U.S. Court of International Trade

Slip Op. 18–142

MIDWEST FASTENER CORP., Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00231

[Remanding the U.S. Department of Commerce's final scope determination.]

Dated: October 19, 2018

Robert Kevin Williams, Clark Hill PLC, of Chicago, IL, argued for plaintiff, Midwest Fastener Corp. With him on the brief were *Lara A. Austrins* and *Mark Rett Ludwikowski*.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Patricia M. McCarthy*, Assistant Director, *Jeanne E. Davidson*, Director, and *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel on the brief was *Jessica Rose DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam Henry Gordon, The Bristol Group PLLC, of Washington, DC, argued for defendant-intervenor, Mid Continent Steel & Wire, Inc. With him on the brief was *Ping Gong*.

OPINION AND ORDER

Kelly, Judge:

This action is before the court on Midwest Fastener Corp.'s ("Midwest" or "Plaintiff") USCIT Rule 56.2 motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Commerce") determination that Plaintiff's strike pin anchors are subject to the antidumping duty ("ADD") order covering certain steel nails from the People's Republic of China ("PRC"). *See* Pl.' [Midwest]'s Rule 56.2 Mot. J. Agency R., Jan. 26, 2018, ECF No. 26; Mem. Law Supp. Pl.'s Rule 56.2 Mot. J. Agency R., Jan. 26, 2018, ECF No. 26 ("Pl.'s Br."); *see also* [ADD] Order on Certain Steel Nails from the [PRC]: Final Ruling on Midwest Fastener Strike Pin Anchors, (Aug. 2, 2017), ECF No. 21–3 ("Final Scope Ruling"); *Certain Steel Nails from the [PRC]*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) (notice of [ADD] order) ("*PRC Nails Order*"). Additionally, Plaintiff challenges as not in accordance with law and unsupported by substantial evidence Commerce's decision not to initiate a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e) (2017)[1] and as not in accordance with law, what Plaintiff claims is, Commerce's retroactive

[1] Further citations to the Code of Federal Regulations are to the 2017 edition.

suspension of liquidation and collection of cash deposits. *See* Pl.'s Br. at 18–21. Midwest, a United States importer of the strike pin anchors at issue here, commenced this action pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012).[2] *See* Summons, Sept. 1, 2017, ECF No. 1; Compl., Sept. 1, 2017, ECF No. 7.

For the reasons that follow, the court remands Commerce's final scope determination that Plaintiff's strike pin anchors are subject to the *PRC Nails Order*.

BACKGROUND

On June 8, 2017, Midwest requested Commerce to issue a scope ruling excluding its strike pin anchors from the scope of the *PRC Nails Order*. *See* Midwest Fastener Scope Req.: Strike Pin Anchors, PD 19, bar code 3579812–01 (June 8, 2017) ("Pl.'s Scope Ruling Req.").[3] Midwest's strike pin anchors have four components—a steel pin, a threaded body, a nut and a flat washer. *Id.* at 2; Final Scope Ruling at 4–5. Midwest avers that the pin component is composed of a medium carbon steel, coated in yellow zinc, has a rounded head, and that it is not meant to be removed from the anchor itself. Pl.'s Scope Ruling Req. at 3, Ex. 4 (producing a photograph of the steel pin component). Midwest's product ranges in size from ¼ x 1 ¾ to ¾ x 7 ½. *Id.* at 2, Ex. 2 (producing a photograph of the strike pin anchors at their various sizes and dimensions). The strike pin anchor is used by inserting the anchor body into a pre-drilled hole, tightening the nut component to orient and position the pin component, and then striking the pin component with a hammer. Final Scope Ruling at 9. The action of striking the pin component expands the anchor body and results in the fastening of the desired item against the masonry. *Id.* On July 14, 2017, Mid Continent Steel & Wire, Inc. submitted comments in opposition to Plaintiff's scope request. *See generally* Opp'n [Comments to Midwest's Scope Ruling Req.], PD 24, bar code 3593422–01 (July 14, 2017).

On August 2, 2017, Commerce issued the final scope ruling. Commerce explained that Midwest's strike pin anchors are unambiguously covered by the scope of the *PRC Nails Order* based upon the plain meaning of the order and stated that the sources enumerated in 19 C.F.R. § 351.225(k)(1) likewise support Commerce's scope determination. *See* Final Scope Ruling at 10–13. Accordingly, Commerce

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

[3] On October 11, 2017, Defendant submitted an index to the administrative record, which can be found at ECF No. 21–1. All further citations to administrative record documents in this opinion will be to the number assigned to those documents by Commerce in the administrative record index.

determined that it did not need to consider the criteria under 19 C.F.R. § 351.225(k)(2) ("(k)(2) analysis"). *Id.* at 10. Commerce issued instructions, effective as of August 2, 2017, to U.S. Customs and Border Protection ("Customs" or "CBP") to continue to suspend liquidation of Midwest's strike pin anchors subject to the *PRC Nails Order*. *See* Liquidation Instructions, PD 29, bar code 3606729–01 (Aug. 11, 2017).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over Plaintiff's challenge to Commerce's scope determination pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012),[4] which grant the court authority to review actions contesting scope determinations that find certain merchandise to be within the class or kind of merchandise described in an antidumping or countervailing duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi); 28 U.S.C. § 1581(c). The court will uphold Commerce's determination 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. Commerce's Determination that Midwest's Strike Pin Anchors are In Scope of the *PRC Nails Order*

Plaintiff argues that Commerce's determination that Midwest's strike pin anchors are unambiguously covered by the plain language of the *PRC Nails Order* is unsupported by substantial evidence. *See* Pl.'s Br. at 14–17. Defendant argues that Commerce's determination is in accordance with law and supported by substantial evidence because the physical description of Midwest's strike pin anchors unambiguously places them within the scope of the *PRC Nails Order*. *See* Def.'s Resp. Pl.'s Rule 56.2 Mot. J. Agency R. at 10–15, May 7, 2018, ECF No. 32 ("Def.'s Resp. Br."). In the alternative, Defendant contends that even if "there is some ambiguity in the scope language," (k)(1) sources, such as prior relevant scope determinations, the U.S. International Trade Commission's ("ITC") final material injury determination ("ITC Report"), and the petition to the underlying investigation all support Commerce's conclusion that strike pin anchors are covered by the order's scope. *See id.* at 15–19. For the reasons that follow, Commerce's scope determination is not supported by substantial evidence and is remanded to the agency. On remand, Commerce should proceed to a (k)(2) analysis, and may reopen the record if Commerce believes it is necessary, to clarify the scope of the *PRC Nails Order*.

[4] Further citations to Title 28 of the United States Code are to the 2012 edition.

The language of an antidumping duty order dictates its scope. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed Cir. 1995)). Commerce's regulations authorize it to issue scope rulings to clarify whether a particular product is within the scope of an order. *See* 19 C.F.R. § 351.225(a). To determine whether a product is within the scope of an antidumping order, Commerce looks at the plain language of that order. *See Duferco*, 269 F.3d at 1097. In addition to the scope language, Commerce will take into account descriptions of the merchandise contained in: (1) the petition; (2) the initial investigation; and (3) past determinations by the Commission and by Commerce, including prior scope determinations (collectively "(k)(1) sources"). 19 C.F.R. § 351.225(k)(1); *see* 19 C.F.R. § 351.225(d). When the (k)(1) sources are not dispositive, Commerce will initiate a formal scope inquiry and further consider:

(i) The physical characteristics of the product;
(ii) The expectations of the ultimate purchasers;
(iii) The ultimate use of the product;
(iv) The channels of trade in which the product is sold; and
(v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(2).

Commerce has broad authority "to interpret and clarify its antidumping duty orders." *Ericsson GE Mobile*, 60 F.3d at 782; *see also King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (stating that Commerce is entitled to substantial deference with regard to interpretations of its own antidumping orders). However, Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)). Furthermore, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089. Although the petition and the investigation proceedings may aid in Commerce's interpretation of the final order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Id.* at 1096.

The relevant scope language of the *PRC Nails Order* provides that

> [t]he merchandise covered by this proceeding includes certain steel nails having a shaft length up to 12 inches. . . . . Certain

> steel nails may be of one-piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint.

PRC Nails Order, 73 Fed. Reg. at 44,961.

The *PRC Nails Order* describes the subject merchandise, in relevant part, as "certain steel nails . . . up to 12 inches..... constructed of two or more pieces. and [that may] have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters." *PRC Nails Order*, 73 Fed. Reg. at 44,961. Several dictionary definitions aid the court in discerning the plain meaning of "nail." *See Nail*, The American Heritage Dictionary of the English Language 1198 (3d ed. 1996) (*Nail*: 2. [a] slim, pointed piece of metal hammered into material as a fastener.); *Nail*, Webster's Third New International Dictionary 1500 (Philip Babcock Gove, Ph.D. & Merriam-Webster Editorial Staff eds. 1993) (*Nail* : 2a: a slender and usually pointed and headed fastener designed for impact insertion); *Nail*, oed.com, *available at* http://www.oed.com/view/Entry/124844?rskey=SYwb52&result=1&isAdvanced=false#eid (last visited Oct. 16, 2018) (*Nail*: II. A small metal spike (and related uses).; 4a: A small metal spike, usually with a sharpened end and a blunt head, which may be driven in to a surface with a hammer or other tool in order to fasten things together, serve as a peg, or (occasionally) to provide purchase, etc.); *Nail*, Merriam-Webster.com, *available at* https://www.merriam-webster.com/dictionary/nail (last visited Oct. 16, 2018) (*Nail*: 2: a slender usually pointed and headed fastener designed to be pounded in).

At issue here, however, are not just nails, but also nails that are "constructed of two or more pieces." Although dictionary definitions can identify the physical characteristics of a nail, none of the definitions consulted by the court identify or define a nail that is constructed of two or more pieces. The plain language of the *PRC Nails Order* does not define the phrase "nails constructed of two or more pieces." Further, the prior scope determinations and the ITC Report that Commerce relies upon, *see* Final Scope Ruling at 11–13, do not explain what it means for a product to be a nail constructed of two or more pieces.[5]

[5] In the final scope determination, Commerce relies on three prior scope rulings and the underlying ITC determination to support its conclusion that Midwest's strike pin anchors are unambiguously in scope of the *PRC Nails Order*. *See* Final Scope Determination at 5–8, 11–13; Certain Steel Nails from the [PRC]: Prior Scope Rulings Relevant to this Proceedings

In the final scope determination, Commerce purports to consider the strike pin anchor as a unitary product, describing

> Midwest Fastener's strike pin anchors [as] consist[ing] of four components: a threaded body; a steel pin (i.e., nail); a nut, and a flat washer. The sizes of the strike pin anchors range from ¼ x 1 ¾ to ¾ x 7 ½. The pin in the anchors is medium carbon steel. The surface of the pin is coated with yellow zinc, and the head of the pin is rounded.

See Final Scope Ruling 10 (citations omitted). Commerce then concludes that the product is a nail constructed of two or more pieces because the product's steel pin component is "practically and substantively a steel nail."[6] *See id.* at 11 (citation omitted). Therefore, Commerce inquires whether a four-component strike pin anchor is a nail, and concludes that it is, by finding that one of its component parts is a nail. Implicit in Commerce's analysis is the understanding that the phrase, "nails . . . constructed of two or more pieces" (i) includes multi-component products where one component is a nail, and the other non-nail components aid the functioning of the nail, and (ii) that here, the threaded body, washer and nut components merely aid the

at Attachs. I, II, III, IV, PD 27, bar code 3603872–01 (Aug. 2, 2017) (providing copies of Certain Steel Nails from the [PRC]: Cobra Anchors Co. Ltd. Final Scope Ruling, A-570–909, (Sept. 19, 2013) ("Cobra"); Antidumping and Countervailing Duty Orders on Certain Steel Nails from the Socialist Republic of Vietnam Final Scope Ruling on OMG, Inc.'s Zinc Anchors, A-552–818/C-522–819, (Feb. 6, 2017) ("OMG"); and Antidumping and Countervailing Duty Orders on Certain Steel Nails from the [PRC]: Final Scope Ruling on Simpson Strong-Tie Company's Anchors, A-570–909, (Mar. 20, 2017) ("Simpson"), and of the ITC determination, Certain Steel Nails from the [PRC], USITC Pub. No. 4022, Inv. No. 731- TA-1114 (July 2008) ("ITC Report")). Commerce contends that anchor products with a steel pin component are in scope of the *PRC Nails Order* because the pin is "practically and substantively a steel nail" that completes the fastening function and, if removed, would "render the product unusable[.]" Final Scope Ruling at 11. Accordingly, Commerce con- cludes that an anchor is a steel nail with other pieces. *Id.* These prior rulings, however, all presume, without support or explanation, that the phrase "constructed of two or more pieces" is defined either by the plain language of the order, a (k)(1) source, other than a previously issued ruling by Commerce, or in the OMG, Cobra, and Simpson rulings them- selves. Commerce's reliance on the ITC Report is likewise not helpful because, although the report identifies a masonry anchor as an example of a nail constructed of two or more pieces, it also identifies several other examples of nails constructed of two or more pieces. *See* ITC Report at I-9. The words of the *PRC Nails Order*, however, do not clarify which of these products the order encompasses.

