U.S. Court of International Trade

Slip Op. 17–75

SOLARWORLD AMERICAS, INC. and GOAL ZERO, LLC, Plaintiff and Consolidated Plaintiff, v. UNITED STATES, Defendant, and YINGLI GREEN ENERGY HOLDING CO., LTD. et al., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00231
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the first administrative review of the antidumping duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: June 28, 2017

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Tara Kathleen Hogan, Senior Trial Counsel, U.S. Department of Justice, Commercial Litigation Branch –Civil Division, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E.* Davidson, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief were *Amanda T. Lee* and *Mercedes C. Morno*, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance.

Neil R. Ellis, Sidley Austin, LLP, of Washington, DC, argued for Defendant-Intervenors Yingli Green Energy Holding Co., Ltd., Yingli Green Energy Americas, Inc., Yingli Energy (China) Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Lixian Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., Beijing Tianneng Yingli New Energy Resources Co., Ltd., Hainan Yingli New Energy Resources Co., Ltd., Jinko Solar Import & Export Co., Ltd., and JinkoSolar International Limited, and Jinko Solar Co., Ltd. With him on the brief were *Richard L.A. Weiner*, *Rajib Pal*, *Shawn Michael Higgins*, and *Justin Ross Becker*.

Robert George Gosselink, *Jarrod Mark Goldfeder*, and *Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, for Defendant-Intervenors Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science & Technology Co., Ltd.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on USCIT Rule 56.2 motions for judgment on the agency record challenging the U.S. Department of Commerce's ("Department" or "Commerce") determination in the first administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China" or "the PRC"). *See* SolarWorld's Mot. J. Agency R., Apr. 15, 2016, ECF No. 62; Consolidated Pl. Goal Zero LLC's Rule 56.2 Mot. J. Agency R., Apr. 15, 2016, ECF No. 60–1; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 80 Fed. Reg. 40,998 (Dep't Commerce July 14, 2015) (final results of ADD administrative review and final determination of no shipments; 2012–2013) ("*Final Results*") and accompanying Decision Memorandum for the Final Results of the 2012–2013 [ADD] Administrative Court Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the [PRC], Sept. 16, 2015, ECF No. 20–5 ("Final Decision Memo").

Plaintiff, SolarWorld Americas, Inc. ("SolarWorld"), commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).[1] *See* Summons, Aug. 12, 2015, ECF No. 1. The action was consolidated with an action filed by Goal Zero, LLC ("Goal Zero"), which challenges aspects of the same determination.[2] *See* Order, Nov. 3, 2015, ECF No. 39.

Goal Zero challenges on several grounds Commerce's application of the China-wide rate of 249.96 percent to ERA Solar Co., Ltd. ("ERA Solar"), the exporter of subject merchandise imported by Goal Zero. *See* Consolidated Pl. Goal Zero LLC's Br. Supp. Rule 56.2 Mot. J. Agency R. Final Confidential Version, Apr. 15, 2016, ECF No. 59 ("Goal Zero Br."). First, Goal Zero argues that Commerce's presumption that Chinese companies are subject to government control is

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[2] The court initially consolidated this action with an action filed by Yingli Green Energy Holding Co., Ltd., Yingli Green Energy Americas, Inc., Yingli Energy (China) Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., Beijing Tianneng Yingli New Energy Resources Co., Ltd., Hainan Yingli New Energy Resources Co., Ltd., and Lixian Yingli New Energy Resources Co., Ltd., filed in *Yingli Green Energy Holding Co., Ltd. et al. v. United States*, Court No. 15–00222. *See* Order, Nov. 3, 2015, ECF No. 39. However, after a consent motion to sever *Yingli Green Energy Holding Co., Ltd. et al. v. United States*, Court No. 15–00222, the court severed that case from this consolidated case on April 8, 2016. *See* Order, Apr. 8, 2016, ECF No. 56.

contrary to law. *See id.* at 10–19. Second, Goal Zero challenges the assignment of an ADD rate based on adverse facts available ("AFA")[3] to ERA Solar, arguing that Commerce improperly imputes noncooperation to ERA Solar without record evidence. *See id.* at 19–25. Third, Goal Zero challenges as uncorroborated the AFA rate assigned to the China-wide entity. *See id.* at 26–38.

SolarWorld challenges four aspects of Commerce's final determination. *See* SolarWorld Americas Inc.'s Mem. Supp. Rule 56.2 Mot. J. Agency R. Revised Confidential Version, Apr. 15, 2016, ECF No. 61 ("SolarWorld Br."). First, SolarWorld challenges Commerce's selection of surrogate value import data for two inputs (steel frames and semi-finished polysilicon ingots and blocks) used in the production of subject merchandise. *See id.* at 14–24. Second, SolarWorld questions Commerce's decision to include a line item identified as "other income" in its surrogate financial ratio calculation. *See id.* at 42–44. Third, SolarWorld challenges Commerce's inclusion of sales made by mandatory respondent Wuxi Suntech Power Co., Ltd. ("Suntech") to an affiliated company in the United States as constructed export price ("CEP") sales when calculating Suntech's dumping margin. *See id.* at 29–33. In relation to this challenge, SolarWorld also claims that Commerce should have determined the date of sale for Suntech's reported sales to its affiliate based on the date the contract was initially executed. *See id.* at 33–39. Fourth, SolarWorld contests Commerce's use of factors of production ("FOP") usage data from Suntech and certain tollers. *See id.* at 39–42.

For the reasons that follow, the court sustains Commerce's application of the China-wide AFA rate of 249.96 percent to ERA Solar as supported by substantial evidence and in accordance with law, Commerce's surrogate value data selections to value solar frames and semi-finished silicon ingots and blocks, Commerce's inclusion of the "other income" line item in its surrogate financial profit calculation, the inclusion of sales to Suntech as CEP sales, and Commerce's acceptance of FOP usage data from Suntech and certain tollers as facts available. However, the court remands for further explanation or reconsideration consistent with this opinion Commerce's determination to use the date of shipment rather than the date of contract for Suntech's sales to its affiliate.

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[3] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) (2014) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, Commerce uses the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference. *See*, *e.g.*, Final Decision Memo at 13–19.

BACKGROUND

On February 3, 2014, Commerce initiated the first administrative review of the ADD order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from China. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 79 Fed. Reg. 6,147 (Dep't Commerce Feb. 3, 2014) (initiation of antidumping and countervailing duty administrative reviews and request for revocation in part). Commerce selected Yingli Energy (China) Company Limited ("Yingli") and Suntech as mandatory respondents in this review. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 80 Fed. Reg. 1,021 (Dep't Commerce Jan. 8, 2015) (preliminary results of ADD administrative review and preliminary determination of no shipments; 2012–2013) ("*Prelim. Results*"). To calculate a surrogate value ("SV") for Yingli's aluminum frames, Commerce preliminarily used import data corresponding to Thai Harmonized Tariff System ("HTS") heading 7604. Decision Memorandum for the Preliminary Results of the 2012–2013 [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC] at 1, PD 513, bar code 3250265–01 (Dec. 31, 2014) ("Prelim. Decision Memo"). Commerce used the world price for polysilicon to calculate a SV for semi-finished ingots and blocks purchased by Yingli in the production of subject merchandise. *Id.* at 2–3. Commerce also preliminarily excluded a line item labeled "other income" from the surrogate profit ratio calculation. *See* [ADD] Administrative Review of Crystalline Silicon Photovoltaic Cells from the [PRC]: Factor Valuation Memo, A-570–979, 9, Attach. V, PD 530, bar code 3252163–01 (Dec. 31, 2014). Commerce preliminarily assigned Yingli Energy (China) Company Limited a rate of 1.82 percent. *See Prelim Results*, 80 Fed. Reg. at 1,023. Commerce preliminarily assigned Suntech the China-wide rate of 238.56 percent, *id.* at 1,023 n.11, because Commerce determined Suntech and entities with which it was collapsed had not demonstrated an absence of de facto government control over export activities. Prelim. Decision Memo at 14.

Commerce preliminarily determined that ERA Solar did not establish eligibility for a separate rate because ERA Solar did not submit a separate rate application. *See* Prelim. Decision Memo at 15. Further, because certain entities did not respond to Commerce's request for quantity and value ("Q&V") information, Commerce determined that the China-wide entity failed to cooperate to the best of its ability. *Prelim. Results*, 80 Fed. Reg. at 1,022, 1,023 n.11. Accordingly, Commerce preliminarily assigned ERA Solar the AFA rate of 238.56 per-

cent assigned to the China-wide entity, *id.*, which is a dumping margin from the petition.[4] *See* Prelim. Decision Memo at 36.

In its final results, Commerce continued to use import data under Thai HTS heading 7604 to value Yingli's aluminum frames inputs. Final Decision Memo at 76, 81–84. Commerce also continued to use the world price for polysilicon to obtain a SV for semi-finished ingots and blocks. *See id.* at 76. Commerce determined that the "other income" line item that had been preliminarily excluded from its surrogate financial profit ratio calculation should be included in surrogate financial profit for the final results. *See id.* at 60. To calculate the amount of certain FOPs consumed in the production of subject merchandise, Commerce used FOP data on the record from Suntech and from certain unaffiliated tollers that supplied FOP usage data as a substitute for missing FOP usage data of other unaffiliated tollers who had not provided usage information. *See id.* at 40–41. Commerce included sales reported by Suntech to its affiliate as CEP sales, because Commerce found that the reported sales price from Suntech to its affiliate was the same price as the price the affiliate sold the merchandise to the first unaffiliated party. *See id.* at 91–94. To determine the date of sale of Suntech's U.S. sales in order to ensure a temporal nexus between home market sales and U.S. sales for Commerce's margin calculation, Commerce used the date of shipment because Commerce determined that the prices in Suntech's contracts for sale of subject merchandise can change after the original contract is executed. *Id.* at 93. These changes resulted in Commerce assigning a 33.08 percent margin to mandatory respondent Suntech and a de minimis margin to Yingli. *Final Results*, 80 Fed. Reg. at 41,001. Commerce also continued to find that ERA Solar was ineligible for a separate rate. Final Decision Memo at 11–12. Commerce assigned the China-wide entity, including ERA Solar, a rate of 238.95 percent. *Final Results*, 80 Fed. Reg. at 41,002, 41,002 n.49.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "The court shall hold unlawful any determination, finding, or conclusion found.

[4] As it had done in the preliminary determination, Commerce calculated the final effective China-wide entity rate of 238.56 percent by offsetting the final China-wide ADD rate of 249.96 percent by the amount of export subsidies and estimated domestic subsidy pass-through, as directed by the statute. *Final Results*, 80 Fed. Reg. at 41,001 n.50; *see also* 19 U.S.C. § 1677a(c)(1)(C) (providing that the price used to establish export price and CEP in a review shall be increased by "the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy").

. .to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Application of AFA to Goal Zero

Goal Zero challenges Commerce's application of the non-market economy ("NME") presumption to ERA Solar, Goal Zero's exporter, as unsupported by substantial evidence. *See* Goal Zero Br. 10–19. Further, Goal Zero argues that the application of a China-wide rate based on AFA is contrary to law and unsupported by substantial evidence. *See id.* at 19–25. Lastly, Goal Zero challenges the AFA rate assigned to the China-wide entity as contrary to law and unsupported by substantial evidence because it is uncorroborated. *See id.* at 26–38. The court addresses each challenge in turn.

A. Application of the NME Presumption

Goal Zero argues that Commerce's application of a rebuttable presumption that all respondents are government controlled is contrary to law because it is inconsistent with Commerce's findings in countervailing duty ("CVD") proceedings that market-oriented reforms render many companies' export activities independent of the Chinese government. *See* Goal Zero Br. 10–15. Defendant responds that the court should decline to decide this issue because Goal Zero failed to exhaust this issue at the administrative level. Def.'s Mem. Opp'n Pls.' Rule 56.2 Mots. J. Upon Agency R. Confidential Version 9–10, Dec. 14, 2016, ECF No. 80 ("Def.'s Resp. Br."). Defendant argues that, even if Goal Zero exhausted its administrative remedies, Commerce's application is consistent with its longstanding practice and supported by substantial evidence. *Id.* at 10–17. The court first addresses Defendant's exhaustion argument. Thereafter, the court proceeds to address the legal bases for Commerce's application of the NME presumption to ERA Solar.

1. Exhaustion of Administrative Remedies

Defendant argues that Goal Zero failed to exhaust its administrative remedies. Def.'s Resp. Br. 9–10. Goal Zero responds that its challenge should be reviewed by the court because other parties raised and extensively briefed the challenge to Commerce's NME presumption at the administrative level. Reply Br. Consolidated Pl. Goal Zero, LLC Confidential Version 2–7, Feb. 16, 2017, ECF No. 100 ("Goal Zero Reply Br."). The court reaches Goal Zero's challenge to the NME presumption because Commerce had ample opportunity to address the arguments supporting this challenge.

Congress has directed that the Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Although the statute requires that parties exhaust their remedies before the pertinent administrative agencies, it also allows the court some degree of discretion to consider circumstances where a strict application of the rule may be inappropriate. *See* 28 U.S.C. § 2637(d); *see also Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (stating that the Court should ordinarily insist that parties exhaust their remedies before the pertinent agency, but the statutory injunction is not absolute). The overarching purpose of the exhaustion doctrine is to "allow[] the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review–advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)).

Here, Commerce had sufficient opportunity to address the legal viability of the NME presumption and its applicability in this proceeding in its final determination because Suntech's brief before the agency raised the same issues.[5] *See* Case Brief of Wuxi Suntech Power Co., Ltd. at 6–12, CD 577, bar code 3275378–01 (May 8, 2015). Indeed, Commerce squarely addressed these arguments, which are materially identical to those raised by Goal Zero here, in its final determination.[6] *See* Final Decision Memo at 98–101. Commerce had ample opportunity to apply its expertise, address any errors made at the administrative level, and develop a record upon which to ensure adequate judicial review.

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[5] Specifically, Suntech argued before Commerce that Commerce's practice of presuming government control of entities operating in NMEs should be abandoned because the presumption is inconsistent with its determination that subsidies are identifiable and measurable in cases involving China. *See* Case Brief of Wuxi Suntech Power Co., Ltd. at 6, CD 577, bar code 3275378–01 (May 8, 2015). Suntech also explicitly argued that this aspect of Commerce's separate rate practice was at odds with Commerce's findings in CVD proceedings regarding economic and legal reforms made in the Chinese economy that made the Chinese economy significantly different than when Commerce first implemented its separate rate practice. *See id.* at 7–9. Further, Suntech contended before Commerce that the findings on which Commerce relied to support the application of CVD law to NME entities directly contravenes the assumptions about the Chinese economy underlying the NME presumption. *See id.* at 9–12.

[6] Commerce cited precedent that it is within Commerce's authority to employ a presumption for state control in a NME country and to place the burden on exporters to demonstrate an absence of government control. *See* Final Decision Memo at 98 (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997)). Further, Commerce distinguished the concept of the "NME-wide entity" for ADD purposes from the "single economic entity" concept discussed in Commerce's treatment of NMEs in the CVD context. *See id.* at 99–100. Specifically, Commerce explained that the NME presumption does not stem from an economy comprised of the government, but rather from "the NME-government's use of a variety of legal and administrative levers to exert influence and control (both direct and indirect) over the assembly of economic actors across the economy." *Id.* at 100.

2. Commerce's Application of the NME Presumption to ERA Solar

Goal Zero contends that Commerce's application of the NME presumption is unsupported by substantial evidence because the presumption is outdated and inconsistent with Commerce's recent findings that the Chinese economy is not composed of a single economic entity.[7] *See* Goal Zero Br. 10–15. Defendant responds that the NME presumption is in accordance with law and that Commerce's findings that the NME presumption should be applied to ERA Solar are not inconsistent with Commerce's findings that CVD law is applicable to China. Def.'s Resp. Br. 17–22. The court agrees with the Defendant.

A NME country is defined in the statute as "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). The statute provides a non-exhaustive list of factors for Commerce to take into account in determining whether a country is a NME country. *See* 19 U.S.C. § 1677(18)(B)(i)–(vi). Once Commerce determines that a country is a nonmarket economy, that determination shall remain in effect until revoked.[8] *See* 19 U.S.C. § 1677(18)(C). In cases involving imports from a NME country, Commerce's regulations permit it to calculate a single dumping margin applicable to all exporters and producers that are not individually examined. *See* 19 C.F.R. § 351.107(d) (2014).[9] Nothing in the statute requires that Commerce determine that exporters operating within a NME country may or may not operate freely of government control. Commerce acts within its discretion to develop a reasonable methodology for determining whether an exporter operates independently of government control in a NME country. Therefore, it is not unreasonable for Commerce to presume government control of an exporter in a NME country. Commerce's practice requires that a party's separate rate status be established in each segment of the proceeding in which the party is involved because a company's corporate structure, ownership, or relationship with the government may change from one segment of a proceeding to the next. Final Decision Memo at 13 (citing Wooden Bedroom Furniture from the [PRC]: Issues and Decision Memoran-

[7] By practice, Commerce employs a presumption of government control for NME-based exporters. *See*, *e.g.*, Final Decision Memo at 98. As a result of this presumption, Commerce assigns all exporters of merchandise subject to review in a NME country a single rate unless an exporter can "demonstrate an absence of central government control." *See id.*

[8] Neither the statute nor Commerce's regulations defines procedures for Commerce to determine whether a country is a NME country.

[9] Further citations to Title 19 of the Code of Federal Regulations are to the 2014 edition.

dum for the Final Results of Review, A-570–890, 7 (Jun. 5, 2013), *available at* http://ia.ita.doc.gov/frn/summary/prc/2013–13987–1.pdf (last visited Jun. 23, 2017)).

Here, Commerce justified the continued viability of the NME presumption on the grounds that it reasonably determines that governments may "use a variety of legal and administrative levers to exert influence and control (both direct and indirect) over the assembly of economic actors across the economy" even where the economy is not comprised entirely of the government. *See* Final Decision Memo at 100. Goal Zero points to no reason why it is unreasonable to conclude that an entity could be controlled by the government where the government does not comprise the entire economy. Commerce reasonably explains why its presumption that an exporter in a NME country is benefiting from government control is compatible with its finding that the Chinese economy has undergone reforms to eliminate the government as a single central authority comprising the entire economy.

Goal Zero argues that Commerce's NME presumption of state control is unreasonable in light of Commerce's findings that changes in the Chinese economy have left Chinese respondents with "'the discretion to change [their] export and/or production decisions.'" *See* Goal Zero Br. 11–14 (quoting Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the [PRC], A-570–912, 10 (July 7, 2008), *available at* http://ia.ita.doc.gov/frn/summary/prc/E8–16156–1.pdf (last visited Jun. 23, 2017)). Further, Goal Zero cites Commerce's recognition that more companies' export activities in China are independent from the government in comparison to the early to mid-1990s.[10] *Id.* at 11–12. However, Commerce explains that the NME presumption does not stem from a determination that individual companies operating within a NME country are government entities, but rather that the NME-government can exert influence over economic actors in such an

[10] Goal Zero notes that a recent World Trade Organization ("WTO") panel decision has found that the NME presumption employed by Commerce is inconsistent with the WTO Antidumping Agreement. Goal Zero Reply Br. 9 (citing Panel Report, *United States-Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS741/R, ¶ 3.1.d (2016), *available at* https://www.wto.org/english/tratop_e/dispu_e/471r_e.pdf (last visited Jun. 23, 2017) ("*US-AD Methodologies (China)*")). However, WTO decisions "are not binding on the United States." *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1348–49 (Fed. Cir. 2005). Moreover, although Goal Zero claims that the United States has not appealed the panel decision and indicated it will implement the panel's decision, *see* Goal Zero Br. 12, it is unclear what steps the United States has undertaken thus far to adopt and implement the *US-AD Methodologies (China)*. Congress has enacted legislation on if and how to implement WTO decisions. *See Corus Staal*, 395 F.3d at 1349; *see also* 19 U.S.C. §§ 3353(f), (g) (providing procedures to adopt and implement WTO decisions into United States law).

economy. *See* Final Decision Memo at 100. Commerce's practice allows a respondent to prove its independence from the government by means of a separate rate application, and it is reasonable to place the burden on a respondent to prove its independence from government control even where economic and legal reforms have progressed to a point where some firms operate freely of government control.[11]

B. Assignment of China-Wide Rate to ERA Solar

Goal Zero claims that Commerce's assignment of the China-wide rate to ERA Solar on the basis that it is government-controlled is unsupported by substantial evidence. Goal Zero Br. 16–19. Defendant counters that Commerce's determination to include ERA Solar within the China-wide entity is supported by substantial evidence because ERA Solar failed to put forth any evidence supporting its eligibility for a separate rate. Def.'s Resp. Br. 17–22. The court agrees with Defendant. Commerce's assignment of the China-wide rate to ERA Solar is supported by substantial evidence.

As already discussed, Commerce's regulations permit it to calculate a single dumping margin applicable to all exporters and producers that are not individually examined in cases involving a NME country. *See* 19 C.F.R. § 351.107(d). Here, Goal Zero does not dispute Commerce's finding that ERA Solar did not meet its burden to demonstrate independence from state control because it did not submit a separate rate application in this administrative review. *See* Final Decision Memo at 11; Goal Zero Br. 18. Because ERA Solar failed to submit any separate rate documentation, Commerce determined that ERA Solar did not qualify for a separate rate. Final Decision Memo at 11. Commerce would not excuse ERA Solar's failure to submit separate rate information because Commerce reasonably determined that ERA Solar had notice that it was subject to the review.[12] *Id.* at 12.

Goal Zero argues that it is unreasonable to presume that ERA Solar is government-controlled for this review where Commerce prelimi-

[11] Goal Zero's separate point that Commerce's NME presumption in ADD proceedings is arbitrary because it simultaneously treats ERA Solar as government-controlled in the ADD proceeding while treating the company as independent of government control in the CVD proceeding, *see* Goal Zero Br. 14–15, stems from the same flawed understanding of the premise for Commerce's decision to apply CVD law to China. Commerce treats ADD and CVD proceedings differently because of the different nature of the inquiry in ADD and CVD proceedings. It is reasonably discernible that Commerce applies the NME presumption in ADD proceedings and evaluates the bestowals of countervailable subsidies precisely because reforms are uneven and some economic actors do not take advantage of the legal and administrative levers the NME-government may use to exert influence and control. *See* Final Decision Memo at 100. Accordingly, as already discussed, Goal Zero's contention that Commerce's presumption is called into question by its own findings regarding the application of CVD law in China are misplaced.

