U.S. Court of International Trade

Slip Op. 18–127

INNER MONGOLIA JIANLONG BIOCHEMICAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and CP KELCO US, INC., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 16–00187
PUBLIC VERSION

[The court remands to Commerce for a further analysis of the sales price, with reference to the full Fufeng AR2 dataset, and a corresponding *bona fide* finding as to Jianlong's NSR transaction. All other determinations made by the Department as to the atypicality of the sale in question are sustained.]

Dated: September 25, 2018

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OPINION AND ORDER

Goldberg, Senior Judge:

Before the court are the Final Results of Redetermination Pursuant to CIT Order, ECF No. 63 (May 21, 2018) ("Final Remand Results"), of the U.S. Department of Commerce ("Commerce" or "the Department") in its review of the request for a new shipper review ("NSR") by Inner Mongolia Jianlong Biochemical Co., Ltd. ("Jianlong"). As part of its antidumping duty investigation of xanthan gum from the People's Republic of China, Jianlong had requested a NSR, which was ultimately rescinded by Commerce. *Xanthan Gum from the People's Republic of China*, 81 Fed. Reg. 56,586 (Dep't Commerce Aug. 22, 2016) (rescission of NSR) and accompanying Issues & Decision Mem ("I&D Mem."). The court remanded to Commerce for reconsideration of that rescission, as well as other findings made by the Department in its rescission decision. *See Inner Mongolia Jianlong Biochemical Co. v. United States*, 41 CIT __, 279 F. Supp. 3d 1332 (2017) ("*Jianlong I*"). On remand, Commerce continues to find support for its decision to rescind Jianlong's NSR, albeit on separate, alternative

grounds. *See generally* Final Remand Results. The court now sustains Commerce's findings as to the atypicality of certain aspects of the sale in question. However, without substantial evidence supporting its selection of input sales, the court is powerless to sustain Commerce's ultimate *bona fide* finding. Therefore, the court remands to Commerce: 1) for further consideration of the sales price, with reference to the entire Fufeng AR2 dataset, and 2) for a finding as to the *bona fide* nature of the NSR transaction that incorporates Commerce's additional sales price analysis.

BACKGROUND

The appeal previously presented to the court arose out of Commerce's review of Jianlong's NSR, the rescission of which was found to be unsupported by substantial evidence. *Jianlong I*, 279 F. Supp. 3d at 1342. That order faulted the Department for: 1) determining that Jianlong had failed to meet the regulatory requirements for requesting a NSR, 19 C.F.R. § 351.214(b)(2)(iv)(A); 2) failing to support with substantial evidence its finding that the sole transaction reported in the period of review ("POR") was non-*bona fide*; and 3) rejecting certain documents (Exhibits 1, 2, and 3 submitted in response to new factual information placed on the record in the Department's Preliminary *Bona Fide* Sales Analysis ("Exhibits 1, 2, and 3")) without considering the stated purposes for which the exhibits were offered. The court ordered that Commerce reconsider each issue. *Id.*

In reexamining its decision to rescind Jianlong's NSR on the basis of Jianlong's failure to report its sample shipments, Commerce has now determined that it lacks substantial evidence to support that determination. Final Remand Results at 6–7. As such, Commerce does "not, in this instance, consider Jianlong's failure to report the[] sample shipments . . . as a failure to meet" the regulatory requirements for requesting a NSR. *Id.* at 7.

The Department therefore has permitted the NSR to proceed under 19 C.F.R. § 351.214(b)(2)(iv)(A), but now bases its rescission on its prior, alternative basis: that Jianlong's only sale during the POR was non-*bona fide*. *See id.* at 12–23, 36–52. "Commerce reexamined all of the evidence on the record of the proceeding and the totality of circumstances surrounding Jianlong's NSR sale. . . . [and] identified additional record evidence that supports the conclusion that Jianlong's single NSR sale is not a *bona-fide* sale." *Id.* at 36. Specifically, the Department determined that four factors support this conclusion: 1) the establishment of Jianlong's U.S. affiliate, Jianlong USA; 2) the timing of the sale in the context of the POR; 3) the sales price; and 4) a new additional factor, namely the actions of [[ ]] after the

sale was completed. Final Remand Results at 12–23. Commerce compared Jianlong's one reported sale to those the Department selected from sales reported by Neimenggu Fufeng Biotechnologies Co., Ltd. ("Fufeng") in the second administrative review ("AR2") of the antidumping duty order on xanthan gum from China.[1] Commerce used only a subset ("input sales" or "Fufeng subset") of the complete dataset of sales reported by Fufeng ("Fufeng AR2 dataset"). The comparison done by Commerce indicated that Jianlong's sales price was high. The evidence, "when considered with the high price" of the transaction in question, indicates to Commerce that Jianlong's normal sales process was not followed, which in turn, suggests to Commerce that the sale in question is non-*bona fide*. *Id.* at 52.

Last, Commerce continues to reject Exhibits 1, 2, and 3 offered by Jianlong as clarifying information. *Id.* at 25–28, 52–56. Commerce has "considered the power of Jianlong's new factual information to rebut, clarify or correct existing factual information and [finds] that [it is rejected because] it does not serve any of these functions." *Id.* at 55.

In the instant appeal, Jianlong does not contest Commerce's change of position as to the reporting of sample shipments, but now argues that the Department's other determinations are unsupported by substantial evidence. Pl.'s Comments on Final Results of Redetermination Pursuant to Remand, ECF No. 66 (June 20, 2018) ("Pl.'s Comments"). Accordingly, Jianlong asks the court for a remand so that Commerce can further consider whether the sale to [[

]] was *bona fide* as well as whether the Department has improperly rejected Jianlong's clarifying documents. Because Commerce's selection of the Fufeng subset lacks substantial evidence, the court remands for further consideration in accordance with this opinion. All other determinations as to the atypicality of the sole NSR transaction are sustained.

Having reviewed the Department's findings and conclusions of law, the court grants Jianlong's motion in part, remanding to Commerce for the limited basis of conducting a further sales price comparison analysis and a corresponding finding as to the *bona fide* nature of the transaction in question.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and will sustain Commerce's determinations unless they are "unsupported by

[1] In its preliminary results, Commerce had also used sales from Deosen Biochemical Ltd. ("Deosen") in its sales price comparison. Prelim. Sales Analysis at 4 n.23. Ultimately, however, the Final Results discarded the Deosen sales and conducted its comparison only with reference to Fufeng sales. I&D Mem. at cmt. 2 n.41.

substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence requires 'more than a mere scintilla,' but is satisfied by 'something less than the weight of the evidence.'" *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (citations omitted). If "a reasonable mind might accept the evidence as sufficient to support the finding," *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017), the substantial evidence threshold is likely met so long as the Department has provided a reasoned basis for its decision. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Commerce's consideration should reflect a sound decision-making process, *see Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), taking into account all evidence on the record, including that which may detract from the ultimate conclusion, *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). But, whatever the result, the agency's rationale must not be arbitrary, capricious, or an abuse of discretion. *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

DISCUSSION

For the reasons outlined below, the court sustains Commerce's determinations regarding: 1) Jianlong's reporting of sample shipments and 2) the individual findings of typicality pursuant to 19 U.S.C. § 1675(a)(2)(B)(iv)(II–VII). Yet, the court remands for a further consideration of Jianlong's sales price that considers the entirety of the Fufeng AR2 dataset, as well as an ultimate *bona fide* finding that accounts for the price comparison to be done on remand. It is recommended that, on remand, the Department admit Exhibits 1, 2, and 3 submitted by Jianlong so as to provide for a proper determination, supported by substantial evidence, that Commerce has selected all relevant input sales for its sales price analysis.

I. Entries for Consumption

In the court's prior decision, it ordered Commerce to conduct "a more fulsome consideration of Jianlong's sample shipments as entries for consumption." *Jianlong I*, 279 F. Supp. 3d at 1339. Having now acknowledged that there is not substantial evidence on the record to support its prior rescission of Jianlong's NSR under 19 C.F.R. § 351.214(b)(iv)(A), the Department "will not, in this instance, consider Jianlong's failure to report these sample shipments in its NSR request as a failure to meet the requirements of 19 C.F.R. §

351.214(b)(iv)(A)."[2] Jianlong agrees that "the final remand results correctly confirm that Jianlong did not fail to meet the regulatory requirements of 19 C.F.R. § 351.214(b)(2)(iv)(A)." Pl.'s Comments at 4. As this finding is no longer in dispute, the court sustains Commerce's determination here.

II. Non-*Bona Fide* Transaction

As part of its review of Jianlong's NSR request, Commerce has conducted an analysis of the sale in question to determine if it is *bona fide*. The court's prior remand ordered Commerce to conduct its analysis, considering the totality of the circumstances, and make a determination "sufficiently supported by substantial evidence, explaining how the establishment of Jianlong USA, the timing of the sale, and the sales price support a finding that the transaction in question was, or was not, *bona fide*." *Jianlong I*, 279 F. Supp. 3d at 1342. Complying with that directive,[3] Commerce has considered each factor and its determination seeks to explain that the totality of the circumstances indicates that the sale was non-*bona fide*. Yet, at this juncture, Commerce has not sufficiently supported its determination so as to allow the court to sustain its ultimate *bona fide* finding. As a result, the court remands for further proceedings in accordance with this opinion while also sustaining certain elements of the Department's examination.

Because the Department's individual findings as to the atypicality of Jianlong's single sale are supported by substantial evidence, the court sustains Commerce's findings in this area. *See infra* sections II.B, II.C, II.E. However, the Department's methodology and findings as to the sales price do not find sufficient support in the record. The Department's determination that the sales price of the NSR transac-

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[2] In so doing Commerce has sidestepped its opportunity to address the court's previously stated concern as to the Department's practices surrounding sample shipments. *See Jianlong I*, 279 F. Supp. 3d at 1338. The court remains troubled that this tension may arise in future cases.

