U.S. Court of International Trade

Slip Op. 17–65

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT GROUP CORP., Plaintiff, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION and THE SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 04–00268

[United States Department of Commerce's Final Results of Redetermination are sustained.]

Dated: June 1, 2017

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiff. With him on the brief were *Bruce M. Mitchell* and *Andrew T. Schutz*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director; *Reginald T. Blades, Jr.*, Assistant Director; and *Nanda Srikantaiah*, Of Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey and *Joshua R. Morey*, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-intervenors. With them on the brief was *R. Alan Luberda*.

OPINION

Eaton, Judge:

This case involves the final results of the first administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC"). *Honey From the PRC*, 69 Fed. Reg. 25,060 (Dep't Commerce May 5, 2004) (final results), PR 113 and accompanying Issues and Decision Mem. (Apr. 28, 2004), PR 107 ("Decision Mem."), *as amended by* 69 Fed. Reg. 32,494 (Dep't Commerce June 10, 2004), PR 118, ECF No. 100 (collectively, "Final Results"). Before the court are the United States Department of Commerce's ("Commerce" or the "Department") Final Results of Redetermination after remand. *See* Final Results of Redetermination Pursuant to Remand (Feb. 10, 2016), ECF No. 83 ("Remand Results").

Plaintiff Zhejiang Native Produce & Animal By-Products Import & Export Group Corp. ("plaintiff" or "Zhejiang") challenges Commerce's determination of the normal value of honey exported to the United States by Zhejiang during the period covered by the review. Plaintiff argues that Commerce unreasonably failed to use the best available information on the record to calculate the surrogate value of Zhejiang's raw honey input. Plaintiff also contests Commerce's adjustment of the raw honey price to account for inflation during the covered period. Finally, plaintiff maintains that Commerce unreasonably failed to average the 2001–2002 and 2002–2003 financial statements of an Indian honey cooperative when calculating surrogate financial ratios. *See* Pl.'s Cmts. Remand Results, ECF No. 90 ("Pl.'s Cmts.") at 1–3.

The United States Government ("defendant" or the "Government"), on behalf of Commerce, argues that the Remand Results are reasonable, supported by the record, and should be sustained. *See* Def.'s Reply Cmts. Remand Results, ECF No. 99 ("Def.'s Reply"). Defendant-intervenors the American Honey Producers Association and the Sioux Honey Association (collectively, "defendant-intervenors") join the defendant in urging the court to sustain the Remand Results. *See* Def.-Ints.' Cmts. Remand Results, ECF No. 89; Def.-Ints.' Reply Pl.'s Cmts. Remand Results, ECF No. 97.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2012).[1] For the reasons set forth below, the court sustains the Remand Results.

BACKGROUND

In January 2003, Commerce initiated the first administrative review of the antidumping duty order on honey from the PRC. *See* Initiation of Antidumping and Countervailing Duty Admin. Revs. and Req. for Revocation in Part, 68 Fed. Reg. 3009 (Dep't Commerce Jan. 22, 2003) (notice). The period of review covered the period of February 10, 2001, though November 30, 2002 ("Original POR"). Decision Mem. at 3.

Because the PRC is a nonmarket economy country, Commerce determined normal value for Zhejiang's sales during the Original POR using the factors of production methodology provided for in 19 U.S.C. § 1677b(c). Commerce selected India as the source of surrogate data to value Zhejiang's factors of production, including raw honey, and to calculate financial ratios.

[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, and any applicable supplements.

To value raw honey, Commerce used an average of raw honey prices from a March 2000 article entitled "Apiculture, a major foreign exchange earner" that was published in the *Tribune of India*, an English language daily newspaper headquartered in Chandigarh, India (the "March 2000 *Tribune* article" or the "2000 article"). Decision Mem. at 9. The 2000 article indicated that the sale price of honey in India ranged from Rs. 25 to Rs. 45 per kilogram. *See* Final FOP Mem. for Zhejiang (Apr. 28, 2004), PR 1288, ECF No. 92 (citing Prelim. FOP Mem. for Zhejiang (Dec. 10, 2003), Attach. 3, PR 858, ECF No. 92 ("Prelim. FOP Mem.")). Commerce chose the 2000 article as the source of surrogate data instead of another article from the *Tribune of India*, proposed by plaintiff, which was published in March 2001 (the "March 2001 *Tribune* article" or the "2001 article"). Decision Mem. at 21. The 2001 article, titled "Honey no longer a sweet business," indicated that the production cost of honey in India was approximately Rs. 23 per kilogram, and the procurement price was Rs. 24 per kilogram—*i.e.*, lower than the range of prices in the March 2000 *Tribune* article. *See* Decision Mem. at 6. Commerce determined that the 2000 article was the best information available because it was public, specific to the Indian honey industry, and representative of the honey industry throughout India. Decision Mem. at 10. Using the prices in that article, Commerce calculated an average raw honey price of Rs. 35 per kilogram. *See* Prelim. FOP Mem. at 2.

Next, Commerce adjusted the average raw honey price (Rs. 35 per kilogram) to reflect what the price would have been during the Original POR, applying its inflation methodology. *See* Prelim. FOP Mem. at 2–3. Under this methodology, the Department adjusted the price using information in the record, including wholesale price indices ("WPI") for India published in selected issues of the International Monetary Fund's *International Financial Statistics* and the raw honey purchase prices paid by two Indian honey processors, Jallowal Bee Farm and Tiwana Bee Farm. Prelim. FOP Mem. at 2; Decision Mem. at 16. Commerce found that the Jallowal and Tiwana pricing information demonstrated that there were price increases during a portion of the Original POR, *i.e.*, December 2001 to May 2002, that exceeded the general rate of inflation.[2] *See* Decision Mem. at 16. Accordingly, Commerce used the Jallowal and Tiwana pricing infor-

[2] Petitioners proposed that Commerce use the Jallowal and Tiwana pricing information to value raw honey, but Commerce declined to use the information for that purpose because the information was limited to Punjab, *i.e.*, it was not representative of country-wide raw honey prices. Decision Mem. at 16. Commerce, however, determined to use the information for a different purpose, *i.e.*, to adjust the surrogate raw honey price calculated using the 2000 article to account for "the significant rate at which Tiwana's and Jallowal's documented raw honey purchase costs increased for the period December 2001, through May 2002." Decision Mem. at 16.

mation to account for the observed price increases. Decision Mem. at 16 ("[I]n order to account for these significant raw honey price increases and consistent with our finding in *Wuhan's Final Results*, we find it appropriate and necessary to inflate the average raw honey price derived from pricing information in the March 2000 *Tribune* article, using [the Jallowal and Tiwana] documented purchase prices.").

To calculate surrogate financial ratios, Commerce used Mahabaleshwar Honey Production Cooperative Society, Ltd.'s ("MHPC") 2001–2002 financial statement as a source of data regarding factory overhead, selling, general, and administrative expenses ("SG&A"), and profit. Decision Mem. at 19. In doing so, it declined to use MHPC's 2002–2003 financial statement, as proposed by Zhejiang, because Commerce found that the 2001–2002 financial statement was more specific, reliable, and contemporaneous with the Original POR than MHPC's 2002–2003 financial statement. Decision Mem. at 19. Based on its findings in the Final Results, Commerce assigned Zhejiang an antidumping duty margin of 67.70 percent. *Honey From the PRC*, 69 Fed. Reg. at 32,495.

After the publication of the Final Results, Commerce amended the record to add eleven public documents received in response to a Freedom of Information Act request ("New Information"). *See* Amendment to Admin. R. in Ct. No. 04–00268 (Nov. 19, 2004), ECF No. 28 ("Amended Record"). The documents, which were not part of the underlying administrative record, included correspondence between Commerce and the authors of articles published in the *Tribune of India*, as well as communications with Indian agricultural and honey specialists.

In July 2004, plaintiff commenced suit in this Court contesting the Final Results. In February 2005, defendant-intervenors filed a motion to dismiss plaintiff's action for lack of jurisdiction, which the court denied. *See Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Group Corp. v. United States*, 29 CIT 1300, 400 F. Supp. 2d 1374 (2005). Subsequently, the court stayed this action pending the final disposition of Court No. 02–00057, a case in which Zhejiang challenged, among other things, Commerce's affirmative critical circumstances determination in the underlying investigation. *See* Order of Sept. 7, 2006, ECF No. 49.

In *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 432 F.3d 1363 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit held that in making its critical circumstances determination Commerce erred by using its

standard 25 percent method to impute knowledge of dumping to respondents, including Zhejiang, during a period when a suspension agreement was in place. *Zhejiang*, 432 F.3d at 1366–68. On remand following the Federal Circuit's decision, Commerce made a negative critical circumstances determination with respect to Zhejiang, which this Court affirmed. *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 37 CIT __, Slip Op. 13–76 (June 18, 2013) (sustaining Commerce's third remand results). Commerce's negative critical circumstances determination had the effect of shortening the period of review for Zhejiang by ninety days, so that the period of review began on May 11, 2001 (instead of February 11, 2001) and ended on November 30, 2002 ("Adjusted POR"). *See* Remand Results at 19. The Federal Circuit issued its final mandate on December 1, 2014, affirming this Court's ruling that Commerce's final determination, as supplemented in remand proceedings, was supported by substantial evidence and in accordance with law. *See Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 580 Fed. Appx. 906 (Mem.) (Fed. Cir. 2014).

On August 4, 2015, the court granted the Government's unopposed request for remand. *See* Order of Aug. 4, 2015, ECF No. 75. In light of the final resolution of Court No. 02–00057 and the New Information added to the record, the court directed Commerce to reconsider issues related to the surrogate value for raw honey; to review the proper source of the financial information used to calculate surrogate values for factory overhead, SG&A, and profit;[3] and to recalculate Zhejiang's dumping margin to reflect the Adjusted POR. *Id*.

On remand, Commerce revisited its selection of data to value raw honey in light of the New Information. Commerce found that the New Information indicated that both the 2000 article and the 2001 article reflected regional, not national, raw honey prices; that is, neither was representative of honey prices in all of India. Remand Results at 19. Commerce also determined that, although the 2001 article was closer to the Adjusted POR, both fell outside of the Adjusted POR. Remand Results at 19.

The Department determined, however, that, on balance, the 2000 article was the best available information, since the March 2001 *Tribune* article contained certain internal inconsistencies that could not be cured by reference to other record evidence, including the New

[3] The court remanded Commerce's choice of MHPC's 2001–2002 financial statement "because of the time that ha[d] passed between [Commerce's] initial determination and a decision in this case," noting that it was "not apparent to the court that this remand will necessarily result in any change on the part of Commerce's source of financial data" or its reasons for selecting that source. Order of Aug. 4, 2015, ECF No. 75.

Information. Remand Results at 21 ("None of the new information on the record of this administrative review contradicts our analysis of this issue in the *Final Results*, nor does the information clarify the inconsistencies contained in the March 2001 article."). For example, the 2001 article stated that price suppression by imports from China, Argentina, Germany, and Australia had kept Indian prices down during a period when Indian government statistics showed that there were no imports from those countries. Remand Results at 20. Moreover, the 2001 article was not clear as to whether and to what extent the prices mentioned in the article were for honey sourced entirely in India. Remand Results at 20. Commerce found that the internal inconsistencies undermined the reliability of the 2001 article. Remand Results at 21 ("[T]he internal inconsistencies that undermine[d] the reliability of the March 2001 article outweigh[ed] the fact that the March 2001 article prices [came] from a time period which [was] closer to the [Adjusted] POR."). Accordingly, on remand, Commerce continued to value raw honey using the Rs. 35 per kilogram average price derived from the March 2000 *Tribune* article, and again adjusted that price using Indian WPI and the Jallowal and Tiwana pricing information. *See* Remand Results at 23–25.

Regarding surrogate financial information, Commerce continued to rely on MHPC's 2001–2002 financial statement to value factory overhead, SG&A, and profit, rather than plaintiff's proposed source—MHPC's 2002–2003 financial statement. Remand Results at 27. As in the Final Results, Commerce found that MHPC's 2001–2002 financial statement was more specific, reliable, and contemporaneous with the Adjusted POR than its 2002–2003 financial statement. Remand Results at 26–27. Commerce also declined to average the two financial statements, as urged by plaintiff, citing its practice "not to average financial statements for the same company when calculating surrogate values for financial ratios." Remand Results at 33 (citing *Honey From the PRC*, 70 Fed. Reg. 9271 (Dep't Commerce Feb. 25, 2005) (new shipper rev.) and accompanying Issues and Decision Mem., Cmt. 3; *Certain Frozen Warmwater Shrimp From the Socialist Rep. of Vietnam*, 72 Fed. Reg. 52,052 (Dep't Commerce Sept. 12, 2007) (final results) and accompanying Issues and Decision Mem., Cmt. 2).

Based on its findings on remand, Commerce recalculated Zhejiang's dumping margin for the Adjusted POR and revised Zhejiang's dumping margin from 67.70 percent to 67.06 percent. Remand Results at 35.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) ("As required by statute, [the court] will sustain the agency's antidumping determinations unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with law." (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000))). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

In cases where subject merchandise is from a nonmarket economy country, Commerce determines its normal value by valuing the factors of production used in producing the merchandise. Commerce generally values the factors of production by using prices from a market economy country, or surrogate country. 19 U.S.C. § 1677b(c)(1). To the extent possible, Commerce is directed to select a market economy country that is (1) at a level of economic development comparable to that of the nonmarket economy country; and (2) a significant producer of comparable merchandise. 19 U.S.C. § 1677b(c)(4). Commerce is also directed to use "the best available information regarding the values of such factors" in the market economy country that Commerce considered to be appropriate. 19 U.S.C. § 1677b(c)(1).

When choosing the "best available" surrogate data on the record, Commerce selects, to the extent practicable, surrogate data that "are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citations omitted). The determination of which information is the "best" available requires making a comparison of data sets on the record. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1677, 462 F. Supp. 2d 1262, 1269 (2006) (observing that to choose the best available information Commerce must "conduct a fair *comparison* of the data sets on the record" (quoting *Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT 736, 435 F. Supp. 2d 1295 (2006) (emphasis in original)). After comparing the available data sets, where there exist on the record "alternative sources of data that would be equally or more reliable . . . it is within Commerce's discretion to use either set

of data." *Geum Poong Corp. v. United States*, 26 CIT 322, 326, 193 F. Supp. 2d 1363, 1369 (2002).

Here, Commerce's choice of India as the surrogate country is not in dispute. Rather, plaintiff challenges as unsupported by the record Commerce's selection of data to value Zhejiang's raw honey input, its adjustment of the raw honey price to account for inflation, and its failure to average two of MHPC's financial statements when calculating surrogate financial ratios.

Turning to Commerce's selection of surrogate data to value raw honey, Commerce found both the March 2000 *Tribune* article and the March 2001 *Tribune* article were publicly available and product specific. Additionally, both were non-representative, because they contained regional instead of national prices, and were non-contemporaneous with the Adjusted POR. Commerce, however, found that the 2001 article contained internal inconsistencies that made it less reliable than the 2000 article. Specifically, the article suggested that imports from China, Argentina, Germany, and Australia had suppressed prices during a period when Indian government statistics showed that there were no imports from those countries. *See* March 2001 *Tribune* Article, Amended Record 123 at 15 ("Dr Madhu Gill, Chairperson of the Northern India Beekeepers Association says that the honey from China, Argentina, Germany, [and] Australia is landing in the country at a price varying between Rs 20 to 25 per kg. It has affected the bee-keepers in a big way."); Remand Results at 20 ("[T]he March 2001 article appeared to identify imports from four countries as suppressing Indian honey prices, but . . . Indian government import statistics did not show honey imports from those countries during the relevant period." (citing Decision Mem. at 11)). Further, it was not clear whether and to what extent the prices in the 2001 article were for honey sourced entirely in India. *See* March 2001 *Tribune* Article, Amended Record 123 at 15; Remand Results at 22 (noting that it was unclear "whether the prices from the raw honey market in Punjab include imports from other countries").