[6] In response to Midwest's argument that nails typically do not have a hex nut or a washer, Commerce states that Midwest's strike pin anchor has a threaded body and explains that "the scope does not necessarily exclude nails with a 'threaded shank.'" Final Scope Ruling at 11. Plaintiff argues that the threaded body, i.e., shank or anchor portion of the product is not a screw threaded shank because, unlike a nail with a threaded shank that makes direct contact with the masonry and acts as the fastener, only the top most part of Midwest's product's body is threaded and that portion does not come into direct contact with the masonry. *See* Pl.'s Br. at 15. Neither of these arguments address the meaning of the words of the scope language "[c]ertain steel nails . . . constructed of two or more pieces." *See PRC Nails Order*, 79 Fed. Reg. at 44,961.

functioning of the nail component, i.e., the steel pin.[7] However, neither the words of the *PRC Nails Order* nor the (k)(1) sources support the implicit interpretation of "nails . . . constructed of two or more pieces" employed by Commerce. Further, the implication that the other components of the strike pin anchor merely aid the functioning of the pin is not supported by substantial evidence on this record. *See* Pl.'s Scope Ruling Req. at 3 (explaining that the threaded body component of a strike pin anchor expands against the sides of the predrilled hole it is inserted into to secure the item being fastened to the masonry). Commerce cannot support its determination that the strike pin anchors are nails constructed of two or more pieces, unless it clarifies the ambiguous phrase, "constructed of two or more pieces," and supports any subsequent determination with record evidence.[8] Commerce's final scope determination is therefore unsupported by substantial evidence and is remanded.

II. Commerce's Liquidation Instructions

Plaintiff challenges Commerce's liquidation instructions as unlawful. *See* Pl.'s Br. at 19–21. Specifically, Plaintiff argues that relevant legal precedent bars Commerce from suspending liquidation retroactively.[9] *See id.* (citing *AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1343–44 (Fed. Cir. 2013); *Sunpreme Inc. v. United States*, 40

[7] Defendant argues that the plain language of the *PRC Nails Order* does not limit what pieces accompany a nail "constructed of two or more pieces." *See* Def.'s Resp. Br. at 12. Defendant-Intervenor similarly contends that nails with "one or more non-nail components ("pieces") affixed or joined to them[]" are within the scope of the order, *see* Def.-Intervenor's Resp. Br. at 6, May 7, 2018, ECF No. 31, and argues that an alternate reading would read out the phrase "constructed of two or more pieces[]" from the scope order altogether. *Id.* at 10. Defendant and Defendant-Intervenor's arguments depend upon the meaning of the phrase "certain steel nails . . . constructed of two or more pieces[,]" and it is not clear what the scope language means by this phrase.

[8] The court is aware of the three recent decisions issued by this Court that opine on the reasonableness of Commerce's interpretation of the same scope language, as applied to products similar to that at issue in this case. *See generally Midwest Fastener Corp. v. United States*, 42 CIT_, Slip Op. 18–132 (Oct. 1, 2018); *Simpson Strong-Tie Co. v. United States*, 42 CIT_, Slip Op. 18–123 (Sept. 21, 2018); *OMG, Inc. v. United States*, 42 CIT_, 321 F. Supp. 3d 1262 (2018). Although this court agrees with the conclusion reached in all three of those cases that the plain meaning of the relevant scope language does not unambiguously include a multi-component anchor system, this court respectfully disagrees with those cases' further finding that the plain language unambiguously excludes anchor products. For the reasons provided above, this court finds that the scope language "nails . . . constructed of two or more pieces" is ambiguous.

[9] In its moving brief, Plaintiff also argues that because antidumping duties on a product can only be assessed at the initiation of a formal scope inquiry, Commerce's retroactive instructions here are unlawful. *See* Pl.'s Br. at 20. In its reply brief, Plaintiff seems to amend its position and states that it is the date of the scope determination, here August 2, 2017, that governs when antidumping duties are assessed and mark when Commerce can issue instructions to CBP. Pl.'s Reply to Def.'s & Def.-Intervenor's Resps. to Pl.'s Rule 56.2 Mot. J. Agency R. at 7, June 14, 2018, ECF No. 36 ("Pl.'s Reply Br.").

CIT_, 145 F. Supp. 3d 1271 (2016) ("*Sunpreme I*");[10] *United States Steel & Fasteners, Inc. v. United States*, 41 CIT_, 203 F. Supp. 3d 1235, 1252–55 (2017)). Defendant argues that Commerce's liquida- tion instructions are in accordance with both the relevant regulatory framework and legal precedent, and are reasonable. *See* Def.'s Resp. Br. at 21–30. For the reasons that follow, the court agrees with Defendant.

The relevant regulatory framework provides that Commerce will continue the suspension of liquidation on entries already subject to a suspension following any subsequent inquiry into scope by Commerce. *See* 19 C.F.R. § 351.225(*l*)(1)–(3). Liquidation continues to be suspended following an affirmative preliminary or final scope determination and will only be lifted on Commerce's instruction to CBP, following either a preliminary or final scope determination that the product is out of scope. *See* 19 C.F.R. § 351.225(*l*)(2)–(3). Accordingly, the relevant regulatory framework does not preclude Commerce from continuing the suspension of liquidation in a situation like the one before the court.

The legal precedent Plaintiff invokes does not preclude Commerce from continuing to suspend liquidation of entries suspended prior to the initiation of a scope inquiry. *AMS* and *Steel & Fasteners* are distinguishable. In *AMS*, after clarifying the scope of an unclear order, Commerce attempted to reach back and retroactively suspend liquidation of entries that were not previously so suspended. *See AMS*, 737 F.3d at 1340–41, 1344. Accordingly, *AMS*'s holding that Commerce may only suspend liquidation and collect cash deposits prospectively "on or after the date of the initiation of the scope inquiry[,]" and not retroactively, addresses situations where Commerce had not previously suspended liquidation. *See id.* at 1344 (quoting 19 C.F.R. § 351.225(*l*)(2)). In *U.S. Steel & Fasteners*, Commerce attempted to retroactively suspend liquidation of entries that were not already suspended. *See U.S. Steel & Fasteners*, 41 CIT at_, 203 F. Supp. 3d at 1238, 1240–41. Here, liquidation of Midwest's pin strike anchors was suspended prior to the filing of the scope inquiry. *See* Final Scope Ruling at 13; Compl. at ¶28. Therefore, Commerce did not retroactively suspended liquidation. The regulations allow for the continued suspension pending a scope inquiry and *AMS* is inapplicable. *See* 19 C.F.R. § 351.225(*l*).

[10] This Court's *Sunpreme I* decision was reversed by the U.S. Court of Appeals for the Federal Circuit. *See Sunpreme Inc. v. United States*, 892 F.3d 1186, 1194 (Fed. Cir. 2018). Plaintiff's moving brief was filed several months prior to reversal and its reply brief was filed on the same date that the Court of Appeals issued its decision.

Plaintiff also relies on *Sunpreme I* to support its argument that Commerce is acting retroactively in violation of *AMS*. *See* Pl.'s Br. at 19. However, the U.S. Court of Appeals for the Federal Circuit's ("Court of Appeals") reversal of *Sunpreme I* eliminates Plaintiff's argument. *See Sunpreme Inc. v. United States*, 892 F.3d 1186, 1194 (Fed. Cir. 2018) ("*Sunpreme II*"). Specifically, the Court of Appeals held that this Court lacked jurisdiction under 28 U.S.C. § 1581(i) to hear a case challenging CBP's determination that certain goods were subject to existing antidumping and countervailing duty orders. *See id.* at 1191–92, 1194. The Court of Appeals held that the remedy available to plaintiff, in response to CBP's determination, was to file a scope inquiry with Commerce seeking the exclusion of the goods from the scope of the orders. *Id.* at 1193–94. If, in its scope determination, Commerce denied the requested exclusion, plaintiff could seek review of that determination pursuant to 28 U.S.C. § 1581(c) in this Court. *Id.* at 1193. The Court of Appeals, therefore, reasoned that because relief was available to plaintiff under another subsection of the jurisdictional statute, this Court's residual grant of jurisdiction under 28 U.S.C. § 1581(i) was not available.[11] *See Sunpreme II*, 892 F.3d at 1193–94. Implicit in the Court of Appeals' reversal of *Sunpreme I* was the recognition that Customs did not act ultra vires in determining that certain goods must enter subject to existing orders and that "Customs can suspend liquidation pre-scope inquiry." *Id.* at 1194. *Sunpreme I*'s reliance on *AMS* stemmed from its holding that CBP had acted ultra vires and the court's conclusion that there was no valid suspension of liquidation in place. *See Sunpreme I*, 40 CIT at __, 145 F. Supp. 3d at 1286–89. *Sunpreme I* found that because there was no valid suspension of liquidation to continue under 19 C.F.R. § 351.225(*l*)(2) and (3), CBP acted beyond its authority in ordering the collection of cash deposits on entries entered prior to Commerce initiating a scope inquiry. *Id.*, 40 CIT at_, 145 F. Supp. 3d at 1286–89, 1295–96.

Sunpreme I cannot help Plaintiff here.[12] The liquidation of goods at issue here was already suspended and Commerce may, under its

[11] This Court's subject matter jurisdiction is governed by 28 U.S.C. § 1581. Subsection (i) of the statute is the Court's residual jurisdiction provision that is invoked under specifically enumerated circumstances, and "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (quoting *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)).

[12] In its reply brief, Plaintiff also invokes *Sunpreme III*, which reviewed a challenge to Commerce's scope determination and addressed the lawfulness of the same liquidation instructions challenged in *Sunpreme I*. *See* Pl.'s Reply Br. at 8 (citing *Sunpreme Inc. v. United States*, 41 CIT_, 256 F. Supp. 3d 1265 (2017) (*Sunpreme III*)). The *Sunpreme III* decision is not helpful for the same reasons *Sunpreme I* is not.

regulatory framework, continue the suspension. Accordingly, although the language of the *PRC Nails Order* is ambiguous and must be clarified through a formal scope inquiry, Commerce's suspension of liquidation is lawful.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's final scope determination is remanded for Commerce to conduct a formal scope inquiry and (k)(2) analysis; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

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

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination.

Dated: October 19, 2018
New York, New York

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

Slip Op. 18–143

NATURAL RESOURCES DEFENSE COUNCIL, INC., CENTER FOR BIOLOGICAL DIVERSITY, and ANIMAL WELFARE INSTITUTE, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, CHRIS OLIVER, in his official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 18–00055

[Defendants' motion for stay pending appeal is denied.]

Dated: October 22, 2018

Giulia C.S. Good Stefani and *Vivian Wang*, Natural Resources Defense Council, of Santa Monica, CA, argued for plaintiffs. With them on the brief were *Stephen Zak Smith* for plaintiff, Natural Resources Defense Council Inc. and *Sarah Uhlemann*, of Seattle, WA, for plaintiffs, Center for Biological Diversity, and Animal Welfare Institute.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were *Jason Forman*, National Oceanic and Atmospheric Administration, of Silver Spring,

MD; *Daniel J. Paisley*, Department of the Treasury, of Washington, DC; and *Glenn Kaminsky*, Department of Homeland Security, of New York, NY.

OPINION

Katzmann, Judge:

Again before this Court is the saga of the vaquita, the world's smallest porpoise and a critically endangered species. In the recent litigation before this Court, it was undisputed that the vaquita, endemic to the northern Gulf of Mexico, was being caught inadvertently and strangled in the gillnets used to catch other fish. Consequently, the vaquita is on the verge of extinction; only about 15 of this evolutionarily distinct marine mammal remain today. Plaintiffs Natural Resources Defense Council ("NRDC"), Center for Biological Diversity, and Animal Welfare Institute moved to have this Court enjoin compliance by the defendants (several United States agencies and officials, collectively referred to as "the Government") with the Congressional mandate in the Marine Mammal Protection Act ("MMPA") that the Government[1] "shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2). Noting the undisputed fact that "the vaquita's plight is desperate, and that even one more bycatch death in the gillnets of fisheries in its range threatens the very existence of the species," this Court granted plaintiffs' motion, and banned, pending final adjudication of the merits, the importation of relevant fish and fish products[2] caught using "gillnets [which] incidentally kill vaquita in excess of United States standards" in the vaquita's range in the northern Gulf of Mexico. *Nat. Res. Def. Council v. United States*, 42 CIT__, Slip Op. 18–92 (July 26, 2018) ("*NRDC I*") at 48–49. In response to the Court's order, the preliminary injunction has been fully implemented. Nonetheless, the Government now moves for a stay of the preliminary injunction pending appeal, alleging that the Court "made several legal errors when determining the likelihood of success and balancing the potential harm to the parties." Defs.' Mot. for Stay Pending Appeal, Aug. 24, 2018, ECF No. 32, ("Mot. to Stay") at 1–2. The Government's request for a stay is denied.

The arguments presented by the Government are not new to the Court – they have been presented before, and in two previous opinions, the Court has not been persuaded by them. *See NRDC I*, Slip Op. 18–92; *Nat. Res. Def. Council v. United States*, 42 CIT_, Slip Op. 18–92 (Aug. 14, 2018) ("*NRDC II*"). In its ruling requiring the

[1] *See infra*, p. 3 n.2.

[2] Specifically, shrimp, curvina, sierra, and chano fish and their products.

Government, pending final adjudication, to ban the importation of "all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range," the Court was simply enforcing the Congressional mandate embodied in the Imports Provision:

> [I]t shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. The Secretary of the Treasury *shall ban* the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.[3]

16 U.S.C. § 1371(a)(2) (emphasis added). The Government continues to object that the Court's rulings ignore its concerns about asserted negotiations with Mexico. Those speculative concerns, however, are not within the province of the court, as Congress has made clear through the language of the statute. The MMPA's language here is unambiguous: the Secretary of Treasury "shall" — not "may" — ban imports of fish under circumstances like those before this Court. 16 U.S.C. § 1371(a)(2). It is implausible that in enacting this statute, Congress was blind to the reality that embargoes may have an impact on foreign relations. While the Government may believe that the ban required by the Imports Provision does not present the best way to protect the vaquita, its disagreement with Congress's choice does not create a basis to disregard the Act. "[T]he self-proclaimed wisdom of the [agency's] approach cannot save it because the Congress, in its more commanding wisdom, has not authorized it." *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1243 (D.C. Cir. 2011); *see also Lachance v. Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999) (quoting *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("The courts are the final authorities on statutory construction. They must

[3] The National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NOAA Fisheries"), which is within the Department of Commerce, has interpreted this directive to apply to the Departments of the Treasury and Homeland Security, in cooperation with NOAA Fisheries. *See* Fish and Fish Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54,390, 54,394 (Aug. 15, 2016) (if NOAA Fisheries finds a foreign fishery does not meet MMPA standards, the agency, "in cooperation with the Secretaries of the Treasury and Homeland Security, will identify and prohibit the impor- tation of fish and fish products" from the harvesting nation). *NRDC I* at 4. The term "Secretary," as used throughout the MMPA, and except where otherwise specified, means "the Secretary of the department in which the National Oceanic and Atmospheric Admin- istration is operating, as to all responsibility, authority, funding, and duties under this chapter with respect to [whales, dolphins, and porpoises] and members, other than wal- ruses, of the order Pinnipedia." 16 U.S.C. § 1362(12)(A)(i). Currently, that is the Depart- ment of Commerce. *See* 50 C.F.R. § 216.3 ("Secretary shall mean the Secretary of Commerce or his authorized representative.").

reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.")).