[3] Jianlong argues that Commerce did not comply with the court's order because it failed to engage with a "key aspect of the Court's analysis," Pl.'s Comments at 6, in that it did not "grapple with the stated purposes for which Jianlong USA was established, 'to provide better service for customers in the United States . . . .'" *Jianlong I*, 279 F. Supp. 3d at 1340. By Jianlong's estimation, Commerce merely "dismissed out of hand" "this essential element of Jianlong USA's selling activities" "with a throwaway 'regardless of whether' remark." Pl.'s Comments at 6 (citing Final Remand Results at 15). However, this characterization misses the mark. Commerce considered Jianlong's stated reasons, but dismissed them as improbable, concluding in the alternative that even if that were true, "the facts show that Jianlong and Jianlong USA did not follow their typical sales process, as reported to Commerce." Final Remand Results at 15. Rather than take Jianlong's word for it, Commerce diligently reviewed the record and uncovered evidence that countered Jianlong's proffered narrative. *See id.* at 13–15, 16–18, 23. In the aggregate, this evidence suggested to Commerce that Jianlong USA was not established for the purposes stated, but rather to obtain a separate rate by means of Jianlong's NSR. *See id.* at 46–47.

tion was high is a crucial one that can greatly impact the *bona fide* sale analysis. As part of this assessment, Commerce must spell out its selection of the Fufeng subset against which it compared Jianlong's sale. On remand, Commerce is to reconsider its sales price analysis, with reference to the full Fufeng AR2 dataset, and adjust its *bona fide* finding accordingly.

A. Legal Framework

Congress has charged Commerce with calculating dumping margins under 19 U.S.C. § 1675(a)(2). As part of that mandate, the Department will conduct a NSR when requested to do so by an exporter not subject to a current antidumping duty order. That assessment requires that Commerce consider only *bona fide* sales—that is, those that Commerce determines to be such by reference to several factors:

> (I) the prices of such sales;
>
> (II) whether such sales were made in commercial quantities;
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> (III) the timing of such sales;
>
> (IV) the expenses arising from such sales;
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> (V) whether the subject merchandise involved in such sales was resold in the United States at a profit;
>
> (VI) whether such sales were made on an arms-length basis; and
>
> (VII) any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.

19 U.S.C. § 1675(a)(2)(B)(iv)(I–VII). "[B]ecause the ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure, any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant." *Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 260, 366 F. Supp. 2d 1246, 1250 (2005).

Ultimately, though, Commerce must consider the *totality* of the circumstances—as outlined by the factors under 19 U.S.C. § 1675(a)(2)(B)(iv)—in order to assess the commercial reasonableness of the transaction in question. In each NSR, the factors that have the most weight will vary based on the circumstances, but one aspect will remain constant throughout each review: the aim of the process is "to

ensure that a producer does not unfairly benefit from an atypical sale to obtain a lower dumping margin than the producer's usual commercial practice would dictate." *Huzhou Muyun Wood Co. v. United States*, Slip Op. 18–89, __ F. Supp. 3d __, __, 2018 WL 3455350, at *8 (CIT July 16, 2018) ("*Huzhou Muyun II*"). Evidence of only a single sale during the POR may raise certain suspicions; as such, "[w]hile a single sale is not inherently commercially unreasonable, it will be carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales." *Tianjin Tiancheng*, 29 CIT at 275, 366 F. Supp. 2d at 1263 (citation omitted).

The goal of the *bona fide* sales analysis is to reveal whether the transaction is "unrepresentative or extremely distortive." *Tianjin Tiancheng*, 29 CIT at 259, 366 F. Supp. 2d at 1249–50. If the entirety of the § 1675(a)(2)(B)(iv) factors indicate that a non-*bona fide* transaction may be afoot, that transaction is to be discarded so that the new shipper is unable to manipulate the NSR for the purposes of obtaining a lower rate than it is entitled. In the absence of any *bona fide* sales, Commerce will rescind the NSR.

In reviewing Commerce's *bona fide* determinations, the court is sensitive to the congressional concerns that motivated adoption of the § 1675(a)(2)(B)(iv) factors: the potential for abuse of the NSR process "to avoid antidumping and countervailing duties." H.R. REP.NO. 114–114(I), pt. 1, at 89 (2015). As a result, the *bona fide* assessment seeks to determine the typicality of the transaction in question, thus allowing for review only of legitimate transactions with no signs of "abuse." *See id.*; *see also generally Huzhou Muyun II*, 2018 WL 3455350.

Here, Commerce considered: 1) Jianlong's formation of a U.S. entity, Jianlong USA; 2) the timing of the sale by Jianlong to [[ ]]; 3) the sales price, as compared to Fufeng's relevant reported sales; and 4) [[ ]] continued behavior after the POR. Each factor is discussed in detail below.

B. Formation of Jianlong USA

Commerce found that the circumstances surrounding the establishment of Jianlong USA indicate that the transaction in question was not typical of those Jianlong would engage in in the future. In light of the stated sales process provided by Jianlong and that which it undertook in its sale to [[ ]], the court sustains Commerce's finding as reasonable.

On the record, Commerce requested that Jianlong describe how it "sets the prices of the merchandise" and the way in which price

negotiations take place. Section A Resp. A-5, ECF No. 50, Confidential J.A. Tab 4, C.R. 6–9 (Sep. 30, 2015) ("Section A Resp."). Jianlong's response indicated the following:

> Jianlong and Jianlong USA set prices based on market conditions, competitive price information and cost of production considerations. Jianlong and Jianlong USA have full autonomy in negotiating prices with U.S. customers, free of intervention from any entity outside the company. With authorization from Jianlong, Jianlong USA negotiates directly with the unaffiliated customers. The purchase order and e-mail correspondence included in the sale trace in Exhibits [*sic*] A-5 provides evidence [*sic*] independent price negotiations.

Id. Exhibit A-5 included emails and their attachments detailing a back and forth between Jianlong USA and [[ ]]. *See id.* at ex. A-5. Other responses given by Jianlong indicated that Jianlong USA also had the responsibility of "identifying U.S. customers." *Id.* at A-17. The response suggested that Jianlong USA's sales staff would accomplish this "by several different means: through trade fairs, exhibitions, requests for proposals, and contacts within the industry." *Id.*

From the chain of emails provided by Jianlong, Commerce has inferred "that the sales process reported to be the normal sales process for Jianlong USA was not followed for the sale in question." Final Remand Results at 13. The Department finds that these emails indicate a sales process devoid of normal price negotiations. *Id.* at 13–14. Additionally, Commerce finds the lack of Jianlong USA's sales expenses particularly troubling "because the sale under review, allegedly made by Jianlong USA, was reported as a constructed export price (CEP) sale," the calculation of which requires the examination of the expenses involved in a typical transaction. *Id.* at 15. The expenses reported did not include those required to "identify or communicate with potential customers." *Id.* at 14. Collectively, this, the Department finds, "is not representative of Jianlong/Jianlong USA's normal business practices, which is one factor that supports a finding that the NSR sales transaction is not *bona fide*." *Id.* at 16.

For its part, Jianlong contests Commerce's findings, stating that "the record evidence contradicts these conclusions." Pl.'s Comments at 5. With regard to price negotiations, Jianlong points out that there was a line of communication that: 1) altered the price from the invoice to the purchase order and 2) resulted in technical specifications and certain modifications to the order. This, Jianlong argues, demonstrates that "Jianlong USA clearly acted on its customer's behalf to

provide superior services for its U.S. customer," *id.* 6, while "Jianlong participated in many aspects of the sale to ensure clear communication . . . and to ensure that there was an enhanced meeting of the minds regarding all terms of sales and other aspects of the NSR transaction," *id.* at 5. Jianlong also argues that Commerce failed to consider that its "normal office expenses," including those expenses for "salaries and office equipment," may in fact cover the sales expenses the Department found to be lacking from the record —particularly those associated with communicating with potential customers. *Id.* at 6.

As an initial matter, the court finds that whether or not a newly formed business has followed its normal sales process is a reasonable factor for Commerce's consideration under 19 U.S.C. § 1675(a)(2)(B)(iv)(VII). As part of its *bona fide* analysis, Commerce may consider "any other factor [it] determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review." 19 U.S.C. § 1675(a)(2)(B)(iv)(VII). Clearly, where the circumstances indicate that the establishment of a U.S. entity is indicative of an atypical transaction, it is within Commerce's discretion to consider that factor as a part of its totality of the circumstances analysis.

To support its non-*bona fide* finding, the Department cites a mismatch between the reported process and that which Jianlong followed in executing this transaction. Where there is but a single sale reported in the POR, Commerce obviously does not have the benefit of comparing the transaction in question to other transactions the new shipper has undertaken; as a result, the best evidence upon which the Department can rely may very well be the normal sales process reported by the new shipper. Certainly, a failure to follow a firm's own reported sales process may indicate that the sale in question is atypical. Here, the evidence in the record supports the view that the mismatch suggests that Jianlong's sale to [[ ]] was non-*bona fide*.

As Jianlong reported that "Jianlong USA negotiates directly with the unaffiliated customers," Section A Resp. at A-5, a genuine price negotiation is highly probative of whether the sale in question is, or is not, "likely to be typical" of sales Jianlong will make in the future. Here, the absence of "independent price negotiations," Section A Resp. at A-5, proves fatal to Jianlong's claim that the sale to [[ ]] followed its normal sales process. Surely, a genuine negotiation typically includes some combination of modifications related to price, quantity, or means of delivery. Indeed, Jianlong claims that it has proven Jianlong USA's involvement in "determining and

confirming the unit price" and addressing certain "technical specifications." Pl.'s Comments at 5. However, Commerce reasonably determined that the terms of the sale had "already been established," Final Remand Results at 39, and that Jianlong USA's role did not reflect the typical sales process reported by Jianlong, *id.* at 42.

What's more, Commerce cites a lack of evidence to show that Jianlong USA engaged in one of its most crucial roles, identifying potential customers. Final Remand Results at 40–41 (citing Section A Resp. at A-17). Rather, Commerce found that the customer, [[ ]], had already been identified through personal contacts and that Jianlong, *not* Jianlong USA, had engaged in a prolonged period of relationship-building prior to the sale. *Id.* at 16–17, 37. While Jianlong attempts to demonstrate Jianlong USA's participation in customer identification activities through reported expenses, Pl.'s Comments at 5–6, Commerce found no support for that explanation in the record. Final Remand Results at 40. No other evidence exists on the record to show that Jianlong USA engaged in customer identification.

Resultantly, Commerce finds no evidence in the record demonstrating that Jianlong USA engaged in either of its two primary functions: price negotiations and customer identification.[4] Therefore, substantial evidence supports the notion that Jianlong did not follow its typical sales process by establishing Jianlong USA to conduct the sale and this factor calls into question the *bona fide* nature of transaction as a whole. In the absence of evidence that Jianlong USA undertook its reported responsibilities during the transaction in question, Commerce was left with no choice but to conclude that the sales process was not reflective of sales Jianlong is likely to engage in in the future. As a result, the court sustains Commerce's findings related to this factor.