As reflected in the New Information, Commerce spoke with the authors of both articles about raw honey prices. *See* Amended Record 130 (memorializing Commerce's discussion with the author of the March 2000 *Tribune* article); Amended Record 123 (memorializing Commerce's discussion with the author of the March 2001 *Tribune* article). The author of the 2000 article, Mr. K. Sarangarajan, explained that "the raw honey price of Rs 25 to 45/kilogram . . . was from a raw honey market in Madras. He stated that this raw honey market is a public market where raw honey is traded and these raw honey prices are written down, and hence are publicly available at this

particular market." Amended Record 130. He also conveyed that he "believe[d] the current market trend [was] somewhere between Rs 45 to 75/kilogram." Amended Record 130. The author of the 2001 article, Mr. Sarbjit Dhaliwal, explained that "the raw honey price of Rs 24/kilogram . . . was from a raw honey market in Punjab. He stated that this raw honey market is a public market where raw honey is traded and these raw honey prices are written down, and hence are publicly available at this particular market." Amended Record 123. He went on to say "that the price of honey is highly elastic, depending upon supply, which is effected [sic] by factors such as the weather and international competition." Amended Record 123.

After considering the other New Information on the record, Commerce found that the internal inconsistencies in the 2001 article persisted:

> [W]e continue to find that the March 2001 article contains internal inconsistencies that undermine the reliability and quality of the raw honey pricing information therein and is not substantiated by the data on the record. In particular, in the *Final Results*, the Department stated that the March 2001 article appeared to identify imports from four countries as suppressing Indian honey prices, but that Indian government import statistics did not show honey imports from those countries during the relevant period. Further, it is not clear whether the raw honey pricing information in [the 2001 article] refers to all raw honey sold in India, or only that sourced from China, Argentina, Germany, and Australia.

Remand Results at 20. Accordingly, Commerce concluded that "the March 2000 article represents more reliable data, as [it] contains none of the internal inconsistencies that exist in the March 2001 article . . . ." Remand Results at 21.

Commerce's conclusion that the 2000 article was more reliable than the 2001 article is reasonable based on the record. Although plaintiff insists that the discussions had between Commerce and the author of the 2001 article eliminated any questions about the article's reliability, Commerce's determination to the contrary is supported by the record. *See* Pl.'s Cmts. 19–20. While the conversations memorialized in Commerce's file notes clarified which markets the articles' respective prices came from—Madras in the case of the 2000 article and Punjab in the case of the 2001 article—it cannot be said that they resolved questions concerning the claimed price suppression by Chinese, Argentine, German, and Australian honey imports. Nor did they clarify the extent that the prices in the 2001 article may have reflected imported honey. As Commerce observed, the document memo-

rializing the conversation with the author of the 2001 article "mentions that prices are affected by factors such as international competition, and does not clarify whether prices from the raw honey market in Punjab include imports from other countries." Remand Results at 22.

It is worth noting that the court's ruling here, that Commerce's selection of the 2000 article is reasonable, is consistent with this Court's holding in *Wuhan Bee Healthy, Co. v. United States*, 29 CIT 587, 374 F. Supp. 2d 1299 (2005). Although, as plaintiff notes, the court is not bound to follow the *Wuhan* decision, the *Wuhan* Court's reasoning is persuasive, given that there Commerce was faced with a choice between the same two articles presenting alternative pricing data for raw honey for a period of review that overlapped with the Adjusted POR here. In *Wuhan*, after weighing the information's publicity availability, specificity, breadth of market coverage, and contemporaneity, Commerce selected the 2000 article over the 2001 article. Upholding Commerce's choice, the Court stated, in pertinent part:

> Commerce is . . . justified in finding that it is not clear whether the [March 2001 *Tribune* article's] pricing information refers to all raw honey sold in India, or only that sourced from China, Argentina, Germany, and Australia. It is indeed unclear how Dr. Gill arrived at a procurement price of Rs. 24 and this lack of clarity is compounded by the reference to selected countries. Though the information conveyed may be in two separate sentences, the sentences are part of a three-sentence string of related, if confusing, information. Finally, Commerce provided evidence tending to show that the prices stated in the article were not reliable. In particular, Commerce found that no honey was imported into India between April 2000 and March 2001 from Argentina, Germany, or China and that these same statistics also contradict the landed prices referenced in the 2001 article.

Wuhan, 29 CIT at 592, 374 F. Supp. 2d at 1304 (internal quotation marks and citations omitted). Based on the record here, including the New Information, Commerce has supported with substantial evidence its finding that the internal inconsistencies in the March 2001 *Tribune* article made it a less reliable source than the March 2000 *Tribune* article, which did not suffer from the same inconsistencies.

Next, the court turns to Commerce's adjustment of the price of raw honey derived from the March 2000 *Tribune* article to account for inflation. Commerce adjusted the raw honey price for three separate time periods within the Adjusted POR: (1) February 2001 to Decem-

ber 2001; (2) December 2001 to May 2002; and (3) June 2002 to November 2002. Remand Results at 23.

For the first period, Commerce used Indian WPI data "to first inflate the [average raw honey price from the 2000 article] to January of 2001, and then to inflate it again using the Indian WPI for the time period February 2001 through December 2001." Remand Results at 23.

For the second time period, "to account for increases in Indian raw honey prices from December 2001, through May 2002, *in excess of inflation*, [Commerce] averaged raw honey purchase prices from . . . Tiwana and Jallowal . . . to calculate a total average raw honey price *for each month* for the period December 2001, through May 2002." Remand Results at 23 (emphasis added). Commerce next calculated "monthly price increases on a percentage-basis, and then applied these price increases to [the] adjusted raw honey price from the March 2000 article." Remand Results at 23. Then, Commerce calculated "a simple average of these adjusted monthly raw honey prices to derive our raw honey surrogate value for the period for which [Commerce] had raw honey purchase pricing data (*i.e.*, December 1, 2001 to May 31, 2002)." Remand Results at 23–24.

For the third time period, *i.e.*, June 2002 to November 2002, Commerce "further adjusted the raw honey surrogate value for inflation by the average WPI." Remand Results at 24. To arrive at a single surrogate value for raw honey covering the entire Adjusted POR, Commerce summed the adjusted raw honey prices from the three periods and divided the sum by three. Remand Results at 24.

Plaintiff argues that Commerce's calculation of the inflated raw honey price is unsupported by substantial evidence. Plaintiff contests Commerce's rejection of its argument that Document 131 in the Amended Record supports placing a cap of Rs. 39 per kilogram on the adjusted price for the month of November 2002. *See* Pl.'s Cmts. 26 (noting that Commerce "rejected plaintiff['s] argument that the November 2002 inflated price should be capped at 39 Rs./kg based on information solicited . . . from [Commerce's] sources in India . . ."). Specifically, plaintiff cites to an email included in Document 131 that contains "information regarding increased prices reported by Santosh Singh," an Agricultural Specialist with the United States Department of Agriculture. Pl.'s Cmts. 27 (citing Amended Record 131 at 37–38 (the "Singh Email")).

In 2003, Mr. Singh was based at the U.S. Embassy in New Delhi. He assisted in fulfilling a research request from Commerce's honey team in Washington, D.C. The honey team was seeking publicly available

prices of domestic bulk raw honey in India for the period May 2002 to November 2002. In the email in question, Mr. Singh stated:

> After contacting a whole range of possible data sources . . . throughout the country, I have been unable to locate any organization (government or industry association) compiling prices for bulk raw honey in India. Consequently, we are unable to provide you quotable (published or publically available) prices for any market in India.

Singh Email at 37. Mr. Singh went on to provide information that he obtained from "private trade contacts in the Punjab market," including prices ranging from $0.74 to $0.86 per kilogram during the requested period. Singh Email at 37. Commerce subsequently followed up with Mr. Singh to ask for additional information to support this pricing information, including price certifications from data sources, but such information was not available. *See* Amended Record 131 at 34–35.

Commerce's regulations indicate a preference to use publicly available data to value factors of production. 19 C.F.R. § 351.408(c)(1) (2015) ("The Secretary normally will use publicly available information to value factors."). This is particularly true when valuing material inputs "because the use of public information for material inputs tends to yield more representative data reflecting numerous transactions between many buyers and sellers." *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT __, __, 977 F. Supp. 2d 1347, 1352 (2014), *aff'd* 636 Fed. Appx. 800 (Mem.) (Fed. Cir. 2016) (summarizing Commerce's explanation of its regulatory preference for publicly available information as stated in 19 C.F.R. § 351.408(c)).

Here, Commerce examined Document 131, including the Singh Email. The Department observed that "[t]he information in this document appear[ed] to be prices obtained from sources that [were] not publicly-available and this information [was] not substantiated. Thus, there [was] no publicly available information on the record which would direct [Commerce] to change its methodology and cap the inflator." Remand Results at 24–25. Plaintiff contends that Commerce unreasonably declined to rely on the Singh Email solely because it contained information that was not publicly available. Plaintiff argues that since Commerce's "preference that surrogate values should be based on publically available information is not a *per se* rule, but is designed to ensure that the data provided is reliable, [Commerce's] rational[e] for rejecting [Zhejiang's] argument cannot be sustained." Pl.'s Cmts. 27 (citations omitted). Plaintiff also maintains that it was "inconsistent" for Commerce to reject the Jallowal and Tiwana pricing information for use in calculating the surrogate

value for raw honey but to accept it for purposes of adjusting the raw honey price. Plaintiff suggests that such information "do[es] not fall within the Department's traditional definition of publically available information." Pl.'s Cmts. 27.

Commerce's decision not to rely on the non-public, unsubstantiated information in the Singh Email was reasonable. Despite plaintiff's argument to the contrary, the Department did not decline to use the information contained in the Singh Email solely because it was not public. Rather, it is apparent from the Remand Results that Commerce considered plaintiff's argument in light of the record before it and determined that the Singh Email pricing information was not only not publicly available but also unsubstantiated—a finding that is supported by the record. Remand Results at 24; Amended Record 131 at 34 ("Based on our thorough research the additional data you requested [*i.e.*, price certifications from each of the companies whose private pricing information was shared with Mr. Singh] is not available.").

Moreover, plaintiff's argument that it was "inconsistent" for Commerce to reject the Jallowal and Tiwana pricing information for use in calculating the surrogate value for raw honey but to accept it for purposes of calculating the inflator is unconvincing.[4] The plaintiff in *Wuhan* similarly argued that "Commerce's use of the Jallowal and Tiwana . . . data to adjust the surrogate value for raw honey cannot be reconciled with its rejection of that same data as not country-wide." *Wuhan*, 29 CIT at 593, 374 F. Supp. 2d at 1305 (citation and quotation marks omitted). This Court disagreed:

> Commerce's decision to reject the Jallowal and Tiwana . . . data for use in calculating the surrogate value for raw honey was based on separate criteria from its decision to use the data to calculate the inflator. In the absence of any other pertinent information on the record, the court finds reasonable Commerce's decision to use the Jallowal and Tiwana . . . data for this limited purpose.

Id. at 594, 374 F. Supp. 2d at 1305.

The Court's reasoning applies equally here. In the Remand Results, the Department determined that the March 2000 *Tribune* article was the best information available to calculate a surrogate value for raw

[4] Plaintiff asserts that the Jallowal and Tiwana pricing information was not public; however, that is not the reason provided by Commerce for declining to use such information to determine a surrogate value for raw honey. Rather, Commerce explained that while the Jallowal and Tiwana raw honey purchase prices were "documented" (*i.e.*, substantiated) they were specific only to two companies in India in a particular region, Punjab. Thus, because of the data's "limited coverage," the Department found that it was not the best available information to value the raw honey input. Decision Mem. at 16.

honey—a decision based on a set of criteria, namely, the public availability, specificity, representativeness, and contemporaneity of the data, long approved by this Court for purposes of determining whether surrogate value data constituted the best available information. *See QVD Food Co. v. United States*, 34 CIT 1166, 1168, 721 F. Supp. 2d 1311, 1315 (2010), *aff'd*, 658 F.3d 1318 (Fed. Cir. 2011); *Qingdao Sea-Line Trading Co. v. United States*, 37 CIT __, __, Slip Op. 13–102 at 6–7 (Aug. 8, 2013), *aff'd*, 766 F.3d 1378 (Fed. Cir. 2014) ("In selecting the best available information for valuing the factors of production, Commerce's practice is to select surrogate values that 'reflect[] a broad market average, [are] publicly available, contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports.'" (quoting *QVD Food Co.*, 34 CIT at 1168, 721 F. Supp. 2d at 1315)). Separately, to account for the price increases during the December 2001 to May 2002 period, the Department followed its practice "to use an inflator specific to a commodity in cases where the price[] changes for that commodity are significantly different from general inflation." Remand Results at 24 (citing *Fresh Garlic From the PRC*, 76 Fed. Reg. 37,321 (Dep't Commerce June 27, 2011), and accompanying Issues and Decision Mem., Cmt. 4). In other words, Commerce "used the price quotes from the [Jallowal and Tiwana] bee farms for the narrow purpose of supporting its inflation methodology, given that prices from these farms demonstrated that raw honey prices increased at a significantly greater rate than a standard inflation rate." Def.'s Reply at 18 (citations omitted). Given the absence of any other reliable data on the record regarding the observed price increases, Commerce reasonably determined that the Jallowal and Tiwana pricing data was the best information available for the limited purpose of accounting for those increases. *See Wuhan*, 29 CIT at 594, 374 F. Supp. 2d at 1305.

Finally, the court examines Commerce's decision to rely solely on MHPC's 2001–2002 financial statement instead of averaging it with the 2002–2003 financial statement. In the Remand Results, Commerce compared the 2001–2002 and 2002–2003 financial statements and found that the 2001–2002 statement was specific, *i.e.*, "narrowly tailored to subject merchandise," and more contemporaneous with the Adjusted POR than the 2002–2003 financial statement. Remand Results at 26. The 2001–2002 financial statement covered April 2001 to March 2002—an overlap with the Adjusted POR of ten months, while MHPC's 2002–2003 financial statement covered April 2002 to March 2003—an overlap of eight months. Remand Results at 26.

Commerce declined to average the two financial statements, as proposed by Zhejiang, finding that its practice was "not to average

financial statements for the same company when calculating surrogate values for financial ratios. Instead, under the [nonmarket economy] methodology, when deemed reliable, it is [Commerce's] established practice to select the most contemporaneous surrogate values to value the factors-of-production and financial ratios." Remand Results at 33 (citing *Honey From the PRC*, 70 Fed. Reg. at 9271 and accompanying Issues and Decision Mem., Cmt. 2; *Certain Frozen Warmwater Shrimp From the Socialist Rep. of Vietnam*, 72 Fed. Reg. at 52,052, and accompanying Issues and Decision Mem., Cmt. 2 (discussing Commerce's practice in nonmarket economy proceedings to "use one set of financial statements from a company that overlaps the most months of the appropriate [period of review]")). The Department explained the rationale for this practice:

> Averaging two financial statements from the same company does not result in a more accurate representation of the Indian honey industry because the Department 'would be deriving financial ratios based on data that is less contemporaneous and creating a temporally less representative method for deriving financial ratios than simply using the most contemporaneous financial statements' were it to average both of MHPC's financial statements.

Remand Results at 33 (quoting *Certain Frozen Warmwater Shrimp from the Socialist Rep. of Vietnam*, 72 Fed. Reg. at 52,052, and accompanying Issues and Decision Mem., Cmt. 2). In other words, because the less contemporaneous financial statement (*i.e.*, the 2002–2003 statement) is less representative of MHPC's factory overhead, SG&A, and profit during the Adjusted POR, including the 2002–2003 data in Commerce's financial ratio calculations would have resulted in a less accurate margin.

Plaintiff challenges neither Commerce's practice nor the quality and reliability of the 2001–2002 statement, but rather argues that Commerce acted arbitrarily by "ignor[ing] the essential similarity of the two statements." Pl.'s Cmts. 30. Moreover, plaintiff contends that "there was [a] dramatic difference in profit realized by MHPC on its resale of processed honey in FY 2002/03 fiscal year . . . compared [to] FY 2001/02 . . . leading to an even more dramatic difference in overall financial ratios," and Commerce's failure to account for this difference was to ignore commercial reality. Pl.'s Cmts. 29–30.