PROCEDURAL BACKGROUND

The background relevant to the motion to stay the preliminary injunction pending appeal is as follows: As noted, on July 26, 2018, the Court granted the motion for a preliminary injunction requiring the Government, pending final adjudication of the merits, to ban the importation of all specified fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range. *NRDC I* at 49. Seeking to restrict the scope of the preliminary injunction, the Government filed a "motion to clarify," which was denied by the Court. *NRDC II* at 11. In that ruling, the Court further ordered the Government to "immediately ban the importation from Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range . . . unless affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as caught outside the vaquita's range." *Id.* at 14. The Court directed "that Defendants shall within the next 15 days submit for publication in the Federal Register notice of the ban on shrimp, curvina, sierra, and chano and their products from Mexico caught with gillnets within the vaquita's range." *Id.* at 14–15. The Government was also ordered to "file a status report with the Court within 30 days documenting compliance with this order, and every 30 days thereafter until the preliminary injunction is fully implemented." *Id.* at 15. On August 24, 2018, the Government filed a notice of appeal from the Order of July 26, 2018 imposing a preliminary injunction and also filed in this Court a motion for stay pending appeal. Notice of Appeal, ECF No. 42; Mot. for Stay. On September 13, 2018, the Court heard oral argument on the motion to stay. Oral Argument, ECF No. 57. On September 27, 2018, per order of the Court, the parties submitted filings regarding the legislative history of the MMPA. Letter re: MMPA Legislative History, ECF No. 61; Notice of Suppl. Authority, ECF No. 62.

The Court has been informed that the preliminary injunction has been fully implemented. More specifically, on August 31, 2018, the Government informed the Court that "[t]he requirements of the preliminary injunction and the Court's August 14, 2018 order have . . . been fully implemented," and that "[s]ince August 14, 2018, CBP [United States Customs and Border Protection] has only allowed importers who can affirmatively represent in writing that their fish products were not sourced using gillnets from within the vaquita's range to enter their goods in the United States." Status Report, ECF

No. 49 ("Aug. 31 Status Report") at 1–2. On October 1, 2018, the defendants reported that the Government has "continued to implement the preliminary injunction" and that "[o]n September 21, 2018 . . . U.S. Customs and Border Protection (CBP) informed importers that, as of October 15, 2018, it will only accept affected imports that are accompanied by a certification of admissibility form, as published in the Federal Register on August 28, 2018." Status Report, ECF No. 64 ("Oct. 1 Status Report") at 1 (citing Import Restrictions on Certain Mexican Fish and Fish Products, CSMS #18–000555 (Sept. 21, 2018), *available at* https://csms.cbp.gov/csms.asp (click on CSMS# 18–000555)).

STANDARD OF REVIEW

A stay pending appeal "is not a matter of right, even if irreparable injury might otherwise result," *Nken v. Holder*, 556 U.S. 418, 419 (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)), and the party seeking the stay "bears the burden of showing that the circumstances justify an exercise of [the court's] discretion," *id.* at 433–34.

DISCUSSION

The Government argues that this Court should stay its preliminary injunction pending appeal because, allegedly, (1) the Court erred in issuing the injunction and (2) the Government is suffering ongoing, serious harm as a result of the injunction. Mot. for Stay at 1–2.

When determining whether to stay a preliminary injunction pending appeal, courts look at four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors are the "most critical" to a court's determination. *Id.* To satisfy the first factor, more than a "mere possibility of relief is required," *id.* (internal quotation omitted); a movant must show either a "strong likelihood of success on the merits" or "a substantial case on the merits provided that the harm factors militate in [the movant's] favor," *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 404 F. App'x 481, 482 (Fed. Cir. 2010). Similarly, to satisfy the second factor, the movant must show more than a mere "possibility of irreparable injury." *Nken*, 556 U.S. at 434 (citation omitted).

The Government has failed to meet its burden for a stay. It has offered no persuasive reason why the Court should reverse its determination that plaintiffs have standing to bring this action. As detailed in *NRDC I*, the Government's inaction harms plaintiffs'

vaquita-related interests, *NRDC I* at 25–27, plaintiffs adequately demonstrated that their harm was traceable to the Government's inaction, *id.* at 27–32, and a Court order directing compliance with the MMPA will help redress plaintiffs' injury due to the Government's inaction, *id.* Furthermore, plaintiffs are likely to succeed on their claim. By failing to ban the fish imports as required by the MMPA, the Government unlawfully withheld agency action under § 706(1) of the Administrative Procedure Act ("APA"). Pursuant to the APA, this Court may enjoin agencies to undertake "mandatory" and "discrete" actions, such as instituting the import ban under the MMPA at issue here. *NRDC I* at 18. Moreover, an agency cannot override Congress' statutory command through regulatory means, as the Government contends it should be permitted to do here, *id.* at 20, 23, and plaintiffs established a fair likelihood that United States standards were exceeded, thus triggering the statutory mandate, *id.* at 35. Requiring the Government to comply with the laws enacted by Congress did not "usurp" the agency's "role," Mot. for Stay at 16; the Government must comply with Congress's mandate that it "shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards," *NRDC I* at 23 (citing 16 U.S.C. § 1371(a)(2)).

Nor did the Court abuse its discretion in weighing plaintiffs' irreparable harm against the Government's logistical concerns with implementing a ban. Plaintiffs have demonstrated their members' interests in the vaquita, and those interests would be irreparably harmed by the vaquita's extinction. Moreover, the public interest is best served when the Government complies with the law, namely the preservation of marine mammal populations, such as the vaquita here, on the verge of extinction. *Id.* at 47–49. Furthermore, the ban ordered by this Court is a tailored one: only particular fish and fish products caught with gillnets in the narrow geographic range of the vaquita are banned. The ban specifically excludes fish and fish products "affirmatively identified as having been caught with a gear type other than gillnets or affirmatively identified as caught outside the vaquita's range." *NRDC II* at 14. Indeed, the Court notes that the Government has fully implemented the ban. Aug. 31 Status Report; Oct. 1 Status Report. Moreover, the Government's alleged harms of potentially chilled negotiations continue to be unpersuasive, *NRDC I* at 47, and the declarations attached to the Government's motion to stay provide no better evidence of a concrete rather than speculative injury. These negotiations have been proceeding since at least 2015, *id.*, and "[r]elevant high-level government-to-government

negotiations with Mexico remain ongoing" while the embargo is in effect. Defs.' Mot. for Ext. of Time, Aug. 28, 2018, ECF No. 46, ("Mot. for Ext.") at 1. Indeed, the Government has even suggested that better vaquita protections may be secured within the next few months. Mot. for Ext. at 1 (stating that "[Mexico and the United States] appear close to reaching resolution on a number of issues related to protection of the vaquita in Mexican waters"). More fun- damentally, as has been noted and bears repeating, the unambiguous language of the Imports Provision directs that the Secretary of Trea- sury "shall" — not may — "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16
U.S.C. § 1371(a)(2). This is a duty imposed by Congress, and it is not within the Government's discretion to disregard this obligation based on its perception of a possible impact on foreign relations. It is implausible that Congress was unaware that embargoes or limitations on imports may impact foreign relations. Quite apart from the principle that the language of the statute is the clearest indication of Congressional intent, the Court further notes that nothing in the MMPA's legislative history indicates that Congress did not mean exactly what it directed. *See Ardestani v. INS*, 502 U.S. 129, 135 (1991). In short, Congress determined that when a marine mammal is endangered — such as the vaquita is here — because of foreign fishing technologies, targeted embargoes on fish caught using those technologies are the remedies to be imposed. The Government's regulatory preferences do not override this legislative command. *See Oceana*, 670 F.3d at 1243.

CONCLUSION

For the foregoing reasons, the Government has not met its burden for a stay of the preliminary injunction pending appeal. Consequently, its motion for a stay is denied.

SO ORDERED.

Dated: October 22, 2018
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 18–144

UNITED STATES, Plaintiff, v. GREAT NECK SAW MANUFACTURERS, INC., Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00049

[Plaintiff's motion to compel discovery denied without prejudice.]

Dated: October 22, 2018

Albert S. Iarossi, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Carl R. Soller, Soller Law Intl, LLC, of So. Elmont, NY for Defendant Great Neck Saw Manufacturers, Inc.

MEMORANDUM and ORDER

Gordon, Judge:

Before the court is the USCIT Rule 37 motion by Plaintiff United Saw Manufacturers, Inc. ("GNSM"). *See* Pl.'s Mot. to Compel Disc. Resps., ECF No. 31 ("Pl.'s Mot."); *see also* Def.'s Mem. In Opp. to Pl.'s Mot. to Compel Disc., August 6, 2018, denied without prejudice.

I. Background

GNSM is an importer and manufacturer of hand tools, including screwdrivers, saws, levels, layout tools, knives, and flashlights ("subject merchandise"). Compl. ¶ 4. The Government brought this action against GNSM pursuant to 19 U.S.C. § 1592 and 28 U.S.C. § 1582 for civil penalties in the amount of $1,111,351.24 based on GNSM's alleged negligence or gross negligence in the importation of the subject merchandise and unpaid customs duties in the amount of $307,767.49. *See id.* ¶ 1.

On April 6, 2018, pursuant to USCIT Rules 33, 34, and 36, the Government served discovery requests on GNSM, consisting of 12 requests for admission, 12 interrogatories, and six requests for the production of documents. Pl.'s Mot. at 1–2. Following these requests, the Government made several attempts to obtain GNSM's discovery responses. *Id.* at 8–40 (providing supporting material with separate pagination of Appx 1–Appx 31). GNSM's responses were due on May 10, 2018, but GNSM requested a two-week extension until May 25th based on "the large number of entries" involved and a "lack of any entry documents" associated with the discovery requests. *Id.* at Appx 16. The Government consented to the extension request, yet GNSM failed to provide the requested discovery by the deadline, nor any explanation for its further delay. *Id.*

Five days later, on May 30th, GNSM emailed the Government a letter with its responses to the Government's requests for admission, but no responses to the interrogatories or document requests. *Id.* at Appx 18–Appx 24. In the letter, GNSM reiterated its concerns expressed previously in its May 10th extension request. It noted that the Complaint identified "more than 6,595 line items on numerous consumption and anti-dumping entries filed primarily at the Port of Memphis, TN.'" *Id.*at Appx 19 (quoting Compl. ¶ 5). It also asserted that without clarification by the Government as to the port(s) at which the violations took place and certain other information, it "is impossible for defendant to identify '"the agent' whom Customs claims is designated as a seller as opposed to a 'buying agent.'" *Id.* at Appx 19–Appx 20 (containing Defendant's discovery responses). Despite these concerns, GNSM's email stated that service of its interrogatory responses was awaiting review and certification by an individual associated with GNSM. *Id.* at Appx 18.

A lapse of four weeks ensued without any additional communication between the parties. Then, on June 26th, the Government emailed GNSM asking for responses to the outstanding discovery requests. *Id.* at Appx 27. GNSM failed to respond. One week later, on July 3rd, the Government again contacted GNSM via email regarding the outstanding discovery requests, noting that GNSM's responses were more than five weeks past due. *Id.* at Appx 26. The Government warned GNSM that if it did not comply by July 6th, the Government would seek the assistance of the court. *Id.* GNSM responded that day, further discussion with the Government the following week. *Id.* The Government did not respond to GNSM's suggestion. Rather, the Government inquired whether GNSM would fulfill its discovery obligations by July 6th, some six weeks beyond the initial deadline. *Id.* another email to GNSM indicating that, since GNSM had refused "to fulfill its discovery obligations," the Government would file a motion to compel. *Id.*

Four days later, on July 10th, in an effort to respond to the outstanding discovery requests, GNSM emailed the Government with a list of factories and ordering processes associated with the buying agents that source and oversee Chinese product for Defendant. *Id.* at Appx 29. GNSM stated that those processes were no different than the ones associated with the subject entries covered by the complaint. *Id.* The Government responded the same day, indicating that the information provided by Defendant "[did] not come close to satisfying [GNSM's] discovery obligations" and that the Government would file

a motion to compel. *Id.* at Appx 28. Defendant, in turn, emailed that it was "quite clear in describing why [the Government's] general discovery requests are impossible to respond to in any particularity." *Id.* GNSM advised the Government that the documents being sought were likely already in the files of U.S. Customs and Border Protection. Additionally, Defendant noted that GNSM's records of the subject entries no longer exist because of the passage of time and that the age of the entries and the fact that the information is only available from overseas occasioned its delay. *Id.* The next day, on July 11th,Defendant again emailed the Government, this time attaching documents demonstrating the cycle for ordering the subject merchandise. *Id.* at Appx 31. GNSM acknowledged that even though those documents were examples of current ordering cycles, they were representative of "what occurred" with the subject entries and that the system has "been the same or with minor variations" since and including the time of those entries. *Id.* Plaintiff's motion to compel ensued.