[12] Further, Commerce noted that ERA Solar had participated and received a separate rate in the investigation of this proceeding. *See* Final Decision Memo at 13.

narily recognized ERA Solar's entitlement to a separate rate in the second administrative review of this same order and in the companion CVD administrative review. *See* Goal Zero Br. 18–19. Commerce explained that the agency cannot rely on a party's separate rate eligibility in one segment of a proceeding as evidence of eligibility in a prior or subsequent segment. Final Decision Memo at 13 ("[A] party's separate rate status must be established in each segment of the proceeding in which the party is involved because a company's corporate structure, ownership, or relationship with the government can change from one segment of a proceeding to the next."). Although Goal Zero claims that no such changes to ERA Solar's corporate structure actually occurred from the investigation to the second period of review, *see* Goal Zero Br. 19, it is reasonably discernible that Commerce relies upon the record of each proceeding because it is not burdensome for a company, which is in the best position to produce such information, to provide such information in each segment. *See* Final Decision Memo at 13. Based upon the record here, Commerce's determination to deny separate rate status based upon ERA Solar's failure to submit a separate rate certification is supported by substantial evidence.[13]

C. Application of AFA to the China-Wide Entity

Goal Zero argues that, in applying an adverse inference, Commerce unreasonably imputed non-cooperation to all members of the NME

[13] Goal Zero claims that case law requires Commerce to look to preceding and future reviews for guidance to determine whether ERA Solar is government-controlled. *See* Goal Zero Br. 18–19 (citing *Calgon Carbon Corp. v. United States*, 40 CIT __, __, 145 F. Supp. 3d 1312, 1322 n.11 (2016)). However, in *Calgon*, the court held that Commerce's determination to deny the respondent a separate rate status was unsupported by substantial evidence because Commerce had not addressed respondent's arguments challenging the basis for the presumption of state control. *See Calgon*, 40 CIT at __, 145 F. Supp. 3d at 1322. The court made clear that it did not intend the holding to apply in a context where Commerce had provided substantive arguments supporting the NME presumption, stating that "[t]his is not to say that, in a future review or in another case, Commerce could not make the proper showing to justify its continued presumption of state control even in contemporary circumstances." *Id.* The court merely drew attention to the fact that the respondent had been designated for separate rate status in the preceding and subsequent reviews to support its determination that Commerce's denial was not supported by substantial evidence. *See id.* The court did not hold or suggest that Commerce must look to a party's separate rate status in a prior or subsequent proceeding. *See id.*

Goal Zero also implies that Commerce has a practice of looking to future reviews for guidance in making determinations about an exporter's entitlement to a separate rate where there is no evidence on the record in the administrative review at issue. Goal Zero Br. 18–19 (citing *Changzhou Hawd Flooring Co., Ltd. v. United States*, 39 CIT __, __, 44 F. Supp. 3d 1376, 1386 (2015)). However, the case cited by Goal Zero does not establish any such practice. In *Changzhou Hawd*, Commerce did not look to prior or future segments of the proceeding to determine an exporter's entitlement for a separate rate, but rather corroborated the inference of a more than de minimis separate rate with citation to the results of a future review. *See Changzhou Hawd Flooring Co., Ltd.*, 39 CIT at __, 44 F. Supp. 3d at 1386.

entity when most of the respondents fully cooperated. Goal Zero Br. 20–25. Defendant responds that Commerce reasonably applied AFA to determine the China-wide rate because Commerce determined that the China-wide entity failed to cooperate by acting to the best of its ability, because PRC exporters or producers that are part of the China-wide entity failed to respond to quantity and volume ("Q&V") questionnaires. Def.'s Resp. Br. 24–26. Commerce's application of an AFA rate to the China-wide entity is in accordance with law and supported by substantial evidence.

Commerce shall use "facts otherwise available in reaching the applicable determination" when a respondent: (1) withholds information that has been requested by Commerce; (2) fails to provide such information by Commerce's deadlines for submission of the information or in the form and manner requested; (3) significantly impedes an antidumping proceeding; or (4) provides information that cannot be verified. 19 U.S.C. § 1677e(a)(2). Commerce may apply an adverse inference in choosing among facts available if the respondent's failure to act to the best of its ability to comply with Commerce's request for information caused the deficiency. 19 U.S.C. § 1677e(b); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003).

Here, Commerce justified its determination to apply AFA to the China-wide entity because Chinese exporters of subject merchandise during the POR that are part of the China-wide entity did not respond to Commerce's Q&V questionnaires.[14] *See* Final Decision Memo at 15; Prelim. Decision Memo at 17. Goal Zero offers no record evidence to detract from Commerce's finding that these companies withheld requested information and, therefore, failed to act to the best of their ability. Therefore, Commerce's determination that the China-wide entity failed to cooperate by acting to the best of its ability is in accordance with law and supported by substantial evidence.

Goal Zero further argues that Commerce lacked substantial evidence to determine that the China-wide entity failed to cooperate to the best of its ability because only two companies for which Commerce completed the review did not respond to its Q&V questionnaires. Goal Zero Br. 22–23. However, the statute only requires that Commerce assess the extent of the China-wide entity's abilities,

[14] Commerce noted that it received Q&V responses from 27 companies. Prelim. Decision Memo at 2. However, Commerce found that "[o]nly 19 of the 23 companies to which [it] sent a Q&V questionnaire responded to the questionnaire." *Id.* at 2 n.3.

efforts, and cooperation. *See Nippon Steel*, 337 F.3d at 1382.[15] Although Commerce could conceivably have taken the extent to which individual members of the China-wide entity cooperated with its requests into account, nothing in the statute requires it to make such an individualized inquiry of respondents that are part of the China-wide entity.[16] Commerce found some respondents that were sent Q&V questionnaires failed to provide information that they reasonably could have been expected to maintain.[17] *See* Final Decision Memo at 15. Therefore, Commerce's determination that the China-wide entity as a whole failed to cooperate to the best of its ability is supported by substantial evidence.[18]

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[15] The statute requires Commerce to first "make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained." *Nippon Steel*, 337 F.3d at 1382. Second, Commerce must make a subjective showing that the respondent's failure to respond is the result of the respondent's lack of cooperation in either: "(a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.*; *see* 19 U.S.C. § 1677e(b).

[16] Goal Zero claims that Commerce has a practice of adjusting the China-wide rate to reflect past cooperation by a respondent that has previously been granted a separate rate in other segments of the same proceeding. Goal Zero Br. 25 (citing *Diamond Sawblades Manufacturers' Coalition v. United States*, 39 CIT __, 2015 WL 5603898 at *8 (2015)). However, the facts here are sufficiently distinguishable from those in *Diamond Sawblades* to reasonably justify Commerce's exercise of its discretion to apply AFA to the China-wide entity despite the cooperation of certain members of the China-wide entity. In *Diamond Sawblades*, Commerce initially determined the China-wide rate based on AFA at a time when a certain company and its affiliates were not part of the China-wide entity (and had been granted a separate rate). *See Diamond Sawblades*, 39 CIT at __, 2015 WL 5603898 at *1. On remand, Commerce determined that entity was not entitled to a separate rate and that the China-wide rate should take into account the inclusion of that entity. *See id.* In the instant case, the China-wide rate was never calculated based upon the extent of cooperation or data of different respondents because Commerce calculated the rate from the outset based upon ERA Solar's non-cooperation. *See* Final Decision Memo at 15.

[17] Goal Zero argues that it is unreasonable for Commerce to conclude that the NME entity was uncooperative, where there was no evidence or explanation on the record of the impact that the absence of the Q&V responses had on Commerce's conduct of its administrative review. *See* Goal Zero Br. 22–24. Goal Zero points out that "[[
]]." *Id.*at 23 (citing Release of Customs and Border Protection Data, CD 7, bar code 3179850–01 (Feb. 10. 2014)). Therefore, Goal Zero claims that the lack of a Q&V response did not have the potential to distort the pool of respondents or to affect Commerce's margin calculations. *Id.* at 24. However, Goal Zero points to nothing in the statute requiring Commerce to consider the effect of the missing information or requiring Commerce to explain why information requested is relevant to its determination.

[18] Commerce gives all respondents an ability to establish independence from government control through its separate rate practice. It is not unreasonable for Commerce to evaluate the conduct of the China-wide entity as a whole given that these parties failed to preserve their entitlement to individualized inquiry. Goal Zero points to nothing in the statute that requires Commerce to evaluate the conduct of each individual member of the China-wide entity to assess whether the China-wide entity cooperated to the best of its ability.

D. Selection and Corroboration of the China-Wide Rate

Goal Zero argues that Commerce's selection of the 249.96 percent rate as the AFA rate is unsupported by substantial evidence because it is not sufficiently corroborated, as required by the statute. Goal Zero Br. 26–38. Defendant responds that Commerce selected the highest rate in the history of the proceeding and corroborated its rate by comparing the petition margins to the margins calculated for the individually examined respondents to determine their probative value. Def.'s Resp. Br. 29. Commerce's selection of an AFA rate is in accordance with its practice and it is adequately corroborated. Therefore, Commerce's selection of an AFA rate for the China-wide entity is supported by substantial evidence and in accordance with law.

Commerce may rely on information from several sources in selecting an AFA rate, including: (1) the petition; (2) the final determination in the investigation; (3) any previous administrative review; or (4) any other information placed on the record. 19 U.S.C. § 1677e(b); *see* 19 C.F.R. § 351.308(c) (mirroring the statute's directives regarding the sources Commerce may rely upon when selecting an AFA rate). When Commerce uses secondary information, it must, to the extent practicable, corroborate the rate with independent sources that are reasonably at its disposal. 19 U.S.C. § 1677e(c). Commerce's regulation refers to "secondary information" as information derived from: (1) the petition; (2) a final determination in a CVD investigation or an ADD investigation; (3) any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review, 19 C.F.R. § 351.308(c)(1)(i)–(iii), and defines the corroboration requirement as providing that Commerce "examine whether secondary information to be used has probative value." 19 C.F.R. § 351.308(d). However, Commerce's regulation explicitly states that the fact that information may not be practicably corroborated "will not prevent [Commerce] from applying an adverse inference as appropriate and using the secondary information in question." *Id.*

Here, Commerce referenced its finding in the investigation that the price and normal value used to derive the highest margin contained in the petition were within the range of the U.S. prices and normal values for the respondents in the investigation.[19] Final Decision Memo at 16 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 31,309,

[19] Commerce selected the highest calculated rate applied in the history of the proceeding that could be corroborated pursuant to its practice of selecting an AFA rate that is sufficiently adverse to induce respondent compliance and to ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. Final Decision Memo at 15.

31,318 (Dep't Commerce May 25, 2012) (preliminary determination of sales at less than fair value, postponement of final determination and affirmative preliminary determination of critical circumstances); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 63,791, 63,795 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part)). Commerce also compared the 249.96 percent rate applied to the China-wide entity here to the margins calculated for individually examined respondents, and determined that the margins fall within the range of Suntech's calculated weighted average dumping margins from this review.[20] Final Decision Memo at 17. Commerce noted that several margins calculated for Suntech's sales were "significantly above" the AFA rate applied here and that many more were at a similar level. *Id.* Goal Zero points to no data on the record that undermines Commerce's conclusions that the margins calculated for some of Suntech's sales are at a similar level or above the selected AFA rate. Therefore, Commerce corroborated the China-wide rate to the extent practicable by finding that the China-wide rate was within the range of the margins applicable to respondents from both the investigation and this review, which were calculated from sources allowed by regulation to corroborate secondary information. *See* 19 C.F.R. § 351.308(c)(1)(i)–(iii).

Goal Zero argues that Commerce lacked substantial evidence to conclude that the 249.96 percent rate in the investigation is corroborated because the AFA rate is disproportionately high relative to the calculated rates for any party whose rates were individually calculated. *See* Goal Zero Br. 31–32. However, Commerce enjoys broad discretion to develop a methodology for calculating an AFA rate so long as the rate is corroborated. *See* 19 U.S.C. §§ 1677e(b),(c). Goal Zero points to no information on the record calling into doubt

[20] Defendant and Commerce asserted that, having already corroborated the AFA rate in the investigation, the burden for triggering any corroboration requirement was on Goal Zero to call into question the probative value of the rate. Def.'s Resp. Br. 31; Final Decision Memo at 17. Defendant and Commerce further asserted that the corroboration of the rate in the investigation satisfied the corroboration requirement in the absence of data questioning the probative value of the rate from the investigation. *See* Def.'s Resp. Br. 31; Final Decision Memo at 17. Nonetheless, Commerce corroborated the rate in this review by reference to several margins calculated for Suntech which are significantly above the 249.96 percent and many other margins at a similar level to the margin assigned to the China-wide entity. *See* Final Decision Memo at 17. As a result, the court need not address Defendant's and Commerce's assertions concerning whether the rate must be corroborated by considering information specifically concerning this review.

Commerce's corroboration of the rate as applied to the China-wide entity.[21] Moreover, none of the authority relied upon by Goal Zero requires that the AFA rate selected for the China-wide entity reflect commercial reality of individually investigated respondents.[22]

Lastly, Goal Zero argues that the petition rate used by Commerce to corroborate the rate applied to the China-wide entity is unreliable because it is based on different methodologies than those used by Commerce in the investigation and administrative review, including different primary surrogate countries and values for certain key inputs. *See* Goal Zero Br. 36–38. However, Goal Zero failed to exhaust its administrative remedies because it did not raise these arguments before Commerce.[23] *See* Case Brief of Goal Zero, LLC, PD 568, bar code 3265921–01 (Mar. 23, 2015) ("Goal Zero Adm. Case Br."). None of

[21] Goal Zero questions why Commerce relies upon Suntech's data to the exclusion of data for other individually investigated respondents to corroborate the China-wide rate. *See* Goal Zero Br. 33. Further, Goal Zero claims that Commerce's final margin analysis of Suntech reveals that there were only [[ ]] the 249.96 percent petition rate. *Id.* (citing Analysis of the Final Results of Administrative Review Margin Calculation for Wuxi Suntech Power Co., Ltd. at Attach. I, CD 606, bar code 3290605–01 (July 13, 2015)). However, Goal Zero points to no authority requiring Commerce to find that all individually examined respondents had margins close to the AFA rate selected where Commerce uses AFA to calculate a rate.

[22] Goal Zero's reliance on *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319, 1324–25 (Fed. Cir. 2010), *see* Goal Zero Br. 31–32, is misplaced. In *Gallant Ocean*, the Court of Appeals for the Federal Circuit held that Commerce imposed an unreasonably high rate on a separate rate respondent because the rate did not reflect commercial reality as it was more than ten times higher than the average dumping margin for cooperating respondents. *Gallant Ocean*, 602 F.3d at 1324. In contrast, here Commerce is corroborating the China-wide rate, not a rate applied to respondents that qualified for a separate rate. *See* Final Decision Memo at 15. *Gallant Ocean* does not require that the rate assigned to the China-wide entity be a reasonably accurate estimate of the rate established for cooperating respondents. *See Gallant Ocean*, 602 F.3d at 1324–25.

Likewise, Goal Zero's reliance on *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373 (Fed. Cir. 2016), *see* Goal Zero Reply Br. 21–22, is similarly misplaced. That case involved the corroboration of an AFA rate applied to an individually examined mandatory respondent, not the corroboration of a NME-wide rate applied to a respondent that had failed to rebut the presumption of government control. *See Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1376 (Fed. Cir. 2016).

The Court of Appeals for the Federal Circuit held that Commerce properly corroborated its selection of a petition rate where Commerce explains why the petition rate continues to be relevant. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1360 (Fed. Cir. 2015). Here, Commerce explained the continued reliability of the rate by referencing individual margins for Suntech in this proceeding. *See* Final Decision Memo at 17. The Court of Appeals for the Federal Circuit further stated that the availability of lower calculated dumping margins for cooperating respondents that have demonstrated eligibility for a separate rate does not render a higher calculated rate based on AFA for the China-wide entity uncorroborated. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d at 1361.

[23] As already discussed, where appropriate, the court shall require the exhaustion of administrative remedies. 19 U.S.C. § 2637(d). The doctrine allows Commerce to "apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review," *see Carpenter Tech.*, 30 CIT at 1374–75, 452 F. Supp. 2d at 1346 (citing *Woodford v. Ngo*, 548 U.S. at 88–90), before the court steps in to review Commerce's determination.

the arguments raised by Goal Zero before the agency implicate the methodological differences between the rates calculated in the petition and prior segments of the proceeding and the calculated rates in this administrative review.[24] *See id.* at 5–10. The purpose of the exhaustion requirement would not be served by reviewing the reliability of the rates Commerce used to corroborate based upon methodological distinctions without Commerce having the opportunity to make a determination, finding, or conclusion on those challenges.

II. Surrogate Value Data

SolarWorld challenges Commerce's selection of import data under Thai HTS heading 7604 to value Yingli's aluminum frames inputs, *see* SolarWorld Br. 14–21, and Commerce's use of world polysilicon prices to value semi-finished polysilicon ingots and blocks purchased by Yingli, *see id.* at 21–25, as unsupported by substantial evidence. SolarWorld also challenges Commerce's determination to offset selling, general, and administrative ("SG&A") expenses by income labeled in its surrogate profit ratio calculation. *See id.* at 42–44. The court first reviews Commerce's selection of SV data for aluminum frames and next reviews Commerce's selection to value semi-finished polysilicon ingots and blocks. Thereafter, the court turns to Commerce's adjustments to its surrogate profit ratio calculation.

A. Aluminum Frames

SolarWorld argues that Commerce unreasonably selected import data for Thai HTS subheading 7604.29, which includes "Aluminum bars, rods and profiles: Other" because the import data under this category is not specific to aluminum solar frames. SolarWorld Br. 14–21. Specifically, SolarWorld argues that the aluminum solar frames purchased by Yingli "have been further manufactured and processed into a good" that can no longer be considered a profile and has assumed the character of a different heading. *Id.* at 19. Defendant responds that Commerce reasonably concluded that import data under HTS heading is the best available information to value the frames purchased because it is most specific to the aluminum solar frames purchased by Yingli, which Yingli describes as "non-hollow, aluminum profiles." Def.'s Resp. Br. 36–40. For the reasons that follow,

[24] In its case brief, Goal Zero challenged the AFA rate as uncorroborated on the basis that: (1) it was not representative of the rates of the individually investigated respondents, *see* Goal Zero Adm. Case Br. at 5; (2) Commerce should have corroborated the AFA rate with transaction-specific margins specific to respondents in this review, including the review-specific margins of Yingli, *see id.* at 7–8; and (3) the selected rate did not reflect commercial reality because the calculated AFA is many times greater than the rate calculated for the mandatory respondent and separate rate respondents, *see id.* at 9.

Commerce's selection of import data under HTS subheading 7604.29 is supported by substantial evidence.

In cases involving imports from NME countries, Commerce obtains a normal value by adding the value of the FOPs used to produce the subject merchandise and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Commerce values the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries." *Id.* Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Jun. 23, 2017) ("*Policy Bulletin 04.1*"); Prelim. Decision Memo at 28.

Here, Commerce concluded that import data under HTS subheading 7604.29, covering "aluminum alloy bars, rods and profiles, other, other than hollow profiles, other" is the best available information to value aluminum frames purchased by Yingli because the data is more specific to Yingli's solar frames than import data under HTS subheading 7616.99, covering "articles of aluminum nesoi." Final Decision Memo at 81–82. Commerce concluded that HTS heading 7604 is more specific than HTS subheading 7616.99 because HTS 7616.99 is "an 'other' category that includes products dissimilar to aluminum frames," *id.* at 81, including "'nails, tacks, staples, screws, bolts, nuts, screw hooks, rivets, cotters, cotter pins, washers, knitting needles, bodkins, crochet hooks, embroidery stilettos, safety pins, other pins and chains, and cloth, grill and netting of aluminum wire.'" *Id.* at 84. Therefore, Commerce reasonably determined that import data under HTS heading 7604 is more specific because SolarWorld points to no evidence indicating that Yingli's aluminum frames are more similar to the products in HTS heading 7616 than those in HTS heading 7604.

SolarWorld's claim that HTS heading 7604 only includes items that are unfinished and Yingli's frames have become finished products is unavailing. First, the notes to Chapter 76 state that profiles include products that "'have been *subsequently worked after production*. . . provided that they have not thereby assumed the character of articles or products of the other headings.'" *See* Final Decision Memo at 82–83 (emphasis in original, quoting *Jiangsu Jiasheng Photovoltaic Technology, Co. v. United States*, 38 CIT __, __, 28 F.Supp.3d 1317, 1337

(2014)). Further, it is reasonably discernible from Commerce's reference to the International Trade Commission's definition of aluminum profiles as "cast sintered, and worked after production," Final Decision Memo at 82, that the work performed on the profiles highlighted by SolarWorld is not sufficient to make Yingli's profiles more similar to the finished products enumerated in a different subheading.[25] SolarWorld points to no evidence detracting from Commerce's determination.[26]

SolarWorld also argues that Commerce unreasonably concluded that Yingli's aluminum frames were "profiles" because profiles must have a uniform cross section. SolarWorld Br. 19–20 (citing the Notes to Chapter 7 of the HTS). SolarWorld suggests that Yingli's profiles are not uniform along their entire length. *Id.* at 20 (citing Yingli's Response to the Department's Fourth Section D Supplemental Questionnaire at Ex. D30, CD 428–430, bar codes 3232605–01–03 (Oct. 1, 2014) ("Yingli 4th Suppl. Sec. D. Resp."). However, Commerce's task is not to classify the solar frame inputs used by Yingli for customs purposes, but to select the best available data to value the FOPs in question. SolarWorld offers no evidence that calls into question Commerce's conclusion that the processing performed by Yingli leaves its solar frames more similar to the unfinished items included in HTS heading 7604 than the dissimilar finished items included in HTS subheading 7616.99. Therefore, Commerce's determination is supported by substantial evidence.

B. Semi-Finished Ingots and Blocks

SolarWorld challenges Commerce's determination to value Yingli's semi-finished ingots and blocks input with the world market price for

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[25] SolarWorld emphasizes the following processing steps, which it argues are [[ ]] to render Yingli's solar frames a finished product classifiable in another subheading: [[ ]]. *See* SolarWorld Br. 15–16.

[26] Commerce concluded that the Customs and Border Protection ("CBP") rulings placed on the record do not support the notion that aluminum frames that have been subsequently worked after production cannot be included in HTS heading 7604. SolarWorld argues that "CBP does not classify finished, 'ready to use' goods, such as frames for solar panels, in 7604." Reply Br. Pl. SolarWorld Americas, Inc. Confidential Version 7–8, Feb. 16, 2017, ECF No. 99 (citing SolarWorld Submission of Factual Information and Submission of Information to Value [FOPs] at Ex. 3, CD 491–512, bar codes 3241320–01–22 (Nov. 10, 2014) ("SolarWorld SV Comments")). Although the CBP ruling cited by SolarWorld states that the aluminum frames, which Commerce classified under HTS 7616.99 are not further processed, nothing in CBP's determination indicates that it relies upon that fact. *See* SolarWorld SV Comments at Ex. 3. Moreover, Commerce notes that another CBP ruling cited by SolarWorld classified aluminum frame sets under HTS category 8541.90. *See* Final Decision Memo at 83. It is reasonably discernible that Commerce determined that this conflicting ruling, which Commerce notes SolarWorld has not argued Commerce should follow, detracts from any claim that CBP relied upon the notion that frames were finished to conclude that they were classifiable under HTS subheading 7616.99. *See id.*

polysilicon, claiming that price does not reflect the substantial additional processing that polysilicon must undergo to become an ingot or block. *See* SolarWorld Br. 23–25. Defendant responds that Commerce's selection is reasonable because there was no surrogate value data for ingots and blocks, and because additional processing was captured elsewhere in Commerce's calculations. *See* Def.'s Resp. Br. 40–41. For the reasons that follow, Commerce's determination is supported by substantial evidence.

