U.S. Customs and Border Protection

Slip Op. 13–109

UNITED STATES, Plaintiff, v. CANEX INTERNATIONAL LUMBER SALES LTD., A CANADIAN CORPORATION, AND XL SPECIALTY INSURANCE COMPANY, A DELAWARE CORPORATION, Defendants.

XL SPECIALTY INSURANCE COMPANY, Cross-Claimant, v. CANEX INTERNATIONAL LUMBER SALES, LTD., Cross-Defendant.

Before: Jane A. Restani, Judge
Court No. 06–00141

[Cross-Claimant's motion for summary judgment on its cross-claim for indemnification and reimbursement granted.]

Dated: August 20, 2013

Aimee Lee, Attorney, International Trade Field Office, U.S. Department of Justice, of New York, NY, for Plaintiff. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Christopher Shaw*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

Joel R. Junker, Joel R. Junker & Associates, of Seattle, WA, for Defendant and Cross-Defendant Canex International Lumber Sales Ltd.

Thomas R. Ferguson and *Arthur K. Purcell*, Sandler, Travis & Rosenberg, PA, of New York, NY, and San Francisco, CA, for Defendant and Cross-Claimant XL Specialty Insurance Company.

OPINION

Restani, Judge:

Remaining to be decided in this action is Cross-Claimant XL Specialty Insurance Company's ("XL") claim against Cross-Defendant Canex International Lumber Sales, Ltd. ("Canex"). XL is a surety on a customs bond covering Canex's tariff obligations, which the court previously found owing. *See Canex Int'l Lumber Sales Ltd. v. United States*, Slip Op. 10–74, 2010 Ct. Intl. Trade LEXIS 74 (June 29, 2010), *aff'd*, 432 F. App'x 977 (Fed. Cir. 2011); *see also United States v. Canex Int'l Lumber Sales Ltd.*, Slip Op. 11–98, 2011 Ct. Intl. Trade LEXIS 98, at *13–14 (Aug. 5, 2011) (granting summary judgment for the government for the face amount of the bond plus prejudgment inter-

est). XL seeks summary judgment. *See* XL's Br. in Supp. of Mot. for Summ. J. on Its Cross-Cl. for Indemnification & Reimbursement ("XL's Br."). It is clear that the court has jurisdiction over the cross-claim pursuant to 28 U.S.C. § 1583 (2006).

Pursuant to its bond obligation, XL paid U.S. Customs and Border Protection ("Customs") $650,835.46. XL's Br. at 3. This amount is clearly owed by Canex to XL. XL also seeks further prejudgment interest and attorney's fees. *Id.* at 6. XL has made no effort to support the additional claims in substance or amount. Thus, even though Canex does not oppose XL's claims on the merits, *see* Resp. of Canex Int'l Lumber Sales, Ltd. to Cross Claimant XL Specialty Ins. Co.'s Mot. for Summ. J. ("Canex Resp.") at 1, the additional claims are denied, without prejudice. If it is in XL's interest to pursue these matters given the asserted "minimal commercial activity" of Canex, *see* Canex Resp. at 1, it may file appropriate papers supporting such claims including the legal basis therefore within 30 days hereof. Judgment will enter forthwith on the principal amount due.

Dated: August 20, 2013
New York, New York

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

Slip Op. 13–110

MICHAELS STORES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 12–00146

[Plaintiff's motion for summary judgment in antidumping duty matter is denied, and summary judgment is entered in favor of defendant.]

Dated: August 21, 2013

Lewis E. Leibowitz, *Craig A. Lewis*, *Eric B. Gillman*, and *Wesley V. Carrington* Hogan Lovells US LLP, of Washington, DC, for plaintiff.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Attorney, United States Department of Commerce.

OPINION

Restani, Judge:

This matter is before the court following denial of Defendant United States' motion to dismiss in *Michaels Stores, Inc. v. United States*, Slip Op. 12–161, 2012 Ct. Int'l Trade LEXIS 161 (Dec. 27, 2012). Plaintiff Michaels Stores, Inc. ("Michaels") challenges the liquidation and cash deposit instructions issued by the Department of Commerce ("Commerce") in administering the antidumping duty ("AD") order for certain cased pencils from the People's Republic of China ("PRC"). *See Antidumping Duty Order: Certain Cased* Pencils from the People's Republic of China, 59 Fed. Reg. 66,909, 66,909 (Dep't Commerce Dec. 28, 1994) ("*Cased Pencils Initial Order*"). For the reasons below, the court determines that Commerce lawfully issued liquidation instructions covering the 2008–2009 and 2009–2010 administrative review periods for certain cased pencils that were imported by Michaels.

BACKGROUND

At issue in this case is the content of liquidation instructions issued following administrative reviews covering two periods of review ("POR"), the 2008–2009 POR and the 2009–2010 POR, both arising out of the 1994 AD order on cased pencils. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Initiation of Administrative Review*, 75 Fed. Reg. 4770, 4771 (Dep't Commerce Jan. 29, 2010) ("*Initiation of Administrative Review 2010*"); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. 5137 (Dep't Commerce Jan. 28, 2011) ("*Initiation of Administrative Review 2011*"). The parties appear to agree on the facts presented below.

During the 2008–2009 POR, Michaels purchased goods that had been produced by three manufacturers of cased pencils, China First Pencil Co., Ltd. ("China First"), Shanghai Three Star Stationery Industry Co., Ltd. ("Three Star"), and Shandong Rongxin Import and Export Co., Ltd. ("Rongxin"). Mem. of Points & Authorities in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem.") at 2; Def.'s Resp. to Pl.'s Mot. for Summ. J. ("Def.'s Resp.") at 6. Michaels received these pencils from three different PRC exporters. Pl.'s Mem. at 2; Def.'s Resp. at 6. Similarly, during the 2009–2010 POR, Michaels purchased goods that had been produced by two manufacturers, China First and Rongxin. Pl.'s Mem. at 6; Def.'s Resp. at 12. Again, Michaels did not receive the

pencils directly from these producers, but instead it received them from two different PRC exporters.[1] Pl.'s Mem. at 6; Def.'s Resp. at 12.

The cash deposit instructions issued by Commerce, to which the liquidation instructions referred, informed U.S. Customs and Border Protection ("Customs") that "if any entries of this merchandise are exported by a firm other than the *exporters* listed above, then the following instructions apply." Pl.'s Mem. Ex. 6 at 1–2, Ex. 9 at 2, Ex. 11 at 1–2 (emphasis added). Commerce first ordered Customs to use a separate rate "[i]f the PRC or non-PRC *exporter* of the subject merchandise has its own rate."[2] *Id.* (emphasis added). Because the exporters of the subject merchandise were not given separate rates in the instructions, Customs continued to the second paragraph, which required Customs to apply the PRC-wide rate to subject merchandise "[f]or all PRC exporters of subject merchandise which have not been assigned to a separate rate."[3] *Id.* As a result, although the cash deposit instructions included separate rates for the companies that produced the merchandise in question, those rates applied only when those companies directly exported the merchandise to the United States. *See id.*

During both PORs, Michaels made cash deposits for the entries of cased pencils with Customs pursuant to Michaels' interpretation of the AD order. Pl.'s Mem. at 2, 6. The corresponding cash deposit instructions indicated that the cash deposit rate for exporters not specifically listed and without a separate rate, however, was "the PRC-wide rate of 114.90 percent."[4] *Id.* Michaels instead made cash

[1] Collectively, the exporters from which Michaels received the merchandise in question will be referred to as the "subject" exporters. Michaels refers to these exporters that were not individually reviewed as the "unreviewed" exporters, but this term is a misnomer, as the court concludes that these exporters, in fact, were reviewed collectively as part of the PRC-wide entity.

[2] Commerce's separate rate procedure is not compelled by statute. Instead, Commerce's procedure requires companies in nonmarket economies ("NME") to assert their independence to avoid being classified as part of the PRC-wide entity. Mandatory respondents may apply for separate rate status through an antidumping questionnaire response, and non-mandatory respondents may apply through a separate rate application. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013).

[3] Here, Commerce's instructions, rather than the ministerial implementation of those instructions, are at issue as jurisdiction is asserted under 28 U.S.C. § 1581(i). A parallel case has been filed under § 1581(a) that addressed the protests filed by Michaels related to the appropriateness of Custom's actions in implementing the instructions. *Michaels Stores, Inc. v. United States*, Ct. No. 12–145 (CIT filed May 23, 2012). For purposes of this action, Michaels claims that Commerce's instructions were clear on their face, provided no discretion to Customs, and were contrary to law.

[4] Although the PRC-wide entity was not specifically examined for this particular POR, the PRC-wide rate applied here was "the rate established in the administrative review for the most recent period." *Certain Cased Pencils From the People's Republic of China: Final*

deposits at the cash deposit rates assigned to the corresponding producer of the pencils. Pl.'s Mem. at 2, 6; Def.'s Resp. at 6, 12. While Commerce initiated administrative reviews of some of the producers at issue here, certain producers withdrew their requests for administrative review, and Commerce reviewed only one of the producers at issue here, Rongxin, and only for the 2008–2009 POR. *Final Results 2011*, 76 Fed. Reg. at 27,989. None of the subject exporters were specifically identified by Commerce, and none of the subject exporters requested a review. *See Certain Cased Pencils From the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 2337, 2339 (Dep't Commerce Jan. 13, 2011) ("*Partial Rescission of AD Review*"); *Certain Cased Pencils From the People's Republic of China: Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 27,990, 27,990 (Dep't Commerce May 13, 2011) ("*Rescission of AD Review*"). For both PORs, Commerce issued liquidation instructions, ordering Customs to liquidate the subject entries at the cash deposit rate in effect at the time of entry. Pl.'s Mem. at 2–4, 7–8; Def.'s Resp. at 8, 10, 14–15.

Furthermore, following the 2008–2009 administrative review of Rongxin, Commerce issued a producer's rate for Rongxin of 0.17 percent. Pl.'s Mem. at 4; Def.'s Resp. at 9. Commerce also issued "exporter/importer-specific"[5] liquidation instructions for Rongxin

Results of the Antidumping Duty Administrative Review, 76 Fed. Reg. 27,988, 27,989 (Dep't Commerce May 13, 2011) ("*Final Results 2011*"). Commerce most recently conducted a reexamination of the PRC-wide entity for the 2007–2008 POR and confirmed the PRC-wide rate to be 114.90 percent. *See Certain Cased Pencils From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 75 Fed. Reg. 38,980, 38,981 (Dep't Commerce July 7, 2010) ("*Final Results 2010*").

[5] Commerce repeatedly referred to "exporter/importer-specific" rates, but that term is not defined in the statute or regulations. Instead, Commerce apparently uses this term to refer to the rate calculated for the subject merchandise when it enters the United States pursuant to § 351.212 of its regulations. *See* 19 C.F.R. § 351.212(b)(1); *see also Final Results 2011*, 76 Fed. Reg. at 27,989 (referencing § 351.212(b)(1) as the source of the "exporter/importer-specific" or "customer-specific" rate). The regulation, to which Commerce referred, provides:

> If the Secretary has conducted a review of an antidumping order under § 351.213 (administrative review), § 351.214 (new shipper review), or § 351.215 (expedited antidumping review), the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

19 C.F.R. § 351.212(b)(1). Of course, an assessment rate is not a less than fair value rate, i.e. the dumping rate, but a rate based on the value of the entered merchandise, as noted in the regulation. *Id.*

without including Michaels on the importer list.[6] Def.'s Resp. at 9–10. Consequently, for pencils manufactured by Rongxin during the 2008–2009 POR that were purchased by Michaels through a different export company, Customs also liquidated these entries at a rate equal to the PRC-wide rate of 114.90 percent. Def.'s Resp. at 11.

Following liquidation, Michaels was assessed supplemental duties associated with these entries, seeking the difference between the cash deposits Michaels made at the producer's rate and liquidation at the PRC-wide rate. Pl.'s Mem. at 6, 9. After most of Michaels' protests with Customs were unsuccessful, Michaels filed the present action. Although defendant attempted to dismiss the majority of Michaels' claims for lack of jurisdiction, the court denied that motion on December 27, 2012. *See Michaels Stores*, 2012 Ct. Int'l Trade LEXIS 161, at *4.

JURISDICTION AND STANDARD OF REVIEW

As established in its previous opinion, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2006).[7] The court will find unlawful an action by Commerce if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. § 2640(e) (directing the court to evaluate 28 U.S.C. § 1581(i) cases under the standards set forth in the Administrative Procedure Act). Moreover, the court will find that Commerce has abused its discretion if its "decision (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law . . . or (4) follows from a record that contains no evidence on which [Commerce] could rationally base its decision." *See Sterling Fed. Sys.*

---

[6] [[

]] *See* Def.'s Confidential App. in Supp. of its Resp. to Pl.'s Mot. for Summ. J. at A30–32 ("Def.'s Confidential App.").

[7] The court's jurisdiction is proper despite defendant's claim that Michaels did not properly exhaust administrative remedies by participating in the administrative review. Defendant misrepresents the scope and purpose of an administrative review, which does not provide a remedy for improperly issued liquidation instructions. Def.'s Resp. 32–34. Rather, an administrative review simply allows a company to challenge its rate. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003) (refusing to hold that a company, which did not request an administrative review, failed to satisfy the exhaustion doctrine when challenging liquidation instructions, recognizing that an administrative review cannot serve as a challenge to the validity of liquidation instructions because an administrative review can only challenge the rate calculated and not instructions issued by Commerce). In this case, Michaels does not challenge the PRC-wide rate, its producers' rates, or request its own or an exporter's separate rate. Rather it challenges how Commerce interprets a regulation dictating final liquidation. In fact, the court already made clear in this case that there are no jurisdictional concerns related to exhaustion of remedies. *See Michaels Stores*, 2012 Ct. Int'l Trade LEXIS 161, at *4. Further, the regulation at issue is not completely clear, and Michaels is not charged with knowing how Commerce finally would interpret it, to the extent this is a discretionary issue.

v. Goldin, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (quoting *Gerritsen v. Shirai*, 979 F.2d 1524, 1529 (Fed. Cir. 1992)).

DISCUSSION

I. Michaels' Motion for Summary Judgment

After apparently conceding that the administrative record[8] would not be sufficient to adjudicate this case, defendant incorrectly argues that Michaels' motion for summary judgment is improper. *See* Def.'s Resp. at 20. Under 28 U.S.C. § 1581(i)(4), the court has jurisdiction over civil actions pertaining to the "administration and enforcement" of certain actions taken by Commerce. Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Therefore, when the plaintiff's "case hinges on pure questions of law, resolution by summary judgment is appropriate." *Can. Wheat Bd. v. United States*, 32 CIT 1116, 1121, 580 F. Supp. 2d 1350, 1356 (2008) (finding summary judgment appropriate in a § 1581(i) case).

A motion for summary judgment, as opposed to judgment on the agency record, is appropriate in this case because Michaels' arguments do not challenge the final results of an administrative review. Michaels merely challenges the liquidation instructions and, only by reference, the cash deposit instructions. The liquidation instructions are not part of an administrative review but rather implement the results of a review. Pl.'s Mem. at 17, 19, 22; *see Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (distinguishing between a challenge to the final results of administrative review and a challenge to liquidation instructions). Consequently, just as in *Canadian Wheat Board* where the plaintiffs properly challenged a notice of revocation with a motion for summary judgment, here the "true nature" of Michaels' argument is a challenge to the administration and enforcement of Commerce's final determination and not to the determination itself. *See* 32 CIT at 1127, 580 F. Supp. 2d at 1356.

[8] Defendant contends that Michaels was required to move for judgment on the agency record rather than summary judgment, thereby limiting the court's review to the agency record related to the liquidation instructions, preventing Michaels from referencing the cash deposit instructions. *See* Def.'s Resp. at 20. Defendant admits, however, that Michaels could have moved to supplement the agency record and that the liquidation instructions incorporate, by reference, the cash deposit instructions. *Id.* Thus, the cash deposit instructions were in substance part of the record. Michaels' motion for summary judgment merely included in concrete form what should have been in the record, with the same result. Further amelioration in this regard is unnecessary.

Thus, Michaels' motion for summary judgment is properly before the court.[9]

II. Appropriateness of Michaels' Cash Deposit Instructions Claims

Defendant contends that Michaels is barred from disputing the lawfulness of the cash deposit instructions because: (1) Michaels did not explicitly raise the issue in its complaint, (2) Michaels' challenges to the cash deposit instruction are time barred, and (3) the court lacks subject matter jurisdiction because Michaels failed to exhaust all remedies.[10] Def.'s Resp. at 29–34. Moreover, defendant contends that even if Michaels can challenge indirectly the cash deposit instructions, those instructions are lawful. Def.'s Resp. at 24–29. Here, the court addresses whether Michaels properly asserted a challenge to the cash deposit instructions as part of the liquidation instructions.

The court simply requires that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . which may include . . . different types of relief." USCIT R. 8(a)(2)–(3); *see also* USCIT R. 8(f) ("Pleadings must be construed so as to do justice"). Pleadings are sufficient if they adequately notify the defendant of "what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Separately, a cause of action under 28 U.S.C. § 1581(i) "is barred unless commenced . . . within two years after the cause of action first accrues." 28 U.S.C. § 2636(i).

Defendant fails to demonstrate that all claims referencing the cash deposit instructions should be disregarded. Even though the initial complaint did not mention explicitly the cash deposit instructions, defendant was put on notice that Michaels intended to challenge the validity of those cash deposit instructions because Michaels expressly challenged the liquidation rate that was set by reference to the cash deposit instructions. Compl. ¶¶ 1, 29–31, 43–44, 47, 50; Pl.'s Mem. Ex. 6 at 69, Ex. 9 at 84, Ex. 11 at 91. Defendant acknowledges that Michaels' complaint alleges that the liquidation instructions were

[9] Additionally, the court will interpret the United States' prayer for relief seeking judgment in its favor as a cross motion for summary judgment. Def.'s Resp. at 34 ("[Defendant] respectfully request[s] that the Court deny plaintiff's motion and enter judgment in favor of the United States."); *see Shell Oil Co. v. United States*, 781 F. Supp. 2d 1313, 1322 (CIT 2011) ("[S]ummary judgment may be granted *sua sponte* in favor of the non-moving party, or even in the absence of any motion, provided that all parties are afforded an appropriate opportunity to come forward with relevant evidence." (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)), *aff'd*, 688 F.3d 1376 (Fed. Cir. 2012).

[10] The issue of exhaustion is dealt with above. To reiterate, requesting an administrative review would not remedy improper liquidation instructions, even though they reference deposit instructions; therefore, it is not a remedy that must be exhausted.

improper. Def.'s Resp. at 30. Michaels has consistently advanced one argument, that the liquidation instructions were improper, and it simply clarified in its motion for summary judgment that Commerce's allegedly unlawful conduct likely stems back to the cash deposit instructions, as plaintiff now understands how Commerce construes the deposit rate instructions. Therefore, the complaint sufficiently put defendant on notice because it alleged that the cash deposit instructions that were incorporated into the liquidation instructions, were incorrect. Pl.'s Reply Br. to Def.'s Resp. to Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 6; *see Twombly*, 550 U.S. at 555 (describing the requirement of fair notice in the context of the analogous Federal Rule of Civil Procedure). As a result, defendant cannot claim that it was surprised by Michaels' claims and arguments raised here.

Moreover, this claim is not time-barred because the cause of action accrued once the liquidation instructions were issued and final duties were assessed on Michaels' entries.[11] Michaels can challenge the lawfulness of the liquidation instructions that give final effect to the cash deposit instructions, as interpreted by Commerce.[12] *See* Pl.'s Mem. at 11–12; Def.'s Resp. at 8, 13, 15. Until the liquidation instructions were issued for plaintiff's specific merchandise and it was liquidated, Commerce's final interpretation of the deposit instructions and their meaning as to plaintiff's merchandise were not definitive.

III. Content of Commerce's Cash Deposit and Liquidation Instructions

Michaels argues that Commerce should have used the producer's rate to determine the cash deposit rate, and ultimately the liquidation rate, applicable to the entries of the subject merchandise, instead of utilizing the PRC-wide rate, which Michaels characterizes as an "all others" rate. *See* Pl.'s Mem. at 15–17. Defendant argues, in effect, that the PRC-wide rate serves as a noncombination rate assigned to all PRC exporters who have not obtained a separate rate, given the

[11] The liquidation instructions under which Michaels' entries were liquidated were issued on July 15, 2011, with respect to the 2008–2009 POR, and June 1, 2011, with respect to the 2009–2010 POR. Def.'s Public App. in Supp. of Its Resp. to Pl.'s Mot. for Summ. J. at A6–7, A16–17. The summons and complaint in this case were filed on May 23, 2012, Dkt. Entry Nos. 1, 5, well within the applicable statute of limitations. *See* 28 U.S.C. § 2636(i) (providing for a two year statute of limitations).

[12] The United States operates a retrospective system of antidumping duties, where the final dumping margin is not calculated until after the subject merchandise has already been imported. *See* 19 C.F.R. § 351.212(a); *SSAB N. Am. Div. v. United States*, 32 CIT 795, 797–98, 571 F. Supp. 2d 1347, 1350–51 (2008) (describing the retrospective system and the importance of both cash deposits and suspension of liquidation).

presumption of state control in NMEs,[13] and therefore is applicable here. Def.'s Resp. at 24–26. Accordingly, the only dispute here is whether the PRC-wide rate for the PRC-entity serves as a specific, i.e. noncombination, rate applicable to the subject exporters.[14] Because Commerce has an established policy of treating non-separate NME companies as a single entity, unless they prove that they are not under state control,[15] Commerce issued lawful instructions when it treated the subject exporters as part of the PRC-entity. Stated otherwise, because the subject exporters did not seek separate rates, they are reviewed as part of the collective PRC-entity and assigned the PRC-wide rate, not a separate rate or a separate combination exporter/producer rate, as will be explained further.

Commerce's actions in determining the appropriate cash deposit rate for nonproducing exporters where an AD order is in place are governed by 19 C.F.R. § 351.107 (2013). It provides, in relevant part:

> [I]f the Secretary has not established previously a combination cash deposit rate . . . for the exporter and producer in question or a noncombination rate for the exporter in question, the Secretary will apply the cash deposit rate established for the producer. If the Secretary has not previously established a cash deposit rate for the producer, the Secretary will apply the "all-others" rate . . . ."

Cash Deposit Rates for Nonproducing Exporters; Rates in Antidumping Proceedings Involving a Nonmarket Economy Country, 19 C.F.R. § 351.107(b)(2). Combination and noncombination rates in market

[13] Although the continued presumption of state control within an NME like the PRC has been questioned in other cases, the PRC remains classified by Commerce as an NME. *See* 19 U.S.C. § 1677(18) (defining an NME). *Compare GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1304 (CIT 2013) (discussing countervailing duties, in a recent case, and noting that "Commerce based its change in policy on the evolution of China's economy from a centrally-controlled monolithic economy towards a market economy"), *with Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) (noting Commerce's practice, in an earlier case, that "because the PRC is a nonmarket economy, *all* commercial entities in the country are presumed to export under the control of the state." (emphasis added)). The court does not discuss the continued validity of this presumption because Michaels has not challenged the classification of the PRC as an NME or otherwise challenged the presumption.

[14] Although this is the central dispute between the parties, the issue is not clearly argued in the briefs.

[15] Michaels has not challenged the validity or reasonableness of Commerce's separate rate methodology, and therefore, the court does not address that question here. Michaels instead claims that Commerce failed to follow its own regulations.

economies ("ME") are company-specific rates,[16] and the all others rate typically is the weighted average of the rates for the companies investigated, with certain exclusions. 19 U.S.C. § 1673d(c)(1)(B)(i), (c)(5). The regulations clarify, however, that for non-market economies, "'rates' may consist of a single dumping margin applicable to all exporters and producers." 19 C.F.R. § 351.107(d). Moreover, whenever the statute is silent on a particular issue, it is well-settled that Commerce may "formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'" *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (quoting *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

The regulations above define Commerce's practice of determining the appropriate cash deposit rates in the ME context, by providing a sequence of options. NMEs are treated differently because Commerce applies a presumption of state control in NME countries over both producers and exporters. *Separate Rates and Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, 70 Fed. Reg. 17,233, 17,233 (Dep't Commerce Apr. 5, 2005). Pointing to this presumption of state control, Commerce rejected the idea that it should assign cash deposit rates to entries based on the identity of the producer of the merchandise as opposed to the identity of the nonproducing exporter. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,303, 27,305 (Dep't Commerce May 19, 1997) ("*Preamble*") (explaining that the new regulation does not alter Commerce's practice in NME cases). Both parties agree that at issue in this case are nonproducing exporters in the NME context, which requires the application of 19 C.F.R. § 351.107(b)(2) in conjunction with (d) to determine the cash deposit rate. Pl.'s Mem. at 2, 6; Def.'s Resp. at 6, 12.

For non-producing exporters, like trading companies, Commerce has said that it "intend[s] to continue calculating AD rates for NME export trading companies, and not the manufacturers supplying the trading companies." *Preamble*, 62 Fed. Reg. at 27,305 (providing Commerce's first clarification of § 351.107). As a result, under Commerce's present methodology, exporters are required to prove that they are not part of the NME-wide entity to be eligible for a separate rate, which occurs through a formal investigation process. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1381 (Fed. Cir. 2002) ("Commerce made clear the consequences to an exporter of not rebut-

[16] Although 19 U.S.C. § 1673d does not define noncombination rates, a plain reading of 19 C.F.R. § 351.107(b)(2) makes clear that a noncombination rate and an all others rate are distinct concepts because they are listed as different options for Commerce to utilize in assigning the appropriate rate.

ting the presumption of state control and establishing its independence: the exporter would be assigned the single rate given to the NME entity").[17] Only upon achieving separate rate status can an exporter be eligible for the NME equivalent of the all others rate for separate rate companies. *See Yangzhou Bestpak*, 716 F.3d at 1374 ("The separate rate for eligible non-mandatory respondents is generally calculated following the statutory method for determining the 'all others rate.'"). Failure to qualify for a separate rate means that Commerce will analyze the exporter through the lens of the presumption of state control. *See id.* at 1373 (citing *Sigma Corp.*, 117 F.3d at 1405).

During the POR, liquidation is suspended for all entries of covered goods until Commerce concludes its review, if any. Then, liquidation instructions are issued by Commerce to Customs to liquidate at either the review rate or at the appropriate cash deposit rate if the company is not reviewed. 19 C.F.R. § 351.212(b),(c)(1)(i). Here, all of the merchandise from the subject exporters was liquidated pursuant to these instructions at the PRC-wide rate. Pl.'s Mem. at 6, 9.

In the present matter, although all of the producers of cased pencils imported by Michaels during the PORs in question were individually investigated and assigned their own rates, those rates are irrelevant to the exporters' rates because the regulation calls for the rates of the exporters to be used, if such exist, prior to looking at the producers' rates. 19 C.F.R. § 351.107(b)(2). Here, the PRC-wide rate serves as a noncombination rate for these nonproducing exporters because § 351.107(d) of the regulation sheds light on the meaning of § 351.107(b)(2). The regulation indicates that for an AD proceeding involving an NME, such as the PRC in the present case, the term "rate" can be read to include the possibility of a single rate for exporters, producers, or both. *See* 19 C.F.R. § 351.107(d). This "single rate" here is the PRC-wide rate.

Although Commerce allows exporters to apply for separate rates, no evidence exists, in this instance, that the exporters used by Michaels did so. Therefore, the subject exporters were not eligible for separate

[17] This presumption of state control and the separate rate analysis is explained in more detail by Commerce's various policies and orders. *See* Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries at 4 (Apr. 5, 2005), *available at* http://ia.ita.doc.gov/policy/bull05–1.pdf (last visited Aug. 19, 2013) ("*Policy Bulletin 05.1*") (requiring a company to prove to Commerce a lack of *de facto* and *de jure* control to achieve separate rate status); *see, e.g.*, *Brake Rotors From the People's Republic of China: Rescission of Second New Shipper Review and Final Results and Partial Rescission of First Antidumping Duty Administrative Review*, 64 Fed. Reg. 61,581, 61,583 (Dep't Commerce Nov. 12, 1999) (engaging in an analysis of *de facto* and *de jure* control related to Commerce's rebuttable presumption of state control).

rates and were presumed by Commerce to be under state control. *See Transcom*, 294 F.3d at 1381–82 (affirming the CIT's decision to sustain Commerce's separate rate NME procedure); *cf. Certain Oil Country Tubular Goods From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 Fed. Reg. 20,335, 20,338, 20,340 (Dep't Commerce Apr. 19, 2010) (utilizing the PRC-wide rate for exporters not individually examined for separate rate status, but providing separate rates to exporters who applied for and established independence and were individually examined). Rather, this failure to apply for separate rate status resulted in the use of the single PRC-wide rate for the exporters in question under Commerce's methodology.[18]

Both sides also raise the additional issue of the change in Commerce's NME policy,[19] but the policy is of no consequence because it impacts only situations in which there is an exporter that is given a separate rate.[20] Pl.'s Mem. at 23–24; Def.'s Resp. at 28–29; *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 Fed. Reg. 65,694, 65,694–95 (Dep't Commerce Oct. 24, 2011) ("*Assessment of AD Duties, Notice of Policy*").[21] Here, the court

[18] Michaels attempts to differentiate the cased pencils that were produced by Rongxin. Pl.'s Mem. 13–14. Commerce acted lawfully and reasonably here as well by liquidating the entries manufactured by Rongxin, but exported by non-separate rate companies, at the PRC-wide rate. Michaels admits that Rongxin was not the exporter of the goods but simply the manufacturer. *Id.* at 20. Again, this exporter was not eligible for a separate rate because it had not applied through Commerce's separate rate procedure. Instead, Commerce applied the PRC-wide rate for the exporter because it was presumed to be a part of the PRC-wide entity. *Accord Royal United Corp. v. United States*, 714 F. Supp. 2d 1307, 1311 n.6 (CIT 2010) (collecting cases upholding Commerce's practice of notifying unnamed exporters from the relevant NME that they will be subject to the results of the review as part of the NME entity unless they establish their separate rate status).

[19] This issue is raised only in reference to the liquidation rate of cased pencils produced by Rongxin during the 2008–2009 POR. *See* Pl.'s Mem. at 23.

[20] Although Michaels argues that this policy is more than a refinement and constitutes a significant change, based on the Federal Circuit's comments on an analogous change in the ME context in *Parkdale Int'l v. United States*, 475 F.3d 1375, 1379 (Fed. Cir. 2007), *Parkdale* does not affect the analysis in this case because the court has determined that the policy does not apply to the subject exporters. Accordingly, the court will not decide whether the NME policy refinement constitutes a "significant change," but the court notes that this situation is different from the change in policy for MEs, given the presumption of state control in the NME context.

[21] Commerce's policy "refinement" states:

> [F]or merchandise entered at the *separate rate* applicable to a reviewed exporter, but which . . . . are not reported in the reviewed company's U.S. sales databases submitted to the Department during an administrative review, or otherwise determined not covered by the review (i.e., the reviewed exporter claims no shipments), the Department will instruct [Customs] to liquidate such entries at the NME-wide rate as opposed to the company-specific rate declared by the importer at the time of entry.

has already concluded that the subject exporters did not apply for a separate rate through Commerce's separate rate procedure. Additionally, the policy may be of little consequence given a 2005 policy by Commerce that clarifies that an exporter's entries are not eligible for separate cash deposit rates if the corresponding merchandise is not reported by the producer during the investigation or review. *See Policy Bulletin 05.1* at 6–7.

Moreover, defendant's position here is not a post-hoc rationalization, as Michaels puts it, but instead it logically flows from Commerce's previous statements and policies regarding exporters in NMEs. *See* Pl.'s Reply at 16. Specifically, Commerce legitimately attempts to prevent NME companies from avoiding Commerce's AD orders. The language in § 351.107(d), when read in conjunction with § 351.107(b)(2), upholds two key policy rationales in the NME context: that an exporter's rate is preferable to a producer's rate as the exporter is likely the party to set prices and know which goods are destined for the United States, and that each exporter has the burden of proving it is eligible for a separate rate. *See* Since Hardware (Guangzhou) Co. v. United States, Slip Op. 10–108, 2010 Ct. Int'l Trade LEXIS 119, at *3–4 (Sep. 27, 2010) (quoting Sigma Corp., 117 F.3d at 1405–06 (explaining that exporters have more information related to issues of state control)); *Preamble*, 62 Fed. Reg. at 27,303–05. Therefore, even though the producers had separate rates, Commerce's concern remains that these producers will use a state-controlled exporter, allowing the state to dump the goods through that exporter while benefitting from the producer's lower rate.[22]

It is not that the producer's rate will never be used by Commerce in the NME context; the producer, however, may need to export the goods itself or use a separate rate exporter to avoid the PRC-wide rate. Under Michaels' theory, Commerce would be required to list every PRC-controlled exporter, known or unknown, in its investigation and indicate that each exporter's entries will be assessed at a specific rate, the PRC-wide rate. Not only is this burden on Commerce possibly impracticable, but this also could allow PRC firms to establish new, unlisted exporters that have not applied for a separate rate to export their goods during a new POR, avoiding the PRC-wide rate, and possibly avoiding review. *See Royal United*, 714 F. Supp. 2d at 1310 (noting Commerce's practice that every exporter from an NME

Assessment of AD Duties, Notice of Policy, 76 Fed. Reg. at 65,694 (emphasis added).

[22] This concern is especially evident when the producer does not know or report the ultimate destination of its goods that are eventually purchased by a PRC-based exporter and sent into the United States[[ ]]. Def.'s Confidential App. at A27–28. In those situations, the sales are not reviewed when calculating a rate for the producer, a situation which could allow dumping to continue unnoticed.

country that is not particularly referenced in the review is in fact "covered by the results of the review" and is assessed the NME-wide rate).[23] Instead, Commerce presumes the PRC to be one entity with one PRC-wide rate to prevent such conduct.

Thus, Commerce lawfully applied the PRC-wide rate to the subject exporters because the PRC-wide rate constitutes a noncombination rate for exporters that are part of the PRC-wide entity under Commerce's methodology. Consequently, pursuant to 19 C.F.R. § 351.107(b)(2), Commerce lawfully issued instructions ordering liquidation of these entries at the PRC-wide rate and not the producer's rate.

CONCLUSION

For the foregoing reasons, the court denies Michaels' motion for summary judgment. Although the United States did not move separately for summary judgment and instead requested judgment only at the conclusion of its brief, the court's holding compels the conclusion that the court should enter summary judgment in favor of the United States. Judgment will be entered accordingly.

Dated: August 21, 2013
New York, New York

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

Slip Op. 13–111

DUPONT TEIJIN FILMS, MITSUBISHI POLYESTER FILM, INC., SKC, INC., AND TORAY PLASTICS (AMERICA), INC., Plaintiffs, v. UNITED STATES, Defendant, and TIANJIN WANHUA CO., LTD., FUWEI FILMS (SHANDONG) CO., LTD., AND SICHUAN DONGFANG INSULATING MATERIAL CO., LTD., Intervenor Defendants.

Before: Jane A. Restani, Judge
Court No. 12–00088

[Final Results of Redetermination in antidumping duty review remanded.]

Dated: August 21, 2013

David M. Horn, *Jeffrey I. Kessler*, *Patrick J. McLain*, and *Ronald I. Meltzer*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for the Plaintiffs.

[23] A new shipper is defined as "an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export, to the United States during the period of investigation." 19 C.F.R. § 351.214(a). Therefore, under Commerce's methodology in the NME context, a new shipper would have to apply for separate rate status to show a lack of affiliation with the government entity that did export during the period of investigation.

David F. D'Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

David J. Craven, David A. Riggle, and Saichang Xu, Riggle and Craven, of Chicago, IL, for the Intervenor Defendants.

OPINION AND ORDER

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *Dupont Teijin Films v. United States*, 896 F. Supp. 2d 1302 (CIT 2013). This action involves a challenge to Commerce's final results in the second antidumping duty review of polyethylene terephthalate film, sheet, and strip ("PET film") from the People's Republic of China ("PRC"). *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of the 2009–2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 77 Fed. Reg. 14,493 (Dep't Commerce Mar. 12, 2012) ("*Final Results*"). The court determines that, for the reasons below, Commerce failed to provide a reasoned justification for disregarding the gross national income data reported in the *World Development Report of 2011* (the "2009 GNI data"), and thus, its selection of India as the surrogate market economy country for the PRC is not in accordance with law and not supported by substantial evidence.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinion, although they are summarized below. *See Dupont Teijin Films*, 896 F. Supp. 2d at 1304–06.

In December 2010, Commerce published its notice of initiation of the second administrative review of the antidumping duty order of PET film from the PRC for the period of review ("POR") of November 1, 2009 through October 31, 2010. *See Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Preliminary Results of the 2009–2010 Antidumping Duty Administrative Review*, 76 Fed. Reg. 68,140, 68,141 (Dep't Commerce Nov. 3, 2011) ("*Preliminary Results*"). On April 8, 2011, Commerce stated that it considered the PRC to be a non-market economy ("NME") and placed on the record a list of countries its Office of Policy ("OP") had found to be economically comparable to the PRC. *April 8 Memorandum*, Pls.' App. in Supp. of Pls.' Cmts. on the First Remand Determination ("Pls.'

App."), Tab 8 at 1, 5. Commerce stated in the *April 8 Memorandum* that "comments, if any, on surrogate country selection must be submitted to the Department no later than April 22, 2011. Rebuttal comments, limited to information submitted by parties on surrogate country selection, are due no later than April 29, 2011." *Id.* at 2. Plaintiffs-Petitioners Dupont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively "Plaintiffs") and other interested parties filed factual information and comments related to Commerce's list on April 22, 2011. *See Final Results of Redetermination Pursuant to Court Order* at 2, n.3 (Dep't Commerce May 8, 2013) (Docket No. 41) ("*Remand Results*"). Plaintiffs argued that based on 2008 GNI data, India was no longer at a level of economic development comparable to the PRC. *Id.* at 2–3. Plaintiffs, however, did not then make arguments based on the 2009 GNI data, nor did they place the 2009 GNI data on the record, even though the World Bank had released the data on April 11, 2011, within the comment period set by Commerce. *See id.* at 3, 7. On October 3, 2011, Plaintiffs filed pre-preliminary results comments and the 2009 GNI data, and they argued that India and the PRC were not economically comparable based on the 2009 GNI data. *Pet'rs' Pre-Preliminary Cmts.* (Oct. 3, 2011), Pls.' App. Tab 1 at 2–3.

In the *Preliminary Results*, Commerce selected India as the surrogate country. 76 Fed. Reg. at 68,142. Commerce concluded that "both Thailand and India are at a level of economic development comparable to that of the NME country and are significant producers of comparable merchandise." *Id.* Commerce selected India, however, because it found the record contained surrogate data from India that was superior compared to the record data from Thailand.[1] *Id.* In the *Final Results*, Commerce again selected India as the surrogate country. *See* 77 Fed. Reg. at 14,494. In the *Final Results*, Commerce relied on the OP's determination of economic comparability, which was based on the 2008 GNI data, to justify its selection of India. *Issues and Decision Memorandum for the Final Results of the 2009–2010 Administrative Review*, A-570–924, ARP:11/1/2009–10/31/2010, at 3

[1] In the *Preliminary Results*, Commerce found that the single financial statement on the record from a Thai company did not apportion raw material costs and consumable costs and thus, could not be used to calculate surrogate financial ratios. 76 Fed. Reg. at 68,142. No party has challenged that finding before the court. *See Dupont Teijin Films*, 896 F. Supp. 2d at 1305 n.1. Accordingly, this litigation may be for naught given the limited surrogate data on the record. Even if India is not an appropriate single surrogate country, Commerce will have to find a reasonable way to value the factors of production ("FOPs"), and it may end up using some values from India, even if India is no longer a comparable country under Commerce's standard. *See* 19 U.S.C. § 1677b(c)(4) (requiring Commerce to value FOPs from economically comparable countries "to the extent possible").

(Mar. 2, 2012) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2012–5936–1.pdf (last visited Aug. 20, 2013). Commerce argued the 2009 GNI data did not affect its determination because the change in disparity between India's and the PRC's GNI between 2008 and 2009 was not significant enough to render India not economically comparable to the PRC. *Id.* at 3–4.

In *Dupont Teijin Films*, the court rejected Commerce's justification for ignoring the 2009 GNI data because Commerce failed to explain or justify why the disparity between the 2008 and 2009 GNI data was insignificant. 896 F. Supp. 2d at 1308–09. Because Commerce did not provide a reasoned explanation for disregarding the 2009 GNI data and because the 2009 GNI data indicated that India and the PRC were not economically comparable during the POR, the court concluded that Commerce's selection of India as the surrogate country was not supported by substantial evidence. *Id.* at 1309. The court remanded for Commerce "to either provide a reasoned explanation as to why it may disregard the 2009 GNI data or, in the alternative, make a surrogate country selection with the benefit of the 2009 data." *Id.* at 1309–10.

On remand, Commerce no longer relies on its previous position that the change in disparity between 2008 and 2009 GNI data was too insignificant to warrant consideration. *Remand Results* at 9 ("[T]he Department is no longer relying on the conclusion that the change in disparity between India's and the PRC's GNI was insignificant."). Instead, Commerce now states an entirely new position that although the 2009 GNI data were placed on the record within the time permitted for submission of factual information, they were submitted too late in the proceedings to be considered by the OP when making its list of economically comparable countries. *Remand Results* at 4 ("[T]he Department has determined that the 2009 GNI data was placed on the record too late during the administrative review to be considered . . . ."); *id.* at 14 (stating that the 2009 GNI data were not an "untimely rejected" submission and "remain[ed] part of the record . . . [but] appeared too late in the review to have a substantive effect *on our list*" (emphasis added)). Plaintiffs continue to challenge Commerce's selection of India as the surrogate market economy country and argue that Commerce failed to provide a reasoned justification for disregarding the 2009 GNI data. *See* Pls.' Cmts. on the First Remand Determination at 5–10 ("Pls.' Cmts.").[2]

[2] Intervenor Defendants Tianjin Wanhua Co., Ltd., Fuwei Films (Shandong) Co., Ltd. and Sichuan Dongfang Insulating Material Co., Ltd. do not challenge Commerce's determination on remand. Cmts. of Def.-Intervenors on Remand Results at 1. They note, however, that if the court remands this action, Commerce should consider their substantive

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

Plaintiffs argue that by finding the 2009 GNI data timely filed, but filed too late to be considered, Commerce has created a new, unannounced deadline that violates the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b), (c) ("APA"). Pls.' Cmts. 8–10. Plaintiffs also argue that even if Commerce's new deadline is valid, it should not apply in this case because Commerce had ample time to consider the 2009 GNI data and could have extended the deadline for the *Preliminary Results* if more time was needed. *Id.* at 5–8. The Defendant argues that the fair and efficient operation of the statute requires that Commerce "establish the list of economically comparable countries early in a proceeding, and . . . Commerce is unable to consider new evidence relating to that determination late in the proceeding." Def.'s Resp. to Pls.' Cmts. Regarding the Remand Redetermination ("Def.'s Resp.") at 6–12. The Defendant argues this is not a new rule, but is merely a clarification of a 2004 policy memorandum that stated that Commerce will request a list of economically comparable countries from the OP "early in a proceeding." *Id.* at 12–14.

When valuing the factors of production ("FOPs") in NME reviews, Commerce must, to the extent possible, use surrogate data from a country that is at a level of economic development comparable to the NME and is a significant producer of comparable merchandise. 19 U.S.C. § 1677b(c)(4); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1370–72 (Fed. Cir. 2010) (noting that the statute is clear that Commerce must use data from economically comparable countries unless such data are not available or are irretrievably tainted). In practice, Commerce usually values the FOPs from a single market economy country, known as the surrogate country.[3] *See* 19 C.F.R. § 351.408(c)(2) (2011). Commerce determines the surrogate country

arguments contained in their previous submissions to Commerce as to why India, and not Thailand, should be chosen as the surrogate country. *Id.* at 2.

[3] Although it is Commerce's preferred practice to value the FOPs from a single surrogate country, *see* 19 C.F.R. § 351.408(c)(2), this is not required by statute, *see* 19 U.S.C. § 1677b(c)(1), (4) (directing Commerce to value the FOPs with "prices or costs of factors of production in one or more market economy countries" that are economically comparable and significant producers of comparable merchandise).

through a four-step process, starting with a determination of which countries are at a level of economic development comparable to the NME. *See Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process* (April 8, 2011) ("*Policy Bulletin 04.1*"), Pls.' App. Tab 8, Attach. 2 at 2–4 (outlining Commerce's four-step process in selecting the surrogate country).[4] "First, early in a proceeding, the operations team sends the Office of Policy ("OP") a written request for a list of potential surrogate countries. In response, the OP provides a list of potential surrogate countries that are at a comparable level of economic development to the NME country." *Id.* at 2.

The OP generally selects five to six countries for inclusion on its list based on GNI data reported in the most recent *World Development Report*, but it also considers which countries are likely to offer adequate surrogate value data. *Id.* at 2–3. The OP relies on the most current annual issue of the *World Development Report* that is available at the time the OP makes its list. *Id.* at 2; *see also Issues and Decision Memorandum for the 2004 - 2005 Administrative Review of Wooden Bedroom Furniture from the People's Republic of China*, A-570–890, ARP: 06/24/2004–12/31/2005, at 28 (Aug. 8, 2007) ("*WBF Issue and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7–16584–1.pdf (last visited Aug. 20, 2013) (declining to consider GNI data placed on the record after the preliminary results because the data were not available at the time the OP created its list).[5] Once Commerce releases the OP list, Commerce will not change its original determination of economic comparability, and Commerce will not revise the list, even if a new *World Development Report* is issued during the proceedings. *Remand Results* at 6; *WBF Issue and Decision Memorandum* at 28 ("The Department cannot wait for a new World Development Report to be released before

[4] In the typical case, Commerce's four-step process is as follows. First, Commerce's OP creates a list of countries found to be economically comparable to the NME. *Policy Bulletin 04.1* at 2. Second, Commerce eliminates countries on the list that are not producers of comparable merchandise. *Id.* at 2–3. Third, Commerce determines which of the remaining countries are significant producers of comparable merchandise. *Id.* at 3–4. Fourth, if more than one country from the list remains viable, Commerce determines which country offers superior data from which to value the FOPs. *Id.* at 4. Although the OP's list is not intended to be exhaustive and parties may request that Commerce select a country not on the list, it is Commerce's practice to select from the OP list unless all of the listed countries lack sufficient data or are otherwise unsuitable. *See id.*

[5] In the first antidumping review for Wooden Bedroom Furniture, the respondents in that case challenged Commerce's decision to ignore the updated World Bank data placed on the record during the proceedings. *See Fujian Lianfu Forestry Co., Ltd. v. United States*, 638 F. Supp. 2d 1325, 1347 (CIT 2009). The court, however, did not review Commerce's justification for rejecting the GNI data, which is similar to the justification presented here, because it found that the respondents had failed to present a developed argument and thus, had waived the issue. *Id.* at 1349–50. Thus, *Fujian* is not helpful here.

issuing the list of potential surrogate countries nor can it change the list if a new World Development Report is released during a proceeding.").

In the *Remand Results*, Commerce explains that revising the OP's list in light of newly submitted GNI data is not feasible because it would require additional time for Commerce to evaluate all the countries listed in the *World Development Report*, not just those on the OP's original list. *Remand Results* at 6. According to Commerce, revising the OP list would nullify, in whole or in part, the parties' comments, rebuttals, and submissions of surrogate value data, causing delays and wasting resources of both Commerce and the parties. *Id.* Commerce also argues that continually revising the list would result in a decrease in the quality of surrogate value data, because parties would focus on submitting information for a variety of potential surrogate countries, in case their preferred country were eliminated from the list, instead of focusing on gathering reliable data from a single potential surrogate country. *Id.* at n.16.

On the record here, Commerce concluded in the same vein that it could disregard the 2009 GNI data, even though it also found that the data were timely submitted pursuant to regulation, because the data had not been released and were not on the record at the time the OP issued its list. *Remand Results* at 5 ("*[T]he list* of potential surrogate countries must be established early in the administrative process . . . .") (emphasis added); *id.* at 14 ("We acknowledge that the data remain part of the record; however, our position is that the data appeared too late in the review to have a substantive effect *on our list* of economically comparable countries . . .") (emphasis added). But, Commerce actually goes further than simply saying that it need not consider factual information submitted after the period for comment on surrogacy. This case is similar to *Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order*, 77 Fed. Reg. 34,346 (Dep't Commerce June 11, 2012), where Commerce noted the necessity of basing its economic comparability finding on the information available to the OP at the time it issues its list. *See Issues and Decision Memorandum for Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Administrative Review*, A-570–831, POR:11/01/09–10/31/10, at 2–6 (June 4, 2012) ("Fresh Garlic"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/2012–14152–1.pdf (last visited Aug. 20, 2013). Commerce also noted that the comments were untimely, *see id.* at 4, the reason it now offers here. But Commerce continues to suggest that as long as the OP relies on the most

current *World Development Report* available at the time the OP makes its list, administrative constraints permit Commerce to disregard any subsequently filed record evidence on this issue, and its determination of economic comparability in the *Final Results* will be supported by substantial evidence. This is the same position Commerce took in the *WBF Issue and Decision Memorandum* cited *supra* and on which it relies here to demonstrate its consistent practice. *See* Def.'s Resp. at 13–14 (stating that although this is the first time Commerce has articulated its reasoning at length, it has taken the same position in previous cases, including the antidumping reviews of Wood Bedroom Furniture and Fresh Garlic). Thus, Commerce's comment period on "surrogate country selection" is essentially a nullity as to issues of economic comparability.

Given Commerce's apparent position that the OP's finding is determinative as to the issue of economic comparability if based on data in existence at the time it issues its list, and that the list will not be revised if new data arises after the list is placed on the record because, *inter alia*, comments on surrogacy depend on a static list, it follows that Plaintiffs' delay in submitting the 2009 GNI data in October is irrelevant, and Commerce's belated attempt to rely on such delay is suspect. Commerce determines on which *World Development Report* to rely based on when the World Bank releases the report relative to when the OP creates its list. Commerce's past statements and the record here indicate Commerce would have ignored the subsequently released 2009 GNI data, regardless of whether it was submitted in April or in October. Moreover, Commerce implicitly found the data timely under its regulations when it expressly rejected the suggestion that it treat the 2009 GNI data as an "untimely rejected submission" under 19 C.F.R. § 351.302(d). *Remand Results* at 10 & n.26–27, 14 (rejecting argument from respondents that Commerce had the authority to reject the 2009 GNI data as an untimely factual submission and to not consider the information under 19 C.F.R. § 351.302(d)).[6] Because Commerce declined to treat the 2009

[6] When a party submits factual information that does not meet its regulatory deadlines, Commerce will not retain that information on the record. *See* 19 C.F.R. § 351.302(d)(1). Commerce did not indicate at the time the 2009 GNI data were submitted that they were untimely factual information and instead addressed the merits of the data in the Final Results. *See Issues and Decision Memorandum* at 3–4; *cf. Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) ("Commerce generally does not consider untimely filed factual information."). Although Commerce might have rejected the 2009 GNI data as an untimely submission, the record is clear that Commerce did not consider the 2009 GNI data to be an untimely factual submission. Thus, the court cannot rely on Commerce's ability to reject untimely factual information as a justification for its actions here. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012) ("Review of an administrative decision must be made on the grounds relied on by the

GNI data as "untimely," Commerce's and Defendant's attempts to characterize the 2009 GNI data as "late" is inapposite.[7] The determinative issue here is not the timing of Plaintiffs' submission, but whether Commerce's blanket rule of ignoring factual information issued after the OP issues its list or its failure to clearly set forth a time for objecting to economic comparability findings effectively eliminates any meaningful comment period on the issue of economic comparability. For the following reasons, the court finds that this is not consistent with the statute or implementing regulations.

In general, Commerce has the discretion to create its own rules of procedure related to the development of the record in order to meet its statutory deadlines. *PSC VSMPO -Avisma Corp. v. United States*, 688 F.3d 751, 760–61 (Fed. Cir. 2012) (noting Commerce's discretion in developing the record); *see also Coal. for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 94, 44 F. Supp. 2d 229, 237 (1999) (noting well-settled principles of administrative law permit an agency to establish and enforce time limits concerning the submission of written information and data). Commerce's exercise of its discretion, however, must be reasonable in

agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." (internal quotation marks and brackets deleted)).

[7] Despite expressly rejecting the suggestion that the 2009 GNI data were an untimely submission, both Commerce and the Defendant reference various deadlines to imply that Plaintiffs failed to timely submit the 2009 GNI data. *Remand Results* at 7–8, 14 (noting the 2009 GNI data was not filed within a five week comment period, ending May 13, 2011); Def.'s Resp. at 9 (noting Plaintiffs failed to submit the data prior to May 13, 2011). The May 13, 2011 deadline, however, is not a regulatory deadline, nor is it a final deadline. The *April 8 Memorandum* stated that if the parties wanted Commerce to consider information submitted to "value factors of production from the surrogate country" for purposes of the preliminary results, the parties must submit that information by May 6, with rebuttal comments due May 13, 2011. Assuming GNI data should be treated the same as information "to value factors of production from the surrogate country," which is debatable given that GNI data is not directly used to value FOPs, such data can be submitted up to 20 days after the preliminary results, pursuant to regulation. *See* 19 C.F.R. § 351.301(c)(3)(ii). If this regulation is applicable to GNI data, then the 2009 GNI data were timely submitted here (it was submitted one month prior to the preliminary results), and the May 13, 2011 deadline does not render the 2009 GNI data untimely or late.

Commerce also notes the 2009 GNI data were filed one month prior to the preliminary results and six months after the issuance of the OP list, neither of which line up with existing regulatory deadlines. *Remand Results* at 8. Commerce, however, makes no reference to the regulatory deadline for the submission of factual information. *See* 19 C.F.R. § 351.301(b)(2) (stating that unless otherwise specified in the regulations, factual information for the final results of an administrative review is due 140 days after the last day of the anniversary month). Commerce's disregard of some deadlines and its reliance on other, seemingly inapplicable deadlines, leaves the court and the parties with no clear explanation as to when "late in a proceeding" occurs and when GNI data must be submitted in order to be considered.

light of Commerce's statutory obligations. *See Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (noting the agency abuses its discretion when its decision is "clearly unreasonable, arbitrary, or fanciful"). For example, although Commerce has the discretion to regulate administrative filings, "that discretion is bounded at the outer limits by the obligation to carry out its statutory duty of determining dumping margins as accurately as possible." *Wuhu Fenglian Co. v. United States*, 836 F. Supp. 2d 1398, 1403 (CIT 2012) (quotation marks and brackets deleted); *see also Grobest & I-Mei Indus. (Viet.) Co. v. United States*, 815 F. Supp. 2d 1342, 1365 (CIT 2012) (stating that in evaluating Commerce's discretion to set deadlines, administrative concerns must be balanced against Commerce's statutory obligations of accuracy and fairness). Additionally, in NME reviews, Commerce's discretion is bounded by its statutory obligation to value the FOPs with surrogate data from an economically comparable country, unless such data were not available. *See Dorbest*, 604 F.3d at 1371–72.

Here, Commerce abused its discretion by depriving the parties of a meaningful opportunity to comment on the OP's initial finding of economic comparability. Although Commerce may set reasonable deadlines, it cannot entirely deprive interested parties of the opportunity to submit factual information on a particular issue. *Cf. Essar Steel*, 678 F.3d at 1278 (finding Commerce acted reasonably in rejecting factual information in part because the party previously "had an opportunity to present its evidence . . . to Commerce during the review); *see also Crawfish Processors Alliance v. United States*, 28 CIT 646, 666, 343 F. Supp. 2d 1242, 1261 (2004) (noting Commerce would abuse its discretion if it prevented parties from commenting on factual information placed on the record by Commerce), *rev'd and vacated on other grounds by* 477 F.3d 1375 (Fed. Cir. 2007) and 31 CIT 1710 (2007). Otherwise, Commerce would be free to place erroneous factual information on the record with no recourse for the parties to respond. Instead, Commerce must provide the parties a meaningful opportunity to develop an accurate factual record as to which countries are economically comparable to the NME and will lead to accurate dumping margins. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("Although Commerce has authority to place documents in the administrative record . . . the burden of creating an adequate record lies with interested parties and not with Commerce." (quotation marks and brackets deleted)). Commerce's elimination of a meaningful comment period on economic comparability, therefore, is an abuse of discretion because it results, despite clear direction in the remand order, in a decision by Commerce to

select a surrogate country without consideration of probative, timely submitted, and apparently unrebutted evidence that the selected surrogate was in fact not economically comparable to the PRC. *See Wuhu Fenglian*, 836 F. Supp. 2d at 1403 (noting Commerce abuses its discretion when it refuses to permit a party to rebut factual information placed on the record by Commerce to the extent that such a refusal unduly hampers its ability to accurately determine dumping margins).

Additionally, Commerce's reliance on the administrative burdens of reconsidering the OP's list do not excuse it from complying with its statutory obligations to determine accurate dumping margins, including its statutory obligation to use data from an economically comparable country.[8] When the OP issues its list "early in a proceeding," months before the preliminary results, issues of finality are not yet present, and it is not an undue burden to require Commerce to set forth clear time limits for comments on comparability and to consider submitted factual information. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (noting the agency's concern over available resources and its interest in finality but noting that at the preliminary results stage, the "tension between finality and correctness simply [does] not exist"). Thus, Commerce's interest in the finality of the OP's list and the administrative burden of considering subsequently released GNI data does not outweigh Commerce's statutory obligations here and does not permit Commerce to completely eliminate any meaningful opportunity to submit factual information related to economic comparability. *See Grobest*, 815 F. Supp. 2d at 1365 (finding Commerce abuses its discretion by rejecting even *untimely* factual information if the administrative burdens and interest in finality are outweighed by the statutory obligations of fairness and accuracy).

---

[8] Commerce argues that it is not unusual for Commerce to disregard record evidence due to administrative constraints. *Remand Results* at 14. Commerce notes that when selecting mandatory respondents, Commerce relies on Customs and Border Protection ("CBP") data and generally does not revise its selection even when subsequently submitted sales data conflict with the CBP data. *Id.* at 15. When Commerce releases the CBP data, however, Commerce provides the parties with the opportunity to submit factual information to dispute the CBP data, and Commerce will consider the parties' submissions when deciding whether to rely on the CBP data when making its final selection. *See Issues and Decision Memorandum* at 19–20 (noting that Commerce provided the parties with seven days to comment on the CBP data and stating that it would rely on the CBP data unless timely submissions demonstrate that the data are inaccurate or otherwise unusable). Here, Commerce did not provide a meaningful opportunity for the parties to submit factual information demonstrating that the GNI data relied on by the OP was inaccurate, and Commerce did not consider any submitted GNI data when deciding whether to rely on the OP's findings. Thus, Commerce's rejection of the 2009 GNI data is not analogous to Commerce's treatment of CBP and sales data. To the extent it is, the CBP procedure is suspect.

Commerce's position in this case also conflicts with its established practice of permitting parties to submit factual information to "rebut, clarify, or correct" information placed on the record by Commerce. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21,246, 21,250 (Dep't Commerce April 10, 2013) (noting that the final rule merely codified Commerce's existing practice, which was to "place factual information on the record of a segment and . . . provide[] interested parties with the opportunity to submit factual information to rebut, clarify, or correct that information.").[9] Commerce has not provided a reasoned justification for singling out the OP list as factual information placed on the record by Commerce that the parties cannot rebut, clarify, or correct. The administrative convenience of a bright-line rule to disregard all GNI data released after the OP issues its list is not a reasoned justification because, as stated above, time constraints do not automatically trump Commerce's statutory obligation to determine accurate dumping margins with surrogate data from an economically comparable country. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1380 (Fed. Cir. 2013) (finding that there is no support in the statute or court precedent for the suggestion that administrative time constraints can override the statutory obligations of fairness and accuracy). Thus, Commerce's preference for determining economic comparability "early in a proceeding" does not permit it to deny the parties a clearly defined and meaningful opportunity to submit comments and develop an accurate factual record on that issue. *See id.* (finding that Commerce's preference to review only two mandatory respondents, and the lack of record evidence that results from that preference, does not excuse Commerce from its obligation to determine reasonably accurate margins).

If administrative constraints prevent Commerce from considering economic comparability after a certain point in the administrative process, that is, prior to the existing regulatory deadline for the submission of factual information, Commerce may create a reasonable deadline for the submission of GNI data pursuant to the requirements of the APA. *See Paralyzed Veterans of America v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) (stating that the APA's notice and comment requirements apply to rules that "effect a change in existing law or policy or which affect individual rights and obligations."); *Parkdale Int'l, Ltd. v. United States*, 31 CIT 1229, 1246, 508 F. Supp. 2d 1338, 1356 (2007) ("[I]f a rule adopts a new position inconsistent with an

[9] Commerce recently codified this practice into a regulation, but the regulation was not in effect at the time of this proceeding. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. at 21,246 (noting the final rule will apply to all segments initiated on or after May 10, 2013).

existing regulation . . . notice and comment are required." (citations and internal quotation mark deleted)). Commerce argues that it can impose a deadline for the submission of GNI data without notice and comment because such a deadline would be a clarification of Commerce's existing practice to request the OP's list "early in a proceeding." *Remand Results* at 16 (citing *Policy Bulletin 04.1*). As indicated, in this case it set no such reasonable deadlines. Further, the *Policy Bulletin 04.1* cannot support an unnoticed deadline if it outlines only Commerce's internal procedures for requesting the OP's list and does not address what limitations, if any, apply to the parties. *See Parkdale Int'l*, 31 CIT at 1246, 508 F. Supp. 2d at 1356 (noting that in contrast to a substantive rule, which creates a new right or duty, an interpretive rule provides a more detailed clarification of an existing authority). Commerce cannot create and enforce a deadline specifically for the submission of GNI data that differs from its existing deadlines for the submission of factual information without first complying with the requirements of the APA. Whether or how it complies, however, is not at issue here.

In sum, Commerce has failed to provide a reasoned justification for disregarding the 2009 GNI data. Commerce accepted the data as timely filed and part of the record, and the consequence of that decision is that it must justify its selection of the surrogates based on the substantial evidence on the record, including the 2009 GNI data. The court previously found that Commerce's selection of India as the single surrogate country was not supported by substantial evidence because the 2009 GNI data were not considered, *see Dupont Teijin Films*, 896 F. Supp. 2d at 1308–09, and Commerce does not really challenge that conclusion. Commerce's challenges are procedural, and they fail.

CONCLUSION

This matter is remanded for Commerce to reconsider its surrogate country or countries selection with the benefit of the 2009 GNI data. The court expresses no opinion on which country or countries Commerce should select on remand or how it should choose its FOP data. If Commerce requires additional information, it may, in its discretion, reopen the record. It is time for Commerce to complete this matter and to do what it needs to do to value FOPs based on the record before it. Commerce recognizes that India and the PRC are changing with regard to economic comparability, but it also must recognize that it must give parties an opportunity to challenge "facts" it sets forth and it must provide notice of deadlines it wishes to enforce. Commerce has many tools to do its job reasonably, and it must utilize them.

Commerce shall file its remand determination with the court within 60 days (October 21, 2013). The parties shall have 30 days thereafter (November 20, 2013) to file objections and the Government will have 15 days thereafter (December 5, 2013) to file its response.

Dated: August 21, 2013
New York, New York

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