I. Discussion

The Government maintains that it acted in good faith in its attempts to resolve the discovery dispute. Pl.'s Mot. at 5. The Government argues that agreeing to GNSM's request for an extension of time to May 25th to respond to the Government's discovery requests, and then waiting four weeks for GNSM to comply after GNSM failed to respond by the May 25th deadline demonstrates that it acted in good faith in accordance with Rule 37(a)(1). *Id.* Plaintiff maintains that it made numerous additional requests of GNSM to comply, half of which were ignored. The Government also contends that the remainder of its requests for discovery—particularly as to the interrogatories or document production—were either (a) ignored by GNSM or (b) met with broad excuses for its non-response to the interrogatories or production of irrelevant documents. *Id.* In the Government's view, it has met its obligation under USCIT Rule 37 to confer or attempt to confer in an effort to obtain the needed discovery without the court's involvement. *Id.* Therefore, "in order to avoid potential further motion practice, as well as unnecessary delays," Plaintiff is seeking an order directing Defendant to comply with its outstanding discovery obligations. Pl.'s Mot. at 5–6.

GNSM responds that "the Government was advised that its explanation of the 'imports' was insufficient to allow for substantive/accurate responses to its interrogatories," and requests that the parties be given "the opportunity to make a substantive good faith effort to conclude discovery." Def.'s Resp. at 2, 4. GNSM argues that "as a

result of a years' long Customs review audit and port account relationship . . . [Customs] should in fact have all the documents it seeks to examine." *Id.* at 1. GNSM also maintains that the requested documents regarding the entries from 2005 through 2010 no longer exist in its records or those of its foreign shippers. *Id.* at 3.

The court understands the Government's frustration that this discovery dispute has lasted approximately six months, particularly in view of Defendant's regular non-compliance with discovery deadlines. Whether the parties conferred in good-faith is a case-by-case determination. *See Benavidez v. Sandia Nat'l Labs*, 319 F.R.D. 696, 723 (D.N.M. 2017).

Here, it appears from Defendant's May 10th extension request that GNSM might have difficulty meeting its obligations given the scope of the Government's discovery requests. Defendant again referenced these concerns in its May 30th letter. GNSM provided some further detail regarding these concerns in its final communication on July 10th. At a minimum, paragraph 5 of the Complaint and GNSM's first two communications should have cued Plaintiff that it might need to engage with Defendant so that the parties could make an effort to "determine precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved." *Williams v. Sprint/United Mgmt. Co.*, 245 F.R.D. 660**,** 664 (D. Kan. 2007). Problematically though, Plaintiff's description of its efforts to confer failed to provide the court with a sense of whether the parties reasonably engaged in deliberations, conversations, a comparison of views, or consultations with an eye to resolving the dispute prior to involving the court. *See Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999).

Plaintiff would have the court believe that the Government did enough to satisfy its burden to confer via its exchange of emails. The difficulty for Plaintiff is that its emails are minimal in length. The requirement to confer is not met by email exchanges that are little more than perfunctory and simply restate Plaintiff's demands that GNSM fulfill its discovery obligations. *See Benavidez*, 319 F.R.D. at 723. Furthermore, "requesting or demanding compliance with the requests for discovery," or "simply showing that the discovery in question was requested more than once" is not enough to satisfy Plaintiff's duty to confer. *Sprint/United Mgmt. Co.*, 245 F.R.D. at 664.

While Plaintiff has not met its duty to confer, Defendant has not been as forthcoming in responding to Plaintiff's discovery requests as required by the Court's Rules. Given the concerns raised by Defendant, there may be a need for the parties to compromise, including the

possibility that Plaintiff may have to refine the scope of its interrogatories and document requests. Accordingly, the court will order the parties to meet in a good faith effort to resolve the discovery dispute. Should this discovery dispute return to the court, the parties shall, at a minimum, include (1) a more detailed and thorough explanation of their efforts, (2) the identification of areas of compromise and areas of disagreement and reasons therefor, (3) any specific issues impeding the ability of Plaintiff and Defendant to resolve their dispute, and (4) a more detailed and thorough explanation of what specifically is preventing Defendant from complying with the outstanding discovery requests.

Despite the possible need for refinement of the Government's discovery requests, GNSM's vaguely worded and broadly based objections and failure to answer Plaintiff's interrogatories or produce any documents ignore the requirements of USCIT Rules 33 and 34. *See Doe v. Nat'l Hemophilia Found.*, 194 F.R.D. 516, 520 (D. Md. 2000) (describing obligations of party objecting to discovery requests under Fed. R. Civ. P. 33). Rule 33 requires that a party specify its grounds for an objection to an interrogatory and to answer to the extent the interrogatory is not objectionable. USCIT R. 33(b)(3), (4). Similarly, Rule 34 provides that with respect to a request for production of documents, if there is an objection to a requested document, the responding party shall "state with specificity the grounds for objecting," and if the responding party is only objecting to part of a request it must "specify the part and permit inspection of the remaining parts." USCIT R. 34(b)(2)(B), (C). Additionally, if Defendant felt unduly burdened by the Government's discovery requests, it had a remedy under Rule 26 to seek a protective order. *See* USCIT R. 26(c). Defendant failed to satisfy either Rule 33 or 34, nor sought protection under Rule 26. Consequently, the court reminds Defendant of its obligations and potential remedies.

I. Conclusion

Based on the foregoing reasons, it is hereby

ORDERED that the Government's motion to compel discovery from GNSM is denied without prejudice; it is further

ORDERED that the parties shall meet in person and reasonably confer on or before November 30, 2018 in an effort to resolve their discovery dispute; it is further

ORDERED that if the parties fail to resolve their discovery dispute, they may individually file a motion or motions provided for in the Court's Rules to resolve that dispute on or before December 20, 2018; and it is further

ORDERED that if the parties resolve their discovery dispute without the intervention of the court, they shall file a proposed joint scheduling order governing further proceedings in this action on or before December 20, 2018.

Dated: October 22, 2018
New York, New York

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

Slip Op. 18–145

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., BOSUN TOOLS CO., LTD., and BOSUN TOOLS INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 15–00164

JUDGMENT

This case having been instituted to challenge certain administrative review determinations of the International Trade Administration, U.S. Department of Commerce ("Commerce") published *sub nom. Diamond Sawblades and Parts Thereof From the People's Republic of China*, 80 Fed. Reg. 32344 (June 8, 2015) (final antidumping duty administrative review of 2012–13 period) ("*Final Results*"), as explained by its accompanying issues and decision memorandum, Public Record Document ("PDoc") 354 (June 2, 2015) ("*IDM*"); and, after a previous remand, the case having been remanded a second time *per Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 18–26, 42 CIT_, 299 F. Supp. 3d 1374 (Mar. 22, 2018), ECF No. 100; and the final administrative results of the second remand redetermination pursuant thereto having been filed (July 20, 2018), ECF No. 106; wherein Commerce explains that it (1) re-examined and adjusted its build-up methodology for diamond sawblade cores produced by respondent Weihai Xiangguang Mechanical Industrial Co., Ltd. with respect to the steel involved in their production, and (2) re-examined the audited 2013 financial statements of K.M. & A.A. Co., Ltd. and determined to use it in addition to Thai Gulf's 2013 financial statements in the calculation of the surrogate financial ratios; and a scheduling order providing for comments on the final second remand redetermination and the filing of supporting documents for such comments to proceed through October 3,

2018, having been entered on the docket, ECF 108 (July 31, 2018); and the administrative record having been filed on that date, ECF No. 109, the period for filing comments having closed, and no further commentary appearing as filed on the docket; Now, therefore, in view of the foregoing, and upon other papers and proceedings, it is

ORDERED, **ADJUDGED and DECREED** that Commerce's *Final Second Remand Redetermination, Diamond Sawblades Manufacturers' Coalition v. United States, CIT Consol. Ct. No. 15–00164, slip op. 18–26* (July 20, 2018), ECF No. 106, be, and it hereby is, sustained.

Dated: October 23, 2018
New York, New York

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

Slip Op. 18–146

THE DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BOSUN TOOLS CO., LTD., Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 17–00167

[Remanding 2014–15 administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: October 23, 2018

Daniel B. Pickard, *Maureen E. Thorson*, and *Stephanie M. Bell*, Wiley, Rein & Fielding, LLP, of Washington, DC, for the plaintiff.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKeiffer & Horgan, PLLC, of Washington, DC, for the defendant-intervenor.

OPINION and ORDER

Musgrave, Senior Judge:

The plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC") challenges three aspects of the 2014–15 administrative review of the antidumping ("AD") duty order on diamond sawblades ("DSBs") and parts thereof from the People's Republic of China

("PRC")[1], to wit: (1) Commerce's decision not to apply adverse facts available ("AFA") to an aspect of Bosun's record-keeping; (2) Commerce's selection for the copper powder and copper iron "clab"[2] factor of production of Thai import statistics as the "best available information" for Bosun; and (3), to the extent remand of either of the forgoing issues impacts the final determination on the margin for the separate respondents, DSMC also seeks recalculation thereof. The defendant-intervenor, Bosun Tools Co., Ltd. ("Bosun"), an exporter and/or producer of subject merchandise and one of the two mandatory respondents during the review, joins the defendant in support of the administrative record and determinations thereon by the International Trade Administration, U.S. Department of Commerce ("Commerce" or "Department"). For the following reasons, the plaintiff's motion for judgment on the agency record persuades that the case requires remand.

I. Jurisdiction and Standard of Review

Jurisdiction is pursuant to 28 U.S.C. §1581(c). The standard of judicial review on an action invoking 19 U.S.C. §1516a(a)(2)(A) and (B)(iii) is to decide whether the administrative determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(1)(B)(i).

II. Discussion

A. Bosun's Record-Keeping

DSMC's first challenge is to Commerce's decision not to apply AFA to an aspect of Bosun's record-keeping. *See* 19 U.S.C. §1677e(b).

1. Background

In general, the AD statute expects that the margin for subject merchandise from a non-market economy ("NME") such as the PRC shall be determined by comparing its U.S. price with a "normal value" determined by reference to data covering the factors involved in production of subject merchandise ("FOPs") plus general and other

[1] *DSBs and Parts Thereof From the PRC*, 82 Fed. Reg. 26912 (June 12, 2017) ("*Final Results*"), Public Record Document ("PDoc") 404, and accompanying issues and decision memorandum, PDoc 389 (June 12, 2017) ("*IDM*"); *see also DSBs and Parts Thereof From the PRC*, 81 Fed. Reg. 89046 (Dec. 9, 2016) (prelim. results of 2014–2015 antidumping duty admin. rev.), PDoc 360.

[2] The court defers to the parties' apparent and mutual understanding of the term as advanced in this matter, although no such word appears to exist in the English language; the nearest similarity would seem to be "clabber," meaning "mud" or "curdled milk." *Cf.*, *e.g.*, *Webster's New International Dictionary of the English Language, Unabridged*, p. 493 (2nd ed. 1956).

expenses and profit obtained from one or more surrogate market economies at a level of economic development comparable to the NME country at issue that is/are also significant producer(s) of comparable merchandise. *See* 19 U.S.C. §1677b(c)(1)&(4).[3]

In order to reach its determinations, Commerce is required to rely on "facts otherwise available" on the record if "necessary" information is missing from the record. 19 U.S.C. §1677e(a) (*i.e.*, "shall"). If such information is missing due to a party's failure to act to the "best of its ability," Commerce "may" use inferences adverse to the non-cooperating party in selecting from among the facts otherwise available, also known as "AFA." *Id.* §1677e(b). Resort to AFA is not mandatory, *see*, *e.g.*, *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003), and the AFA statute has been held to confer administrative discretion in its application and to require judicial deference thereto. *E.g.*, *Shangdong Huarong Machinery Co., Ltd. v. United States*, 30 CIT 1269, 1297, 435 F. Supp. 2d 1261, 1285–86 (2006); *AK Steel Corp. v. United States*, 28 CIT 1408, 1416, 346 F. Supp. 2d 1348, 1355 (2004). Further, in the exercise of that discretion AFA is intended to be remedial: "The purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation, not to impose punitive damages." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012), quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

During the administrative review Bosun maintained production facilities in both Thailand and the PRC. Letter from deKieffer & Horgan, PLLC to Sec'y Commerce, Sections C&D Questionnaire Response (July 1, 2016) ("QR") at C-1, CDocs 132–143, PDocs 207–210. In the United States, Bosun's sales affiliates were Bosun Tools, Inc. ("Bosun USA") and Pioneer Tools, Inc. ("Pioneer"). *Id.* Both U.S. sales affiliates sold to U.S. customers diamond sawblades produced by both Thai and PRC facilities during the POR. *Id.* at C-2.

These products, both subject and non-subject merchandise, were maintained in containers purportedly indicating their country of origin. Memorandum to File, re: Verification of the U.S. Sales Response of Bosun Tools Co., Ltd. (May 17, 2017) ("VR"), PDoc 383, CDoc 365, at 4. Bosun's U.S. sales affiliates did not, however, record this information when selling them to U.S. customers. *Id.* Lacking direct documentation during the review on which sales were of subject merchandise, Bosun reconstructed country of origin for those sales by: (1)

[3] *See also* Letter from Minoo Hatten, Program Manager, AD/CVD Operations, Off. I, to All Interested Parties, re: Diamond Sawblades and Parts Thereof from the People's Republic of China: Request for Surrogate Country and Surrogate Value Comments and Information (Feb. 24, 2016) at 1–2.

identifying the models of sawblades that Pioneer and Bosun USA purchased through "unique product codes" assigned to each affiliate; (2) identifying the country of origin by matching those codes to unit purchase prices; and (3) applying a first-in, first-out ("FIFO") methodology to assign a country of origin to each sale. QR at C-2 to C-3.

