U.S. Customs and Border Protection

Slip Op. 12–151

PAPIERFABRIK AUGUST KOEHLER AG AND KOEHLER AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 11–00147

[Staying action pending appeal in *Union Steel v. United States*, CAFC Court No. 2012–1248]

Dated: December 10, 2012

William Silverman and *Richard P. Ferrin*, Drinker Biddle & Reath LLP, of Washington, D.C., for plaintiffs.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, and *Claudia Burke*, Assistant Director, U.S. Department of Justice, of Washington, D.C., for defendant. With them on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel was *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Gilbert B. Kaplan and *Daniel Schneiderman*, King & Spalding LLP, of Washington, D.C., for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs Papierfabrik August Koehler AG and Koehler America, Inc. (collectively "Koehler") contest the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued to conclude the first administrative review of an antidumping duty order on lightweight thermal paper (the "subject merchandise") from Germany, covering entries made during the period November 20, 2008 through October 31, 2009. *See Lightweight Thermal Paper from Germany: Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 Fed. Reg. 22,078 (Apr. 20, 2011) ("*Final Results*").

Plaintiffs' complaint contains three claims, the third of which challenges the Department's use of the "zeroing" methodology in the first administrative review, whereby Commerce assigned U.S. sales of

subject merchandise from Germany made above normal value a dumping margin of zero, instead of a negative margin, in the calculation of the weighted-average dumping margin.[1] Compl. ¶ 27 (June 3, 2011), ECF No. 6. In this action, plaintiffs are opposed by defendant United States and defendant-intervenor Appleton Papers Inc.

At oral argument held on October 18, 2012, the court requested that the parties make submissions on the question of whether the court should stay this action pending the final disposition of *Union Steel v. United States,* 36 CIT __, 823 F. Supp. 2d 1346 (2012) ("*Union Steel*"). *Union Steel* involves a challenge to the Department's use of zeroing in an administrative review of an antidumping duty order. *Union Steel,* 36 CIT __, __, 823 F. Supp. 2d at 1347–48. An appeal of the judgment entered by the Court of International Trade in that action is now pending before the United States Court of Appeals for the Federal Circuit ("Court of Appeals").[2]

Plaintiffs and defendant oppose a stay. Pls.' Br. Regarding Stay Issue (Oct. 26, 2012), ECF No. 67 ("Pls.' Opp'n"); Def.'s Opp'n to Proposed Stay of Proceedings (Oct. 26, 2012), ECF No. 66 ("Def.'s Opp'n"). Plaintiffs, alternatively, support a partial stay, in which litigation of the claim on zeroing would be stayed while the other claims proceed. Pls.' Opp'n 6. Defendant-intervenor supports a stay of the action inclusive of all claims. Def-Intervenor's Br. in Supp. of Staying the Proceeding 1 (Oct. 26, 2012), ECF No. 68.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The decision when and how to stay a proceeding rests "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In making this decision, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257. For the reasons discussed below, the court will stay this action.

Plaintiffs' zeroing claim challenges the Department's use of the zeroing methodology to calculate Koehler's weighted-average dumping margin in the first administrative review. Compl. ¶¶ 27–30.

[1] In their first claim, Plaintiffs Papierfabrik August Koehler AG and Koehler America, Inc. (collectively "Koehler") challenge the failure of U.S. Department of Commerce ("Commerce") to disclose certain correspondence between members of Congress and the Secretary of Commerce until the date of the Department's final determination. Compl. ¶ 23 (June 3, 2011), ECF No. 6. Plaintiffs' second claim contests the Department's decision not to adjust plaintiffs' home market prices to account for monthly home market rebates. *Id.* ¶ 25.

[2] The United States filed a Notice of Appeal of the judgment in *Union Steel* on March 6, 2011. ECF No. 79 (Consol Ct. No. 11–00083). The appeal has been docketed as *Union Steel v. United States*, CAFC Court No. 2012–1248.

Plaintiffs argue that Commerce has interpreted section 771(35) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677(35) (2006)[3] inconsistently by employing zeroing in the review despite having abandoned that methodology in antidumping investigations.[4] *Id.* ¶ 29. Plaintiffs direct their claim to section 771(35)(A) of the Tariff Act, which defines "dumping margin" as the "amount by which the normal value exceeds the export price or the constructed export price of the subject merchandise." 19 U.S.C. § 1677(35). Plaintiffs argue that the Department's inconsistent interpretations render the use of zeroing in the Final Results unlawful. Compl. ¶ 30.

In *Union Steel*, the Court of International Trade affirmed a remand redetermination in which Commerce had explained its rationale for zeroing in administrative reviews. *Union Steel,* 36 CIT __, __, 823 F. Supp. 2d at 1359–60. The issue now on appeal in *Union Steel* is whether the Department's use of zeroing in an administrative review of an antidumping duty order rests upon a lawful statutory interpretation in light of the explanation given by Commerce on remand. Accordingly, the outcome of *Union Steel* likely will affect the court's disposition of plaintiffs' claim challenging the Department's use of zeroing.

Defendant opposes a stay on a number of grounds. Defendant argues, first, that the doctrine of exhaustion of administrative remedies bars plaintiffs' zeroing claim. Def.'s Opp'n 3; Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. 34 (Mar. 06, 2012), ECF No. 39 ("Def.'s Resp."). An exhaustion issue arises in this case because plaintiffs failed to raise the issue of zeroing during the administrative review. Def.'s Opp'n 3; Def.'s Resp. 35–36.

In litigation involving challenges to antidumping determinations, the U.S. Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). The Department's regulation requires that parties' administrative case briefs raise all issues "that continue in the submitter's view to be relevant to the Secretary's final determination or final results." 19 C.F.R. § 351.309(c)(2) (2008).

Plaintiffs argue, *inter alia*, that exhaustion was not required in this case because zeroing was not a "live" issue during the period for case brief submissions. Br. in Support of Pls.' Mot. for J. on the Agency R. under Rule 56.2 34 (Nov. 16, 2011), ECF No. 27. However, plaintiffs concede that they did not raise the issue of zeroing before Commerce during the administrative review and addressed it for the first time in a letter sent to the Department on April 25, 2011, five days after

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

issuance of the Final Results. Pls.' Opp'n 10–11. As a result, plaintiffs have failed to exhaust their administrative remedies with respect to their claim challenging zeroing before the court.

In trade cases, the court may exercise discretion with respect to whether to require exhaustion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) ("*Corus Staal*"). Moreover, the exhaustion requirement has several recognized exceptions, one of which may apply when a pertinent judicial decision is rendered after the relevant administrative determination. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT ___, ___, 601 F. Supp. 2d 1370, 1377 (2009). Here, the intervening judicial decision exception applies because there was a change in the controlling law on the use of zeroing.

For nearly the entire administrative review, the legality of the Department's use of zeroing in administrative reviews was settled, the Court of Appeals repeatedly having upheld the Department's use of zeroing in administrative reviews as a reasonable statutory interpretation entitled to deference. *See*, *e.g.*, *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373–74 (Fed. Cir. 2011); *Corus Staal*, 502 F.3d at 1375; *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004). But on March 31, 2011, thirteen days before the *Final Results* were issued, the Court of Appeals decided *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("*Dongbu*"), in which, for the first time, it declined to affirm a judgment of this Court sustaining the Department's use of zeroing in an administrative review of an antidumping order, remanding for Commerce to explain its inconsistent interpretations of 19 U.S.C. § 1677(35). The Court of Appeals reasoned that while Commerce has discretion to interpret the statute with respect to zeroing, "[this] discretion is not absolute" and that "[i]n the absence of sufficient reasons for interpreting the same statutory provision inconsistently, the Department's action is arbitrary." *Dongbu*, 635 F.3d at 1371–73.

On June 29, 2011, approximately ten weeks after the *Final Results* were issued, the Court of Appeals reinforced its changed position on zeroing in *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) ("*JTEKT*"). The Court of Appeals rejected the Department's reasoning, concluding that "[w]hile Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question — why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations?" *JTEKT*, 642 F.3d at 1384.

Defendant argues that the appellate decisions in *Dongbu* and *JTEKT* are not intervening judicial decisions that excuse plaintiffs' failure to exhaust because they did not change existing law on zeroing but merely remanded the Departmental decisions for explanation. Def.'s Opp'n 6. Defendant's argument is unconvincing. Contrary to defendant's characterization, these decisions effectively unsettled previously settled law, setting aside judgments of this Court affirming the use of zeroing in reviews despite the Department's having discontinued zeroing in antidumping investigations. Because the controlling law is now unsettled, the court deems it appropriate to allow the Court of Appeals to address the issue in *Union Steel* before adjudicating plaintiffs' zeroing claim.

Although acknowledging that ordering a stay is a matter for the court's discretion, Def.'s Opp'n 1, defendant argues that a stay is not appropriate because plaintiffs cannot establish a "clear case of hardship or inequity in being required to go forward" with the litigation, *id.* at 7 (citing *Landis*, 299 U.S. at 255). Defendant misconstrues the applicable standard. A party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays *will work damage to someone else*." *Landis*, 299 U.S. at 255 (emphasis added). Here, Defendant has not shown that a stay will cause it harm, and the court perceives no harm that would accrue to the defendant should a stay be ordered.

Further, defendant submits that ordering a stay would create a "significant administrative burden" for the court and the defendant, predicting a "deluge when all cases stayed pending *Union Steel* or other zeroing appeals become simultaneously ripe for adjudication." Def.'s Opp'n 9. The court is not persuaded that a stay will have such a result. To the contrary, a stay will streamline and simplify resolution of the zeroing issue, avoiding unnecessary remands and appeals.

Defendant also argues that a stay is inappropriate because there is not a strong likelihood that plaintiffs' position will prevail in *Union Steel*. *Id*. Defendant maintains that "[a]bsent a showing of irreparable harm, plaintiff must show a strong likelihood of success on the merits to be entitled to a stay, or interim relief, pending review." *Id*. (citing *Balouris v. United States Postal Serv.,* 277 F. App'x 980, 980 (Fed. Cir. 2008) (unpublished) (citations omitted)). Once again, defendant misconstrues the applicable standard. The principle on which defendant relies refers to a plaintiff's burden to obtain a stay pending appeal. The procedural posture of this case is not one in which there has been a final judgment, and thus the proposed stay is not one that

is pending appeal. Therefore, the court, when evaluating whether or not to stay this action, need not consider the likelihood that plaintiffs' challenge to zeroing will succeed.

Finally, plaintiffs argue for a partial stay of their zeroing claim.[5] Pls.' Opp'n 6–9. A partial stay, however, is not in the interest of judicial economy. A partial stay may necessitate multiple decisions and separate remands on the zeroing and non-zeroing issues, which would delay and extend proceedings through piecemeal litigation and appellate reviews. *See* USCIT R. 1.

In conclusion, the objections raised by plaintiffs and defendant do not persuade the court that a stay of this action should be avoided.

ORDER

Upon consideration of the submissions filed by plaintiffs Papierfabrik August Koehler AG and Koehler America, Inc., defendant United States, and defendant-intervenor Appleton Papers Inc., and upon all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that this case be, and hereby is, stayed until 30 days after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248.

Dated: December 10, 2012
New York, New York

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

[5] Plaintiffs and defendant cite recent cases of this Court where, in similar situations, stays were not ordered. Whether to order a stay, however, is a matter within the court's sound discretion.

ERRATA

Please make the following changes to *Papierfabrik August Koehler AG v. United States*, No. 11–00147, Slip Op. 12–151.

- page 4, line 2: delete footnote 4.
- page 8, line 5: change the number of footnote 5 to footnote 4.

December 26, 2012.

Slip Op. 12–156

MUELLER COMERCIAL DE MEXICO, S. DE R.L. DE C.V., and SOUTHLAND PIPE NIPPLES CO, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00319
PUBLIC VERSION

[Plaintiffs' motion for judgment on the agency record denied; final administrative review results sustained.]

Dated: December 21, 2012

David E. Bond, *Yohai Baisburd*, *Jay C. Campbell*, and *Ting-Ting Kao*, White & Case LLP of Washington, DC, for Plaintiffs Mueller Comercial de Mexico, S. de R.L. de C.V. and Southland Pipe Nipples Co., Inc.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Plaintiff United States. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Nathaniel J. Havlorson*, Department of Commerce, Office of the Chief Counsel for Import Administration.

Roger B. Schagrin and *Michael J. Brown*, Schagrin Associates of Washington, DC, for Defendant-Intervenors TMK IPSCO Tubulars and Allied Tube and Conduit.

Jeffrey D. Gerrish and *Robert E. Lighthizer*, Skadden Arps Slate Meagher & Flom, LLP of Washington, DC, for Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Gordon, Judge:

This action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering certain circular welded non-alloy steel pipe from Mexico. *See Certain Circular Welded Non-Alloy Steel Pipe From Mexico*, 76 Fed. Reg. 36,086 (Dep't of Commerce June 21, 2011) (admin. review 2008–09 final results) (*Final Results*); *see also* Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico, A-201–805 (June 13, 2011), available at http://ia.ita.doc.gov/frn/summary/mexico/2011–15461–1.pdf (*Decision Memorandum*), which incorporates by reference the Use of Adverse Facts Available (AFA) for Final Results Memorandum (June 13, 2011) (AFA Memo), CD 66[1] (last visited Dec. 21, 2012.)

Before the court is the motion for judgment on the agency record of Plaintiffs Mueller Comercial de Mexico, S. de R.L. de C.V., and South-

[1] "CD __" refers to Confidential Document.

land Pipe Nipples Company, Inc. (collectively Mueller). The court previously stayed Mueller's challenge to Commerce's use of zeroing pending a decision on that issue from the Federal Circuit. *See* Order, Nov. 21, 2011, ECF No. 35. This opinion addresses Mueller's remaining challenge to Commerce's use of facts available for missing production data from a non-cooperating mandatory respondent that supplied Mueller. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[2] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court sustains Commerce's use of facts available.

I. Standard of Review

For administrative reviews of antidumping duty orders, the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" 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). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and 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. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2012). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2012).

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

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.,* 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Background

At the start of the administrative review, Commerce selected three mandatory respondents, (1) Mueller, an exporter, who sourced subject merchandise from producers, (2) Tuberia Nacional, S.A. de C.V. ("TUNA"), and (3) Ternium Mexico, S.A. de C.V. ("Ternium"). *Certain Circular Welded Non-Alloy Steel Pipe from Mexico*, 75 Fed. Reg. 78,216 at 78,216, (Dep't of Commerce Dec. 15, 2010) (admin. review 200809 prelim. results) ("*Preliminary Results*"). Mueller fully cooperated. As a reseller, though, Mueller did not possess all of the cost information Commerce required to calculate Mueller's margin. *Decision Memorandum* at 13. Commerce requested the cost information directly from Mueller's two principal unaffiliated suppliers (and the two other mandatory respondents), TUNA and Ternium. *Preliminary Results* at 78,219–20; *see also SKF USA Inc. v. United States*, 630 F.3d 1365, 1371, 1375–76 (Fed. Cir. 2011) ("*SKF*") ("On the face of these provisions, Commerce can utilize unaffiliated suppliers' records for cost of production data in lieu of the exporter's acquisition cost."), *on remand to*, *SKF USA Inc. v. United States*, 35 CIT ___, 2011 WL 4889070 (Oct. 14, 2011), *opinion after remand*, *SKF USA Inc. v. United States*, 36 CIT ___, 2012 WL 2929404 (July 18, 2012). Although TUNA's review was rescinded (due to no direct shipments), and Ternium opted not to participate in its own margin calculation, TUNA and Ternium did respond separately to Commerce's request for cost of production (COP) data for sales made to Mueller. Commerce sought this information to evaluate (1) whether Mueller's home market sales were made below the cost of production, and (2) to calculate a constructed value for comparison to Mueller's United States prices when a price-to-price comparison was not possible. *Preliminary Results* at 78,219–20; *see also* 19 U.S.C. § 1677b(b)(3); 19 U.S.C. § 1677b(e).