As already discussed, Commerce selects the best available information to value FOPs by evaluating data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. *See Policy Bulletin 04.1*; Prelim. Decision Memo at 28. Here, Commerce determined that, because no party submitted a SV for ingots and blocks, the world market price was the best information available to value ingots and blocks purchased by Yingli. Final Decision Memo at 76. Commerce noted that the inputs in question are primarily composed of polysilicon. *Id.* Further, because Yingli self-produces most of its ingots and blocks, Commerce could account elsewhere in its calculations for the additional processing costs to turn polysilicon feedstock into ingots and blocks. *Id.* Therefore, Commerce determined that no reliable record evidence suggests that the world market price for polysilicon would result in unrepresentative pricing for ingots and blocks.[27] *Id.*

SolarWorld contends that Commerce's use of a price for polysilicon fails to capture all the costs associated with the ingots and blocks. No party submitted SV data for ingots and blocks and additional manufacturing is required to transform polysilicon into ingots and blocks. *Id.* Yet, Commerce concluded that additional manufacturing costs were already accounted for because "Yingli self-produces most of its ingots and blocks." *Id.* Commerce found further adjustments unnecessary. *Id.* However, SolarWorld claims that, because evidence on the record indicated that Yingli purchased a significant portion of the blocks consumed in the production of subject merchandise, Commerce erroneously concluded that the additional processing costs required to manufacture ingots and blocks were accounted for elsewhere in the

[27] Commerce declined SolarWorld's suggestion that it compare Yingli's market economy purchases of ingots and blocks to the SV generated from its SV data selection for valuing ingots and blocks because it concluded that its market economy purchases are not necessarily representative of industry-wide prices available to other producers. Final Decision Memo at 76. SolarWorld points to no evidence to undermine Commerce's conclusion that the market economy purchases of polysilicon ingots and blocks were unrepresentative of industry-wide prices.

calculation.[28] SolarWorld Br. 24 (citing Yingli's Response to the Department's Section D Questionnaire, Including Related Appendices at Exh. D-5, CD 173–176, bar codes 3201697–01–04 (May 13, 2014)). However, the data relied upon by SolarWorld does not undermine Commerce's conclusion that the agency accounted for processing costs required to manufacture the ingots and blocks for most merchandise. Yingli highlights record evidence demonstrating that the total purchases of ingots and blocks relative to the volume of ingots and blocks consumed during the period of review ("POR") was not significant.[29] *See* Oral Arg. 01:21:22–01:24:36, May 5, 2017, ECF No. 129 (comparing Yingli 4th Suppl. Sec. D. Resp. at Revised Exh. D-7 (outlining consolidated purchases by Yingli entities of monocrystalline and polysilicon blocks and ingots during the POR) with Yingli 4th Suppl. Sec. D. Resp. at Exh. D-20 (outlining total consolidated quantities of ingots and blocks consumed by Yingli entities during the POR)). It is reasonably discernible that Commerce considered the imperfect nature of the surrogate value, noting that no party had submitted SV for ingots and blocks that were purchased, and reasoned that it had chosen "the best SV information on the record to value Yingli's ingots and blocks" because it had accounted for most of the additional processing costs. *See* Final Decision Memo at 76. Although SolarWorld claims that the record contained information to allow Commerce to add processing costs onto the value of polysilicon to build up a price for these inputs,[30] *see* SolarWorld Br. 23–24, the availability of another methodology does not make Commerce's determination unreasonable given the record evidence.

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[28] SolarWorld highlights evidence showing the extent of Yingli's market economy purchases relative to its total purchases of blocks. SolarWorld Br. 24. SolarWorld argues that Yingli's responses to Commerce's Section D Questionnaire demonstrate that its "purchases of [[ ]]." *Id.* An examination of the record evidence relied on by SolarWorld reveals that the exhibit contains spreadsheets reflecting only market economy purchases and not total purchases of ingots and blocks by Yingli and related entities. *See* Yingli's Response to the Department's Section D Questionnaire, Including Related Appendices at Exh. D-5, CD 173–176, bar codes 3201697–01–04 (May 13, 2014). However, the share of market economy purchases of ingots and blocks says nothing about the fraction of overall purchases of ingots and blocks.

[29] At oral argument, Yingli highlighted record evidence demonstrating that Yingli purchased just [[ ]] percent of total polysilicon blocks and [[ ]] percent of total polysilicon ingots used during the POR. *See* Oral Arg. 01:21:22–01:24:36, May 5, 2017, ECF No. 129 (citing Yingli 4th Suppl. Sec. D. Resp. at Revised Exh. D-7 (outlining consolidated purchases by Yingli entities of monocrystalline and polysilicon blocks and ingots during the POR); Yingli 4th Suppl. Sec. D. Resp. at Exh. D-20 (outlining total consolidated quantities of ingots and blocks consumed by Yingli entities during the POR)).

[30] Specifically, SolarWorld claims that "Commerce could have started with its [SV] for polysilicon and [[ ]]." SolarWorld Br. 23. Yingli points to several issues with SolarWorld's suggested approach including: (1) assuming that Yingli self-produced all of the ingots and blocks consumed would overvalue a substantial number of its purchased ingots; and (2) Commerce lacks data for inputs valued on a proper basis to

Lastly, SolarWorld argues that Yingli's market economy purchases demonstrate that the SV chosen by Commerce is aberrational. *See* SolarWorld Br. 25. Commerce cited its practice, which is not to use a respondent's market economy purchase prices as benchmarks because those prices are specific to one respondent and not necessarily representative of industry-wide prices available to other producers. Final Decision Memo at 76. It is reasonably discernible from Commerce's statement that most of the ingots and blocks used by Yingli in production are self-produced that Commerce considered the small scale of Yingli's market economy purchases to be a weak indicator of industry-wide pricing. *See id.* SolarWorld points to no evidence that Yingli's market economy purchases were more representative in this case to justify a deviation from Commerce's cited practice, which is not to use a respondent's market economy purchase prices as a benchmark to determine if a surrogate value is aberrational. *See id.* (citing Issues and Decision Memorandum for the 2003–2004 [ADD] Administrative Review: Certain Cased Pencils from the [PRC], A-570–827, 8 (July 6, 2006), *available at* http://ia.ita.doc.gov/frn/summary/prc/E6–10568–1.pdf (last visited Jun. 23, 2017) (stating that pricing data can be selectively obtained and does not serve as a basis for evaluating whether other pricing from other data sources is unreliable)).

C. Calculation of Surrogate Financial Profit Ratio to Include "Other Income"

SolarWorld challenges as unsupported by substantial evidence Commerce's deduction of a line item labeled "Other Income" in the financial statements of PT Len Industri (Persero) ("PT Len"), an Indonesian producer of electrical equipment including solar modules, whose financial statements Commerce selected to calculate respondents' surrogate financial profit ratio. *See* SolarWorld Br. 43–44; *see also* Prelim. Decision Memo at 33.

As already discussed, Commerce obtains a normal value in NME cases by adding the value of the FOPs used to produce the subject merchandise and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Neither the statute nor Commerce's regulations further define how Commerce is to calculate its surrogate financial profit ratio. Nonetheless, as a matter of practice, Commerce typically offsets

make the suggested adjustment. *See* Resp. Def.-Intervenors, Yingli Green Energy Holding co., Ltd., et al. Opp'n Pl's Rule 56.2 Mot. J. Agency R. Confidential Version 13, Jan. 1, 2017, ECF No. 89. Although Commerce does not reference these specific issues, it is reasonably discernible from Commerce's observation that the SV selected would account for processing costs for most of the ingots and blocks used in production that Commerce favored an approach that would lead to the least distortion. *See* Final Decision Memo at 76. Commerce's determination is therefore supported by substantial evidence.

a company's SG&A expenses by any income related to the general operations of the company for the current period, when calculating the surrogate profit ratio. *See* Final Decision Memo at 60; 1,1,1,2-Tetrafluoroethane from the [PRC]: Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value [ADD] Investigation, A-570–998, 46–47 (Oct. 14, 2014), *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–24903–1.pdf (last visited Jun. 23, 2017) ("1,1,1,2 Tetra from PRC I&D"). Here, Commerce offset the SG&A expenses in the surrogate profit ratio calculation with the "other income" line item on PT Len's financial statements. *See* Final Decision Memo at 60. Commerce explained that the "other income" line item consists of "foreign exchange," "interest from bank," and "interest income," which are among the types of expenses that it normally allows to offset SG&A expenses. *Id.*(citing SolarWorld Submission of Factual Information at Ex. 24 at 524, CD 491–512, bar code 3241320–01–22 (Nov. 10, 2014) ("SolarWorld Factual Info.")). Commerce further explained its determination by referencing its practice in NME cases of assuming that unassigned income relates to a company's general operations, absent evidence indicating that such income relates to a specific expense. *Id.* (citing 1,1,1,2 Tetra from PRC I&D at 46–47). SolarWorld claims that no record evidence indicates that the sums deducted were overhead expenses normally deducted by Commerce. *See* SolarWorld Br. 43. Yet, SolarWorld does not challenge the reasonableness of Commerce's practice, nor does it point to record evidence indicating that the "other income" line item relates to a specific expense unrelated to PT Len's general operations. Here, not only does Commerce point to record information indicating that the "other" income line item was grouped with line items that are attributable to general overhead, but Commerce also points to record evidence indicating that PT Len actually treated the "other income" line item as income attributable to the general operations of the company.[31] Final Decision Memo at 60. Therefore, Commerce's determination is supported by substantial evidence.

[31] Commerce references record evidence indicating that the "other income" line item was used in determining profit before income tax, to explain why treating PT Len's "other income" line item as overhead expenses was consistent with the agency's practice of attributing such items to general operations. Final Decision Memo at 60. SolarWorld argues that Commerce provides no cite to the record indicating where it obtained this information. *See* SolarWorld Br. 44. Defendant clarifies that Commerce is referring to PT Len's financial statements, which demonstrate that "the amount for 'other income' (22,350,878,864) was added to operating profit when calculating profit before income tax." Def.'s Resp. Br. 51 (citing SolarWorld Factual Info. at Ex. 24 at 489). Although Commerce should have referenced the specific record evidence supporting its determination to allow SolarWorld to verify the accuracy of its finding, it is reasonably discernible from the specificity of Commerce's reference in its final determination that its determination is based on the record evidence highlighted by Defendant. *See* Final Decision Memo at 60.

III. Suntech's CEP Sales

The court first addresses SolarWorld's challenge to Commerce's inclusion of Suntech's U.S. sales to an affiliated party as CEP sales in its calculation of Suntech's dumping margins. *See* SolarWorld Br. 25–33. The court next addresses SolarWorld's alternative challenge, which argues that Commerce inappropriately determined the date of sale for Suntech's reported CEP sales. *See id.* at 29–32.

A. Treatment of Suntech's Sales to U.S. Affiliate as CEP Sales

SolarWorld argues that Commerce lacked substantial evidence to include sales to an affiliated party in Suntech's margin calculation. SolarWorld Br. 25–33. Defendant responds that Commerce properly calculated CEP based on the price at which subject merchandise was first sold in the United States by Suntech's affiliated seller to an unaffiliated customer. Def.'s Resp. Br. 42–44. For the reasons that follow, Commerce's inclusion of Suntech's sales as CEP sales is in accordance with law and supported by substantial evidence.

Commerce determines the dumping margin by calculating the amount by which the normal value exceeds the export price or CEP of the subject merchandise. 19 U.S.C. § 1677(35)(A). CEP is the price, subject to certain adjustments, "at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter" to an unaffiliated purchaser. 19 U.S.C. § 1677a(b). Here, Commerce classified sales made by Suntech's affiliated seller after the date of importation to the first unaffiliated customer as CEP sales. Final Decision Memo at 92–93. Suntech reported the price and quantity of modules sold to an unaffiliated purchaser and Commerce could verify those terms against documentation provided by Suntech.[32] *Id.* Commerce also determined that it could make the required adjustments under the statute to CEP. *Id.*

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[32] Commerce recognized that Suntech identified sales during the POR using an [[ ]], a Suntech affiliate, generated by Suntech America, Inc. on the date it shipped subject merchandise directly to [[ ]], the unaffiliated customer, and not through an invoice issued by Suntech America, Inc. directly to [[ ]]. Comments in the Issues and Decision Memorandum Containing Business Proprietary Information at 12, CD 583, bar code 3289927–01 (July 7, 2015). However, Commerce considered these transactions to reflect sales to [[ ]] because the price and quantity reflected in the invoice to the unaffiliated purchaser are identical to the invoice issued by [[ ]], Suntech's affiliate, to [[ ]]. *See id.* Commerce also found that it could verify the price paid in each stage of the transaction against the terms of the contract, the parties to which were Suntech America, Inc. and [[ ]], including [[ ]] in the contract. *Id.*

SolarWorld claims that the unaffiliated party paid the affiliated party for the installation of a completed solar farm (a "turnkey solar project"). SolarWorld Br. 25–30. SolarWorld points to evidence indicating that the terms for this turnkey solar project were fixed terms. *Id.* at 31. There was no indication that the cost of solar modules was negotiated or priced separately.[33] *See id.* Therefore, SolarWorld argues that the record evidence relied upon by Commerce cannot support its determination that the sales prices for modules to Suntech's affiliate were identical to the sales price for modules to the unaffiliated customer. *See id.* However, Commerce found that the gross unit price for the modules was verified in parts of the contract between Suntech and the unaffiliated purchaser.[34] *See* Comments in the Issues and Decision Memorandum Containing Business Proprietary Information at 12, CD 583, bar code 3289927–01 (July 7, 2015). SolarWorld points to no record evidence detracting from Commerce's determination that the price and quantity reflected in the invoice to the unaffiliated purchaser are identical to the invoice issued by Suntech's affiliate to the purchaser.[35] Therefore, Commerce's inclusion of module sales by Suntech's affiliate to its unaffiliated customer as CEP sales is supported by substantial evidence and in accordance with law.

B. Determination of Date of Sale for Suntech's Reported Sales

SolarWorld also challenges as unsupported by substantial evidence Commerce's use of the date of shipment rather than the date of contract for Suntech's reported CEP sales of solar modules to its unaffiliated purchaser. *See* SolarWorld Br. 33–39. Defendant responds that Commerce supported its determination with record evidence showing that the material terms of the contracts were subject to change up to the date of shipment, which was also consistent with

[33] SolarWorld focuses on record evidence demonstrating that the terms of the transaction between [[ ]] and [[ ]] provided for payment of [[ ]] for construction of the completed solar project. SolarWorld Br. 31 (citing Supplemental Section C Questionnaire Response –Wuxi Suntech Power Co., Ltd. at Ex. 3, CD 518–523, bar codes 3245430-01–05 (Dec. 4, 2014)). Therefore, SolarWorld contends that the payments made under the contract reflect a [[ ]] agreed to pay for the solar project, which included billings for ancillary services such as installations, and not a specific negotiated price for solar modules. *Id.*

[34] Commerce found the gross unit price for the modules is [[ ]] between [[ ]] and the unaffiliated purchaser [[ ]]. *See* Comments in the Issues and Decision Memorandum Containing Business Proprietary Information at 12, CD 583, bar code 3289927–01 (July 7, 2015). Moreover, Commerce noted that the gross unit module price is linked to [[ ]], which is part of the contract. *Id.*

[35] SolarWorld's speculation that the module prices contained in the contract and invoices provided to verify those prices are the result of [[ ]] contract price for the solar farm is unsupported by record evidence. *See* SolarWorld Br. 32.

usual solar industry contract pricing practices, including those of Suntech. Def.'s Resp. Br. 45–47. The court agrees with SolarWorld that Commerce's determination is not supported by substantial evidence because the record evidence relied upon by Commerce reflects a transaction for the supply of solar modules, not a contract for the provision of a turnkey solar project. On remand, Commerce must explain what record evidence supports a determination that the key terms of the sales between Suntech's affiliated seller and the purchaser were subject to change after the contract date or must reconsider its determination.

As already discussed, the statute provides that CEP is the price at which merchandise is "first sold (or agreed to be sold) before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b). The statute does not define when a product is deemed sold, nor does it define how Commerce determines date of sale for purposes of determining what sales should be included in calculating CEP for the POR. *See id.* Commerce's regulations provide that Commerce "normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business" as the date of sale. 19 C.F.R. § 351.401(i). However, Commerce has discretion to use an alternative date if it determines that "a different date better reflects the date on which the exporter or producer establishes the material terms of sale." *Id.*

Here, Commerce determined that a date other than the date of invoice reflects the date that the material terms of sale were established. Final Decision Memo at 93. Commerce justified this determination by referencing contracts on the record for the sale of solar modules that are subject to change, *id.* (citing Section A Questionnaire Response –Wuxi Suntech Power Co., Ltd. at Ex. 16, CD 120–122, bar code 3196404–01–03 (Apr. 18, 2014)), and referencing its findings in past proceedings regarding contract pricing practices within the solar industry that are subject to change. *Id.* (explaining that "the Department's knowledge of solar industry contract pricing practices, including those of Wuxi Suntech, indicates that the material terms of its contracts are subject to change.").

Commerce relies upon language in specific contracts of sale for solar modules in separate transactions, unrelated to the sales it included as CEP sales, to support its finding that Suntech America, Inc.'s contracts with purchasers are generally subject to change after they are executed. However, SolarWorld contends that the specific con-

tracts between Suntech and its unaffiliated purchaser that were included as CEP sales include payment for services other than the sale of solar modules.[36] *See* SolarWorld Br. 36 (citing Supplemental Section C Questionnaire Response –Wuxi Suntech Power Co., Ltd. at Ex. 3, CD 214–218, bar codes 3209510–01–02, 3209387 -01–03 (Jun. 16, 2014) ("Suntech Suppl. Sec. C Questionnaire Resp.")). Commerce does not explain why it is reasonable to conclude that specific language in a contract that reflects only the sale of solar modules lends support for an interpretation of a contract for services other than the sale of solar modules. Further, SolarWorld points to specific language in the contract for the sales included as CEP sales to support its claim that the terms of the contract were fixed as of the date of contract.[37] *Id.* at 37. Commerce failed to explain why its determination that these contracts are subject to change is reasonable in light of the affirmative language in the specific contract underlying the transaction included as CEP sales. On remand, Commerce must do so or reconsider its determination.

IV. Use of FOP Data of Certain Suntech Tollers

SolarWorld contends that Commerce's acceptance of FOP usage data from Suntech and certain tollers in place of missing data from relevant toll processors was not supported by substantial evidence.[38] SolarWorld Br. 39–42. Defendant responds that Commerce reasonably determined that the FOP usage data reported by Suntech and certain of its tollers could serve as a substitute for the missing FOP data and that it was appropriate to use facts otherwise available without an adverse inference because record evidence indicated that Suntech cooperated to the best of its ability. Def.'s Resp. Br. 49–50. For the reasons that follow, Commerce's determination is supported by substantial evidence.

Commerce shall determine the normal value of subject merchandise exported from a NME country on the basis of the value of FOPs, to which Commerce shall add an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. 19

[36] Specifically, Commerce found that the contract reflects that [[ ]]. *See* SolarWorld Br. 36 (citing Supplemental Section C Questionnaire Response – Wuxi Suntech Power Co., Ltd. at Ex. 3, CD 214–218, bar codes 3209510–01—02, 3209387–01–03 (Jun. 16, 2014)).

[37] SolarWorld points out that there is specific language in the contract affirmatively indicating [[ ]], *see* SolarWorld Br. 37 (citing Suntech Suppl. Sec. C. Questionnaire Resp. at Ex. 3 at Art. 5.5), and indicating that [[ ]]. *See id.*(citing Suntech Suppl. Sec. C. Questionnaire Resp. at Ex. 3 at Art. 5.1).

[38] Commerce found that Suntech entities obtained certain wafers, coated glass, insulative strips, junction boxes, and modules/laminates from toll processors. *See* Memorandum re: Unreported Factors of Production at 1, CD 585, bar code 329025–01 (July 7, 2015).

U.S.C. § 1677b(c)(1). The valuation of FOPs "shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." *Id.* Therefore, the statute gives Commerce discretion in assessing what the best available information for valuing FOPs and in calculating a normal value for subject merchandise in NME cases. *See id.* To make the applicable determination, Commerce shall generally apply facts otherwise available on the record in reaching an applicable determination if: (1) information necessary to Commerce's administrative determination is not available on the record; (2) an interested party withholds information requested or fails to provide the information in a timely fashion or in the form and manner requested; (3) significantly impedes a proceeding; or (4) provides information but the information cannot be verified. *See* 19 U.S.C. § 1677e(a). The statute permits Commerce to use an inference that is adverse to the interests of a party in selecting from among the facts otherwise available if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. 19 U.S.C. § 1677e(b).

Here, Commerce acknowledged that Suntech was unable to provide the requested FOP consumption data for all of its tollers. Final Decision Memo at 40. Commerce accordingly determined that it was appropriate to apply facts available to calculate Suntech's FOP usage. *See id*. at 40–41. Commerce justified its exercise of discretion to decline to apply an adverse inference to Suntech's FOP consumption by recounting Suntech's efforts to cooperate and act to the best of its ability to comply with Commerce's request for such data. *See id.* at 41.

Moreover, Commerce noted that its practice is to use FOP information from tollers as a substitute for missing FOP data where: (1) a respondent has a number of tollers; (2) a respondent identifies tollers in a timely manner; (3) a respondent documents its unsuccessful efforts to obtain FOPs from its tollers; and (4) non-reporting tollers account for only a small portion of FOPs and there is usable FOP information from other suppliers that could serve as a substitute for the missing FOPs. *See* Final Decision Memo at 40–41. Commerce found that Suntech had a large number of tollers and that Suntech identified those tollers in a timely manner.[39] *Id.* at 40. Commerce also found that Suntech documented its unsuccessful efforts to obtain the

[39] Specifically, Commerce noted that Suntech identified over [[ ]] tollers for the relevant FOPs in a timely manner. Memorandum re: Unreported Factors of Production at 7, CD 585, bar code 329025–01 (July 7, 2015).

For module/laminate toll processors, Commerce noted that Suntech identified its tollers in response to Commerce's initial questionnaire. *Id.* at 3. Commerce also reviewed that Suntech identified additional module/laminate tollers in response to its supplemental questionnaires. *Id.*

requested data from its tollers. *Id.* at 41 (citing Memorandum re: Unreported Factors of Production, CD 585, bar code 329025–01 (July 7, 2015) ("Unreported FOP Memo")). Commerce also justified its reliance on the tollers' FOP data together with data provided by Suntech because it found that the non-reporting tollers accounted for a small portion of FOPs.[40] Final Decision Memo at 41. Therefore, Commerce's determination to follow its practice of using FOP information from Suntech, as well as cooperating tollers, as a substitute for missing FOP data from tollers used by Suntech is supported by substantial evidence.[41] *See id.* at 40. Commerce also explained that it determined not to apply an adverse inference to Suntech's FOP usage for non-reporting tollers because Commerce concluded that Suntech had acted to the best of its ability in complying with Commerce's request for the information. *See id.* SolarWorld points to no evidence undermining Commerce's conclusion.

SolarWorld argues that Commerce's use of Suntech's own FOP data, for modules/laminates, as a substitute for missing unaffiliated tollers' data is unreasonable because the unaffiliated tollers would

[40] Commerce specifically noted that the wafers processed by Suntech's wafer toll processors accounted for [[ ]] percent of the total quantity of wafers consumed in the production of subject merchandise during the POR. Unreported FOP Memo at 2. However, Commerce found that Suntech produced subject merchandise from "purchased (*i.e.*, finished, non-tolled") wafers." *Id.* Commerce found that purchased wafers represent [[ ]] percent of the total quantity of wafers consumed in the production of subject merchandise during the POR. *Id.* Thus, Commerce noted that "[Suntech] has either FOP data or wafer consumption quantities for [[ ]] percent of wafers consumed in the production of merchandise under consideration during the POR." *Id.* at 2–3.