C. Timing of Sale

Likewise, Commerce supported with substantial evidence its determination that the timing of Jianlong's sole transaction suggested that the sale was non-*bona fide*. The Department reasonably concluded that the timing of the sale "called into question whether the sale was made and timed specifically to obtain an NSR rate." Final Remand

[4] Jianlong argues that Commerce failed to consider that the office expenses it reported could "cover the costs necessary to communicate with potential customers (such as telephone and internet expenses) or the personnel time dedicated to such communication." Pl.'s Comments at 6. Critically lacking from this argument, though, is a satisfactory explanation as to how customer *identification* may be folded into those costs. As such, notwithstanding these asserted communication expenses, Jianlong cannot overcome the dearth of evidence to demonstrate that Jianlong USA engaged in its other critical functions.

Results at 16. As such, the court sustains Commerce's findings as to this particular element of the Department's *bona fide* analysis.

Commerce viewed the timing of the sale significant because it signaled that the "focus was on making a U.S. sale of subject merchandise during the POR to obtain a NSR." Final Remand Results at 46–47. This, Commerce viewed, was supported by the following circumstances: "(1) a sales process executed within 4 days at the end of the POR, even though Jianlong was in contact with the U.S. customer [] a year and a half earlier; (2) [[ ]]; (3) [[ ]]; and, (4) [[ ]] instruction to Jianlong USA [[ ]]. *Id.* at 47. Ultimately, that all suggested to Commerce that the sale was atypical and, thus, not *bona fide*. *Id.* at 47.

To this, Jianlong responds by questioning Commerce's presumption "that a sale made in the last month of a period of review raises concerns regarding the *bona fide* nature of the sale." Pl.'s Comments at 8. Additionally, Jianlong contends that the fact that no sample was provided before shipment is of no moment (because samples had already been provided), that there is no record evidence to support the conclusion that rushing to make shipment is *not* typical, and that "there is no evidence . . . that shipment of the merchandise *actually* was expedited" because the shipment was made by "normal sea freight" and not some other expedited means. *Id.*

By its terms, 19 U.S.C. § 1675(a)(2)(B)(iv)(III) enables Commerce to consider the timing of a sale in its totality of the circumstances analysis. That consideration enjoys its due weight and the Department may consider when the sale was made both in relation to other sales and the timing relative to the POR itself. The timing of a single sale may give the Department pause as it may indicate that the sale was made in an expedited manner so as to complete the transaction within a given POR.

Jianlong asserts that the Department's findings in this space are lacking in that they rely on the sort of "suspicion and innuendo" the court had previously found deficient. Pl.'s Comments at 6–7 (citing *Jianlong I*, 279 F. Supp. 3d at 1340). Specifically, Jianlong argues that Commerce relies on no evidence to conclude that "there was no communication between the parties over 450 days" and that the parties "rushed to complete the sale . . . in 37 days." *Id.* at 7. (citing Final Remand Results at 17). Jianlong contends that Commerce disregarded "the long history and relationship between Jianlong and its

U.S. customer" and that "[i]t is not reasonable . . . for Commerce to consider a year-and-a-half long process to be a 'rush to complete a sale.'" *Id.*

Regardless, the Department's finding that the timing of the sale is suggestive of a non-*bona fide* sale is reasonable and, therefore, sustained by the court. Certainly, that "the xanthan gum was shipped [[ ]] days prior to, and invoiced [[ ]] days prior to, the end of the POR," Final Remand Results at 42, is a relevant consideration. That timing becomes questionable when combined with the following: 1) there were interactions between the firms at least a year and a half prior to the reported sale; 2) there was no evidence in the record that Jianlong and [[ ]] had any communication for 450 days before the sale; and 3) the communications that ensued between [[ ]] and Jianlong USA spanned over only four days, during which time Jianlong represents that Jianlong USA negotiated and completed a sale. *See id.* at 43. That narrative has left Commerce to consider an initial relationship, a period of silence, and then a quickly executed sale near the end of the POR. Under such circumstances, it is reasonable for Commerce to conclude that the sale in question was timed specifically to obtain an NSR and, therefore, atypical.

Further, Commerce considered several other reviews in which the timing of a sale similarly suggested that a given NSR transaction was non-*bona fide*. Final Remand Results at 19 (citing *Certain Preserved Mushrooms from the People's Republic of China*, 82 Fed. Reg. 1,317 (Dep't Commerce Jan. 5, 2017) (rescission of NSR); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 80 Fed. Reg. 55,090 (Dep't Commerce Sept. 14, 2015) (rescission of NSR); *Certain Steel Nails from the People's Republic of China*, 76 Fed. Reg. 56,147 (Dep't Commerce Sept. 12, 2011) (prelim. results & prelim rescission of NSR)).[5] In both *Crystalline Silicon Photovoltaic Cells* and *Certain Preserved Mushrooms*, Commerce determined that the lack of sales activity occurring between firms followed by a sale in the last month of a POR raised suspicions as to the *bona fide* nature of a transaction. Commerce thus has demonstrated its consistent, reasonable practice such that the court declines to overturn its reasoned determination.

[5] Jianlong claims that Commerce has a practice dictating that "the date of factory shipment is the appropriate date of sale for constructed export price sales, which are sold back-to-back through U.S. affiliates, if the shipment date precedes the date of invoice." Pl.'s Comments at 8–9. As a result, Jianlong believes that "the actual date of sale took place almost a month before the end of the POR when the merchandise first was shipped from China." *Id.* at 10. No matter whether the sale was completed four days prior to the end of the POR or almost a month before the end of the POR, Commerce reasonably concluded that the timing of the sale was atypical.

Accordingly, the court sustains Commerce's findings as to the timing of Jianlong's sales.

D. Sales Price

Next, Commerce has marched through a methodology for comparing Jianlong's transaction to Fufeng's sales, but has failed to support with substantial evidence the selection of the input sales. As the sales price is, most often, the most important factor in the Department's *bona fide* analysis, the need for substantial evidence supporting any determination in this area is of paramount importance to the court's consideration. The analysis provided to this point remains unsatisfactory to the court. Without substantial evidence supporting Commerce's selection of input sales, the court cannot sustain the Department's conclusions. As a result, the proceedings are remanded for further consideration in accordance with this opinion.

At the outset of the proceedings, Commerce placed on the record certain sales from Fufeng for comparison against Jianlong's one sale; ultimately, that comparison produced results indicating to Commerce that the sales price was atypical and, thus, another factor showing that this was a non-*bona fide* sale. Having provided a reasonable rubric for the comparison of Jianlong's NSR transaction with similar Fufeng sales, Commerce's methodology is sustained. However, Commerce has left the record bereft of any meaningful indication of how the Fufeng subset was selected. The court, therefore, remands to Commerce 1) for additional consideration of the input sales placed on the record that takes the entire Fufeng AR2 dataset into account and 2) to engage in the same price comparison methodology, if appropriate, using any new sales information.

In general, Commerce compared Jianlong's sales against the input sales, concluding that Jianlong's U.S. sales price was high and, therefore, indicative of a non-*bona fide* sale. Commerce's methodology "reduced Jianlong USA's sales price for *all* appropriate transportation expenses, customs duties, taxes, and U.S. direct and indirect selling expenses," Final Remand Results at 48–49; declined to make adjustments for customer types, instead following its practice to use "control numbers (CONNUMs) for product matching purposes that reflect the physical characteristics of the merchandise," *id.* at 49–50; and followed its practice of not adjusting "for cash deposit rates when calculating net prices in its price comparisons," *id.* at 50.

Where there is substantial variability between product characteristics, it is reasonable for Commerce to choose a comparison product and evaluate the price at which that comparison product was sold. *See, e.g.*, *Huzhou Muyun Wood Co. v. United States*, 41 CIT __, __, 279

F. Supp. 3d 1215, 1227–28 (2017) ("*Huzhou Muyun I*"). When making this choice, Commerce is to support with substantial evidence its choice of the comparison product as well as any adjustments made to the price comparison. *See id.* As is the case with all questions of substantial evidence, the court is only able to sustain Commerce's determinations on the grounds invoked by the agency, *State Farm*, 463 U.S. at 43; if the record is devoid of any indication of the reasons for a certain determination, the court is powerless to sustain that finding.

As discussed below, while its means for comparing two sets of data was reasonable in this context, Commerce's selection of input sales remains suspect. Accordingly, pursuant to this opinion, on remand Commerce must: 1) articulate its selection of the Fufeng subset with reference to the entire Fufeng AR2 dataset, 2) engage in a proper sales comparison, and 3) make an ultimate finding as to the *bona fide* nature of the transaction at issue.

1. Input Sales

The court agrees that sales of the same grade of xanthan gum are the relevant sales for Commerce's price comparison, but finds insufficient evidence on the record to verify the Department's representation that it extracted all relevant sales from the complete Fufeng AR2 dataset. Commerce cites to no methodology for its selection of the Fufeng subset upon which it relies in its price comparison, but rather merely asserts that the Department has placed the complete relevant subset of Fufeng sales on the record. *See* I&D Mem. at cmt. 2 (stating Commerce "believe[d] [it] ha[d] the complete relevant sales data from AR2 on the record" because it placed on the record only "the reported sales of xanthan gum of the same grade as the grade of xanthan gum sold by [Jianlong]."); Final Remand Results at 51 ("The complete relevant subset of Fufeng's AR2 sales data, which were extracted from Fufeng's full U.S. sales database and used in the comparison, is on the record."). Without a more developed record, articulating the methodology used for identifying input sales with reference to the entire Fufeng AR2 dataset, the court cannot sustain on the grounds invoked by the Department, namely that it has placed on the record the relevant input sales and reliance on the Fufeng subset was reasonable. Because this process falls short of the substantial evidence threshold required for the court to sustain, the proceedings are remanded to Commerce for further consideration of the sales price and how that further analysis impacts the Department's ultimate *bona fide* finding.