TUNA fully cooperated with these COP data requests, reporting cost of production on a product-specific basis. Ternium, however, did not cooperate to the same extent. Ternium failed to "'provide detailed product-specific calculations that allocate costs based on product dimensions.'" AFA Memo at 2 (quoting Ternium's December 21, 2010,

section D questionnaire response at 3). After determining Ternium had not cooperated to the best of its ability, Commerce applied adverse facts available (AFA) for Ternium's "cost of production for the specific products sold by Ternium to Mueller." AFA Memo at 5.[3] More specifically, Commerce analyzed TUNA's sales to Mueller and the corresponding costs of production, and identified as AFA the sale between TUNA and Mueller made at the greatest percentage below the cost of production. *Id.* at 4–5. Commerce then evaluated whether that potential AFA rate was an outlier or aberrational, and concluded it was not. *Id.* at 5. Commerce also compared that potential AFA rate with other TUNA-Mueller sales/cost differentials and found them to be "insufficiently adverse to compel Ternium to cooperate." *Id.*

Having identified what it believed to be an appropriate AFA rate for Ternium's CONNUM-specific production costs, Commerce returned to Mueller's margin calculation and multiplied the AFA rate by Mueller's acquisition costs for each of Ternium's products. *Id.* ; *Decision Memorandum* at 13–21. Throughout the process Commerce carefully, if not cleverly, avoided drawing an adverse inference directly against Mueller, a cooperating party. *Id.* at 12–13. Commerce repeatedly made clear that it was drawing an adverse inference against Ternium, not Mueller. Mueller, nevertheless, suffered adverse collateral consequences from Commerce's use of Ternium's AFA rate in Mueller's margin calculation, which increased from 4.81 percent in the preliminary results to 19.81 percent in the final.

Mueller challenges Commerce's selection of facts available for Mueller's production costs that include an AFA rate for Ternium's production costs. *See* Mem. in Supp. of Pls.' R. 56.2 Mot. for J. on Agency R. ("Pls.' Br."), ECF No. 38–2. Mueller argues that Commerce unreasonably applied the antidumping statute, violating the court's decision in *SKF USA, Inc. v. United States*, 33 CIT ___, ___, 675 F. Supp. 2d 1264, 1276 (2009) ("*SKF USA*"). *Id.* at 3–11 (Commerce's "actions and interpretation of the antidumping statute are clearly impermissible under this Court's ruling in *SKF USA, Inc.*"). Mueller also argues in the alternative that the facts available applied by Commerce are unreasonable on this administrative record (unsupported by substantial evidence). *Id.* at 13–17.

[3] Commerce also assigned Ternium a total adverse facts available (AFA) rate of 48.33% for Ternium's overall failure to participate in the review. AFA Memo at 1.

III. Discussion

A. Commerce's Application of 19 U.S.C. § 1677e is Reasonable

This case involves 19 U.S.C. § 1677e, which governs Commerce's use of "facts available." Section 1677e directs Commerce to use the facts otherwise available if necessary information is not available on the administrative record. 19 U.S.C. § 1677e(a). Necessary information may not be available if, among other things, an interested party withholds information that has been requested, or fails to provide information in the form and manner requested. 19 U.S.C. § 1677e(a)(2). For Mueller's margin calculation TUNA's production costs were available in the form and manner requested, but Ternium's were not. Ternium's missing data implicated 1677e(a) because Ternium, an interested party and mandatory respondent, failed to provide requested information in the form and manner requested. Ternium's lack of cooperation also implicated section 1677e(b), which permits Commerce to draw adverse inferences when selecting from among the facts available to fill an information gap. The question here is whether section 1677e also allows Commerce to factor in AFA against a noncooperative supplier when selecting from among the facts otherwise available to calculate a cooperating exporter's production costs. Or stated another way, does the antidumping statute require Commerce to ignore the adverse inference against Ternium when filling the information gap for Mueller's costs of production?

Mueller and Defendant agree that the statute "is silent" for purposes of the *Chevron* two-step framework. Pls.' Br. at 4. Defendant-Intervenor United States Steel Corporation argues that Commerce's action is, in fact, mandated under the first prong of *Chevron*. United States Steel Corp.'s Mem. in Opp'n to Pls.' Mot. for J. on the Agency R. at 3–5, ECF No. 50. The court, however, agrees with Mueller and Defendant that Congress did not specifically provide the manner in which Commerce should evaluate the costs of a cooperating exporter sourcing product from a non-cooperating producer.

Under the second prong of *Chevron*, Commerce's "interpretation governs" as long as it is reasonable. *United States v. Eurodif S.A.,* 555 U.S. 305, 316 (2009); *accord Timken Co. v. United States,* 354 F.3d 1334, 1342 (Fed. Cir. 2004) ("[a]ny reasonable construction of the statute is a permissible construction"). To determine whether Commerce's interpretation is reasonable, the court "may look to 'the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole.'" *Wheatland Tube Co. v. United States,* 495 F.3d 1355, 1361 (Fed. Cir.

2007) (quoting *NSK Ltd. v. United States,* 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1296–97 (2002)).

Commerce interpreted Section 1677e as "manifesting an intent by Congress to provide the agency with authority to seek such information" and "a mechanism to induce compliance if the interested party's failure to cooperate might affect the dumping margin of another party." *Decision Memorandum* at 18; *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) ("Without the ability to enforce full compliance with its questions, Commerce runs the risk of gamesmanship and lack of finality in its investigations."). Commerce explained that it "does not have subpoena power," and "the use of [AFA] is the only recourse available to the agency to ensure that interested parties provide it with full and complete information." *Decision Memorandum* at 18; *see also Essar Steel*, 678 F.3d at 1276 ("Because Commerce lacks subpoena power, Commerce's ability to apply adverse facts is an important one."). Commerce elaborated that its "ability to use facts available provides the only incentive for an interested party to cooperate." *Decision Memorandum* at 18; *see also Essar Steel*, 678 F.3d at 1276 ("The purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation") (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)). Commerce further explained that it "has a duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance." *Decision Memorandum* at 18. Commerce concluded that the statute does not require it to ignore Ternium's non-cooperation when selecting from facts available to fill the information gap for Mueller. *Id.*

Commerce also considered the potential effect that its statutory interpretation would have upon cooperative respondents such as Mueller. *Cf. SKF*, 630 F.3d at 137475 & n.6 (Commerce's "[u]se of adverse inferences may be unfair considering SKF has no control over its unaffiliated supplier's actions," and "Commerce must explain why" this "concern is unwarranted or is outweighed by other considerations."). Commerce reiterated that it did "not attempt to penalize Mueller," but rather, it sought "to induce compliance and to ensure that Ternium [did] not benefit from its non-compliance." *Decision Memorandum* at 18–19. Commerce recognized that, as "a general matter, companies that choose to do business with uncooperative parties may also be impacted." *Decision Memorandum* at 19. Commerce reasoned that, if it "were unable to apply [AFA] to Ternium's exports through Mueller, Ternium would benefit from its failure to

cooperate with" Commerce's "requests for information." *Id.* Specifically, Commerce explained that, "if we were to accept Mueller's arguments, the subject merchandise produced and exported by Ternium would be subject to a total [AFA] rate of 48.33" percent, "while the Ternium-produced merchandise exported by Mueller would be subject to the much lower weighted-average rate of Mueller, such as the rate of 4.81 [percent] from the Preliminary Results." *Id.* at 19–20. Commerce expressed concern that under Mueller's interpretation of the statute, "Ternium could continue to produce and sell the subject merchandise for prices less than its normal value to the U.S. market, by directing it[s] merchandise through Mueller, where it would have no obligation to ever provide cost of production information." *Id.* at 20.

Commerce further considered its duty to determine Mueller's margin accurately and concluded that its decision advances this interest. From a practical standpoint, without the required Ternium COP data, there is no way to know whether Mueller's home market sales of Ternium products are above or below cost, and whether they may properly be used as a basis for normal value. It is therefore difficult for Commerce, the parties, or the court to know with certainty what a truly "accurate" margin for Mueller is. Commerce explained: "Although premised on the adverse inference that Ternium's actual cost information would not be favorable—otherwise Ternium may not have elected to withhold it from the Department—the selected facts available are intended to produce an accurate, non-punitive, dumping margin for Mueller." *Id.* Commerce reasoned that if it "ignores the fact that Ternium chose to withhold necessary information and fails to apply an adverse inference in the selection of facts available, the resulting dumping margin would not reflect accurately the rate at which Mueller's sales of merchandise produced by Ternium was sold at less than normal value." *Id.* Commerce concluded that the "[a]pplication of an adverse inference only to the missing cost of production information that Ternium has withheld is a reasonable and limited inference based on the information on the record that ensures Ternium does not benefit from its failure to cooperate and also avoids an inaccurate dumping margin for Mueller." *Id.*

Mueller, for its part, argues that it fully cooperated during the review and that Commerce should therefore ignore Ternium's non-cooperation to be fair when calculating Mueller's dumping margin. Pls.' Br. at 5 (quoting *SKF USA*, 33 CIT at ___, 675 F. Supp. 2d at 1275).

Mueller relies heavily upon the decision in *SKF USA*, arguing that

Commerce's decision violates that precedent. Pls.' Br. at 1–10. In *SKF USA*, Commerce interpreted Section 1677e as authorizing Commerce to draw an adverse inference against a cooperative exporter, SKF, based solely upon non-cooperation by SKF's unaffiliated supplier. *SKF USA*, 33 CIT at ___, 675 F. Supp. 2d at 1274–75. Notably, the "unaffiliated supplier was not a party to the administrative reviews proceeding and, therefore, was not in a position to be assigned a margin reflecting an adverse inference." *Id.* at 1275. Instead, Commerce imposed an AFA rate of 17.33 percent directly upon the otherwise cooperative reseller, SKF, for purposes of all sales from the noncooperative supplier during the review. *Id.* at 1267, 1275. Commerce selected 17.33 percent because it was adverse to SKF, representing the highest dumping margin ever calculated for SKF in any segment of the proceeding, from approximately 15 years earlier during the third administrative review. *Id.* at 1275. The court held that Commerce's interpretation of Section 1677e was unreasonable under the second prong of *Chevron*, was "not fair" to the cooperating respondent, and violated Commerce's duty to determine margins "accurately and according to the relevant information on the record of the administrative review." *Id.* The court noted:

> Allowing an interested party's failure to cooperate to affect adversely the dumping margin of another interested party who is a party to the proceeding, about whom Commerce did *not* make a finding of noncooperation, violates the Department's obligation to treat fairly every participant in an administrative proceeding. As is any government agency, Commerce is under a duty to accord fairness to the parties that appear before it. Although 19 U.S.C. § 1677e(b) does not expressly state that Commerce may not adversely affect a party to a proceeding based upon another interested party's failure to cooperate, a construction permitting such an absurd result makes a mockery of any notion of fairness. In the specific context of the antidumping laws, a party that did not fail to meet its obligation to cooperate, as imposed by § 1677e(b), is entitled by § 1675(a) and related provisions of the antidumping law to have its margin determined accurately and according to the relevant information on the record of the administrative review. *See* 19 U.S.C. § 1675(a)(1)-(2) (requiring generally that Commerce determine the amount of antidumping duty according to normal value and export price or constructed export price of each entry of subject

> merchandise); *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990)(stating that "the basic purpose of the [antidumping] statute [is] determining current margins as accurately as possible").

Id. at 1276.

In this case Commerce took a decidedly different approach. Commerce did not draw an adverse inference against Mueller, did not rely upon a dumping rate previously calculated for Mueller, or select a rate because it was adverse to Mueller. Rather, Commerce selected a ratio based on some of TUNA's cost data as the best available information in place of *Ternium's* missing cost data. *Id.* When Commerce made the judgment as to what information available on the record was best to evaluate Mueller's cost of production for Ternium products, Commerce considered the adverse inference that it had drawn against Ternium—a mandatory respondent to whom Commerce had assigned a margin reflecting an adverse inference. *Id.* Unlike *SKF USA*, this case involves a different interpretation of Section 1677e by Commerce, a different methodology for selecting from the facts available, and a different record. Therefore, Mueller's argument that the facts in *SKF USA* are "virtually identical to the facts in this case" is not correct. As opposed to Commerce's "unreasonable" decision-making in *SKF USA*, Commerce's decision-making here appears thorough, thoughtful, logical, and complete.

Commerce carefully considered the remedial statutory scheme, the intent of Congress, the potential unfairness to Mueller, and the impact of its decision on the accuracy of Mueller's dumping margin. *Decision Memorandum* at 16–20. Using its administrative expertise, Commerce reasonably concluded that all of these factors support the agency's interpretation of the antidumping statute that Congress has charged it to administer. *Id.* Commerce determined, consistent with the remedial purposes of the antidumping law, the statutory policy of encouraging interested parties to cooperate with information requests, and the obligation to calculate dumping margins as accurately as possible, that Section 1677e authorizes Commerce, in place of missing cost data needed to determine a cooperating exporter's dumping margin, to consider an adverse inference against a non-cooperative supplier when selecting from facts otherwise available on the record. In the court's view, that determination is reasonable and entitled to *Chevron* deference. It therefore "governs." *See Eurodif*, 555 U.S. at 316, *Timken*, 354 F.3d at 1342.

B. Commerce Selection from Among Facts Available is Reasonable

Mueller also argues in the alternative that the facts available applied by Commerce are unreasonable on this administrative record (unsupported by substantial evidence). Pls.'s Br. at 13–17. This argument though is largely predicated on Mueller's argument that Commerce may not consider the adverse inferences drawn against Ternium when choosing from among the facts available to use for Mueller's production costs. As explained above, the facts available on the administrative record for Ternium's production costs for sales made to Mueller included the AFA rate that Commerce determined for Ternium's costs of production, which Commerce derived from TUNA's production cost data and Mueller's acquisition cost data. AFA Memo at 4.

Commerce compared "TUNA's sales to Mueller and TUNA's cost of production information for specific products." Commerce was "able to perform a cost test on TUNA's sales to Mueller," and Commerce selected "the sales transaction between TUNA and Mueller made . . . at the greatest percentage below the cost of production." AFA Memo at 4. This "was the same as the next two transactions with a differential between the sale price and the cost of production." *Id.* at 5. Commerce determined that a ratio based on TUNA's production costs for these transactions was most probative of Ternium's withheld cost data. *Decision Memorandum* at 16, 20 (Commerce "has selected from the facts otherwise available, the best information to use in place of Temium's withheld cost data"); AFA Memo at 5 (Commerce selected the "most probative evidence" available). There is no dispute that, like Ternium, TUNA produced the same types of products in the same country and then sold them to the same exporter (Mueller) during the same period of review.

Mueller, nevertheless, argues that production costs for the TUNA transactions that Commerce selected are not probative of *all* TUNA transactions, Pls.' Br. at 11–12, 14–16, but Defendant correctly explains that this misses the point. Commerce selected a ratio based on *some* of the TUNA transactions because the production costs associated with them (and the accompanying **[]** percent differential with Mueller's acquisition price) were, according to Commerce, the best information to use in place of *Ternium's* missing cost data. *Decision Memorandum* at 16, 20; AFA Memo at 5. Commerce reasonably declined to rely upon *TUNA's* cost data for the balance of *TUNA's* products, which had a differential of less than **[]** percent, because Commerce determined that they were "insufficiently adverse" to in-

duce *Ternium's* cooperation. AFA Memo at 5. Commerce explained that it had assigned Ternium a total AFA rate (48.33%) during the prior review, and this had not induced Ternium to cooperate during the current review, leading Commerce to draw an adverse inference that Ternium refused to cooperate because its data would have been less favorable. AFA Memo at 5 (citing *Certain Circular Welded Non-Alloy Steel Pipe From Mexico*, 75 Fed. Reg. 20342, 20343 (Dep't of Commerce Apr. 19, 2010) (admin. review 2007–08 final results)); *Decision Memorandum* at 15–16, 18, 20 (discussing inference against Ternium).