To the extent plaintiff argues that Commerce failed to consider MHPC's 2002–2003 financial statement, it is evident in the Remand Results that Commerce compared the statements in terms of their contemporaneity, representativeness, and specificity and found the 2001–2002 statement to be superior in quality. Remand Results at 27

("We continue to find that there are two principal problems with Zhejiang's proposal: non-contemporaneity and the lack of representativeness of the data."). As the defendant observes, plaintiff's argument "fails to demonstrate that [the 2002–2003 financial statement was] the best available data, other than to argue that that the differences in profits . . . [led] to a 'dramatic difference' in overall financial ratios." Def.'s Reply 19. Plaintiff points to no legal authority to support its claim that Commerce erred here in following its established practice regarding averaging statements from the same company. Moreover, plaintiff does not deny that the 2001–2002 statement satisfies the criteria Commerce traditionally considers in evaluating sources of surrogate data. *See Qingdao*, 766 F.3d at 1386 (Commerce considers whether surrogate data "are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review"). Commerce reasonably determined that MHPC's 2001–2002 financial statement met the criteria for quality and reliability and justified its decision not to average the two financial statements based on its established practice. Accordingly, Commerce's selection of MHPC's 2001–2002 financial statement was reasonable.

CONCLUSION

In the end, plaintiff has failed to show that the information it prefers for determining its rate is superior to that used by Commerce. Thus, for the foregoing reasons, the court sustains the Remand Results as supported by substantial evidence and otherwise in accordance with law. Judgment will be entered accordingly.

Dated: June 1, 2017
New York, New York

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

Slip Op. 17–66

ITOCHU BUILDING PRODUCTS CO., INC., TIANJIN JINGHAI COUNTY HONGLI INDUSTRY & BUSINESS CO., LTD., HUANGHUA JINHAI HARDWARE PRODUCTS CO., LTD., TIANJIN JINCHI METAL PRODUCTS CO., LTD., SHANDONG DINGLONG IMPORT & EXPORT CO., LTD., TIANJIN ZHONGLIAN METALS WARE CO., LTD., HUANGHUA XIONGHUA HARDWARE PRODUCTS CO., LTD., SHANGHAI JADE SHUTTLE HARDWARE TOOLS CO., LTD., SHANGHAI YUEDA NAILS INDUSTRY CO., LTD., SHANXI TIANLI INDUSTRIES CO., LTD., MINGGUANG ABUNDANT HARDWARE PRODUCTS CO., LTD., CHINA STAPLE ENTERPRISE (TIANJIN) CO., LTD., and CERTIFIED PRODUCTS INTERNATIONAL INC., Plaintiffs, v. UNITED STATES, Defendant, MID CONTINENT NAIL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 13–00132

[Plaintiffs' motion for judgment on the agency record in antidumping duty administrative review granted in part, denied in part.]

Dated: June 5, 2017

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of Washington, DC, argued for plaintiffs. With him on the brief were *Bruce M. Mitchell* and *Dharmendra N. Choudhary*.

Tara K. Hogan, Senior Trial Counsel, U.S. Department of Justice, of Washington, DC, argued for defendant. On the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Sosun Bae*, Trial Attorney. Of counsel on the brief was *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, and *Jordan C. Kahn*, Picard, Kentz & Rowe, LLP, of Washington, DC, argued for defendant-intervenor. On the brief was *Ping Gong*, The Bristol Group PLLC, of Washington, DC.

OPINION

Restani, Judge:

This action challenges the U.S. Department of Commerce ("Commerce")'s final results rendered in an administrative review of the antidumping ("AD") duty order on certain steel nails from the People's Republic of China ("PRC"), covering the period of August 1, 2010, through July 31, 2011. *See Certain Steel Nails from the People's Republic of China: Final Results of Third Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 16,651, 16,651 (Dep't Commerce Mar. 18, 2013) ("*Final Results*"); *see also* Certain Steel Nails from the People's Republic of China: Issues and Decision Mem. for the Final Results of the Third Antidumping Duty Admin. Review at 1, PD

359 (Mar. 5, 2013) ("*I&D Memo*"). Plaintiffs Itochu Building Products Co., Inc., Tianjin Jinghai County Hongli Industry & Business Co., Ltd., Huanghua Jinhai Hardware Products Co., Ltd., Tianjin Jinchi Metal Products Co., Ltd., Shandong Dinglong Import & Export Co., Ltd., Tianjin Zhonglian Metals Ware Co., Ltd., Huanghua Xionghua Hardware Products Co., Ltd., Shanghai Jade Shuttle Hardware Tools Co., Ltd., Shanghai Yueda Nails Industry Co., Ltd., Shanxi Tianli Industries Co., Ltd., Mingguang Abundant Hardware Products Co., Ltd., China Staple Enterprise (Tianjin) Co., Ltd., and Certified Products International Inc. (collectively "Itochu") seek remand of the *Final Results*, arguing that Commerce erred in selecting surrogate financial statements and surrogate value data for steel wire rod, an input of steel nails. Pls.' Rule 56.2 Mot. for J. upon the Agency R. 1, ECF No. 27 ("Itochu Br."). Defendant United States ("the government") and defendant-intervenor Mid Continent Nail Corporation ("Mid Continent") contend that the *Final Results* are based on substantial evidence and are in accordance with law. Def.-Intvnr. Mid Continent Nail Corp.'s Resp. to Pls.' USCIT Rule 56.2 Mot. for J. upon the Agency R. 2–3, ECF No. 40 ("Mid Continent Br."); Def.'s Opp'n to Pls.' Mot. for J. upon the Agency R. 2, ECF No. 41 ("Gov't Br."). For the reasons stated below, the court remands the *Final Results* on the issue of steel wire rod selection. The court further instructs Commerce on remand to consider its financial statement choices in the light of its wire rod decision.

BACKGROUND

Following a request for review, Commerce initiated an AD review into steel nails from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 76 Fed. Reg. 61,076, 61,077 (Dep't Commerce Oct. 3, 2011). Because Commerce considers the PRC a non-market economy ("NME"), Commerce creates a hypothetical market value for steel nails in conducting its review. *See Downhole Pipe & Equip. LP v. United States*, 887 F. Supp. 2d 1311, 1320 (CIT 2012) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999)). To construct such a value, Commerce relies on data from a market economy or economies to provide surrogate values for the various factors of productions ("FOPs") used to manufacture the subject merchandise. *See* 19 U.S.C. § 1677b(c)(1)(B). In addition, Commerce uses financial statements from producers of identical or comparable merchandise to yield surrogate financial ratios to calculate "general expenses and profit" for inclusion in normal value. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288,

303 n.7, 366 F. Supp. 2d 1264, 1277 n.7 (2005). The essence of the dispute here is Itochu's preference for certain FOPs from Ukraine as opposed to FOPs from Thailand, as selected by Commerce and supported by Mid Continent.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

I. Specificity of Steel Wire Rod Data

A. Facts

The parties placed three data sources on the record for calculating the surrogate value of steel wire rod, the primary input of steel nails: (1) Thai Global Trade Atlas ("GTA") import data; (2) Ukrainian GTA import data; and (3) Ukrainian Metal Expert data, a source reflective of domestic prices. *I&D Memo* at 16–17; *see* Itochu First Surrogate Value Submission at Ex. 5A, PD 201–20, 222–27 (Apr. 30, 2012) ("Itochu First SV Submission") (Metal Expert data); *id.* at Ex. 4 at 1–2, 102 (Ukrainian GTA data); Commerce Surrogate Values for the Final Results at 3 & Attach. 2, PD 356 (Mar. 5, 2013) ("SVs for Final Results") (Thai GTA data). Commerce concluded that the data sources were equal in all respects except for the data sets' specificity in relation to the steel wire rod used by the mandatory respondents.[1] *I&D Memo* at 17–19. The two factors Commerce considered in determining specificity were wire rod diameter and carbon content of the steel. *Id.* at 17–18. Regarding diameter, the Metal Expert data reported the value of steel wire rod for diameters of 6.5 millimeters ("mm") – 8 mm, while the GTA import data sets reported the price of steel wire rod and bars for diameters 14 mm and below. Itochu First SV Submission at Ex. 4 at 1–2, 102 & Ex. 5A; SVs for Final Results at 3 & Attach. 2; *see Certain Steel Nails from the People's Republic of China: Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 77 Fed. Reg. at 53,845,

[1] Commerce found that the data sources were all publicly available, contemporaneous with the period of review, representative of a broad-market averages, from an approved surrogate country, and tax-and duty-exclusive. *I&D Memo* at 17. The steel wire rod used by the mandatory respondents is 6.5 millimeters in diameter. *Certain Steel Nails from the People's Republic of China: Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 77 Fed. Reg. at 53,845, 53,848 (Dep't Commerce Sept. 4, 2012) ("*Preliminary Results*").

53,848 (Dep't Commerce Sept. 4, 2012) ("*Preliminary Results*"). Commerce concluded that the GTA import data and Metal Expert data were "comparably specific" on diameter because the "[r]espondents' diameter ranges are covered within" the 14 mm and below category. *I&D Memo* at 18. On carbon content, Commerce determined that the GTA import data sets were more specific than the Metal Expert data because the former listed separate prices for low-and medium-carbon content steel, while the latter did not. *Id.* at 18. Accordingly, Commerce rejected the Metal Expert data as an option because the GTA import data sets were "comparably specific" to the Metal Expert data on diameter, and more specific on carbon content. *Id.* at 17–18. To select between the Thai and Ukrainian GTA import data sets, Commerce relied on its regulatory preference for valuing all factors "in a single surrogate country." 19 C.F.R. § 351.408(c)(2); *see I&D Memo* at 18. Because Commerce had previously selected Thailand as the primary surrogate country, largely based on the suitability of financial statements, Commerce chose to use the Thai GTA import data over the Ukrainian data in its calculations. *I&D Memo* at 13–14, 18.

Itochu argues that substantial evidence does not support Commerce's selection of the Thailand GTA import data as the best available information for valuing steel wire rod. Itochu Br. at 25–36. Itochu contends that Commerce's conclusion that the Metal Expert data and GTA import data are "comparably specific" with respect to the wire rod used by the mandatory respondents in terms of wire rod diameter is "clearly incorrect," and that it contradicts Commerce's conclusions in past proceedings. *Id.* at 27–29. Given this, Itochu argues, Commerce was required to explain whether diameter specificity or carbon content is a more important factor in determining the price of steel wire rod, and posits that diameter is more important. *Id.* at 30, 32–33. Itochu presents other subsidiary or related arguments which are addressed only as necessary at this stage.[2]

[2] Itochu contends that, as between the Metal Expert data and the Ukrainian GTA import data, the Metal Expert data is preferable because it comes from a domestic source, which is preferable where, as here, domestic production exceeds consumption and imports. Itoch Br. at 30–31. In addition, Itochu contends that the Metal Expert data is superior to the Thai GTA import data because: (1) Commerce's preference for using values from a single surrogate country only applies when the data from different countries is equally specific, which, Itochu argues, is not the case here; (2) Thailand should not have been chosen as the surrogate country in the first place because the Dneprometiz financial statement from Ukraine should have been used instead of the Thai financial statements; (3) Commerce should choose the surrogate country based on the country from which data comes for the primary factor in the cost of steel nails, steel wire rod, rather than on the country from which financial statements were drawn, which is a relatively low influencer of the subject merchandise's cost; and (4) the Metal Expert data is corroborated by the Ukrainian GTA import data. *Id.* at 34–36; Itochu's Reply to the United States' and Mid Continent Nail Corp.'s Resps. to Itochu's Rule 56.2 Mot. for J. Upon the Agency R. 15–17, ECF No. 48 ("Itochu Reply Br.")

Mid Continent and the government respond that Commerce's selection of the Thai GTA import data was supported by substantial evidence. Mid Continent Br. at 31–41; Gov't Br. at 16–21. Mid Continent backs Commerce's conclusion that the Metal Expert wire rod diameter data is "comparably specific" to the GTA import data sets, arguing that Commerce's use of diameter in selecting surrogate data during the second period of review is irrelevant because it is a separate past proceeding, and that the other cases cited by Itochu are inapposite because carbon content was not a factor there. Mid Continent Br. at 36–38. Mid Continent also contends that Commerce "found carbon content more important for purposes of valuing wire rod [than diameter] in the underlying review." *Id.* at 37 (citing *I&D Memo* at 18).[3]

B. Discussion

"In selecting data to value factors of production, Commerce must choose 'the *best available information* regarding the values of such factors in a market economy country or countries." *Allied Pacific Food (Dalian) Co. v. United States*, 30 CIT 736, 757, 435 F. Supp. 2d 1295, 1313 (2006) (quoting 19 U.S.C. § 1677b(c)(1)). "In assessing data and data sources, it is [Commerce's] stated practice to use . . . prices specific to the input in question[.]" Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), http://enforcement.trade.gov/policy/bull04–1.html (last visited May 31, 2017). In addition, Commerce "normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2).

Substantial evidence does not support Commerce's determination that the Metal Expert data and GTA import data sets were "comparably specific." *See I&D Memo* at 18. The Metal Expert data reports prices for wire rods with a diameter of 6.5 mm to 8 mm, whereas the GTA import data reports prices for wire rods and bars with a diameter of 14 mm and under. Itochu First SV Submission at Ex. 4 at 1–2, 102 & Ex. 5A; SVs for Final Results at 3 & Attach. 2. Commerce's rationale for concluding that the data sets were "comparably specific" was that the mandatory respondents' diameter of 6.5 mm is "covered within" the GTA import data. *I&D Memo* at 18; *see Preliminary Results*, 77 Fed. Reg. at 53,848. But, this fact does not mean the two diameter ranges are equally specific, or that a category which also

[3] Mid Continent identifies other alleged defects with the Metal Expert data, such as that the prices are reflective of only one company rather than a "price average," and that the data is an incorrect summarization of that one company. Mid Continent Br. at 39. Commerce rejected these as "unsupported speculation." *I&D Memo* at 17. Mid Continent also states that, as the GTA import data is superior to the Metal Expert data, and because Commerce correctly chose to use the Thai financial statements, Commerce properly applied its preference for using surrogate information from a single country. Mid Continent Br. at 39–41.

covers bars is even probative.[4] Furthermore, Commerce has on numerous occasions found the very basket category at issue in this case to be less specific than a data set reporting prices for steel wire rod of a single diameter, such as 6 mm. *See, e.g.*, *Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Second Antidumping Duty Administrative Review* at 15–16, A-570–909 (Feb. 23, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–4877–1.pdf (last visited May 31, 2017) ("[W]e find that the JPC data is more specific to the input in question than the GTA data because the Indian HTS category under which it enters is a basket category that includes many different sizes of [steel wire rod ("SWR")] (i.e., SWR with diameters ranging from below 14 mm), as well as steel bars, which are not used in the production process at all."); *Issues and Decision Memorandum for the Antidumping Duty Investigation of Wire Decking from the People's Republic of China: Final Antidumping Duty Determination* at 20, A-570–949 (June 3, 2010), *available at* http://enforcement.trade.gov/frn/summary/prc/2010–13977–1.pdf (last visited May 31, 2017) (similar); *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Issues and Decision Memorandum for the Final Determination* at 31, A-570–941 (July 20, 2009), *available at* http://enforcement.trade.gov/frn/summary/prc/E9–17717–1.pdf (last visited May 31, 2017) (similar). Contrary to Mid Continent's contention, Commerce's consideration of carbon content in this case, as opposed to previous cases, does not reasonably explain Commerce's conclusion on the narrow question of whether 6.5 mm to 8 mm steel wire rod data is more specific than data reporting prices on rod and bars 14 mm and under.[5] *See* Mid Continent Br. at 37–38. Carbon content is irrelevant to the narrow conclusion that Commerce reached, that as to diameter the data sets were equally specific. Arguably, the Metal Expert and GTA import data diameter ranges are "comparably specific," if diameter is a non-factor in determining price. But, Commerce did not find that this is the case,[6] *see generally I&D Memo*, and Itochu has introduced evidence indicating that diameter plays some role in influencing wire rod price, *see* Itochu Post-Preliminary Surrogate Value Rebuttal Submission at Ex. 4, PD 328 (Oct. 9, 2012).