For modules/laminates, Commerce found that the modules/laminates processed by the two tollers that responded to Suntech's FOP usage data requests represent [[ ]] percent of the total quantity of modules/laminates produced during the POR. *Id.* at 3. Commerce noted that Suntech reported usage data for its own self-production of modules/laminates, which represents [[ ]] percent of the total quantity of modules/laminates produced during the POR. *See id.* Therefore, Commerce found that the information submitted reflected FOP data for [[ ]] percent of all modules/laminates produced during the POR. *Id.*

[41] Generally, Commerce did not use Suntech's own FOP data as a substitute for missing FOP data. *See* Final Decision Memo at 41. However, for modules/laminates, Commerce accepted Suntech's own FOP data together with that of the reporting tollers as a substitute for the missing FOP data. *Id.* Although SolarWorld expresses concern that data from Suntech may differ from the missing toller data, *see* SolarWorld Br. 40–42, SolarWorld points to no evidence in the record of discrepancies in FOP usage between Suntech's FOP usage and that of its responding tollers or among the responding tollers to support its concerns. Moreover, Commerce also justified its determination that the missing information did not significantly affect the representativeness of the data used as facts available because Suntech purchased approximately [[ ]] percent of the total quantity of wafers consumed and self-produced approximately [[ ]] percent of the total quantity of modules/laminates produced during the POR. *See* Unreported FOP Memo at 7. Commerce also notes that the non-reporting tollers individually supplied [[ ]] percent of wafers consumed and [[ ]] percent of modules/laminates produced during the POR. *Id.* Therefore, Commerce's determination to use the FOP data reported by Suntech as facts available was supported by substantial evidence.

likely have higher costs. SolarWorld Br. 40. SolarWorld argues that no record evidence indicates that a toll processor would have similar per-unit costs to that of a large integrated producer like Suntech. *See id.* However, SolarWorld points to no evidence on the record that supports its suggestion that a relatively small producer of modules/laminates would have higher per-unit costs than a large integrated producer like Suntech. Nor does SolarWorld support its assertion that Commerce's acceptance of data for modules laminates would have meaningfully affected Commerce's margin calculation.[42] *See id.* Without such affirmative evidence of a disparity between the missing costs, the court cannot say that Commerce's determination is unsupported by substantial evidence.[43]

Finally, SolarWorld argues that Commerce's decision to accept Suntech's own FOP data for modules/laminates in place of its toll processors presents a significant risk for manipulation. SolarWorld Br. 41. However, Commerce notes that Suntech not only reported its own FOP data, but also reported data from cooperating unaffiliated tollers of modules. Unreported FOP Memo at 3. It is reasonably discernible that Commerce concluded, based on the absence of discrepancies in tolling data between the reporting tollers and the small proportion of module production for which it lacked data, that the data supplied could serve as a substitute for the missing data. Where SolarWorld cannot point to a discrepancy in the data actually produced which would render it unreasonable for Commerce to accept this data, the court cannot say that Commerce's determination is unreasonable.

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[42] SolarWorld points out that more than [[ ]] percent of modules/laminates consumed by Suntech were produced by unaffiliated toll processors. SolarWorld Br. 40. This fact alone does not undermine Commerce's conclusion that the missing data would not have materially affected its margin calculation given Commerce's explanation that the non-reporting tollers supplied a "limited portion of the quantity" of these inputs used during the POR. *See* Unreported FOP Memo at 7. SolarWorld points to no data undermining Commerce's conclusion.

[43] SolarWorld contends that Commerce's determination incorrectly relied on Suntech's supply of actual consumption quantities for all raw materials provided to module/laminate toll processors. *See* SolarWorld Br. 40–41. SolarWorld claims that "some raw material costs for the module/laminate toll processors may not have been reflected at all in the FOPs reported by Suntech" because Suntech admitted that unaffiliated tollers may have provided materials other than those supplied by Suntech. *Id.* at 41. SolarWorld's argument is premised on the notion that Commerce accepted FOP data because Suntech provided consumption quantities for raw materials provided to the toll processors for the [[ ]] percent of modules/laminates produced by unaffiliated toll processors. *See id.* (citing Unreported FOP Memo at 3). However, it is reasonably discernible that Commerce accepted the data from Suntech and its unaffiliated module/laminate tollers because Commerce concluded that the data provided by Suntech, which provided FOP data for [[ ]] percent of all module/laminates produced during the POR, was representative of the experience of the non-responding tollers and not because it had complete data for the remaining [[ ]] percent of modules/laminates. *See* Unreported FOP Memo at 3. Therefore, Commerce did not rely upon Suntech's supply of actual consumption quantities for all raw materials provided to module/laminate toll processors.

CONCLUSION

The court remands Commerce determination to use the date of shipment rather than the date of contract for Suntech's reported CEP sales of solar modules to its unaffiliated purchaser for further consideration and explanation. The court sustains the *Final Results* in all other respects. In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are remanded for further consideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination within 45 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on Commerce's remand redetermination; and it is further

ORDERED that the parties shall have 15 days thereafter to file replies to comments on the remand redetermination.

Dated: June 28, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–80

FINE FURNITURE (SHANGHAI) LIMITED, et al., Plaintiffs, and METROPOLITAN HARDWOOD FLOORS, INC., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COALITION for AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 14–00135

[Clarifying the court's previous opinion and order]

Dated: July 7, 2017

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Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, for defendant-intervenor Coalition for American Hardwood Parity.

OPINION AND ORDER

Stanceu, Chief Judge:

Defendant United States moves for clarification of an aspect of the court's previous opinion and order, *Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT __, 182 F. Supp. 3d 1350 (2016) ("*Fine Furniture*"). Def.'s Partial Consent Mot. for Clarification or, in the Alternative, Mot. for Voluntary Remand 1 (Nov. 18, 2016), ECF No. 327 ("Mot. for Clarification").[1] Conditioned on the outcome of its motion for clarification, defendant also seeks a voluntary remand to allow the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to reconsider an additional argument made by one of the plaintiffs in the case. *Id.* Finally, defendant requests an extension of time, until forty-five days from the court's decision on its motion, for Commerce to file the remand redetermination required by *Fine Furniture*. *Id.* at 4.

In this Opinion and Order, the court identifies certain aspects of *Fine Furniture* that in the court's view resolve the issue upon which defendant seeks clarification. The court concludes, further, that the voluntary remand defendant seeks in the alternative is unnecessary. As requested by defendant, the court extends the period in which Commerce shall submit the required remand redetermination, allowing forty-five days from the date of this Opinion and Order.

I. BACKGROUND

A. The Contested Determination

In this consolidated action,[2] plaintiff Fine Furniture (Shanghai) Limited ("Fine Furniture") and several other Chinese producers or

[1] According to defendant, "[c]ounsel for the Coalition for American Hardwood Parity (Jeff Levin), Lumber Liquidators (Mark Ludwikowski), and the Lizhong plaintiffs (Thomas Trendl) took no position on the motion," and "counsel for Fine Furniture (Sarah Wyss), the Dalian Huilong plaintiffs (Mark Ludwikowski), the Dalian Kemian plaintiffs (Jeffrey Neeley), and the Hangzhou/Metropolitan plaintiffs (Lizbeth Levinson) consented to the motion." Def.'s Partial Consent Mot. for Clarification or, in the Alternative, Mot. for Voluntary Remand 1–2 (Nov. 18, 2016), ECF No. 327. No party served a response within the fourteen-day time period imposed by USCIT Rule 7(d).

[2] Consolidated under Consol. Court No. 14–00135 are: *Metropolitan Hardwood Floors, Inc. et al. v. United States*, Court No.14–00137; *Dalian Kemian Wood Industry Co., Ltd. et al. v. United States*, Court No. 14–00138; *Dalian Huilong Wooden Products Co., Ltd., et al. v.*

exporters of multilayered wood flooring contested a final determination Commerce issued to conclude the first periodic administrative review of an antidumping duty order on multilayered wood flooring ("subject merchandise") from the People's Republic of China ("China" or the "PRC"). The contested decision (the "Amended Final Results") was published as *Multilayered Wood Flooring from the People's Republic of China: Amended Final Results of the Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 35,314 (Int'l Trade Admin. June 20, 2014) ("*Amended Final Results*").

B. The Court's Previous Opinion and Order

In the Amended Final Results, Commerce assigned Fine Furniture, a mandatory respondent in the first administrative review, a weighted average dumping margin of 5.92%. *Fine Furniture*, 40 CIT __, 182 F. Supp. 3d at 1355. Because Fine Furniture was the only respondent with an individually-determined margin that was not *de minimis*, Commerce assigned this 5.92% margin to the "separate rate" respondents, i.e., respondents that qualified for a margin separate from the 58.84% rate Commerce assigned to the PRC-wide entity but that did not receive an individually-determined margin. *Id.*, 40 CIT at __, 182 F. Supp. 3d at 1354–55. Some of these separate rate respondents are plaintiffs or plaintiff-intervenors in this case. *Id.*, 40 CIT at __, 182 F. Supp. 3d at 1355, 1355 n.4.

Finding merit in certain of plaintiffs' claims, the court directed Commerce to reconsider the following aspects of the Amended Final Results: (1) the Department's method of determining deductions from U.S. price for Fine Furniture's value-added taxes, *id.*, 40 CIT at __, 182 F. Supp. 3d at 1359, (2) with respect to the determination of the normal value of Fine Furniture's merchandise, the Department's choice of financial statements of companies in its chosen surrogate country (the Philippines) for use in calculating surrogate values ("financial ratios") for Fine Furniture's factory overhead expenses, selling, general administrative ("SG&A") and interest expenses, and for Fine Furniture's profit, *id.*, 40 CIT at __, 182 F. Supp. 3d at 1359–61, and (3) its determination of a surrogate value for Fine Furniture's electricity usage, *id.*, 40 CIT at __, 182 F. Supp. 3d at 1369–71. Defendant's motion for clarification involves only the second issue, i.e., the choice of financial statements from among the Philippine companies.

As the court explained in *Fine Furniture*, the record contains financial statements of four Philippine plywood manufacturers: Tagum PPMC Wood Veneer, Inc. ("Tagum"), Richmond Plywood Corporation

United States, Court No. 14–00139; and *Shanghai Lizhong Wood Products Co., Ltd. / The Lizhong Wood Industry Limited Co. of Shanghai v. United States*, Court No. 14–00172.

("RPC"), Philippine Softwoods Products, Inc. ("PSP"), and Mount Banahaw Industries, Inc. ("Mount Banahaw"), that Commerce considered to satisfy its criteria for use in calculating financial ratios because they "were specific to the product in question, contemporaneous with the period of review, complete, accurate, and otherwise reliable." *Id.*, 40 CIT at __, 182 F. Supp. 3d at 1359. From these four companies, Commerce chose two, Tagum and RPC, concluding that only these two were integrated at the same level as Fine Furniture. *Id.* ; *Issues and Decision Mem. for the Final Results of the 2011–2012 Antidumping Duty Admin. Rev. of Multilayered Wood Flooring from the People's Republic of China*, A-570–970, ARP 11–12 at 26 (Int'l Trade Admin. May 9, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–10698–1.pdf (last visited July 7, 2017); *see also Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 26,712 (Int'l Trade Admin. May 9, 2014). From the Tagum and RPC financial statements, Commerce calculated separate factory overhead expenses, SG&A and interest expenses, and profit ratios for each of the two companies and then averaged those ratios to derive a single set of surrogate financial ratios for the calculation of the normal value of Fine Furniture's subject merchandise. *Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1360.

Fine Furniture argued that record evidence showed that RPC, unlike Fine Furniture, is not an integrated producer of the subject merchandise, i.e., multilayered wood flooring, and it also challenged the Department's finding that the RPC financial statement was accurate and complete. *See Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1360. Further, Fine Furniture incorporated the argument of another party (Zhejiang Layo Wood Industry Co., Ltd.) that Commerce wrongly found Mount Banahaw *not* to be an integrated producer, an argument Commerce did not consider in reaching its decision to use only the Tagum and RPC statements. *Id.* Fine Furniture also maintained that Commerce had erred in rejecting not only the use of the financial statements of Mount Banahaw but also those of three other Philippine companies, Winlex Marketing Corporation, Industrial Plywood Group Corporation, and Mega Plywood Corporation. *Id.*

The court concluded in *Fine Furniture* that "Commerce was obligated to consider Fine Furniture's argument that Mount Banahaw is an integrated producer." *Id.*, 40 CIT at __, 182 F. Supp. 3d at 1361 (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011). For this reason, the court held that "Commerce must reconsider the matter and decide, based on findings supported by substantial record evidence, which financial statement or statements are

most appropriate for calculating Fine Furniture's financial ratios." *Id.* The court did not address the other grounds Fine Furniture presented as to why it considered the Department's decision to use only the statements of RPC and Tagum to be unlawful because the Department's redetermination pursuant to remand had the potential to moot some of those grounds. *Id.*

II. DISCUSSION

A. Defendant's Motion for Clarification

Defendant requests clarification of whether the court "intended to limit the scope of Commerce's consideration to the question of Mount Banahaw's status as an integrated producer, or whether the Court intended for Commerce to reconsider its selection of surrogate financial statements for Fine Furniture as a whole." Mot. for Clarification 3. Defendant further states that "[s]hould the court have intended to limit the remand to the issue of Mount Banahaw's status as an integrated producer, we respectfully request that the Court grant Commerce a voluntary remand to reconsider, in the context of the ongoing remand proceeding, an additional argument raised by Fine Furniture in this litigation." *Id.* "In particular, Commerce requests a voluntary remand to reconsider its prior finding regarding the accuracy and completeness of RPC's financial statement." *Id.*

The court ordered Commerce to reconsider "the decision to base Fine Furniture's financial ratios on the statements of RPC and Tagum." *Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1361. The court did not limit its order to a reconsideration of the specific finding by Commerce that Mount Banahaw was not an integrated producer. *See id.* ("Commerce must reconsider the matter and decide, based on findings supported by substantial record evidence, which financial statement or statements are most appropriate for calculating Fine Furniture's financial ratios."). This is demonstrated not only by the breadth of the court's directive to reconsider the decision to use the RPC and Tagum statements in calculating Fine Furniture's financial ratios but also by the absence of any language in the *Fine Furniture* Opinion and Order sustaining or rejecting any of the subordinate findings by which Commerce reached that ultimate decision.

B. Defendant's Motion, in the Alternative, for a Voluntary Remand

Because the Opinion and Order in *Fine Furniture* broadly directed Commerce to reconsider the decision to base Fine Furniture's financial ratios on the RPC and Tagum financial statements, it is not necessary for the court to grant defendant's request for a voluntary remand under which Commerce specifically would be granted author-

ity to reconsider Fine Furniture's argument concerning the accuracy and completeness of the RPC statement. As noted above, the court neither sustained nor rejected this or any other finding subordinate to the Department's decision to use the RPC and Tagum statements.

III. CONCLUSION AND ORDER

Upon consideration of defendant's motion for clarification, and all other papers and proceedings had herein, it is hereby

ORDERED that Commerce shall issue, within forty-five (45) days of the date of this Opinion and Order, a new determination upon remand ("Remand Redetermination") that conforms to the court's Opinion and Order in *Fine Furniture*, issued September 9, 2016, as clarified herein, and redetermines as necessary the dumping margins of Fine Furniture and the plaintiffs who are separate rate respondents; it is further

ORDERED that plaintiffs, plaintiff-intervenors, and defendant-intervenor may file comments on the Remand Redetermination within thirty (30) days from the date on which the Remand Redetermination is filed with the court; and it is further

ORDERED that defendant may file a response to the comment submissions within fifteen (15) days from the date on which the last of any such comments is filed with the court.

Dated: July 7, 2017
New York, New York

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

Slip Op. 17–81

VINH HOAN CORPORATION et al., Plaintiff and Consolidated Plaintiffs, and BINH AN SEAFOOD JOINT STOCK COMPANY, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CATFISH FARMERS of AMERICA et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 13–00156

[Sustaining in part and remanding in part the U.S. Department of Commerce's second remand redetermination in the eighth antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: July 10, 2017

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, for Plaintiff and Defendant-Intervenor Vinh Hoan Corporation.

Andrew Brehm Schroth, *Dharmendra Narain Choudhary*, and *Ned Herman Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY and Washington, DC, for Consolidated Plaintiffs and Defendant-Intervenors Vietnam Association of Seafood Exporters and Producers and Consolidated Plaintiff Anvifish Joint Stock Company.

Robert George Gosselink and *Jonathan Michael Freed*, Trade Pacific, PLLC, of Washington, DC, for Consolidated Plaintiff Vinh Quang Fisheries Corporation.

John Joseph Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for Consolidated Plaintiff Binh An Seafood Joint Stock Company.

Nazakhtar Nikakhtar and *Jonathan Mario Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Consolidated Plaintiff and Defendant-Intervenors Catfish Farmers of America et al.

Kara Marie Westercamp, Trial Attorney, U.S. Department of Justice, Commercial Litigation Branch –Civil Division, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Nanda Srikantaiah*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") final results of its second redetermination filed pursuant to the court's decision and remand order in *Vinh Hoan Corporation v. United States*, 40 CIT __, 179 F. Supp. 3d 1208 (2016) ("*Vinh Hoan II*"). *See* Final Results of Redetermination Pursuant to Vinh Hoan Corporation et al. v. United States, Consol. Court No. 13–00156, Slip Op. 16–53 (May 26, 2016), Jan. 27, 2017, ECF No. 203–1 ("Second Remand Results"); *see also Vinh Hoan II*, 40 CIT, 179 F. Supp. 3d.

In *Vinh Hoan II*, the court remanded four aspects of Commerce's first reconsideration after remand of its final determination in this eighth antidumping duty ("ADD") administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"). *Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1237; *see also* Final Results of Redetermination Pursuant to Vinh Hoan Corporation et al. v. United States 44–46, 79–82, Aug. 3, 2015, ECF No. 132 ("First Remand Results"). Specifically, the court ordered Commerce to explain or reconsider its: 1) selection of surrogate value data to value respondents' sawdust factor of production; 2) selection of surrogate value data to value respondents' rice husk factor of production; 3) decision to construct a value for respondent Vinh Hoan Corporation's ("Vinh Hoan") fish oil byproduct rather than selecting the best surrogate value data for fish oil placed on the record; and 4) methodology for calculating byproduct offsets. *See Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1237.

For the reasons that follow, Commerce's determinations in the Second Remand Results to value sawdust and rice husk using Indonesian import data comply with the court's remand order, are supported by substantial evidence, and are sustained. Commerce's byproduct offset calculation, as applied in the Second Remand Results,

is also sustained. However, Commerce's determination to value fish oil using a constructed value continues to be unsupported by substantial evidence. The court accordingly remands Commerce's decision to construct a value for Vinh Hoan's fish oil byproduct rather than select the best available existing surrogate value data source for fish oil for further explanation consistent with this opinion.

BACKGROUND

The court presumes familiarity with the facts of this case as discussed in *Vinh Hoan II* and in *Vinh Hoan Corporation v. United States*, 39 CIT __, 49 F. Supp. 3d 1285 (2015) ("*Vinh Hoan I*"), and here summarizes the facts relevant to the present discussion of the Second Remand Results.

In the final determination of this eighth administrative review of the ADD order, Commerce selected Indonesia as the primary surrogate country. *See Certain Frozen Fish Fillets From [Vietnam]*, 78 Fed. Reg. 17,350 (Dep't Commerce Mar. 21, 2013) (final results of ADD administrative review and new shipper reviews; 2010–2011), *as amended*, 78 Fed. Reg. 29,323 (Dep't Commerce May 20, 2013) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews for Certain Frozen Fish Fillets from [Vietnam] 27, June 19, 2013, ECF No. 27–3 ("Final Decision Memo"). Commerce selected Indonesian import data for HTS 4401.30 ("Sawdust and Wood Waste and Scrap") to value respondents' sawdust factors of production ("FOP"), determining that data to be the best available information because it satisfied all of the surrogate value ("SV") data selection criteria. *See* Final Decision Memo at 32. Commerce likewise determined that Indonesian import data for HTS 1213.00 ("Cereal Straw and Husks, Un prepared, Whether or Not Chopped, Ground, Pressed or in the Form of Pellets") is the best available information for valuing rice husk because that data satisfied all of the SV data selection criteria as well. *See id.* at 33. Commerce valued the fish oil byproduct offset using Indonesian import data for HTS 1504.20.9000, but capped the fish oil SV at a value constructed for unrefined fish oil, *id.* at 38, "starting with fish waste and adding the [FOPs] used by Vinh Hoan to produce fish oil, and included surrogate financial ratios to ensure the value is on an as-sold basis." [Eighth] Administrative Review, and Aligned [Ninth] New Shipper Reviews, of Certain Frozen Fish Fillets from [Vietnam]: Surrogate Values for the Final Results,

A-552–801, at 6, PD 436, bar code 3124119–01 (Mar. 13, 2013) ("Final Surrogate Value Memo").[1]

In *Vinh Hoan I*, the court remanded Commerce's primary surrogate country selection of Indonesia, determining that the selection was contrary to law and not supported by substantial evidence. *Vinh Hoan I*, 39 CIT at __, 49 F. Supp. 3d at 1296–1321. The court accordingly reserved judgment on all challenges to Commerce's SV data source selection to value respondents' FOPs, including the selection of Indonesian import data for sawdust and rice husk, awaiting further explanation of Commerce's selection of Indonesia as the primary surrogate country. *See id.*, 39 CIT at __, 49 F. Supp. 3d at 1321. The court also sought further explanation of Commerce's choice of FOP SVs. *Id.*, 39 CIT at __, 49 F. Supp. 3d at 1309–11. The court granted Defendant's request for a remand for Commerce to reconsider its calculation of respondent's fish oil byproduct offset.[2] *Id.*, 39 CIT at __, 49 F. Supp. 3d at 1321–22.

On first remand, Commerce again selected Indonesia as the primary surrogate country and determined to use Indonesian import data under HTS 4401.30 to value respondents' sawdust FOP, First Remand Results 62–65, and Indonesian import data under HTS 1213.00 to value respondents' rice husk FOP. *Id.* at 57–61. Regarding the offset for the fish oil byproduct, Commerce continued to "cap" Indonesian import data for HTS 1504.20.9000 at a value representative of Vinh Hoan's fish oil, derived from a buildup of FOPs used to produce unrefined fish oil, because the import data value was greater than the value for whole fish, the main input. *Id.* at 79. Commerce determined that "[i]t would be illogical to value an unrefined byproduct like fish oil at a value greater than that of the main input, a value that also approaches that of the finished product, frozen fish fillets." *Id.* at 80. Commerce also made certain adjustments to its fish oil calculation. *See id.* at 44–46.

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[1] On June 19, 2013, Defendant submitted indices to the public and confidential administrative records, which identify the documents that comprise the public and confidential administrative records to Commerce's final determination. The indices to these administrative records can be located at ECF No. 27. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these administrative records.