Mueller also argues that its acquisition costs are "certainly more probative of the issue," Pls.' Br. at 11–12, but Commerce reasonably concluded otherwise using its administrative expertise. *Preliminary Results* at 78,219–20. Congress requires that Commerce determine the costs associated with Mueller's sales of Ternium products by calculating "an amount equal to the cost of materials and fabrication or other processing of any kind employed in producing the merchandise," plus profit and selling, general, and administrative expenses. *See* 19 U.S.C. § 1677b(e). There is no dispute that Mueller does not possess all of this information because it resells rather than produces the merchandise at issue. *Decision Memorandum* at 13. Commerce also determined that Mueller's acquisition costs for products from its supplier, TUNA, did not equate to the costs of production reported by TUNA for those products. AFA Memo at 4–6. Commerce reasonably concluded that supplier production costs are more probative than exporter acquisition costs. *Decision Memorandum* at 13; *see also SKF*, 630 F.3d at 1371, 1375–76 ("On the face of these provisions, Commerce can utilize unaffiliated suppliers' records for cost of production data in lieu of the exporter's acquisition cost."), *on remand to*, *SKF USA Inc. v. United States*, 35 CIT ___, 2011 WL 4889070 (Oct. 14, 2011), *opinion after remand*, *SKF USA Inc. v. United States*, 36 CIT ___, 2012 WL 2929404 (July 18, 2012)).

Finally, Mueller suggests that Commerce could have relied upon Ternium's data. Pls.' Br. at 13–14. Ternium supplied average cost of production data relative to four of its "product families" during the administrative review, but Ternium failed to provide data as Commerce requested on a specific, product-by-product basis. AFA Memo at 3. Commerce did not use average cost data for Ternium's "product families" due to accuracy concerns. *Decision Memorandum* at 16–17. Commerce explained that Ternium's average cost data limited to four product categories did not "reflect cost differences attributable to the different physical characteristics" of the several dozen products re-

viewed. *Id.* at 17. Therefore, Commerce reasonably concluded that Ternium's overall cost data was not the most probative facts available in place of Ternium's missing product-specific cost data.

IV. Conclusion

For the foregoing reasons, Commerce's application of facts available to calculate Mueller's costs of production is sustained. Accordingly, it is hereby

ORDERED that the *Final Results* are sustained with respect to Commerce's application of facts available to calculate Mueller's costs of production; and it is further

ORDERED that Mueller's challenge to Commerce's practice of zeroing remains stayed pending a decision on the issue from the U.S. Court of Appeal for the Federal Circuit.

Dated: December 21, 2012
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 157

UNITED STATES COURT OF INTERNATIONAL TRADE UNITED STATES, Plaintiff, v. ALEJANDRO SANTOS, CHB, Defendant.

Before: Donald C. Pogue,
Chief Judge
Court No. 11–00436

[granting motion for default judgment]

Dated: December 21, 2012

Karen V. Goff, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office.

OPINION

Pogue, Chief Judge:

This is an action by United States Customs and Border Protection ("Customs") to recover civil penalties from a customs broker, Mr. Alejandro Santos ("Santos"), for violating Customs' regulations. Customs' Motion for Default Judgment, ECF No. 10, filed pursuant to USCIT R. 55(b), is currently before the court. Because the Clerk has entered default against Santos, Order, May 8, 2012, ECF No. 9, and Customs' Complaint, ECF No. 3, establishes a right to relief, sufficient facts to support that right, and sufficient facts to support the

requested relief, Customs' motion will be granted, and judgment will be entered against Santos in the amount of $19,000.

The court has jurisdiction pursuant to Section 641(d)(2)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(d)(2)(A) (2006) [1] and 28 U.S.C. § 1582(1) (2006).

BACKGROUND

Customs' Complaint contains four counts, each relating to one of the four penalties imposed against Santos. Customs alleges that it imposed the penalties following three separate reviews of entries of merchandise by Santos at the Port of Laredo, TX. Because Santos did not plead or otherwise respond to Customs' Complaint, the following factual allegations are taken as true. USCIT R. 8(c)(6).

First, on January 15, 2009, Customs Import Specialists visited Santos' place of business to conduct a review of entries. Compl. ¶ 6. During the review, the Import Specialists discovered that Santos had billed certain entries (BTN-00005014, BTN-0000730–9, BTN-0000742–4, BTN-0002238–1, BTN-0003018–6, and BTN-0000165–8) to a freight forwarder, Salvador Pedraza d/b/a SPR International ("SPR"), rather than the importer of record or ultimate consignee, without transmitting a copy of the bill to the importer of record or obtaining a waiver from the importer. Id. ¶¶ 6–9; Ex. A to Compl. Based on these findings, Customs issued penalty number 2010–2304–3-00004–01, in the amount of $5000. Compl. ¶ 11; Ex. D to Compl. This penalty is the subject of Count I.

During the same visit, the Import Specialists requested a copy of the power of attorney associated with entry BTN-00001658. Compl. ¶¶ 15–17. The requested power of attorney was not in Santos' records; instead, it was faxed to Santos' office upon the Import Specialists' request. *Id*. ¶ 20. The power of attorney faxed to Santos' office was dated February 15, 2007, *Id*. ¶ 18, which was subsequent to the importation of the entry on November 10, 2006, *Id*. ¶ 16; furthermore, the document did not identify Santos as the holder of power of attorney, *Id*. ¶ 18–19; Ex. E to Compl. Based on these findings, Customs issued penalty number 2010–2304–3-00005–01, in the amount of $5000. Compl. ¶ 23; Ex. H to Compl.[2] This penalty is the subject of Count II.

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

[2] In the Complaint, Customs alleged a $4000 penalty under Count II, Compl. ¶ 23; however, this appears to have been a typo, as the penalty notice referenced in Count II was for $5000. *See* Pl.'s Mot. Entry Default J. at 14 n.3; Ex. H to Compl. Because the court determines the amount of the penalty *de novo*, *see* discussion *infra* under Standard of Review, it is within the courts' authority to correct this error in the Complaint.

Second, on September 4, 2008, Santos presented four entry summaries, Customs Form CF 7501 ("CF 7501"), to Customs for entry numbers BTN-00040011, BTN-00040029, BTN-00040037, and BTN-00040045. Compl. ¶ 28. The entry summaries classified the merchandise as "vegetable hair" under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 1409.90.10. *Id*. ¶ 28; Ex. A to Mot. Default J. (entry summaries attached as Ex. 1). The entered merchandise, however, was corn husks, which Customs asserts are separately classified under HTSUS subheading 1404.90.90. Compl. ¶ 28. Based on these findings, Customs issued penalty number 2010–2304–3-00003–01, in the amount of $4000. *Id*. ¶ 31; Ex. K to Compl. This penalty is the subject of Count III.

Third, on April 15, 2009, Santos filed entry BTN00052032, indicating that the entry contained "U.S. goods returned." Compl. ¶ 35. An April 17, 2009, inspection of the entry revealed that the merchandise was not entirely U.S. Goods Returned. *Id*. ¶ 36. After receiving notification from Customs, Santos acknowledged the discrepancy and indicated that the entry included goods originating in Great Britain; however, Santos never corrected the CF 7501. *Id*. ¶¶ 37–39; Exs. L, M to Compl. Based on these findings, Customs issued penalty number 20102304–3-00180–01, in the amount of $5000. Compl. ¶ 43; Ex. P to Compl. This penalty is the subject of Count IV.

For each penalty, Customs issued a pre-penalty notice, penalty notice, and final demand for payment; Santos failed to respond to any of Customs' penalty notices or demands, and the penalties remain unpaid. Compl. ¶¶ 11–12, 23–24, 31–32, 43–44; Ex. B to Mot. Default J. ¶¶ 11–18. To remedy Santos' nonpayment, Customs, on November 9, 2011, commenced suit in this court by filing the Summons and Complaint. On January 12, 2012, Commerce filed proof of service. Proof of Service, ECF No. 4. Santos did not respond to the Complaint, and upon motion for entry of default, the Clerk of the Court entered default on May 8, 2012. Order, May 8, 2012, ECF No. 9. Customs subsequently filed its Motion for Default Judgment, and Santos has not responded to the Motion.

STANDARD OF REVIEW

A case brought pursuant to 28 U.S.C. § 1582(1) is reviewed *de novo*. 28 U.S.C. § 2640(a)(6) (providing that in cases commenced under 28 U.S.C. § 1582, "[t]he Court of International Trade shall make its determinations upon the basis of the record made before the court"); *United States v. UPS Customhouse Brokerage*, __ CIT __, 686 F. Supp. 2d 1337, 1364 (2010) ("*UPS Customhouse Brokerage II*") (interpreting "determination upon the basis of the record made before the court" to

require trial *de novo*).[3] Specifically, to decide a penalty enforcement action under § 1582(1), the court must consider both whether the penalty has a sufficient basis in law and fact and whether Customs provided all process required by statute and regulations. *UPS Customhouse Brokerage II*, __ CIT at __, 686 F. Supp. 2d at 1346. No distinction is drawn in § 2640(a) between determination of the penalty claim and the penalty amount; therefore, pursuant to 28 U.S.C. § 2640(a), the court considers both the claim for a penalty and the amount of the penalty *de novo*. *See Ricci*, 21 CIT at 1146, 985 F. Supp. at 127.

A defendant's default admits all factual allegations in the complaint, USCIT R. 8(c)(6), but it does not admit legal claims, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (reasoning, in the context of a motion to dismiss for failure to state a claim, that when a court accepts factual allegations as true, it does not, therefore, accept legal conclusions as true).[4] "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.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In addition, in the case of a

[3] *United States v. Ricci*, 21 CIT 1145, 985 F. Supp. 125 (1997), interpreted 28 U.S.C. § 2640(a) as providing only a scope and not a standard of review. *Ricci*, 21 CIT at 1146, 985 F. Supp. at 126. Therefore, the *Ricci* court looked to the Administrative Procedure Act for the standard of review and determined that 5 U.S.C. § 706(F) applied, making the standard of review *de novo*. *Ricci*, 21 CIT at 1146, 985 F. Supp. at 126–27. Nonetheless, because § 2640(a)

> describes the manner in which the Court "shall make its determinations" — or, in other words, settle or decide the case in the first instance — the statutory language "upon the basis of the record made before the court" appears to contemplate *de novo* review by the court and constitute a standard of review.

UPS Customhouse Brokerage II, __ CIT at __, 686 F. Supp. 2d at 1363 (quoting 19 U.S.C. § 2640(a)) (additional quotation marks and citations omitted); *see also id*. (reasoning, furthermore, that the Supreme Court has interpreted "upon the basis of the record made before the court" to mandate *de novo* review and that § 2640(a) governs other actions where the court conducts a trial *de novo*, including, *inter alia*, civil actions to contest the denial of a protest under 19 U.S.C. § 1515).

[4] Because a court may grant a motion to dismiss *sua sponte* when a complaint is insufficiently pled, the court will not grant default judgment on the basis of a complaint that is insufficiently pled. This is the rule in the majority of circuits. *See Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1069 (11th Cir. 2007); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006); *Bazrowx v. Scott*, 136 F.3d1053, 1054 (5th Cir. 1998); *Ledford v. Sullivan*, 105 F.3d 354,356 (7th Cir. 1997); *Thomas v. Scully*, 943 F.2d 259, 260 (2dCir. 1991); *Martin-Trigona v. Stewart*, 691 F.2d 856, 858 (8th Cir. 1982); *Dodd v. Spokane Cnty., Wash.*, 393 F.2d 330, 334 (9th Cir. 1968); *see also Gooden v. City of Memphis Police Dept.*, 29 F. App'x 350, 352–53 (6th Cir. 2002); *but cf. Neitzke v. Williams*, 490 U.S. 319, 329 n.8 (1989) ("We have no occasion topass judgment, however, on the permissible scope, if any, of *sua sponte* dismissals under Rule 12(b)(6).").

default judgment, the court may look beyond the complaint if necessary to "determine the amount of damages or other relief" or "establish the truth of an allegation by evidence." *See* USCIT R. 55(b); *United States v. Inner Beauty Int'l (USA) Ltd.*, Slip Op. 11–148, 2011 WL 6009239, at *2 (CIT Dec. 2, 2011).

DISCUSSION

Pursuant to 19 U.S.C. § 1641(d)(1)(C), Customs may "impose a monetary penalty . . . if it is shown that the broker . . . has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision."[5] As noted above, Customs' Complaint contains four counts, each alleging that Customs has not received payment of a monetary penalty lawfully imposed against Santos pursuant to 19 U.S.C. § 1641(d)(1)(C) for violation of applicable regulations and following the procedures required by 19 U.S.C. § 1641(d)(2)(A). The court will address each count in turn.

I. Count I

Count I alleges that Santos violated 19 C.F.R. § 111.36 when he conducted business with a freight forwarder, SPR, without forwarding a copy of his bill to the importer of record. Compl. ¶¶ 6–10. A broker employed by an unlicensed person, such as a freight forwarder, is required to transmit a copy of the bill or entry to the importer of record "unless the merchandise was purchased on a delivered duty-paid basis or unless the importer has in writing waived transmittal of the copy of the entry or bill for services rendered." 19 C.F.R. § 111.36(a) (2006). Customs alleges that Santos failed to copy the importer of record for entries billed to SPR. Compl. ¶¶ 8–9. Customs supports these allegations with copies of the brokerage receipts for the entries in question. Ex. A to Compl. The receipts show that Santos billed SPR, but they do not indicate that the importer was notified of the transaction as required by § 111.36(a). Ex. A to Compl. Taking these facts as true, Santos violated 19 C.F.R. § 111.36 by failing to notify the importer of record when doing business with an unlicensed person.

II. Count II

Count II alleges that Santos violated 19 C.F.R. § 141.46 by conducting Customs business without a valid power of attorney. Compl. ¶¶ 17–22. "Before transacting Customs business in the name of his principal, a customhouse broker is required to obtain a valid power of

[5] The procedure for imposing a monetary penalty pursuant to § 1641(d)(1)(C), and the basis for the court's jurisdiction, is provided by 19 U.S.C. § 1641(d)(2)(A).

attorney to do so. . . . Customhouse brokers shall retain powers of attorney with their books and papers, and make them available to representatives of [Customs] . . . .” 19 C.F.R. § 141.46 (2006). Customs alleges that when requested by the Customs Import Specialist, Santos could not produce the power of attorney for entry BTN-00001658; instead a power of attorney was faxed to Santos, but this power of attorney was dated after the entry of merchandise and did not identify Santos as the holder of power of attorney. Compl. ¶¶ 16–20; Ex. E to Compl. Taking these facts as true, Santos violated 19 C.F.R. § 141.46 by conducting business without a valid power of attorney for entry BTN-00001658.

III. Count III

Count III alleges that Santos violated 19 C.F.R. §§ 152.11 and 141.90 by misclassifying merchandise. Compl. ¶¶ 28–30. “Merchandise shall be classified in accordance with the [HTSUS] . . . .” 19 C.F.R. § 152.11 (2008). Furthermore, it is the responsibility of the importer or the customs broker to include the proper classification on the invoice. *Id*. § 141.90(b).[6] Customs alleges that Santos incorrectly classified four entries of corn husks under HTSUS subheading 1404.90.10, the subheading for vegetable hair, whereas corn husks are properly classified under HTSUS subheading 1404.90.90. Compl. ¶ 28. Customs further alleges that Santos misclassified the entries after prior advice from Customs regarding the proper classification of corn husks. Ex. A to Mot. Default J. ¶ 3. Taking these facts as true, Santos misclassified the entries in question, in violation of 19 C.F.R. §§ 152.11 and 141.90.[7]

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[6] The subject entries were entered in 2008. Compl. ¶ 28. At that time, § 141.90(b) only referenced importers and not customs brokers. *Compare* 19 C.F.R. § 141.90(b) (2008), *with* 19 C.F.R. §141.90(b) (2010). Because application of the 2008 regulation to a customs broker is not contested in this case and because the court defers to an agency’s interpretation of its own regulation, *United States v. UPS Customhouse Brokerage, Inc.*,575 F.3d 1376, 1382 (Fed. Cir. 2009) (“*UPS Customhouse Brokerage I*”), the court will not overrule the penalty.

[7] While the court accepts the alleged facts as true, it does not accept Customs’ interpretation of the tariff classification, which is a question of law. *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997) (“[T]he proper meaning of the tariff provisions at hand . . . is a question of law, which we review *de novo*.”). The question before the court, however, is not whether Customs should have classified the merchandise otherwise than it did; rather, the question is whether Customs properly imposed a penalty on Santos for failing to classify merchandise in accordance with what he knew to be the correct HTSUS subheading. That Santos was previously advised on the classification of corn husks and failed to classify the entries at issue in accordance with that advice is sufficient for the court to uphold the penalty. Therefore, the court need not and does not address the proper interpretation of the relevant HTSUS subheadings.