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[4] For example, if a person is actually 36 years old, an age range of "35 to 40 years" provides a more specific answer to the question of what that person's age is than "100 years or less."

[5] Additionally, neither Mid Continent nor Commerce identify any cases in which Commerce has found a broad range of diameters to be "comparably specific" to a smaller range.

[6] Indeed, Commerce "note[d] that in previous segments of this case, [Commerce] has found that diameter is a key factor as to specificity for valuing wire rod." *I&D Memo* at 17. Commerce nowhere suggests that that is not also true in this proceeding.

Without substantial evidence for Commerce's "comparably specific" diameter conclusion, the court cannot uphold Commerce's decision to select the Thai GTA import data set because Commerce premised its rejection of the Metal Expert data on this conclusion. *See I&D Memo* at 17–18.[7] Given the court's rejection of Commerce's diameter specificity conclusion, Commerce's only remaining rationale for preferring either of the GTA import data sets over the Metal Expert data is carbon content specificity. *See id.* at 18–19. Although carbon content possibly plays some role in influencing wire rod price, as Commerce concluded,[8] *I&D Memo* at 18, Commerce nowhere states that carbon content is more important than wire rod diameter in affecting price. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Mid Continent cites to the *I&D Memo* in support of its argument that Commerce concluded carbon content is more important than wire rod diameter in influencing price, but such a statement cannot be found. *See* Mid Continent Br. at 37 (citing *I&D Memo* at 18). Accordingly, the court remands to Commerce the choice of which data set to use in determining the surrogate value of steel wire rod.[9]

II. Public Availability of the Dneprometiz Financial Statement

A. Facts

In its *Final Results*, Commerce chose to use financial statements from the Thai companies L.S. Industry Co., Ltd. and Bangkok Fastening Co., Ltd. in the financial ratios calculations, rather than the

[7] As Commerce concluded,

> [W]hile Ukrainian and Thai GTA import data are basket categories reporting diameter with a range of 14mm and below, [Commerce] also finds that these data sources are specific because the Respondents' diameter ranges are covered within these HTS categories. Accordingly, [Commerce] finds that these three data sources are comparably specific to wire rod because each source covers the determinative factor, diameter, of the input. . . . [Commerce] will examine the three possible data sources for valuing the steel wire rod input based on their specificity to the carbon content.

I&D Memo at 17–18.

[8] Commerce cited to questionnaire responses of the respondents to support its conclusion. *See* Stanley Second Suppl. Section C & D Questionnaire Resp. at Exs. SSCD-5, SSCD-7, SSCD-8, CD 236 (July 25, 2012); Hongli Suppl. Section C Questionnaire Resp. at Exs. 5–7, CD 217–18 (June 8, 2012). In addition, Itochu does not contest that carbon content plays at least some role in influencing the price of steel wire rod.

[9] Because the court concludes that Commerce's determination on wire rod diameter specificity is not supported by substantial evidence, the court does not reach the issue of whether Commerce erred in preferring the Thai GTA import data over the Ukrainian GTA import data on the basis of its financial data choice and the resulting single country preference. The court notes, however, that steel wire rod is the primary influencer of steel nail prices, and except in extraordinary circumstances it should play the principal role in determining the primary surrogate country.

Ukrainian company Dneprometiz. *I&D Memo* at 10, 15. Commerce's sole rationale for this decision was that Dneprometiz's statement was not "publicly available." *Id.* at 14–15. Commerce reached this public availability conclusion for a variety of reasons. First, Commerce rejected Itochu's assertion that a "Dneprometiz Market Report" ("Report") created by and found on Marketpublishers.com indicated that Dneprometiz's financial statement is "publicly available." *Id.* at 14. Commerce's concerns with the Report included a lack of record evidence demonstrating that the Dneprometiz's financial statement served as the basis for the Report,[10] that there were "discrepancies" between the Report and the Dneprometiz financial statement, and that the Report is simply "a market report providing summary information about Dneprometiz." *Id.* Second, Commerce reasoned that the Report did not make the Dneprometiz financial statement publicly available because Dneprometiz's website "states that company materials are only available at the written request of the shareholders." *Id.* at 15. Third, Commerce relied on the fact that when Mid Continent e-mailed Dneprometiz and asked, with Dneprometiz's financial statement attached, "[i]s this financial statement available to the public?," Dneprometiz responded that "[w]e forbid you to use the provided information to the public." Mid Continent Case Br. at Attach. 1, PD 334–39 (Oct. 19, 2012); *see I&D Memo* at 15. Lastly, Commerce stated that Itochu "did not indicate how they obtained the [Dneprometiz] financial statements." *I&D Memo* at 15. For these reasons, Commerce concluded that the Dneprometiz financial statement was not "publicly available." *Id.* Itochu also argued before Commerce that public availability "is not an absolute criterion" for selecting financial statements, but Commerce responded that "this is not an instance where the non-public financial statement itself or the record as a whole compel us to overlook public availability as an important criterion." *Id.* Accordingly, Commerce selected the Thai financial statements over Dneprometiz's statement. *Id.*

Itochu argues that substantial evidence does not support Commerce's conclusion that the Dneprometiz financial statement is not publicly available. Itochu Br. at 12–24. First, Itochu argues that Dneprometiz's financial statement is available to more than just shareholders, and thus, is publicly available. *Id.* at 18–21. Itochu claims that substantial similarities between the Report and the

[10] The Dneprometiz financial statement is a separate record document from the Report. Mid Continent Surrogate Value Submission at Ex. 2, PD 316–18 (Oct. 1, 2012) ("Mid Continent SV Submission") (providing the Report); Itochu First SV Submission at Ex. 7 (providing the Dneprometiz financial statement). The court finds no need to discuss whether the internet link to the Report was always functional or not.

Dneprometiz financial statement is evidence of this. *Id.* at 13, 18–19. In addition, Itochu argues that Dneprometiz's response to Mid Continent's e-mail is ambiguous, and to the extent it cuts against public availability, it should not be credited given that the question came from an unknown, foreign law firm. *Id.* at 19–20; Itochu's Reply to the United States' and Mid Continent Nail Corp.'s Resps. to Itochu's Rule 56.2 Mot. for J. upon the Agency R. at 4, ECF No. 48 ("Itochu Reply Br."). Separately, Itochu argues that Dneprometiz is "mandated to disclose [its] financial and operational activities" because it is a "public company registered on the Ukrainian Stock Exchange." Itochu Br. at 18.[11] Second, Itochu contends that, even if Dneprometiz's website is correct that the financial statements are available only to shareholders, the statements are publicly available because information need not be "published" to be publicly available. *Id.* at 14–18.

Mid Continent responds that the Report does not provide evidence for Itochu's conclusion that Dneprometiz's financial statement is publicly available. Mid Continent Br. at 20–25. Mid Continent highlights "numerous, significant discrepancies" between the financial statement and the Report—that the Report has no auditors' notes, no fixed asset schedule or depreciation schedules, no listing of "beginning-and end-of-period inventory valuations," no specific income and expense items, and no statement of cash flows. *Id.* at 21–22, 26. Furthermore, Mid Continent faults Itochu for failing to establish the provenance of the financial statement it placed on the record. *Id.* at 22–23. Lastly, Mid Continent states that "Commerce practice requires that it and other interested parties be able to obtain financial statements before they will be considered publicly available," and that this requirement was not satisfied here. *Id.* at 24 n.3. The government responds largely by repeating Commerce's statements found in the *I&D Memo*. Gov't Br. at 13–16.

B. Discussion

Commerce must use the "best available information" when selecting financial statements to be used in calculating the surrogate fi-

[11] In its supplemental briefing, Itochu argues that the Dneprometiz financial statement is publicly available because of record evidence from a separate, subsequent administrative review showing that the financial statement is accessible from the Ukrainian stock exchange regulator's website. Itochu's Suppl. Br. in Resp. to the Ct.'s Order of Mar. 23, 2015 5–6, ECF No. 73. But, this evidence was not submitted in the instant review, and "each administrative review is a separate segment of proceedings with its own unique facts." *Peer Bearing Co.–Changshan v. United States*, 32 CIT 1307, 1310, 587 F. Supp. 2d 1319, 1325 (2008) (quoting *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005)). Accordingly, the court will not consider it.

nancial ratios. *See* 19 U.S.C. § 1677b(c)(1)(B); *Goldlink Indus. Co. v. United States*, 30 CIT 616, 618, 431 F. Supp. 2d 1323, 1326 (2006). The "best available information" is generally "publicly available information," *see* 19 C.F.R. § 351.408(c)(1), because "publicly available information addresses the concern that a lack of transparency about the source of the data could lead to proposed data sources that lack integrity or reliability." *Since Hardware (Guangzhou) Co. v. United States*, 911 F. Supp. 2d 1362, 1367 (CIT 2013) (internal quotation marks omitted). Commerce has "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 26 CIT 434, 438, 201 F. Supp. 2d 1316, 1321 (2002).

Substantial evidence supports Commerce's conclusions that the Dneprometiz financial statement is not publicly available. Even assuming all Itochu's arguments, the Dneprometiz financial statement is not fully publicly available because the Report is missing several of the statement's sections. Notably, although the Dneprometiz financial statement itself includes information used in the surrogate financial ratio calculation process, such as "raw material cost," "labor costs," "social overhead costs," and "other operating costs," the Report lacks any of this information. *See* Mid Continent Surrogate Value Submission at Ex. 2, PD 316–18 (Oct. 1, 2012) ("Mid Continent SV Submission"); Itochu First SV Submission at Ex. 7 at 21; *Hebei Metals*, 29 CIT at 303 n.7, 366 F. Supp. 2d at 1277 n.7 (explaining surrogate financial ratios calculation factors); *I&D Memo* at 14 (stating that the Report contains only "summary information" and has "discrepancies" with the Dneprometiz financial statement); *see also* Mid Continent Br. at 26 (listing other items lacking in the Report).[12]

[12] The court is not convinced by Itochu's other explanations as to why the Dneprometiz financial statement is publicly available. Itochu's contention that Dneprometiz is "mandated to disclose [its] financial and operational activities" because it is a "public company registered on the Ukrainian Stock Exchange" was simply pulled by Itochu from the Report. *See* Itochu Br. at 18; Mid Continent SV Submission at Ex. 2 at 21. Neither the Report nor Itochu indicate whether Dneprometiz is required to actually disclose the financial statement in question, whether the disclosure is simply to a single government office or to the public in general, whether members of the public can obtain the financial statement if the disclosure is only to a government office, or even the legal basis for this requirement. Accordingly, Commerce reasonably did not accept this argument.

In addition, Itochu's contention that the Dneprometiz financial statement is publicly available because it is disclosed to shareholders is baseless. Commerce's implicit finding that shareholders are not the "public" is a reasonable interpretation of its regulations. *See Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009) ("[T]he agency's construction of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (quoting *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005))); *Public*, MERRIAM-WEBSTER DICTIONARY (last visited May 31, 2017), *available at* http://www.merriam-webster.com/dictionary/public (defining "public" as "exposed to general view," or "of, relating to, or affecting all the people or the

But, Itochu aptly notes that the Report clearly drew from the financial statement. For example, the following line items represent some of the similarities between the two documents, with the Dneprometiz financial statement's numbers listed first followed by the Report's numbers, reported in thousand Ukrainian Hryvnia ("UAH") — Income/Revenue (804,428/804,219); Value added tax (75,133/75,036); Administrative expenses (24,696/26,835); Financial expenses (7,850/7,850); Other expenses (2,323/2,400). *See* Mid Continent SV Submission at Ex. 2; Itochu First SV Submission at Ex. 7 at 20. Furthermore, Itochu's contention finds support in the fact that several line items in Dneprometiz's "[f]or the previous period" column closely match numbers given in the Report in a column from the previous year, that is, the same year as the financial statement's "previous period." Mid Continent SV Submission at Ex. 2; Itochu First SV Submission at Ex. 7 at 20–21.[13] Nonetheless, as discussed above, Commerce is correct that the Dneprometiz financial statement is not as fully publicly available as the Thai financial statements.

This, however, may not be the end of the inquiry in this case. As Commerce acknowledges, public availability is an important criterion; it is not, however, an absolute requirement. Commerce may yet have to address whether it has sufficient reliable financial data from the Ukraine to calculate the surrogate financial ratios it needs for general expenses and profit as part of normal value. First, it must decide if the key wire rod value data from the Ukraine is superior to that of Thailand or not.

CONCLUSION

It goes without saying that Commerce must put aside any consideration of who wins and who loses, i.e., whether the margin is driven higher or lower. Once a decision is made as to which data set for steel wire rod is superior, Commerce should proceed to weigh its preferences for a single surrogate country and publicly available financial data. If Ukraine has the superior wire rod data, Commerce shall consider whether the financial data from Ukraine is sufficiently reliable to use despite its technical lack of public availability. Commerce

whole area of a nation or state"). Itochu also relies on *Shantou Red Garden Foodstuff Co. v. United States*, 815 F. Supp. 2d 1311 (CIT 2012) for its argument, but that case does not support Itochu's contention. In *Shantou Red*, the court found Commerce's determination that export price data from the Ecuadorean Central Bank was not publicly available to be unsupported by substantial evidence. *Id.* at 1327, 1330. But, in *Shantou Red*, unlike here, *any* person, not just shareholders, could potentially obtain a copy of the data by asking the Ecuadorean Central Bank for a copy. *Id.* at 1327.

[13] Commerce's concerns about Dneprometiz's website's statement that the financial statements are only available to shareholders, and Dneprometiz's e-mail response to Mid Continent, do not belie the fact that clearly at least some of the Dneprometiz financial statement's data appears in the Report, even if the numbers are slightly different.

also has the choice to mix data sets from different countries if the Ukraine steel wire data is clearly superior. If the Thailand steel wire data is equal or superior, the suitability of the financial data from Thailand does not appear to present a serious issue.[14] In sum, there are a number of factors and preferences for Commerce to consider and weigh. Commerce has discretion to put aside some normal preferences if a more accurate result will be achieved. For the foregoing reasons, Itochu's motion for judgment upon the agency record is granted in part, and denied in part.

Commerce shall file its remand determination with the court before or on August 4, 2017. The parties shall have until September 5, 2017, to file objections, and the government will have until September 19, 2017, to file its response.

Dated: June 5, 2017
New York, New York

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

[14] The Thai financial statements' lack of a cash flow statement does not detract from Commerce's use of the Thai financial statements. *See I&D Memo* at 15 ("[T]he lack of [cash flow] statements does not render [the Thai] financial statements any less useful."). Itochu itself notes that Commerce "does not consider Cash Flow statements when computing financial ratios. . . ." Itochu Rebuttal Case Brief at 16, PD 341 (Oct. 26, 2012) ("Itochu Rebuttal Agency Br.").

Itochu hints at another defect with the Thai statements in stating that the Dneprometiz statement "is completely disaggregated, separately providing discrete individual expense and income line items, thereby enabling [Commerce] to compute financial ratios with the highest degree of accuracy." Itochu Br. at 23; Itochu Rebuttal Agency Br. at 16. Commerce did not address this concern in its *I&D Memo*. To the extent Itochu argues the Thai financial statements lack discrete individual expense and income line items, Itochu failed to present this argument to Commerce. Thus, Commerce cannot be faulted for failing to address it. On remand, Commerce may address it if relevant. In its rebuttal case brief before Commerce, Itochu highlights that Dneprometiz's financial statement "is sufficiently well disaggregated," and makes a general statement that "Dneprometiz's financial statement is distinctly superior to the two Thai financial statements available on the record." Itochu Rebuttal Agency Br. at 16. But, Itochu does not specifically claim or identify a problem with the Thai financial statements' expense or income line items. *See id.*

Slip Op. 17–67

SOLARWORLD AMERICAS, INC., Plaintiff, v. UNITED STATES, Defendant, and JINKO SOLAR IMPORT & EXPORT CO., LTD. et al., Defendant-Intervenors.

Before: Claire R. Kelly,
Judge Court No. 15–00232

[Sustaining the remand results issued by the U.S. Department of Commerce concerning its final determination in the first administrative review of the countervailing duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: June 7, 2017

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, DC, for plaintiff.