[2] The court made the following determinations in *Vinh Hoan I*. The court remanded for further consideration Commerce's: primary surrogate country selection; use of facts available for Vinh Hoan's consignment constructed export price sales; determination not to adjust Vinh Hoan's normal value margin calculation to exclude glazing weight; and fish oil byproduct calculation (pursuant to Defendant's request). *Vinh Hoan*, 39 CIT at __, 49 F. Supp. 3d at 1327. The court sustained Commerce's inclusion of sample sales in Vinh Hoan's margin calculation. *Id.* The court deferred judgment on Vinh Hoan's challenges to Commerce's SV selection, in light of remand on the issue of primary surrogate country selection. *Id.*, 39 CIT at __, 49 F. Supp. 3d at 1321.

After remand, Vinh Hoan continued to challenge Commerce's SV selections for valuing FOPs in light of the further explanation provided by Commerce. First Remand Results 40–45. Relevant here, Vinh Hoan questioned the specificity of the Indonesian import data under HTS 4401.30 used to value sawdust by presenting evidence that the import data includes "more complex and value-added products, such as 'cat litter product' and 'wood fire starters.'" Pl.'s Comments Final Results of Redetermination Pursuant to Remand 4–5, Oct. 23, 2015, ECF No. 149 ("Vinh Hoan Comments on First Remand"). Vinh Hoan also challenged the selection of Indonesian import data to value rice husk on the grounds that the data was non-specific and aberrational because the import data covered by HTS 1213.00 is a basket category that covers too many items to be specific and representative of the value of rice husk. *Id.* at 2–4. Vinh Hoan doubted whether large volumes of imports under this category could reasonably be specific to rice husk in light of evidence that: (1) Indonesia is a significant producer of rice with seemingly little need to import this byproduct; (2) large volumes of Indonesian imports came from countries that are not significant rice producers; and (3) the rice husk SV exceeded the value of rice. *See id.* Vinh Hoan further argued that the SV assigned by Commerce was too high in relation to the SV assigned to subject merchandise to accurately reflect the role played by rice husk as a fuel source in producing Vinh Hoan's fish oil byproduct. *See id.* at 30–31. Vinh Hoan also argued that Commerce unreasonably "capped" the SV selected for fish oil, rendering the valuation of fish oil unsupported by substantial evidence and contrary to law.[3] *Id.* at 6–15.

In *Vinh Hoan II*, the court remanded Commerce's SV data selection for sawdust and rice husk for further explanation. *Vinh Hoan II*, 40 CIT at __, 179 F. Supp.3d at 1227–29. The court determined that Commerce's explanation that HTS heading 4401.30 specifically names sawdust "fails to address record evidence that the import data covered other materials and possibly higher value-added materials," *id.* at 1228, and remanded for Commerce to address the detracting evidence. *See id.* at 1229. The court also determined that Commerce had not addressed evidence that detracted from its finding that Indonesian import data for rice husk is specific and non-aberrational and, accordingly, that Commerce's selection of Indonesian import data to value rice husk was not supported by substantial evidence. *Id.* at 1228–29. The court also remanded Commerce's decision to con-

[3] Vinh Hoan argued that capping the SV had the result of understating the by-product offset, "thus overstating Vinh Hoan's overall margin results." Vinh Hoan Comments on First Remand at 6.

struct a value for fish oil because Commerce failed to explain why it is reasonable to depart from its normal methodology of choosing the best existing SV data source to value respondent's fish oil byproduct by using a constructed value in lieu of SV data derived from an existing data source. *See id.* at 1224. The court stated that, until Commerce acknowledged that its methodology was in fact a constructed value rather than a SV derived from an existing data source, the court could "not review whether Commerce's choice of Indonesian import data is reasonable when it is unclear how, to what extent, or even if Commerce used Indonesian import data for fish oil in calculating a SV for Vinh Hoan's fish oil." *See id.* As a separate matter, the court also held that Commerce failed to provide a reasonable explanation for its byproduct offset calculation methodology. *See id.* at 1225.

In the Second Remand Results, Commerce made the following determinations. First, Commerce reconsidered its SV selection for sawdust. After reopening the record to obtain additional Indonesian historical import data for HTS 4401.30, covering "Sawdust and Wood Waste and Scrap," reported on a monthly basis, Commerce continued to find Indonesian import data for HTS 4401.30 to be the best available information to value sawdust because the data is specific and non-aberrational. *See* Second Remand Results 11–14. Commerce also reconsidered its SV selection for rice husk. *See id.* at 14–23. Reopening the record to obtain Indonesian historical import data for HTS 1213.00, covering "Cereal Straw and Husks, Unprepared, Whether or Not Chopped, Ground, Pressed or in the Form of Pellets," Commerce found that the Indonesian import data for HTS 1213.00 used in the final results to value rice husk is aberrational. *Id.* at 19–21; *see* Final Decision Memo at 33–34. Although Commerce determined that both Indonesian data (from the Central Bureau of Statistics ("ICBS")) and Indian import data on the record satisfy its SV data selection criteria, Commerce selected the ICBS data over Indian import data to value respondent's rice husk FOP because the ICBS data is from the primary surrogate country. *Id.* at 21–23.

Additionally, on second remand, Commerce continued to construct a value for fish oil using import data for Indonesian Global Trade Atlas category HTS 1504.20.9000 ("Fish Fats & Oils & Their Fractions Exc Liver, Refined or Not, Not Chemically Mod"), which covers both refined and unrefined fish oil, capping that data at a value derived from

a build-up of FOPs used to produce unrefined fish oil.[4] Second Remand Results 23. Commerce "capped" the import data at the value for unrefined fish oil because Commerce considered it unreasonable to use as a SV Indonesian import data for fish oil with a higher value than data for whole fish, the main input.[5] *Id.* at 23–24. Finally, Commerce determined that it need not reconsider its methodology for calculating a byproduct offset, which deducted the absolute value of a byproduct with a negative SV (that is, a byproduct sold at a loss) from normal value, because there were no longer any byproduct values greater than the revenues for the byproducts. *See id.* at 25–26.[6]

JURISDICTION AND STANDARD OF REVIEW

The court continues to have 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) (2012),[7] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the

[4] Commerce noted that Vinh Hoan reported the FOPs it consumed during the production of fish oil. Second Remand Results 24–25. Commerce stated that "[t]he verified FOPs consumed by Vinh Hoan to produce unrefined fish oil during the POR were applied to POR-specific SVs from the primary surrogate country, Indonesia," in Commerce's calculation of Vinh Hoan's normal value. *Id.* at 25. Commerce then added surrogate ratios for overhead, selling, general, and administrative expenses, and profit to the value of materials used to produce Vinh Hoan's fish oil byproduct. *Id.* Commerce also adjusted for yield loss (*i.e.*, the amount by weight of fish waste, which Commerce found to be the main input used to produce fish oil, that would be lost in the production of fish oil). *See id.* at 38–39.

Commerce does not indicate that it changed its general calculation methodology from its *Final Results* on remand or on second remand. In the *Final Results*, Commerce calculated material costs for fish oil on a per-kilogram basis by multiplying a per-kilogram value for each FOP by a usage rate calculated based on Vinh Hoan's usage data and adding the per-kilogram costs of manufacture together to derive a cost of materials for fish oil. *See* Eighth Administrative Review of Certain Frozen Fish Fillets from [Vietnam]: Final Results Analysis Memorandum for Vinh Hoan Corporation, A-552–801, at 6, Attach. II, CD 261, bar code 3124243–01 (Mar. 13, 2013) ("Final Analysis Memo"); *see* Final Decision Memo at 38. Commerce then added a per-unit overhead cost to obtain a total per-kilogram manufacturing costs. *See* Final Analysis Memo at Attach. II. Commerce then multiplied the total per-kilogram manufacturing costs by the selling, general, and administrative expense ratio and added that product to the total manufacturing costs to obtain a constructed value for fish oil. *See id.* Lastly, Commerce added a profit ratio to obtain a fully-loaded constructed value. Id.

[5] Commerce attributed this anomaly to the fact that the import data on the record for GTA HTS 1504.20.9000.9000 includes prices for refined fish oil while Commerce found that Vinh Hoan produced only unrefined fish oil. *Id.* at 35.

[6] Commerce's changes on remand resulted in revised weighted-average dumping margins for mandatory respondent Vinh Hoan of $0.13 per kilogram ("kg"). *Id.* at 41. The weighted-average dumping margins for mandatory respondent Anvifish Joint Stock Company changed to $1.26 per kg on remand.

[7] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306).

DISCUSSION

I. Sawdust Surrogate Value

In *Vinh Hoan II*, the court held that Commerce cannot rely exclusively upon the fact that the word "sawdust" appears in the heading to conclude that the data source is specific and non-aberrational. *Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1227–28. The court further held that Commerce's selection of Indonesian import data under HTS 4401.30, covering "Sawdust and Wood Waste and Scrap," is unsupported by substantial evidence because Commerce failed to respond to arguments and record evidence demonstrating that the HTS category includes higher value-added products. *Id.* The court specifically drew attention to Commerce's failure to explain why it could discount the possibility that the data contained significant volumes of non-specific, higher value-added merchandise without any analysis. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1228 n.18. The court remanded for Commerce to explain its determination that Indonesian import data is specific and non-aberrational, given record evidence that higher value-added products are included within the category and the significant range of values contained in the import data. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1227–28.

In the Second Remand Results, Commerce determined that the record lacked information to examine whether the sawdust SV generated in the First Remand Results is aberrational. Second Remand Results 5–6. Accordingly Commerce reopened the record to permit Vinh Hoan to place additional Indonesian historical data for HTS 4401.30 for sawdust on the record to allow Commerce to examine whether the sawdust SV is aberrational. *Id.* at 5. Commerce examined the data and continued to find that import data for HTS 4401.30 is specific to Vinh Hoan's sawdust, *id.* at 10–11, and non-aberrational. *Id.* at 11–14. Commerce explained its conclusions that the import data is non-aberrational despite the wide range of average unit values ("AUV") and that the category is specific to sawdust used by Vinh Hoan despite the fact that it includes higher value-added product. *Id.* at 10–14. Therefore, Commerce's SV data selection complies with the court's remand order.

In NME cases, Commerce obtains a normal value by adding the value of the FOPs used to produce the subject merchandise and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Commerce values the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries." *Id.* Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited July 5, 2017) ("Policy Bulletin 04.1"). Commerce's practice for selecting the best available information to value individual FOPs favors selecting a data source that satisfies the breadth of its selection criteria where possible. *See* Final Decision Memo at 11.

On second remand, Commerce supported its determination that the import data is specific despite the fact that it may contain imports of value-added products by referencing Vinh Hoan's questionnaire response that it consumes "pressed sawdust," which Commerce concluded has been processed into a value-added product that is closer in form to HTS 4401.30 than to Bangladeshi price quotes for "unprocessed sawdust." *See* Second Remand Results 10. To address Vinh Hoan's claim that Indonesian import values are affected by especially small but expensive shipments from Singapore, the United States, and Germany, Commerce removed import data from those countries for quantities of less than 100 kilograms ("kg") and found no difference in historic AUVs for HTS 4401.30.[8] *Id.* at 6–7. Commerce also explained its determination that the import data is specific, despite Vinh Hoan's claim that the data must have included non-specific merchandise because a SV derived from this data is too high relative to other fuel sources Vinh Hoan reported using, by noting the absence of record information relating various fuel sources to the energy they

[8] Commerce notes that it removed the imports from these three countries for quantities of less than 100 kg as an exception to its practice of not selectively removing import data to comply with the court's request that it analyze whether the data is aberrational. Second Remand Results 7. Moreover, Commerce notes that the inclusion or exclusion of these data has no impact on the historic AUVs for HTS 4401.30 "because these values represent broad market averages for different periods of time." *Id.* at 7–8.

provide.[9] *Id.* at 9. Lastly, Commerce discounted the notion that the import data for HTS 4401.30 could not be specific to sawdust because export data indicates that exports under this HTS are cheaper than imports. *See id.* at 9–10. Commerce determined that this disparity does not affect its determination that the import data is specific because the category is a basket category that may include higher priced value-added products. *See id.* Commerce reasoned that its selection of import data under this HTS is supported by the fact that imports are higher priced because Vinh Hoan used pressed sawdust, a higher value-added product. *Id.*

Commerce justified its determination that import data for HTS 4401.30 for the period of review ("POR") is not aberrational by comparing the import data to historical import data. *See* Second Remand Results 12–13. Although Commerce acknowledged that the SV generated for the POR is the highest AUV in recent years, Commerce found that the AUV for the POR is only eight percent higher than the previous year and only three times higher than the lowest AUV in 2009. *Id.* at 13. Therefore, Commerce found that the import data for HTS 4401.30 is not so much higher than the historical values on the record that it could be aberrationally high. *Id.* Commerce's reconsideration complies with the court's order to explain why the data is specific and non-aberrational in light of the detracting evidence highlighted by Vinh Hoan.

No party continues to challenge Commerce's SV data selection for sawdust. Commerce has further explained why the import data, which includes higher value-added products, is specific to the sawdust Vinh Hoan reported using in production. Further, Commerce's explained its conclusion that the import data is not aberrational by comparing the AUV for this POR to historical AUVS and concluding that the AUVs from the POR do not different significantly. Therefore, Commerce has complied with the court's order.

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[9] Commerce also notes that it could not adequately compare certain record information provided about the extent to which coal produces more energy than sawdust because the information provided specific values for anthracite and bituminous coal while Vinh Hoan did not report using a specific type of coal as an FOP in its questionnaire responses. Second Remand Results 8–9.

In any event, Commerce questions Vinh Hoan's assumption that the company would always consume the most economical energy source. *See* Second Remand Results 9. Commerce notes that Vinh Hoan reported consuming sawdust, coal, rice, and electricity as energy sources. *Id.* Commerce noted that the fact that Vinh Hoan consumes various energy sources undermines the notion that Vinh Hoan would select its energy inputs purely on the basis of which was most economical. *See id.*

II. Rice Husk Surrogate Value

In *Vinh Hoan II* the court remanded Commerce's selection of Indonesian import data for HTS 1213.00 to value rice husk. *See Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1228–29. The court determined that Commerce's conclusion that the data is specific and non-aberrational was not supported by substantial evidence in light of evidence that the SV derived from this data was too high relative to the role rice husk played as a fuel source in Vinh Hoan's production of fish oil and given the substantial increase in the Indonesian value from the preliminary to the final determination. *See id.* at 1229. The court ordered Commerce on remand to either explain its SV data selection in light of this detracting evidence or reconsider its determination. *Id.*

On remand, Commerce placed Indonesian historical data for HTS 1213.00 on the record. *See* Second Remand Results 15. Commerce continued to find that the import data is specific to the input because cereal husks are among the items covered by the plain terms of the heading. *Id.* at 18. However, after comparing Indonesian import data to import data on the record from other countries on the surrogate country list, Commerce determined that the Indonesian import data for HTS 1213.00 is aberrational. *Id.* at 20. Therefore, Commerce declined to use Indonesian import data for HTS 1213.00 to value Vinh Hoan's rice husk FOP. *See id.* at 21. Instead, Commerce selected Indonesian ICBS data as the best available information because it the data is representative of a broad market average, publicly available, tax and data exclusive, contemporaneous, reliable, and from the primary surrogate country. *Id.* at 21–23.

As already discussed, Commerce uses the "best available information" to value FOPs with a SV from a market economy country, 19 U.S.C. § 1677b(c)(1), seeking a SV that is specific to the input, tax and import duty exclusive, contemporaneous with the period of review, representative of a broad market average, and publically available. Policy Bulletin 04.1. Here, Commerce supported its conclusion that the Indonesian import data for HTS 1213.00 is aberrational by noting that the Indonesian data, when compared to rice husk benchmark data for other countries on the surrogate country list, is so much higher that Commerce considered the data aberrationally high. Second Remand Results 20. Specifically, Commerce found that the Indonesian value is "over five times higher than the Philippine value, and over 150 times higher than the Indian value for HTS 1213.00[ ], and

the ICBS data."[10] *Id.* Therefore, Commerce declined to use either the Philippine data or the Indonesian import data for HTS 1213.00 in its Second Remand Results, as it had in its *Final Results*. *See id.* at 21. Instead, on remand, Commerce determined that Indonesian ICBS data is the best available information to value rice husk because it satisfies the breadth of Commerce's SV data selection criteria. *See id.* Although Commerce found that Indian import data for HTS 1213.00 equally meets its SV data selection criteria, Commerce preferred the ICBS data because it is from the primary surrogate country. *See id.* at 22. Commerce explained that it prefers to rely on factor costs from a single surrogate country because doing so "better reflects the trade-off between labor costs and other factors' costs, including capital, based on their relative prices." *Id.* Commerce also determined that the two Bangladeshi price quotes on the record are not the best available information for valuing rice husk because Commerce could not determine whether the price quotes are reliable.[11] *Id.* at 14–15.

No party continues to challenge Commerce's SV data selection to value rice husk. Commerce has complied with the court's remand order regarding rice husk.

III. Byproduct Offset Calculation

The court held that Commerce failed to provide a reasonable explanation for why its byproduct offset calculation methodology is appropriate even where it has the effect of reducing normal value, which appears to be at odds with the logic behind a byproduct offset. *See Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1224–25. The court remanded Commerce's determination for further explanation of why granting an offset that reduces normal value is reasonable or reconsideration of its byproduct offset calculation, which subtracts the absolute value of the byproduct value from normal value. *See id.*

On second remand, Commerce determined that the propriety of its byproduct offset calculation, which deducted the absolute value of a byproduct with a negative SV (*i.e.*, sold at a loss) from normal value in the *Final Results*, is moot because the changes in SV on remand

[10] Commerce discounted the significance of the Philippine data because it found the quantity of imports was too low and from only one country that record evidence indicates does not have a rice industry. *See* Second Remand Results 20.

[11] Specifically, Commerce noted that it found that the price quotes were not contemporaneous, not representative of broad market averages, that the record does not demonstrate the quotes are tax and duty exclusive. Second Remand Results 14 (citing First Remand Results 25–27). Commerce also referenced its earlier findings that the SR Apparels quote was unreliable because it lacked adequate facts about the conditions under which the price quotes were solicited and whether they were self-selected from a broader range of quotes. *Id.* For the Seraph International price quote, Commerce determined that, although the quote is accompanied by an affidavit indicating how it was obtained, it could not determine whether these price quotes were self-selected from the affidavit. *See* id. at 14–15.

result in no negative byproduct values. *See* Second Remand Results 26. No party questions Commerce's conclusion, and the issue of the propriety of Commerce's prior calculation that had the effect of increasing normal value is no longer a live case or controversy. Commerce's has complied with the court's order regarding the byproduct offset calculation.

IV. Fish Oil Constructed Value

Vinh Hoan II remanded for further explanation or reconsideration Commerce's decision to use a "cap" to limit the SV chosen for Vinh Hoan's fish oil byproduct. *Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1222–24. Commerce purported to use a SV based on Indonesian import data for HTS 1504.20.9000 while "capping" the value at a constructed value using fish oil FOPs derived from Vinh Hoan's production data. *See id.* Therefore, Commerce, in effect, used a constructed value in place of a SV for fish oil based upon Indonesian pricing data. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1224. As a result, the court held that Commerce deviated, without explanation, from its standard methodology for valuing FOPs using a SV for fish oil as the best available information.[12] *Id.*

On second remand, Commerce continues to use a constructed value. *See* Second Remand Results 23–25. Commerce still has not explained its rationale for constructing a value in this case rather than choosing the best existing SV data source for fish oil from the existing alternative sources. Therefore, the court remands this issue again for Commerce to explain why constructing a value constitutes the best available information, rather than using an existing alternative SV data source for fish oil on the record, or reconsider its determination.

As already discussed, Commerce values FOPs in NME cases "based on the best available information regarding the values of such factors in a market economy country or countries." 19 U.S.C. § 1671(b)(c)(1). Commerce uses the same methodology to "offset production costs incurred by a respondent with the sale of by-products generated during the production process." *See* Final Decision Memo at 34. Commerce's methodology for selecting the best available information

[12] The court required Commerce to explain how the fish oil cap is not just a rejection of the import data in favor of a constructed value. *Vinh Hoan II*, 40 CIT at __, 179 F. Supp. 3d at 1222. Further, the court stated that

> Commerce may have a good reason to go beyond its [methodology of selecting the best existing SV data source] and construct a value, but Commerce needs to state what it is doing and explain why it is reasonable so that the court may review Commerce's methodology and determination. The court cannot review whether Commerce's choice of Indonesian import data is reasonable when it is unclear how, to what extent, or even if Commerce used Indonesian import data for fish oil in calculating a SV for Vinh Hoan's fish oil.

Id., 40 CIT at __, 179 F. Supp. 3d at 1224.

evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. Policy Bulletin 04.1. Although Commerce has discretion to decide what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), Commerce must ground its selection of the best available information in the overall purpose of the ADD statute, calculating accurate dumping margins. *See CS Wind Vietnam Co., Ltd. v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1271, 1277 (2014) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

Commerce has not explained, or squarely acknowledged, its use of a constructed value methodology in place of a surrogate value for fish oil. On second remand, Commerce stated it had determined that Indonesian import data for HTS 1504.20.9000 is the best available information by examining "the SVs on the record versus the value of the by-product, and whether the value of the by-product would lead to an unreasonable result." *See* Second Remand Results 23. Yet Commerce does not actually use the import data for HTS 1504.20.9000 as a SV. Instead, Commerce builds a constructed value for the fish oil using fish oil FOPs and calls this value a "cap."[13] *See id.* at 35–36. Commerce identified the FOPs used to produce fish oil from Vinh Hoan's SV questionnaire responses. *See id.* at 24–25. Commerce described its calculation as applying the "verified FOPs consumed by Vinh Hoan to produce unrefined fish oil during the [period of review]" to period-of-review-specific SVs. Id. at 25. Therefore, it is apparent that Commerce selected SVs for the FOPs used to produce fish oil to construct a SV for the byproduct, rather than selecting actual SV data for fish oil on the record. However, because Commerce is not applying the calculated "capped" value to existing import data to remove any data values above the "cap," it is apparent that Commerce is simply substituting a constructed value for a surrogate value.[14] *See id.* Commerce claims that the Indonesian import data is the best available

[13] Although Commerce refers to its methodology as "capping" the Indonesian surrogate value, the term "cap" is a misnomer. There is no indication in the parties' briefs or in the record documents that Commerce uses the "cap" as a threshold by which to retain import values below and discard import values above, as the name "cap" suggests. Rather, Commerce has constructed a value based on FOPs for Vinh Hoan's fish oil production, and uses that constructed value as the surrogate value. *See*, *e.g.*, Final Decision Memo at 38; Final Surrogate Value Memo at 6. In this way, the value used is not reflective of the Indonesian HTS data at all. Because the value used is not dependent upon the actual Indonesian import data, the fish oil byproduct value used by Commerce is in fact a constructed value, rather than a surrogate value adjusted with a cap.