While it is true that this court typically does not "upset Commerce's reasonable choice" of sales data, *see Huzhou Muyun I*, 279 F. Supp. 3d at 1228 (quoting *Ad Hoc Shrimp Trade Action Comm. v. United States*, 36 CIT __, __, 828 F. Supp. 2d 1345, 1354 (2012)), the court must be presented with some reliable basis upon which it can discern the methodology employed by Commerce. *See generally Allied Tube & Conduit Corp. v. United States*, 31 CIT 1090, 1094, 2007 WL 2040695, at *4 (2007) ("Commerce has the discretion to choose whatever methodology it deems appropriate, *as long as it is reasonable and its conclusions are supported by substantial evidence*." (emphasis added)). While Commerce claims that it has "compared the price of Jianlong's NSR sales transaction to the average export price and maximum export price of the same type of xanthan gum sold by Fufeng," Final Remand Results at 20, the Department provides no explanation of how it initially determined which of Fufeng's reported sales belonged in the subset of input sales. When Commerce placed the Fufeng subset on the record, it merely described its methodology as follows: "We compared the quantity and unit price of the sale under review to the quantities and unit prices of sales of similar subject merchandise, with similar sales terms, reported by the mandatory respondents in [AR2] in this proceeding, which covers the same period as this NSR." Prelim. *Bona Fide* Sales Analysis 4, ECF No. 50, Confidential J.A. Tab 10, P.R. 136, C.R. 73–75 (Mar. 15, 2016) ("Prelim. Sales Analysis"). Clearly lacking from this statement—and the Department's successive discussions on the topic—is any indication of how Commerce identified the relevant sales.[6] This flaw calls into question the results of the Department's sales comparison. Without an understanding of the choice of input sales and substantial evidence supporting their selection, the court cannot sanction the output produced by Commerce's methodology.

In a NSR sales price comparison, the starting point for Commerce is often to place on the record all sales, subsequently using only a relevant subset of those sales to compare to the new shipper's reported transactions. *See, e.g.*, *Zhengzhou Huachao Indus. Co. v. United States*, 37 CIT __, __, 2013 WL 3215181, at *4 (May 14, 2013) ("Commerce placed on the record [Customs] data containing *all* entries of merchandise exported to the United States from the PRC during the POR . . . ." (emphasis added)). Here, rather than place the full dataset on the record, Commerce merely asserted that it had

[6] Indeed, the court notes that the simplest, most practical solution—and the only one that would unquestionably satisfy the court's concerns over the lack of substantial evidence—would be to introduce on to the record all Fufeng sales from AR2 in order to allow for a comparison of the entire dataset with the subset chosen for comparison's sake.

chosen the relevant sales for consideration. *See* I&D Mem. at cmt. 2; Final Remand Results at 51.

Tellingly, Commerce seems to acknowledge that its chosen dataset may be under-inclusive. *See* Final Remand Results at 26 ("Commerce only compared the price of Jianlong's [[ ]] sales transaction during the POR of xanthan gum with Fufeng's sales of [[ ]] xanthan gum during AR2. Therefore, *unless there were additional sales of [[ ]] xanthan gum made by Fufeng in AR2, that were omitted from the price-comparison data Commerce used in its bona fide analysis*, submitting the complete AR2 Fufeng sales database on the record does not rebut, clarify, or correct the factual information place on the record by Commerce." (emphasis added)). Commerce cannot rely on Jianlong's burden of proof, 28 U.S.C. § 2639(a)(1), to discharge its duty to "establish[] antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Il. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994) ("[T]here is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so."). Commerce's own admission that the reliability of its dataset only furthers the court's doubts that the Department's selection of data may be unreliable. *See Allied Tube & Conduit Corp.*, 31 CIT at 1096, 2007 WL 2040695, at *5. As a result, it appears that both Commerce and Jianlong agree that there *may* be Fufeng sales of [[ ]] xanthan gum that were not included in the subset of input sales.

However inartful its discussion of the problem may be, See Pl.'s Comments at 11–12; Final Remand Results at 51, Jianlong is at least correct that without an articulation of Commerce's methodology to select the data upon which it relies, the court is left with no tools from which it can assess Commerce's determination. Because the court is unable to gauge the reliability of the input sales, the Department's omission amounts to a failure to "articulate any rational connection between the facts found and the choice made." *Burlington Truck Lines*, 371 U.S. at 168. The Fufeng subset does not, on its own, contain the requisite indicators of reliability. *See* Prelim. Sales Analysis at attach. III. Commerce's assurances that it "believes" it has placed all "relevant" sales on the record likewise provide little comfort.

As such, the court cannot sustain Commerce's finding that the sales price is indicative of an atypical sale. Without substantial evidence supporting the Department's view, this factor does not support Com-

merce's non-*bona fide* finding. Accordingly, the court remands this portion of the proceedings to Commerce for a further sales price analysis that indicates the methodology employed by Commerce for selecting the input sales. Commerce is to conduct this assessment with reference to the complete Fufeng AR2 dataset. Once that final piece of the *bona fide* analysis is complete, the Department should be able to resolve the *bona fide* sales inquiry informed both by reference to the factors sustained here, as well as a sales price determination (hopefully) supported by substantial evidence.

2. Methodology

Notwithstanding the deficiencies in Commerce's selection of input sales, the court sustains the Department's methodology for comparing sales—if not the result—employed by the Department. Following additional consideration of the complete Fufeng AR2 dataset, if appropriate, Commerce should utilize the same methodology, along with a reasoned decision explaining its selection of input sales—and possibly a new subset of input sales, depending on the results of Commerce's price determination—in the remand proceedings.

Commerce's methodology compared sales of the same grade of xanthan gum—[[ ]] xanthan gum—with the same terms of sale. Commerce began by narrowing the Fufeng dataset to only [[ ]] xanthan gum sales. Prelim. Sales Analysis at attach. III. By "limiting [its] comparison to similar products," Commerce appropriately limited the scope of Fufeng's sales that it would consider. Final Remand Results at 51. Then, Commerce "reduced Jianlong USA's sales price for *all* appropriate transportation expenses, customs duties, taxes, and U.S. direct and indirect selling expenses."[7] *Id.* at 48–49. This second step enabled Commerce to either "compare[] prices of sales with the same terms [[ ]], after making adjustments, or ma[ke] conservative comparisons with Fufeng's [[ ]] sales." *Id.* The result of Commerce's methodology produced a comparison showing that Jianlong's sale price of [[ ]] was high when compared to Fufeng's average of [[ ]], Prelim. Sales Analysis at attach. II—that is, "[[ ]] than the average price of the same grade of xanthan gum sold by Fufeng during the POR," Final Remand Results at 51.

[7] "Specifically, [Commerce] made deductions from the gross unit price for international freight expense, U.S. inland freight expense from port to warehouse, U.S. inland freight expense from warehouse to the unaffiliated customer, U.S. customs duty, U.S. brokerage and handling expense, credit expense, indirect selling expenses incurred in the United States, inventory carrying costs incurred in the United States, and irrecoverable input value added tax." Final Remand Results at 49.

Further, Commerce's view that "differences in timing, sales terms, customer type, and dumping duties" are not to be included in the comparison is reasonable. *See* Final Remand Results at 47–48. With respect to the selection of the input sales, "Commerce placed on the record data from AR2 for all the reported sales by Fufeng of xanthan gum that matched the grade of xanthan gum sold by Jianlong," *id.* at 51, and compared only Fufeng's sales of the particular grade of xanthan gum which Jianlong sold to [[ ]]. As to the timing of the sales, Commerce reviewed a substantial number of Fufeng transactions from the same period, [[ ]], and the average gross unit sales price of Fufeng's sales were similar across different time periods, [[ ]]. *Id.* at 48. That indicated to Commerce that the timing of Fufeng's sales across the POR remained stable. Commerce also explained that its methodology is to "use[ ] control numbers (CONNUMs) for product matching purposes that reflect the physical characteristics of the merchandise, not differences in customer type," *id.* at 49, and Jianlong has failed to raise a significant reason to depart from this practice. Last, Commerce dismissed "Jianlong's claim that Commerce should adjust for dumping cash deposit rates" by explaining that the Department has a "longstanding practice [] not to adjust for cash deposit rates when calculating net prices in its price comparisons." *Id.* at 50.

In each instance detailed above, Commerce either articulated a specific reason why departing from its regular practice was not appropriate or supported its choice with substantial evidence. For considerations of customer type and dumping cash deposit rates, Commerce followed its respective practices in these spaces. As those practices reflect a reasonable interpretation of the Department's duties, the court finds the agency's reasonable interpretations to be in accordance with law. As to the issues of timing and sales terms, the Department supported its given approaches with convincing rationales and reasonable adjustments. Accordingly, the court sustains those determinations as well.

All in all, Commerce's methodology itself was reasonable. Commerce reasonably explained its methodology and the reasons that it did not undertake to make the adjustments Jianlong sought. However, as explained above, the court cannot now say that this process resulted in a reasonable comparison. Accordingly, the court remands for further consideration of the sales price of the [[ ]] transaction and comparison to Fufeng's relevant sales.

E. Other Factors

Although the court remanded to conduct a totality of the circumstances analysis "sufficiently supported by substantial evidence, explaining how the establishment of Jianlong USA, the timing of the sale, and the sales price support a finding that the transaction in question was, or was not, *bona fide*," *Jianlong I*, 279 F. Supp. 3d at 1342, Commerce furthered its analysis by considering additional factors beyond those three referred to in the court's remand order. *See, e.g.*, Final Remand Results at 22 (commercial quantities); *id.* at 39 (expenses arising from the sale). The totality of the circumstances test is a flexible one, allowing the Department to prioritize certain factors depending on the context, but it at least requires that Commerce consider as many factors as are relevant.

Jianlong now challenges a new, additional factor considered by Commerce: "that [[ ]] . . . did not purchase xanthan gum after the sale in question . . . ." Final Remand Results at 23. Commerce found it atypical that a firm like [[ ]] would purchase the subject merchandise from Jianlong at a high price given the circumstances.[8] *Id.* Jianlong maintains that it was improper for Commerce to consider these factors because they relate not to Jianlong's sale, but "to the customer's own situation and to the developing market situation of xanthan gum downstream products in the United States." Pl.'s Comments at 12. The court sees no reason to disturb the normal discretion afforded Commerce to rely on "any other factor the [Department] determines to be relevant . . . ." 19 U.S.C. § 1675(a)(2)(B)(iv)(VII). Jianlong suggests neither the ways in which Commerce's determination here lacks substantial evidence nor why the Department's reasoning was arbitrary or capricious. Accordingly, the court sustains Commerce's finding as to this additional factor.

III. Rejection of Certain Documents

Last, the court reaches Commerce's rejection of Exhibits 1, 2, and 3 submitted to clarify the subset of Fufeng sales placed on the record. As the court held previously, "Commerce's characterization of Exhibits 1, 2, and 3 as mere confirmation of factual information is unreasonable." *Jianlong I*, 279 F. Supp. 3d at 1341. In this proceeding, Commerce does not appear to have altered its position but asks that the court sustain its rejection of this documentation anyway. As its

[8] That is, that: 1) [[ ]] "maintain[ed] an oversupply of xanthan gum," 2) the market was experiencing a "downturn," 3) there was "price competition from other U.S. producers of downstream products containing xanthan gum," and 4) [[ ]] business around xanthan gum purchases enabled it to keep its "production costs low and stable." Final Remand Results at 23.

decision reflects an abuse of discretion, the court will not do so and remands for additional proceedings.