Justin Reinhart Miller, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *Lydia Caprice Pardini*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Neil R. Ellis, Richard L.A. Weiner, Rajib Pal, Shawn Michael Higgins, and *Justin Ross Becker*, Sidley Austin, LLP, of Washington, DC, for defendant-intervenors.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce" or "Department") remand redetermination in the first administrative review of the countervailing duty order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("China"), filed pursuant to the court's order in *SolarWorld Americas, Inc. v. United States*, 40 CIT __, 181 F. Supp. 3d 1372 (2016) ("*SolarWorld I*"). Final Results of Redetermination Pursuant to Remand, Jan. 18, 2017, ECF No. 49–1 ("Remand Results"); *see Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 80 Fed. Reg. 41,003 (Dep't Commerce July 14, 2015) (final results of countervailing duty administrative review; 2012) and accompanying Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, C-570–980, (July 7, 2015), ECF No. 21–2 ("Final Decision Memo"); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012)

(countervailing duty order). For the reasons that follow, Commerce's Remand Results adequately address the concerns raised in the court's prior opinion, are supported by substantial evidence, and are in accordance with law. The Remand Results are therefore sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in full in the previous opinion ordering remand to Commerce, *see SolarWorld I*, 40 CIT at __, 181 F. Supp. 3d at 1374–75, and here recounts the facts relevant to the court's review of the Remand Results.

In the underlying countervailing duty ("CVD") investigation covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from China, Commerce determined that the Government of China provided a countervailable subsidy through its Export-Import Bank in the form of loans at preferential rates for buyers of goods used in certain energy projects, including solar cells, for export from China ("Export Buyer's Credit Program"). *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,788, 63,789 (Dep't Commerce Oct. 17, 2012) (final affirmative CVD determination); *see* Final Decision Memo at 33. In the investigation, Commerce applied adverse facts available ("AFA")[1] to select a rate of 10.54 percent for this program, corresponding to the highest rate calculated for the identical program in another CVD proceeding for the same country, as no rate was calculated for a cooperating respondent for the identical program within this proceeding.[2] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China at 64, C-570–980, (Oct. 9, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–25564–1.pdf (last visited June 2, 2017).

On February 3, 2014, Commerce initiated the first administrative review of the CVD order covering subject merchandise entered during

[1] Commerce uses the phrase "adverse facts available" or "AFA" to refer to its use of facts otherwise available and the subsequent application of adverse inferences to those facts, pursuant to 19 U.S.C. § 1677e(a)–(b); 19 C.F.R. § 351.308(a)–(c) (2014). *See*, *e.g.*, Final Decision Memo at 13–20, 32–33, 42–44, 57–59.

[2] According to Commerce's AFA hierarchy methodology, in investigations Commerce will rely on, in order of preference: the highest non-zero rate calculated for the identical program in the investigation; the highest non-de minimis rate calculated for the identical program in another proceeding involving the same country; the highest non-de minimis rate calculated for a similar program in another proceeding involving the same country; or, finally, the highest rate calculated for any non-company specific program that the industry subject to the investigation could have used. Remand Results 4.

the period of March 26, 2012 through December 31, 2012. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 Fed. Reg. 6,147, 6,149–57 (Dep't Commerce Feb. 3, 2014). In the final determination of the first administrative review, Commerce again applied AFA to the Export Buyer's Credit Program.[3] Final Decision Memo at 14, 33, 43–44. Commerce applied an AFA rate of 5.46 percent to the Export Buyer's Credit Program,[4] a rate which corresponds to the highest rate calculated for a similar program in this proceeding.[5] *Id.* at 44.

Plaintiff, SolarWorld Americas, Inc. ("SolarWorld"), moved for judgment on the agency record, challenging Commerce's determination in the first administrative review.[6] *See* SolarWorld's Mot. J. Agency R., Feb. 12, 2016, ECF No. 24. Specifically, SolarWorld challenged as unsupported by substantial evidence and otherwise contrary to law Commerce's determination to countervail the Export Buyer's Credit Program at an AFA rate of 5.46 percent in the review, contending that Commerce selected the rate using an AFA methodology that unreasonably differs from the methodology the agency uses in investigations. Br. Supp. Pl. SolarWorld Americas, Inc.'s Rule 56.2 Mot. J. Agency R. 9–20, Feb. 12, 2016, ECF No. 24. Defendant responded that Commerce followed its practice of selecting an AFA rate to apply in administrative reviews. Def.'s Opp.'n Pls.' Mot. J. Admin. R. 8–18,

[3] Although respondents reported not using the Export Buyer's Credit Program during the POR, Commerce was unable to verify the reported non-use of the program. Final Decision Memo at 33. If, in the course of a CVD proceeding, an interested party or any other person provides information to Commerce that cannot be verified, Commerce shall use facts otherwise available in making its determination, 19 U.S.C. § 1677e(a)(2)(D), and may apply an adverse inference in selecting from among the facts otherwise available where it determines that the interested party did not cooperate fully with its request for information. 19 U.S.C. § 1677e(b). Here, Commerce found that the Government of China failed to provide information sufficient to verify the respondents' reported non-use of the subsidy program, and that the Government of China did not cooperate fully to comply with the agency's requests for information. Final Decision Memo at 43–44. Accordingly, Commerce relied on adverse facts available to determine that the respondents did benefit from the Export Buyer's Credit Program during the period of review. *Id.*

[4] The 5.46 percent was the rate calculated in this review for the Preferential Policy Lending to the Renewable Energy Industry program, a subsidy program determined by Commerce to be similar to the Export Buyer's Credit Program. Final Decision Memo at 44.

[5] As discussed in detail below, according to Commerce's AFA hierarchy methodology, in reviews Commerce relies on, in order of preference: the highest non-de minimis calculated rate for the identical program in the same proceeding; the highest non-de minimis calculated rate for a similar program in the same proceeding; the highest non-de minimis calculated rate for the identical program in another proceeding involving the same country; the highest non-de minimis calculated rate for a similar program in another proceeding involving the same country; or, finally, the highest calculated rate for any program from the same country that the industry subject to the proceeding could have used. *See* Remand Results 5; Final Decision Memo at 14.

[6] Plaintiff commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2012). *See* Summons, Aug. 12, 2015, ECF No. 1.

May 10, 2016, ECF No. 26. The court remanded to Commerce to clarify or reconsider, as appropriate, its AFA rate selection hierarchy as applied in this administrative review. *SolarWorld I*, 40 CIT at __, 182 F. Supp. 3d at 1375, 1381. Commerce published the Remand Results on January 18, 2017. *See generally* Remand Results.

SolarWorld argues that on remand Commerce has failed to explain why its different AFA rate source selection methodology in investigations and reviews is reasonable, and has not supported its determination to countervail the Export Buyer's Credit Program at an AFA rate of 5.46 percent in this review. Pl. SolarWorld Americas Inc.'s Resp. to Final Results of Redetermination Pursuant to Remand 4–9, Feb. 24, 2017, ECF No. 53 ("SolarWorld Remand Comments"). Defendant responds that the Remand Results provide a reasonable explanation for Commerce's different AFA rate source selection methodologies in investigations and reviews. Def.'s Resp. to Comments the Remand Redetermination 9–12, Apr. 24, 2017, ECF No. 56.[7]

STANDARD OF REVIEW

The court has jurisdiction pursuant to Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012),[8] which grant the court authority to review actions contesting the final determination in an administrative review of a countervailing 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 (2008)).

DISCUSSION

The court remanded to Commerce for further explanation or reconsideration of the agency's different AFA rate selection practices in investigations and reviews, in the context of the selection of an AFA rate for the countervailable Export Buyer's Credit Program in this

[7] Defendant-Intervenors support the arguments presented in Defendant's response to Plaintiff's comments on remand. *See* Reply Def.-Intervenors Jinko Solar Co., Ltd., Jinko Solar Import and Export Co., Ltd., and JinkoSolar International Limited to SolarWorld Americas, Inc.'s Comments on the Remand Redetermination 1, Apr. 24, 2017, ECF No. 57.

[8] 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.

first administrative review. *SolarWorld I*, 40 CIT at __, 182 F. Supp. 3d at 1375, 1381. On remand Commerce provided further explanation of its AFA rate selection hierarchy practices, in general and as applied in this review, stating that the methodologies differ because less information is generally on the record in an investigation than in a review, requiring the agency to shift its methodology in order to achieve a rate with appropriate accuracy and inducement in investigations. *See* Remand Results 4–9. For the reasons that follow, Commerce's explanation is reasonable and complies with the court's order.

During a CVD proceeding, Commerce may select a rate with which to countervail a subsidy program by applying an adverse inference from among the facts otherwise available where it "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with [its] request for information." 19 U.S.C. § 1677e(b). When applying an adverse inference, Commerce may rely on information derived from any stage of the proceeding, including the petition, a final determination in the investigation, any previous review, or any other information placed on the record. *Id.* §§ 1677e(b)(1)–(4); 19 C.F.R. §§ 351.308(c)(1)(i)–(iii) (2012).[9]

Commerce has considerable discretion to develop a methodology for calculating an AFA rate derived from one of the sources listed in the statute to countervail a subsidy program, as neither the statute nor the regulations dictate how Commerce is to determine the AFA rate. *See* 19 U.S.C. §§ 1677e(b)(1)–(4); 19 C.F.R. § 351.308(c)(1). The statute does not require Commerce to favor any single source from among the list of possible sources on which it could base its adverse inference. *See* 19 U.S.C. §§ 1677e(b)(1)–(4). An AFA rate selected by Commerce must reasonably balance the objectives of inducing compliance and determining an accurate rate. *See F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

Commerce developed different methodologies for selecting an AFA rate to countervail a subsidy program in administrative reviews and investigations. In reviews, if another cooperating company in the proceeding used the identical program, Commerce applies the highest non-de minimis rate calculated for a cooperating company for the identical program in the same proceeding.[10] Final Decision Memo at 14; Remand Results 5. In the absence of a usable rate for the identical program in the same proceeding, Commerce applies the highest non-de minimis rate calculated for a cooperating company for a simi-

[9] Further citations to Title 19 of the Code of Federal Regulations are to the 2012 edition.

[10] This methodology applies to subsidy programs not involving income tax exemptions and reductions. Final Decision Memo at 14.

lar program in the same proceeding. Final Decision Memo at 14; Remand Results 5. In the absence of such a rate, Commerce applies the highest non-de minimis rate calculated for a cooperating company for an identical program in a different CVD proceeding (*i.e.*, involving a different industry) for the same country. Final Decision Memo at 14; Remand Results 5. In the absence of such a rate, Commerce uses the highest non-de minimis rate calculated for a cooperating company for a similar program in a different proceeding for the same country. Final Decision Memo at 14; Remand Results 5. Finally, in the absence of such a rate, Commerce uses the highest rate calculated for any non-company specific program from the same country that the industry subject to the proceeding could have used. Final Decision Memo at 14; Remand Results 5.

In investigations, if another cooperating company in the proceeding used the identical program, Commerce applies the highest non-zero rate (even if de minimis) calculated for a cooperating company for the identical program in the same proceeding. Remand Results 4. If no other cooperating company in the investigation used the identical program, instead of applying a rate calculated for a cooperating company for a similar program in the same proceeding as in reviews, Commerce applies the highest non-de minimis rate calculated for an identical program in a different CVD proceeding involving the same country. *Id.* In the absence of such a rate, Commerce uses the highest non-de minimis rate calculated for a similar program in a different CVD proceeding involving the same country. *Id.* Finally, in the absence of such a rate, Commerce uses the highest rate calculated for any non-company specific program from the same country that the industry subject to the investigation could have used. *Id.* Therefore, while in reviews, Commerce's second alternative is to apply a rate for a similar program from a company in the same proceeding (*i.e.*, the same industry), the second alternative in investigations is to apply a rate for the identical program in a different proceeding. In *SolarWorld I*, the court sought further explanation or reconsideration of the different hierarchies for these seemingly similar situations. *SolarWorld I*, 40 CIT at __, 181 F. Supp. 3d at 1376, 1380–81.

On remand Commerce explained that, in both investigations and reviews, the agency seeks a rate which serves its "dual goals" of relevancy and inducing respondents' cooperation. Remand Results 5–7, 9. Commerce achieves relevancy by seeking an AFA rate that best approximates how the non-cooperating respondent likely used the subsidy program. Within relevancy, Commerce seeks both program relevancy (*i.e.*, a rate reflective of a company using the identical

program) and industry relevancy (*i.e.*, a rate reflective of a company in the same industry), which both inform an accurate rate. Commerce seeks to induce cooperation by ensuring that a non-cooperating respondent does not receive a more favorable rate for the program under AFA than it would have received had the company cooperated. *See id.* at 7. Thus, Commerce's AFA rate selection hierarchy attempts to balance three variables: inducement, program relevancy, and industry relevancy. *Id.* at 6–7.

As a general rule, absent a usable rate for a cooperating company within the industry for the identical program, the agency prefers to weigh industry relevancy more heavily than program relevancy. *See* Remand Results 6. Commerce explained that it considers rates for similar programs within the same industry to be more relevant and thus preferable to rates for the identical program in a different industry. Its preference for industry relevancy over program relevancy stems from two assumptions: 1) that subsidy programs conferring similar benefits will likely be used similarly by companies in the same industry, and 2) that companies in different industries will likely use the same subsidy program differently. *Id.* The agency's AFA selection hierarchy for reviews, in which Commerce selects a rate for a similar program in the same industry, if available, reflects this preference. *See id.* at 4–5. Further, with each subsequent review, more rates are available and therefore the risk of choosing a lower rate (and sacrificing inducement) diminishes. *Id.* at 8, n.22. It is discernible from Commerce's explanation that Commerce considers its review methodology to better balance its dual goals of relevancy and inducement. *Id.* at 6–7. Therefore, in reviews, Commerce will apply a rate from a similar program in the same proceeding before a rate from the identical program in a different proceeding.

However, in investigations, Commerce diverts from its preference for industry relevancy to focus on program relevancy out of a concern that the agency will have few relevant industry rates available at that stage of the proceeding. Remand Results 7. Commerce's investigation methodology is therefore an exception to its preferred practice. The exception appears rooted in the agency's recognition that its preference for industry relevancy may lead it towards unrepresentative rates in investigations, since it may not have sufficient rates for the industry during an investigation to choose a representative rate that is nonetheless high enough to induce cooperation. *See id.* at 7–8. Commerce explained:

> In many recent CVD investigations, the Department has exercised its discretion under [19 U.S.C. §1677f-1(e)(2)] to limit its examination to two or three producers or exporters, or has only

> had a few available respondents to examine. Thus, if one producer or exporter is uncooperative, there are only one or two other companies that might have used a similar program, and perhaps each has used the similar program only once or twice. This leaves very few observations from which the Department may "adversely" infer usage of the program, and thus the possibility arises that limiting the pool of proxy rates to within the proceeding will mean choosing a rate that is too low. Moreover, by "similar program," the Department refers to a program with the same type of benefit, as defined under 19 C.F.R. § 351.504 through 19 C.F.R. § 351.520. Thus, a grant would be similar to another grant; a loan subsidy to another loan subsidy; etc. The Department does not look at the "next most similar program." Thus, in choosing an AFA rate for a loan program, for example, the Department limits itself to the rates calculated under other loan programs. This limitation on the number of relevant rates that might be available for an AFA rate (a limitation that is necessary to maintain relevancy) further increases the odds that an insufficiently low rate will be selected if the Department confines itself to a single segment (*i.e.*, the investigation) in selecting an AFA rate.