In light of such reporting, DSMC argued that AFA should be applied to Bosun because Bosun could not demonstrate that it reported a complete and accurate universe of U.S. sales. Letter from Wiley Rein LLP to Sec'y Commerce (Jan. 17, 2017) ("DSMC Case Brief"), PDoc 373, CDoc 344, at 2–11. Specifically, DSMC argued that Bosun had conceded that it was unable to definitively identify its U.S. sales of subject merchandise made during the POR, *see id.*, and that Bosun's reported methodology for identifying U.S. sales was insufficiently supported and not demonstrated to be accurate. *Id.* at 6–11. In rebuttal, Bosun asserted that it had fully complied with Commerce's information requests and had demonstrated the steps it undertook to identify sales of subject merchandise. *See* Letter from deKieffer & Horgan, PLLC to Sec'y Commerce (Jan. 24, 2017) ("Bosun Case Brief"), PDoc 367, at 6–8.

Due to this conflict, Commerce decided to verify Bosun's U.S. sales responses. *See* Memorandum from Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations to Acting Assistant Sec'y for Enf't and Compliance, re: Issues and Decision Memorandum for the Administrative Review of the Antidumping Duty Order on DSBs and Parts Thereof from the PRC (June 6, 2017); *see also IDM* at 22. Verification confirmed to Commerce that Bosun USA's and Pioneer's inventories of sawblades were maintained in boxes indicating the blades' origin and that this information was not recorded during the sales process. VR, CDoc 365, PDoc 383, at 4. According to Bosun, as stated during verification, its affiliates did not record country of origin because it "was not necessary information which needed to be recorded in its computer system for purposes of its business operations." *Id.* As to its reporting and methodology, Bosun contended

> that the petitioner's argument omits the second stage and jumps from the first stage to the FIFO stage. Bosun argues that they were logical steps assigning the country of origin to the vast majority of products, not assumptions. Bosun explains that the Department extensively replicated and tested these stages in the database of all sales for Bosun USA and Pioneer USA and found no discrepancies.

IDM at 25.

Commerce reviewed Bosun's first-in-first-out ("FIFO") method, constructed after the fact for the review, for identifying merchandise of

PRC or Thai origin. VR at 9–11. Commerce found that Bosun could not replicate the reported results of the FIFO step of its methodology for one of the three or four pre-selected sales for which this step was reviewed at verification. *Id.* at 10–11. Bosun "was unable to explain this discrepancy." *Id.* at 11 (citation omitted).

Commerce also learned of errors in Bosun's control number ("CONNUM") reporting of multiple physical characteristics for certain of the examined sales. These errors were manifest for three out of the sixteen transactions examined, or nearly 19% of those sales reviewed at verification. *Id.* at 2, 7; *IDM* at 31. Specifically, Commerce discovered that Bosun had reported the incorrect code for cutting edge, segment height, segment length, and core thickness for two of those sales, VR at 7, and in preparing for verification Bosun also discovered that it had reported the incorrect diamond grade for an additional sale. *Id.* at 2; *IDM* at 31.

Commerce then permitted the parties to submit additional case briefs based on its verification of Bosun. *See IDM* at 22. DSMC continued to argue to Commerce that AFA should be applied to Bosun, highlighting that Bosun had failed to maintain country of origin information that would allow it to accurately identify sales of merchandise made in the PRC despite having the ability to do so. Letter from Wiley Rein LLP to Sec'y Commerce, re: Results of Bosun's U.S. Sales Verification (May 23, 2017) ("DSMC Verification Case Brief"), PDoc 385, CDoc 366, at 12–14. DSMC also argued that Commerce's verification demonstrated that Bosun's identification of sales of subject merchandise was unreliable because it could not replicate the results of its multi-step process for determining origin. *Id.* at 15–16. Finally, DSMC noted that verification revealed errors with other aspects of Bosun's reporting, specifically the physical characteristics used to develop control numbers. *Id.* at 19–21.

For the final determination Commerce, determined not to apply AFA to Bosun. *IDM* at 25–31. In doing so, Commerce accepted Bosun's FIFO methodology for identifying the country of origin for U.S. sales by Pioneer and Bosun USA. *IDM* at 25–29. *See id.* at 28; *see also* VR at 9. Commerce found that Bosun "fully complied" with Commerce's requests for additional information regarding this issue. *See IDM* at 28. Commerce ultimately concluded that the errors identified in the verification report did not justify the application of AFA because they were "isolated" to the transactions identified at verification. *Id.* Accordingly, Commerce found that Bosun had satisfied the "best of its ability" standard, *i.e.*, "Bosun was [not] inattentive, careless, or inadequate in keeping the country of origin record *enough* to warrant

AFA." *Id*. (italics added). Commerce therefore based the margin for Bosun on the information Bosun provided. *Id*. at 25.

2. Analysis

a. Compliance with the "Best of Its Ability" Standard

DSMC contends that Bosun reasonably should have anticipated country of origin data as information necessary to this administrative proceeding, as covered by precedent, and it asks how Bosun could have possibly met the "best of its ability" standard and thereby avoided application of AFA? DSMC argues Commerce has yet to provide an adequate explanation of the problem that would satisfy the standard of *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'"), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Responding, Bosun contends that DSMC's restatement of what transpired is "myopic"; that Commerce can only resort to "facts available" if information is "missing"; and that at the end of the day, because Bosun presented a logical and verified hierarchical test using available records, Commerce concluded the information was not missing. Bosun Resp. at 3–4. More precisely, the defense supports the adequacy of Commerce's decision on five grounds: (1) Commerce reasonably explained how Bosun's behavior complied with the "best of its ability" standard because Bosun was "able to segregate the sales of subject merchandise using its sales identification methodology"; (2) Commerce found that Bosun was "not 'inattentive, careless, or inadequate'" in maintaining origin information; (3) Commerce reasonably exercised its discretion not to apply adverse inferences to Bosun; (4) Commerce explained that application of adverse inferences here would be inconsistent with 19 U.S.C. §1677m(d); and (5) Commerce reasonably explained that Bosun's origin-identification methodology met the requirements of 19 U.S.C. §1677m(e), such that application of AFA would be inappropriate. Def.'s Br. at 12–16; Bosun's Br. at 4–6.

In holding that the "best of its ability" standard of 19 U.S.C. 1677e(b) inherently "requires that [interested parties] . . . take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable [party] should anticipate being called upon to produce", *Nippon Steel Corp.*, *supra*, 337 F.3d at 1382, appellate precedent has explicitly interpreted that statute to require potential interested parties to a future administrative proceeding to anticipate the information that would be necessary thereto

and conduct their information acquisition and maintenance accordingly. But in this instance, it is unclear whether Commerce's conclusion in the *IDM* that Bosun had met the "best of its ability" standard is on the basis of Bosun's responses to Commerce's requests for information, or whether Commerce's conclusion was with respect to Bosun's overall conduct prior to and during the review. Either instance would appear to be at odds with appellate precedent on the meaning of the "best of its ability" standard and the facts on the record at bar, and therefore remand at least for clarification, or reconsideration if Commerce deems that appropriate, is necessary.

Generally speaking, Commerce recognized that while the "best of its ability" standard does not require "perfection," it does not condone inattentiveness, carelessness, or inadequate record keeping. *IDM* at 27 (referencing *Nippon Steel*, 337 F.3d at 1382 & 19 U.S.C. §1677m(d) & (e)). Nonetheless, Commerce in this instance appears to have elided over the fact that Bosun is not a naif in these proceedings, having been individually reviewed in the original investigation and two prior annual reviews. *See IDM* at 27. Commerce also appears to have elided over Bosun's awareness of the necessity of country of origin information as an aspect of these proceedings. Bosun's seemingly cavalier statement to Commerce, that country of origin data were "not necessary information which needed to be recorded in its computer system for purposes of its business operations" is odd, given that accurate identification of the country of origin is unquestionably necessary to distinguishing U.S. sales of subject merchandise and to determining accurate duty margins. *See* 19 U.S.C. § 1675(a); *see*, *e.g.*, *Kyocera Solar, Inc. v. United States*, 41 CIT__,__, 253 F. Supp. 3d 1294, 1312 (2017). Notwithstanding that Bosun claims to have attempted to provide that information by other means, the "best of its ability" standard "requires the respondent to do the maximum it is able to do," inclusive of "maintain[ing] full and complete records" of relevant data. *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396, 1400 (Fed. Cir. 2014); *Nippon Steel*, 337 F.3d at 1382. Obviously, Bosun's origin identification methodology would not have been necessary had it "maintain[ed] full and complete records" of the origin of the sawblades sold in the United States in the first place. *See id*.

On the first of the defense's points, as mentioned Commerce apparently concluded that because Bosun was "able to segregate the sales of subject merchandise using its sales identification methodology", this meant that Bosun had cooperated to the best of its ability. Def.'s Br. at 12; *IDM* at 27–28. DSMC's counter is that this explanation fails to recognize that Bosun could not fully replicate the results of its methodology for determining origin at verification. DSMC Reply at 6,

referencing VR at 10–11. While this might seem a weak reed for DSMC's argument, as there was "only" one error identified which related to the reporting of an incorrect quantity and DSMC does not address whether that is error impugning Bosun's methodology as a whole or whether the error resulted from misreporting, either instance would seem to necessitate further clarification.

DSMC argues that Commerce appears to have applied a more "relaxed" standard to Bosun on this issue and in this particular instance, *i.e.*, "d[id] not find that Bosun was inattentive, careless, or inadequate in keeping the country of origin record *enough* to warrant AFA." *See IDM* at 27 (italics added). The court agrees that the standard Commerce applied in this instance does not appear to be consistent with the standard Commerce has applied in other proceedings. Lacking here is explanation of how Commerce's conclusion comports with judicial articulations of the "best of its ability" standard, or alternately how it can lawfully substitute for that standard a "looser" one that does not require a respondent to "maintain full and complete records" of relevant data. *See IDM* at 27. Agency action is arbitrary when insufficient reasons are offered for treating similar situations differently. *E.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S at 57 (1983); *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2011).

Bosun argues that Commerce reasonably concluded that Bosun's behavior met the requirements of *Nippon Steel*, because Bosun supplied all the records in its possession and developed an alternative strategy for determining origin that Commerce concluded was reliable. Bosun's Br. at 4–6. Bosun further argues that the facts underlying *Nippon Steel* were distinct, involving a particularly recalcitrant respondent. *Id*. But again, the "best of its ability" standard requires a respondent to do the "maximum," inclusive of "maintain[ing] full and complete records" of relevant data. *Peer Bearing Co.-Changshan*, 766 F.3d at 1400; *Nippon Steel*, 337 F.3d at 1382. Origin information is among the most basic data necessary for the calculation of a margin, and an experienced respondent would reasonably foresee the need to maintain it. Bosun apparently did not maintain the country of origin information that had been in its possession. While it may have been frank regarding its failure to do so, this court does not understand how such frankness transforms a recordkeeping insufficiency into compliance with the "best of its ability" standard. As the appellate court has indicated, the standard applies to not only malfeasant conduct but to "inattentiveness, carelessness, or *inadequate* recordkeeping." *Nippon Steel*, 337 F.3d at 1382 (italics added).

As to the second line of defense, the defendant argues Commerce found that Bosun was not in fact "inattentive, careless, or inadequate" in its recordkeeping. Def.'s Br. at 12–13. But, the question DSMC has raised is not whether Commerce found that Bosun was appropriately attentive, *etc.*, but why it so found. To the extent Commerce found that Bosun did not act "inattentive[ly], careless[ly], or inadequate[ly]" by failing to track and maintain origin information, that finding is a conclusion. It does not amount to an explanation for a conclusion. Furthermore, while Commerce concluded that Bosun's use of an after-the-fact, indirect methodology as a substitute for direct origin information met the "best of its ability" standard, it indicated that in any further reviews it would expect Bosun to record origin data at the time of sale, *IDM* at 27, which would seem to contradict finding that Bosun had, in fact, acted to the "best of its ability."

The defense also claims, thirdly, that Commerce reasonably exercised its discretion not to apply adverse inferences. Def.'s Br. at 13–14. Within the substantial-evidence context of judicial review, once a party fails to meet the "best of its ability" standard the court would normally review an administrative decision on whether or not to apply AFA for abuse of discretion. *See*, *e.g.*, *POSCO v. United States*, 42 CIT ___, ___, Slip Op. 18–117 at 28 (2018); *Maverick Tube Corp. v. United States*, 41 CIT___,___, 273 F. Supp. 3d 1293, 1312–13 (2017). Here, however, because Commerce found that Bosun met the "best of its ability" standard, *IDM* at 28–29, the exercise of discretion in whether or not to apply AFA is irrelevant, as DSMC argues. *Cf.* 19 U.S.C. §1677e(a) *with* 19 U.S.C. §1677e(b). As it stands, it is Commerce's finding that Bosun had in fact acted to the best of its ability that DSMC contends has not been adequately explained. To the extent the defendant claims that Commerce would have acted reasonably in declining to apply adverse inferences had it been in a position to exercise its discretion (*i.e.*, had Commerce found that Bosun did not act to the best of its ability), speculating as to what Commerce might have done in a different situation does not explain why it did what it did here.

The defense also argues, fourthly, that Commerce explained that it could not have applied adverse inferences consistently with 19 U.S.C. §1677m(d). Def.'s Br. at 14; Bosun's Br. at 4. That statute requires Commerce, where it finds that a respondent has provided deficient data, to offer an opportunity for correction. 19 U.S.C. §1677m(d). If the respondent then fails to offer a "satisfactory" response, the statute specifies that Commerce may disregard the respondent's information. *Id*. Conversely, where the respondent provides a "satisfactory" response to an opportunity to correct a deficiency, the statute indicates

that the information should be considered. *See id.*

In its *IDM*, Commerce stated that it had questions regarding the origin methodology described in Bosun's initial questionnaire responses and thus asked supplemental questions. *IDM* at 26, 28. Commerce stated that Bosun "fully complied" with these supplemental questions, indicating that it found Bosun's overall origin data to be satisfactory. *See id.* But again, the question underlying DSMC's appeal is that of why Commerce found the data "satisfactory," *i.e.*, why it found that Bosun acted to the "best of its ability" overall. That finding has yet to be explained in a manner that is reasonably grounded in the requirements of "best of its ability" standard, as articulated by the courts. *See*, *e.g.*, *Peer Bearing Co.-Changshan*, 766 F.3d at 1400, quoting *Nippon Steel*, 337 F.3d at 1382 (indicating that the "best of its ability" standard requires respondents to "take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable [respondent] should anticipate being called upon to produce").