IV. Count IV

Count IV alleges that Santos violated 19 C.F.R. §§ 111.28, 111.29, 141.90, 142.6, and 152.11. Compl. ¶¶ 35–42. These allegations relate to entry BTN-00052032, which Santos entered as "U.S. goods returned"; however, subsequent inspection revealed that not all of the entered merchandise was U.S. goods returned. *See id*. ¶¶ 35–36. Furthermore, Santos acknowledged that some of the goods originated from Great Britain but never corrected the CF 7501. *See* id. ¶¶ 37–39; Ex. L to Compl. Customs claims under Count IV fall into three categories.

First, Customs alleges that Santos failed to properly classify merchandise. Compl. ¶ 42. As noted above, 19 C.F.R. §§ 152.11 and 141.90 require a customs broker to properly classify goods in accordance with the HTSUS. Furthermore, the commercial invoice or other documentation submitted with the entry shall include, *inter alia*, "[a]n adequate description of the merchandise [and] . . . [t]he appropriate eight-digit subheading from the [HTSUS]." 19 C.F.R. § 142.6 (2009). Accordingly, Customs alleges that Santos misclassified goods originating from Great Britain under HTSUS subheading 9801.00.10 (U.S. goods returned). *See* Compl. ¶¶ 36–37. Taking these facts as true, Santos improperly classified goods originating from Great Britain as U.S. goods returned, in violation of 19 C.F.R. §§ 141.90, 142.6, and 152.11.

Second, Customs alleges that Santos failed to exercise due diligence. Compl. ¶ 40. A customs broker "must exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter handled by him as a broker." 19 C.F.R. § 111.29 (2009). Customs alleges that Santos failed to correct the misclassification on the CF 7501 entry summary and failed to pay the merchandise processing fee, as well as any duty that would have been assessed on properly entered goods. Compl. ¶ 40; Ex. N to Compl. Taking these facts as true, Santos violated 19 C.F.R. § 111.29 by failing to exercise due diligence to correct a record filed with Customs and failing to pay money due to Customs.

Finally, Customs alleges that Santos failed to exercise responsible supervision and control. Compl. ¶ 41. A customs broker "must exercise responsible supervision and control . . . over the transaction of the customs business . . . ." 19 C.F.R. § 111.28(a) (2009). Responsible supervision and control is defined as "that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an

employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide." *Id*. § 111.1 (listing ten factors for consideration). As discussed above, Customs alleges that Santos failed to correct an acknowledged misclassification filed with Customs. Compl. ¶ 41; Ex. L. to Compl. Taking these facts as true, Santos failed to exercise reasonable supervision and control pursuant to 19 C.F.R. § 111.28 by failing to ensure that the misclassification was corrected.[8]

V. Amount of Penalty

Customs imposed a $5,000 penalty for the collective violations under Count I, Compl. ¶ 11; Ex. D to Compl.; a $5,000 penalty for the violation under Count II, Compl. ¶ 23; Ex. H to Compl.[9]; a $4,000 penalty for the collective violations under Count III, Compl. ¶ 31; Ex. K to Compl.; and a $1,000 penalty for each of the five violations under Count IV, Compl. ¶ 43; Ex. P to Compl. In total, Customs imposed penalties against Santos in the amount of $19,000.

The statute does not provide penalty guidelines for penalties imposed pursuant to 19 U.S.C. § 1641(d)(1)(C), except that such penalties should not "exceed $30,000 in total for a violation or violations of this section." 19 U.S.C. § 1641(d)(2)(A). Within this limit, the amount of a § 1641(d)(1)(C) penalty is left to Customs' discretion. While the court reviews the amount of penalty *de novo*, *see* 28 U.S.C. § 2640(a)(5); *Ricci*, 21 CIT at 1146, 985 F. Supp. at 127, where Customs' determination of the appropriate penalty amount is unchallenged, as it is here, the determination will be upheld so long as it is reasonable and supported by the facts. *See United States v. NJC Int'l, Inc.*, Slip Op. 12–148, 2012 WL 6062562, at *1 (CIT Dec. 6, 2012).

In this case, Customs imposed penalties for violations of multiple Customs regulations relating to twelve entries of merchandise. Some

[8] In order to assess a penalty pursuant to 19 C.F.R. § 111.28, Customs must consider all ten factors listed in the definition of reasonable supervision and control at 19 C.F.R. § 111.1. *UPS Customhouse Brokerage I*, 575 F.3d at 1383. Here, Customs has provided evidence that the Import Specialist whore commended the penalty considered all ten factors. *See* Ex. A to Mot. for Default J. ¶¶ 12–22.

The court in *UPS Customhouse Brokerage II* held that the appropriate Customs officer to consider the ten factors is the Fines, Penalties, and Forfeiture Officer ("FP&F Officer") for the relevant port, because it is the FP&F Officer that issues the pre-penalty notice and considers any response from the broker before issuing the penalty. *UPS Customhouse Brokerage II*,__ CIT at __, 686 F. Supp. 2d at 1348. In this case, Customs provided evidence that the Import Specialist, not the FP&F Officer, considered the ten § 111.1 factors. Because Santos did not challenge the penalties before Customs, the court finds no reason to require that Customs show that the FP&F Officer reanalyzed the ten § 111.1 factors rather than accepted the Import Specialist's analysis.

[9] There is discrepancy between the amount claimed in the Complaint and the penalty imposed. *See supra* note 2.

of the violations are ones for which Santos had previously received sanction or warning from Customs. Ex. A to Mot. Default J. ¶¶ 3, 14 (noting that previous entries of corn husks entered by Santos were rejected for misclassification; Santos had attended broker compliance meetings regarding proper classification of corn husks and U.S. goods returned; that Santos was issued a prior penalty for improperly associating with a freight forwarder, and Santos violated the power of attorney regulation on three prior occasions). Furthermore, the $19,000 penalty is well below the statutory maximum of $30,000. 19 U.S.C. § 1641(d)(2)(A). Finally, Customs provided Santos with a pre-penalty notice and opportunity to challenge the penalty in each case, *see id.*, but Santos did not respond. *See* Compl. ¶¶ 11, 23, 31, 43; Exs. B, C, F, G, I, J, N, O to Compl. On these grounds, the court finds the penalty award reasonable and supported by the facts.

CONCLUSION

Consistent with the foregoing opinion, Customs' Motion for Default Judgment is granted and the amount of penalty imposed by Customs is upheld on all counts; therefore, the court finds that a penalty in the amount of $19,000 is warranted.

Judgment will issue accordingly.

Dated: December 21, 2012
New York, NY

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

ERRATA

United States v. Santos, Court No. 11-00436, Slip Op. 12-157, dated December 21, 2012.

• page 4: In Line 6, replace 1409.90.10 with 1404.90.10.

January 2, 2013

Slip Op. 12–158

TIANJIN MAGNESIUM INTERNATIONAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and US MAGNESIUM, LLC, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Consol. Court No.: 11–00006

Held: Plaintiff's motion for reconsideration is denied.

Dated: December 21, 2012

Riggle & Craven, (*David A. Riggle*) for Tianjin Magnesium International Co., Ltd., Plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Renee Gerber*); Office of Chief Counsel for Import Administration, United States Department of Commerce, *Thomas M. Beline*, Of Counsel, for the United States, Defendant.

King & Spalding, LLP, (*Stephen A. Jones* and *Jeffrey B. Denning*) for US Magnesium, LLC, Defendant-Intervenor.

OPINION AND ORDER

TSOUCALAS, Senior Judge:

In *Tianjin Magnesium International Co. v. United States*, 36 CIT , 844 F. Supp. 2d 1342 (2012) ("*Tianjin I*"), this court remanded to the Department of Commerce ("Commerce") in *Pure Magnesium from the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review of the Antidumping Order*, 75 Fed. Reg. 80,791 (Dec. 23, 2010). Specifically, the court directed Commerce to reconsider its inconsistent application of adverse facts available against plaintiff Tianjin Magnesium International Co. ("TMI") despite persistent fraudulent conduct in multiple proceedings below. The court also directed parties to file comments within thirty days from the date the results were filed and to file any rebuttal comments within fifteen days thereafter. Commerce filed the remand results on August 8, 2012.

On October 1, 2012, TMI filed a consent motion for extension of time, ostensibly to allow it additional time to receive and review the official record pertaining to the remand determination. Dkt. 92 at 1–2. The court granted the motion, establishing October 15, 2012 as the comment deadline and November 9, 2012 as the response deadline. Defendant-intervenor US Magnesium LLC timely filed its comments in support of the remand determination on October 15, 2012, and Commerce timely responded thereto on November 6, 2012. *TMI failed to comment or respond at all*. As no party objected, this court

upheld the remand determination in its entirety in *Tianjin Magnesium International Co. v. United States*, 36 CIT , Slip. Op. No. 12–143 (Nov. 21, 2012) (not reported in the Federal Supplement) ("*Tianjin II*").

Even though it did not object to the remand determination within the time frame *it requested*, Dkt. 92 at 1–3, TMI now moves for reconsideration of this court's order in *Tianjin II* under USCIT R. 59. Pl.'s Mot. Recons. TMI bases its motion on USCIT R. 46, which states that "[f]ailing to object does not prejudice a party who had *no opportunity to do so* when the ruling or order was made." *Id.* at 2 (quoting USCIT R. 46) (emphasis added, alteration in original).

Reconsideration under USCIT R. 59 is within the court's sound discretion. *Dorsey v. U.S. Sec'y of Agric.*, 32 CIT 270, 270 (2008) (not reported in the Federal Supplement). Although this Court may exercise such discretion "to rectify 'a significant flaw in the conduct of the original proceeding,'" *id.* (quoting *W.J. Byrnes & Co. v. United States*, 68 Cust. Ct. 358, 358 (1972)), "[t]he purpose of a rehearing is not to relitigate the case." *NEC Corp. v. Dep't of Commerce*, 24 CIT 1, 2, 86 F. Supp. 2d 1281, 1282 (2000) (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT 2, 2, 994 F. Supp. 393, 394 (1998)).

Despite its curious assertion to the contrary, TMI had a full opportunity to present its arguments before the deadline it requested. As TMI fails now to present any new factual or legal authority that was unavailable at the time its objections were due, *see Ford Motor Co. v. United States*, 34 CIT , , 751 F. Supp. 2d 1316, 1318 (2010) (denying reconsideration where, among other things, movant failed to present new factual or legal authority demonstrating that prior order was manifestly erroneous), TMI' s motion for reconsideration must be denied.

As a final courtesy, TMI is once again warned that its frivolous conduct is unacceptable and potentially within the scope of the court's authority to impose sanctions under USCIT R. 11(c). *See* USCIT R. 11(b)(2), (c).

ORDER

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Tianjin Magnesium International Co., Ltd.'s motion for rehearing is denied, and it is further

ORDERED that defendant Department of Commerce and defendant- intervenor US Magnesium LLC shall have twenty (20) days after the filing of this order to submit their affidavits of itemized costs and counsel fees pursuant to USCIT R. 54(d) as the court

previously directed in *Tianjin Magnesium International Co. v. United States*, 36 CIT , Slip. Op. No. 12–143 (Nov. 21, 2012); and it is further

ORDERED that plaintiff Tianjin Magnesium International Co. Ltd. shall have fourteen (14) days to respond thereto.

Dated: December 21, 2012
New York, New York

/*s*/ *NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 12–159

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

Before: Timothy C. Stanceu, Judge
Consol. Court No. 11–00022

[Remanding the final results of an antidumping duty administrative review for redetermination]

Dated: December 21, 2012

John M. Gurley, *Diana Dimitriuc Quaia*, and *Matthew L. Kanna*, Arent Fox LLP, of Washington, DC, for plaintiff and defendant-intervenor Peer Bearing Company-Changshan.

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

Herbert C. Shelley and *Christopher G. Falcone*, Steptoe & Johnson LLP, of Washington, DC, for defendant-intervenors Changshan Peer Bearing Co. Ltd. and Peer Bearing Company.

William A. Fennell, *Terence P. Stewart*, and *Stephanie R. Manaker*, Stewart and Stewart, of Washington, DC, for plaintiff and defendant-intervenor The Timken Company.

OPINION AND ORDER

Stanceu, Judge:

This consolidated case arose from the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the twenty-second administrative review of an antidumping duty order (the "Order") on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, from the People's Republic of China ("China" or "PRC"). *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Review*, 76 Fed. Reg. 3,086 (Jan. 19, 2011) ("*Final Results*"). The twenty-second administrative review pertained to entries of TRBs and parts thereof from China (the "subject merchandise) that were made during the period of June 1, 2008 through May 31, 2009 (the "period of review" or "POR"). *Id.* at 3,086.

As discussed herein, the court determines that a remand is appropriate with respect to certain aspects of the Final Results that are contested in this litigation.

I. BACKGROUND

Background is provided in a prior opinion and order and is supplemented herein. *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, Slip Op. 11–125, at 2 (Oct. 13, 2011) (denying a motion to dismiss one of the claims brought in this consolidated action).

Peer Bearing Company-Changshan ("CPZ"), a Chinese manufacturer of TRBs that was a respondent in the twenty-second review, brought an action to contest the Final Results. *See* Compl. (Feb. 2, 2011), ECF No. 6. The Timken Company ("Timken"), a U.S. TRB manufacturer and a defendant-intervenor in Court No. 11–00022, also contested the Final Results. *See* Compl. (Mar. 10, 2010), ECF No. 9 (Court No. 11–00039). The two cases are now consolidated. Order (June 13, 2011), ECF No. 27.

On September 11, 2008, approximately three months into the POR, various companies controlled by a Swedish conglomerate, AB SKF, acquired CPZ from its majority shareholders, the Spungen family. *See Tapered Roller Bearings & Parts Thereof, Finished or Unfinished, From the People's Republic of China: Prelim. Results of the 2008–2009 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 41,148, 41,148–51 (July 15, 2010) ("*Prelim. Results*"); *Final Results*, 76 Fed. Reg. at 3,087. At the same time, AB SKF also acquired Peer Bearing Company, an Illinois-based and Spungen-owned U.S. sales affiliate of CPZ. *Prelim. Results*, 75 Fed. Reg. at 41,448; *Final Results*, 76 Fed. Reg. at 3,087. During the acquisition process, CPZ and Peer Bearing Company transferred to a separate company, PBCD, their responsibilities for participation in dumping reviews and litigation and for payment of dumping duties assessed on entries of subject merchandise made prior to the acquisition. *Letter from SKF to the Sec'y of Commerce*, at App. 2 (Mar. 19, 2010) (Admin. R. Doc. No. 5731). In this opinion, the pre-acquisition Chinese producer is identified as "CPZ," and the pre-acquisition U.S. sales affiliate is identified as "PBCD/Peer."

After the acquisition, CPZ underwent a reorganization to become a new Chinese company, Changshan Peer Bearing Co. Ltd. (referred to herein as "CPZ/SKF" or "SKF"). *Prelim. Results*, 75 Fed. Reg. at 41,152. CPZ/SKF and the acquired Peer Bearing Company ("SKF/Peer") are defendant-intervenors in this case. Commerce determined that CPZ/SKF was not the successor in interest to CPZ and, therefore, treated the two companies as separate respondents in the review. *Final Results*, 76 Fed. Reg. at 3,087. In the Final Results, Commerce assigned weighted-average dumping margins of 38.39% to CPZ (identified in the Final Results as "PBCD") and 14.13% to SKF. *Id*. at 3,088.

The court held oral argument on March 22, 2012. Oral Tr. 1 (May 17, 2012), ECF No. 90.

II. DISCUSSION

Before the court are the motions of CPZ and Timken for judgment on the agency record, made under USCIT Rule 56.2, to contest the Final Results. [CPZ's] R. 56.2 Mot. for J. upon the Agency R. (Aug. 19, 2011), ECF No. 38; [Timken's] R. 56.2 Mot. for J. on the Agency R. (Aug. 19, 2011), ECF No. 36.