Remand Results 8, n.22. Therefore, the agency considers it likely that it will lack sufficient industry rates to make a selection that serves its goals of relevancy and inducement. Commerce explained that, when it lacks sufficient information about the industry, "there is little to be gained by continuing to give weight to an industry-specific proxy rate for that program." *Id.* at 8. Essentially, the difference between the two practices is that in investigations Commerce foregoes attempting to find a rate for a similar program in the same proceeding. It is discernible that Commerce believes there is a smaller benefit to relying on rates from the industry in investigations than in reviews. That smaller benefit is diminished further by the potential effect on inducement: with fewer rates from which to choose, it is more likely that there will be fewer high rates with which to induce cooperation.[11]

The court cannot say that this logic is unreasonable. It is discernible that Commerce believes its ability to capitalize on industry relevancy is more limited in investigations than in reviews. With fewer available rates, Commerce has a reasonable concern the available rates may not be relevant to the program at issue, and may be too low

[11] For a review, Commerce expects to have more industry rates from which to choose, and therefore a higher likelihood that there will be a more relevant industry rate and a higher likelihood of a higher rate to induce cooperation. *See* Remand Results 8, n.22.

to induce compliance. Therefore, Commerce's investigation methodology favors program relevancy, using a rate for the identical program from a different industry. *See* Remand Results 7–8. Commerce has acknowledged that different industries may use the same subsidy program differently, such that a rate calculated for a company in a different industry may not be representative of the subsidization experience of the respondent company. *Id.* at 6. However, Commerce has chosen to offset the loss of industry relevancy with greater inducement in investigations. Commerce has adequately explained its different methodologies for investigations and reviews. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

SolarWorld's counterarguments are unavailing. SolarWorld argues that the review methodology is unfair as applied here during a first administrative review. SolarWorld Remand Comments 6. SolarWorld contends that Commerce has not explained why the "limited additional information" on the record in a first review "necessarily justifies a shift in [the agency's] focus." *Id.* The shift to which SolarWorld refers is the shift from program relevancy in investigations to industry relevancy in reviews. Implicit in this argument is that the investigation methodology—that is, choosing a rate with program relevancy over a rate with industry relevancy—should be applied in reviews as well. SolarWorld's conception of the investigation methodology as the standard by which the review methodology is measured reveals the root of the parties' disagreement. It is discernible in Commerce's explanation that the review hierarchy, favoring industry relevancy, is the agency's preferred methodology. Remand Results 6–7. This preference stems from Commerce's position that companies in the same industry will use similar programs similarly while companies in different industries will likely use similar programs differently, but that the agency may not have enough information on the industry during the investigation to select a representative industry rate. *Id.* at 6. Although the reasonableness of the investigation hierarchy is not before the court, it is plausible that Commerce may not have enough information at the beginning of the proceedings to be able to capitalize on industry relevancy, and that it will have more data on the record in later stages of the proceeding to know more about the industry when calculating rates. Therefore, SolarWorld's argument that the review methodology is unreasonable because it differs from the investigation methodology is unpersuasive.

SolarWorld also argues that Commerce's logic that the presence of more rates on the record in reviews justifies switching the methodology is untenable during a first review, when only a few rates may be added to the record following the investigation. SolarWorld Remand

Comments 6. As discussed above, it is discernible that Commerce considers its review methodology preferable. It is reasonable to apply the preferred methodology as soon as possible in the proceeding, as doing so would enable the agency to benefit from applying a more-representative industry rate rather than a program rate. Commerce has made the policy decision to make that switch at the first review. Although Commerce does not provide a certain number of rates that it considers sufficient to enable the selection of a representative industry rate, there should be more rates on the record in the first review than in the investigation. *See* Remand Results 8, n.22.

Relatedly, SolarWorld argues that Commerce has not explained why it was reasonable in this case to select an industry-specific rate in the review, when that same rate was available, but not chosen, in the investigation. SolarWorld Remand Comments 6–7. As SolarWorld states, Commerce prioritizes "industry-specific data in a review but program-specific data in an investigation." *Id.* at 7. Commerce has adequately explained the reasoning behind the two different methodologies. Using a rate in the first review that was available during the investigation does not undermine Commerce's logic. Commerce's preference for program specific data in investigations enables it to choose a relevant rate when the agency may lack knowledge sufficient to know which industry rates are representative of the program.

Additionally, SolarWorld argues that Commerce has failed to sufficiently explain why it weighs inducement more heavily in investigations than reviews, thus striking a different balance between inducement and relevancy. SolarWorld Remand Comments 5–6. However, Commerce explained why it chose the rates it did in the investigation and the review. Remand Results 2–9. When Commerce considers using a particular rate it considers three attributes of that rate: program relevancy, industry relevancy and inducement. Commerce explains its concern that emphasizing industry relevance in investigations may sacrifice program relevancy and undermine inducement, because it will likely have fewer rates from which to choose. *Id.* at 8, n.22. Commerce explained this concern regarding industry data availability in investigations render industry relevancy a less valuable variable for investigations, and this difference causes Commerce to "strike the balance differently among these three variables." *Id.* at 9.

Finally, SolarWorld argues that adherence to a strict hierarchy is unreasonable, and that Commerce should instead adapt to the specific situation in each case to avoid the "absurd result" here of

lowering the AFA rate from the investigation to the review.[12] SolarWorld Remand Comments 7. SolarWorld suggests that this hierarchy did not lead to the best AFA rate here because the rate dropped from the investigation to the review. *Id.* The use of different methodologies, which the court finds reasonably explained, in investigations and reviews may reasonably result in different rates. It is possible that the original rate did not reflect the most relevant or representative rate. With more information available in the review, Commerce may be able to achieve a more representative rate reflective of the non-cooperating company's subsidization experience. The court assesses the methodology for reasonableness and for sufficient explanation of the reasoning underlying the approach. Given the different circumstances that exist in investigations and reviews, the different approaches are reasonable. Although it could be argued that a case-by-case hierarchy system also would be reasonable, that possibility does not make Commerce's hierarchy structure unreasonable. Commerce is entitled to devise a methodology to apply to all cases and the court cannot say that this methodology is unreasonable in general or as applied here.

CONCLUSION

For the foregoing reasons, the results of Commerce's remand determination in the first administrative review of the CVD order covering crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China are found to comply with the court's remand order in *SolarWorld I*, 40 CIT at __, 181 F. Supp. 3d at 1381, and to be supported by substantial evidence and in accordance with law. Therefore, the court sustains the Remand Results. Judgment will enter accordingly.

Dated: June 7, 2017
New York, New York

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

[12] SolarWorld emphasizes that the use of a hierarchy system in this case "had the absurd result of lowering the AFA rate despite the GOC's repeated and continued refusal to cooperate," noting that "[a] lower AFA rate simply does not have any deterrent effect." SolarWorld Remand Comments 7. Although a higher rate would seemingly induce cooperation, it did not have that effect here; the Government of China continued to not cooperate in the first review. *See* Final Decision Memo at 18, 33, 43–44.

Slip Op. 17–68

UNITED STATES, Plaintiff, v. HORIZON PRODUCTS INTERNATIONAL, INC., Defendant.

Before: Leo M. Gordon, Judge
Court No. 14–00104

[Plaintiff's Motion for Default Judgment granted.]

Dated: June 7, 2017

Daniel B. Volk, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Plaintiff United States. On the brief with him were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, and *Eric J. Singley*, Trial Attorney. Of counsel on the brief was *Claire J. Lemme*, Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection of Miami, FL.

Peter S. Herrick, of Peter S. Herrick, P.A. of St. Petersburg, FL, and *Josh Levy*, Marlow, Adler, Abrams, Newman & Lewis, P.A. of Coral Gables, FL for Defendant Horizon Products International, Inc.

OPINION

Gordon, Judge:

Before the court is the motion of Plaintiff United States ("the Government"), pursuant to USCIT Rule 55, for a default judgment against Defendant Horizon Products International, Inc. ("Horizon") for a civil penalty in the amount of $324,540.00, plus post-judgment interest. Pl.'s Mot. for Default J., ECF No. 47 ("Pl.'s Mot."). Defendant responded but did not challenge the Government's request for a default judgment and penalty. Def.'s Resp. to Pl.'s Mot. for Default J. at 1, ECF No. 48 "Def.'s Resp."). The court has jurisdiction pursuant to 28 U.S.C § 1582(1) (2012) for the recovery of a civil penalty and duties under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012) ("Section 592" or "§ 592").[1]

For the reasons set forth below, the court grants Plaintiff's motion for default judgment, and awards the United States a civil penalty of $162,270, plus post-judgment interest.

I. Background

The United States commenced this action to collect a civil penalty assessed under § 592 for Defendant's alleged negligent misclassification of certain entries of plywood and for unpaid duties on those entries. The background of this litigation is summarized briefly below and provided in detail in *United States v. Horizon Prods. Int'l, Inc.*, 39

[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.

CIT ___, 82 F. Supp. 3d 1350 (2015) ("*Horizon I*"). The court presumes familiarity with the underlying facts, administrative proceedings before U.S. Customs and Border Protection ("Customs"), and the procedural history of this action.

From April 2006 through August 2007, Horizon entered or attempted to enter 64 entries of various types of imported plywood into the United States under certain duty-free provisions of the Harmonized Tariff Schedule of the United States ("HTSUS"), *i.e.*, HTSUS subheadings 4412.29.56, 4412.94.10, or 4412.99.51. The majority of Horizon's imported plywood contained at least one outer ply of nonconiferous wood other than birch, Spanish cedar, or walnut ("nonconiferous plywood"), with the remainder containing an outer ply of sapele, a tropical wood ("sapele plywood"). Subsequent to importation Customs determined that Defendant should have classified the nonconiferous plywood under either HTSUS subheading 4412.14.31 (2006) or 4412.32.31 (2007), and the sapele plywood under HTSUS subheading 4412.13.40 (2006) or 4412.31.40 (2007), all with an applicable 8% duty rate.

Customs then rate-advanced (liquidated at a higher rate) 21 of Horizon's entries because of the misclassification. Horizon paid $42,016, representing the full rate-advanced 8% duty on those entries. Customs liquidated the remaining 43 entries at the inapplicable duty-free rate. Pl.'s Mot. for Summ. J., App. at A1–8, ECF No. 14–2 ("Pl's Summ. J., App.").

At the conclusion of the underlying administrative pre-penalty and penalty process, Customs identified a $162,270 total revenue loss, consisting of $42,016 in potential revenue loss relating to the rate-advanced entries and $120,254 actual revenue loss relating to the entries liquidated at the inapplicable duty-free rate. Customs eventually demanded payment of $120,254 in outstanding duties and a $324,540 penalty, an amount equal to twice the $162,270 total lost revenue. Customs recovered $50,000 from Defendant's surety, leaving $70,254 in unpaid duties. *Id.* at A5–13.

Horizon sought mitigation of the penalty before Customs, arguing it did not have the means to pay, and provided supporting documentation, including financial statements and tax filings. Def.'s Non-Confid. App. at Hor. 1–84, ECF No. 31–1. Customs agreed that Horizon could not pay the full amount, but determined that Horizon had sufficient equity to pay up to $200,000 combined duties and penalty. Thereafter, Customs mitigated the penalty to $85,278 conditioned on full payment of the duties owed within 60 days. *Id.* at Hor. 85–89. Defendant countered with alternate terms, but the parties' negotiations yielded no resolution. Subsequently, Customs demanded the $70,254 in out-

standing duties and the full penalty amount of $324,450. *Id.* at Hor. 124. When Defendant failed to pay, Plaintiff commenced this action.

Defendant previously conceded that it misclassified the subject merchandise and was liable for the unpaid duties. *Horizon I*, 39 CIT at ___, 82 F. Supp. 3d at 1355. Thereafter, the court entered a USCIT Rule 54(b) partial judgment for $70,254 for those unpaid duties.[2] J., ECF No. 37. However, the court determined that genuine issues of material fact remained for resolution after a trial regarding whether Defendant exercised reasonable care in the entry of the subject merchandise, *Horizon I*, 39 CIT at ___, 82 F. Supp. 3d at 1357–58, and the "appropriate penalty, if any, to be assessed . . .," *id.*, 39 CIT at ___, 82 F. Supp. 3d at 1360.

The parties then sought, and the court provided time for supplemental discovery and pre-trial preparation. Order, Sept. 11, 2015, ECF No. 38 (order governing supplemental discovery and requirements for preparation for trial) ("September 11th Order"). Horizon did not follow through with the agreed upon supplemental discovery plan and did not comply with its pre-trial obligations. Ultimately, Horizon decided that it did not wish to proceed to trial and advised Plaintiff and the court that it would no longer defend itself in this action. Pl.'s Req. for Trial, ECF No. 40 ("Defendant does not concur with the Government's request for trial. Defendant does not wish to proceed to a trial."); Def.'s Mot. for Protective Order at 1, ECF No. 41; Pl.'s Resp. to Def.'s Mot. for Protective Order at 2, ECF No. 42; Def.'s Resp. to Pl.'s for Default J. at 3, ECF No. 48.

II. Legal Framework

Section 592 governs the assessment of a civil penalty for the entry of imported merchandise into the United States due to negligence. 19 U.S.C. § 1592. Section 592(a)(1) provides that "no person, by . . . negligence[,] . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1). As for materiality, [a] document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing . . . . [Customs'] determination of an importer's liability for duty . . . ." 19 C.F.R. Pt. 171, App. B(B) (2009).

Under § 592, where a violator is culpable for negligence and duty assessment is affected, the maximum penalty is the lesser of "(i) the domestic value of the [subject] merchandise, or (ii) two times the

[2] As of this date, Horizon has not satisfied any portion of the partial judgment.

lawful duties, taxes, and fees of which the United States is, or may be deprived." 19 U.S.C. § 1592(c)(3). Additionally, the United States may recover any unpaid lawful duties regardless of whether a monetary penalty is assessed. *Id.* § 1592(d).

When a civil penalty is sought on the basis of negligence, the burden of proof is initially on the United States "to establish the act or omission constituting the violation." *Id.* § 1592(e)(4). The burden then shifts to the alleged violator to prove that "the act or omission did not occur as a result of negligence." *Id.* Accordingly, the alleged violator must "affirmatively demonstrate that it exercised reasonable care under the circumstances." *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2009).[3]

III. Discussion

USCIT Rule 55 provides a two-step process for obtaining judgment when a party fails to plead or otherwise defend. *See* USCIT R. 55(a), (b); *see also* 10A C. Wright & A. Miller, Federal Practice & Procedure § 2682 (4th ed. 2017). The first step in that process is the entry of a default, *see* USCIT R. 55(a), followed by a motion for entry of a default judgment, *see* USCIT R. 55(b).

After Horizon's notifications that it no longer intended to go to trial or otherwise defend this action, the court, on its own initiative, satisfied step one of the Rule 55 process by ordering entry of default against Defendant. *United States v. Horizon Prods. Int'l, Inc.*, 40 CIT ___, 190 F.Supp.3d 1155 (2016). The court entered the default because Plaintiff failed to do so before filing its motion for default judgment. *Id.*, 40 CIT at ___, 190 F. Supp. 3d at 1156.

The mere fact that a defendant is in default does not entitle a plaintiff to a default judgment as a matter of right. *See City of New York v. Adventure Outdoors, Inc.*, 644 F. Supp. 2d 201, 212 (E.D.N.Y. 2009). Therefore, determining whether to grant a motion for default judgment lies within the sound discretion of the court. *Id.* In exercising its discretion, the court considers, among other factors, whether (1) denial of the motion will prejudice plaintiff; (2) defendant has a meritorious defense; and (3) defendant's culpable conduct contributed to the default. *See Eastern Elec. Corp. v. Shoemaker Const. Co.*, 657 F.Supp. 2d 545, 551 (E.D. Penn. 2009) (quotation omitted). Additionally, when a defaulting party has appeared, as in this case, the court

[3] The general parameters of what constitutes reasonable care are set forth in 19 C.F.R. Part 171, App. B(D)(6). *See also* H. Rep. No. 103–361 at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670 (identifying possible methods by which one may show reasonable care).

will examine whether the claimant has served the defaulting party with written notice of the motion for default judgment. USCIT R. 55(b).

Here, given Horizon's actions, including its unwillingness to appear for trial, denial of the motion for default judgment would prejudice Plaintiff by leaving it with no effective remedy for Defendant's violation of § 592. As to the second factor, the record before the court demonstrates that Horizon had an opportunity to present testimony and evidence in support of its affirmative defense of reasonable care, but ultimately chose not to do so. Third, Defendant's conduct reflects a conscious disregard of the court's September 11th Order and an unwillingness to move forward with this litigation in any meaningful way. Lastly, the docket shows that that Horizon was served and is on notice that the court may enter judgment on Plaintiff's motion. *See* Def.'s Resp. Accordingly, it is appropriate for the court to grant Plaintiff's motion and enter a default judgment against Horizon.