The court reviews Commerce's rejection of information offered to clarify for an abuse of discretion, which may be evidenced by a decision that "is clearly unreasonable, arbitrary, or fanciful, is based on an erroneous conclusion of law, rests on clearly erroneous fact findings, or follows from a record that contains no evidence on which Commerce could rationally base its decision." *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d, 1288 (2017) (citing *Gerritsen v. Shirai*, 979 F.2d 1524, 1529 (Fed. Cir. 1992)). Because it is clearly unreasonable for Commerce to reject the documentation in question on the grounds invoked by the agency, the court remands for further consideration in accordance with this opinion.

In its preliminary findings, Commerce found that, based on comparator sales, the price of Jianlong's sale was atypically high. *See* Prelim. Sales Analysis at 4. As part of that price comparison, the Department placed new information on the record as to sales reported by mandatory respondents in AR2, including Fufeng. *See id.*; *see also* Deadline for Submission of Comments on New Factual Information, ECF No. 50, Confidential J.A. Tab 11, P.R. 137 (Mar. 17, 2016). Jianlong challenged Commerce's sales price finding, arguing that the Department should take a more holistic view of the sales price comparison and should place on the record "the full sales data reported by the mandatory respondents." Jianlong's Resp. to CP Kelco's Request to Reject Jianlong's Submission 2, ECF No. 50, Confidential J.A. Tab 12, P.R. 141 (Apr. 4, 2016) ("Jianlong's Resp. to Request to Reject Submission"). Doing so, Jianlong argued, would clarify the input sales and allow that sales data to serve as a reliable means of comparison. *Id.* Commerce itself described Exhibits 1, 2, and 3 as "contain[ing] the full U.S. sales databases and responses to Section C of the Department's questionnaire of the mandatory respondents in AR2 and the Section A supplemental questionnaire response of one of the mandatory respondents in AR2," but nevertheless rejected Jianlong's submission as a mere confirmation of the information the Department had already placed on the record. Rejection Mem. 1–2, ECF No. 50, Confidential J.A. Tab 15, P.R. 148 (Apr. 25, 2016).

Here, Commerce purports to give additional reasons for the rejection of this documentation,[9] stating that Jianlong failed to show that the information placed on the record was "not understandable or

[9] The Government's citation to *Hyster Co. v. United States*, 18 CIT 119, 848 F. Supp. 178 (1994) is unpersuasive. *See* Def.'s Resp to Comments on Remand Redetermination 29–30, ECF No. 68 (July 20, 2018) ("Def.'s Comments"). Simply put, *Hyster's* consideration of model matching methodologies invokes an entirely different set of considerations, making

comprehensible" and therefore in need of clarification. Final Remand Results at 54. The Department rebukes Jianlong's alleged failure to "explicitly state[] that there were errors that needed to be corrected," *id.*,[10] but Commerce has missed the forest for the trees. In painting Jianlong's submission as one aimed at "confirm[ing] the accuracy of the subset of sales from AR2 which Commerce placed on the record," *id.* at 25, the Department overlooks how Exhibits 1, 2, and 3 may clarify the nature of the input sales. Moreover, Commerce appears to demand that Jianlong meet the artificial burden of "assert[ing] that there were errors in the data Commerce used." Def.'s Comments at 27.

The Department has seemingly ignored—yet again—Jianlong's stated purpose for submitting Exhibits 1, 2, and 3: "the Department's claim that it compared [Jianlong's] sale under review to sales of similar subject merchandise, with similar sales terms, cannot be relied upon unless the full sales data reported by the mandatory respondents (and a complete description and examination of those data) are available for comparison." Jianlong's Resp. to Request to Reject Submission at 2–3. Jianlong asked *not* that the entire Fufeng dataset be accepted so that the parties could confirm what was already known, but so that the information could clarify at least the means by which the Department selected the information on which it relied.

The Department's explicit justification for rejecting Exhibits 1, 2, and 3 relies on its view that those documents can only serve to confirm that which is already on the record. Given the circumstances, that is clearly unreasonable and is an abuse of discretion. The full Fufeng AR 2 dataset would certainly serve to clarify which of those sales Commerce selected as input sales.

Further, Commerce's determination implicitly rejected the notion that the entire dataset cannot clarify its selected subset. On its face, such a reading of the regulation's use of the word "clarify" is unreasonable. The regulation is designed to ensure that the Department "obtain the information it needs in its antidumping investigations," *see Guangzhou Maria Yee Furnishings, Ltd. v. United States*, 29 CIT 1470, 1475 412 F. Supp. 2d 1301, 1306 (2005), and that information

comparison to the instant case inapt. The court cannot derive an intelligible principle of a plaintiff's burden of proof for the submission of clarifying information from a model matching methodology case.

[10] The court is sympathetic to the Government's concern that parties' "failing to explain how [] new information serves to rebut, clarify, or correct could lead to 'a respondent placing a voluminous amount of new factual information on the record with a vague explanation, or no explanation at all, as to how its submission rebuts, clarifies or corrects other information,' leaving 'Commerce to try to discern whether the information indeed rebuts, clarifies, or corrects other information.'" Def.'s Comments at 29 (citing Final Remand Results at 56). However, in this instance, the documents' power to clarify is exceedingly clear.

certainly can include that from which input data is derived. The regulation does not free Commerce from its duty to support its determinations with substantial evidence nor does it grant the Department carte blanche to reject information simply because the data on the record is not explicitly erroneous.

In a situation such as this, where the Department has left the record bereft of its reasoning and supplementing the record may elucidate Commerce's rationale, rejecting such documentation may be an abuse of discretion. That is the precise situation the court now faces. Accordingly, the Department's decision to reject Exhibits 1, 2, and 3 due to their failure to clarify reflects an abuse of discretion and the court remands for the purposes of verifying that the proper subset was chosen from among the complete Fufeng sales dataset.

The court recommends that Commerce reopen the record on remand and accept Exhibits 1, 2, and 3 as clarifying information. *See Thai Plastic Bags Indus. Co. v. United States*, __ CIT __, __, 895 F. Supp. 2d 1337, 1346 (2013); *see also Qingdao Sea-Line Trade Co. v. United States*, Slip Op. 13–102, 2013 WL 4038618, at *5 (CIT Aug. 8, 2013) ("Reopening the record is particularly appropriate when, as here, doing so clearly advances the purposes of the remand."). Such a step seems to be the most straightforward—and quite possibly the best—way to support the selection of input sales with substantial evidence.

In any event, the court remands the case to Commerce with directions to articulate its methodology for choosing the Fufeng subset, with reference to the entire Fufeng AR2 dataset. With that information in tow, the court will be properly situated to assess the reasonableness of Commerce's findings with regard to sales price.

CONCLUSION AND ORDER

For the foregoing reasons, the court remands on a limited basis: with reference to the complete Fufeng AR2 dataset, Commerce shall articulate a reasonable method, supported by substantial evidence and in accordance with law, for selecting the input sales for the purposes of its sales price analysis. As part of that determination, the court recommends that Commerce reopen the record and accept Exhibits 1, 2, and 3 as a means of clarifying the Fufeng subset. Once it has chosen that subset and supported that selection with substantial evidence, Commerce is to employ the same comparison methodology, if appropriate, approved here: 1) to determine whether, with regard to the entire Fufeng AR2 dataset, the sales price was atypical and 2) to make a finding under 19 U.S.C. § 1675(a)(2)(B)(iv) as to the *bona fide*

nature of the transaction in question. That *bona fide* inquiry shall incorporate the Department's new sales price analysis as well as all other factors here sustained.

Accordingly, it is hereby:

ORDERED that the *Rescission* is remanded to Commerce for redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce issue a redetermination in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

ORDERED that Commerce explain, with reference to the entire Fufeng AR2 dataset, how it chose the subset of Fufeng [[ ]] xanthan gum sales and use that subset to conduct a sales price comparison; it is further

ORDERED that Commerce conduct a "totality of the circumstances" analysis using the findings here sustained combined with its new sales price finding to determine whether the transaction in question was, or was not, *bona fide*; it is further

ORDERED that the Department reconsider its rejection of Exhibits 1, 2, and 3; it is further

ORDERED that all other challenged determinations of Commerce are sustained; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff and Defendant-Intervenor shall have thirty (30) days from the filing of the redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff's and Defendant-Intervenor's comments to file comments.

Dated: September 25, 2018
New York, New York

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

Slip Op. 18–130

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

[Commerce's *Final Results* in the Administrative Review of Commerce's antidumping duty order on chlorinated isocyanurates from the People's Republic of China are remanded for Commerce to apply the average of the zero rates assessed against the mandatory respondents to Heze Huayi Chemical Co., Ltd., for the 2012–2013 period of review.]

Dated: September 28, 2018

Gregory Menegaz, *Alexandra Salzman*, *James Horgan*, and *John Kenkel*, deKieffer and Horgan, PLLC, of Washington, D.C., for Plaintiff Heze Huayi Chemical Co., Ltd.

David D'Alessandris and *Sonia Orfield* of the United States Department of Justice, of Washington D.C. With them on the were *Joseph Hunt*, Acting Assistant Attorney General, *Jeanne Davidson*, Director, and *Patricia McCarthy*, Assistant Director. Of counsel was *David Richardson* of the Department of Commerce, of Washington, D.C., for the Defendant.

James Cannon, Jr., *Jonathan Zielinski*, and *Ulrika Skitarelic Swanson*, Cassidy Levy Kent (USA), LLP, of Washington, D.C., for the Defendant-Intervenors Clearon Corporation and Occidental Chemical Corporation.