[14] Commerce describe its methodology as using the data that "Vinh Hoan reported . . . coupled with POR-specific SV from the primary surrogate country and adjusted by surrogate ratios, to calculate a fully loaded unrefined fish oil SV." Second Remand Results 36.

data, but then claims that it cannot use that data without adjustment. Commerce cannot justify its decision to construct a value by relying on the extent to which Indonesian import data for HTS 1504.20.9000 best satisfies its SV data selection criteria, and then discard that import data for HTS 1504.20.9000. If Commerce is going to deviate from its practice of selecting the best SV data source for a particular FOP, it must acknowledge it is doing so and explain why it is reasonable to conclude that the constructed value for that FOP yields more accurate margins than the other SV data on the record for that FOP.[15] It may be reasonable for Commerce to construct a value; that is not yet for the court to say. But the court cannot assess the reasonableness of using a constructed value for fish oil when Commerce justifies that methodology by claiming it is something other than what it actually is.[16]

Commerce has not explained why a constructed value is a better choice than any of the other SV choices on the record; it has only explained why the Indonesian import data for HTS 1504.20.9000 is better than any of the other choices on the record. Although Commerce compares the extent to which the Indonesian import data for HTS 1504.20.9000 better satisfies its SV data selection criteria than

[15] Commerce has the power to use facts available when it lacks necessary information on the record. 19 U.S.C. § 1677e(a). However, it must explain why the information it does have is insufficient.

[16] Commerce argues that it has developed a practice of constructing a value for an FOP in past cases using the same methodology it used in this case where it concluded that the constructed value represented the best available information. Second Remand Results 35–36 (citing *Clearon Corp. and Occidental Chemical Corp., et al. v. United States*, Court of International Trade Consolidated Court No. 13–00073, Final Results of Redetermination Pursuant to Remand at 7–11, *available at* http://enforcement.trade.gov/remands/15–91.pdf (last visited July 5, 2017) ("*Chloro Isos Remand*"); Drill Pipe from the People's Republic of China: Issues and Decision Memorandum for the Final Determination, A-570–965, at 26–29 (Jan. 3, 2011), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–390–1.pdf (last visited July 5, 2017) ("Drill Pipe from PRC Final Decision Memo"). However, in neither case does Commerce purport to use import data for the input in question. In both cases, Commerce simply constructs a value using other SV data on the record. *See Chloro Isos Remand* at 8 (wherein Commerce calculated the byproduct offset by deducting any costs associated with converting ammonia gas and sulfuric acid into ammonium sulfate from the surrogate value of the downstream product (*i.e.*, ammonium sulfate, not the byproducts in question, which were ammonia gas and sulfuric acid); Drill Pipe from PRC I&D at 28 (wherein Commerce acknowledged it constructed a value based upon SV data for the inputs applied to the components of tool joints from the selected surrogate country and not based upon SV data for tool joints). Commerce does not justify its use of a constructed value by claiming that it is using a SV for the input in question and merely capping that SV. *See Chloro Isos Remand* at 8, Drill Pipe from PRC I&D at 28. Moreover, in both cases Commerce found that the SV data for the input in question was not the best available information and determined that the constructed value was the best available information to value the input in question. *See Chloro Isos Remand* at 9–10; Drill Pipe from PRC I&D at 26–28. Here, Commerce concludes that import data for fish oil is the best available information to value fish oil and then proceeds to construct a value for fish oil based upon SV data for the inputs used to produce fish oil. *See* Second Remand Results 23–25.

would the Indonesian price quote on the record, *see* Second Remand Results 23, this analysis is of no help in discerning why a constructed value of fish oil FOPs using import data is superior to the alternative SV data sources on the record for fish oil. The constructed value does not use the import data for Indonesia HTS 1504.20.9000 in any way. Therefore, Commerce cannot justify its determination to construct a value based on the superiority of HTS 1504.20.9000 Indonesian import data to price quotes on the record. On remand, Commerce must explain why none of the SV data sources for fish oil on the record lead to a reasonable value and otherwise explain why a constructed value is superior to the alternative SV data sources for fish oil on the record or reconsider its determination. Commerce does state that using "Vinh Hoan's own information in its production of fish oil is necessarily the most representative, and specific, value."[17] Second Remand Results 25. However, Commerce has multiple factors that it considers in assessing the best available information. *See* Policy Bulletin 04.1. The court continues to defer consideration of Vinh Hoan's arguments regarding the accuracy of Vinh Hoan's fish oil constructed value calculations until Commerce has adequately explained the reasonableness of its practice.

CONCLUSION

The court sustains Commerce's surrogate value data selections for rice husk and sawdust. The court also sustains Commerce's byproduct offset calculation. However, the court again remands Commerce's determination to construct a value for Vinh Hoan's fish oil byproduct. Therefore, in accordance with the foregoing, it is

ORDERED that Commerce's remand redeterminations regarding fish oil is remanded for further consideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its third remand redetermination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the third remand redetermination; and it is further

ORDERED that the parties shall have 15 days to file their replies to comments on the third remand redetermination.

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[17] Commerce may indeed have good reason to conclude that using Indonesian HTS data would lead to an unreasonable value for Vinh Hoan's fish oil. But it does not follow that the best alternative is to construct a value. Nor could the idea that using the import data as is would lead to an unreasonable SV, *see* Def.'s Resp. Pls.' Comments Second Remand Redetermination 11–14, Apr. 26, 2017, ECF No. 212, justify constructing a value, as Commerce has not explained why constructing a value yields superior data to using the alternative SV data sources for fish oil on the record.

Dated: July 10, 2017
New York, New York

/s/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–82

AN GIANG FISHERIES IMPORT and EXPORT JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiffs, and VIETNAM ASSOCIATION of SEAFOOD EXPORTERS and PRODUCERS et al., Plaintiff-Intervenor and Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CATFISH FARMERS of AMERICA et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 14–00109

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand redetermination in the ninth antidumping duty administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: July 10, 2017

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Kara Marie Westercamp, Trial Attorney, U.S. Department of Justice, Commercial Litigation Branch –Civil Division, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Department" or "Commerce") Final Results of Redetermination Pursuant to *An Giang Fisheries Import and Export Joint Stock Company et al. v. United States*, Consol. Court No. 14–00109, Slip Op.

16–55 (June 7, 2016) filed pursuant to the court's decision in *An Giang Fisheries Import and Export Joint Stock Company v. United States*, 40 CIT __, 179 F. Supp. 3d 1256 (2016). *See* Final Results of Redetermination Pursuant to *An Giang Fisheries Import and Export Joint Stock Company et al. v. United States*, Consol. Court No. 14–00109, Slip Op. 16–55 (June 7, 2016), Feb. 10, 2017, ECF No. 151–1 ("*Remand Results*"); *see also An Giang Fisheries Import and Export Joint Stock Company v. United States*, 40 CIT __, 179 F. Supp. 3d 1256 (2016). The court remanded Commerce's *Final Results* in the ninth antidumping duty ("ADD") administrative review of certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam") to further explain or reconsider its selection of data to calculate a surrogate value ("SV") of respondents' rice husk factor of production ("FOP") and Commerce's decision to construct a value for respondent Vinh Hoan Corporation's ("Vinh Hoan") fish oil byproduct rather than selecting the best SV data for fish oil placed on the record. *See An Giang*, 40 CIT at __, 179 F.Supp. 3d at 1262; *see generally Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 79 Fed. Reg. 19,053 (Dep't Commerce Apr. 7, 2014) (final results of ADD administrative review and new shipper review; 2011–2012) ("*Final Results*"), *as amended* 79 Fed. Reg. 37,714 (Dep't Commerce July 2, 2014) and accompanying Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Ninth Administrative Review and Aligned New Shipper Review, Aug. 5, 2014, ECF No. 29–3 ("Final Decision Memo"). The court also remanded Commerce's normal value ("NV") calculation to permit Commerce to ensure that the export price and NV are stated on a consistent basis.[1] *An Giang*, 40 CIT at __, 179 F.Supp. 3d at 1262; *see also* Final Decision Memo at 70–75.

On remand, Commerce changed its selection to value rice husk to the Indonesian Central Bureau of Statistics ("ICBS") historic rice prices data in Indonesia. *Id.* at 12–13. On remand, Commerce also adjusted Vinh Hoan's U.S. sales database and FOP database to ensure that all data is reported on a net weight basis (*i.e.*, exclusive of

[1] Commerce acknowledged that it was required to determine whether export price and NV should be based on net weight (*i.e.*, unglazed weight) or gross weight (*i.e.*, glazed weight). *See* Final Decision Memo at 70. Commerce likewise acknowledged that the U.S. price and normal value should be stated on a per-unit basis with consistent denominators. *See id.* Defendant requested that this issue be remanded to reconsider its calculation to ensure that the input consumption ratio was calculated on a consistent basis. *See* Def.'s Resp. Consolidated Pls.' Rule 56.2 Mot. J. Upon Agency R. 92, July 29, 2015, ECF No. 76. As the court explained in its decision remanding Commerce's determination, "[g]lazing of frozen fish refers to coating the finished fillet with water and then freezing it." *An Giang*, 40 CIT at __, 179 F.Supp. 3d at 1262 n.3.

glazing). *Id.* at 18–19. The court sustains both determinations because Commerce has complied with the court's remand instructions and no party challenges either decision.

Commerce also continued to construct a value for Vinh Hoan's fish oil byproduct based on a calculation of Vinh Hoan's data for inputs used to produce its fish oil while also continuing to maintain that it is using Indonesian import data for HTS 1504.20.9000. *See* Remand Results 14–17. An Giang Fisheries Import and Export Joint Stock Company, Asia Commerce Fisheries Joint Stock Company, Cuu Long Fish Joint Stock Company, Hiep Thanh Seafood Joint Stock Company, International Development and Investment Company, QVD Food Company Ltd., Southern Fishery Industries Company, Ltd., and Vinh Hoan Corporation (collectively "Vinh Hoan") continue to challenge Commerce's decision to construct a value for fish oil as unsupported by substantial evidence. *See* Pl.'s Comments on Final Results of Redetermination Pursuant to Remand 4–8, Apr. 11, 2017, ECF No. 155 ("An Giang Remand Comments"). The court remands Commerce's determination because Commerce fails to explain why its decision to construct a value rather than choose the best available existing SV data source for fish oil is reasonable.

BACKGROUND

The court generally presumes familiarity with the facts as discussed in *An Giang*. Nevertheless, the court briefly summarizes the facts relevant to its discussion here for ease of reference. In its final determination, Commerce valued respondents' rice husk FOP using Indonesian import data under HTS 1213.00, covering "Cereal Straw and Husks, Unprepared, Whether or Not Chopped, Ground, Pressed, or in the Form of Pellets." Final Decision Memo at 36. The court remanded Commerce's selection to value rice husk because Commerce failed to explain why the import data is specific, representative of a broad market average, and not aberrational. *See An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1275–76. Second, in its *Final Results*, Commerce determined that the correct U.S. price to use for its margin calculations is "the gross unit price (*i.e.*, glazed weight basis and unglazed weight basis for those specific sales) recorded on the commercial invoice because this is the weight basis price that Vinh Hoan sold and was paid for the subject merchandise." Final Decision Memo at 71. The court granted Defendant's request for a remand for Commerce to reconsider its decision not to adjust Vinh Hoan's NV to exclude glazing weight from Vinh Hoan's FOP consumption calculations. *See An Giang*, 40 CIT __, 179 F. Supp. 3d at 1285.

Third, Commerce determined that, although Indonesian import data under HTS 1504.20.9000 is the best available information to value Vinh Hoan's fish oil byproduct in its final results, it should "cap" the price of fish oil at the calculated constructed value of the FOPs and ratios used by Vinh Hoan to make fish oil. *See* Final Decision Memo at 78–86. Commerce justified its constructed "cap" because Vinh Hoan reported producing only unrefined fish oil while the import data includes prices for both refined and unrefined fish oil. *See id.* at 81–83. The court explained that "Commerce's purported 'cap' is in fact a rejection of the import data in favor of a [constructed value]." *An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1281–82. Therefore, the court remanded Commerce's determination for further consideration and explanation of why it is reasonable to depart from the normal methodology of choosing the best existing SV data source by employing a constructed value to value fish oil. *See id.*, 40 CIT at __, 179 F. Supp. 3d at 1283.

In its remand redetermination, Commerce reopened the record to examine whether the rice husk SV is specific and non-aberrational. *Remand Results* 5. Commerce continued to find that the import data under this category is specific to Vinh Hoan's rice husk input because the HTS heading names "cereal husks" as one the items covered by the heading. *Id.* at 8. However, Commerce found the Indonesian import data for HTS 1213.00 aberrational because the SV data derived from the import data is too high relative to data from the same HTS subcategory for other countries on Commerce's list of economically comparable countries. *Id.* at 10–11. On remand, Commerce selected Indonesian ICBS data to value rice husk because it found that the ICBS data and Indian import data equally satisfied its SV data selection criteria, but the ICBS data is from the primary surrogate country. *Id.* at 12–13. Further, Commerce reopened the record and requested Vinh Hoan to submit a revised U.S. sales database and revised FOP database on a net weight basis because Commerce found that Vinh Hoan reported U.S. sales as well as FOP consumption on a mixture of net weight and gross weight bases. *Id.* at 18–19. Finally, on remand, Commerce continued to construct a value for Vinh Hoan's fish oil byproduct derived from a build-up of FOPs used to produce fish oil.[2] *Id.* at 14–15. Commerce justified this determination by noting that the SV from the import data yielded a higher value than

[2] Commerce noted that Vinh Hoan reported the FOPs it consumed during the production of fish oil. *Remand Results* 16. Commerce stated that "[t]he FOPs used to produce fish oil during the [period of review] were applied to [period of review]-specific SVs from the primary surrogate country, Indonesia," in Commerce's calculation of Vinh Hoan's normal value. *Id.* Commerce then added surrogate ratios for overhead, selling, general, and administrative expenses, and profit to the value of materials used to produce Vinh Hoan's fish

the whole live fish input used to make the subject merchandise. *Id.* at 14. Commerce considered this result unreasonable, and it attributed the anomaly to the fact that the import data on the record includes prices for refined fish oil while Commerce found that Vinh Hoan produced only unrefined fish oil. *Id.* at 15.

These changes in Commerce's methodology on remand resulted in revised weighted-average dumping margin for mandatory respondent Vinh Hoan and for the separate respondents. *See id.* at 30. Vinh Hoan's margin changed to $0.00 per kilogram ("/kg"), and the rate assigned to the separate rate respondents changed to $1.20/kg. *Id.* Anvifish Joint Stock Company's margin remained unchanged at $1.20/kg. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court continues to have 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) (2012),[3] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306).

oil byproduct. *Id.* at 16–17. Commerce also adjusted for yield loss (*i.e.*, the amount by weight of fish waste, which Commerce found to be the main input used to produce fish oil, that would be lost in the production of fish oil). *See id.* at 27–28.

Commerce does not indicate that it changed its general calculation methodology from its *Final Results* on remand. In the *Final Results*, Commerce calculated material costs for fish oil on a per-kilogram basis by multiplying a per-kilogram value for each FOP by a usage rate calculated based on Vinh Hoan's usage data and adding the per-kilogram costs of manufacture together to derive a cost of materials for fish oil. *See* Final Results Final Analysis Memorandum for Vinh Hoan at Attach. I, CD 237, bar code 3192905–01 (Mar. 28, 2014). Commerce then added a per-unit overhead cost to obtain a total per-kilogram manufacturing costs. *See id.* Commerce then multiplied the total per-kilogram manufacturing costs by the selling, general, and administrative expense ratio and added that product to the total manufacturing costs to obtain a constructed value for fish oil. *See id.* Lastly, Commerce added a profit ratio to obtain a fully-loaded constructed value. *Id.*

On August 15, 2014, Defendant filed indices to the public and confidential administrative records for its final results, which identify the documents that comprise these administrative records, respectively. Those indices can be located at ECF No. 29–1 at Attach. I. All further references to documents from the administrative records to the final results are identified by the numbers assigned by Commerce in these administrative records.

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

DISCUSSION

I. Rice Husk SV

In *An Giang*, the court held that Commerce's SV data selection is not supported by substantial evidence because Commerce failed to address certain detracting evidence concerning whether the Indonesian import data for HTS 1213.00 is aberrational, the data's specificity, and its representativeness of a broad market average. *An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1275. On remand, Commerce declined to use Indonesian import data for HTS 1213.00 to value rice husk because it found Indonesian import data for HTS 1213.00 to be aberrational. *Id.* at 10–11. For the reasons that follow, Commerce has complied with the court's instructions and no party continues to argue that Commerce's selection of the best available information is unsupported by substantial evidence.

The court remanded for Commerce to further explain or reconsider its SV data selection for rice husk, a waste byproduct of rice, given that no record evidence suggests that rice husk can trade for more than rice. *Id.* On remand, Commerce placed historical Indonesian import data for HTS 1213.00 and import data from other countries on its surrogate country list on the record. *Id.* On remand, Commerce revisited the Indonesian import data for HTS 1213.00 and concluded that the Indonesian import data for HTS 1213.00 used in its *Final Results* is aberrational.[4] *See id.* at 10. Commerce selected Indonesian ICBS data as the best available information because the data is representative of a broad market average, publicly available, tax and data exclusive, contemporaneous, reliable. *Id.*

Although Commerce found that Indian import data for HTS 1213.00 and Indonesian ICBS data equally meet its SV data selection criteria, Commerce preferred the ICBS data because it is from the primary surrogate country. *See id.* at 12. Commerce explained that it prefers to rely on factor costs from a single surrogate country because doing so "better reflects the trade-off between labor costs and other factors' costs, including capital, based on their relative prices." *Id.*

Commerce also determined that the two Bangladeshi price quotes on the record are not the best available information for valuing rice husk because they do not represent broad market averages, are not tax and duty exclusive, and Commerce could not confirm their reli-

[4] After comparing Indonesian data to data from other countries on Commerce's surrogate country list and to ICBS data placed on the record for the *Remand Results*, Commerce found the Indonesian average unit values ("AUV") in HTS 1213.00 to be much higher relative to the other benchmark data on the record for rice husk. *Remand Results 10–11*.

ability.[5] *See Remand Results* 3–4. Commerce decided that an Indonesian rice husk price quote from Pt. Vitafarm Indonesia is not the best available information citing its findings in its final determination that this price quote is not representative of a broad market average, not tax and duty exclusive. *Id.* at 4 (citing Final Decision Memo at 42). Moreover, Commerce cited concerns regarding whether this price quote may have been self-selected from a larger group of price quotes because Commerce could not determine how the single transaction referenced in the price quote was generated. *Id.* at 4–5.

No party continues to challenge Commerce's SV data selection to value rice husk. Commerce has complied with the court's remand order. Therefore, Commerce's selection of Indonesian ICBS data to value rice husk is sustained.

II. Recalculation of Vinh Hoan's Margins

The court remanded Commerce's margin calculations to allow it to ensure the calculations reflect values that are calculated on a consistent basis. *An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1285.

On remand, Commerce determined that it should recalculate Vinh Hoan's margin using a net weight denominator.[6] *Remand Results* 17. Commerce concluded it should use a net weight denominator because, although Vinh Hoan reported its U.S. sales database on a mixture of a net weight and gross weight basis, most of Vinh Hoan's sales were reported on a net weight basis. *See id.* at 18. Therefore, Commerce adjusted both the U.S. sales database and the FOP database to an exclusively net weight basis. *See id.* at 18–19. No party continues to question Commerce's determination, and Commerce has complied with the court's instructions by reasonably supporting its determina-

[5] Specifically, Commerce noted that it found in its *Final Results* that the price quotes were not contemporaneous, not representative of broad market averages, and that the record does not demonstrate the quotes are tax and duty exclusive. *Remand Results* 3 (citing Final Decision Memo at 41–42). Commerce also found the SR Apparels quote is unreliable because there were inadequate facts on the record about the conditions under which the price quotes were solicited and whether they were self-selected from a broader range of quotes. *Id.* at 3–4. For the Seraph International price quote, Commerce determined that, although the quote is accompanied by an affidavit indicating how it was obtained, Commerce could not determine if the price quote is reliable. *See id.* at 4. Commerce cited concerns that the affidavit accompanying the Seraph quote indicates that Seraph had numerous discussions with various rice processors and rice husk traders, but only submitted one price quote. *Id.* Commerce also cited contradictory information as to whether Seraph produces and sells rice husks "because the hard copy printout from Seraph's website does not list rice or rice husk as one of the many agricultural products that Seraph offers for sale." *Id.*

[6] Commerce explains that "net weight (or unglazed weight) is the weight of the frozen fish fillets only, whereas gross weight (or glazed weight) is the net weight of the frozen fish fillets with additional water added as glazing or ice." *Remand Results* 17–18.

tion to adjust its margin calculations to ensure a uniform basis for comparison. Therefore, the court sustains Commerce's revised margin calculation.

III. Fish Oil CV

In *An Giang*, the court remanded for further explanation or reconsideration Commerce's decision to use a constructed value for Vinh Hoan's fish oil byproduct rather than any SV data source for fish oil on the record. *See An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1282. The court held that, "[a]lthough Commerce purports to be following its practice of choosing the best SV data source, it has actually taken a different approach" by constructing a value for fish oil that does not rely upon data from Indonesian import data HTS 1504.20.9000.[7] *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1281–82. Therefore, the court held that Commerce deviated from its stated practice without adequate explanation. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1282. Vinh Hoan argues that Commerce still fails to explain its use of a constructed value to value fish oil and, therefore, that Commerce's determination to use a constructed value is not supported by substantial evidence. Pl.'s Comments on Final Results of Redetermination Pursuant to Remand 3–4, Apr. 11, 2017, ECF No. 155 ("Vinh Hoan Remand Comments"). Commerce still has not explained its deviation from its standard practice and construct a value in this case rather than choosing the best existing SV data source for fish oil from the alternative sources on the record. On remand, Commerce must explain why constructing a value from fish oil FOPs is the best available information versus existing alternative SV data on the record or for fish oil reconsider its determination.