Having decided that a default judgment is proper, the court turns to the issues of liability and damages (the amount of the penalty). The entry of a default generally has the effect of establishing liability on the part of the defaulting party. *See Nishimatu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). While the factual basis for liability is established by the default, the default does not serve as an admission of the claim of liability. *Id.* Similarly, a party's failure to defend does not operate as an admission as to the amount of damages claimed in the complaint. *See Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012).

Normally, the court will determine whether the well-pled facts of the complaint, taken as true, are sufficient to permit the entry of judgment on Plaintiff's claim as a matter of law. *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) (citation omitted). However, given the posture of this action (one in which Horizon appeared and participated in much of the life of the litigation, but, at a late stage, ceased its participation), the court considers the entirety of the record in determining the sufficiency of the liability claim. *See* USCIT R. 55(b).

As noted previously, Horizon conceded that it misclassified the subject entries of plywood. *See Horizon I*. In denying Plaintiff's motion for summary judgment in part, the court found that Horizon's entry documents contained material false written statements "that altered Customs' assessment of Horizon's liability for duties." *Horizon I*, 39 CIT at ___, 82 F. Supp. 3d at 1356. The court, however, stopped short of concluding that Horizon acted negligently, as a matter of law,

in violation of § 592(a). The court stated that an open question existed as to whether Horizon exercised reasonable care in making the subject entries, which, if proven, would defeat the Government's claim of negligence. *Id.*, 39 CIT at ___, 82 F. Supp. 3d at 1357–58. Despite having an opportunity to prove that it acted with reasonable care, Defendant failed to proffer any evidence to support its affirmative defense. Accordingly, the court now holds that, as a matter of law, Defendant negligently misclassified the subject entries of plywood in violation of § 592.

Turning to damages, Rule 55 contemplates that the defaulting party is entitled to contest damages and may participate in a hearing, if one is held, before the entry of a default judgment. USCIT R. 55(b). Horizon does not dispute Plaintiff's claim for damages. Def.'s Resp. at 1 ("Horizon does not respond for the purpose of challenging the Government's request for a default judgment and penalty."). As a result, there is no need for an evidentiary hearing to receive testimony and documents for the purposes of determining the appropriate penalty as Defendant knowingly and willfully ceased its participation in the litigation, including not asking for a hearing on the amount of the proposed penalty. *See, e.g., Finkel v. Romanowicz*, 577 F.3d 79, 87 (2d Cir. 2009) (hearing not required when no disputed issues of fact and defaulting party failed to request hearing). Rather, the court will "hear" from the parties via declaration(s) and other documents on the record to determine if there is a basis for an award of damages. *Entrepreneur Media, Inc. v. JMD Entm't Grp., LLC*, 958 F. Supp. 2d 588, 593 (D. Md. 2013) (citing 10A C. Wright & A. Miller, Federal Practice & Procedure § 2688).

Here, the Government seeks the statutory maximum penalty of two times the lawful duties, $324,540, which is less than the domestic value of the subject merchandise, which exceeded $2 million. Pl.'s Mot. for Default J., App. at 13–14, ¶ 8, ECF No. 14–2 ("Pl.'s Mot. for Default J., App.") (Declaration of Jose Sacerio); Compl. Ex. A at 3, ECF No. 3–1. Although it may request the statutory maximum, the Government is not entitled, as a matter of right, to a penalty in that amount. Rather, the court must exercise its discretion to determine an appropriate penalty amount. 19 U.S.C. § 1592(e)(1); *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1368–69 (Fed. Cir. 2008) (citing *Ford Motor Co.*, 463 F.3d at 1285); *United States v. Int'l Trading Servs., LLC*, Slip Op. 17–55, 41 CIT ____, 2017 WL 1957548, at 4–7 (May 5, 2017).

In arguing for the statutory maximum penalty, the Government, without analysis, presumes applicability of the 14-factor test set forth in *United States v. Complex Mach. Works Co.*, 23 CIT 942, 83 F. Supp.

2d 1307 (1999) ("*Complex Machine*").[4] In civil penalty actions involving litigation on the merits, the court has consistently applied *Complex Machine* to arrive at the amount of the penalty. *See, e.g., United States v. Nat'l Semiconductor Corp.*, 30 CIT 769 (2006) (trial on negligence claim), reconsideration denied, 30 CIT 1429 (2006), *aff'd*, 547 F.3d 1364 (Fed. Cir. 2008); *United States v. Matthews*, 31 CIT 2075, 533 F.2d 1307 (2007) (summary judgment on negligence claim). In each of those cases, the parties had an opportunity to make a full and complete record on the substantive claims and present evidence on mitigating or aggravating considerations that affect the determination of the penalty. That scenario is not present in this case.

In a typical default judgment situation—one in which a defendant has not answered the complaint or otherwise appeared to defend—the court does not have a fully developed record on the merits. In these circumstances, the court has taken differing approaches in determining the amount of the penalty. In some circumstances, the court has not applied the *Complex Machine* factors, but simply verified the penalty amount claimed against a well-pled complaint, and any affidavits or supporting documentation, and entered a default judgment in that amount. *See, e.g., United States v. NYCC 1959 Inc.*, 40 CIT ___, 182 F. Supp. 3d 1346 (2016) (negligence claim) (absence of equitable considerations to support lessening penalty below statutory cap).

In other cases, the court has done more than just verify the penalty claimed. It has weighed mitigating or aggravating considerations in determining an award of a § 592 penalty. There, the court appears to be acting on the basis of the existence of some evidence as to those considerations, relying, to some degree, on *Complex Machine* in certain instances, and not at all in others. *See, e.g., Int'l Trading Servs.*, 41 CIT at ____, 2017 WL 1957548, at 4–7 (consideration of *Complex Machine* factors); *United States v. New-Form Mfg. Co.*, 27 CIT 905, 919–25, 277 F. Supp. 2d 1313, 1327–32 (2007) (consideration of *Complex Machine* factors); *United States v. Jean Roberts of Calif., Inc.*, 30 CIT 2027, 2039–40, 2006 WL 3775970, at *10 (2006) (relying on both

[4] The *Complex Machine* factors are: (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscience of the [c]ourt; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require. *Complex Machine*, 23 CIT at 949–50, 83 F. Supp. 2d at 1315 (footnote omitted).

Complex Machine and 19 C.F.R. Pt. 171, App. B(E)-(H) for mitigating factors); *United States v. Inner Beauty Int'l (USA) Ltd.*, Slip Op. 11–148, 35 CIT ___, 2011 WL 6009239 (Dec. 2, 2011) (relying on 19 C.F.R. Pt. 171, App. B for assessing penalty)

This action does not fall at either end of the spectrum. It was not fully litigated, as initially contemplated, with the resulting application of the 14-factor test of *Complex Machine*. *See Horizon I*, 39 CIT at ___ -___, 82 F. Supp. 3d at 1359. Neither is it representative of the typical circumstance involving the entry of default and a motion for default judgment. Horizon did answer the complaint and did, for a period of time, defend this action. A modest, but not a full, record exists, upon which the court may rely in determining the appropriate penalty. Given these circumstances, the court declines to simply verify the penalty sought and enter a judgment in favor of the Government. Nor will it automatically apply the totality of *Complex Machine* as urged by the Government. Rather, the court will derive the appropriate amount of penalty after weighing any applicable mitigating or aggravating considerations in this particular case. *See Int'l Trading Servs.*, 41 CIT at ____, 2017 WL 1957548, at 5 (penalty determined "in light of totality of evidence supporting a higher or lower penalty").

The Government predicates much of its claim for the maximum penalty on deterrence—focusing principally on considerations regarding Defendant's character, the seriousness of the violation, and Horizon's dilatory conduct. As to character, the Government argues that Defendant failed to make a good faith effort to comply with the customs laws in that some of Horizon's misclassifications contradicted the information shown on its invoices. Pl.'s Mot. for Summ. J. at 9. Specifically, Plaintiff maintains that Horizon classified several of its plywood entries as having an outer ply of birch, even though the associated invoices expressly identified other species of wood. Pl.'s Mot. for Summ. J., App. (Remainder) at A530, A541, A548, A565, A571, A594, A613, A623, ECF No. 27–1. For other entries, the Government contends that Horizon used a duty-free "other" classification, rather than selecting the correct classification. Pl.'s Mot. for Summ. J. at 8. Plaintiff also maintains that even after Customs advised Horizon of the correct classification in a May 30, 2007 notice of action, Pl.'s Mot. for Summ. J., App. at A1, Horizon continued to misclassify its merchandise as duty-free for entries stretching into August 2007. Compl. Ex. A at 3 (entries dated July 2, 2007, July 17, 2007, August 1, 2007, and August 7, 2007). In response, Horizon offered the declaration of one of its co-owners indicating that it made the subject entries using an authorized customs broker, with the

implication being that Horizon exercised reasonable care. *See* Def.'s Resp., Decl. of Kelsey Quintana ¶ 4, 5. Ultimately, Horizon conceded that it misclassified the subject entries and was liable for the unpaid duties. *Horizon I*, 39 CIT at ___, 82 F. Supp. 3d at 1355.

Problematically for Defendant, however, there is no evidence (other than the above-referenced self-serving declaration) before the court as to any steps taken by Horizon, on its own or by a customs broker acting on Horizon's behalf, to ascertain the correct classification of the imported plywood either before or after notification from Customs. Additionally, Horizon failed to demonstrate that it made a good faith effort to assert the correct classification in entering the subject merchandise. As a result, the record lacks any evidence to suggest a reason for Horizon's actions other than an unlawful effort to obtain a duty-free rate for its entries. Accordingly, Horizon is not entitled to mitigation as it has failed to show any "extraordinary cooperation beyond that expected from a person under investigation for a Customs violation." *United States v. Optrex Am., Inc.*, 32 CIT 620, 640, 560 F. Supp. 2d 1326, 1343 (2008).

As to the gravity of Defendant's violation, the court examines, among other things, whether Horizon's actions were isolated occurrences or presented a pattern of disregard for the customs laws of the United States. *See United States v. New-Form Mfg. Co.*, 27 CIT 905, 921–22, 277 F. Supp. 2d 1313, 1328–29 (2003) (quoting *Complex Machine*, 83 F. Supp. 2d at 1316–17). It is undisputed that Horizon's misclassifications encompassed 64 entries spanning more than one year, and continued even after Customs notified Horizon of the correct classification. The record also demonstrates that Horizon disregarded information on the face of the invoices that contradicted its description of the imported merchandise on the subject entries. Despite these facts, Horizon offers little to no evidence to explain the basis for its claimed classification. Horizon's actions do not diminish the gravity of its violation, and consequently, do not provide a basis for mitigation of the penalty amount claimed by the Government.

In seeking the maximum penalty, the Government places great emphasis on Defendant's dilatory conduct throughout the underlying administrative process but also in this litigation. The Government contends that it has expended substantial resources to enforce the law in this case, and that Horizon has engaged in a pattern of delay, uncooperative conduct, and meritless contentions.

As to the administrative proceeding, Plaintiff contends that Horizon had 30 days to submit a written petition to respond to Customs' pre-penalty notice, Pl.'s Mot. for Summ. J., App. at A5, and that Horizon waited until the deadline date to request a 60-day extension

to submit its petition, Pl.'s Mot. for Default J. at 9. Simultaneously, Horizon notified Customs of its intent not to waive the statute of limitations. Pl.'s Mot. for Default J., App. at 1. After denying Defendant's extension request, *id.* at 4, Customs issued a penalty notice to Horizon. Pl.'s Mot. for Summ. J., App. at A13. Two months later, when Customs followed up with a demand letter, Pl.'s Mot. for Default J., App. at 5, Horizon maintained that Customs had not "personally served" it, and therefore no legal action could be taken against it, *id.* at 6. In response, Customs noted that it had a copy of Horizon's signed return receipt for the pre-penalty notice, to which Horizon renewed its request for an extension to file a petition. *Id.* at 9. Subsequently, Horizon submitted a petition that Customs accepted for review. The administrative process continued for approximately three years, ending in late 2012.

Horizon was definitely slow-playing the Government, and its behavior was not optimal or to be emulated. A significant penalty for this behavior is warranted. Problematically, however, in seeking the maximum penalty the Government has also lumped in as an additional justification Horizon's behavior before the court. The Government focuses on Horizon's failure to "cooperate in discovery" and "deciding not to participate in a pretrial schedule [that Defendant] jointly proposed." Pl.'s Mot. for Default J. at 9. In particular, the Government contends that Horizon's conduct throughout this litigation—whether by failing to cooperate in discovery or by changing its mind and deciding not to participate in a pretrial schedule it had jointly proposed—has further exhausted Government resources unnecessarily. *See* Pl.'s Opp'n to Def. Mot. to File an Amended Scheduling Order Out-Of-Time, ECF No. 16; Def.'s. Mot. for a Protective Order; Pl.'s Notice of Filing Proposed Pretrial Order, ECF No. 43.

Although the court is sympathetic with the Government's arguments about Horizon's uncooperative and dilatory behavior before the court, a civil penalty under § 592 is not the remedy for contumacious behavior, dilatory tactics, or a lack of cooperation on the part of a litigant in an action under 28 U.S.C. § 1582. Rather, the Government's remedy for this conduct lies within other provisions of the USCIT Rules, like Rule 11, Rule 16(f) (sanctions), or Rule 37(b) (failure to comply with discovery order). The Government chose not to avail itself of these remedies. The court is reluctant to address questionable litigation behavior governed by specific rules through a statutory penalty provision designed to promote compliance before an administrative agency, Customs.

With that said, the court notes that the public interest here does favor a significant penalty. There is a strong public interest in "the

truthful and accurate submission of documentation to Customs and the full and timely payment of duties required on imported merchandise. These are weighty interests, contravention of which necessitates the imposition of a penalty of some substance." *Complex Mach. Works Co.*, 39 CIT at ____, 83 F. Supp. 2d 1317. Horizon not only harmed the public fisc by failing to remit undisputed duties, but gained an economic benefit through its actions. Horizon's actions run contrary to the public interest.

IV. Conclusion

All told, the above considerations favor deterrence and a significant penalty. The court though does not believe that the Government has justified imposition of the statutory maximum because, as explained above, the Government seeks in part to apply the statutory § 592 penalty to also remedy litigation behavior that is governed by other more specific Court Rules. Here, rather than the statutory maximum, the court believes that a civil penalty in the amount of $162,270[5] , plus interest from the date of judgment until it is paid, is appropriate. Judgment will enter accordingly.

Dated: June 7, 2017
New York, New York

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

[5] This is equal to the amount of the total lost revenue identified by Customs in the pre-penalty and penalty notices. It is in addition to $70,254 in unpaid duties for which the court previously issued a partial judgment. *See* J., ECF No. 37.

Slip Op. 17–69

JINAN FARMLADY TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, v. CHRISTOPHER RANCH, LLC, THE GARLIC COMPANY, VALLEY GARLIC, VESSEY AND COMPANY, INC., and FRESH GARLIC PRODUCERS ASSOCIATION, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 12–00181

[The court finds that the inclusion of the 15-Day Policy in the *Final Results* lacked the support of a reasoned explanation. The court sustains the remaining determinations of Commerce.]

Dated: June 7, 2017

Robert T. Hume, Hume & Associates LLC, of Taos, New Mexico, argued for Plaintiff.

Jane C. Dempsey, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the briefs were *Stuart F. Delery*, Principle Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Melissa M. Devine*, Trial Attorney, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs were *George H. Kivork* and *Michele D. Lynch*, Office of Chief Counselor for Import Administration, U.S. Department of Commerce, of Washington D.C.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington, D.C., argued for Defendant-Intervenors. With him on the briefs was *John M. Herrmann.*

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Jinan Farmlady Trading Co., Ltd. ("Farmlady") challenged the final determination of Defendant U.S. Department of Commerce ("Commerce") concerning its sixteenth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China. *Fresh Garlic from the People's Republic of China*, 77 Fed. Reg. 34,346 (Dep't Commerce June 11, 2012) (final admin. review) ("*Final Results*") and accompanying Issues and Decision Memorandum ("I&D Mem."). Farmlady moved for judgment on the agency record under USCIT Rule 56.2. For the reasons discussed below, the court sustains the determinations of Commerce with regard to its calculation of surrogate values and finds unlawful Commerce's actions in announcing its intention to issue liquidation instructions 15 days after the publication of the *Final Results*.