Lastly on this point, the defense argues Commerce explained that Bosun's information complied with the terms of 19 U.S.C. §1677m(e), making adverse inferences inappropriate. Def.'s Br. at 15–16; Bosun's Br. at 4; *see also IDM* at 28–29. Pursuant to 19 U.S.C. §1677m(e), where a respondent avails itself of the opportunity to correct a deficiency under 19 U.S.C. §1677m(d), but provides information that "does not meet all applicable requirements," Commerce shall not decline to rely on the data so long as certain pre-requisites are met. 19 U.S.C. §1677m(d) & (e). During the review, Commerce found that although it had questions about aspects of Bosun's reporting (most notably its origin determination methodology), Bosun complied with Commerce's requests for further information, and the methodology was reviewed at verification and found acceptable. *IDM* at 28. Commerce also noted that Bosun's inability to recreate the reported results of its application of the FIFO step of the methodology affected only one of the three or four sales for which this step was reviewed at verification. *Id.*; *see also* VR at 10–11. Accordingly, Commerce found that the pre-requisites of 19 U.S.C. §1677m(e) were met, such that it would be inappropriate for it to decline to rely on Bosun's reported origin information. *IDM* at 28.

Commerce's explanation, however, does not acknowledge that among 19 U.S.C. §1677m(e)'s pre-requisites is that the respondent demonstrate that it "acted to the best of its ability." 19 U.S.C. §1677m(e)(4). Thus, any finding that Bosun's origin reporting methodology complied with 19 U.S.C. §1677m(e) does not itself adequately explain why Commerce determined that Bosun "acted to the best of

the ability" for purposes of 19 U.S.C. §1677e(a)-(b), despite failing to maintain direct origin data that was, or had been, within its possession. At best, it means that Commerce has failed to explain its determination that Bosun "acted to the best of its ability" both in applying 19 U.S.C. §1677e(a)-(b) and in applying 19 U.S.C. §1677m(e). And at this point, DSMC's fundamental argument — that Commerce has not adequately explained how Bosun's efforts to compensate for a lack of recordkeeping satisfies a standard that is fundamentally concerned with a respondent's duty to "keep and maintain full and complete records", *Nippon Steel*, 337 F.3d at 1382 — is persuasive.

2. Commerce's Conclusion on the Reliability of Bosun's Data

DSMC also challenges Commerce's finding that errors in Bosun's reported information did not indicate a failure to comply with the "best of its ability" standard. DSMC Br. at 17–20. As mentioned, at verification Commerce found that Bosun could not replicate the results of the FIFO step of its origin-identification methodology for one of the three or four pre-selected sales reviewed. VR at 10–11. Commerce also learned that Bosun had misidentified the physical characteristics of the goods included in certain sales. *Id*. at 2, 7. These errors affected three out of sixteen transactions examined at verification, and involved multiple product characteristics and more than one model of merchandise. *Id*.; *see also IDM* at 31. Commerce nonetheless found that Bosun had acted to the best of its ability in reporting its data, concluding that the errors identified at verification were isolated and did not implicate the overall reliability of Bosun's reported data. *IDM* at 29–31.

Commerce's explanation for this decision is here defended as adequate for two reasons. Def.'s Br. at 15–17; Bosun's Br. at 6–9. The defendant argues that Commerce explained that Bosun's data met the requirements of 19 U.S.C. §1677m(e). Def.'s Br. at 15–16. The defense also argues that Commerce adequately explained its conclusion that Bosun's errors were isolated and not indicative of unreliability in the reported data as a whole. *Id*. at 16–17; Bosun's Br. at 6–9.

First argued is that Commerce's explanation that Bosun's information complied with 19 U.S.C. §1677m(e) and regardless of any errors identified at verification. Def.'s Br. at 15–16; *see also IDM* at 28–29. However, as discussed above, 19 U.S.C. §1677m(e) premises the use of nonstandard data on a respondent's compliance with the "best of its ability" standard. Accordingly, to conclude that a respondent acted to the best of its ability because its data complies with 19 U.S.C. §1677m(e) is akin to concluding that it acted to the best of its ability

because it acted to the best of its ability. Such a tautology does not rise to the level of "a satisfactory explanation for [agency] action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 43, quoting *Burlington Truck Lines*, 371 U.S. at 168. *See*, *e.g.*, *Husteel Co. v. United States*, 40 CIT__, __, 180 F. Supp. 3d 1330, 1348 (2016), *aff'd*, 710 F. App'x 890 (Fed. Cir. 2018).

Next argued is that Commerce adequately explained its view that the errors identified at verification were "isolated," and otherwise not indicative of problems in Bosun's reporting. Def.'s Br. at 16–17; Bosun's Br. at 6–9. The defense notes that Commerce explained that the error identified in Bosun's application of the FIFO step of its origin-identification methodology affected only one of the three or four sales for which this step was reviewed at verification, while the errors identified in Bosun's physical characteristics reporting affected only two of the product codes examined at verification. Def.'s Br. at 16–17. For its part, Bosun argues that the agency acted diligently at verification, and that discovery of errors is common and does not necessarily implicate the overall reliability of a respondent's prior-reported information. Bosun's Br. at 6–9. However, verification is meant to spot-check the accuracy of a respondent's prior-reported data. *See*, *e.g.*, *Hyundai Steel Co. v. United States*, 42 CIT__, __, 282 F. Supp. 3d 1332, 1350 (2018), referencing *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997). Here, in conducting that spot check, Commerce identified a mistake in Bosun's application of its FIFO methodology, which affected one out of the three or four sales traces for which Commerce reviewed the FIFO methodology. *Id.*; *see also* VR at 10. Given a maximum sample size of four sales traces, Commerce's conclusion that the error was "isolated" and did not affect other sales is not sufficiently explained. *IDM* at 29–30.

Bosun also argues that DSMC has mischaracterized the importance of the FIFO step of its origin-identification methodology. Bosun's Br. at 6–7. Bosun describes this step as applying to a "small number of sales." *Id.* at 7, quoting VR at 10. The verification report is not ideally clear with respect to the quantum of Bosun's sales for which origin was determined pursuant to the FIFO step, but it does indicate that the agency reviewed the FIFO step's application to three or four transactions, and found an error in one of the transactions reviewed, *i.e.*, an error effecting 25%-33% of reviewed transactions. As such, even if the FIFO step was applied only in the last resort, Commerce has yet to explain its conclusion that the error discovered at verification was not replicated in other sales, which were not reviewed at verification, to which the FIFO step applied. Further, because Bosun

was unable to explain how the error was made, the particularities of the error do not themselves suggest that the error was limited to this single sales trace. VR at 10–11. Nor did Commerce identify anything unique about the affected sales trace that indicates that the mistake did not affect other, unreviewed sales. *IDM* at 29–30.

Commerce's explanation for concluding that errors in reporting physical characteristics were not widespread is similarly insufficient. *Id*. at 31. The errors affected three out of sixteen transactions identified at verification, and related to multiple product characteristics. *Id*.; *see also* VR at 2, 7. Nor were the errors limited to Bosun's reporting of a single model of merchandise. *IDM* at 30–31; VR at 2, 7. Similarly, Commerce's conclusion that errors identified in Bosun's reporting at verification did not indicate Bosun's failure to act to the best of its ability is insufficiently explained. While Commerce found that Bosun's data met the standards of 19 U.S.C. §1677m(e), that statute incorporates the "best of its ability" standard, such that mere reference to the statute does not logically or adequately support Commerce's conclusion. Further, while Commerce downplayed the errors identified at verification, those errors affect a substantial percentage of the sample transactions reviewed at verification, and Commerce has not pointed to anything unique about the reviewed samples that would suggest such errors were limited to those samples.

As previously noted, the standard of review requires Commerce to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made[,]'" *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 168, and the defense here underscores the lack of adequate explanation for Commerce's finding and its tension with judicial articulations of the "best of its ability" standard. Remand of Commerce's conclusion that Bosun acted to the best of its ability is thus necessary for further clarification and/or reconsideration.

B. Selection of Surrogate Values

DSMC's second challenge is to Commerce's selection of Thai import statistics for the copper powder and copper iron clab factor-of-production ("FOP") as the "best available information" for Bosun. *See* 19 U.S.C. §1677b(c)(1).

1. Background

The submission of potential surrogate country data from interested parties for the record obligates Commerce to determine the evidence

that represents the "best available information." *See id*. Commerce's publically announced policy in that regard is that it "normally will value all factors in a single surrogate country." 19 C.F.R. §351.408(c)(2). Further, because the AD statute "does not mandate that Commerce use any particular data source" in reaching a particular determination, *Guangdong Chemicals Import & Export Corp. v. United States*, 30 CIT 1412, 1416, 460 F. Supp. 2d 1365, 1368–69 (2006), Commerce is conferred "wide" discretion to determine what constitutes the best available FOP information. *See Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

Each party placed on the record data from Thailand to serve as the surrogate values ("SVs") for most FOPs. *See* DSMC SV Comments at Ex. 1; Bosun SV Comments at Ex. SV-1; Fengtai SV Comments at Ex. 1. To value copper powder and copper iron clab in particular, DSMC also provided South African import statistics under Harmonized Tariff Schedule ("HTS") 7406.10, and DSMC placed on the record import statistics under HTS 7406.10 for each additional country, as well as the United States, identified on Commerce's "OP List" as economically comparable to China (Bulgaria, Ecuador, Mexico, and Romania), as well as the United States, in support of it selection of South African data to value copper powder and copper iron clab. Letter from Wiley Rein LLP to Sec'y Commerce, re: Diamond Sawblades and Parts Thereof from the People's Republic of China: DSMC's Rebuttal Surrogate Value Comments (May 31, 2016) at Ex. 1C, PDoc 195–196. Those data are as follows:

Country	AUV (USD/kg)
Thailand	1.32
Mexico	4.92
Romania	8.35
United States	9.68
South Africa	12.14
Bulgaria	15.50
Ecuador	59.24

DSMC Case Brief at 15–16. Bosun and Fengtai also proposed Thai import statistics under HTS 7406.10 to value these inputs. Bosun SV Comments at Ex. SV-1; Fengtai SV Comments at Ex. 1.

DSMC argued in its comments prior to Commerce's preliminary determination that the South African import statistics should be used to value the copper powder and copper iron clab. Letter from Wiley Rein LLP to Sec'y Commerce, re: Diamond Sawblades and Parts Thereof from the People's Republic of China: DSMC's Pre-Preliminary Determination Comments Regarding Surrogate Values (Nov. 15, 2016) at 2–4, PDoc 340. DSMC argued that the record

demonstrated that the Thai import statistics for HTS 7406.10 were aberrational, as the average unit value ("AUV") calculated from these data was substantially below the AUVs based on the import data from all other countries on the record. *Id.* at 3.

In its preliminary determination, Commerce relied on Thai import statistics under HTS 7406.10 to value copper powder and copper iron clab. Memorandum from Yang Jin Chun, Senior Int'l Trade Compliance Analyst, AD/CVD Operations, Off. I, Through Minoo Hatten, Program Manager, AD/CVD Operations, Off. I, to The File, re: Diamond Sawblades and Parts Thereof from the PRC: Surrogate Values for the Preliminary Results of Review (Dec. 5, 2016) at Ex. 2, PDoc 343. In making this determination, Commerce did not address DSMC's arguments. *See id.* at 3–8; Memorandum from Christian Marsh, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Enf't and Compliance, re: Diamond Sawblades and Parts Thereof from the PRC: Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review; 2014–2015 (Dec. 5, 2016), PDoc 345.

DSMC then argued again in its case brief that South African, not Thai, import statistics should be used to value copper powder and copper iron clab. DSMC Case Brief at 13–16. DSMC highlighted that Commerce is required to rely on the best available information in valuing factors of production and argued that the AUV based on Thai import statistics was substantially below the AUV based on import statistics from every other country identified as economically comparable to the PRC. *Id.* at 13–15. DSMC also noted that the AUV based on South African import statistics was well within the range of AUVs calculated for other economically comparable countries and was consistent with the AUV based on U.S. import statistics. *Id.* at 15–16.

In rejecting the argument that South African and not Thai import statistics constituted the best available information, in its final determination Commerce found that DSMC did not provide evidence to support the claim that the Thai surrogate value was aberrational. *IDM* at 47–48. In doing so, Commerce pointed to its preference for relying on surrogate values from a single source and stated that DSMC had not "substantiated its claim" that the Thai AUV was aberrational, because the "mere appearance of an AUV on the high or low end of a range of AUVs is not generally sufficient to determine that an AUV at one end is aberrational" and the record did not contain historical data that "would permit us to evaluate whether this Thai AUV is aberrational." *Id.* at 48. Accordingly, for the final results, Commerce continued to use Thai import statistics to value copper powder and copper iron clab.

2. Analysis

The parties agree that import data for HTS 7406.10 is appropriate for valuing the copper powder and copper iron clab inputs. *See IDM* at 47–48. DSMC acknowledges Commerce's preference to value all FOPs with costs from a single country, if possible. *See* 19 C.F.R. §351.408(c)(2). DSMC argues that Commerce failed to rely on the best available information for the provision as required by the statute insofar as Commerce has not provided any rationale for its decision to rely on the Thai AUV for HTS 7406.10.