OPINION AND ORDER

Restani, Judge:

This action challenges the final results of the U.S. Department of Commerce ("Commerce")'s administrative review of chlorinated isocyanurates ("chlorinated isos") from the People's Republic of China ("PRC") for the 2012–2013 period of review ("POR"). *See Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 4539 (Dep't Commerce Jan. 28, 2015) ("Final Results"); *see also Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China; 2012–2013*, A-570–898, POR: 6/1/12–5/31/13 (Jan. 21, 2015) ("*I&D Memo*"). Plaintiff Heze Huayi Chemical Co., Ltd. ("Heze") asks the court to remand the case to Commerce with instructions to assign Heze an antidumping rate based on an average of the zero rates assigned to the mandatory respondents or else calculate an individual margin based on record evidence. *See* Plaintiff Heze Huayu Chemical Co., Ltd. Memorandum in Support of Motion for Judgment on the Agency Record at 30 (Apr. 6, 2015) ("Heze 56.2 Br."). Defendant United States ("the Government") asks for a remand in the light of the intervening decision in *Albemarle Corp. v. U.S.*, 821 F.3d 1345 (2016). Defendants Supplemental Brief and Motion for a Voluntary

Remand at 6 (June 21, 2016) ("U.S. Supp. Br."). Defendant-Intervenors Clearon Corp. and Occidental Chemical Company ("Clearon and Occidental") argue that the case should be remanded to Commerce for it to re-open the record and make a determination. Supplemental Brief of Clearon Corp. and Occidental Chemical Corporation at 5–6 (June 21, 2016) ("Clearon Supp. Br."). For the reasons stated below, the case is remanded to Commerce with direction to assign a zero rate to Heze for the relevant period of review.

BACKGROUND

On August 1, 2013, Commerce initiated an administrative review of the antidumping duty ("AD") order on chlorinated isos from the PRC covering the period of review ("POR") from June 1, 2012 through May 31, 2013. *Decision Memorandum for the Preliminary Results of the 2012–2013 Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China*, A-570–898, POR: 6/1/12–5/31/13, at 2 (July 17, 2014) ("*Prelim I&D Memo")*. Amongst a pool of five separate rate applications, Commerce selected the two largest exporters as mandatory respondents–Hebei Jiheng Chemical Co., Ltd. ("Jiheng") and Juancheng Kangtai Chemical Co., Ltd. ("Kangtai"). *Id.* The third largest respondent–Heze Huayi–was neither selected to be a mandatory nor a voluntary respondent, despite Heze's requests to be considered as such. *See Id*; Heze 56.2 Br. at 4–5; U.S. Resp. Br. at 4–5. Heze filed suit challenging Commerce's decision not to select it as a respondent in either capacity, while the Government contended that this action was proper, in particular given Heze's late submission for individual consideration. *See* Heze 56.2 Br. at 8–17; Defendant's Response to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("U.S. Resp. Br.") at 13–15. Clearon Corp. put forth similar arguments to those of the Government with regards to the respondent selection issue. *See* Response Brief of Clearon Corp. and Occidental Chemical Corporation (June 8, 2015) ("Clearon Resp. Br.") at 7–13.

In addition to the respondent selection claims, Heze challenged the assigned antidumping duty rate. Heze 56.2 Br. at 17–27. In the light of the zero rate assigned to the mandatory respondents, Heze contended that the 53.15% rate it was assigned was not supported by substantial evidence. *Id.* at 17–20.[1] The Government and Clearon initially disagreed arguing that it is Commerce's "general rule" to exclude zero rates when determining the proper non-respondent rate.

[1] This matter was assigned to this judge on September 4, 2018. Order of Reassignment, Doc. No. 78. At a conference on September 11, 2018, Heze agreed that there is no need to examine its other data if it receives a rate of zero based on the rate of the selected mandatory respondents. Conference Call, Doc. No. 80.

U.S. Resp. Br. at 26; Clearon Resp. Br. at 14. In their initial briefs, Defendant and Defendant-Intervenor also argued that this practice is consistent with the statute. U.S. Resp. Br. at 26–27; Clearon Resp. Br. at 13–15.

During the pendency of this action, the Federal Circuit issued its opinion in *Albemarle Corp. v. United States*, 821 F.3d 1345 (2016). In that decision, the court held that normally Commerce should average the zero or *de minimus* rates of mandatory respondents in determining the rates of non-examined parties. *See Id.* at 1354.

In the light of *Albemarle*, the court asked the parties to submit supplemental briefing on the decision's impact on this proceeding. Heze argues that given the similarity between it and the plaintiff in *Albemarle*, the court should remand the issue to Commerce with instructions to use the "expected method" and apply the zero rate to Heze for the POR. Plaintiff's Supplemental Brief Concerning the Impact of the Court of Appeal for the Federal Circuit's Decision in *Albemarle* ("Heze Supp. Br.") at 4–12. Clearon disagrees arguing that *Albemarle* is distinguishable and that if the action is remanded, then Commerce should be permitted to reopen the record to assess the proper rate against Heze. Clearon Supp. Br. at 4–6. The United States requests a remand to consider the impact of *Albemarle*. U.S. Supp. Br. at 5–6.

JURISDICTION AND STANDARD OF REVIEW

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

DISCUSSION

In view of the intervening precedent of *Albemarle*, the resolution of this matter is made substantially easier. The Federal Circuit Court of Appeals found Commerce's practice of disregarding zero or *de minimus* mandatory respondent rates when determining the rates of non-respondents to be inconsistent with the Uruguay Round Agreements Act's[2] "expected method." *See Albemarle*, 821 F.3d at 1354.

[2] The text of the relevant section of the Statement of Administrative Action accompanying the Uruguay Round Agreements Act reads:

> 2) All Others Rate Recognizing the impracticality of examining all producers and exporters in all cases. Article 9.4 of the Antidumping Agreement permits the use of an all others rate to be applied to non-investigated firms. To implement the Agreement, section 219(b) of the bill adds section 735(c)(5)(A) to the Act which provides that the all others rate will be equal to the weighted-average of individual dumping margins calculated for those exporters and producers that are individually investigated, exclusive

Albemarle, however, made clear that under some circumstances deviation from this expected calculation method may be reasonable: when there is evidence that the dumping margins have not changed from period to period (and thus the assignment of a rate from a previous review might be appropriate) and when, in the adverse facts available context, "Commerce is allowed to consider deterrence as a factor." *Id.* at 1357. In *Albemarle*, the Court found that neither circumstance was present in that case given evidence that the dumping margin had changed over time and that the non-selected party had fully cooperated with the review, and, in fact, had requested to be individually examined. *Id.* at 1357–58.

Here, neither specified circumstance for deviation from the expected method occurred. First, there is clear evidence that the dumping margins have changed given the mandatory respondents were assigned a zero rate in this review, while they were assigned significant rates in the review immediately prior.[3] *See Final Results*; *Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 4875 (Dep't Commerce Jan. 30, 2014).

Second, like the plaintiff in *Albemarle*, Heze's request that Commerce individually exam it was denied. *See Albemarle*, 821 F.3d at 1349; *Prelim I&D Memo* at 2; Heze 56.2 Br. at 4–5; U.S. Resp. Br. at 4–5. Additionally, despite being rejected as both a mandatory and voluntary respondent, Heze still submitted documentation Commerce requested of the selected mandatory respondents, albeit argu-

of any zero and de minimis margins, and any margins determined entirely on the basis of the facts available. Currently, in determining the all others rate, Commerce includes margins determined on the basis of the facts available.

Section 219(b) of the bill adds new section 735(c)(5)(B) which provides an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or de minimis. In such situations, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for noninvestigated exporters or producers, Commerce may use other reasonable methods." Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201; *see also* 19 U.S.C. § 3512(d)(noting that the statement of administrative action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

[3] In the 2011–2012 POR, Commerce assigned a 47.17% rate to Hebe Jiheng Chemical Co., Ltd. and a 59.12% rate to Juancheng Kangtai Chemical Co., Ltd. *Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 4875 (Dep't of Commerce Jan. 30, 2014).

ably after the deadline. *See* Heze 56.2 Br. at 13–14; U. S. Resp. Br. at 4. In view of Heze's repeated attempts to cooperate with Commerce, deterrence is not a reasonable reason to deviate from the expected method of averaging the rates assigned to mandatory respondents.

Given that the Federal Circuit left open that other circumstances may exist that could make deviation from the expected method reasonable, the court asked the United States during the conference of September 11, 2018, whether there was any reason for Commerce to do anything other than apply the zero rate to Heze in this circumstance. The United States responded that no such reason existed. *See* United States Response to Court's September 12, 2018, Order at 2. The court concludes there is no reason for further examination of any evidence and remands this action with instructions for Commerce to apply a zero rate to Heze for the 2012–2013 POR.

CONCLUSION

For the foregoing reasons, the court remands this matter for Commerce to apply the mandatory respondent's averaged zero rate to Heze Huayi. Commerce shall file its remand determination with the court on or before 21 days of the issuance of this opinion. As there is no new action possible that could require further briefing, the court does not set a further schedule, but will enter judgment upon receipt of the conforming determination.

Dated: September 28, 2018
New York, New York

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

Slip Op. 18–131

AGILENT TECHNOLOGIES, Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00183

[Remanding the U.S. Department of Commerce's redetermination on remand scope ruling on Agilent Technologies' mass filter radiator.]

Dated: October 1, 2018

George R. Tuttle, III, Law Offices of George R. Tuttle, A.P.C., of Larkspur, CA, and *Melanie A Frank*, The Global Trade Group, PLLC, of Arlington, VA, for Plaintiff Agilent Technologies.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica R. DiPietro*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price, *Derick G. Holt*, and *Robert E. DeFrancesco, III*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Aluminum Extrusions Fair Trade Committee. *Laura El-Sabaawi* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Agilent Technologies ("Agilent"), a manufacturer of electronic and bio-analytical measurement instruments, challenges a scope ruling on Agilent's mass filter radiator issued by the U.S. Department of Commerce ("Department" or "Commerce"). Before the court are the results of redetermination on remand filed by Commerce pursuant to the court's prior opinion, *Agilent Techs. v. United States*, 41 CIT __, 256 F. Supp. 3d 1338 (2017) ("*Agilent I*"). *See* Results Redetermination Pursuant Court Remand, Dec. 15, 2017, ECF No. 40–1 ("*Remand Results*").

In its initial scope ruling, Commerce determined that the mass filter radiator is covered by the scope of the antidumping and countervailing duty orders (collectively, "Orders") on aluminum extrusions from the People's Republic of China ("China"). *See* Final Scope Ruling on Agilent Technologies, Inc.'s Mass Filter Radiator, A-570–967 and C-570–968, (Aug. 10, 2016), *available at* http://enforcement.trade.gov/download/prc-ae/scope/97-mass-filter-radiator 10aug16.pdf (last visited Sept. 26, 2018) ("Final Scope Ruling"); *see also Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order) ("*Antidumping Duty Order*"); *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order) ("*Countervailing Duty Order*"). Plaintiff filed a Rule 56.2 motion for judgment on the agency record, and the court remanded Commerce's Final Scope Ruling with instructions for Commerce to fully address the evidence on the record relating to the applicability of the finished heat sink exclusion. *See Agilent I*, 41 CIT at __, 256 F. Supp. 3d at 1345. Commerce issued its Results of Redetermination Pursuant to Court Remand on December 15, 2017. *See Remand Results*. Agilent contests the Remand Results. *See* Pl.'s Comments Def.'s Redetermination Remand, Jan. 16, 2018, ECF No. 42 ("Pl.'s Comments"). Defendant United States ("Government") and Defendant-Intervenor Aluminum Extrusions Fair Trade Committee

support Commerce's Remand Results. *See* Def.'s Resp. Comments Department Commerce's Remand Results, Jan. 29, 2018, ECF No. 43 ("Def.'s Comments"); Def.-Intervenor Aluminum Extrusions Fair Trade Committee's Reply Comments Final Results Redetermination Pursuant Ct. Remand, Jan. 30, 2018, ECF No. 46 ("Def.-Intervenor's Comments").

ISSUE PRESENTED

The court considers whether Commerce's scope redetermination on remand regarding Plaintiff's mass filter radiator is supported by substantial evidence.

For the reasons set forth below, the court concludes that Commerce's redetermination results are not supported by substantial evidence and remands this matter for further proceedings consistent with this opinion.

BACKGROUND

The court presumes familiarity with the facts of this case. *See Agilent I*, 41 CIT at __, 256 F. Supp. 3d at 1340–41. Commerce issued two Orders on aluminum extrusions from China on May 26, 2011. *See Antidumping Duty Order*, 76 Fed. Reg. at 30,650; *Countervailing Duty Order*, 76 Fed. Reg. at 30,653. Both Orders have identical scope language, which provide the following description of the subject merchandise:

> The merchandise covered by this order is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents).

Antidumping Duty Order, 76 Fed. Reg. at 30,650; *Countervailing Duty Order*, 76 Fed. Reg. at 30,653.

The Orders explicitly exclude "finished heat sinks." *See Antidumping Duty Order*, 76 Fed. Reg. at 30,651; *Countervailing Duty Order*, 76 Fed. Reg. at 30,654. "Finished heat sinks" are defined as follows:

> Finished heat sinks are fabricated heat sinks made from aluminum extrusions the design and production of which are organized around meeting certain specified thermal performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements.

Antidumping Duty Order, 76 Fed. Reg. at 30,651; *Countervailing Duty Order*, 76 Fed. Reg. at 30,654.

Plaintiff manufactures a mass filter radiator, which houses the central components of a mass spectrometer and plays an important role in transferring heat from critical components. *See* Scope Inquiry on Certain Finished Aluminum Components from the People's Republic of China (Case Nos. A-570–967 and C-570–968): Mass Filter Radiator at 5, PD 1, bar code 3245192–01 (Dec. 3, 2014) ("Agilent's Scope Ruling Request"). Agilent asserts that its mass filter radiator should be excluded from the scope of the Orders because it is a finished heat sink designed, produced, and tested to meet specified thermal resistance properties to remove damaging heat from electronic equipment. *See id.* at 5–12.

The court remanded the Final Scope Ruling after determining that Commerce failed to consider certain record evidence in support of Agilent's position that the mass filter radiator is covered by the finished heat sink exclusion. *Agilent I*, 41 CIT at __, 256 F. Supp. 3d at 1345. The court instructed Commerce to consider Agilent's R&D Declaration, scope ruling request, questionnaire response, presentation slides, responses to Petitioner's comments, and two supplemental questionnaire responses. *Id.*

On December 15, 2017, Commerce issued its Remand Results, finding that Agilent's mass filter radiator is covered by the scope of the Orders and does not qualify for the finished heat sink exclusion. *See Remand Results* 2. Agilent submitted comments to the court arguing that the Remand Results were not supported by substantial evidence on the record and were contrary to the law. *See* Pl.'s Comments 6. Defendant argues that Commerce was reasonable in determining that the mass filter radiator does not meet the finished heat sink exclusion. *See* Def.'s Comments 28. The court held oral argument on June 5, 2018. *See* Oral Argument, Jun. 5, 2018, ECF No. 53.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to review Commerce's scope determination pursuant to 28 U.S.C. § 1581(c) (2012). Commerce's final scope determination will be upheld unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

In determining whether a product is within scope of the Orders, "the scope of a final order may be clarified, [but] it can not be changed in a way contrary to its terms." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). Because the descriptions of subject merchandise contained in Commerce's determi-

nations must be written in general terms, it is often difficult to determine whether a particular product is included within the scope of an antidumping or countervailing duty order. *See* 19 C.F.R. § 351.225(a) (2016); *Duferco Steel*, 296 F.3d at 1096.

Antidumping and countervailing duty 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 Steel*, 296 F.3d at 1089. Generally, Commerce "enjoys substantial freedom to interpret and clarify its antidumping orders." *Id.* (quoting *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir 2002)). Commerce is given "substantial deference" to interpret its own antidumping duty and countervailing duty orders. *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). If the Department fails "to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion[,] [the Department's determination is] unsupported by substantial evidence." *Ceramark Tech., Inc. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1317, 1323 (2014) (quoting *Allegheny Ludlum Corp. v. United States*, 24 C.I.T. 452, 479, 112 F. Supp. 2d 1141, 1165 (2000)). Although Commerce's "explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." NMB Singapore Ltd. v. United States, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Agilent argues that Commerce's Remand Results are unsupported by substantial evidence and are contrary to the law. *See* Pl.'s Comments 6. Plaintiff argues that the mass filter radiator meets all of the criteria identified by Commerce to qualify as a finished heat sink and should be excluded from the scope of the Orders. *See id.* at 25–28. The Government counters that Commerce's determination is supported by substantial evidence because the record demonstrates that the mass filter radiator does not qualify for the finished heat sink exclusion. *See* Def.'s Comments 11–24. Commerce focuses on its assertion that Agilent's mass filter radiator does not meet the definition of a finished heat sink because it was not designed and produced to meet specified thermal performance requirements and was not tested for compliance with specified design requirements. *See id.*

When interpreting the antidumping duty order's scope, Commerce first examines the scope of the Order to determine if that language "is ambiguous and open to interpretation." *Kirovo-Chepetsky Khimichesky Kombinat, JSC v. United States*, 39 CIT __, __, 58 F. Supp. 3d 1397, 1402 (2015) (citing *Mid Continent Nail Corp. v. United States*,

725 F.3d 1295, 1302 (Fed. Cir. 2013)); *see also Duferco Steel*, 296 F.3d at 1097 ("[A] predicate for the interpretative process is language in the order that is subject to interpretation."). If Commerce finds that scope language is subject to interpretation, Commerce may turn to the (k)(1) factors, *i.e.*, "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [U.S. International Trade] Commission" for clarification. 19 C.F.R. § 351.225(k)(1); *see also Tak Fat Trading Co. v.* United States, 396 F.3d 1378, 1382 (Fed. Cir. 2005). While these (k)(1) sources may provide valuable guidance as to the interpretation of the final order, "they cannot substitute for language in the order itself." *Duferco Steel*, 296 F.3d at 1097.

Pursuant to its regulation, if Commerce is able to interpret the scope of the Order after examination of the (k)(1) factors—that is, if Commerce finds that the (k)(1) factors are dispositive—then its inquiry ends, and Commerce will issue a final scope ruling regarding whether the subject merchandise is covered by the Order. *See* 19 C.F.R. § 351.225(d). For a (k)(1) determination "to be dispositive, the permissible sources examined by Commerce 'must be controlling of the scope inquiry in the sense that they *definitely answer* the scope question.'" *OTR Wheel Eng'g, Inc. v. United States*, 36 CIT __, __, 853 F. Supp. 2d 1281, 1287–88 (2012) (quoting *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)) (emphasis added). Should Commerce find that the (k)(1) factors are not dispositive, however, it must further consider the (1) "physical characteristics of the product"; (2) "expectations of the ultimate purchasers"; (3) "ultimate use of the product"; (4) "channels of trade in which the product is sold"; and (5) "manner in which the product is advertised and displayed" (*i.e.*, the (k)(2) factors). 19 C.F.R. § 351.225(k)(2). Where a scope determination is challenged, the Court's purpose is to determine whether the scope of the Order "contain[s] language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel*, 296 F.3d at 1089.

Commerce's Final Scope Ruling found that the mass filter radiator was covered by the scope of the Orders. *Remand Results* 9. Commerce determined that the mass filter radiator "consisted entirely of a single piece of extruded aluminum which is further processed, including being [computerized numerical control] machined and plated with a proprietary material, in a manner consistent with the scope of the *Orders*." *Id.* Commerce continued to find that the mass filter radiator does not meet the requirements of the heat sink exclusion. *Id.* at 49–50.

To determine whether Plaintiff's product is included within the scope of the Order, Commerce first looks to the plain language of the Order. The scope of the Orders includes "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." *Antidumping Duty Order*, 76 Fed. Reg. at 30,651; *Countervailing Duty Order*, 76 Fed. Reg. at 30,654. Agilent's mass filter radiator is created by machining and plating a single piece extruded aluminum tube. *See* Agilent's Scope Ruling Request at 3. Based on Agilent's Scope Ruling Request, Commerce determined that Agilent's mass filter radiator is covered by the plain language of the Orders. *See* Final Scope Ruling at 17. Commerce concluded that unless otherwise excluded as "finished merchandise" or a "finished heat sink," the mass filter radiator is covered by the scope of the Orders. *See id.*

Commerce continued its analysis by examining the exclusion language for "finished heat sink" to determine whether the mass filter radiator was expressly excluded from the scope of the Orders. *See Remand Results* 11. In the Remand Results, Commerce identified five requirements that must be present for a product to qualify for the "finished heat sink" exclusion:

> 1) the product must be a "fabricated heat sink{} made from aluminum extrusions;" 2) specified thermal performance requirements must exist; 3) the product's design must have been organized around meeting those specified thermal performance requirements; 4) the product's production must be organized around meeting the specified thermal performance requirements; and 5) the product must have been fully, albeit not necessarily individually, tested to comply with the specified thermal performance requirements. We have determined that in accordance with the language of the scope, all five of these elements must be present for the [mass filter radiator] to be a finished heat sink.

Id.; *see also* Final Scope Ruling at 21.

Pursuant to a (k)(1) analysis, Commerce considers the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of Commerce and the Commission, including prior scope determinations, when analyzing whether a particular product is included within the scope of an Order. 19 C.F.R. § 351.225(k)(1). Only when a (k)(1) analysis is not dispositive will Commerce "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." *Id.* § 351.225(k)(2).