BACKGROUND

When foreign exporters sell their goods in the United States at less than fair value and to the detriment of U.S. industry, the U.S. Government imposes duties on those goods. 19 U.S.C. § 1673. These "antidumping duties" are calculated by subtracting the foreign prod-

uct's "export price," or the product's price in the United States, from its "normal value" ("NV"), or the product's price in the exporting country. *See id.* However, when that exporting country has a non-market economy ("NME"), the export-country price cannot be used because the law presumes that government intervention distorts prices in the home market. *See Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1316–17 (2013). Therefore, to calculate NV for goods made in NME countries, Commerce assigns each of the goods' direct material inputs an artificial market price or surrogate value. 19 U.S.C. § 1677b(c)(1).

The underlying antidumping order in this case covers imports of fresh garlic from China. *Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order). In its sixteenth administrative review of that order, Commerce selected five separate rate respondents, including Farmlady, in addition to two mandatory respondents. *See Final Results*, 77 Fed. Reg. at 34,347–38.

Commerce selected India as the primary surrogate country for purposes of this review, and relied on data from that country to calculate the surrogate values for all factors of production, including chlorine dioxide and packing materials. *See Fresh Garlic from the People's Republic of China: Preliminary Results of the 2009–2010 Antidumping Duty Administration Review*, 76 Fed. Reg. 76,375 (Dep't Commerce Dec. 7, 2011) ("*Preliminary Results*"). The Indian import data covered the period of review and consisted of the unit values of inputs that were imported to India from a range of countries.

For the *Preliminary Results*, Commerce derived the surrogate values for chlorine dioxide and packing materials by calculating their average unit value from the Indian import data. *See* Surrogate Value Mem. for the *Preliminary Results* 2, PD 136 (Dec. 5, 2011) ("Prelim. Surrogate Value Mem."). But Commerce excluded from these calculations any unit values for imports from NME countries. *Id*. In addition, Commerce excluded values of imports to India "from countries which provide generalized subsidies and "imports that were labeled as originating from an 'unidentified' country," because, Commerce "could not be certain that [such imports] were not from either an NME country or a country with general export subsidies." *Id*. At the administrative level, Farmlady raised two objections that it raises again before this court. First, Farmlady objects to Commerce's exclusion of NME imports from the Indian surrogate data. *See* Mem. in Supp. of Mot. for J. on the Agency R. 31, ECF No. 21 ("Farmlady Br."). Second, Farmlady claims that Commerce was required, but failed, to

exclude "aberrational" imports from the Indian surrogate data. *Id.* at 36.

Farmlady also challenges Commerce's policy of issuing liquidation instructions to Customs and Border Protection ("CBP") 15 days after the publication of the final results of an administrative review (the "15-Day Policy"). *Id.* at 56.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) to hear Farmlady's challenge to Commerce's calculation of surrogate values. The court will sustain Commerce's decisions 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). This Court has jurisdiction under 28 U.S.C. § 1581(i) to consider Farmlady's challenge to Commerce's policy issuing liquidation instructions 15 days after the publication of the *Final Results. See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304–05 (Fed. Cir. 2004). In reviewing the 15-Day Policy, this Court determines whether Commerce's attendant actions, findings, or conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; 28 U.S.C. § 2640(e).

DISCUSSION

I. The Court Sustains Commerce's Selection of Data for Surrogate Values.

As discussed above, in determining the surrogate values for the chlorine dioxide and packing material inputs, Commerce excluded import data that reflected imports into India from NME countries. Prelim. Surrogate Value Mem. 2.

Farmlady argues that Commerce was required to "use all (non-aberrational) imports" from the Indian import statistics to calculate surrogate values. Farmlady Br. 19 n.52. Farmlady therefore challenges Commerce's calculations of the surrogate values on two grounds. First, Farmlady contests Commerce's decision to exclude from the import statistics any data for imports to India from NME countries. Farmlady Br. 31–36. Second, Farmlady argues that the import statistics on which Commerce relied contained "aberrational" data that distorted the surrogate values for chlorine dioxide and the packing materials. *Id.* at 36–38.

The Government maintains that Commerce's exclusion of Indian import data for imports from NME countries was reasonable because those data were "distorted and are, therefore, unreliable." Def. Opp. to Pl.'s Mot. for J. on the Agency R. 6, ECF No. 27 ("Gov. Br."). In

addition, the Government argues that no record evidence demonstrated that any included data were "aberrant, unreliable, or unrepresentative." *Id.* For the following reasons, the court agrees and sustains the determinations of Commerce concerning the selection of surrogate value data.

A. Commerce Did Not Err in Excluding Import Data from NME Countries.

The relevant statute is silent on the question of how Commerce should derive surrogate values from import statistics. *See* 19 U.S.C. § 1677b(c)(1). The statute does not direct Commerce to either include or exclude import data on imports from NME countries. Rather, Commerce must select and apply the "best available information regarding the values of such factors" in an appropriate surrogate market economy country. *Id.* Because the term "best available information" is not defined by statute, Commerce has broad discretion to determine what constitutes such information. *See Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011)).

Here, Commerce was justified in disregarding any import data concerning imports into India from NME countries. Commerce provided a reasoned explanation for its decision, namely, that excluding data on imports to India from NME countries followed its "longstanding determination that NME prices are unreliable." I&D Mem. 37. Commerce relied on Indian import data as a means to reducing the distortion presented by China's NME. It follows that it was reasonable for Commerce to infer that any surrogate import data from NME countries are likewise unreliable. This court has previously held that, while a "blanket policy" against ever using NME data cannot be sustained, "it is reasonable for Commerce to infer that data on imports from an NME country are inferior to import data for goods from a market economy country." *Jinan Yipin Corp. v. United States*, 33 CIT 934, 950, 637 F. Supp. 2d 1183, 1195–96 (2009). Ultimately, Commerce's decision to exclude the data was logically consistent with the antidumping statute's general requirement that the agency derive values of NME inputs using the "best available information regarding the values of such factors in a market economy country." *See* 19 U.S.C. § 1677b(c)(1)&(4). Thus, Commerce reasonably disregarded Indian import statistics for imports from NME countries.

Farmlady contends that Commerce's decision to exclude NME import data yielded "grossly distorted" surrogate values. Farmlady Br. 33–34; *see also* Farmlady Case Brief 4, PD 186 (Apr. 20, 2011) ("[T]he Department cannot exclude NME imports since such exclusions dis-

tort the 'in' country price equivalent."). Even if true – and Farmlady has not demonstrated that it is – this contention, by itself, is immaterial. Commerce's mandate is to determine *antidumping margins* as accurately as possible. *See Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (citing another source). The court in *Shakeproof* held that, because "[t]he process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise," Commerce is authorized to augment its use of surrogate values in order to select the "best available information." *Id.* at 1381–82. Farmlady demonstrates only that some values for imports into India from NME countries *differ* from the average Indian import values. In fact, as Farmlady admits, excluded NME import values were higher than the average value for some inputs and lower than the average value for other inputs. *See* Farmlady Case Brief 12. Consequently, the impact of Commerce's methodology on the ultimate antidumping margins, if any, is not readily apparent. Farmlady does not establish that Commerce's decision to exclude NME import data is inconsistent with its obligation to use the best information available. Specifically, Farmlady does not establish how, if at all, the exclusion of NME import data resulted in distorted *antidumping margins*.

In sum, Commerce's decision to disregard the import data for inputs that were imported to India from NME countries was consistent with the antidumping statute and Farmlady has not cited any evidence to require Commerce to do otherwise. Commerce's reasoned methodology produced antidumping margins supported by substantial evidence and must be sustained.

B. Commerce Did Not Improperly Include Aberrational Data.

Farmlady also contends that Commerce's calculation of surrogate values for chlorine dioxide and packing materials was distorted by "aberrational" import data. Farmlady Br. 36. However, contrary to Farmlady's assertions, Commerce reasonably determined that its surrogate value calculations did not contain aberrational data.

As an initial matter, Farmlady claims that Commerce failed to evaluate whether the import statistics on which the agency relied contained aberrational data. *See* Farmlady Br. 36. But Commerce specifically acknowledged Farmlady's claim and found that there was "no evidence on the record of the instant case that demonstrates that

any of the Indian import statistics used as surrogate values . . . were aberrant, unreliable, or unrepresentative." I&D Mem. 38 & n.175. The court agrees.

Farmlady cites two areas of the record in support of its claim that the chosen import statistics contained aberrational data. First, Farmlady focuses on the data for Indian imports of packaging tape from Nepal, asserting broadly that this data was "aberrational and low" because it reflects a value that is lower than the average value. Farmlady Br. 36. But merely showing that a price is low is not enough. *See, e.g., Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1362, 1370–71 (2014) (finding that labor data from a surrogate country was not "aberrational" just because values were lower than those of data from other potential surrogate countries). Indeed, because an average is necessarily calculated from higher and lower values within a range of numbers, it cannot be the case that a value is aberrant simply because it is lower than the average.

Second, Farmlady contrasts values of Indian imports of chlorine dioxide from Canada, which were $175.50 per kilogram, with the average unit value for all Indian imports of chlorine dioxide, which Farmlady cites as $1.81 per kilogram. Pl. Reply in Supp. of Mot. for J. on the Agency R. 11, ECF No. 30. But Farmlady again fails to establish that the value for Indian imports of chlorine dioxide from Canada was "aberrational." Simply showing that a price is high is not enough. *See Jacobi Carbons AB*, 38 CIT __, __, 992 F. Supp. 2d 1360, 1375–76 (2014).

Farmlady only asserted that low and high import prices were aberrational. But Farmlady failed to provide evidence to show that any subsequent surrogate values were distorted. It is the parties to a proceeding that bear the burden of building an adequate record. *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Farmlady does not contend that it was unable to supplement the record with any information that might have shown how "aberrational" values in the import statistics distorted certain surrogate values. In turn, Farmlady has not demonstrated how any allegedly distorted surrogate values resulted in inaccurate NV or antidumping margins.

Thus, Commerce's determination that there were no aberrational data in the import statistics used to calculate the surrogate values for chlorine dioxide and packing materials was reasonable.

II. Commerce's Inclusion in the *Final Results* of its Intention to Issue Liquidation Instructions 15 Days After the Publication of the *Final Results* was Unlawful.

Farmlady also challenges Commerce's statement in the *Final Results* that "[t]he Department intends to issue appropriate assessment instructions . . . to CBP 15 days after the date of publication of this notice in the Federal Register." *Final Results*, 77 Fed. Reg. at 34,348. The parties agree that the inclusion of this language is an established policy of Commerce.

Farmlady argues that the 15-Day Policy unlawfully conflicts with the 30-day period interested parties have to commence a civil action under 19 U.S.C. § 1516a(a)(2)(A). Farmlady Br. 56. In response, the Government argues that Farmlady lacks standing to bring this claims and that, in any event, the 15-Day Policy is reasonable and lawful. For the reasons discussed below, the court finds that the 15-Day Policy, in light of the statutory time period for filing an action under 19 U.S.C. § 1516a(a)(2)(A), is unlawful in that it lacks the support of a reasoned explanation.

Under USCIT Rule 3(a) and 19 U.S.C. § 1516a(a)(2)(A), an interested party must file any challenge to the final results of an administrative review within 30 days of the publication of the final results. Once an interested party files both a summons and complaint, it can seek a preliminary injunction against liquidation of its entries pending the resolution of its action. *See* USCIT R. 56.2(a). The inclusion of the 15-Day Policy language in the final results puts an interested party on notice that it will likely have to file its summons, complaint, and preliminary injunction motion within 15, rather than 30, days from the publication of the final results in order to avoid liquidation of its entries. Farmlady argues that the 15-Day Policy therefore unlawfully truncates the statutory period for preparing and filing a challenge to the final results of an administrative review. *See* Farmlady Br. 58.[1]

[1] This Court has previously addressed the interaction of Commerce's 15-Day Policy and the 30-day period for filing a civil action. The court acknowledges that there are divergent decisions on this topic, some of which support the position of the Government and some of which support the position of Farmlady. *See, e.g., SKF USA Inc. v. United States*, 33 CIT 1866, 1890, 675 F. Supp. 2d 1264, 1286 (2009) and *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1649, 353 F. Supp. 2d 1294, 1309 (2004), *aff'd*, 146 F. App'x 493 (Fed. Cir. 2005). *But see Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1145, 502 F. Supp. 2d 1295, 1316 (2007). None of these decisions are binding here. However, the court is persuaded by the reasoning of those decisions which held that Commerce failed to reconcile the 15-Day Policy with the time allotted for interested parties to file an action challenging the final results of an administrative review under 19 U.S.C. § 1516a(a)(2)(A).

The Government makes a number of related arguments concerning the justiciability of Farmlady's claim. *See, e.g.,* Def. Resp. to Ct. Req. for Supp. Briefing 4, ECF No. 46 ("Gov. Supp. Br.") (arguing that "Farmlady raises only hypothetical harm"). However, as this Court has previously found, the 15-Day Policy "causes recurring injury in fact by repeatedly forcing plaintiffs to file the summons, complaint, and motion for a preliminary injunction within fifteen days of publication of the Final Results." *SKF USA Inc. v. United States*, Slip Op. 11–94, 2011 WL 3320637, at *4 (CIT Aug. 2, 2011). Furthermore, this Court has reasoned that the 15-Day Policy is an agency action capable of repetition yet evading review. *SKF USA Inc. v. United States*, 33 CIT 1602, 1614, 659 F. Supp. 2d 1338, 1348–49 (2009), *aff'd in part and vacated in part upon other grounds*, 630 F.3d 1365 (Fed. Cir. 2011). Therefore, the issue is reviewable under an exception to the mootness doctrine. *See Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995). The court is persuaded by the analyses of its previous rulings, *see, e.g., SKF USA*, 2011 WL 3320637, at *4, and finds that Farmlady's challenge alleges an injury in fact and is justiciable.

With regard to the merits of Farmlady's challenge, the Government correctly points out that "the statute is silent as to when Commerce is to issue liquidation instructions." Gov. Br. 21. Accordingly, this matter is entrusted to Commerce and this Court reviews this agency action with great deference. *See Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771, 773 (Fed. Cir. 1999). But even under this deferential standard, Commerce's actions must be reasonable and "based on a consideration of the relevant factors." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The Government argues that it has "reasonably filled that statutory gap" because unliquidated entries are deemed liquidated six months after the final results of an administrative review, per 19 U.S.C. § 1504(d). Gov. Br. 21. Thus, the Government reasons, the 15-Day Policy sensibly achieves the goal of ensuring that CBP has enough time to avoid deemed liquidations. But Commerce's justification for the 15-Day Policy evidences no attempt to consider any relevant factors competing with CBP's interests, namely, the interests of parties seeking to investigate, prepare, and file thorough challenges to the final results of an administrative review. On the administrative record of these proceedings, Commerce makes no mention of how the inclusion of the 15-Day Policy language is compatible with the time period allotted to Farmlady under § 1516a or with the practical realities that time period reflects. As a result, the court cannot say

that Commerce has reasonably filled the statutory gap. In light of the period of time allotted for filing an action under § 1516a, Commerce's inclusion of the 15-Day Policy in the *Final Results* was arbitrary, capricious, and unlawful. *See* 28 U.S.C. § 2640(e); 5 U.S.C. § 706(2)(A).

CONCLUSION

The court finds that the inclusion of the 15-Day Policy in the *Final Results* lacked the support of a reasoned explanation. The court sustains Commerce on all other issues.

Accordingly, it is hereby,

ORDERED that Plaintiff's Motion for Judgment on the Agency Record Under USCIT Rule 56.2 is DENIED in part and GRANTED in part; it is further

ORDERED that the determinations of Commerce concerning the calculation of surrogate values are sustained; it is further

ORDERED that Commerce's inclusion, in the *Final Results*, of its intention to issue liquidation instructions 15 days after the publication of the *Final Results* lacked the support of a reasoned explanation and was therefore unlawful.

Dated: June 7, 2017
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE