at LTAR was a countervailable subsidy. However, after receiving additional submissions from RZBC regarding the identity of the companies that supplied its sulfuric acid, Commerce decided that RZBC had provided all of the information requested of it, and that the application of adverse facts available ("AFA") to it was not warranted. Decision Memorandum at 70. This change provided little practical benefit to RZBC, however, because Commerce maintained its conclusion that the GOC had not provided requested ownership information for the sulfuric acid producers that sold to RZBC. *Id.* Based on the application of AFA, those producers would therefore still be treated as authorities. *Id.*

Additionally, Commerce continued to rely on sulfuric acid benchmark prices derived from world market prices, a "tier-two" benchmark under 19 C.F.R. § 351.511(a)(2). Decision Memorandum at

[4] A subsidy is *de jure* specific "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i).

[5] A subsidy is *de facto* specific if (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) an enterprise or industry is a predominant user of the subsidy; (3) and enterprise or industry receives a disproportionately large amount of the subsidy; or (4) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others. 19 U.S.C. § 1677(5A)(D)(iii)(I)-(IV).

57–58. The GOC and RZBC argued that Commerce should have used actual transaction prices paid by RZBC for non-GOC sulfuric acid, a "tier-one" benchmark under 19 C.F.R. § 351.511(a)(2). While acknowledging that actual transactions prices were available, Commerce cited information provided by the GOC to conclude that the GOC's extensive involvement in the Chinese domestic market rendered the tier-one prices unreliable. Specifically, the GOC data indicated that state-controlled sulfuric acid producers accounted for 56 percent and 54 percent of domestic production in 2008 and 2009 respectively. *Id*. at 17. Moreover, Commerce noted that domestic production accounted for 97.09 percent and 95.47 percent of domestic consumption respectively for those same years. *Id.* Based on this, Commerce reasoned that it was appropriate to utilize tier-two prices. *Id.* at 18. Upon comparing the benchmark prices to the prices paid by RZBC to its suppliers, Commerce determined that the sulfuric acid was sold at LTAR, and a benefit was thereby conferred. *Id*.

Regarding the creditworthiness determinations, Commerce maintained its findings that RZBC Juxian was uncreditworthy in 2006 and that RZBC Co. was uncreditworthy in 2007. Final Creditworthiness Determination at 8. Commerce changed its determination regarding the combined RZBC entity, however, and determined that the record established that RZBC was creditworthy for the years 2008 and 2009. *Id.* at 11–12.

## III. ANALYSIS

### A. Commerce's Steam Coal Determination

The Petitioners argue that Commerce's decision to defer making a determination regarding the countervailability of the alleged steam coal subsidy was contrary to law. 19 C.F.R. § 351.311(c)(2) allows Commerce to "defer consideration of [a] newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any." The Petitioners assert, however, that deferral under this provision is not available to Commerce here because it only applies when Commerce officials "discover or receive notice of a practice that appears to provide a countervailable subsidy" during the course of an investigation or administrative review. 19 C.F.R. § 351.311(a). The Petitioners argue that Commerce did not "discover or receive notice" of a possible subsidy during the course of this administrative review. Rather, the Petitioners timely filed new subsidy allegations, and Commerce concluded that these allegations were sufficient to initiate an investigation of the steam coal subsidy. That being the case, Petitioners argue, Commerce was statutorily required under 19 U.S.C. § 1677d to issue a final determination regarding the countervailability of the steam coal provision.

In its brief, the Government agrees with the Petitioners regarding the inapplicability of the deferral regulation, but states that its inapplicability results from the fact that Commerce actually made a final determination. According to the Government, Commerce determined that because the record contained insufficient evidence of *de facto* specificity, there was no basis upon which to determine that the steam coal was countervailable, and that the issue would be revisited in a subsequent review. Def. Br. at 41. While the Government asserts that Commerce's course of action in this regard was a final determination in accord with the law, it also argues that it would have been unreasonable to either countervail the steam coal subsidy, or declare the program not countervailable, without sufficient evidence on the record to make such a determination. *Id.* Yixing joins the Government in arguing that Commerce's determination was in accord with the law, but for a different reason. Like the Petitioners, it argues that Commerce deferred making a final determination, but its entire brief is devoted to the argument that this deferral was justified under 19 C.F.R. § 351.311.

As may be clear from the arguments set forth above, it is difficult to discern exactly what action Commerce took with regard to the alleged steam coal subsidy, which the court must do for the purpose of deciding what legal review to afford. In some respects the *Final Results* reflect a final determination on the issue; in others it appears that Commerce was attempting to defer making a determination. While the Government here argues that the deferral provisions of 19 C.F.R. § 351.311 are irrelevant because Commerce did not defer making a determination, Commerce indicated below that it was deferring its determination regarding the countervailability of the steam coal. *See, e.g., Final Results* at 77,208 (Commerce "will have to defer a decision on the program's countervailability to a future administrative review."); Decision Memorandum at 51 ("Therefore, we are not able at this time to determine whether steam coal is being provided by the GOC to a specific industry or enterprise or group of industries or enterprises. Instead, we intend to revisit the *de facto* specificity of this program in a future review."). This confusion is exacerbated by Commerce's failure to cite any authority for its action.

The court would necessarily undertake different analyses depending on what action was actually taken by Commerce in the *Final Results*. For example, if Commerce was relying on the statutory and regulatory bases for deferral, its action would likely be reviewed under the *Chevron* framework. It also appears to the court that there is an interpretation of Commerce's action that was not discussed by

the parties. Specifically, the bottom line effect of the *Final Results* is that the subsidy rate imposed therein does not include a rate for steam coal sold at LTAR. *See Final Results* at 77,208. In an administrative review, this would normally be the result of a final determination that the subsidy under consideration was not countervailable for the given period of review. Commerce, however, did not provide sufficient analysis of its specificity conclusion to give such a determination meaningful review here. *See Diamond Sawblades Mfrs. Coalition v. United States*, 612 F.3d 1348, 1360–61 (Fed. Cir. 2010). Given that Commerce's conclusion does not contain sufficient analysis or explanation for the court to examine under either aspect of the standard of review set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), the court remands on this issue so that the agency can better explain its conclusion regarding the countervailability of the alleged steam coal provision.

### B. Application of AFA

RZBC argues that Commerce's determination that its sulfuric acid producers were authorities based on the application of AFA was contrary to law. Once Commerce concluded that RZBC fully cooperated in the investigation, RZBC asserts, imputing the GOC's failure to cooperate to RZBC conflicted with the law. Commerce's AFA finding regarding the GOC is not challenged here. Rather, the court must address whether, in a countervailing duty proceeding, the application of AFA to a non-cooperating party may adversely impact a cooperating party.

The inquiry engaged in before applying AFA is well-established. Commerce may use facts otherwise available in the record if

(1) necessary information is not available on the record, or

(2) an interested party or any other person –

> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
> (C) significantly impedes a proceeding under this subtitle, or
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title.

19 U.S.C. § 1677e(a). Once this determination regarding the use of facts otherwise available has been made, Commerce may make an adverse inference in selecting facts adverse to the interests of a party

that "has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] . . . ." 19 U.S.C. § 1677e(b). In challenging the *Final Results*, RZBC relies on the principle that Commerce lacks "authority under 19 U.S.C. § 1677e(b) to use an inference that is adverse to a party to the proceeding absent a factual finding that such party 'failed to cooperate by not acting to the best of its ability to comply with a request for information.'" *SFK USA, Inc. v. United States*, 33 CIT __, 675 F. Supp. 2d 1264, 1275 (2009) (quoting 19 U.S.C. § 1677e(b)).

Commerce asserts that it did not deviate from this principle, but that the adverse impact to RZBC of the AFA finding is a function of the specific information sought in countervailing duty cases. 19 U.S.C. § 1677(5)(B) sets forth the elements of a countervailable subsidy - "an authority . . . provides a financial contribution . . . to a person and a benefit is thereby conferred."[6] Section 1677(5)(B) also states that "'authority' means a government of a country or any public entity within the territory of the country." Commerce, therefore, needed to determine not only who RZBC's sulfuric acid producers were, but whether they were government- or publicly-controlled as to satisfy the definition of "authority" under § 1677(5)(B). Once Commerce received RZBC's supplemental responses identifying its sulfuric acid producers, Commerce concluded that "RZBC provided all the information requested of it and that the application of AFA to RZBC is not warranted." Decision Memorandum at 70.

Identifying RZBC's sulfuric acid producers, however, could not tell Commerce whether those producers were authorities. To make that determination, Commerce needed ownership information. To obtain the necessary information, Commerce issued questionnaires to the GOC and described the GOC's responses as follows:

> [F]or certain suppliers, no information was submitted; for certain other suppliers that had some direct corporate ownership, the GOC failed to provide articles of association for each level of ownership, information as to whether any of the owners, members of the boards of directors or managers were also government officials or CCP ["Chinese Communist Party"] officials, or whether operational and strategic decisions made by the management or boards of directors are subject to government review or approval; and for other suppliers that were directly owned by individuals, the GOC generally failed to address whether any of the owners, members of the boards of directors or managers were also government officials or CCP officials, or whether op-

[6] 19 U.S.C. § 1677(5)(A) contains the additional requirement that a countervailable subsidy be "specific" as described in 19 U.S.C. § 1677(5A).

> erational and strategic decisions made by the management or boards of directors are subject to government review or approval.

Decision Memorandum at 3. The information the GOC failed to provide was relevant to whether the producers identified by RZBC were "authorities" under § 1677(5)(B), and there is no indication in the record that RZBC could have provided this information, or that it could have been sought from any other source. Accordingly, Commerce applied AFA and concluded that RZBC's sulfuric acid producers were "authorities" within the meaning of 19 U.S.C. § 1677(5)(B). *Id.* at 70.

These facts follow the previously articulated pattern that "[t]ypically, foreign governments are in the best position to provide information regarding the administration of their alleged subsidy programs . . . [and] respondent companies, on the other hand, will have information pertaining to the existence and amount of the benefit conferred on them by the program." *Essar Steel Ltd. v. United States*, 34 CIT __, 721 F. Supp. 2d 1285, 1297 (2010), *aff'd in part and rev'd in part on other grounds*, 678 F.3d 1268 (Fed. Cir. 2012). For this reason, "[w]here the foreign government fails to act to the best of its ability, Commerce will usually find that the government has provided a financial contribution to a specific industry." *Id.* (citation omitted). The application of AFA to the GOC under such circumstances may adversely impact a cooperating party, although Commerce should seek to avoid such impact if relevant information exists elsewhere on the record. *See Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT __, 865 F. Supp. 2d 1254, 1262 (2012). However, absent alternative satisfactory evidence on the record, it is in accord with the law for Commerce to apply AFA to the GOC even though a cooperating party may be adversely impacted. *See id.* (sustaining Commerce's application of AFA based upon the GOC's failure to cooperate even though such application adversely impacted a cooperating party); *see also GPX Intern. Tire Corp. v. United States*, 37 CIT __, 893 F. Supp. 2d 1296, 1333 (2013) (recognizing that in the countervailing duty context AFA can be applied to the GOC even though it will collaterally impact a cooperating party).

Here, RZBC does not claim it could have provided the ownership information Commerce requested from the GOC, so it would have been dependent on the GOC's responses on this point whatever they had been. As it was, the GOC failed to provide the requested information resulting in the "authority" element of the § 1677(5)(B) analysis being decided by an application of AFA. An "authority" is only

important in a countervailing duty analysis to the extent that it confers a benefit on someone. RZBC was that someone here, and Commerce's determination was in accord with the law.

### C. Use of Tier-Two Benchmark Prices

Once Commerce determined by application of AFA that an "authority" had provided RZBC with sulfuric acid, it still needed to determine whether that provision conferred a benefit. Where goods have been provided, Commerce will normally deem that provision as conferring a benefit if it was provided at LTAR. 19 U.S.C. § 1677(5)(E)(iv). An LTAR determination, in turn, is made by comparing the price paid by the respondent to a market-determined benchmark established under 19 C.F.R. § 351.511(a)(2). This provision contains a series of market data tiers which are applied in a descending order of preference. A tier-one benchmark is established by using prices "resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). When there are no usable tier-one prices, a tier-two benchmark is established using an average of available, comparable world market prices. 19 C.F.R. § 351.511(a)(2)(ii).

RZBC argues that Commerce's decision to use tier-two benchmark prices rather than the tier-one benchmark prices on the record was contrary to law and not supported by substantial evidence. It is important to note what is not challenged by RZBC. RZBC does not take issue with Commerce's use of any GOC-provided data, or the conclusion drawn from that data that state- or collectively-controlled companies were predominant in the Chinese sulfuric acid market. Rather, RZBC states that Commerce "ignored" and "failed to consider" its sulfuric acid purchases from foreign suppliers, and argues that this conflicts with Commerce's preference for tier-one benchmark prices. RZBC Br. At 23, 24. RZBC also argues that the tier-two prices used by Commerce did not take into account how prices can vary for different grades of sulfuric acid, and that world market prices for industrial grade sulfuric acid, the type purchased from PRC suppliers, are actually close to PRC prices. RZBC Br. At 24; *see also* Decision Memorandum at 56.

As to RZBC's first argument, the record is clear that Commerce considered RZBC's purchases of sulfuric acid from non-GOC sources. Commerce stated that "[b]eginning with tier-one, we must determine whether the prices from actual sales transactions involving Chinese buyers and sellers are significantly distorted." Decision Memorandum at 17. Commerce then quoted its own regulations as a basis for its concerns over market distortion: "Where it is reasonable to con-

clude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative {tier two} in the hierarchy." *Id.* (quoting *Preamble - Rules and Regulations: Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) ("*CVD Preamble*"). Commerce then cited GOC data stating that state- or collectively-controlled producers accounted for over half of domestic production in 2008 and 2009, and that domestic production accounted for over 95 percent of domestic consumption in those same years. *Id.* Commerce also noted that the GOC had imposed an export tax on sulfuric acid from February 2008 until June 2009, and that such practices can discourage exportation and increase domestic supply. *Id.* Taken together, Commerce found that these practices triggered the concern set forth in the *CVD Preamble*, that domestic and import prices were unreliable, and that reliance on tier-two prices was appropriate. *Id.* at 17–18.

RZBC's argument that Commerce ignored actual transaction prices is therefore contradicted by the Decision Memorandum. Furthermore, arguing that Commerce utilized tier-two benchmarks after ignoring the tier-one benchmarks it has preferred in prior proceedings misrepresents both the determinations of Commerce and the relevant regulatory regime. The fact that tier-one benchmarks are preferred under 19 C.F.R. § 351.511 is agreed to by all the parties, and that preference was expressly cited in the Final Determination. *Id.* at 16–17. However, Commerce's duty to utilize tier-two prices when reliable tier-one prices are unavailable is well established by the *CVD Preamble*, 19 C.F.R. § 351.511(a)(2)(ii), and prior decisions of this court. *See, e.g., Royal Thai Gov't v. United States*, 30 CIT 1072, 1080, 441 F. Supp. 2d 1350, 1359 (2006). Finally, the court finds that the data that prompted Commerce to utilize tier-two prices here was consistent with data in previous cases leading to utilization of tier-two prices. *See Guangdong Wireking Housewares & Hardware Co., Ltd. v United States*, 37 CIT __, 900 F. Supp. 2d 1362, 1380–82 (2013) (sustaining Commerce's use of tier-two prices when 47.97 percent of domestic production was state-controlled, imports comprised 1.53 percent of the domestic market, and export tariffs were in place). Accordingly, the court will sustain Commerce's utilization of tier-two benchmark prices.

Regarding RZBC's claim that Commerce failed to consider world market prices for the same grade of sulfuric acid RZBC purchased, Commerce dismissed this argument as "untimely" and stated that RZBC did not take advantage of earlier opportunities during the proceedings to submit benchmark information. Decision Memoran-

dum at 58. RZBC argues that this is incorrect, and points to its Rebuttal Comments Concerning Petitioners' Additional Subsidy Allegations (Dec. 27, 2010), PR 59, CR 15 ("Subsidy Rebuttal Comments"). In that filing, RZBC stated that the Petitioners' subsidy allegations included "generic and overly broad trade data for the sulfuric acid" which failed to "distinguish between concentration levels and grades of sulfuric acid, which have vastly different pricing." Subsidy Rebuttal Comments at 2. As an example, RZBC cited nontechnical grades which it claims are sold in smaller quantities and at higher prices than the industrial grade sulfuric acid purchased by RZBC, and it attached nontechnical grade pricing and grading information. *Id.*; *see also* RZBC's Administrative Case Brief. (Oct. 24, 2011), PR 58, CR 47, at 29.

In response, the Government argues that the information submitted by RZBC was inadequate for determining benchmark prices, especially when compared to the documentation submitted by Petitioners. The court notes, however, that while this may have been an appropriate conclusion for Commerce to reach after analyzing the submissions of RZBC and the Petitioners on this point, it is not the conclusion Commerce in fact reached. Rather, after apparently considering only RZBC's Administrative Case Brief, Commerce stated that RZBC's argument was untimely. Commerce never addressed the fact that RZBC had raised the argument and filed supporting documentation almost ten months earlier in its Subsidy Rebuttal Comments. It is unclear from the record whether Commerce was even aware of this earlier submission, and the court cannot sustain Commerce's use of the tier-two benchmark prices submitted by the Petitioners if it is not clear that Commerce considered RZBC's submissions challenging those prices. *See Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1349 (Fed. Cir. 2011) (noting that "Commerce's action must be evaluated on the basis of what it said and did at the time, not on its counsel's subsequent justification for the agency action made in litigation challenging it.").

Additionally, both the Government and the Petitioners rely on the principle articulated in *Essar* that the benchmark input prices being compared need not be "identical . . . [because] Commerce's regulations require only that [the input price] be a comparable market-determined price that would be available to the purchasers in the country at issue." *Essar*, 678 F.3d at 1273–74. While it is true that 19 C.F.R. §351.511(a)(2) does not require that world market prices be gathered from "identical" products, it does require that Commerce consider "factors affecting comparability." 19 C.F.R. §351.511(a)(2)(ii).

That is why the court of appeals followed the sentence quoted above by saying it was satisfied that "Commerce properly took into account factors affecting comparability in its selection of the benchmark." *Id.* at 1274; *see also Essar*, 721 F. Supp. 2d at 1294 (explaining the process by which Commerce compared products in calculating a tier-two benchmark). This analysis did not occur here because Commerce wrongly concluded that RZBC's arguments were untimely. Thus Commerce must inquire into comparability on remand.

**D. Creditworthiness**

After subsidy allegations were made by the Petitioners, Commerce investigated loans made to RZBC under the Shandong Province Tenth Five Year Plan, which established a policy of lending to citric acid producers in the Shandong Province. Preliminary Creditworthiness Determination at 2. Pursuant to 19 U.S.C. § 1677(5)(D)(i), loans received from an "authority" can amount to a countervailable subsidy. "In the case of a loan, a benefit exists to the extent that the amount a firm pays on the government-provided loan is less than the amount the firm would pay on a comparable commercial loan(s) *that the firm could actually obtain on the market*." 19 C.F.R. § 351.505(a)(1) (emphasis added). When there is a question regarding whether the firm, here RZBC, could have actually obtained the loans at issue, Commerce will undertake an examination of the firm's creditworthiness. Commerce "will consider a firm to be uncreditworthy if [it] determines that, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources." 19 C.F.R. § 351.505(a)(4)(i). When undertaking analysis of a firm's creditworthiness,

> [Commerce] may examine, among other factors, the following:
>
> (A) The receipt by the firm of comparable commercial long-term loans;
>
> (B) The present and past financial health of the firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts;
>
> (C) The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and
>
> (D) Evidence of the firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the agreement between the lender and the firm on the terms of the loan.

*Id*. As the regulatory language makes clear, Commerce has "flexibility and discretion in determining which factors to consider and weigh in making its creditworthiness decision." *Saarstahl AG v. United States*, 21 CIT 1158, 1163, 984 F. Supp. 616, 620 (1997), *aff'd in part and rev'd in part on other grounds*, 177 F.3d 1314 (Fed. Cir. 1999). Commerce has stated that, in undertaking this analysis, it "is essentially placing itself in the position of a commercial bank at the time the long-term loan in question is being approved and asking, would the bank make this loan?" Final Creditworthiness Determination at 8.

The Petitioners and RZBC challenge of a number of findings made by Commerce in the Final Creditworthiness Determination, and the court addresses each in turn below.

1. *Basis for 2006 and 2007 Determinations*

RZBC argues that Commerce's determinations that RZBC Juxian in 2006 and RZBC Co. in 2007 were uncreditworthy were unsupported by substantial evidence in the record. RZBC begins this argument by paraphrasing Commerce to assert that "the standard is not whether Commerce would give a loan, but whether a conventional commercial source would have given the loan." RZBC Br. at 11. RZBC then states that "the record is devoid of any standards that would explain how a conventional commercial bank may analyze a company's records when issuing a long-term loan." *Id.* Finally, in addition to relying on this lack of standards, RZBC argues that "Commerce failed to cite any record evidence in support of its analysis that a conventional commercial bank would have concluded that RZBC Juxian and RZBC Co. were uncreditworthy." *Id.*

As an initial matter, the court notes that Commerce's attempt to clarify its role by comparing its analysis to that of a commercial bank should not be read to impose a supra-regulatory standard as RZBC seems to argue. While the regulations establish the ability to obtain long-term loans from commercial sources as the measure of creditworthiness, 19 C.F.R. § 351.505(a)(4)(i), this standard can be articulated as an inquiry into "whether the company will generate sufficient income to be able to repay the loan, given all the other financial demands on the company." Pet. Resp. at 15. Essentially, 19 C.F.R. § 351.505(a)(4)(i) directs Commerce to analyze the loan recipient's ability to repay. This provision grants to Commerce the authority to make that determination, and to make it on "a cases-by-case basis," guided by, "among other factors," the considerations articulated in 19 C.F.R. § 351.505(a)(4)(i)(A)-(D). Because commercial lenders normally make determinations like these, analogizing Commerce's role to that of a commercial lender is helpful in understanding the analysis Com-

merce must undertake. However, RZBC's insistence that Commerce, in making this analysis, must do so justifying each step as one that would be taken by a commercial lender is simply without basis in the regulations.

In undertaking this analysis here, Commerce began by noting that RZBC had received loans only from state-owned banks or short-term loans, and that there were therefore no long-term commercial loans to consider under 19 C.F.R. § 351.505(a)(4)(i)(A). Turning to the factors set forth in 19 C.F.R. § 351.505(a)(4)(i)(B)-(D), Commerce considered RZBC's financial data and trends for the relevant period, and compared that information to data from a peer group of comparable companies. Preliminary Creditworthiness Determination at 4. Commerce used this data to analyze the RZBC entities' current ratios,[7] quick ratios,[8] debt-to-equity ratios, debt-to-asset ratios, and times interest earned ratios.[9] In the Preliminary Creditworthiness Determination, Commerce set forth specific numeric values for each of these ratios, as well as what these values meant for the financial health and ability to meet obligations of RZBC Juxian in 2006 and RZBC Co. in 2007. *Id.* at 4–6.

After receiving additional comments from the parties, Commerce maintained the conclusion reached in the Preliminary Creditworthiness Determination that RZBC Juxian in 2006 and RZBC Co. in 2007 could not have obtained long-term loans from a conventional commercial source. Analyzing the 2006 data for RZBC Juxian, Commerce noted that its current ratio indicated that it [[ ], but its quick ratio of [[ ] indicated that RZBC Juxian "[[ ]]" because of [[ ]]. Final Creditworthiness Determination at 10. RZBC also had a [[ ]] times interest earned ratio, indicating that RZBC Juxian's [[ ]] *Id*. Finally, Commerce noted that "RZBC Juxian's [[ ]] income was [[ ] in 2006, showing that RZBC Juxian was not profitable." *Id.*

Regarding RZBC Co., Commerce noted that it had a [[ ]] net cash flow "from operations show[ing] that the company's primary business activity was [[ ]] of generating a positive return on investments." Final Creditworthiness Determination at 11. Commerce also noted that "RZBC Co. had [[ ]." *Id.*

---

[7] A company's "current ratio" gauges its ability to pay short term obligations. *Id*.

[8] A company's "quick ratio gauges" its ability to pay short term obligations with cash or assets that can be easily liquidated. *Id*.

[9] The times interest earned ratio gauges a company's ability to pay its debts by comparing pretax income with interest payments. *Id.* at 5.

Given the scope of the data considered by Commerce, its repeated explanations regarding what that data meant for the companies' ability to repay, and the detailed attention given to the parties' comments, the court does not agree with RZBC's characterization of Commerce's determination as lacking in record support or devoid of standards. The data cited by Commerce paints a picture of two companies with questionable financial health and ability to meet their financial obligations. Commerce's conclusion that RZBC Juxian in 2006 and RZBC Co. in 2007 would not have been able to obtain a loan from a conventional commercial source, was therefore a reasonable one, and it will be sustained by the court.

2. *Inclusion of Government Issued Loan in Analysis*

RZBC argues that Commerce's decision to include the government loans at issue in its financial analysis of the RZBC entities was contrary to law because, by definition, those loans would not have been "information available at the time of the government-provided loan." *See* 19 C.F.R. 351.505(a)(4)(i). Citing no authority other than this regulatory provision, RZBC argues that "[c]learly the critical moment at which a 'commercial bank' will make a determination is based on the finances prior to receiving the loan, not after the loan already has been made." RZBC Br. at 15. Failure to exclude the government loans from the financial data considered, RZBC argues, skewed the companies' debt-to-equity ratio by making it appear that the companies' would be taking on additional debt equal in amount to the government loan already issued.

In declining to exclude the loans at issue, Commerce stated that such an exclusion would depart from previous practice, *see* Final Creditworthiness Determination at 5 (citing *Cold-Rolled Carbon Steel Sheet from Argentina: Preliminary Affirmative Countervailing Duty Determination*, 49 Fed. Reg. 5151 (Dep't of Commerce, Feb. 10, 1984)), and that such a practice would "be unadministrable . . . [and] a nearly impossible exercise." *Id.* at 8. Commerce further stated that a commercial lender "would necessarily examine a firm's projected financial ratios after receipt of a loan" because the lender's priority "is to ensure that it will be repaid in full and on time." *Id.*

The court agrees. A borrower's financial health is of concern to a lender only when that borrower has a loan to repay, and a borrower's ability to repay only becomes an issue once the loan is made. There is nothing in 19 C.F.R. 351.505(a)(4)(i) that required Commerce to exclude the government loans at issue from its consideration of RZBC's finances. Congress nowhere speaks directly to this issue. The court will therefore defer to Commerce's interpretation of what "informa-

tion available at the time of the government-provided loan" could be considered unless it is "arbitrary, capricious, or manifestly contrary to statute." *Chevron*, 467 U.S. at 844. RZBC's argument on this point is unconvincing, and as already stated, Commerce's approach is reasonable and consistent with the rest of the relevant regulatory regime. The court will therefore sustain Commerce's decision not to exclude the government loans at issue from its analysis of RZBC's finances.

3. *RZBC Juxian's Project Appraisal*

In accord with 19 C.F.R. § 351.505(a)(4)(i)(D), Commerce requested from RZBC any "studies, reports, and/or analyses" that would provide evidence of RZBC's future financial health, in particular its future income and ability to make loan payments. Fourth Supplemental Questionnaire for RZBC at 3 (Dep't of Commerce, July 8, 2011). In response, RZBC submitted a document entitled 6000 MT/Year Pharmaceutical Good Quality Citric Acid and Citrate Project – Feasible Research Report dated March 17, 2006. RZBC's Fourth Supplemental Questionnaire Response at 5, Ex. 3 (July 29, 2011), PR 203, CR 66 ("Project Appraisal"). Commerce noted that the Project Appraisal provides data on RZBC Juxian's production projections. Final Creditworthiness Determination at 10. Commerce determined that the Project Appraisal was not probative of RZBC Juxian's creditworthiness because it contained insufficient evidence of the company's future financial position, its sales and revenue, and the market conditions within which RZBC Juxian would operate. *Id.* Commerce was also concerned that there was no evidence that the Project Appraisal was independently prepared. *Id.*

RZBC argues that Commerce's decision not to credit the Project Appraisal as establishing RZBC Juxian's creditworthiness was unsupported by substantial evidence and not in accord with law. RZBC asserts that Commerce's conclusion in the Final Creditworthiness Determination conflicted with its finding in the Preliminary Creditworthiness Determination that the Project Appraisal "showed a [[ ]], an investment recovery period of [[ ]] years, and a break-even point of [[ ]]." Preliminary Creditworthiness Determination at 5. RZBC also argues that Commerce's concern over the Project Appraisal's not being independently prepared has no basis in the regulations. Finally, RZBC asserts that Commerce's conclusion regarding future sales and revenue and market conditions is contradicted by a section of the Project Appraisal entitled "Market Forecast."

Regarding whether the Project Appraisal was independently prepared, the court notes that the regulations do not require indepen-

dent preparation and are silent on the issue altogether. Therefore, Commerce may consider this lack of independence as a mark against the Project Appraisal and this determination is not "arbitrary, capricious, or manifestly contrary to statute," *Chevron*, 467 U.S. at 844, and in fact seems well within the "flexibility and discretion" afforded Commerce under the regulations governing creditworthiness determinations. *Saarstahl,* 21 CIT at 1163, 984 F. Supp. at 620. The more important question, however, is how the Project Appraisal fits into the creditworthiness analysis overall. The Project Appraisal is relevant, if at all, under 19 C.F.R. § 351.505(a)(4)(i)(D) to the extent it sheds light on RZBC Juxian's future financial position. As such, it was considered by Commerce alongside all of the other data discussed above. While RZBC's assertion that the Project Appraisal contains data indicating an expansion of RZBC Juxian's production capabilities may be well-founded, there is nothing in the Project Appraisal that renders Commerce's analysis so unsupported as to fall short of the substantial evidence standard. Both the Preliminary and Final Creditworthiness Determinations make clear that Commerce gave more than a cursory consideration to the Project Appraisal. *See Legacy Classic Furniture, Inc. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1353, 1360 (2011) (remanding based on Commerce's "cursory" treatment of record evidence). However, upon considering the information contained in the Project Appraisal, Commerce gave more weight to the extensive record evidence discussed above indicating RZBC Juxian's "unprofitability, illiquidity, and relatively high leverage." Preliminary Creditworthiness Determination at 5. Commerce's conclusion that the Project Appraisal did not overcome this evidence to establish that RXBC Juxian could have received a long-term loan from a commercial lender was reasonable, and it will be sustained by the court.

4. *Treatment of RZBC Juxian as a New Company*

In the Final Creditworthiness Determination, Commerce noted that RZBC Juxian was founded in [[ ]], the same year for which its creditworthiness was being considered. Final Creditworthiness Determination at 11. Commerce noted that, in previous reviews, it had considered "other factors, such as the financial health of parents and affiliates" when weighing the creditworthiness of a new company. *Id.* Commerce further stated that it had considered such evidence in this review "[w]here appropriate," but found it inconclusive. RZBC characterizes this as a failure by Commerce to treat RZBC Juxian as a newly-founded company, and argues that this decision was unsupported by substantial evidence.

RZBC's argument seems to boil down to an assertion that there is a "new company" status that may be applied to newly-formed companies when their creditworthiness is being considered. *See* RZBC Br. at 17. This assertion, however, has no basis in the regulations, in Commerce's determinations in this case, or in previous determinations. The question that Commerce must answer in a creditworthiness analysis is clear - whether a company could have obtained long-term loans from conventional commercial sources. 19 C.F.R. § 351.505(a)(4)(i). To answer this question, Commerce may apply the factors set forth in 19 C.F.R. § 351.505(a)(4)(i)(A)-(D), or others it deems appropriate according to a proper exercise of its "flexibility and discretion." *Saarstahl,* 21 CIT at 1163, 984 F. Supp. at 620.

In the Final Creditworthiness Determination, Commerce did not handicap RZBC Juxian's data and ratios based on its recent establishment. Rather, in accord with its statement regarding past practice, it considered the finances of RZBC Co. because it had a [[ ]] stake in RZBC Juxian. Final Creditworthiness Determination at 11. Commerce determined that RZBC Co.'s finances did not bolster RZBC Juxian's creditworthiness. RZBC Co. would itself be deemed uncreditworthy for 20007 based upon consideration of its 2006 and 2007 financial data, and from this Commerce surmised that RZBC Co. "was not [[ ] in 2006." *Id.* The court concludes that Commerce acted within the bounds of its regulatory discretion in considering data from RZBC Co. based on RZBC Juxian's recent establishment, and that its conclusion upon weighing that data was reasonable. The court will sustain Commerce on this issue.

5. *RZBC's Creditworthiness in 2008 and 2009*

In the Preliminary Creditworthiness Determination, despite noting some positive aspects of RZBC's financial health for 2008 and 2009, Commerce ultimately found the combined company to be uncreditworthy because it was "[[ ]] and [[ ]]." Preliminary Creditworthiness Determination at 8. Commerce reconsidered this conclusion in the low, Commerce cited other ratios and data indicating "[[ ]]," significantly improved profitability ratios, and debt ratios higher than peer medians. Final Creditworthiness Determination at 11. Commerce also noted that RZBC was "[[ ]]" with profit margins above peer medians. *Id.* All of this led Commerce to conclude that RZBC could have obtained long-term loans from conventional commercial sources in 2008 and 2009.

The Petitioners argue that this conclusion was contrary to law and unsupported by substantial evidence because, in making it, Commerce considered information that was unavailable at the time the

government loans were made. Specifically, the Petitioners note that the government loans in question were issued to RZBC on March 31, 2008, March 27, 2009, and June 11, 2009. *See* RZBC New Subsidy Allegation Supplemental Questionnaire – Section B Response, Exs. 1, 5, and 7 (Apr. 26, 2011), PR 134, CR 42. The Petitioners further note that in making its creditworthiness determination for the combined RZBC entity, Commerce considered financial statements from the four RZBC companies. These financial statements were submitted to Commerce in a 2008 audit report dated [[ ]] and a 2009 audit report dated March 10, 2010. Since the audit reports for each year were dated after the government loan for that year was made, the Petitioners argue those audit reports were not "information available at the time of the government-provided loan," 19 C.F.R. § 351.505(a)(4)(i), and therefore cannot serve as the basis for a determination of whether RZBC was creditworthy for those years.

As Commerce argues, however, although the audit reports were compiled after the government loans were made, those audit reports were compilations of financial statements from each of the RZBC companies. Those financial statements necessarily preexisted the audit reports into which they were eventually compiled. Commerce asserts, and the record contains no indication otherwise, that the financial statements, or the information contained in them, were available contemporaneously with the government loans being made. In other words, at the time the government loans were made, a conventional commercial lender could have reviewed the information that was eventually compiled into the audit reports. The important point is not the format in which this information wass presented, but what the information indicates and when it would have been available. The regulation prompts Commerce to consider only "information available at the time of the government provided loan," and makes no mention of the "documents" or information "sources" that may have been available. Commerce's reliance on the audit reports comports with 19 C.F.R. § 351.505(a)(4)(i), and is reasonable given that those audit reports would have contained "information available at the time of the government-provided loan."

## III. CONCLUSION

For the foregoing reasons, it is hereby

**ORDERED** that the Petitioners' motion for judgment on the agency record is granted in part as set forth in the remand order below and denied in all other aspects; it is further

**ORDERED** that RZBC's motion for judgment on the agency record is granted in part as set forth in the remand order below and denied in all other aspects; it is further

**ORDERED** that this matter is remanded so that Commerce can provide a clearer explanation of its conclusion regarding the countervailability of steam coal; it is further

**ORDERED** that this matter is remanded so that Commerce can address the effect of different grades of sulfuric acid when calculating a world market sulfuric acid benchmark price; it is further

**ORDERED** that Commerce shall file its remand determination no later than July 29, 2013; it is further

**ORDERED** that the parties may file comments to the remand determination no later than August 30, 2013; and it is further

**ORDERED** that the parties may file responses to such comments no later than September 16, 2013.

Dated: May 28, 2013
New York, NY

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

Slip Op. 13–70

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

E Before: Nicholas Tsoucalas, Senior Judge
Court No.: 13–00031

**Held:** Defendant's motion to dismiss is granted and plaintiff's cross-motions to stay and to consolidate are denied.

Dated: May 30, 2013

*Hodes Keating & Pilon* (*Lawrence R. Pilon* and *Michael G. Hodes*) for Medline Industries, Inc., Plaintiff.

*Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Douglas G. Edelschick*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Scott D. McBride*, Of Counsel, for the United States, Defendant.

## *OPINION AND ORDER*

**TSOUCALAS, Senior Judge:**

This case comes before the court on defendant United States Department of Commerce's ("Commerce") motion to dismiss plaintiff Medline Industries, Inc.'s ("Medline") complaint, Def.'s Mot. Dismiss, No. 13–00031, Dkt. No. 13 at 1 ("Def.'s Mot."), and Medline's cross-motions to stay Commerce's motion and consolidate the instant case ("*Medline I*") with *Medline Industries, Inc. v. United States*, No. 13–00070 (Ct. Int'l Trade filed Feb. 18, 2013) ("*Medline II*"). *See* Pl.'s

Resp. Mot. Dismiss, No. 13–00031, Dkt. No. 17 at 1 ("Pl.'s Resp."). *See also* Pl.'s Mot. Consolidate, No. 13–00031, Dkt. No. 18; Pl.'s Mot. Stay Proceedings, No. 13–00031, Dkt. No. 19. Commerce argues that *Medline I* "was filed prematurely and is duplicative of Medline's identical challenge in [*Medline II* ]." Def.'s Mot. at 1. Medline argues that at least one of its cases is jurisdictionally proper, and therefore asks this court to stay Commerce's motion and to consolidate *Medline I* with *Medline II* to "avoid the necessity of Medline being whipsawed on the jurisdictional issue and forced into appealing a dismissal now to protect itself from a successful jurisdictional challenge in [*Medline II* ]." Pl.'s Resp. at 3. For the following reasons, the court grants Commerce's motion and denies Medline's cross-motions.

## BACKGROUND

On November 14, 2012, Medline filed a scope ruling request asking Commerce to determine that its hospital bed end panel components are outside the scope of the antidumping duty order on wooden bedroom furniture from the People's Republic of China ("PRC"). *See* Complaint, No. 13–00031, Dkt. No. 10 at 7 ("Compl."). *See also Wooden Bedroom Furniture From the PRC: Final Results and Final Rescission in Part*, 77 Fed. Reg. 51,754 (Aug. 27, 2012) (the "*Order*"). In a determination dated December 21, 2012, Commerce found that the merchandise in question was within the scope of the *Order*. *See Wooden Bedroom Furniture from the PRC: Scope Ruling on Medline Industries, Inc.'s Hospital Bed End Panel Components*, Inv. No. A-570–890 (Dec. 21, 2012) ("*Scope Ruling*").

On December 27, 2012, Commerce emailed a copy of the *Scope Ruling* to Medline's counsel. *See* Compl. at 2. Medline insists that Commerce "confirmed to [Medline's] legal counsel that there would be no mailing other than the emailing on December 27, 2012."[1] *Id.* Relying on Commerce's representations regarding the December 27 email, Medline commenced this action on January 18, 2013 to appeal the results of the *Scope Ruling*. *See id.* at 3; Pl.'s Resp. at 2; Summons, No. 13–00031, Dkt. No. 1 at 1.

On January 28, 2013, Commerce mailed a copy of the *Scope Ruling* to Medline's counsel. *See* Compl. at 2–3. In response to this mailing, Medline also commenced *Medline II* to appeal the results of the Scope Ruling.[2] *See* Summons, No. 13–00070, Dkt. No. 1 at 1.

[1] Commerce asserts that it did not mail the *Scope Ruling* at that time "due to an apparent misunderstanding." Def.'s Mot. at 2.

[2] In its motion to dismiss *Medline I*, Commerce states multiple times that Medline filed *Medline II* in a timely fashion following the mailing of the *Scope Ruling*. *See* Def.'s Mot. at 2, 3.

Commerce now moves to dismiss *Medline I* for lack of subject matter jurisdiction or, alternatively, for failure to state a claim. *See* Def.'s Mot. at 1. Specifically, Commerce argues that this Court lacks jurisdiction because Medline filed *Medline I* before commencement of the thirty-day window for filing an appeal of a scope determination under section 516A(a)(2)(A)(ii) of the Tariff Act of 1930.[3] *Seeid.* at 3–4. Commerce also argues that *Medline I* should be dismissed because Medline's complaint is "duplicative" of the complaint in *Medline II*. *Id.* at 2.

## STANDARD OF REVIEW

"Subject matter jurisdiction constitutes a 'threshold matter' in all cases, such that without it, a case must be dismissed without proceeding to the merits." *Demos v. United States*, 31 CIT 789, 789 (2007) (not reported in the Federal Supplement) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). "The burden of establishing jurisdiction lies with the party seeking to invoke th[e] Court's jurisdiction." *Bhullar v. United* States, 27 CIT 532, 535, 259 F. Supp. 2d 1332, 1334 (2003) (citing *Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570, 1573 (1990)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "For the purposes of a motion to dismiss, the material allegations of a complaint are taken as admitted and are to be liberally construed in favor of the plaintiff(s)." *Humane Soc'y of the U.S. v. Brown*, 19 CIT 1104, 1104, 901 F. Supp. 338, 340 (1995) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421–22 (1969)).

## DISCUSSION

An action challenging a final scope ruling by Commerce must be filed "[w]ithin thirty days after . . . the date of mailing" of that scope ruling. 19 U.S.C. § 1516a(a)(2)(A)(ii). If a party does not satisfy the terms of section 1516a(a)(2)(A)(ii), this Court lacks jurisdiction over that party's claim. *See NEC Corp. v. United States*, 806 F.2d 247, 248 (Fed. Cir. 1986) ("The proper filing of a summons to initiate an action in the Court of International Trade is a jurisdictional requirement."). "Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in con-

[3] All further references to the Tariff Act of 1930 will be to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

senting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986). The Court's jurisdiction over this action turns on whether the email to Medline's counsel on December 27, 2012 constituted a "mailing" within the meaning of section 1516a(a)(2)(A)(ii).

Medline argues that "th[is] Court has jurisdiction over at least one of [*Medline I* and *Medline II* ]." Pl.'s Resp. at 3. Medline states that it "is unaware of any court decision holding that email notification does or does not satisfy 19 U.S.C. § 1516a(a)(2)(A)(ii)." *Id.* at 3–4. Given this fact and in light of Commerce's representations concerning the legal effect of the December 27, 2012 email, Medline asks the court to stay Commerce's motion and consolidate *Medline I* with *Medline II*. *Id.* at 4. Medline insists that this result "spares Medline the necessity of filing a costly and unnecessary appeal of an adverse jurisdictional ruling in [*Medline I* ], just to protect itself from possible jurisdictional challenges in [*Medline II* ]." *Id.*

Medline has not met the burden of establishing this Court's jurisdiction over *Medline I*. In light of its obligation to construe the terms of section 1516a(a)(2)(A) strictly, *see Georgetown Steel*, 801 F.2d at 1312, the court refuses to extend the definition of "mailing" to include email messages. *See Bond St., Ltd. v. United States*, 31 CIT 1691, 1695, 521 F. Supp. 2d 1377, 1381 (2007) (holding that a fax was not a "mailing" within the meaning of 19 U.S.C. § 1516a(a)(2)(A)(ii)); *cf. Tyler v. Donovan*, 3 CIT 62, 65–66, 535 F. Supp. 691, 693–94 (1982) (mailed notification of a final determination was insufficient to trigger filing period when statute required publication in the Federal Register). Although email is a widespread means of communication, Medline has not demonstrated that an email is sufficient to commence the filing period under section 1516a(a)(2)(A)(ii). Accordingly, the thirty-day period for Medline to appeal the results of the *Scope Ruling* was triggered by the January 28, 2013 mailing of the *Scope Ruling* to Medline's counsel. *See* 19 U.S.C. § 1516a(a)(2)(A)(ii). Because Medline filed *Medline I* prematurely, the court must dismiss for lack of subject matter jurisdiction.[4] *See W. Union Tel. Co. v. FCC*, 773 F.2d 375, 381 (D.C. Cir. 1985) (dismissing for lack of jurisdiction where plaintiff filed petition for review before the 28 U.S.C. § 2344 filing window opened); *Bond St.*, 31 CIT at 1695, 521 F. Supp. 2d at 1381. Although the court is wary of granting Commerce's motion given the alleged misrepresentations to Medline's counsel, this concern is tempered by the fact that Medline initiated *Medline II* in a

[4] Because the court does not have subject matter jurisdiction over *Medline I*, the court will not rule on whether Medline stated a claim in its complaint.

timely fashion following the January 28, 2013 mailing of the *Scope Ruling*. *See* Def.'s Mot. at 2, 3.

Also before the court are Medline's cross-motions to stay Commerce's motion to dismiss, *see* Pl.'s Mot. Stay, No. 13–00031, Dkt. No. 19 at 1, and to consolidate *Medline I* with *Medline II*. *See* Pl.'s Mot. Consolidate, No. 13–00031, Dkt. No. 18 at 1. In light of the court's decision to dismiss *Medline I* for lack of subject matter jurisdiction, these motions are denied as moot. *See Hitachi Home Elecs. (Am.), Inc. v. United States*, 34 CIT __, __, 704 F. Supp. 2d 1315, 1322 (2010), *aff'd* 661 F.3d 1343 (Fed. Cir. 2011) (denying plaintiff's cross-motion for consolidation as moot when dismissing for lack of subject matter jurisdiction).

## CONCLUSION

For the foregoing reasons, Medline's complaint is dismissed without prejudice due to lack of subject matter jurisdiction, and Medline's cross-motions to stay and to consolidate are denied as moot.

## ORDER

In accordance with the above, it is hereby

**ORDERED** that defendant's motion to dismiss is **GRANTED**; and it is further

**ORDERED** that plaintiff's complaint (Dkt. No. 10) in this action is dismissed without prejudice; and it is further

**ORDERED** that plaintiff's cross-motion to consolidate (Dkt. No. 18) is **DENIED**; and it is further

**ORDERED** that plaintiff's cross-motion to stay (Dkt. No. 19) is **DENIED.**

Dated: May 30, 2013
New York, New York

*/s/ Nicholas Tsoucalas*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 13–72

PEER BEARING COMPANY - CHANGSHAN, Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 10–00013

[Sustaining in part, and remanding in part, a Commerce Department remand redetermination in an action contesting the final results of an administrative review of an antidumping duty order on tapered roller bearings and parts thereof from China]

Dated: June 6, 2013

*John M. Gurley* and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief was *Matthew L. Kanna*.

*L. Misha Preheim*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Joanna V. Theiss*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

*William A. Fennell* and *Terence P. Stewart*, Stewart and Stewart, of Washington, DC, argued for defendant-intervenor. With them on the brief was *Stephanie R. Manaker*.

## *OPINION AND ORDER*

**Stanceu, Judge:**

Before the court is a decision (the "Remand Redetermination") the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in response to the court's order in *Peer Bearing Company-Changshan v. United States*, 35 CIT __, 804 F. Supp. 2d 1337 (2011). *Final Results of Redetermination Pursuant to Court Remand* (Apr. 11, 2012), ECF No. 107 ("*Remand Redetermination*"). In this consolidated action, plaintiffs Peer Bearing Company-Changshan ("CPZ") and The Timken Company ("Timken") contested the determination ("Final Results") Commerce issued to conclude the twenty-first review of an antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished (the "subject merchandise"), from the People's Republic of China ("China" or the "PRC"). *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 844 (Jan. 6, 2010) ("*Final Results*").[1] Compl. (Jan. 20, 2010), ECF No. 2; Compl. (Mar. 5, 2010), ECF No. 11 (Court No. 10–00045). The twenty-first review pertained to entries of subject merchandise made during the period of June 1, 2007 through May 31, 2008 ("period of review" or "POR"). *Final Results*, 75 Fed. Reg. at 845.

For the reasons discussed in this Opinion and Order, the court sustains the Remand Redetermination as to two decisions therein, both of which pertain to surrogate values for CPZ's production inputs. The court orders a second remand to address another issue in this

[1] The scope of the order is "tapered roller bearings and parts thereof, finished and unfinished, from the PRC; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use." *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 844, 845 (Jan. 6, 2010).

case, which is whether Commerce acted lawfully in determining that certain TRBs processed in Thailand using Chinese-origin parts should be considered to be merchandise subject to the antidumping duty order.

## *I. BACKGROUND*

The background of this case is presented in *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1340–41, and is supplemented briefly herein.

In contesting the Final Results, CPZ, a Chinese producer of subject merchandise, challenged: (1) the Department's decision that certain TRBs further manufactured in Thailand from Chinese-origin parts were, for antidumping duty purposes, products of Chinese origin and therefore subject merchandise, (2) the Department's method of calculating an assessment rate to be applied to subject merchandise imported by CPZ's U.S. affiliate, Peer Bearing Co., and (3) the Department's surrogate value for its production input of bearing-quality steel bar. *Id*. at __, 804 F. Supp. 2d at 1339. Timken, a domestic producer of tapered roller bearings (and also a defendant-intervenor in this consolidated action), challenged the Department's surrogate value for bearing-quality steel wire rod, another production input CPZ used in producing the subject merchandise. *Id*. at __, 804 F. Supp. 2d at 1339–40.

In *Peer Bearing Company-Changshan*, the court sustained the Department's assessment rate methodology but held unlawful the Department's determining the TRBs processed in Thailand to be subject merchandise and the surrogate values Commerce applied to bearing-quality steel bar and steel wire rod. *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1355. The court ordered Commerce to reconsider its country of origin determination and to redetermine the steel bar and steel wire rod surrogate values. *Id*. at __, 804 F. Supp. 2d at 1355–56.

In its Remand Redetermination, filed on April 11, 2012, Commerce redetermined the two surrogate values but again concluded that the TRBs processed in Thailand were of Chinese origin and therefore subject merchandise. *Remand Redetermination* 1. As a result of the redetermined surrogate values, Commerce revised CPZ's weighted-average dumping margin from 24.62% to 7.37%. *Id*. at 28. CPZ and Timken filed comments on the Remand Redetermination on May 11, 2012. Pl. Peer Bearing Company-Changshan's Comments on Def.'s Final Results of Redetermination Pursuant to Court Remand, ECF No. 112 ("CPZ's Comments"); The Timken Company's Comments on the Dept. of Commerce's Remand Redetermination, ECF No. 111

("Timken's Comments"). Defendant replied to those comments on June 26, 2012. Def.'s Reply to Pls.' Comments upon the Remand Redetermination, ECF No. 125 ("Def.'s Reply").

## *II. DISCUSSION*

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a (2006),[2] including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court will sustain the Department's redetermination if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law. *See* Tariff Act, § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

### *A. The Court Sustains the Department's Redetermined Surrogate Value for Bearing-Quality Steel Bar*

In the Final Results, Commerce determined a surrogate value ("SV") for CPZ's bearing-quality steel bar input according to World Trade Atlas ("WTA") import data pertaining to Indian Harmonized Tariff Schedule ("HTS") subcategory 7228.30.29, which reflected an average unit value ("AUV") of $1,889 per metric ton. *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1347–48 (citation omitted). Commerce chose this data set over others on the record, which included WTA data for Thailand HTS subcategory 7228.30.90 showing an AUV of $1,164 per metric ton. *Id*. at __, 804 F. Supp. 2d at 1349 (citation omitted). The court rejected the Department's determination that the Indian WTA data were the "best available information," 19 U.S.C. § 1677b(c)(1), for use in valuing the steel bar input, concluding that this determination was unsupported by substantial evidence on the record considered as a whole. *Id*. at __, 804 F. Supp. 2d at 1347–54. "The principal flaw in the Department's finding is that the value shown by the data pertaining to Indian HTS subheading 7228.30.29, $1,889 per metric ton, which is not specific to bearing-quality steel, is substantially higher than the AUVs shown by each of the other data sets on the record that were specific to bearing-quality steel."[3] *Id*. at __, 804 F. Supp. 2d at 1351. The court concluded that Commerce, citing its "benchmarking practices," disre-

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

[3] The court cited three data sets on the record that were specific to bearing-quality steel: Infodrive data for India, showing an average unit value ("AUV") of $1,209 per metric ton for bearing-quality steel bar imports in India; U.S. import data, with an AUV of $1,081 per

garded these other data sets as potential corroboration for an AUV obtained from WTA import data and that "[t]he bearing-quality-specific AUVs corroborate closely the AUV of $1,164 per metric ton shown by the WTA Thai HTS data." *Id*. at __, 804 F. Supp. 2d at 1350–51. The court further concluded that "[t]hey do not corroborate the $1,889 AUV the Department obtained from the Indian HTS data." *Id*. at __, 804 F. Supp. 2d at 1351.

In the Remand Redetermination, Commerce used WTA import data for Thai HTS subcategory 7228.30.90 to value CPZ's steel bar input. *Remand Redetermination* 28. Quoting the court's decision, Commerce stated its reasoning as follows:

> For the reasons discussed in the *Final Results*, we continue to find that the use of certain sources for benchmarking purposes remains inconsistent with longstanding Department practice and policy. However, we have re-evaluated the potential SV sources for this factor of production ("FOP") in light of the Court's holding that there is not substantial evidence on the record to support the use of the Indian HTS category to value steel bar. Specifically, we find that the Thai import data under HTS category 7228.30.90 are publicly available, broad market averages, contemporaneous with the POR, tax-exclusive, and representative of significant quantities of imports, thus satisfying key elements of the Department's SV test. Moreover, the Thai import data are from an HTS category which is among the most specific on the record for purposes of valuing CPZ's steel bar input. Further, these data are both reliable in that they are comprised of official government import statistics, and appropriate in that they come from a country which the Department found to be both economically comparable to the People's Republic of China ("PRC") and a significant producer of subject merchandise.

*Id*. at 4–5 (footnotes omitted).

CPZ concurs in, and Timken opposes, the Department's decision to use the Thai import data for HTS subcategory 7228.30.90 to value CPZ's bearing-quality steel bar input. CPZ's Comments 3–4; Timken's Comments 2–8. Timken argues that substantial evidence does not support the Department's finding that these data are the best avail-

metric ton for U.S. bearing-quality steel bar imports; and market-economy purchases for Peer Bearing Company-Changshan, with an AUV that, although confidential, could be described generally as comparable to these other two AUVs. *Peer Bearing Company-Changshan v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1337, 1351 (2011).

able information on the record.[4] Timken's Comments 2. Timken argues that Thai HTS subcategory 7228.30.90 is not specific to the input being valued, citing certain proprietary record data that Timken characterizes as evidence that CPZ's steel bar input possessed a certain characteristic inconsistent with that subcategory.[5] *Id*. (citations omitted). Commerce did not make a finding of fact in either the Final Results or the Remand Redetermination on the question of whether CPZ's steel bar input, as a general matter, possessed the characteristic Timken identifies.[6] The proprietary record data Timken cites in support of its position, *id*. at 6–7, do not pertain to CPZ's home market purchases of steel bar and represent only a small fraction of CPZ's overall steel bar production input. The court views this evidence as minimally probative, insubstantial, and therefore insufficient to require Commerce, upon consideration of the record as a whole, to have reached a finding that CPZ's steel bar input generally possessed the characteristic to which Timken refers. The court, therefore, rejects Timken's argument.

The Department's decision on remand to use import data from Thai HTS subcategory 7228.30.90 to value the steel bar input responds directly to the shortcoming the court identified in the surrogate value Commerce selected for the Final Results. In the language from the Remand Redetermination quoted above, Commerce adequately explained the reasons for its redetermined surrogate value. The court sustains this choice because it complies with the court's remand order and is supported by substantial record evidence, including the record evidence pertaining to the value of bearing-quality steel, which corroborates the value the Department selected.

### *B. The Court Sustains the Department's Redetermined Surrogate Value for Bearing-Quality Steel Wire Rod*

Defendant requested, and the court granted, a voluntary remand so that Commerce could reconsider its surrogate value for bearing-

[4] In the comments on the Remand Redetermination that The Timken Company ("Timken") submitted to the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), Timken advocated using a subset of import data from Infodrive India for Indian Harmonized Tariff Schedule subcategory 7228.30.29 that can be identified as "bearing quality." *Final Results of Redetermination Pursuant to Court Remand* 17 (Apr. 11, 2012), ECF No. 107. Timken does not advocate this position in the comments it filed with the court.

[5] The particular characteristic is not disclosed in this Opinion and Order due to a claim for proprietary treatment.

[6] In its response to comments on the Remand Redetermination, defendant objects that Timken raised this issue only in the remand proceeding, too late for proper consideration by the Department. Def.'s Reply to Pls.' Comments upon the Remand Redetermination 10–11 (June 26, 2012), ECF No. 125. Because the court, in its discretion, chooses to consider Timken's argument on the merits, it does not reach defendant's objection.

quality steel wire rod, which Commerce had determined according to a Thai tariff provision that did not pertain to products of a circular cross-section. *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1354–55. The court concluded that the surrogate value Commerce determined in the Final Results was unsustainable without a finding of fact, supported by substantial record evidence, that the input being valued was not of a circular cross-section. *Id*.

In the Remand Redetermination, Commerce redetermined the surrogate value according to WTA data for Thai HTS subcategory 7228.50.10, which corresponds to steel rod that is of a circular cross-section. *Remand Redetermination* 1, 28. Commerce stated that subcategory 7228.50.10 is appropriate based on plaintiff's indication in a December 2011 questionnaire response that the steel wire rod input consumed by CPZ was of circular cross-section. *Id*. at 6 (footnote omitted). The redetermined surrogate value complies with the court's remand order, and no party opposed this redetermined surrogate value in comments filed before the court. CPZ's Comments 3; Timken's Comments 1–2. The court, therefore, affirms this aspect of the Remand Redetermination.

*C. A Second Remand is Required on the Department's Determination of the Country of Origin of Certain TRBs Processed in Thailand*

In *Peer Bearing Company-Changshan*, the court ordered Commerce to redetermine the country of origin of certain TRBs subject to the twenty-first review that resulted from processing, including assembly, performed in Thailand by a CPZ affiliate. *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1342. Applying what it termed a "substantial transformation" and "totality of the circumstances" test, Commerce had determined in the Final Results that the TRBs at issue were of Chinese origin and therefore subject to the antidumping duty order. *Id*. at __, 804 F. Supp. 2d at 1341.

The Thai manufacturing operations were performed using unfinished cups and cones that were forged, turned, and heat-treated in China and finished rollers and cages that were made in China. *Id*. (citation omitted). CPZ's affiliate in Thailand performed additional grinding and honing ("finishing") on the cups and cones to achieve the required size and polished finish and assembled the cups, cones, rollers, and cages to produce finished TRBs. *Id*.; *Remand Redetermination* 6–7 (footnotes omitted).

In reviewing the Department's country of origin determination as set forth in the Final Results, the court rejected a finding that the costs incurred by CPZ's processor in Thailand were not significant

compared to the cost of manufacture of each subject TRB product, determining the finding to be "unsustainable under the substantial evidence standard of review." *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1342. The court noted that the record contains evidence that the processing costs in Thailand accounted for 42% of the total cost of manufacturing. *Id*. (footnote omitted). The court noted that "[w]hile possessing significant discretion in making country-of-origin determinations . . . Commerce may not disregard record evidence that detracts significantly from, and appears to refute, one of the findings on which the Department relied." *Id*. (internal citation omitted). The court directed Commerce to "reconsider on the whole its determination of the country of origin of the bearings that underwent further processing in Thailand . . . ensur[ing] that its redetermination of the origin of these bearings is based on findings supported by substantial evidence on the record of this case." *Id*.

In the Remand Redetermination, Commerce again concluded that the TRBs processed in Thailand are products of China for purposes of the antidumping duty order. *Remand Redetermination* 17. Commerce once more applied what it described as a "substantial transformation" and "totality of the circumstances" test, under which it applied the following six criteria: (1) "class or kind" of the subject merchandise; (2) physical/chemical properties and essential character; (3) nature/sophistication of processing; (4) level of investment; (5) ultimate use; and (6) third country cost of manufacturing ("COM") as a percentage of total COM. *Id*. at 8–17.

CPZ continues to oppose the Department's country of origin determination. CPZ's Comments 4–14. CPZ argues, *inter alia*, that the determination "remains woefully unsupported by a persuasive rationale, while uprooting twenty years of country of origin practice by U.S. Customs and Border Protection ('Customs') along with importers' expectations of finality with respect to imports of TRBs forged in one country and ground, finished and assembled in another country." *Id*. at 5. CPZ further characterizes the Department's analysis as "flawed" because the analysis "does not properly account for the facts presented in this proceeding and the information provided on the record by CPZ." *Id*. at 14. Timken supports the Department's country of origin determination but does not offer any specific comments on the issue. Timken's Comments 1.

The Court of International Trade previously considered, and rejected, a country of origin determination in a circumstance nearly identical to that presented by this case. In the subsequent (twenty-second) periodic administrative review of the antidumping duty order

on TRBs from China, Commerce also concluded that TRBs that were further processed in Thailand from parts made in China were products of China for purposes of the antidumping duty order. *Peer Bearing Company-Changshan*, 36 CIT __, __, 884 F. Supp. 2d 1313, 1320–25 (2012). Commerce applied six criteria that were very similar to those it applied in the Remand Redetermination. Upon a challenge by Peer Bearing Company-Changshan ("CPZ"), this Court, identifying three flaws, rejected the Department's country of origin determination in the entirety and remanded the issue for redetermination. *Id*. at __, 884 F. Supp. 2d at 1325. First, in applying its totality of the circumstances test, the court noted that Commerce gave weight to its initial criterion, the inclusion of finished and unfinished parts of TRBs within the class or kind of merchandise defined by the scope of the Order, but Commerce provided no reason why this criterion was relevant, on the record of that case, to the country of origin determination being made. *Id*. at __, 884 F. Supp. 2d at 1320–22. Second, with respect to its "cost of production/value added" criterion, the Department found that the processing performed in Thailand did not represent a significant value added to the finished product, a finding that this Court held to be unsupported by substantial evidence on the record as a whole. *Id*. at __, 884 F. Supp. 2d at 1322–23. The third flaw pertained to the "ultimate use" criterion. Commerce found significant to its decision its finding that an unfinished TRB is intended for the same ultimate end-use as a finished TRB, but that finding, the court concluded, had no apparent relevance to the country of origin question posed by that case, which, as here, involved third country processing performed on finished and unfinished TRB parts, not on unfinished TRBs. *Id*. at __, 884 F. Supp. 2d at 1323–24. For reasons similar to those set forth in *Peer Bearing Company-Changshan*, *id*. at __, 884 F. Supp. 2d at 1320–25, the court identifies flaws in the Department's analysis of the country of origin issue in this case that require a second remand order.

*1. Commerce Failed to Provide Reasons Why the Inclusion of Finished and Unfinished Parts in the Scope of the Order Was Relevant to its Country of Origin Determination*

Applying its first criterion, "class or kind" of merchandise, the Remand Redetermination found that "[t]he unfinished components shipped by CPZ to Thailand (*i.e.*, cups and cones), and the finished TRBs and components exported from Thailand, are within the same class or kind of merchandise." *Remand Redetermination* 8 (footnote omitted). The Remand Redetermination concluded that "[t]he fact

that both the finished and unfinished products are within the scope of the order suggests that the TRBs are not substantially transformed in Thailand." *Id*.

The court fails to *see* how the "fact that both the finished and unfinished products" are within the scope of the order "suggests" that a substantial transformation did not occur in Thailand, and the Remand Redetermination offers no reasoning in support of this conclusion. That the Chinese-origin parts would have been considered subject merchandise had they been exported to the United States has no apparent relevance to the issue presented by this case, which is the country of origin of the finished TRBs. To resolve that issue according to a "substantial transformation" analysis, Commerce must decide whether the Chinese-origin parts, finished and unfinished, were substantially transformed by the processing in Thailand that converted these parts into finished TRBs. The Remand Redetermination not only reaches a conclusion unsupported by reasoning but also errs in misstating the issue, framing it as one of whether *TRBs*, as opposed to the finished and unfinished parts, are "substantially transformed in Thailand." *See id*. For these reasons, the court concludes that the Remand Redetermination erred in applying, and giving weight to, the Department's first criterion.

*2. The Department's Analysis under its Second Criterion Reaches Ultimate Findings that Are Not Supported by Substantial Evidence on the Record*

Under its second criterion, "physical/chemical properties and essential character," Commerce reached a number of findings. It found that "[t]he forging process is where the main physical properties are established in that this operation imparts the strength, initial hardness and the physical shape of the cup and cone." *Remand Redetermination* 9. It also found that "[t]he turning process is where the cups and cones are ground to just within final customer specifications so that they are ready for heat treatment" and that "[t]he heat treatment process is equally crucial because it changes the chemical/mechanical characteristic of the cup and cone to ensure durability, hardness and shock resistance." *Id*. (footnote omitted). Although there is evidence on the record that could support these subsidiary findings, the Department reached ultimate findings under its second criterion that are impermissible: "While all stages of production are necessary to obtain the final quality and tolerance levels for a finished TRB or TRB component, in this case, the finishing processes performed in Thailand on the cups and cones impart no substantial changes to the *physical* properties and no change to the chemical/*mechanical* prop-

erties or essential character *of the merchandise* that would constitute a substantial transformation *of the merchandise*." *Id*. at 10 (footnote omitted) (emphasis added). Except for the finding as to "chemical" properties, these ultimate findings are not supported by substantial evidence on the record.

As is obvious from the record evidence, a TRB is designed and built to perform load-bearing and friction-reducing functions in the machine to which it is fitted. Commerce did not find, and on this record could not permissibly have found, that any single component produced in China possessed the physical properties, mechanical properties, or essential character of the "merchandise," which in this case consisted of finished TRBs, not unfinished TRBs or parts. And because no single part made in China possessed the essential character of a TRB, the Department's finding that the essential character of the finished TRBs was imparted in China, as opposed to Thailand, is a logical impossibility.

The Department's findings that the processing conducted in Thailand imparted no changes to the mechanical properties, and no substantial changes to the physical properties, of the merchandise at issue are not supported by substantial record evidence. The record evidence will not permit a finding that any part produced in China had the mechanical or physical properties characterizing a finished TRB, which were acquired only following the finishing and assembly processes. As the Department noted, when exported to Thailand, each cup and each associated cone, the two major components of a TRB, were unfinished. Therefore, in the form in which they were exported, the cups and cones could not even perform their respective functions as TRB *parts* because they had not been ground and polished to their final finish and dimensions. *Remand Redetermination* 8–9. For these reasons, the court must reject all but one of the ultimate findings Commerce reached under its second criterion.

*3. Substantial Evidence Does Not Support the Department's Finding, Reached under its Third Criterion, that the Nature, Extent and Sophistication of the Thai Processing Were Not Significant*

With respect to its third criterion, "nature/sophistication of processing," Commerce described the grinding and honing of the cups and cones in Thailand as "machine processes" encompassing "a series of steps wherein the width, the outside diameter, and bore of the rings (cup and cone) are ground and the inside diameter of the outer ring and the outside diameter of the inner ring are polished." *Remand Redetermination* 11 (footnote omitted). Commerce stated that "[w]hile we acknowledge that the grinding process may on its face appear to

be sophisticated because machines are used in this operation, we find that the nature and extent of the finishing processing performed in Thailand does [sic] not support a finding that the TRBs are substantially transformed because the finishing operations serve only to further refine the cup and cone's finished measurements and polish the roller raceway." *Id*. (footnote omitted). Later in the Remand Redetermination, Commerce stated a finding that "the nature, extent and sophistication of the Thai processing were also not significant." *Id*. at 24.

The Department's conclusion under its third criterion relies largely on the finding that the machining operations performed on the cups and cones in Thailand create the final dimensions and surface finish, which in the Department's view are not as important as the processes in China that forge, turn, and heat-treat the cups and cones. Commerce viewed the Thai processing as less "sophisticated" than the processing conducted on the cups and cones in China, which is merely a descriptive characterization for which Commerce provided little reasoning. Even were the court to accept this characterization, it could not sustain the Department's finding that "the nature, extent and sophistication of the Thai processing were also *not significant*." *Id*. (emphasis added). That finding is not supported by substantial evidence on the record, which contains evidence, acknowledged in the Remand Redetermination, that the processing conducted in Thailand on the cups and cones involved multiple stages of grinding and honing. *Id.* at 13–14, 24, 26 (footnotes omitted). That processing also included assembly operations, which involved multiple stages. *Id*. at 13, 27 (footnotes omitted). As Commerce acknowledged elsewhere in the Remand Redetermination, the grinding and honing operations performed on the cups and cones in Thailand "serve an important role in the production of a bearing . . . ." *Id.* at 9–10. The reliance on an unsupported finding of fact compromises the analysis Commerce conducted under its third criterion.

*4. The Record Does Not Support the Finding under the Fourth Criterion that the Investment in the Thai Equipment Is Not "Significant" in Comparison to the Investment in the PRC Equipment*

With regard to its fourth criterion, "level of investment," Commerce acknowledged that due to a lack of record data it is unable to "quantify a monetary value of investment," adding that it "does not have a threshold for considering a certain level of investment to be significant in a substantial transformation analysis." *Remand Redetermination* 12 (footnote omitted). Despite the acknowledged limitations,

Commerce proceeded to apply its fourth criterion, stating that "[t]hus, for purposes of the redetermination we have analyzed the production equipment used in each stage of production in the PRC and in Thailand in order to make a finding concerning the level of investment." *Id*. The record evidence upon which Commerce made this finding consisted of purely qualitative descriptions of the processing performed in China and the processing performed in Thailand. Based on this evidence, Commerce characterized the Thai production stages as requiring "significantly less machinery, and less sophisticated machinery than the PRC production stages." *Id*. at 27 (footnote omitted).

Whether or not supporting the Department's general characterization regarding how "sophisticated" the machinery was, the record does not support the finding of "significantly less machinery" in Thailand for a reason Commerce admits: the record lacked quantitative data. Commerce also admitted that it has no quantitative threshold for what is a "significant" level of investment yet proceeded to find, paradoxically, that "based on the types of equipment required for the production stages in the PRC versus the type of equipment required for the finishing and assembly processing occurring in Thailand, the investment in the Thai equipment is *not significant* in comparison to the investment in the PRC equipment." *Id*. at 14 (emphasis added). As the Remand Redetermination acknowledges, the record not only lacked quantitative data but included evidence that the cups and cones underwent multiple stages of processing in Thailand requiring "an investment for machinery" and evidence that all assembly operations for the TRBs at issue took place in Thailand. *Id*. at 12–14, 25–27. Because such evidence is present, the record as a whole cannot support the finding that the investment in production equipment in Thailand was not "significant," either by itself or in comparison with the investment in China.

*5. The Department's "Ultimate Use" Findings Erroneously Analyze "Unfinished TRBs," Irrelevantly Cite the Scope of the Order, and Ignore Probative Evidence of Different Uses*

The Department's fifth criterion in its "totality of the circumstances" test is "ultimate use." *Remand Redetermination* 14. Commerce considered this factor to support the conclusion that "there is no substantial transformation between the unfinished and the finished merchandise." *Id*. (footnote omitted). The Remand Redetermination states two findings under the fifth criterion, on the basis of which Commerce "determined that the ultimate use factor supports the conclusion that there is no substantial transformation between

the finished and the unfinished merchandise." *Id.* Because both findings are flawed, the court rejects the analysis Commerce performed under its "ultimate use" criterion.

Commerce found, first, that "[t]he fact that the scope of the *Order* includes TRBs and parts thereof (cups, cones, rollers, cages, *etc*.), finished and unfinished, indicates that both finished and unfinished TRBs are intended for the same ultimate end-use, that is, a finished TRB that can ultimately be used in a downstream product." *Id*. (footnote omitted). The inclusion of this finding in the Remand Redetermination is erroneous in two respects. First, the finding as Commerce stated it is irrelevant in light of the facts of this case, which does not involve "unfinished TRBs." Commerce did not find, and on this record could not permissibly have found, that any of the parts exported to Thailand, finished or unfinished, could be considered to have been unfinished TRBs. The second error is one of logic: the inclusion of "parts" within the scope of the antidumping duty order has no relationship to the question of ultimate end-use. The use of any good, including its "ultimate" use, is a question of fact that is not dependent on the scope of an antidumping duty order.

The Remand Redetermination states the second objectionable finding as follows: "Furthermore, we also find that these products do not need to be interchangeable to determine their ultimate use because we found that the expected use of the unfinished TRB components is the same use as that of finished TRBs." *Id*. In the form in which it was stated by Commerce, this finding is contradicted by the record evidence in this case. As demonstrated by the record evidence, the only "expected" use of the unfinished TRB components that were exported to Thailand could have been the use to which they were put, *i.e.*, use in the production of finished cups and cones in Thailand, and the only "expected" use of the cups and cones was in the assembly process, also performed in Thailand, resulting in finished TRBs. *Id*. at 6–7, 41.

The court must consider the two findings and the associated reasoning just as presented in the Remand Redetermination. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). But even if the court were to overlook the obvious errors in the manner in which the two findings discussed above are stated, it still would note that the fifth criterion is overly narrow in considering only "ultimate use" and not all of the probative record evidence on the issue of the uses of the parts exported to Thailand. In applying the fifth criterion, Commerce appears to give little or no consideration to the record fact that the two major TRB components, the cups and cones, were not suitable for use in the assembly process in the form in which they were exported to Thailand. *Remand Redetermination* 6–7, 41.

*6. As Commerce Acknowledges, Its Revised Cost of Manufacturing Percentage for the Thailand Processing Could Support a Determination of Substantial Transformation*

In applying the sixth criterion, "third country COM as a percentage of total COM," Commerce responded to the court's discussion of record evidence that the processing costs in Thailand accounted for 42% of the total cost of manufacturing. *Remand Redetermination* 7, 14–15 (citing *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1342). Commerce re-examined the data underlying the 42% COM calculation and changed the calculation in two respects. First, it applied its revised surrogate values. *Id*. at 15 (footnote omitted). Second, it revised the calculation formula, concluding that the formula incorrectly included some costs incurred in Thailand that were "unrelated to manufacturing, *i.e.*, selling, general and administrative costs, financial expenses and/or profit." *Id*.

The changes to the calculation reduced the result from the 42% percentage, *id*. at 16, but the revised percentage (which is proprietary) cannot fairly be characterized as insignificant. Moreover, the extent of the reduction from 42% effected by the Department's recalculation can be fairly characterized as minor. Commerce acknowledged that its recalculated percentage of COM occurring in Thailand "may be meaningful," *id.*, and that "considered on its own" it "could be part of an analysis that finds in favor of substantial transformation," *id.* at 23. Commerce went on to conclude that "nevertheless, no single factor is dispositive" and that the recalculated percentage "is not so significant as to outweigh the other factors which the Department must take into account," *id*. at 16, each of which "clearly weigh[s] against a finding of substantial transformation," *id*. at 28. However, as the court discussed above, the Department's analyses under each of the other five criteria are flawed.

*7. On Remand, Commerce Must Reconsider its Determination that the TRBs Processed in Thailand Were of Chinese Origin for Purposes of the Antidumping Duty Order*

On remand, Commerce must reach a new country of origin determination because the record in this case lacks substantial evidence to support the Department's current determination that the TRBs processed in Thailand were products of China for purposes of the antidumping duty order. The Remand Redetermination acknowledges, and the record confirms, that the cups and cones (which, irrefutably, are the two major components of each TRB) were exported to Thai-

land in unfinished form, *Remand Redetermination* 9–10; that the grinding and honing operations performed on the cups and cones in Thailand, in the Department's own words, "serve an important role in the production of a bearing . . . ," *id*.; that all assembly operations took place in Thailand, *id*.; and that the percentage of the cost of manufacturing that was incurred in Thailand, in the Department's words, was "meaningful" and "could be part of an analysis that finds in favor of substantial transformation," *id.* at 23. In reaching its determination, Commerce impermissibly relied on certain critical findings of facts that, as discussed above, were not supported by substantial evidence on the record and that, in some cases, were reached without consideration of probative evidence to the contrary. Among the disregarded evidence is the evidence that no single component exported to Thailand possessed the physical properties, mechanical properties, or essential character of a finished TRB. Commerce acknowledged that the analysis it performed under its sixth criterion (percentage of COM) could support a finding that Thailand is the country of origin, and the analyses conducted under the other five criteria were flawed for the reasons the court has discussed, with the first criterion not having been shown to have any relevance to the country of origin question posed by this case. Moreover, some of the discussion in the Remand Redetermination appears to lose sight of the "substantial transformation" issue that the case actually presents, which is whether the Chinese-origin parts, finished and unfinished—no one of which was an unfinished bearing—were substantially transformed by the processing that occurred in Thailand. The Remand Redetermination refers to "unfinished" TRBs even though no unfinished TRBs are at issue in this case.

In replying to plaintiff's comments on the Remand Redetermination, defendant argues that plaintiff raised certain arguments in its comments to the court that it did not raise in its draft comments on the Remand Redetermination. Defendant points specifically to comments on the "physical/chemical properties/essential character" and "nature and sophistication of processing" criteria and argues that "in its comments to Commerce, CPZ commented only on the level of investment and COM." Def.'s Reply 20–23. The court is not persuaded that it should affirm the country of origin finding in the Remand Redetermination, in whole or in part, by invoking the doctrine of exhaustion of administrative remedies.

Whether, and how, to invoke the doctrine of exhaustion in trade cases is a matter for this Court's discretion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007). Here, the court's

remand order expressly required Commerce to reconsider the country of origin decision in the entirety and to ensure that all associated findings are supported by substantial record evidence. *Peer Bearing Company-Changshan*, 35 CIT at __, 804 F. Supp. 2d at 1342, 1356. Further, reviewing the country of origin decision necessarily requires the court to review the reasoning by which Commerce reached its findings, including the ultimate finding of country of origin, and that reasoning consists of the analysis Commerce conducted under the criteria of its "substantial transformation" and "totality of the circumstances" test. Thus, the court considers it necessary and appropriate to analyze fully whether Commerce has adhered to the court's directive, regardless of whether plaintiff commented to the Department on the application of particular criteria in that test. For the reasons stated above, the court concludes that Commerce has not complied with the court's general directive and issues a second remand order to address the deficiencies in the Remand Redetermination. Plaintiff's comments to the Department did not waive its broader argument that the Remand Redetermination failed to comply with the court's remand order. In light of these circumstances, the court, in its discretion, decides not to affirm the country of origin finding in the Remand Redetermination, either in whole or in part, based on the doctrine of exhaustion of administrative remedies.

## *III. CONCLUSION AND ORDER*

For the reasons discussed in the foregoing, the court affirms in part, and rejects in part, the Remand Redetermination. Accordingly, upon consideration of *Final Results of Redetermination Pursuant to Court Remand* (Apr. 11, 2012), ECF No. 107, the comments of the parties thereon, and all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that the Remand Redetermination submitted by the International Trade Administration, U.S. Department of Commerce ("Commerce") on April 11, 2012, be, and hereby is, sustained in part and remanded to Commerce in part in accordance with this Opinion and Order; it is further

**ORDERED** that the Remand Redetermination be, and hereby is, sustained with respect to Commerce's redetermination of the surrogate values for the consumption of bearing-quality steel bar and steel wire rod by Peer Bearing Company-Changshan ("CPZ"); it is further

**ORDERED** that Commerce shall submit to the court a second Remand Redetermination in which it redetermines, in accordance with the requirements of this Opinion and Order, the country of origin of certain tapered roller bearings ("TRBs") that underwent further processing in Thailand consisting of grinding and honing (finishing) of cups and cones, and assembly; it is further

**ORDERED** that Commerce shall submit its second Remand Redetermination within forty-five (45) days of the issuance of this Opinion and Order; it is further

**ORDERED** that CPZ and The Timken Company ("Timken") shall have thirty (30) days from defendant's filing of the second Remand Redetermination to file any comments thereon; and it is further

**ORDERED** that defendant shall have fifteen (15) days from the filing of CPZ's or Timken's comments, whichever is later, in which to file any response to such comments.

Dated: June 6, 2013
New York, New York

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