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(c) (2006). Under this provision, the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"),[1] 19 U.S.C. § 1516a(a)(2)(B)(iii), including an action contesting the Department's issuance, under section 751 of the Tariff Act, 19 U.S.C. § 1675(a), of the final results of an administrative review of an antidumping duty order. In reviewing the final results, the court must hold unlawful any finding, conclusion or determination that is not support by substantial evidence on the record or that is otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

CPZ brings four claims in its Rule 56.2 motion. First, it claims that Commerce unlawfully determined that certain bearings that resulted from processing in Thailand consisting of grinding and honing of cups and cones, and final assembly, and that were exported from Thailand to the United States as finished products, were of Chinese origin and therefore subject to the Order. Pl.'s Mem. of P & A in Supp. of its Mot. for J. on the Agency R. 4 (Aug. 19, 2011), ECF No. 39 ("CPZ's Mem."). Second, CPZ claims that Commerce calculated an unlawful assessment rate for subject merchandise imported by Peer Bearing Company. *Id.* at 2–3. Third, CPZ claims that Commerce used an unlawful surrogate value for the steel bar input to the TRB production process. *Id.* at 3. Finally, CPZ claims that Commerce used an unlawful surrogate value for the steel wire rod input. *Id.* at 3–4.

Timken asserts two claims in its USCIT Rule 56.2 motion. First, Timken claims that Commerce erred in deciding not to treat SKF's acquisition of Peer Bearing Company, which included an acquisition of inventory consisting of subject merchandise, as the first U.S. sale of that inventory to an unaffiliated purchaser for purposes of the antidumping statute. The Timken Co.'s Mem. of P & A in Supp. of its Mot. for J. on the Agency R. 2, 5 (Aug. 19, 2011), ECF No. 36

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

("Timken's Mem."). Second, Timken claims that Commerce erred in using factor-of-production ("FOP") data pertaining to the post-acquisition producer (*i.e.*, SKF) rather than FOP data pertaining to the pre-acquisition producer (*i.e.*, CPZ) when determining the normal value of subject merchandise imported into the United States prior to the acquisition. *Id.* at 2, 12–13.

The court decides: (1) to direct Commerce to reconsider the Department's determination that CPZ's bearings processed in Thailand are of Chinese origin and therefore are subject merchandise; (2) to deny relief on CPZ's claim challenging the assessment rate; (3) to direct Commerce to redetermine a surrogate value for CPZ's use of steel bar; (4) to deny relief on CPZ's claim challenging the Department's surrogate value for steel wire rod; (5) to deny relief on Timken's claim that, for antidumping purposes, a sale of the U.S. inventory occurred upon SKF's acquisition of Peer Bearing Company; and (6) to direct Commerce to reconsider and explain the Department's decision to use SKF's data on factors of production in determining the normal value of subject merchandise that was imported prior to the acquisition and, therefore, had been produced by CPZ. The court addresses below each of these six claims.

A. Commerce Must Reconsider its Decision that Certain Bearings on which Grinding and Honing, and Assembly Operations, Were Conducted in Thailand Are Subject Merchandise

Some of the imported bearings subject to the review were exported to the United States from Thailand after having undergone processing by a CPZ affiliate in Thailand,[2] which performed grinding and honing operations on unfinished cups and cones made in China and also performed the assembly operations, which involved the cups and cones processed in Thailand and cages and rollers produced in China. Issues & Decision Mem., A-570–601, at 10–11 (Jan. 11, 2011) (Admin. R. Doc. No. 6041) ("*Decision Mem.*"). Commerce determined that China was the country of origin of these bearings and that, accordingly, these bearings were merchandise subject to the Order. *Id.* 11–17; *Final Results*, 76 Fed. Reg. at 3,086. CPZ claims that a substantial transformation occurred in Thailand resulting in finished bearings that should have been determined to have Thai origin, not Chinese origin, for antidumping purposes. CPZ's Mem. 32–40. CPZ argues, *inter alia*, that substantial evidence does not support the Department's origin determination and that the determination is

[2] Peer Bearing Company-Changshan ("CPZ") initially claimed confidential treatment for the identity of the third country but later, at oral argument, disclosed the identity of the country to the public. Oral Tr. 47–48 (May 17, 2012), ECF No. 90.

inconsistent with rulings by U.S. Customs and Border Protection concluding on the same facts that the country of origin of the TRBs is Thailand. *Id*. at 37–38.

In making its country of origin determination, Commerce applied what it termed its "established substantial transformation criteria," *Decision Mem.* 12, based upon the "totality of the circumstances," *id.* at 11. In doing so, the Department discussed six criteria: (1) the class or kind of merchandise within the scope of the Order, (2) the nature and sophistication of the upstream processing (*i.e.*, the processing conducted in China) and the third-country processing (*i.e.*, the processing conducted in Thailand), *id*. at 13; (3) the identification of the processing that imparts the essential physical or chemical properties of a TRB, *id*. at 14–15; (4) the cost of production and value added by the third-country processing, *id*. at 15–16; (5) the level of investment in the third country and the potential for circumvention, *id*. at 16–17; and (6) whether "unfinished and finished bearings are both intended for the same ultimate end-use," *id.*

In summarizing its country of origin decision, Commerce stated that "the Department recognizes that the grinding and finishing processes are important and necessary processes for the products in question to become finished TRBs, and we do not dispute the fact that a considerable investment was made in the third country." *Id.* at 17. The Department then stated that "however, we do not find the investment (even though considerable) in a process (even though important) that, as explained above, does not change the class or kind of merchandise, does not confer the essential characteristics, does not represent a significant value added to the final product, and does not change the ultimate end-use to be sufficient to constitute substantial transformation." *Id*. at 17.

As discussed below, the court identifies three flaws in the Department's analysis of the country of origin issue in this case. First, in applying its totality of the circumstances test, 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 it failed to supply a reason why this criterion was relevant, on the record of this case, to the country of origin determination Commerce was making. Second, with respect to the fourth criterion, the Department made a finding that the processing performed in Thailand did not represent a significant value added to the finished product, a finding that is not supported by substantial evidence on the record. The third flaw pertains to the sixth criterion the Department identified, the ultimate use of the bearings. 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 has no apparent relevance to the country of origin question posed by this case, which did not involve third-country processing conducted on unfinished TRBs.

1. Commerce Failed to Provide Reasons Why Inclusion of Parts within the "Class or Kind" of Merchandise within the Scope of the Order Was Relevant to its Country of Origin Determination

Commerce described the first criterion in its "totality of the circumstances" test as "Class or Kind/Scope." *Decision Mem.* 12. In the Decision Memorandum, Commerce found "the merchandise ground and finished in the third country to be of the same class or kind of merchandise covered by the scope of the order, since the language of the scope explicitly includes both finished and unfinished components of TRBs and no party has challenged this 'class or kind' determination." *Id.* Although explaining that "we did not find that this 'class or kind' determination was dispositive in determining the TRBs' country of origin" and "instead examined the totality of circumstances," the Decision Memorandum nevertheless clarifies that Commerce considered integral to its country of origin determination that the Order contained within its scope both TRBs and parts of TRBs, finished or unfinished. *See id*.

On the facts of this case, Commerce's determination that the processing conducted in Thailand did not change the class or kind of merchandise would seem irrelevant to the precise question Commerce was called on to decide. That question was whether the Chinese-origin parts, finished and unfinished, which were converted into completed TRBs by the processing in Thailand, were "substantially transformed" by that processing. In analyzing the record before it, Commerce failed to identify any logical relationship between the Department's answer to that question and the fact that the Order includes parts of TRBs. Were parts of bearings not included within the scope of the Order, any issue as to the country of origin of the TRBs that emerged from Thailand necessarily would involve that same inquiry. Although the parts sent to Thailand, in the Department's view, would have been subject merchandise had they been exported from China to the United States, the fact remains that these parts instead were sent to Thailand to be subjected to further manufacturing operations from which emerged finished TRBs.

For the purpose of considering the Department's reliance on the first criterion, the court is willing to presume that the inclusion

within the Order of finished and unfinished parts could have relevance for an anticircumvention inquiry by the Department. Here, however, after applying its fifth criterion (*i.e.*, level of investment in the third country and potential for circumvention), Commerce acknowledged that the Thailand operations were "important and necessary" and required "considerable investment." *Id*. at 16–17. In this way, Commerce implicitly acknowledged that its fifth criterion did not affirmatively support its ultimate origin determination (while also concluding that this criterion, standing alone, did not resolve the country of origin issue in favor of CPZ's position).[3] Nor did Commerce reach a finding that the "important and necessary" operations performed in Thailand posed any circumvention potential. The court views this omission as a flaw in the Department's analysis because Congress expressly addressed the exact circumstance posed by this case in the "prevention of circumvention" provision set forth in 19 U.S.C. § 1677j(b). Commerce chose not to invoke this provision in the Final Results. In § 1677j(b), Congress authorized Commerce, upon satisfying certain conditions, to include within the scope of an antidumping duty order merchandise imported into the United States that is of the same class or kind as merchandise produced in the foreign country named in the order and that, prior to such importation, is completed or assembled in a third country from merchandise subject to the order. 19 U.S.C. § 1677j(b). Among the conditions that must be met before Commerce may include the completed/assembled good within the scope of an order is a determination that the process of assembly or completion in the third country be "minor or insignificant." *Id.* § 1677j(b)(1)(C). Commerce made no such determination in this case and made certain findings (*i.e.*, that the Thai operations were important and necessary and required considerable investment) that would appear to be inconsistent with any such determination. Another condition imposed by the statute is a Commerce determination, absent in this case, that "action is appropriate under this paragraph to prevent evasion of such order or finding." *Id.* § 1677j(b)(1)(E). For both determinations, the statute specifies "factors" that Commerce must "take into account." *Id*. § 1677j(b)(2), (3).

[3] In its Issues & Decisions Memorandum, Commerce concluded that "[a]s in the prior review, we continue to find that PBCD has failed to provide *sufficient* record evidence to demonstrate that the level of third country investment is *sufficient*, *by itself*, to demonstrate substantial transformation has occurred." Issues & Decision Mem., A-570–601, at 10–11 (Jan. 11, 2011) (Admin. R. Doc. No. 6041) ("*Decision Mem.*") at 7 (emphasis added). This conclusion is not only circular but also clouded by the Department's acknowledgement that, as to its fifth criterion, "[t]he Department does not have an established threshold for determining whether a certain level of investment in the third country is significant in a substantial transformation analysis." *Id.* at 16 (footnote omitted).

Having found no potential for evasion and having avoided any reliance on its anticircumvention authority, the Department grounded its country of origin determination solely on the narrow question of whether the TRBs processed in Thailand should be placed within the scope of the order because they are products of China and not products of Thailand.[4] But the fact that the order encompasses parts, finished or unfinished, has no apparent relevance to that question absent affirmative determinations of whether the third-country processing is minor or insignificant and the appropriateness of the remedy, such as those Congress described in § 1677j(b)(1)(C) and (E), respectively. Because Commerce has not demonstrated the relevance of its first criterion to the origin question presented, reliance on that criterion appears, on the facts of this case, to be an attempt to avoid the strictures Congress placed in § 1677j(b).

The only rationale stated in the Decision Memorandum for the Department's basing the country of origin determination, in part, on the inclusion of finished and unfinished parts within the class or kind of merchandise covered by the Order is that the Department has done so in past proceedings, including the prior review. *Decision Mem*. 24 (citing *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007–2008 Administrative Review of the Antidumping Duty Order* (Jan. 6, 2010), 75 Fed. Reg. 844, 845; Issues & Decision Mem., A-570–601, at 6–8 (December 28, 2009)). Mere reliance on a practice developed over past administrative decisions is not reasoning justifying use of a criterion that has no apparent relevance to the circumstances of this case.

2. The Record Lacks Substantial Evidence to Support the Finding that the Processing Performed in Thailand Does Not Represent a Significant Value Added to the Finished Product

Applying its fourth criterion, "Cost of Production/Value Added," Commerce found as a fact that the processing performed in Thailand added no significant value to the finished bearings. *Decision Mem.* 15–17. In *Peer Bearing Company-Changshan v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1337, 1342 (2011) ("*Peer Bearing I*"), this Court remanded the final results of the previous administrative review and

[4] Prior to making the required findings under 19 U.S.C. § 1677j(b), Commerce must give notification to the International Trade Commission of its proposed action and consider any advice provided by the Commission in response. 19 U.S.C. § 1677j(b), (e). Congress provided in paragraph (e)(1) of § 1677j, however, that "[n]otwithstanding any other provision of law, a decision by the administering authority regarding whether any merchandise is within a category for which notice is required under this paragraph is not subject to judicial review." 19 U.S.C. § 1677j(e)(1).

required Commerce to reconsider the Department's determination of Chinese origin for TRBs that underwent processing in Thailand that was highly similar, if not nearly identical, to the Thai processing involved in this case. In the previous review as well as the instant review, the processing in Thailand consisted of grinding and honing of cups and cones, and assembly operations. *Id.*; *Decision Mem.* 13. In *Peer Bearing I*, this Court concluded that the record in the previous review lacked substantial evidence for the Department's finding that the value added in Thailand was insignificant. 35 CIT at __, 804 F. Supp. 2d at 1342. The court reaches the same conclusion in this case.

In the instant review, Commerce, applying the same methodology as it had in the previous review, "found that the average unit cost of manufacturing in the PRC represents a significant percent of normal value relative to the third-country processor's costs." *Decision Mem.* 15 (citation omitted). Such a finding, however, does not logically compel the conclusion that no significant value was added in Thailand. The Department's framing of the issue would imply that only a single country can impart significant value to the subject merchandise, even though the word "significant" implies no such limitation. Although the record might support a finding that the value added in China exceeded the value added in Thailand, neither that finding nor the record as a whole can support a conclusion or inference that the latter was not significant.

The Department found that "the costs involved in third country processing do not represent a significant percent of normal value." *Id*. In support of this finding, the Department cited evidence submitted by Timken consisting of calculations of the percentage of manufacturing costs and normal value attributable to Thai processing for various of CPZ's bearing models. Citing this evidence, the Department concluded that "third-country processing costs do not represent a significant amount, let alone the majority, of either the reported manufacturing costs or calculated normal value costs when compared to the costs incurred for the processing performed on the merchandise in the PRC." *Id*. at 15–16 (citing *Rebuttal Br. of the Timken Co., Petitioner[,] Regarding PBCD*, at 47–48 (Oct. 12, 2010) (Admin. R. Doc. No. 5934) ("*Timken's Rebuttal*")). In the Decision Memorandum, Commerce did not explain how Timken's calculations were derived. But even were the court to presume, *arguendo*, that the results of Timken's calculations are valid, the court still could not agree with the Department's generalized characterization that the costs incurred in Thailand were an insignificant percentage of normal value.[5]

[5] The Department's comparing processing costs to normal value raises a tangential question in that aspects of normal value are at issue in this case.

The record in this review contains qualitative evidence submitted by CPZ that is relevant to the question of value added in Thailand. *See Sections C and D Joint Resp. of SKF and CPZ*, Ex. E-1 (May 28, 2010) (Admin. R. Doc. No. 5760). CPZ's submission includes a "work process" chart for the grinding center in Thailand and a "working chart" for the Thailand assembly shop. *Id*. Ex. E-1, at 4–5. The work process chart describes multiple machining processes performed on cones, specifically, raceway grinding, followed sequentially by rib grinding, inner-diameter grinding, and super-finishing of ribs and raceways, and it also describes grinding and super-finishing processes performed on cups. *Id*. Ex. E-1, at 4. Commerce appears to have given little if any probative weight to this qualitative evidence, which detracts from the Department's country of origin determination.[6]

In summary, Department's finding, made under the "Cost of Production/Value Added" criterion, that no significant value had been added to the finished TRBs as a result of the processing conducted in Thailand is not supported by substantial evidence on the record.