Commerce's usual practice for determining whether data is aberrational is to require a quantitative analysis, comparing data from economically comparable countries and/or historical data from the country at issue, in order to determine if the data is unreliable or an outlier.[4] Here the defendant, echoed by Bosun, reiterates Commerce's usual preference for valuing inputs using data from the primary surrogate country and supports Commerce's conclusion that DSMC did not place "sufficient data" to undermine finding the Thai data aberrant by contending that Commerce's explanation for that decision (*i.e.*, "the mere appearance of an AUV on the high or low end of a range of AUVs is not generally sufficient to determine that an AUV at one end is aberrational") is sufficient by reference to various rul- ings that it believes are analogous. Def's Resp. at 19, citing *IDM* at 48 (citing *Polyethylene Terephthalate Film, Sheet, and Strip from the PRC*, 80 Fed. Reg. 33241 (June 11, 2015) (final results admin. review), and accompanying issues and decision memorandum[5] at 17), and *Camau Frozen Seafood Processing Import Export Corp. v. United*

[4] *See, e.g., Tri Union Frozen Products, Inc. v. United States*, 41 CIT_,_, 254 F. Supp. 3d 1290, 1296 (2017), *appeal filed*, No. 17–2523 (Fed. Cir. Sep. 8. 2017); *Ad Hoc Shrimp Trade Action Committee v. United States*, 41 CIT_,_, 234 F. Supp. 3d 1315, 1319 (2017); *Jinxiang Chengda Import & Export Co. v. United States*, 37 CIT___,___, Slip Op. 13–40 at 10 (2013) ("clear from the record" that transfer price was not only high in comparison to Customs AUV but an outlier vis-a-vis the data thereof), *aff'd*, 553 Fed. App'x 1005 (Fed. Cir. 2014); *Nan Ya Plastics Corp. v. United States*, 37 CIT_,_, 906 F. Supp. 2d 1348, 1353–54 (2013) (on claim that "interquartile range comparison (applied here) is the average dumping margin for the 25% of sales with the lowest dumping margin compared to the average dumping margin for the 25% of sales with the highest dumping margin" plaintiff "presented what appear to be good and compelling statistical arguments that test the reasonableness of Commerce's total AFA rate", which Commerce needed to address), *aff'd on other grounds*, 810 F.3d 1333 (Fed. Cir. 2016); *Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 261 n.4 (2005) ("a simple modal analysis would have allowed Commerce to show its reasons for disregarding that month's value with greater precision"), referencing Laurence C. Hamilton, *Data Analysis for Social Scientists* 78–82 (Duxbury Press, 1996). *Cf. Ozdemir Boru San. ve Tic. Ltd. v United States*, 42 CIT_,_, 282 F. Supp. 3d 1352, 1352 (2018) ("there is a reasonable basis for treating the Istanbul and Yalova land parcels as outliers").

[5] Non-*IDM* memoranda hereinafter "I&D Memo".

States, 37 CIT____,____, 929 F. Supp. 2d 1352, 1356 n.9 (2013) ("*Camau Frozen Seafood*") ("[o]n this record, the Bangladeshi data is not aberrational, it is merely the lowest price in a range of prices"). More broadly, the defendant and Bosun contend that Commerce examines the record for import values for other potential surrogate countries and also historical data and determines if such values or data support concluding that a particular value is aberrational. Both emphasize that the record here lacked such historical information, albeit amplifying certain of the statements therein. *See* Def's Resp. at 19–20; Bosun's Resp. at 10.

DSMC responds that while historical data could provide additional information on whether a particular data set is aberrational, Commerce failed to explain why the lack of such data "necessarily" means that the Thai data it selected are not aberrational and/or are the best available information. DSMC Reply at 18 (Commerce "has not explained why contemporaneous data are insufficient, or conversely, why historical data is required"), referencing *IDM* at 47–48. The court, however, does not interpret Commerce's statement regarding historical data to be a requirement for the record; Commerce's comment on the lack thereof on this record simply meant that the record lacked an aspect that would otherwise have assisted in determining aberrancy or normality. *Accord*, *e.g.*, *Certain Activated Carbon from the PRC*, 80 Fed. Reg. 61172 (Oct. 9, 2015) (final results of antidumping duty admin. rev.; 2013–2014), and accompanying I&D Memo at 31 ("the record does not contain historical data . . . which would permit us to evaluate whether the[ ] data are aberrational").

On the other hand, DSMC did provide a type of quantitative analysis. Commerce's preference for valuing all FOPs in a single country may be reasonable where there is no reason to suspect that data from the primary surrogate country are inferior, *Jacobi Carbons AB v. United States*, 38 CIT_._, 992 F. Supp. 2d 1360, 1376 (2014), but DSMC pointed out that the AUV of the Thai import data is almost four times lower than the next-higher value and vastly below all other AUVs on the record, and that excluding the AUVs for Thailand and Ecuador (the latter of which being nearly eight times greater than the Thai AUV)[6], the average "inner" AUV is $10.12. DSMC's fundamental argument is that the Thai AUV is an outlier.

On this issue, there is weakness in the analyses of both sides. Commerce did not adequately address DSMC's argument that the Thai AUV is an outlier, but at the same time DSMC did not further advance its argument on aberrancy, arguing only as to the degree to

[6] DSMC contends the 59.24 AUV for Ecuador is aberrant, and statistical analysis bears that out. *See infra*, note 9.

which the Thai AUV figure differed from the other data points rather than, for example, putting on the record further evidence or any recognized statistical argument on outlier data.[7] Nonetheless, given that Commerce did not directly address the substance of the DSMC's argument, the standard of review of substantial evidence compels remand in this instance, because one cannot discern the "leap" Commerce has made in the *IDM* as to the reliability of the Thai AUV in the face of the unaddressed DSMC's arguments on the "aberrancy" of the Thai AUV on the record.

The regulatory preference for valuing inputs for an NME respondent's production using data from a single "primary" surrogate country has been held insufficient to explain decisions to reject data from a non-primary surrogate country if questions remain unanswered as to the suitability of the primary surrogate country data. *See Calgon Carbon Corp.v. United States*, 40 CIT_,_, 145 F. Supp. 3d 1312, 1327–28 (2016) ("Commerce, by relying on its single surrogate coun- try preference and nothing more, improperly rejected other SVs for anthracite coal derived from POR6-contemporaneous data from other countries. This 'preference'. . . carries the day only when it is used to 'support a choice of data as the best available information where the other available data 'upon fair comparison, are otherwise seen to be fairly equal'") (quoting, *inter alia*, *Peer Bearing Co.-Changshan v. United States*, 35 CIT 1626, 1643, 804 F. Supp. 2d 1337, 1353 (2011)); *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 37 CIT_._, 929 F. Supp. 2d 1352, 1355 (2013) ("it is not sufficient for Commerce to cite the policy of using a single surrogate country where, as here, there is reason to believe that the primary surrogate country may not provide the best available information for a particular FOP"); *Peer Bearing Co.-Changshan v. United States,* 35 CIT 103, 124, 752 F. Supp. 2d 1353, 1373 (2011) ("because the statute requires Commerce to compare the chosen data set with other data sets on the record and thereby determine what is the best available information, the regulatory preference cannot suffice as adequate reasoning if it is the only factor that Commerce considers"), *vacated on other grounds*, 766 F.3d 1396 (Fed. Cir. 2014).

In sum, Commerce has not adequately explained its determination to reject South African surrogate values for Bosun's copper powder and copper iron clab or to rely on Thai surrogates for these inputs.

[7] *E.g.*, Chauvenet's criterion; Grubbs' test; Dixon's *Q* test; *et cetera*. *See*, *e.g.*, Vic Barnett and Toby Lewis, *Outliers in Statistical Data* (1994 Wiley, 3rd ed); Douglas M. Hawkins, *Identification of Outliers* (1980 Chapman and Hall). Applying John Tukey's "fences," for example: the median of all the data points is 9.68; the first and third quartile values are 6.635 and 13.82, respectively; the inter-quartile range is 7.185; and outliers would be points less than -4.1425 or greater than 24.5975.

Rather, Commerce appears to have relied solely on regulatory preferences that have previously been deemed insufficient in the face of unaddressed arguments, and/or otherwise provided conclusory rationales for its choice, without engaging in a reasoned analysis of the record data. Commerce's selection of the surrogate values for copper powder and copper iron clab will therefore be, and hereby are, remanded for further consideration.

C. Separate Rate

In view of the foregoing, remand of the margin calculation for the separate respondents is also necessary.

III. Conclusion

For the above reasons, the case must be, and hereby is, remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings consistent with this opinion. The results of remand shall be due February 20, 2019. By the fifth business day after the filing thereof with the court, the parties shall confer and file a joint status report as to a proposed scheduling of comments, if any, on those results.

So ordered.

Dated: October 23, 2018
New York, New York

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

Slip Op. 18–147

JSW STEEL LTD. and JSW STEEL COATED PRODUCTS LTD., Plaintiffs v. UNITED STATES, Defendant, and AK STEEL CORP.; STEEL DYNAMICS, INC.; CALIFORNIA STEEL INDUS., INC.; ARCELORMITTAL USA LLC; and NUCOR CORP., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 16–00165

[Sustaining the Department of Commerce's remand redetermination.]

Dated: October 23, 2018

Mark D. Davis, Davis & Leiman PC, and *Irene H Chen*, Chen Law Group LLC, of Washington, D.C., for plaintiffs.

Claudia Burke, Assistant Director, Commercial Litigation Branch, Civil Division U.S. Department of Justice for defendant. With her on the brief were *Chad A. Readier*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director and *Elizabeth Speck*,

Senior Trial Counsel. Of counsel on the brief was *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

John W Bohn, Schagrin Associates, of Washington, D.C., for defendant-intervenors. With him on the brief was *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C.

OPINION AND ORDER

Goldberg, Senior Judge:

Now before the court are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 76 (Aug. 7, 2018) ("Remand Results") of the Department of Commerce ("the Depai1ment" or "Commerce") in the countervailing duty ("CVD") investigation of certain corrosion-resistant steel products from India. *Certain Corrosion-Resistant Steel Products from India*, 81 Fed. Reg. 35,323 (Dep't Commerce June 2, 2016) (final determ.), and accompanying Issues & Decision Mem. In compliance with the court's remand, *JSW Steel Ltd. v. United States*, 42 CIT , 315 F. Supp. 3d 1379 (2018) ("*JSW Steel I*"), the Department has recalculated the CVD rate for JSW Steel Ltd. and JSW Steel Coated Product Ltd. (collectively "JSW") as 4.24 per- cent. Remand Results at 18. Because Commerce has now supported its determination with substantial evidence, the court sustains the Remand Results.

For the purposes of this opinion, familiarity with the facts is presumed. *See JSW Steel I*, 42 CIT at_, 315 F. Supp. 3d at 1380–81. The court's prior order faulted Commerce for applying adverse facts available ("AFA") under 19 U.S.C. § 1677e(b) "without substantial evidence to support the required threshold finding that there was a gap in the record warranting the use of facts available" under § 1677e(a). *Id.*, 42 CIT at_, 315 F. Supp. 3d at 1382. That is, "Commerce [] failed to show that it requested information concerning [JSW affiliate, JSW Steel (Salav) Ltd. ("Salav")] that was then withheld by JSW" such that its application of AFA was unwarranted. *Id.* As a result, the court remanded the proceedings to Commerce.

In an attempt to satisfy the court's remand order, Commerce has reversed its decision to apply a punitive AFA rate and has reduced JSW's rate to 4.24 percent. Remand Results at 18. For its part, JSW asks that the court sustain Commerce's recalculated margin. *See* Pl.'s Comments on Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 80 (Sept. 4, 2018).

The court's review is limited to confirming that Commerce has complied with the court's remand order and has done so in a manner that is supported by substantial evidence and in accordance with law.

See 19 U.S.C. § 1516a(b)(1)(B)(i); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT_,_, 992 F. Supp. 2d 1285, 1290 (2014). As "Commerce [has] recalculate[d] JSW's CVD rate without regard to Salav or any subsidies Salav may have received," *JSW Steel I*, 42 CIT at_, 315 F. Supp. 3d 1379 at 1384, the court finds that the Final Results do indeed comply with the remand order. Notwithstanding Commerce's views to the contrary,[1] *see generally* Remand Results, the fact remains that the Department never requested the information upon which it previously sought to apply AFA. *See JSW Steel I*, 42 CIT at_, 315 F. Supp. 3d at 1382. Due to the Department's abandonment of the AFA rate—and for the reasons stated in the court's prior opinion—Commerce's determination is supported by substantial evidence and in accordance with law.

Accordingly, Commerce's Remand Results are **SUSTAINED** and judgment is entered.

Dated: October 23, 2018
New York, New York

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

Slip Op. 18–148

TOSÇELIK PROFIL VE SACENDÜSTRISI A.Ş., and TOSYALI DIS TICARET A.Ş., ÇAYIROVA BORU SANAYI VE TICARET A.Ş., and YÜCEL BORU ITHALAT-IHRACAT VE PAZARLAMA A.Ş., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00339

[*Remand Results* remanded.]

Dated: October 24, 2018

David L. Simon, Law Offices of David L. Simon of Washington, DC, argued for Plaintiffs Tosçelik Profil ve Sac Endüstrisi A.Ş., Tosyali Dis Ticaret A.Ş., Çayirova Boru Sanayi ve Ticaret A.Ş., and Yücel Boru Ithalat-Ihracat ve Pazarlama A.Ş.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC, for Defendant United States, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel

[1] Commerce now mischaracterizes the court's prior remand as predicated on a misunderstanding as to the operation of the Department's subsidy attribution practice. Remand Results at 8. However, the court's prior opinion expressed dissatisfaction not with Commerce's practices but with the Department's questionnaire. *See JSW Steel I*, 42 CIT at_, 315 F. Supp. 3d at 1383–84. Discussion of Commerce's practices surrounding the treatment of certain information is of no moment as long as the Department *did not actually request that information*.

was *Saad Y. Chalchal*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION AND ORDER

Gordon, Judge:

This action involves the U.S. Department of Commerce ("Commerce") antidumping duty investigation covering welded line pipe from the Republic of Korea and the Republic of Turkey. *See Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,362 (Dep't of Commerce Oct. 13, 2015) (final determination of sales at less than fair value) ("*Final Determination*"); *see also* Issues and Decision Memorandum for Welded Line Pipe from the Republic of Turkey, A-489–822 (Dep't of Commerce Oct. 13, 2015), available at http://enforcement.trade.gov/frn/summary/turkey/201525990–01.pdf (last visited this date) ("*Decision Memorandum*").