In NME cases, Commerce obtains a normal value by adding the value of the FOPs used to produce the subject merchandise and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Commerce values the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries." *Id.* Commerce's methodology for selecting the best available information evaluates data sources based upon their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public availability. Final Decision Memo at 13; *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surro-*

[7] Thus, the court noted that "Commerce's explanation of why the HTS import data is superior to the other SV data sources on the record is . . . irrelevant to its calculation of a SV for Vinh Hoan's fish oil byproduct." *An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1283.

gate Country Selection Process, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited July 5, 2017). Commerce's practice for selecting the best available information to value individual FOPs favors selecting a data source that satisfies the breadth of its selection criteria where possible. *See* Final Decision Memo at 13 (citing Fifth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Issues and Decision Memorandum for the Final Results at 10, A-570893, (Aug. 12, 2011), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–21259–1.pdf (last visited July 5, 2017)). Commerce uses the same methodology to "offset production costs incurred by a respondent with the sale of by-products generated during the production process." *See* Final Decision Memo at 34. Although Commerce has discretion to decide what constitutes the best available information, *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011), Commerce must ground its selection of the best available information in the overall purpose of the AD statute, calculating accurate dumping margins. *See CS Wind Vietnam Co., Ltd. v. United States*, 38 CIT __, __, 971 F. Supp. 2d 1271, 1277 (2014) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

Commerce has not explained, or squarely acknowledged, its substitution of a constructed value methodology for a SV approach. On remand, Commerce continued to affirm that Indonesian import data for HTS 1504.20.9000 is the best available information because it found that the import data is the only SV source on the record that meets the surrogate value criteria.[8] *See Remand Results* 13. Yet Commerce does not actually use the import data for fish oil.[9] Instead, it builds a constructed value for the fish oil using fish oil FOPs and calls this value a "cap." *See id.* at 17. Commerce identified the FOPs used to produce fish oil from Vinh Hoan's SV questionnaire responses. *Id.* at 16–17. Commerce described its calculation as applying "[t]he FOPs used to produce fish oil during the [period of review]" to period-

[8] In contrast, Commerce found that none of the price quotes on the record are representative of a broad market average, contemporaneous, or tax and duty exclusive. *Remand Results* 13–14. Commerce found reliability concerns with some of the price quotes because the accompanying affidavits were not on official company letterhead and did not list the payment terms. *Id.* at 14. Furthermore, Commerce noted that for one price quote, the affidavit indicated that the sales were not typical of the company's business practices. *Id.*

[9] As the court stated in *An Giang*, Commerce acknowledged that it constructed a value rather than relying upon data from the Indonesian HTS category. *An Giang*, 40 CIT at __, 179 F. Supp. 3d at 1283 (citing Oral Arg. 02:14:50–02:15:05). Moreover, there were no entries into Indonesia under HTS 1504.20.9000 during the period of review that were at or below the value than the $1.73 per kilogram constructed value derived from Vinh Hoan's data. *Id.*, 40 CIT at __, 179 F. Supp. 3d at 1283 n.42. Commerce does refute these characterizations of its methodology on remand.

of-review-specific SVs. *Id.* Therefore, it is apparent that Commerce selected SVs for the FOPs used to produce fish oil to construct a SV for the byproduct rather than selecting actual SV data for fish oil on the record. Because Commerce is not applying the calculated "capped" value to existing import data, it is apparent that Commerce is simply substituting constructed value for a surrogate value.[10] *See id.* Commerce cannot justify its decision to construct a value by relying on the extent to which Indonesian import data for HTS 1504.20.9000 best satisfies its SV data selection criteria and then discard the import data for HTS 1504.20.9000. If Commerce is going to deviate from its practice of selecting the best SV data source for a particular FOP, it must acknowledge it is doing so and explain why it is reasonable to conclude that the constructed value for that FOP yields more accurate margins than the other SV data on the record for that FOP.[11] The court cannot assess the reasonableness of using a constructed value for fish oil when Commerce justifies that methodology by claiming it is something other than what it actually is.[12]

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[10] Commerce describes its methodology as using the data that "Vinh Hoan reported . . . coupled with POR-specific SVs from the primary surrogate country and adjusted by surrogate ratios, to calculate a fully loaded unrefined fish oil SV." *Remand Results* 24.

[11] Commerce has the power to use facts available when it lacks necessary information on the record. 19 U.S.C. § 1677e(a). However, it must explain why the information it does have is insufficient.

[12] Commerce argues that it has developed a practice of constructing a value for an FOP in past cases using the same methodology it used in this case where it concluded that the constructed value represented the best available information. *Remand Results* 24–25 (citing *Clearon Corp. and Occidental Chemical Corp., et al. v. United States*, Court of International Trade Consolidated Court No. 13–00073, Final Results of Redetermination Pursuant to Remand at 7–11, *available at* http://enforcement.trade.gov/remands/15–91.pdf (last visited July 5, 2017) ("*Chloro Isos Remand*"); Drill Pipe from the People's Republic of China: Issues and Decision Memorandum for the Final Determination at 26–29, A-570–965, (Jan. 3, 2011), *available at* http://ia.ita.doc.gov/frn/summary/prc/2011–390–1.pdf (last visited July 5, 2017) ("Drill Pipe from PRC I&D"). However, in neither case does Commerce purport to use import data for the input in question. In both cases, Commerce simply constructs a value using other SV data on the record. *See Chloro Isos Remand* at 8 (wherein Commerce calculated the byproduct offset by deducting any costs associated with converting ammonia gas and sulfuric acid into ammonium sulfate from the surrogate value of the downstream product (*i.e.*, ammonium sulfate, not the byproducts in question, which were ammonia gas and sulfuric acid); Drill Pipe from PRC I&D at 28 (wherein Commerce acknowledged it constructed a value based upon SV data for the inputs applied to the components of tool joints from the selected surrogate country and not based upon SV data for tool joints). Commerce does not justify its use of a constructed value by claiming that it is using a SV for the input in question and merely capping that SV. *See Chloro Isos Remand* at 8, Drill Pipe from PRC I&D at 28. Moreover, in both these cases, Commerce found that the SV data for the input in question was not the best available information and determined that the constructed value was the best available information to value the input in question. *See Chloro Isos Remand* at 9–10; Drill Pipe from PRC I&D at 26–28. Here, Commerce concludes that import data for fish oil is the best available information to value fish oil and then proceeds to construct a value for fish oil based upon SV data for the inputs used to produce fish oil. *See Remand Results* 13, 17.

Further, labels aside, Commerce has not explained why a constructed value is a better choice than any of the other SV choices on the record. It has only explained why the Indonesian import data for HTS 1504.20.9000 is better than any of the other choices on the record. Commerce does state that using Vinh Hoan's own information in its production of fish oil "is necessarily the most representative, and specific, value."[13] *Remand Results* at 17. However, Commerce has multiple factors that it considers in assessing the best available information. *See* Policy Bulletin 04.1. Although Commerce compares the extent to which the Indonesian import data for HTS 1504.20.9000 better satisfies its SV data selection criteria versus the five price quotes on the record, *see* Remand Results 13–14, this analysis is of no help to discerning why a constructed value of fish oil FOPs using import data is superior to the alternative SV data sources on the record for fish oil. The constructed value does not use the import data for Indonesia HTS 1504.20.9000 in any way. Therefore, Commerce cannot justify its determination to construct a value based on the superiority of HTS 1504.20.9000 Indonesian import data to price quotes on the record. On remand, Commerce must explain why none of the SV data sources on the record lead to a reasonable value and otherwise explain why a constructed value is superior to the alternative SV data sources on the record or reconsider its determination.

Vinh Hoan also continues to object to Commerce's fish oil cap calculations. *See* Vinh Hoan Remand Comments 8–9. However, the court defers consideration of Vinh Hoan's arguments regarding the accuracy of Vinh Hoan's fish oil constructed value calculations until Commerce has adequately explained the reasonableness of its practice.

CONCLUSION

The court sustains Commerce's SV data selection for rice husk. The court also sustains Commerce's revision to the margin calculation for Vinh Hoan to ensure that both the NV and U.S. price are calculated on a net weight basis. However, the court again remands Commerce's determination to construct a value for Vinh Hoan's fish oil byproduct. Therefore, in accordance with the foregoing, it is hereby

ORDERED that Commerce's remand redeterminations regarding fish oil is remanded for further consideration consistent with this opinion; and it is further

[13] Commerce may indeed have good reason to conclude that using Indonesian HTS data would lead to an unreasonable value for Vinh Hoan's fish oil. But it does not follow that, even if Vinh Hoan's fish oil is a low value-added product, the best alternative is to construct a value. Commerce continues to cling to the term "cap," which is at odds with Commerce's description of how it uses the Indonesian import data for fish oil.

ORDERED that Commerce shall file its second remand redetermination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the second remand redetermination; and it is further

ORDERED that the parties shall have 15 days to file their replies to comments on the second remand redetermination.

Dated: July 10, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–83

CANNAKORP, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 17–00092

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted. Plaintiff's motions for a show cause order and for leave to file a reply in support of its motion for a show cause order are denied as moot.]

Dated: July 11, 2017

Kristin H. Mowry, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With her on the brief were *Jeffrey S. Grimson* and *Jill A. Cramer* of Mowry & Grimson, PLLC, of Washington, D.C., and *William M. Jay* and *Andrew Kim*, Goodwin Proctor LLP, of Washington, D.C.

Guy Eddon, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Assistant Director, and *Aimee Lee*, Senior Trial Counsel. Of Counsel on the brief was *Alexandra Khrebtukova,* Office of Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

MEMORANDUM AND ORDER

Barnett, Judge:

CannaKorp, Inc. ("CannaKorp" or "Plaintiff") brings this action against the United States ("Defendant") to challenge a pre-importation ruling issued by U.S. Customs and Border Protection ("Customs" or "CBP"). *See* Compl., ECF No. 2. Defendant moves to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of International Trade ("USCIT"). *See* Def.'s Mot. to Dismiss and Def.'s Mem. in Supp. of its Mot. to Dismiss ("Def.'s Mot."), ECF No. 17. Plaintiff opposes this motion. *See* Pl.'s Resp. to Def.'s Mot. to Dismiss ("Pl.'s Resp."), ECF No. 18. For the

reasons discussed below, the court grants Defendant's motion to dismiss for lack of subject matter jurisdiction and dismisses this case.[1]

BACKGROUND

In April 2016, CannaKorp requested a pre-importation ruling from CBP regarding its "single-use, pod-based cannabis vaporizer system known as the CannaCloud." Compl. ¶¶ 1, 24–25. In its ruling request, CannaKorp sought to "establish that importation of the CannaCloud is lawful under the Controlled Substances Act [("CSA")]," 21 U.S.C. §§ 801 *et seq.*, because it fell within the ambit of the CSA's exemption provision, 21 U.S.C. § 863(f)(1).[2] Compl., Ex. 3 at 1, ECF No. 2–1; *see also* Compl. ¶¶ 26–30. On March 24, 2017, CBP issued a ruling that the "[CannaCloud] is not exempted from the prohibition on the importation of drug paraphernalia set forth in 21 U.S.C. § 863(a) and may not be legally imported into the United States because the exemption set forth in 21 U.S.C. § 863(f)(1) does not apply." Compl., Ex. 1 at 5, ECF No. 2–1. On April 27, 2017 CannaKorp filed a complaint seeking judicial review of this Customs ruling. *See* Compl. Plaintiff invokes jurisdiction pursuant to 28 U.S.C. § 1581(h),[3] alleging that without pre-importation review, CannaKorp "would experience irreparable harm . . . through disruption of supplier relationships, lost business opportunities, and reputational harm [that] threatens the complete failure of CannaKorp's business." Compl., ¶¶ 7, 3–11. Plaintiff further alleges that CBP's ruling was "arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law," Compl. ¶ 53, 57, 60, and asks the court to (i) order expedited consideration and briefing; (ii) declare CBP's ruling unlawful; (iii) "declare that the CannaCloud is not restricted merchandise" because it is exempted from the CSA pursuant to 21 U.S.C. § 863; (iv) order any other relief deemed just and proper; and (v) award CannaKorp and attorney's fees and costs pursuant to 28 U.S.C. § 2412(d), *id.*¶ 61. Defendant has moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which

[1] Plaintiff has moved for an order to show cause why an expedited litigation schedule should not be entered, Pl.'s Mot. for an Order Directing Def. to Show Cause Why an Expedited Litigation Schedule Should Not Be Entered in this Action ("Pl.'s Sched. Mot."), ECF No. 5, which the court construes as a motion for an expedited briefing schedule, and for leave to file a reply in support of that motion, Mot. for Leave to File Reply in Supp. of Pl.'s Mot. for an Order Directing Def. to Show Cause Why an Expedited Litigation Schedule Should Not Be Entered in this Action, ECF No. 15. Because the court finds that it lacks subject matter jurisdiction over this action, Plaintiff's motions are denied as moot.

[2] Subsection 863(f)(1) provides that "any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items" is not subject to the prohibitions stated in section 863. 21 U.S.C. § 863(f)(1)(2012).

[3] In its complaint Plaintiff also asserted jurisdiction pursuant to 28 U.S.C. § 1581(i), but has since withdrawn this invocation. *See* Compl. ¶ 9; Pl.'s Resp. at 2 n. 1.

relief can be granted. *See* Def.'s Mot. Plaintiff opposes this motion. *See* Pl.'s Resp.

SUBJECT MATTER JURISDICTION

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

A plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When reviewing a motion to dismiss for lack of subject matter jurisdiction, the court proceeds according to whether the motion "challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings." *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006). When the motion challenges the sufficiency of the pleadings, the court assumes that the allegations within the complaint are true. *Id*. When, as here, "the motion controverts factual allegations supporting the [c]omplaint, 'the allegations in the complaint are not controlling,' and 'are subject to fact-finding by the [trial] court.'" *Id*. at 692, 437 F. Supp. 2d at 1339 (quoting *Cedars–Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)) (alterations added). *Cf. Power-One Inc. v. United States*, 23 CIT 959, 962, 83 F. Supp. 2d 1300, 1303 n.9 (1999) (when a party "challenges the actual existence of subject matter jurisdiction," the "allegations in Plaintiffs' Complaint are not controlling, and only uncontroverted factual allegations are accepted as true").

Pursuant to subsection 1581(h),

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, . . . relating to . . . restricted merchandise, . . . or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h).

A plaintiff must show that it has met four requirements to establish jurisdiction under subsection (h): "1) review must be sought prior to importation; 2) review sought must be for a ruling; 3) the ruling must

relate to certain subject matter; and 4) the importer must show that irreparable harm will result unless judicial review prior to importation is obtained." *Am. Frozen Food Inst., Inc. v. United States*, 18 CIT 565, 569, 855 F. Supp. 388, 393 (1994) (supplying the requirements); 28 U.S.C. § 2639(b) (supplying the burden of proof); *see also Heartland By-Prods, Inc. v. United States*, 31 CIT 1711, 1719, 521 F. Supp. 2d 1386, 1393 (2007), *rev'd on other grounds*, 568 F. 3d 1360 (Fed. Cir. 2009) ("The heightened burden of having to demonstrate irreparable harm under § 1581(h) provides grounds for jurisdiction over disputes that might otherwise be considered speculative or not ripe for review. It is precisely this distinction that makes jurisdiction under § 1581(h) extraordinary.") (citations omitted). Only the fourth prong of the jurisdictional criteria, irreparable harm, is at issue here. *See* Def.'s Mot. at 4, 5; Pl.'s Resp. at 5.

LEGAL FRAMEWORK FOR IRREPARABLE HARM

The "standard for proving irreparable harm [in a § 1581(h) case] is essentially identical to that used to determine irreparable injury in cases where injunctive relief is sought." *Connor v. United States*, 24 CIT 195, 199 (2000) (citation omitted). Plaintiff must demonstrate, with clear and convincing evidence, that "the harm is highly probable." *Id.* at 196–97 (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992)). *Cf. Thyssen Steel Co. v. United States*, 13 CIT 323, 326, 712 F. Supp. 202, 204 (1989) (court denied claim of irreparable harm where plaintiff relied solely on an affidavit); *Holford USA Ltd. v. United States*, 19 CIT 1486, 1491–92, 912 F. Supp. 555, 559–60 (1995) (affidavits and letters proffering relevant facts and contract terms constituted sufficient evidence supporting claim of irreparable harm).

"Irreparable harm is that which 'cannot receive reasonable redress in a court of law.'" *Connor*, 24 CIT at 197 (quoting *Manufacture de Machines du Haut-Rhin v. Von Rabb*, 6 CIT 60, 64, 569 F. Supp. 877, 881–82 (1983)). "In evaluating that harm, the court must consider 'the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief.'" *Shree Rama Enter. v. United States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 194, (1997) (quoting *Queen's Flowers de Colombia v. United States*, 20 CIT 1122, 1125, 947 F. Supp. 503, 506 (1996). Of these three factors, "immediacy [of the injury] and the inadequacy of future corrective relief" may be weighed more heavily than magnitude of harm. *Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 53, 628 F. Supp. 978, 984 (1986) (citations omitted).

Critically, irreparable harm may not be speculative, *see Am. Inst. for Imported Steel, Inc. v. United States*, 8 CIT 314, 318, 600 F. Supp. 204, 209 (1984), or determined by surmise, *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp. 2d 1324, 1331 (2001) (citation omitted). "It is not enough to establish 'a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.'" *Shree Rama*, 21 CIT at 1167, 983 F. Supp. at 194–95 (quoting *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (2009)).

Economic harm, or injury to the business, may constitute irreparable harm when "the loss threatens the very existence of the movant's business," *Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (DC. Cir. 1985) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C. Cir. 1977)), and is otherwise noncompensable, *Kwo Lee, Inc. v. United States*, 38 CIT ___,___, 24 F. Supp. 3d 1322, 1327 (2014) ("Financial loss alone—compensable with monetary damages—is not irreparable") (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Economic harm may include financial loss, reputational injuries, and severe business disruption. *Kwo Lee,* 24 F. Supp. 3d at 1327 ("Irreparable harm may take the form of '[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities.'") (quoting *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012); *Sanofi–Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1381–83 (Fed. Cir. 2006)). Generally, however, "[a]llegations of harm to potential future business relations are too speculative to constitute irreparable harm." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 428, 795 F. Supp. 428, 437 (1997).

Defendant asserts that the court's jurisdiction rests on Plaintiff's ability to show irreparable harm absent pre-importation judicial review and that it has not done so. Defendant is correct.

DISCUSSION

Defendant contends that Plaintiff has failed to show by clear and convincing evidence that it will suffer irreparable harm absent pre-importation judicial review. Def.'s Mot. at 3–16. Defendant argues that the harms that would allegedly befall CannaKorp, if it were to await an attempted importation to bring its challenge, are speculative, self-inflicted, not of the type considered irreparable, and lacking evidentiary support. *See* Def.'s Mot. at 8–16; Def.'s Reply Brief in Further Supp. of its Mot. to Dismiss ("Def.'s Reply") at 2–14, ECF No. 19. Plaintiff responds that "economic injury that threatens the viabil-

ity of a business, and for which no monetary remedy is available, is irreparable," and that its proffered evidence is sufficient to carry its burden. Pl.'s Resp. at 6; *see also id.* at 6–17. Plaintiff denies that its injury is self-inflicted. *See id*. at 17–21. Plaintiff particularly points to financial loss, disruption of business operations (including loss of key employees, supplier relationships, and manufacturing facilities), and reputational harm (including loss of market strategy, first-mover status, and consumer goodwill), as constituting irreparable harm. *See id*. at 11–14. Plaintiff also argues that this harm is severe enough to threaten the existence of its business, and that it may not be able to seek compensation even if it prevails because of the government's sovereign immunity. *See id*. at 6–10.

Plaintiff's support for its position is limited to two declarations by James Winokur, the CEO and co-founder of CannaKorp. Compl., Ex. 2 ("Winokur Decl."), ECF No. 2–1; Pl.'s Resp., Ex. 1 ("Suppl. Winokur Decl.", ECF No. 18–1). Plaintiff provides no financial records or other documents in support of Mr. Winokur's declarations. This is significant because the declarations contain numerous vague, speculative, or conclusory statements, and internal inconsistencies, and are otherwise impossible to corroborate. During the court's teleconference of May 3, 2017, CannaKorp declined the court's offer of an evidentiary hearing at which it could offer testimony and further evidence in support of its motion to expedite.[4] As discussed more fully below, the declarations are insufficient to meet Plaintiff's burden of proof. *Cf. Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011) (CEO's conclusory projections regarding harm to the business are insufficient to establish harm under the standard).

The court recognizes that, as a start-up business, CannaKorp may believe that it is in a "Catch-22" situation–that it is unable to establish the existence of the economic harm caused by CBP's ruling because the ruling prevents it from getting off the ground and establishing evidence of its viability. Even if there is some basis for that belief, it does not absolve CannaKorp of the responsibility of supporting its allegations of irreparable harm with clear and convincing evidence appropriate to its situation. As discussed below, CannaKorp failed to provide any documentation, records, or third-party testimony in support of the harms Mr. Winokur asserts are likely and it is on this basis that CannaKorp's claims fail.

[4] In CannaKorp's motion to expedite the briefing in this case, Plaintiff asserted that there was good cause to expedite the briefing schedule because otherwise it would suffer irreparable harm. *See* Pl.'s Sched. Mot.

A. CannaKorp Fails to Establish Actual, Imminent Harm

CannaKorp argues that CBP's ruling has "placed [it] at imminent risk of failure" because of the "significant, if not total, disruption of its business operations in the form of hampered supplier relationships, lost business opportunities, and reputational harm" resulting from the ruling. Pl.'s Resp. at 2, 11. Defendant contends that Plaintiff's claim and Mr. Winokur's declarations in support of its arguments regarding imminent harm are speculative, and, thus, fail to demonstrate the irreparable harm required for § 1581(h) jurisdiction. Def.'s Mot. at 8–12; *see also Def.*'s Reply at 7–14.

(i) Business Disruption

Business disruption may constitute economic harm when the likelihood and nature of the disruption is adequately documented. *See, e.g.*, *CPC Int'l, Inc. v. United States*, 19 CIT 978, 979, 980–83, 896 F. Supp. 1240, 1243, 1244–45 (1995) (importer demonstrated harm in the form of costs, expenditures, business disruption, and other financial losses through affidavits that detailed these costs and disruption with specificity); *Holford*, 19 CIT at 1492, 912 F. Supp. at 560 (affidavit attesting to harm in the form of increased costs, lost profits and loss to business reputation was supported by letters, relevant contract terms, and details regarding relevant quotas that imposed costs on the importer); *Nat'l Juice Prods.*,[5] 10 CIT at 54, 628 F. Supp. at 984–85 (plaintiff provided third party affidavits attesting that compliance with a new Customs ruling would take up to two and a half years and prevent satisfaction of customer orders). In contrast, the Winokur declarations contain several vague and internally inconsistent statements on the extent and nature of the alleged disruption.

First, Mr. Winokur declares that "[t]he CannaCloud is now ready for commercial manufacture and launch." Winokur Decl. ¶ 11. He then, however, avers that "preparation for launch requires many months of lead time," Winokur Decl. ¶ 16, "[s]tarting manufacture would require additional capital," Suppl. Winokur Decl. ¶ 7, and "the financial forecast requires [CannaKorp] to raise an additional $10 million by the first quarter of 2018 . . . [to] be used for inventory, shipping, and distribution," Winokur Decl. ¶ 20. It is unclear from these statements whether the product is actually ready for launch or whether CannaKorp will first need to raise $10 million, followed by the necessary "lead time" before the product can be launched.

[5] *Nat'l Juice Products* has since been superseded by statute, but the change does not relate to the propositions for which it is being cited herein. *See Precision Specialty Metals, Inc. v. United States,* 24 CIT 1016, 1041, 116 F. Supp. 2d 1350, 1375 (2000) (discussing change to statutory provisions detailing the process by which Customs makes changes to its practice or position).

Second, Mr. Winokur's declarations contain inconsistent assertions regarding the imminent closure of the business. In the first declaration, prepared in late April 2017, Mr. Winokur estimates the business will close in August 2017. Winokur Decl. ¶ 18 ("[t]he threat of further delay seriously threatens the company's viability [and that] without additional revenue or funding, CannaKorp projects that it will run through its current capital by August 2017"). However, in his second declaration, filed in early June 2017, Mr. Winokur informs the court that the business now has "enough cash to operate until October" because it has conducted "additional capital fundraising." Suppl. Winokur Decl. ¶ 8.