3. Commerce Has Not Shown the Relevance of its Finding that an Unfinished TRB Is Intended for the Same Ultimate End Use as a Finished TRB

Applying the sixth criterion in its "totality of the circumstances" test, "ultimate use," Commerce made a finding that an unfinished TRB is intended for the same ultimate end use as a finished TRB. *Decision Mem.* 17. Specifically, the Decision Memorandum restates a finding Commerce made in the prior review: "In the prior review, we determined that, while the unfinished TRB is not suitable for use in a downstream product, both unfinished and finished bearings are both [*sic*] intended for the same ultimate end-use (*i.e.*, as a TRB which can ultimately be used in a downstream product.)" *Id*. (footnote omitted). The Decision Memorandum adds that "[n]o party has commented on or challenged this determination regarding 'ultimate use'

[6] Commerce rejected an argument made by CPZ that pointed to a recent Commerce country of origin decision (which also applied a "totality of the circumstances" test) concluding that the "numerous steps and specialized equipment needed to laminate the exterior ply of plastic film on [woven sacks]" constituted "significant additional processing" sufficient to confer county of origin. *Decision Mem*. 15–16 (citing *Laminated Woven Sacks From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 75 Fed. Reg. 55,568 (Sept. 13, 2010)). It appears from the Decision Memorandum that Commerce summarily disregarded the qualitative evidence that the Thai processing added value by setting up a value-added threshold. Commerce stated that "PBCD has provided no evidence to support its assertion that the value added in the instant case is more substantial than the value added to the merchandise at issue in [Laminated Woven Sacks]." *Decision Mem*. 16.

in the instant proceeding" and that "[a]s such, we continue to find that the merchandise in question is intended for the same ultimate end-use as a finished bearing." *Id.* It is understandable that no party challenged the finding, which is unassailably correct. An unfinished bearing obviously has no use except to become a finished bearing, and in that sense finished and unfinished TRBs have the same "ultimate" end use. But the finding the Department reached is also irrelevant, as the country of origin question presented in this case did not involve an unfinished TRB. The grinding and finishing operations occurring in Thailand were performed on unfinished rings (cups and cones) that were produced in China, and the assembly operations in Thailand were performed on the products of those operations and on cages and rollers that were produced in China. No individual part exported from China to Thailand plausibly could have been found to be an unfinished bearing, and Commerce made no finding to that effect. The question presented is whether those individual parts (finished and unfinished) were substantially transformed by the third country processing, which included grinding, finishing, and assembly, not whether unfinished bearings were substantially transformed by that processing. The Department's application of the sixth criterion, therefore, has no apparent relevance to the country of origin issue presented by this case.

4. On Remand, Commerce Must Reconsider its Country of Origin Determination in the Entirety

As revealed by the discussion in the Decision Memorandum, which describes a "totality of the circumstances" test, Commerce did not intend for the analysis it performed under any of its three remaining criteria to be sufficient to support its entire country of origin determination. As Commerce implicitly acknowledged, and as the court previously discussed, the analysis Commerce conducted under the fifth criterion, level of investment/potential for circumvention, did not lend support to the final determination. As to the second criterion, which Commerce termed "Nature/Sophistication of Processing," Commerce reiterated its finding from the previous review that "the finishing process [*i.e.*, grinding and honing of cups and cones] . . . is an important and necessary part to becoming a finished TRB because it reduces friction and enables the TRB to carry a load," *Decision Mem.* 13, but again concluded, nevertheless, that "the finishing process in and of itself is not significant enough to be considered a process that substantially transforms the subject merchandise for antidumping purposes, because there is no substantial change to the primary properties of the subject merchandise other than slight alterations to

the shape of the TRB through the finish grinding processes and a smoothing of the TRB's cup and cone raceways through the honing process," *id*. (citation omitted). This conclusion, limited in scope, does not address the overall question to be decided. That question, as the court repeatedly has emphasized, is whether the parts made in China, which included the unfinished cups and cones and the cages and rollers, were substantially transformed by the entirety of the processing performed in Thailand. It is not a question of whether the grinding and honing of cups and cones was enough, standing alone, to constitute a substantial transformation. Any valid resolution of the origin question posed by this case must consider the assembly process and the fact that the two major components of TRBs, the cups and cones, underwent not only assembly in Thailand but *also* grinding and finishing, which Commerce found to be important and necessary to the functioning of a TRB.

Under its third criterion, "Physical/Chemical Properties and Essential Component," Commerce concluded, as it had in the previous review, that forging, turning, and heat treatment of cups and cones, "along with roller and cage operations," . . . "imparted the essential physical and chemical properties of the TRB." *Id*. at 14. Here also, the Decision Memorandum does not state or imply that this conclusion, standing alone, should be seen as sufficient to support the Department's entire, ultimate determination of country of origin. This conclusion was made independently of other evidence on the record. For example, it is uncontested that the cups and cones left China in an unfinished state. Although they had been forged, turned, and heat treated, the cups and cones as exported were not yet capable of performing the functions of cups and cones because they had not been ground and finished to the required dimensions. As Commerce itself impliedly recognized, cups and cones must be machined to a smooth finish and within close tolerances in order to permit assembly into a finished article that will carry the load and reduce friction. Moreover, the Department's reference to "roller and cage operations" also must be read in the context of the record as a whole, which contained uncontested evidence that the roller and cage operations, like the machining operations done on the cups and cones, occurred partly in China and partly in Thailand: all assembly operations involving rollers and cages (as well as those involving cups and cones) were conducted in Thailand, not China. With respect to any "essential component," Commerce did not find, and lacked evidence from which to find, that any single component imparted the essential character to the finished TRB.

In summary, the court concludes that the Department's determination that the finished bearings resulting from the operations in Thailand were of Chinese origin is flawed because Commerce failed to show the relevance, on the record of this case, of the first and sixth criteria it applied and because the Department's finding, made upon applying the fourth criterion, that the Thai processing "does not represent a significant value added to the final product," *id*. at 17, is not supported by substantial evidence on the record viewed as a whole. Because of the various flaws the court has identified in the Department's "substantial transformation" analysis, Commerce must reconsider the Department's country of origin determination in the entirety. Any determination Commerce reaches on remand must rely solely on criteria relevant to whether the parts exported to Thailand were substantially transformed and must be based on findings supported by substantial record evidence. Moreover, the decision must be supported by an adequate explanation of the Department's reasoning.

B. No Relief is Available on the Challenge to the Assessment Rate for PBCD/Peer

Commerce calculated separate assessment rates for the POR entries of subject merchandise made by the pre-acquisition Peer Bearing Company, *i.e.*, PBCD/Peer, and those made by the post-acquisition Peer Bearing Company, *i.e.*, SKF/Peer. *Decision Mem.* 21 & n.52. Commerce calculated PBCD/Peer's assessment rate by dividing the sum of the individual dumping margins that Commerce determined for each examined sale made prior to the acquisition by the sum of the entered values of the merchandise on those same sales. *Id.* at 21. The examined sales that occurred prior to the acquisition were "PBCD/Peer's downstream sales of merchandise during the POR." *Id.* Commerce instructed Customs to apply the resulting percentage to the entered value of subject merchandise on each of the POR entries made by PBCD/Peer, all of which occurred up until the acquisition. *Id*. at 21 n.52.[7] Commerce determined an assessment rate for SKF/Peer by performing the same type of calculation, using the examined post-acquisition sales, all of which were "SKF/Peer's downstream sales of merchandise during the POR," and the entries made by SKF/Peer, all of which occurred after the acquisition. *Id.* at 21.

[7] Commerce indicated that it would instruct Customs to assess PBCD antidumping duty liability on subject merchandise "imported, and withdrawn from warehouse for consumption during the period 06/01/2008 through 09/12/2008" and to assess SKF antidumping duty liability on subject merchandise "imported, and withdrawn from warehouse for consumption during the period 09/12/2008 through 05/31/2009." *Decision Mem.* 21 n.52. It appears from the context that the first reference to 09/12/2008 was intended to be a reference to the date of acquisition, 09/11/2008.

CPZ objects to the Department's method. Referring to subject merchandise that was entered by PBCD/Peer prior to the acquisition and sold by SKF/Peer from inventory after the acquisition, CPZ argues that "Commerce should have calculated a weighted-average assessment rate for PBCD/Peer based on the assessment rate calculated for this importer both in the RPOR [the "reduced POR," *i.e.*, the portion of the POR ending September 11, 2008] and the portion of the POR after September 11, 2008." CPZ's Mem. 15. For the reasons discussed below, the court rejects the claim that Commerce acted unlawfully in determining PBCD/Peer's assessment rate.

The antidumping statute provides that Commerce will determine the normal value, export price or constructed export price, and the dumping margin, for each entry of subject merchandise, 19 U.S.C. § 1675(a)(2)(A)(ii), and that this determination "shall be the basis for the assessment of . . . antidumping duties," *id.* § 1675(a)(2)(C). Rather than ground its arguments in that provision, CPZ points to the Department's regulations, which provide that Commerce "normally will calculate an assessment rate for each importer of subject merchandise covered by the review" and that Commerce "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." 19 C.F.R. § 351.212(b)(1) (2008).

CPZ argues, first, that the method Commerce used to calculate the assessment rate for PBCD/Peer is inconsistent with § 351.212(b)(1), in two respects. First, CPZ characterizes the assessment rate assigned to PBCD/Peer as "seller-specific" rather than "importer-specific," arguing that an "importer-specific" assessment rate is contemplated by the regulation. CPZ's Mem. 14. Second, pointing out that "all of the POR sales by SKF/Peer from pre-existing inventory are based on entries by PBCD/Peer," *id*. at 10–11 (footnote omitted), CPZ submits that "the assessment rate for SKF/Peer incorrectly includes entries made by both SKF/Peer and PBCD/Peer, while the assessment rate for PBCD/Peer does not take into account post-acquisition sales corresponding to entries by PBCD/Peer," *id*. at 14. CPZ argues that the language of the regulation "is unequivocal that the importer-specific assessment rate is limited to that importer's entries" and that ". . . the assessment rate calculated for SKF/Peer in the Final Result[s] is inconsistent with that language on its face." *Id*. at 13.

The court does not agree that the assessment rate Commerce calculated for PBCD/Peer is not "importer specific." Commerce determined a separate assessment rate for each of the two importers,

PBCD/Peer and SKF/Peer, thus adhering to its normal practice as reflected in the first sentence of § 351.212(b)(1), under which Commerce "normally will calculate an assessment rate for each importer of subject merchandise covered by the review." Because each assessment rate was individual to the respective importer, the Department's method was not inconsistent with the procedure specified in the first sentence.

According to the second sentence of § 351.212(b)(1), Commerce "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." For two reasons, the court disagrees with CPZ's argument as it relates to the second sentence of the regulation. First, the regulation sets forth a "normal" method from which Commerce has discretion to make exceptions. Second, even if the regulation were binding as written, the court would not agree with plaintiff's construction of the regulation, under which an assessment rate specific to an importer must be calculated using margins, and entered value, determined solely according to entries made by that importer. CPZ's Mem. 13. The court addresses each of these two points below.

In the review, Commerce found that CPZ/SKF was not the successor in interest to CPZ and that SKF/Peer was not the successor in interest to PBCD/Peer. *Final Results*, 76 Fed. Reg. at 3,087. On the basis of these two findings, neither of which CPZ contests, Commerce split the POR into two segments based on the September 11, 2008 date of the acquisition, after which date Commerce considered PBCD/Peer to no longer exist and considered SKF/Peer to have made both the sales and the entries. Because the constructed export price method of determining U.S. price was used in this review, the sales examined appear to have occurred, in many if not all cases, after the entry was made, resulting in what CPZ describes as "post-acquisition sales" by SKF/Peer "corresponding to entries by PBCD/Peer." CPZ's Mem. 14. Commerce calculated "importer-specific" assessment rates for PBCD/Peer and for SKF/Peer based on the respective sales made by each—and directed Customs to apply those separate assessment rates to the respective entries made by each—during the separate portions of the POR. *Decision Mem.* 21 & n.52.

The second sentence of § 351.212(b)(1) uses the word "normally" in describing the method of calculating an assessment rate and thereby allows the reasonable exercise of discretion in making such determination. Accordingly, the court need not decide whether Commerce calculated PBCD/Peer's assessment rate according to the precise method set forth in the second sentence of § 351.212(b)(1). Here,

Commerce calculated two separate aggregate dumping margins, one based on the sales by PBCD/Peer and the other based on the sales by SKF/Peer, and then divided each by the entered value of the respective merchandise on the two groups of sales. Thus, the method Commerce used essentially applied the calculation specified in the "normal" method not once, but twice. This might be described as a variation from the normal method of the second sentence in that the period of review was split into two separate sub-periods for purposes of determining individual assessment rates for PBCD/Peer and for SKF/Peer. Because Commerce usually has occasion to recognize only one period of review in an administrative review proceeding, § 351.212(b)(1) ordinarily is applied according to the single, undivided POR corresponding to the period of the review Commerce is conducting.

Plaintiff errs in construing § 351.212(b)(1) to contemplate that an assessment rate specific to an importer will be calculated using the aggregate of the margins, and of the entered values, determined solely according to entries made by that importer. The language of the regulation, when read according to plain meaning, does not impose such a requirement. Under the normal method the regulation sets forth, an importer-specific assessment rate is *applied* to all of an importer's entries that occurred during a period of review, but it is not necessarily *calculated* solely according to entries made during that period of review, nor must it be calculated exclusively according to entries made by that importer. The normal method, which involves an examination of sales occurring during a period of review, does not rely on an exact correspondence between such sales and the entries that occurred during that same period of review. *See Peer Bearing I*, 35 CIT at __, 804 F. Supp. 2d at 1343–44. In summary, the court has no basis to conclude that in determining PBCD/Peer's assessment rate, Commerce acted inconsistently with its regulation.

CPZ also alludes to an inconsistency with the Department's "practice," citing various of the Department's past administrative determinations for the proposition that it "is not aware of a similar case where Commerce has exercised its discretion to calculate importer-specific assessment rates in a manner so plainly inconsistent with its regulations." CPZ's Mem. 14 (citations omitted). Specifically, CPZ argues that Commerce, rather than calculate what plaintiff characterizes as "seller-specific" assessment rates, should have followed the method CPZ suggested, *i.e.*, calculation of a weighted-average assessment rate for PBCD/Peer based on both portions of the POR, because that method would have been consistent with the approach Com-

merce took in a past review, *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,437 (Dec. 12, 2005). *Id.* at 14–15. CPZ characterizes the review at issue in this case as similar to the *Softwood Lumber Products* review, "where, as a result of multiple acquisitions of producers (and exporters) of subject merchandise, Commerce calculated multiple cash deposit rates and assessment rates for various portions of the POR." *Id.* at 14 (footnote omitted). CPZ argues that Commerce's rationale for not following the *Softwood Lumber* approach in this review "is inconsistent with Commerce's claim that it has calculated importer-specific assessment rates," *id.* at 16, and that "Commerce has failed to explain how this methodology is consistent with 19 C.F.R. § 351.212(b)(1)," *id.* at 16–17.

The court does not find merit in the argument that Commerce impermissibly departed from a practice. Commerce distinguished its past administrative determinations by explaining in the Decision Memorandum that because PBCD/Peer and SKF/Peer were separate entities, and the latter was not a successor in interest to the former, it was appropriate to calculate period-specific assessment rates for PBCD/Peer and for SKF/Peer based on the respective sales by each made in the portion of the period of review in which each existed. *Decision Mem.* 19. The court concludes that Commerce had adequate reasons to distinguish this case from the past determinations.[8] For reasons the court already has discussed, CPZ is incorrect in claiming that the assessment rates were not importer-specific and fails to make any convincing case as to the Department's regulation, which allows a measure of discretion.

[8] In *Certain Softwood Lumber Products from Canada*, Commerce confronted the issue of how to calculate assessment rates when two respondents were amalgamated in the last month of the POR, with the resulting company being successor in interest to both. *Notice of Final Results of Antidumping Duty Admin. Review: Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 73,437 (Dec. 12, 2005) and Issues & Decision Mem., A-122–838, ARP 4–04, at 73 (Dec. 12, 2005). In *Small Diameter Carbon Pipe from Romania*, the issue was how to calculate assessment rates when there was only one importer but both market and non-market economy portions of the POR. *Certain Small Diameter Carbon & Alloy Seamless Standard, Line, & Pressure Pipe From Romania: Final Results of Antidumping Duty Admin. Review & Final Determination Not To Revoke Order in Part*, 70 Fed. Reg. 7,237 (Feb. 11, 2005) and Issues & Decision Mem., A-485–805, ARP 7–03 (Feb. 4, 2005); *see also Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results & Final Partial Rescission of Antidumping Duty Admin. Review*, 70 Fed. Reg. 12,651, 12,653 (Mar. 15, 2005) (same). In *Fresh Atlantic Salmon from Chile*, Commerce set cash deposit rates in the preliminary results for two respondents that were collapsed during the POR. *Notice of Prelim. Results of Antidumping Duty Admin. Review, Prelim. Determination To Revoke the Order in Part, & Partial Rescission of Antidumping Duty Admin. Review: Fresh Atlantic Salmon From Chile*, 67 Fed. Reg. 51,182, 51,191 (Aug. 7, 2002).