Before the court are the Final Results of Redetermination ("*Remand Results*"), ECF No. 67–1, filed by Commerce pursuant to *Toscelik Profil ve Sac Endustrisi, A.S. v. United States*, 41 CIT_, 256 F. Supp. 3d 1260 (2017), and the comments of Plaintiffs Çayirova Boru Sanayi ve Ticaret A.Ş. and Yücel Boru Ithalat-Ihracat ve Pazarlama A.Ş. (collectively, "Çayirova"), as well as Tosçelik Profil ve Sac Endüstrisi A.Ş. and Tosyali Dis Ticaret A.Ş. (collectively, "Tosçelik"). *See* Pls.' Comments on Final Result of Redetermination Pursuant to Remand, ECF No. 74 ("Pls.' Cmts."); *see also* Def.'s Reply to Comments on the Remand Redetermination, ECF No. 77 ("Def.'s Resp."). For the reasons that follow, the court remands this matter to Commerce to recalculate Plaintiffs' duty drawback adjustment.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being sup-

ported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2018). Familiarity with the prior judicial and administrative decisions in this action is presumed.

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

I. Duty Drawback Framework

Duty drawback is a term of art in international trade that typically refers to a program (in a given country) pursuant to which import duties on merchandise may be recouped by the subsequent exportation of that merchandise. The antidumping statute specifically addresses duty drawback programs by directing Commerce to increase export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). Commerce applies a two-pronged test for duty drawback adjustments:

> (1) the import duty paid and the rebate payment are directly linked to, and dependent upon, one another (or the exemption from import duties is linked to exportation); and (2) there are sufficient imports of the imported raw material to account for the drawback received upon the exports of the manufactured product.

Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback, 71 Fed. Reg. 61,716, 61,723 (Dep't of Commerce Oct. 19, 2006) ("Duty Drawback Methodology"); *see also Far East Machinery Co. v. United States*, 12 CIT 972, 699 F. Supp. 309 (1988).

Turkey has a duty drawback program known as the Inward Processing Regime ("IPR"). *See Decision Memorandum* at 7; *Remand Results* at 6. Under the IPR, Turkish companies apply for import duty

exemptions through certificates ("DIIBs"). DIIBs detail (1) the quantity of raw materials that a company intends to import under the Turkish IPR without payment of import duties and (2) the quantity of actual exports. *See Decision Memorandum* at 4; *Remand Results* at 1. The IPR satisfies Commerce's two-pronged duty drawback test. *See Decision Memorandum* at 7 (*citing Steel Concrete Reinforcing Bar from Turkey*, 79 Fed. Reg. 54,965 (Dep't of Commerce Sept. 15, 2014) (final negative determ.) and *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 Fed. Reg. 41,971 (Dep't of Commerce July 18, 2014) (final determ.)). In this action Commerce imposed additional criteria for Plaintiffs' duty drawback adjustment: (1) the claimed DIIBs must have been "closed" during the period of investigation (the "POI limitation"); and (2) the import certificates must have reflected exports to the United States of welded line pipe. *See Remand Results* at 3.

At issue in this action is the first of those criteria, the POI limitation. The parties agree that a DIIB must have been closed,[1] but disagree about when that closure must have occurred. Commerce, as noted, requires closure during the POI. Plaintiffs argue that Commerce should include DIIBs closed prior to verification. Çayirova submitted two DIIBs to Commerce for use in its drawback adjustment, DIIBs #1650 and #6794. Commerce determined that neither DIIB could be used for Çayirova's drawback adjustment because DIIB #1650 had no U.S. sales in the POI and DIIB #6794 did not close until after the POI. *See* Pls.' Cmts. at 6; *Remand Results* at 4. Çayirova only challenges Commerce's refusal to use DIIB #6794 due to the POI limitation. Tosçelik submitted six DIIBs to Commerce for use in its drawback adjustment, DIIBs #2756, #2794, #2795, #3171, #5139, and #5560. Pls.' Cmts. at 23. Commerce determined that only DIIBs #2756 and #2795 were suitable for use in the drawback adjustment, finding that DIIBs #3171, #5139, and #5560 did not contain exports of subject merchandise to the United States and that DIIB #2794 did not close until after the POI. *See id.*; *Remand Results* at 4. Tosçelik only challenges Commerce's refusal to use DIIB #2794 due to the POI limitation. Critically, Commerce collected and verified information on *all* of the DIIBs submitted by Plaintiffs (regardless of whether the DIIBs closed within the POI or not) for the amount of Plaintiffs' uncollected import duties. *See Remand Results* at 3.

Commerce, for its part, has struggled to identify a reasoned basis

[1] In the investigation Commerce considered a DIIB "closed" after it expired, at which point the DIIB holder could no longer apply any additional imports or exports to the DIIB. *See Remand Results* at 2 n.4. Subsequent to the investigation, and not relevant here, "Commerce's practice has since evolved, and it now defines a DIIB as closed on the date the DIIB holder applies for closure of the DIIB with the Turkish Government." *Id.* at 3 n.10.

for its POI limitation. In the *Final Determination* Commerce merely concluded that the POI limitation applied. *Final Determination* at 11. When Plaintiffs challenged that determination here, Commerce requested a voluntary remand to provide an explanation for the new criterion. *See* Def.'s Resp. in Opp'n to Pls.' Mot. for J. Upon the Agency R., ECF No. 43 at 14–17. On remand, Commerce tried to explain the POI limitation, but faltered. Commerce thought the POI limitation might thwart potential manipulation of "information reflected on the DIIBs prior to their closure." *See Remand Results* at 13. Commerce abandoned this "manipulation" rationale, however, because there was no evidence that respondents had manipulated the drawback information. *Id.* Consequently, in the final *Remand Results*, Commerce settled upon yet another new rationale for the POI limitation. *Id.* at 5.

Commerce's newest rationale for the POI limitation is that it reasonably allows Commerce to evaluate respondents' "actual duty liability extinguished... during the POI." *Id.* at 8. Commerce also contends that the POI limitation helps to make computing respondents' duty drawback "more administrable for Commerce." *Id.* According to Commerce: "1) it affords Commerce sufficient time to analyze the data and notify respondents of any deficiencies; 2) it avoids the potential for the double counting of claims in multiple segments; and 3) it provides predictability and transparency in the administration of duty drawback claims." *Id.* at 13.

II. Discussion

In the *Remand Results* Commerce noted that "neither the duty drawback statute nor the legislative history provides guidance on the methodology to be used in determining the amount of these uncollected duties," and, "in the absence of such guidance, Commerce may develop reasonable methodologies to fill gaps in the statute." *Remand Results* at 7. Here, Commerce was apparently hoping to frame its POI limitation as a *Chevron* step two issue. Although Congress certainly was not thinking about the Turkish IPR when drafting the duty drawback adjustment provision, Congress did speak clearly when it required Commerce to increase export price by the amount of a respondent's duty drawback. *See* 19 U.S.C. § 1677a(c)(1)(B). Against that statutory requirement, Commerce and the interested parties did an excellent job in the investigation and remand proceeding working through the complexities of the Turkish IPR. Commerce and Plaintiffs are basically in agreement on most of the challenging issues to account for Plaintiffs' duty drawback adjustment: When does a DIIB close? How does the DIIB information get reflected in Plaintiffs'

margin calculation? The only remaining question is the reasonableness of Commerce's POI limitation that excluded some of the verified closed DIIBs. That question is ultimately not a legal issue resolved under the second prong of *Chevron*, but a substantial evidence issue in which the court evaluates the reasonableness of Commerce's POI limitation given the administrative record. As explained above, Commerce's POI limitation has always been a result in search of a rationale, and in the *Remand Results*, Commerce failed to identify a reasonable explanation supported by the record.

Commerce tried to justify the POI limitation by equating a respondent's import duty liability with a standard "cost or expense" that goes into a respondent's overall Cost of Production ("COP") for producing subject merchandise:

> Given that the transactions at issues [sic] here relate to duties on imported raw materials, and that raw materials are among costs included in COP, we find that limiting the duty drawback of those duties to amounts earned during the POI to be particularly appropriate.

Remand Results at 10–11. Commerce concluded that because respondents' import duty liabilities during the POI are similar to costs, Commerce's "general practice of examining costs and expenses during the POI" justifies the adoption of the POI limitation in this matter. *Id.* at 12.

Plaintiffs persuasively counter that Commerce's explanation is unreasonable given the operation of the Turkish drawback program, and Commerce's own treatment of various other margin adjustments. Plaintiffs explain that the respondents' imports of raw materials consumed in the POI "may, or may not, have been imported under one of the DIIBs used – or opened, or closed – in the POI," and that there "is literally no linkage between DIIB usage and cost accounting, particularly since the duties foregone do not show up in the respondent's accounting system at all." Pls.' Cmts. at 11. Plaintiffs also explain that Commerce's claimed "'general practice' has so many exceptions that it is more a starting point than an actual practice." *Id.* at 8. For instance, "[f]or annual rebates, Commerce relies on rebate ratios of the most recently completed rebate period, even if that is entirely or partially in the year before the reporting period." *Id.* Plaintiffs note that Commerce's claim that its analysis of COP data is limited to the POI is also not quite accurate. "In the cost of production, Commerce uses ratios for general and administrative expenses and interest expense from whatever full fiscal year closed in the

period of review." *Id.* Through these examples (and Plaintiffs' overall persuasive command of the antidumping calculation), Plaintiffs demonstrate that Commerce's treatment of costs and expenses tends to depend on the *nature* of the expense, rather than a consistent, imagined adherence to calculating all costs solely that occur and are accounted for in the POI. And here, Plaintiffs' duty drawback is "*not* recorded in a company's books." Pls.' Cmts. at 12.

Understanding that its primary justification was inadequate alone, Commerce provided a "secondary" rationale for the POI limitation, contending that it helped to make computing respondents' duty drawback "more administrable for Commerce." *Remand Results* at 8. According to Commerce: "1) it affords Commerce sufficient time to analyze the data and notify respondents of any deficiencies; 2) it avoids the potential for the double counting of claims in multiple segments; and 3) it provides predictability and transparency in the administration of duty drawback claims." *Id.* at 13.

Regarding the need for time to confirm the accuracy of data, Commerce reasoned that it would be "impracticable for Commerce to rely on information concerning DIIBs closed after the POI" because "Commerce must review numerous spreadsheets, duplicate and confirm calculations set forth by the respondents and confirm calculations set forth by respondents and analyze them for errors, and conduct a new analysis to determine whether the revised data meet Commerce's two-prong test." *Id.* at 17. Although Commerce poses an interesting hypothetical of impracticability, there was no impracticability here because Commerce verified the usage and closure of the DIIBs on the record, including those that closed after the POI, and all of which included exports to the United States made during the POI. *See* Pls.' Cmts. at 6, 13, 23. Commerce's stated concerns about the timeliness of drawback data submissions do not apply to this administrative record. This action simply does not involve untimely information or a failure to honor statutory and regulatory time limits. *See id.* at 16. And Commerce's verification of all the closed DIIBs belies its arguments that it would be impracticable to do so. Commerce did it.

Commerce's next reason about possible double-counting lacks merit. Commerce felt that without the POI limitation Commerce would need a DIIB tracking system "to prevent counting the same DIIB in multiple segments of a particular proceeding." *Remand Results* at 18. Commerce's double-counting rationale fails because a DIIB simply cannot be double-counted from one segment to the next. Pls.' Cmts. at 15. The duty drawback ratio is not exhausted by its having been reported in a given segment of a proceeding. *Id.* at 13. Two exports that are in different administrative review periods that

occur on the same DIIB are entitled to the same adjustment. *Id.*

And although Commerce hopes that, "the acceptance of DIIBs closed as of particular date . . . lends additional transparency and predictability to the administration of the antidumping law," *Remand Results* at 18, Plaintiffs persuasively counter that there is no "element of predictability or transparency served by denying a drawback adjustment that has been verified and the accuracy of which is not in question." Pls.' Cmts. at 15. The court agrees with Plaintiffs. Commerce's imposition of the POI limitation in this matter unreasonably undercuts its stated goals of accuracy, transparency, and predictability by ignoring verified record information. The one reasonable thing to do here is calculate Plaintiffs' duty drawback adjustments consistent with that verified information.

II. Conclusion

In accordance with the foregoing, it is hereby

ORDERED that Commerce shall calculate the drawback ratio using the verified information on the record, incorporating DIIB #6794 for the calculation of Çayirova's drawback adjustment, and DIIB #2794 for the calculation of Tosçelik's drawback adjustment; and it is further

ORDERED that Commerce shall file its remand results on or before December 7, 2018; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page/word limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: October 24, 2018
New York, New York

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

Slip Op. 18–149

HEZE HUAYI CHEMICAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant. CLEARON CORP. and OCCIDENTAL CHEMICAL CORPORATION, Defendant-Intervenors

Before: Jane A. Restani, Judge
Court No. 15–00027

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation having rendered a decision herein; now therefore, in conformity with said decision it is hereby

ORDERED, ADJUDGED, and DECREED that the *Final Results of Redetermination Pursuant to Court Remand*, Ct. No. 15–00027, Doc. No. 84, by the United States Department of Commerce are **SUSTAINED**.

Dated: October 24, 2018
New York, New York

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