Third, Mr. Winokur uses vague and conditional language to describe the nature and likelihood of harm to its supplier and manufacturer relationships.[6] Mr. Winokur avers "it is very *likely*" that "current circumstances" will result in "substantial breach of our partnership agreements," whereby CannaKorp's "partners would dismantle the customized CannaCloud assembly lines," Suppl. Winokur Decl. ¶ 10 (emphasis added), and that "in the event of substantial delay, the Chinese company is *likely* to terminate its relationship with CannaCloud," Winokur Decl. ¶ 33 (emphasis added), resulting in "a *potential* claim for damages" and a "*likely* los[s of] its supplier relationship, Winokur Decl. ¶ 34 (emphasis added); *see also id*. ¶ 37 (similar issues with German manufacturer of the cPod whereby "delay . . . *could* constitute a substantial breach of contract" leading the "German manufacturer [to] *likely* sever its relationship with CannaKorp" if the CannaCloud launch is "substantially or indefinitely delayed.") (emphasis added). Plaintiff's statements are unsupported by documentary proof, such as copies of contracts showing breach and damages clauses. Additionally, the uncertainty of Mr. Winokur's assertions of harm are underlined by his assertion that "[i]n light of the

[6] In contrast to the ambiguous language used in Mr. Winokur's declarations, this court has found affidavits to be persuasive when they represent the harm with more certainty and specificity. *See CPC Int'l,* 19 CIT at 985–86, 896 F. Supp. at 1247–48 (reviewing cases). For example, in *American Frozen Food Institute*, plaintiffs proffered affidavit evidence that "they *will* lose substantial sums of money from the destruction of stockpiled non-complying labelling"; "that its costs to destroy labels and its printing costs to change labels *would be* in excess of $900,000"; that "labelling redesign [is] projected at over $9 million"; and that "it would be necessary to re-engineer its inventory management process to . . . to ensure that the various labels will correctly reflect the countries of origin for [its product]." *Am. Frozen Food Inst.* 18 CIT at 570, 855 F. Supp. at 393–94 (emphasis added). In *Nat'l Juice Products*, plaintiffs offered several affidavits by representatives of third party supply and processing companies detailing challenges to complying with Customs' ruling, such as their inability to timely "provide the necessary labels and cans," preventing the fulfillment of customer orders, and the "substantial" costs to be incurred in preparing new labels and packaging. *Nat'l Juice Prods.*, 10 CIT at 54, 628 F. Supp. at 985. Plaintiffs also provided evidence demonstrating their need to warehouse or destroy its current inventory of labels. *Id.* at 54, 628 F. Supp. at 985.

fact that CBP's decision *has* delayed launch of the CannaCloud indefinitely, CannaKorp faces a potential claim for damages . . . and will likely lose its supplier relationship." *Id*. ¶ 34 (emphasis added).

Mr. Winokur is similarly unclear about the nature of the potential harm to CannaKorp's manufacturing relationships, speculating that "[t]he tools and other assets . . . *likely* cannot be transferred to a new manufacturer." *Id*. ¶ at 35; *see also id*. ¶ 37 (speculating that "the tools and other assets that the German company developed for the cPod's production *likely* cannot be transferred to a new manufacturer") (emphasis added). Mr. Winokur further speculates that "it is *very likely* that [CannaKorp's manufacturing] partners will claim that we are in substantial breach of our partnership agreements because production orders fell far short of expectations," and that "they *may* take [legal action] for such a breach" and "dismantle [] customized CannaCloud assembly lines and retrain their personnel." Suppl. Winokur Decl. ¶ 10. Again, Mr. Winokur's declarations are speculative and conditional, lacking specific details of key contract terms and the ownership of intellectual property and engineering design(s) presumably developed in conjunction with manufacturing partners and with CannaKorp's financial input. *See, e.g.*, Winokur Decl. ¶ 8 (noting sums spent by CannaKorp in "design, development and production").

Finally, Plaintiff makes vague and unsupported claims regarding potential loss of employees. *See id*. ¶ 38 ("Without the revenue and additional capital that will result from taking the CannaCloud to market, CannaKorp will not be in a financial position to continue retaining the services of these expert employees."); Suppl. Winokur Decl. ¶ 8 ("CannaKorp has enough cash to operate until October and would be forced to downsize its operations and terminate key employees to remain afloat until then."). Although Mr. Winokur expresses concern that CannaKorp's key employees "are in such demand that they are likely to be hired immediately by another company," Winokur Decl. ¶ 38, his statements do not shed light on whether CannaKorp has entered into non-compete agreements with its key staff, or why the possibility that they may leave the company to work for another company, even a competitor, is something other than the normal course of business in which highly skilled employees may seek more lucrative or rewarding employment.

Taken together, Mr. Winokur's conclusory, at times vague, and unsupported statements do not provide sufficient proof of business disruption to satisfy Plaintiff's burden by clear and convincing evidence.

(ii) Financial Loss

This court has found irrecoverable financial losses to constitute harm when allegations of such losses are supported by clear and convincing evidence. *See Nat'l Juice Prods.*, 10 CIT at 54–57, 628 F. Supp. at 984–87 (Plaintiff provided affidavits from "a sampling of processors" estimating the substantial cost of new labels and packaging). Here, Plaintiff's allegations of imminent financial loss are vague, at times contradictory, and unsupported.

Mr. Winokur estimates that CannaKorp faces financial losses of approximately $14.8 million based on the, now delayed, July 2017 launch date and its expectation that 49,700 units would be sold within a year of launch. Winokur Decl. ¶ 20. In contrast, in the supplemental declaration he claims that "by the end of 2017, CannaKorp had expected to distribute nearly 4,000 CannaClouds in the United States." Suppl. Winokur Decl. ¶ 9. Plaintiff provides no documentation to support its estimated sales and revenue, and, crucially, does not explain how (or why) it expected to sell only 4,000 CannaClouds in the six month period following its July 2017 launch, but in the six to twelve month period thereafter it expected to sell more than twelve times that number. Plaintiff characterizes Defendant's argument that "objective" evidence is needed to support Mr. Winokur's assertions as an argument requiring "independent, third-party" evidence. Pl.'s Resp. at 3; *see also, e.g.*, Def.'s Resp. at 16. To the contrary, CannaKorp's own market research and business plans showing some rational basis for its sales and revenue projections would go a long way to support Plaintiff's allegations of financial harm. As it is, the court cannot evaluate the reasonableness of Plaintiff's assertions or expectations based solely on the statements in Mr. Winokur's declarations.

Plaintiff also makes contradictory assertions regarding the degree to which Customs' ruling impacts its ability to obtain additional funding. *See* Winokur Decl. ¶ 20 (Customs' ruling "seriously threatens CannaKorp's ability to obtain additional funding . . . [and] additional investment will be difficult, *if not impossible*, to obtain in light of CBP's decision") (emphasis added); Suppl. Winokur Decl. ¶ 6 (Customs' ruling "has significantly *stymied* CannaKorp's ability to attract additional investors," and "those investors *see* CBP's decision . . . as the *primary* roadblock to investment") (emphasis added). Mr. Winokur's failure to identify the other potential roadblocks prevents the court from evaluating the veracity of CannaKorp's claim. Moreover, CannaKorp's assertions of difficulty in obtaining new investment are contradicted by Mr. Winokur's admission that the company successfully raised $500,000 in additional capital in the six weeks following

Mr. Winokur's initial declaration, *see* Suppl. Winokur Decl. ¶ 8, that additional fundraising would be "difficult, if not impossible," Winokur Decl. ¶ 20.

In sum, like Plaintiff's statements on business disruption, Plaintiff's allegations of financial harm are unsupported and, at times, contradictory. Plaintiff's proofs are insufficient and unpersuasive in light of the clear and convincing burden of proof standard it faces.

(iii) Reputational Harm

The court considers the loss of customers when reviewing claims of harm when such loss is sufficiently nonspeculative. *Compare, e.g.*, *Lois Jeans & Jackets, U.S.A., Inc. v. United States*, 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (established importer and distributor of wearing apparel presented sufficient evidence in the form of an affidavit and oral testimony during a hearing showing injury to reputation as a reliable supplier), *with, e.g.*, *Techsnabexport*, 16 CIT at 428, 795 F. Supp. at 437 (affidavits averring challenges to the establishment of long term business relationships were "too speculative to constitute irreparable harm"). It also remains incumbent upon the movant to sufficiently document the alleged harm. *See Arbor Foods, Inc. v. United States*, 8 CIT 355, 359, 600 F. Supp. 217, 220 (1984) (declining to find harm when nature and scale of lost profits was "unknown," and loss of benefits from past marketing and damage to reputation was speculative) (citations omitted). To the extent that reputational harm may be considered economic harm, this court has customarily found such non-measurable harms to rise to this level only when the moving party is able to show a clear detriment; for example, an existing customer base (and its impending loss). *See Heartland*, 23 CIT at 758–59 & n. 8, 74 F. Supp. 2d at 1331 & n. 8 (finding irreparable harm when party stood to lose its three main customers and had documented this through an affidavit and "letters from the customers indicating their plans to take their business elsewhere").

Here, Mr. Winokur's affidavits fail to rise above speculation. Mr. Winokur avers that Customs' ruling prevents CannaKorp from establishing consumer goodwill as a result of "first-mover advantage," Winokur Decl. ¶ 29, which it bases on its having generated "over 20 million views and 50,000 comments, the vast majority of which were positive and supportive" in response to a Facebook video, *id.* ¶ 30. Mr. Winokur also makes repeated reference to potential competitors in the market and the consequent loss of "market potential" and "first-mover advantage" that allegedly results from CBP's ruling. *Id*. ¶¶ 22–30. Mr. Winokur estimates the monetary value of "first-mover

advantage" in 2017 at $2 million. *Id*. ¶ 29. The court simply notes that Facebook views and comments are an insufficient measure of consumer goodwill and Plaintiff has submitted no evidence showing it has an established customer base or distribution arrangements. As such, the harms alleged remain unknown and speculative.

Similarly, CannaKorp provides no documentation or studies explaining or supporting its monetary estimate of its so-called first-mover advantage, particularly in light of Mr. Winokur's assertion that the company had expected to distribute 4,000 CannaClouds by the end of 2017 (suggesting that he valued the first-mover advantage at $500 per unit). Suppl. Winokur Decl. ¶ 9. Mr. Winokur's statements, taken together, fail to provide clear and convincing evidence of the alleged reputational harm that CannaKorp would suffer if it cannot challenge Customs' pre-importation ruling. CannaKorp provides no documents or reasoning to support its claims of estimated monetary losses. Although economic loss need not be precisely measured, the court must have some ability to evaluate the magnitude and imminence of the loss in order to consider the likelihood of harm. CannaKorp has failed to provide the court with evidence that would enable such an assessment. As a result, CannaKorp has failed to meet its burden to provide clear and convincing evidence of harm.

B. Whether CannaKorp's Alleged Harms are Irreparable

CannaKorp argues that its alleged harms are irreparable because the government's sovereign immunity "makes potential monetary damages irrecoverable." Pl.'s Resp. at 7. Defendant contends that CannaKorp has failed to carry its burden in proving the economic harms it alleges, Def.'s Reply at 3–4, and that its only other harms amount to "litigating costs and litigation delay" generally associated with challenges to pre-importation rulings, *id.* at 4–5.

"[T]he fact that economic losses may be unrecoverable does not absolve the movant from its considerable burden' of proving that those losses are 'certain, great and actual." *Nat'l Min. Ass'n*, 768 F. Supp. 2d at 52 (internal quotation marks, citation, and emphasis omitted). Plaintiff has to establish the harm before the court can address the question of recoverability. As discussed above, Plaintiff has failed to establish by clear and convincing evidence that its business would suffer harm. As such, the court need not address whether any of that harm would be recoverable.[7]

[7] In addition to the arguments addressed above, Defendant also argued that Plaintiff's alleged harms were self-inflicted because of the time-lag between when it filed its patent application (2014) and when it requested the pre-importation ruling from Customs (2016), and because Plaintiff did not "account for the possibility of litigation delay when developing its business model and negotiating its contracts." Def.'s Reply at 6–7; Def.'s Mot. at 13–16;

To the extent that Plaintiff includes the time and financial costs of litigation in its list of harms, these costs are part and parcel of doing business and do not constitute irreparable harm sufficient to justify jurisdiction pursuant to subsection 1581(h). *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Fed. Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (where plaintiff had argued "that the expense and disruption of defending itself in protracted adjudicatory proceedings constitute[d] irreparable harm," the Court ruled that, even though "the burden of defending this proceeding will be substantial . . . [,] 'the expense and annoyance of litigation is 'part of the social burden of living under government'"") (quoting *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938)).

CONCLUSION AND ORDER

The court finds that Plaintiff has failed to establish that it would be irreparably harmed if it cannot obtain pre-importation judicial review as required by subsection 1581(h). Although Plaintiff presents the court with claims of business disruption, financial loss, and reputational harm, the evidence it presents in support of its claims ranges from vague, to inconsistent, to contradictory. Thus, Plaintiff has failed to carry its burden to show by clear and convincing evidence that it faces the harms it alleges. Because Plaintiff fails to establish the harms, the court need not address its arguments regarding the irreparability of those harms. Similarly, the court does not reach Defendant's arguments regarding Plaintiff's failure to state a claim for which the court may grant relief. *See* Def.'s Mot. at 22–24; Def.'s Reply at 14–16; Pl.'s Resp. at 23–25.

Therefore, upon consideration of Defendant's motion to dismiss pursuant to USCIT Rules 12(b)(1) and 12(b)(6), the response and reply thereto, the complaint and its exhibits, and upon due deliberation, it is hereby

ORDERED that Defendant's motion to dismiss (ECF No. 17) pursuant to USCIT Rule 12(b)(1) is **GRANTED;** it is further

ORDERED that Defendant's motion to dismiss pursuant to USCIT Rule 12(b)(6) is **DENIED AS MOOT**; it is further

ORDERED that Plaintiff's motion for an expedited briefing schedule (ECF No. 5) is **DENIED AS MOOT**; it is further

ORDERED that Plaintiff's motion for leave to file a reply in support of its motion for an expedited briefing schedule (ECF No. 15) is **DENIED AS MOOT**; and it is further

see also Pl.'s Resp. at 17–21. Because the court finds that Plaintiff has failed to establish irreparable harm in the first instance, the court need not reach this additional argument.

ORDERED that this action is dismissed. Judgment will be entered accordingly.

Dated: July 11, 2017
New York, New York

/s/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE

Slip Op. 17–84

TENSION STEEL INDUSTRIES CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 14–00218

[Remand results sustained.]

Dated: July 12, 2017

Kelly A. Slater, Jay Y. Nee, and *Edmund W. Sim*, Appleton Luff Pte Ltd. of Washington, DC for Plaintiff Tension Steel Industries Co., Ltd.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. On the brief with him were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mercedes C. Morno*, Attorney, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Robert E. DeFrancesco, III and *Alan H. Price*, Wiley Rein, LLP of Washington, DC for Defendant-Intervenor Maverick Tube Corporation.

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

Roger B. Schagrin, John W. Bohn, and *Paul W. Jameson*, Schagrin Associates of Washington, DC for Defendant-Intervenors Boomerang Tube LLC, Energex Tube (a Division of JMC Steel Group), Tejas Tublar Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") final determination in the less than fair value investigation of certain oil country tubular goods from Taiwan. *See Certain Oil Country Tubular Goods from Taiwan*, 79 Fed. Reg. 41,979 (Dep't of Commerce July 18, 2014) (final LTFV determ.), as amended, 79 Fed. Reg. 46,403 (Dep't of Commerce Aug. 8, 2014) ("*Final Determination*"), and accompanying Issues and Decisions Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from Taiwan, A-583–850 (Dep't of Commerce July 10, 2014), *available at* http://enforcement.trade.gov/frn/summary/taiwan/2014–16861–1.pdf (last visited this date) ("*Decision Memorandum*"); Antidumping Duty Investigation of Certain Oil Country Tubular Goods from Taiwan: Proprietary Issues (Dep't of

Commerce July 10, 2014), CD 388 ("*Confidential Decision Memorandum*").[1]

Before the court are the Results of Remand Determination, ECF No. 87–1 ("*Remand Results*"), filed by Commerce pursuant to the court's remand order in *Tension Steel Indus. Co. v. United States*, 40 CIT ___, 179 F. Supp. 3d 1185 (2016) ("*Tension Steel I*"). 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) (2012),[2] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court sustains the *Remand Results*.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court 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); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). 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. 2017). 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." 8A West's Fed. Forms, National Courts § 3.6 (5th ed. 2017).

[1] "CD" refers to a document contained in the confidential administrative record.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

II. Discussion

In the *Final Determination*, Commerce rejected adjustments for rebate payments made by the respondent, Tension Steel Industries Co., Ltd. ("Respondent" or "Tension"), pursuant to sales contracts that did not specifically include a rebate clause. *Decision Memorandum* at 11. According to Commerce, the only "legitimate rebates" proffered by Tension were those known by customers at or before the time of the sale. *Id.* Tension persuaded the court that Commerce's practice of rejecting rebates when Commerce is not satisfied that customers were aware of the terms and conditions of the rebate at the time of the sale violated *Papierfabrik August Koehler AG v. United States*, 38 CIT ___, 971 F. Supp. 2d 1246 (2014) ("*Papierfabrik*"), which held that Commerce's practice contravened the plain language of Commerce's regulations. *Tension Steel I*, 40 CIT at ___, 179 F. Supp. 3d at 1190–91. The court noted that *Papierfabrik* explained that "the plain language of Commerce's regulations require [Commerce] to calculate normal value 'net of *any* price adjustment . . . that is reasonably attributable to the . . . foreign like product' that '[is] reflected in the purchaser's net outlay.'" *Tension Steel I*, 40 CIT at ___, 179 F. Supp. 3d at 1190 (quoting *Papierfabrik*, 38 CIT at ___, 971 F. Supp. 2d at 125253 (quoting 19 C.F.R. §§ 351.102(b)(38), 351.401(c))). The court also observed that *Papierfabrik* had become final, and instead of filing an appeal, Commerce chose to amend the applicable regulation. Accordingly, the court remanded this issue to Commerce to grant all of Tension's rebate adjustments. *Tension Steel I*, 40 CIT at ___, 179 F. Supp. 3d at 1191.

On remand, Commerce granted all of Respondent's reported rebates and recalculated Tension's antidumping duty margin.[3] *Remand Results* at 3. The petitioners, Maverick Tube Corporation ("Maverick"), United States Steel Corporation, and Boomerang Tube LLC (collectively "Petitioners"), argued that *Papierfabrik* is an outlier and that the then-existing regulations permitted Commerce to deny Tension's claimed adjustments for rebates that were not contemplated at the time of sale. *Id.* Though it "did not disagree" with Petitioners' arguments, Commerce determined that it would comply with the court's remand in *Tension Steel I*. *Id.* at 4.

Maverick now challenges Commerce's determination to comply with the court's remand and grant all of Tension's reported rebate adjustments. In particular, Maverick argues that in *Tension Steel I*

[3] The recalculated weighted-average margin for Tension was zero percent.

the court inappropriately relied upon *Papierfabrik*, "as [*Papierfabrik]* is an outlier, reflecting an unreasonable standard that is contrary to established Commerce practice as well as the spirit of the antidumping duty laws." *Maverick's Comments on Remand Results* at 3, ECF No. 93 ("*Maverick's Br.*"). Maverick also contends that Commerce did not explain how its decision is supported by the record. *Id.* at 6.

Maverick's challenge to *Papierfabrik* is a continuation of the arguments raised by the Government and adopted by Maverick in the initial USCIT Rule 56.2 briefs on the merits in this action. *See* Def.'s Opposition to Pls.' R. 56.2 Mot. for J. upon Agency Record at 33–36, ECF No. 62; Maverick Tube Corp.'s Response to Tension's Mem. in Support of its R. 56.2 Mot. for J. on the Agency Record at 2, ECF No. 65 (agreeing, supporting, and incorporating by reference Defendant's arguments (pages 25–36 of Defendant's brief) on Commerce's denial of certain rebate adjustments sought by Tension). Maverick again argues that *Papierfabrik* is "an outlier" from prior court decisions. *See* Maverick's Br. 4 (citing *Koenig & Bauer Albert AG v. United States*, 22 CIT 574, 15 F. Supp. 2d 834 (1998); *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 890 F. Supp. 1106 (1995); *Dupont Teijin Films USA, LP v. United States*, 28 CIT 896 (2004); and *Mitsubishi Electric Corp. v. United States*, 12 CIT 1025, 700 F. Supp. 538 (1988)). Specifically, Maverick contends that these decisions demonstrate that Commerce maintains broad discretion to require a respondent to prove the existence of claimed rebates and to reject any claimed price adjustments that are intended to evade or circumvent the antidumping duty law. *Id.*

The court disagrees that these cases support Maverick's argument. As noted in *Papierfabrik, Koenig* and *Nachi-Fujikoshi* are inapplicable as they arose from administrative determinations made prior to the implementation of the regulations applicable in this action. *See Papierfabrik* 38 CIT at ___, 971 F. Supp. 2d at 1256. Furthermore, Maverick's reliance on these four decisions is misplaced because Maverick does not contend, nor does the administrative record demonstrate, that any of Tension's claimed rebates are either illusory or pose the risk of manipulation. *See Koenig*, 22 CIT at 576, 15 F. Supp 2d at 840 (upholding Commerce's authority "to reject price amendments that present the potential for price manipulation"); *Nachi-Fujikoshi*, 19 CIT at 920, 890 F. Supp at 1110 (sustaining Commerce's disallowance of claimed rebate given respondent's failure to adequately provide record information supporting the rebate claim); *Dupont*, 28 CIT at 904 (noting Commerce's authority to interpret the statutory price adjustment provisions in a manner that accounts for

the risk of manipulation); *Mitsubishi*, 12 CIT at 1046, 700 F. Supp. at 555 (upholding Commerce's authority to act with "the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."). Commerce has made no finding that Respondent's claimed rebates were illusory, posed the risk of manipulation, or were otherwise aimed at the evasion or circumvention of the antidumping duty law. To the contrary, as the court has already noted, "Commerce was able to verify *all* of Tension's proposed rebate amounts while on-site in Taiwan." *Tension Steel I*, 40 CIT at ___, 179 F. Supp. 3d at 1197 (citing *Confidential Decision Memorandum* at 10–11).

Maverick's preferred arguments regarding Commerce's practice of rejecting certain claimed rebate adjustments under the prior version of the applicable regulations were considered and rejected in *Papierfabrik*. In challenging the *Remand Results*, Maverick is essentially asking the court to reconsider its decision in *Tension Steel I*. The court will not do this and continues to follow *Papierfabrik*.

Turning to whether Commerce failed to explain how the record supports its *Remand Results*, the court concludes that Maverick's argument lacks merit. In its remand order, the court examined and considered *Papierfabrik* in detail. This action presents the same scenario as in *Papierfabrik*, namely that Commerce found sufficiently documented rebates but rejected those rebates whose terms were not known to the buyer at the time of purchase. Here the court concluded that the same result as in *Papierfabrik* was appropriate—an order to grant all the rebates properly claimed by the Respondent. *Tension Steel I*, 40 CIT ___, 179 F. Supp. 3d at 1191. In its *Remand Results*, Commerce acknowledged Maverick's continued challenge to *Papierfabrik* while explaining that it was following the court's order. *Remand Results* at 4. Given the administrative record, Commerce's decision to obey that order and grant all proposed rebates is reasonable and must be sustained. Maverick's re-reiteration of its dissatisfaction with *Papierfabrik* has once again failed to persuade the court otherwise.

III. Conclusion

For the reasons set forth above, Commerce's *Remand Results* are sustained. Judgment will be entered accordingly.

Dated: July 12, 2017
New York, New York

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