Commerce provided reasons for exercising its discretion in the way that it did. In the Decision Memorandum, Commerce identified an objective "to prevent one importer from becoming liable for another importer's [antidumping] duties," and it considered its method of determining the assessment rates "particularly appropriate in consideration of the Department's longstanding practice to calculate assessment rates based on the entered value corresponding to the sales examined for each importer during the POR, and not the entered value of all products actually entered during the POR." *Id.* at 21 (footnote omitted). CPZ argues that these two stated reasons, as offered in support of the Department's determination, "are either incorrect or fail to consider the unique facts of this case." CPZ's Mem. 17.

Specifically, CPZ points to the statement by the Department in the Decision Memorandum that "we agree with SKF that because it was the downstream sales by SKF/Peer which gave rise to the [antidumping] duties on the products in question and, because SKF/Peer had some control over the terms of these sales, it is not improper for SKF/Peer to be liable for the resulting duties." *Decision Mem.* 21. CPZ argues, in turn, that the Department's logic "is flawed because it focuses only [on] the numerator . . . of the assessment rate calculation." CPZ's Mem. 19. According to CPZ, "the denominator of the assessment rate formula (entered value) was determined by PBCD/Peer alone," who, CPZ alleges, was "just as involved in the resulting antidumping duties and assessments for these entries as is SKF/Peer who made the U.S. sales." *Id.* CPZ submits that "Commerce's insistence on the fact that its assessment rate methodology ensures that neither importer bears liability for the other['s] antidumping duties is not confirmed by the facts." *Id.* CPZ argues that the Department's focus on SKF/Peer's having some control over the terms of the sale "ignored the fact that importers are deemed to be responsible for duties related to the sales, whether they have 'control' or not," *id.*, and that, accordingly, "the issue of 'control' over sales has little to do with whether importers are liable for entries made by them," *id.* at 20. From all of these assertions, CPZ repeats its contention that "Commerce's assessment methodology is contrary to its regulations and practice and is not supported by substantial evidence on the record." *Id.*

The court explained previously why the calculation method cannot be said to be contrary to the regulation or to the Department's practice. A valid claim that a determination is not supported by substantial evidence must be grounded in a disputed finding of fact, and plaintiff, while theorizing as to the significance of the denominator of

the Department's formula and taking issue with the associated explanation, fails to identify a discrete finding of fact that it wishes to contest.

The remainder of CPZ's lengthy argument is, in essence, a contention that the method Commerce chose made PBCD/Peer liable for antidumping duties that should have been assessed to SKF/Peer. The court finds this contention unpersuasive. For each of the two separate assessment rate calculations, the denominator of the Department's formula was the aggregate entered value of the merchandise on the examined sales of the particular importer; Commerce used these same sales to determine the aggregate margin comprising the numerator of the formula. Thus, the aggregate margin used to determine PBCD/Peer's assessment rate was determined according to PBCD/Peer's own sales during the POR; Commerce followed the parallel procedure in determining the assessment rate for SKF/Peer. The normal method set forth in 19 C.F.R. § 351.212(b)(1) relies on the examined sales made during the POR, not the entries made during the POR, to calculate an assessment rate to be applied to all of an importer's POR entries. It does not entail the Department's calculating an individual margin for each entry that an importer made during the POR based on the actual sale associated with that entry. The fact most emphasized by CPZ—that POR sales by SKF/Peer involved merchandise previously imported by PBCD/Peer—does not itself establish that PBCD/Peer improperly was assessed SKF/Peer's antidumping duties. CPZ also emphasizes that PBCD/Peer "determined" the entered value for each of its POR entries by making those entries, but CPZ's emphasizing this point does not refute the fact that Commerce based the assessment rate for PBCD/Peer, and the one for SKF/Peer, on the POR sales that each importer actually made.

C. A Remand is Required on CPZ's Claim Challenging the Surrogate Value of Steel Bar

In determining the normal value of subject merchandise from a nonmarket economy country such as China, Commerce, under section 773(c)(1) of the Tariff Act, ordinarily values "the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). The statute requires generally that Commerce value factors of production "based on the best available information regarding the values of such factors in a market economy country or countries" that Commerce considers appropriate. *Id.* CPZ claims that Commerce failed to use the best available information on the record to value bearing-quality steel bar, which was one of the materials CPZ used to produce subject

merchandise prior to the acquisition. CPZ's Mem. 20–32. The court concludes that a remand is required on this claim.

Commerce valued CPZ's bearing-quality steel bar inputs by using publicly-available information on the average unit value ("AUV") of Indian imports made during the POR, as reported by Global Trade Atlas ("GTA"). *Decision Mem*. 31; *Prelim. Results*, 75 Fed. Reg. at 41,150, 41,155. From the GTA import data pertaining to Indian Harmonized Tariff Schedule ("HTS") subheading 7228.30.29,[9] Commerce calculated an AUV of $1,956 per metric ton ("MT").[10] *Mem. to the File from Int'l Trade Compliance Analyst*, at 4 n.7 (Jan. 11, 2011) (Admin. R. Doc. No. 6039) ("*Final Analysis Mem. - PBCD*"). Observing that this subheading is not specific to bearing-quality steel goods, Commerce used only the GTA import data thereunder that pertained to Indian imports from the United States, Japan, and Singapore, determining from record evidence that the other countries of origin shown in the GTA data (Austria, Canada, France, Germany, Slovenia, Turkey, and Taiwan) "could not be shown definitively to have exported bearing quality steel to India during the POR." *Decision Mem.* 34 (footnote omitted). That record evidence consisted of Indian import data compiled by Infodrive India ("Infodrive"), which CPZ placed on the administrative record during the review.[11] *Id.* at 33–34.

Although relying on the Infodrive data for its finding that, among the imports under Indian HTS subheading 7228.30.29, bearing-quality steel was included only among the imports from the United States, Japan, and Singapore, Commerce did not base its surrogate value on Infodrive data pertaining to bearing-quality steel imports. *Id*. Arguing that "[i]f Commerce were to use a surrogate value price derived solely from bearing-quality steel from the Infodrive data, the resulting surrogate value is only $1,596/MT," CPZ claims that the determination to use the surrogate value of $1,956 per metric ton derived from the GTA import data is "distortive as it reflects high-priced imports of non-bearing quality steel from the U.S., Japan, and Singapore," and, therefore, "cannot be supported by substantial record evidence." CPZ's Mem. 28–30 & Attach. 2.

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[9] Commerce describes this tariff subheading as applicable to "Other bars and rods of other alloy steel; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel; Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded; Bright Bars; Other." *Decision Mem.* 29 n.86.

[10] The actual surrogate value was slightly below this amount because Commerce combined the public import data with proprietary data pertaining to certain market economy purchases of steel bar by CPZ. *Mem. to the File from Int'l Trade Compliance Analyst*, at Attach. 1 (Jan. 11, 2011) (Admin. R. Doc. No. 6039).

[11] Infodrive India ("Infodrive") is a private entity located in India that provides data on imports and exports. *See Peer Bearing Company-Changshan v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1337, 1348 n.13 (2011) (citation omitted).

CPZ placed on the administrative record an analysis of the GTA and Infodrive data sets that, according to CPZ, "demonstrated that Indian HTS 7228.30.29 contained large amounts of high-priced steel that was clearly not bearing quality steel." *Id*. 22–23 (citing *Letter from PBCD to Sec'y of Commerce* , at Ex. 1 (Aug. 19, 2010) (Admin. R. Doc. No. 5887); *Letter from PBCD to the Sec'y of Commerce*, at Ex. 3 (Oct. 4, 2010) (Admin. R. Doc. No. 5917) ("*CPZ's Case Br.*")). Commerce made no finding to the contrary and acknowledged "that Infodrive shows that the Indian dataset contains entries *not specific to the input in question . . .*" *Decision Mem.* 34 (emphasis added). Commerce responded to this acknowledged shortcoming in the GTA import data by "using the quantity and value data of Indian imports from the United States, Japan, and Singapore in Indian HTS subheading 7228.30.90 obtained from GTA, for these final results." *Id.* (footnote omitted). The Final Results, however, fail to correct the problem CPZ identifies, *i.e.*, the presence of substantial quantities of non-bearing-quality steel goods within the dataset Commerce chose. The Decision Memorandum itself refers to non-bearing-quality steel import entries included within the GTA import data as "entries not specific to the input in question." *Id.* However, the Department's surrogate value of $1,956 per metric ton cannot be shown to have been based entirely, or even principally, on Indian import data that *were* specific to the input being valued. The record evidence, therefore, is insufficient to support a finding that the subset of GTA Indian import data Commerce used to derive the $1,956 value were the best available information on the record for use in valuing the factor of production.

Defendant raises several arguments in support of the Department's surrogate value. Defendant argues, first, that "Commerce's use of Infodrive India data to evaluate the import data and exclude countries that did not export bearing quality steel to India rendered the Indian data the most specific on the record, and yielded a surrogate value that reasonably reflects the cost of bearing quality steel bar for the POR." Def.'s Opp'n to Pls.' Mots. for J. upon the Agency R. 28 (Oct. 28, 2011), ECF No. 53 ("Def.'s Mem."). This argument mischaracterizes the record evidence. The GTA data the Department used were not the record data most specific to the input being valued, as those data contained substantial quantities of non-bearing-quality steel. The Infodrive AUV data, on the other hand, are specific to goods made of bearing-quality steel.

Second, defendant argues that "[a]lthough PBCD/Peer contends that Commerce should have excluded all entries that were not listed as 'bearing quality steel' according to Infodrive India, Commerce's determination to include exports from the countries that exported

bearing quality steel to India during the POR was consistent with its practice of using broad market averages that are representative of a significant quantity of imports." *Id*. at 28–29. Referring to the Department's established criteria, defendant makes the related argument that Commerce found that the GTA data under Indian HTS subheading 7228.30.90 "are publicly available, broad market averages, contemporaneous with the POR, tax exclusive, and representative of significant quantities of imports." *Id*. at 30 (citing *Final Results*, 76 Fed. Reg. at 3,088 and *Decision Mem.* 31) (internal quotation marks omitted). There are two flaws in these arguments. First, Commerce did not state expressly in the Decision Memorandum that it considered the Infodrive data on bearing-quality steel imports to constitute an unrepresentative quantity. *Decision Mem*. 31–34. Second, the argument is illogical. As the court noted above, the Decision Memorandum itself characterizes non-bearing-quality steel imports as "entries not specific to the input in question." *Id*. at 34. If, as defendant's argument would hold, the Infodrive data on bearing-quality steel represent too small a quantity to support a surrogate value, and if, as Commerce itself stated, non-bearing-quality steel is not specific to the input being valued, then diluting the specific data by combining those data with non-specific data cannot improve, and can only compromise, the result. Commerce made its exclusions from the GTA database on a country-by-country basis, but it did so according to the Infodrive database, which allowed specific identification of quantities and values for bearing-quality steel. If an entry of a steel good from the United States, Japan, or Singapore was of non-bearing quality steel, the steel goods on that entry do not magically become specific to the input being valued simply by originating in a country that also exported goods that were of bearing-quality steel. For this reason, the Department's "country-wide" methodology did not cure the problem posed by the overbreadth of Indian HTS subheading 7228.30.90. *See Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1343 (Fed. Cir. 2011) (opining in *dicta* that "calculating a surrogate value on the basis of every material imported under the HTS heading, in the face of InfoDrive descriptions suggesting that certain imports were not representative, might well conflict with Commerce's obligation to use the best available evidence for its calculation of surrogate value.").

Nor did Commerce find the Infodrive data to be unreliable. To the contrary, Commerce expressly found that the Infodrive data were credible evidence of the quantity and value of imports into India

during the POR, stating that "we find that the Infodrive data . . . demonstrates significant coverage of the GTA data, and can be used as a probative tool to corroborate the surrogate value in question," *Decision Mem.* 31 (stating that "over 93 percent of both the total GTA quantity and value from all countries that the Department includes in its SV calculations is accounted for in the total quantifiable [12] weight and value figures from the corresponding Infodrive data" (footnote omitted)); and that "there is remarkable correlation between the values reported in each dataset (*i.e.*, nearly 100 percent for most countries)," *id.* at 33 n.102. Commerce also determined that the Infodrive data were a credible basis for discerning which entries were bearing-quality steel bar, stating that "no interested party to this proceeding has objected to PBCD's overall separation of the Infodrive line items as 'included as bearing quality steel' or not, nor has any interested party questioned the term 'bearing-quality' as it exists in the Infodrive data." *Id.* at 34.

In summary, substantial evidence does not support a finding that the subset of GTA data chosen by Commerce was the best available information for use in valuing the bearing-quality steel bar that CPZ used to produce its subject merchandise. On remand, Commerce must reconsider this finding, consider what alternatives are feasible based on the record before it, including in particular the use of the Infodrive data to determine a surrogate value, and reach a surrogate value shown by substantial evidence to be based on the best available record information.

D. No Relief is Appropriate on CPZ's Claim Challenging the Surrogate Value of Roller-Quality Steel Wire Rod of Circular Cross Section

Commerce valued another of CPZ's factors of production, roller-quality steel wire rod of circular cross section, using GTA data pertaining to imports from Thailand made during the POR under Thai HTS subheading 7228.50.10. *Decision Mem.* 34–35; CPZ's Mem. 31 (citing *Final Analysis Mem.–PBCD* Attach. 1). These data yielded an AUV of $2,530 per metric ton. CPZ's Mem. 31 (citing *Final Analysis Mem.–PBCD* Attach. 1). Commerce described Thai HTS subheading 7228.50.10 as pertaining to the article description "Other bars and rods of other alloy steel; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel; Other bars and rods, not further worked than cold-formed or cold-finished: Of circular cross-section." *Decision Mem.* 34–35 n.106.

[12] The Global Trade Atlas data refer only to entries denominated in quantifiable terms such as kilograms, as opposed to "sets" or "pieces." *Decision Mem.* 33 n.102. The Infodrive analysis thus excludes Infodrive data that is not quantifiable.

Commerce chose to use the Thai data over several other sources. The record contains data pertaining to imports from Indonesia classified under Indonesian HTS subheading 7228.50, which shows an AUV of $1,633 per metric ton, and Philippine import data showing an AUV of $1,799 per metric ton. CPZ's Mem. 31 (citing *Letter from PBCD to Sec'y of Commerce*, at Ex. 5 (Jun. 16, 2010) (Admin. R. Doc. No. 5770)). The article description for HTS subheading 7228.50 differs from the article description of Thai HTS subheading 7228.50.10 in that it is not specific to articles "[o]f circular cross-section." Commerce also declined to use data pertaining to imports into the United States under subheading 7228.50.10.10, HTSUS, which reflected an AUV of $1,881 per metric ton. *Id*. The article description for subheading 7228.50.10.10, HTSUS, does not specify circular cross-section but includes the descriptive words "[o]f tool steel (other than high-speed steel): of ball-bearing steel." Finally, Commerce rejected an Indian company's financial data, which showed a value of $1,564 per metric ton. *Id.* This publicly available data, placed on the record by Timken, is taken from the company's 2008–2009 annual report, which covered the fiscal year April 1, 2008 through March 31, 2009. *Letter from Timken to Sec'y of Commerce*, at Ex. 13, p. 33 (Dec. 17, 2009) (Admin. R. Doc. No. 5692). The company, ABC Bearings Limited ("ABC"), is a producer of TRBs, cylindrical roller bearings, and slewing bearings. *Id*. The data presented in the annual report, which the Department used for purposes of calculating financial ratios, includes the value and quantity for steel consumed by ABC for the fiscal year, which CPZ converted to U.S. dollars/metric ton. *Id*.; CPZ's Mem. 31; *CPZ's Case Br.* 29. The annual report does not specify whether the input relied upon is roller-quality steel wire rod of circular cross section, which is the input used by respondents in the production of subject TRBs.

CPZ claims that Commerce failed to use the best available information to value the roller-quality steel wire rod. CPZ's Mem. 31–32. The statute defines "best available information" as information from "one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). CPZ argues that Commerce "erred in refusing to consider data from other surrogate countries, including U.S. import data." CPZ's Mem. 31. It argues that the Thai HTS data showed an aberrationally high value for steel wire rod and that Commerce instead should have based the surrogate value on the Indonesian data. *Id.* at 32. The court determines that the Department's determination rests on substantial evidence and must be affirmed.

The Department's explanation does not directly address the issue of whether the Thai HTS data are the "best available information" as required by § 1677b(c)(1). In the Decision Memorandum, Commerce explained that it would continue to value roller-quality steel wire rod using the Thai HTS data, which it had used in the Preliminary Results, because CPZ had not "put forth a colorable claim, based on record evidence, that the Thai import data are inappropriate," such that Commerce would perform its "benchmarking" analysis. *Decision Mem.* 34–35. Commerce explained that neither the U.S. import data nor the financial data of the Indian company provided "suitable comparative price benchmarks to test the validity of selected SVs," referring to statements earlier in the Decision Memorandum explaining that the Department seeks broad-based price averages and does not consider it appropriate to use information from countries at a dissimilar level of economic development to China as "benchmark" data. *Id.* at 35. Commerce also explained that the uncorroborated lower prices reflected by the Indonesian and Filipino data also did not constitute "sufficient evidence to compel the Department to question the validity of the more-specific eight-digit data used in the *Preliminary Results*." *Id.* (footnote omitted). Commerce concluded by stating that it continued to find that the Thai HTS data were the "most specific to the input in question, as this HTS category values steel rod of circular cross section, which is the type of wire rod used in the production of TRBs by the respondents." *Id.* By addressing only whether CPZ made an adequate showing under the Department's "benchmarking" practice, Commerce failed to directly address the relevant inquiry under the statute: whether the record supports the Department's determination that the Thai HTS data were the best available information.

Nevertheless, the court concludes that the record contains adequate evidentiary support for the Department's determination that the Thai HTS data should be used to value the steel wire rod input. The record shows that, consistent with the Department's finding, the Thai HTS data pertained to steel wire rod of circular cross-section, unlike any of the alternative data sources. The record also supports the Department's conclusion that the Thai HTS data were superior to the U.S. data based on the statutory requirement that Commerce use, to the extent possible, information from countries "at a level of economic development comparable to that of the nonmarket economy country." 19 U.S.C. § 1677b(c)(4). Commerce determined in the Preliminary Results that Thailand and China were at comparable levels of economic development. *Prelim. Results*, 75 Fed. Reg. at 41,149–50. Finally, Commerce validly concluded that the Thai HTS data were

superior to the data of a single Indian company because the Thai HTS data represented a broad-based market average and that the Indian data were not specific to the input at issue.

E. No Relief is Appropriate on Timken's Claim Challenging the Department's Determination of the Appropriate U.S. Sale

Timken claims that SKF's acquisition of Peer Bearing Company on September 11, 2009 constituted a sale in the United States of the latter's then-unsold inventory of subject merchandise from CPZ to SKF and that Commerce should have used this sale, rather than subsequent downstream sales to individual customers, when determining the U.S. price of this subject merchandise for purposes of calculating margins for CPZ and SKF. Timken's Mem. 16–22. In support of its claim, Timken argues that "[w]hile there are often a series of sales before the ultimate purchase for consumption, the statute specifies that the *first sale* to an unaffiliated U.S. customer at arm's length is the proper measure of the United States price." *Id.* at 17 (citing 19 U.S.C. § 1677a(a), (b) (defining "export price" and "constructed export price," respectively)). Timken submits that a sale is, by definition, a transfer of ownership for compensation and that "[s]o long as a U.S. transaction is comprised of a seller affiliated with the producer or exporter, an unaffiliated U.S. purchaser, and the transfer of ownership of subject merchandise for some consideration, it is a sale subject to the dumping laws." *Id.* at 19 (citing 19 U.S.C. § 1677a(a)-(b)). According to Timken, CPZ sold the bearings in its inventory to an unrelated party, SKF, in the United States, for consideration, and "[t]he sale of these bearings meets all the statutory requirements of a constructed export price sale." *Id.* at 21. Timken concludes that "Commerce's use of subsequent U.S. sales of the TRBs in that inventory to determine dumping was not supported by substantial evidence and should be rejected by this Court." *Id.* at 21. The court does not find merit in this claim.

Commerce found that the Master Purchase Agreement ("MPA") "specifies the details of the share transfer between ownership parties upon finalization of the acquisition agreement, which resulted in the transfer of ownership of various Spungen-owned companies, including PBCD/Peer and PBCD/CPZ, to various AB SKF-owned affiliates." *Decision Mem.* 23 (quoting *Prelim. Results*, 75 Fed. Reg. at 41,152–53). Commerce concluded from the MPA that "there was no sale value specifically associated with just the TRB inventory as part of the MPA or any other document submitted to the record." *Id.* at 22 (quoting *Prelim. Results*, 75 Fed. Reg. at 41,153). Commerce observed that "while the transfer of stock ownership of Peer Bearing Company

from one entity to another would necessarily result in the new ownership acquiring the company, along with all assets of said company (including inventory assets), at no point in the MPA document (or in any other document on the record) is there any explicit or implicit reference to the valuation of inventory assets as part of the actual purchase agreement . . . ." *Id.* at 23–24. From its own examination of the MPA, the text of which is proprietary, the court concludes that the Department's findings are supported by substantial evidence.

Timken does not identify record evidence that is sufficient to refute the Department's finding that no agreed-upon sale price specific to the TRB inventory is set forth in the MPA or any other document submitted to the record. Identifying MPA provisions and associated record documents describing the valuation of the inventory, Timken argues that "[v]arious representations and covenants in the MPA and Assignment agreement, in particular, establish the terms governing PBCD's inventory sale." Timken's Mem. 19 (citations omitted). Timken concludes from the record documents that "[t]hese provisions make clear that the parties contemplated that the MPA was to constitute a binding agreement for the sale of PBCD's business and the goods it held in inventory to SKF." *Id*. at 20 (citations omitted). Timken references a general warranty regarding "Inventory," a covenant regarding continued ordinary business operations, and a promise made with respect to the tax treatment of the acquisition, according to which the parties would make certain tax elections consistent with an asset sale as opposed to a share sale. *Id*. at 19–20 (citing *Letter from SKF to Sec'y of Commerce*, at 4, 8–10 (Jun. 9, 2010) (Admin. R. Doc. No. 5769)); The Timken Co.'s Reply Br. in Supp. of its Mot. for J. on the Agency R. 4–5 (Dec. 12, 2011), ECF No. 78 ("Timken's Reply").

Timken's argument, based on what Timken considers to be terms of the sale of inventory, is not convincing. There is no dispute that the inventory at issue was transferred as part of the share acquisition. As Commerce found, the record does not contain evidence showing that the parties agreed or intended to agree upon a separate price for the transfer of the TRBs in the inventory held by Peer Bearing Company when negotiating the acquisition. Although asserting that the inventory transfer was made for consideration, Timken does not demonstrate from record evidence that Commerce erred in concluding that separate consideration was not negotiated for that inventory.[13] In the absence of such separate consideration, Commerce was within its

[13] With respect to the valuation of the inventory, Commerce addressed certain record documentation in the Preliminary Results, stating that "[Changshan Peer Bearing

statutory authority in determining that a sale of the inventory did not occur for purposes of determining U.S. price.[14]

Finally, Timken argues that the Department's decision that the SKF acquisition did not constitute a sale to an unaffiliated party was invalid because it was based on a reason not found in the statute: that the acquisition was not a sale "for consumption." Timken's Mem. 16–17. Timken bases this argument on a sentence in the Decision Memorandum in which Commerce rejected the need to request additional information regarding the SKF acquisition by stating that "[b]ecause we do not find that this transfer of inventory constitutes a sale of subject merchandise *for consumption* to the first unaffiliated customer . . . , we do not agree with Petitioner that there is no viable sales price on the record." *Decision Mem.* 24 (emphasis added). This argument fails for two reasons. First, as discussed above, Commerce determined from substantial record evidence that the SKF acquisition did not constitute a sale of the TRBs in inventory because no specific price was negotiated for that inventory. The Decision Memorandum's reference to a sale for consumption was not necessary to the Department's determination. Second, the reason why Commerce chose not to request additional information would be pertinent were Timken claiming here that Commerce acted unlawfully in failing to request additional information on the transfer of the inventory. Timken made a related argument before Commerce during the review but is not arguing that point before the court.

Company, Ltd. and Peer Bearing Company (collectively, "SKF")] reported sales prices for the inventory based on an accounting value it obtained from a third party accounting firm for financial reporting purposes subsequent to the acquisition," adding that "[t]hus, the value reported by SKF is not reflective of negotiated sales prices for this merchandise." *Tapered Roller Bearings & Parts Thereof, Finished or Unfinished, From the People's Republic of China: Prelim. Results of the 2008–2009 Admin. Review of the Antidumping Duty Order*, 75 Fed. Reg. 41,148, 41,153 (July 15, 2010). Nothing in the Final Results or the incorporated Decision Memorandum departed from this determination.

[14] The Timken Company ("Timken") argued before Commerce during the review that CPZ and SKF did not submit important documents that might have been relevant to the sale of assets pursuant to the acquisition and that Commerce, accordingly, should determine constructed export price of the inventory using the reported entered value of that subject merchandise as partial AFA ["adverse facts available"; *see* 19 U.S.C. § 1677e(a), (b)]. *Decision Mem.* 21–22 (citations omitted). Timken does not make this precise argument before the court, arguing only generally that the Department may use facts otherwise available to the extent that any pricing information is missing from the record. The Timken Co.'s Reply Br. in Supp. of its Mot. for J. on the Agency *R.* 7 (Dec. 12, 2011), ECF No. 78.

F. Relief is Appropriate on Timken's Claim Challenging the Department's Using SKF's Factors of Production to Value Merchandise Produced by Pre-Acquisition CPZ

In determining normal value according to the nonmarket economy country procedure of 19 U.S.C. § 1677b(c)(1), Commerce requested individual sets of data on factors of production from PBCD (on behalf of pre-acquisition CPZ) and from post-acquisition CPZ, *i.e.* SKF. Timken's Mem. 12 (citation omitted). For subject merchandise that was imported before the acquisition but sold after the acquisition, Commerce used post-acquisition factors of production, *i.e.*, factors of production pertaining to SKF, not CPZ. *Id.* ; Def.'s Mem. 27. Timken claims that this was unlawful because Commerce was expressly required by 19 U.S.C. § 1677b(c)(1) to value of the factors of production "utilized in producing the merchandise." Timken's Mem. 22–27. According to Timken, the factors of production for the post-acquisition producer, SKF, could not possibly have been those actually utilized in producing the merchandise, which was produced by CPZ. *Id*. at 12.

Timken admits it failed to exhaust administrative remedies on its claim, having made no objection to the Department's use of post-acquisition factors of production in the case brief it submitted to Commerce during the review. Timken's Reply 7. Instead, Timken raised the issue for the first time in its rebuttal brief before Commerce (in a footnote) and then raised the issue again in a ministerial error allegation after the publication of the Final Results. Def.'s Mem. 27–28 (citing *Timken's Rebuttal* at 7 n.1); *Letter from Timken to the Sec'y of Commerce* (Jan. 19, 2011) (Admin. R. Doc. No. 6034). Timken requests that the court waive the failure to exhaust because this claim presents a purely legal question and "a serious error of law." Timken's Reply 7–8. Defendant argues that failure to exhaust administrative remedies should bar relief on Timken's claim, relying on *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) and 19 C.F.R. § 351.309(d)(2), in which Commerce has provided by regulation that "the rebuttal brief may respond only to arguments raised in case briefs." Def.'s Mem. 27.

As provided by statute, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." Customs Courts Act, § 301, 28 U.S.C. § 2637(d) (2006). Here, there is no question that a failure to exhaust administrative remedies occurred. Nevertheless, the issue presented is whether it is "appropriate" to require exhaustion of administrative remedies in the circumstance presented. In deciding this question, the court may exer-

cise a measure of discretion. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). An exception to the exhaustion requirement has been recognized when the issue presented is a "pure legal question." *Id*. at 1378–79 & n.4. That exception is applicable here. The issue presents no question of fact. Commerce determined, and no party contested, that SKF was not the successor in interest to CPZ, and Commerce treated the companies as separate respondents in the review. *Final Results*, 76 Fed. Reg. at 3,087. Commerce collected separate FOP information for both. *Prelim. Results*, 75 Fed. Reg. at 41,148–49. The only question to be resolved is whether, on these uncontested facts, Commerce acted inconsistently with 19 U.S.C. § 1677b(c)(1) in using the FOP data it obtained from SKF to value subject merchandise produced by CPZ.

Defendant-Intervenor SKF addresses Timken's claim on the merits, arguing that "the statute does not require that the FOPs correspond to the factors used to produce the merchandise sold during the POR" and that the term "factors of production utilized in producing the merchandise" is ambiguous and was interpreted reasonably by Commerce in this case. Def.-Ints.' Resp. to Pl.'s R. 56.2 Mot. for J. upon the Agency R. 14 (Oct. 28, 2011), ECF No. 55. Defendant, however, does not argue, as an alternative to its exhaustion argument, that Commerce acted within its statutory authority in deciding to use the SKF factors of production. The Decision Memorandum does not address the issue, and the only determination Commerce made with respect to Timken's claim is that the claim was not a proper allegation of a ministerial error. *Mem. to Dir., AD/CVD Operations Office*, at 4 (Feb. 18, 2011) (Admin. R. Doc. No. 6086). Before considering SKF's argument, the court considers it appropriate that Commerce, upon reconsidering the Department's decision to use SKF's FOP data, first address the merits of Timken's argument in the redetermination it issues upon remand in response to this Opinion and Order.

III. CONCLUSION AND ORDER

For the reasons explained above, the court concludes that: (1) Commerce must reconsider its decision to treat the TRBs exported to the United States from Thailand as products of China and redetermine the country of origin of these TRBs; (2) no relief is appropriate on CPZ's claim challenging the assessment rate applied to pre-acquisition entries; (3) Commerce must reconsider and redetermine its surrogate value for bearing-quality steel bar; (4) no relief is appropriate on the claim challenging the surrogate value of roller-quality steel wire rod; (5) no relief is appropriate on Timken's claim challenging the Department's determination of the appropriate sale

for antidumping duty purposes; and (6) Commerce must reconsider and explain the Department's decision to use SKF's data on factors of production for subject merchandise imported prior to the acquisition.

Therefore, upon consideration of all proceedings in this case and upon due deliberation, it is hereby

ORDERED that the final determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in *Tapered Roller Bearings & Parts Thereof, Finished & Unfinished, From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Admin. Review*, 76 Fed. Reg. 3,086 (Jan. 19, 2011) ("*Final Results*") be, and hereby is, remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that, on remand, Commerce shall issue a Remand Redetermination that recalculates the weighted-average dumping margin of Peer Bearing Company-Changshan ("CPZ") as required to fulfill the directives of this Opinion and Order, is supported by substantial evidence on the record, and is in all respects in accordance with law; it is further

ORDERED that Commerce must reconsider the challenged country of origin determination and redetermine the country of origin of the tapered roller bearings ("TRBs") that were exported to the United States from Thailand and, on remand, must base its country of origin determination solely on criteria and factors that are shown to be relevant to the issue of whether the parts exported from China to Thailand were substantially transformed by the processing, including assembly, that occurred in Thailand; it is further

ORDERED that Commerce must redetermine the surrogate value that it applied to CPZ's input of bearing-quality steel bar using the best available record information; it is further

ORDERED that Commerce must reconsider its decision to value pre-acquisitionproduced subject merchandise using factors of production pertaining to the post-acquisition producer and show that its decision on remand accords with 19 U.S.C. § 1677b(c)(1) (2006); and it is further

ORDERED that Commerce must file the Remand Redetermination with the court within ninety (90) days of the date of this Opinion and Order, that each plaintiff and defendant-intervenor shall have thirty (30) days from the filing of the Remand Redetermination in which to file with the court comments on the Remand Redetermination, and that defendant shall have thirty (30) days from the last filing of such comments in which to file with the court any responses to the comments of other parties.

Dated: December 21, 2012
New York, New York

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