In its Remand Results, Commerce concluded that Agilent did not provide evidence of any specified thermal performance requirements, particularly related to the design, production, and testing of its products to meet the specified thermal performance requirements. *See Remand Results* 42–43. Commerce determined that "dimensional tolerances, regardless of precision, and regardless of documentation, even those established pursuant to enhancing thermal performance, are not 'specified thermal performance requirements,' and do not turn . . . [products] into finished heat sinks for purposes of the scope exclusion at issue." *Id.* at 25. The Department noted that the use of computer controlled milling machine processing to produce a product also does not make it a finished heat sink. *Id.* at 24–25. Commerce disregarded much of the evidence submitted by Agilent regarding the existence of specified thermal performance requirements. *Id.* at 25–35. Based on this perceived lack of evidence, Commerce concluded that Agilent's mass filter radiator did not meet the finished heat sink exclusion requirements and was included in the scope of the Orders. *Id.* at 32–37.

Agilent argues that its mass filter radiator is designed, produced, and tested around a specified 200 degrees Celsius thermal performance requirement that must be met in order to absorb a specific amount of heat and to function properly as a finished heat sink. *See* Pl.'s Comments 15–28; *see also* Oral Argument at 19:56–20:01, 21:26–21:40, 22:08–22:26, 40:27–40:46, 1:26:31–1:26:55, 1:29:00–1:29:11. Agilent asserts that its product was developed decades ago, and that the specified thermal performance requirements remain the same today as when the product was developed originally. *See* Pl.'s Comments 16–17, 23. Agilent states that the quadrupole temperature must be 200 degrees Celsius for the thermal absorption and heat transfer properties of the mass filter radiator to function properly as designed. *See id.* at 22–23. Plaintiff explained that it uses specific dimensional tolerances in order to achieve the required thermal absorption of its mass filter radiator. *See id.* at 19–20. Agilent contends that it provided documents to support its position. *See id.* at 31. Commerce largely ignored Agilent's arguments and evidence regarding the specified thermal performance requirements of its mass filter radiator.

For a (k)(1) determination "to be dispositive, the permissible sources examined by Commerce must be controlling of the scope

inquiry in the sense that they *definitely answer* the scope question." *OTR Wheel Eng'g*, 36 CIT __, __, 853 F. Supp. 2d at 1287–88 (quoting *Sango Int'l*, 484 F.3d at 1379). The exclusionary provision of the Orders does not unambiguously define "the design and production of which are organized around meeting certain specified thermal performance requirements," *Antidumping Duty Order*, 76 Fed. Reg. at 30,651; *Countervailing Duty Order*, 76 Fed. Reg. at 30,654. Commerce conducted a (k)(1) analysis, but discounted most of Plaintiff's evidence regarding specified thermal performance requirements and related physical design properties of the mass filter radiator. Commerce did not reach the 19 C.F.R. § 351.225(k)(2) factors.

Both parties discuss at length the meaning of the exclusion term "specified thermal performance requirements." The Parties differ in their understanding of how the thermal performance requirements may be met, and it is unclear how the industry views "specified thermal performance requirements." Commerce concludes merely that "dimensional tolerances, regardless of precision, and regardless of documentation, even those established pursuant to enhancing thermal performance, are not 'specified thermal performance requirements,' and do not turn . . . [products] into finished heat sinks for purposes of the scope exclusion at issue." *Remand Results* 25.

Commerce relies heavily on the prior Final ECCO Light Bars Scope Ruling for support that "dimensional or other physical tolerances" are not specified thermal performance requirements "even if such physical tolerances are specifically identified, are precise, and are established explicitly to enhance thermal performance." *Id.* at 24 (citing Final ECCO Light Bars Scope Ruling at 17–21, PD 35, bar code 3523146–02 (Nov. 24, 2014) ("ECCO")). Commerce's reliance on ECCO is misplaced. In ECCO, Commerce found that "ECCO fail[ed] to demonstrate how these identified specifications translate into ECCO's product meeting specified thermal performance requirements." *Id.* The key element is apparently the need for a "translation" or explanation of how the physical design meets specified thermal performance requirements. *See id.* ECCO supports an analysis of specific facts to determine whether physical design requirements can establish the existence of specified thermal performance requirements. A company must provide information explaining how the physical elements lead to specified thermal performance requirements—a "translation"—something that ECCO failed to do, but the possibility is not precluded. *See id.* at 19–24.

The court concludes that Commerce was unreasonable when it discounted Agilent's evidence of a target quadrupole temperature of 200 degrees Celsius for the mass filter radiator to pass user-selected

tests, and evidence of dimensional or other physical tolerances that were designed to meet specified thermal performance requirements. Commerce's determination lacks substantial evidence that Agilent did not meet the specified thermal performance requirement of the finished heat sink exclusion. The sources used by Commerce, including the Department's reliance on the prior ECCO scope ruling, do not definitively answer the question of whether Agilent's mass filter radiator is excluded from the scope of the Orders. It seems quite unlikely that Commerce can confine itself to a limited 19 C.F.R. § 351.225(k)(1) analysis here and reach a supported conclusion for the question of whether Agilent's products are designed and produced around meeting specified thermal performance requirements. Numerous questions remain. For example: What are specified thermal performance requirements? How does the industry view products that are designed and produced around meeting specified thermal performance requirements? What are the expectations of the ultimate purchasers? What is the ultimate use of the mass filter radiator? These are the types of questions that would appear to require a more complete (k)(2) analysis. Commerce should revisit its analysis and provide other substantial evidence supporting a definitive answer, or it should proceed with a full inquiry pursuant to 19 C.F.R. § 351.225(k)(2).

CONCLUSION

The court remands the matter to Commerce for further evaluation pursuant to 19 C.F.R. § 351.225(k). For the reasons set forth above, and in accordance with the foregoing, it is hereby

ORDERED that Commerce's *Remand Results* regarding Agilent's mass filter radiator are remanded for Commerce to conduct an additional evaluation pursuant to 19 C.F.R. § 351.225(k); and it is further

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

ORDERED that Commerce shall file the administrative record on the second remand redetermination on or before December 21, 2018; and it is further

ORDERED that the Parties shall file any comments on the second remand determination on or before January 7, 2019; and it is further

ORDERED that the Parties shall file any replies to the comments on or before February 6, 2019; and it is further

ORDERED that the joint appendix shall be filed on or before February 13, 2019.

Dated: October 1, 2018
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–132

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

Before: Judge Gary S. Katzmann,
Court No. 17–00131

[Commerce's *Final Results* are remanded and plaintiff's motion for judgment on the agency record is granted in part.]

Dated: October 1, 2018

Robert K. Williams, Clark Hill PLC, of Chicago, IL, argued for plaintiff. With him on the brief were *Mark R. Ludwikowski* and *Lara A. Austrins*.

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

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for defendant-intervenor. With him on the brief were *Ping Gong* and *Lydia K. Childre*.

OPINION

Katzmann, Judge:

In this iteration of litigation centering on whether a product is classified as a nail, plaintiff Midwest Fastener Corp. ("Midwest") challenges the Department of Commerce's ("Commerce") determination that its imported zinc and nylon anchors fall within the scope of the *Certain Steel Nails From the Socialist Republic of Vietnam: Countervailing Duty Order*, 80 Fed. Reg. 41,006 (Dep't Commerce July 14, 2015), and *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015) (collectively, the "*Orders*"). Midwest argues that its anchors are not steel nails and, therefore, do not fall within the scope of the *Orders* and that Commerce's scope determination is unsupported by substantial evidence on the record and is otherwise not in accordance with law. The court concludes that Commerce's determination was not in accordance with law.

BACKGROUND

A. *Legal and Regulatory Framework of Scope Reviews Generally.*

Dumping occurs when a foreign company sells a product in the United States for less than fair value – that is, for a lower price than

in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012)). Similarly, a foreign country may provide a countervailable subsidy to a product and thus artificially lower its price. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To empower Commerce to offset economic distortions caused by dumping and countervailable subsidies, Congress enacted the Tariff Act of 1930.[1] *Sioux Honey Ass'n*, 672 F.3d at 1046–47. Under the Tariff Act's framework, Commerce may — either upon petition by a domestic producer or of its own initiative — begin an investigation into potential dumping or subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Id.*

In order to provide producers and importers with notice as to whether their products fall within the scope of an antidumping or countervailing duty order, Congress has authorized Commerce to issue scope rulings clarifying "whether a particular type of merchandise is within the class or kind of merchandise described in an existing . . . order." 19 U.S.C. § 1516a(a)(2)(B)(vi). As "no specific statutory provision govern[s] the interpretation of the scope of antidumping or countervailing orders," Commerce and the courts developed a three-step analysis. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015); *Polites v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1352, 1354 (2011); 19 C.F.R. § 351.225(k).

Because "[t]he language of the order determines the scope of an antidumping duty order[,]" any scope ruling begins with an examination of the language of the order at issue. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). If the terms of the order are unambiguous, then those terms govern. *Id.* at 1382–83. "[T]he question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists is a question of law that we review de novo." *Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017). As the Federal Circuit has held, the terms of an order govern its scope. *Duferco*, 296 F.3d at 1097; *see Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998). "Although the scope of a final order may be clarified, it can not be changed in a way contrary to its terms." *Duferco*, 296 F.3d at 1097 (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). For that reason, "if [the scope of an order] is not ambiguous, the plain meaning of the lan-

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

guage governs." *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012).

"In determining the common meaning of a term, courts may and do consult dictionaries, scientific authorities, and other reliable sources of information, including testimony of record." *NEC Corp. v. Dep't of Commerce*, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999) (quoting *Holford USA Ltd. v. United States*, 19 CIT 1486, 1493–94, 912 F. Supp. 555, 561 (1995)). Furthermore, "[b]ecause the primary purpose of an antidumping order is to place foreign exporters on notice of what merchandise is subject to duties, the terms of an order should be consistent, to the extent possible, with trade usage." *ArcelorMittal*, 694 F.3d at 88.

If Commerce determines that the terms of the order are either ambiguous or reasonably subject to interpretation, then Commerce "will take into account . . . the descriptions of the merchandise contained in the petition, the initial investigation, and [prior] determinations [of Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1) ("(k)(1) sources"); *Polites*, 755 F. Supp. 2d at 1354; *Meridian Prod.*, 851 F.3d at 1382. To be dispositive, the (k)(1) sources "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Polites*, 755 F. Supp. 2d at 1354 (quoting *Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)). If Commerce "can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of . . . section [351.225], whether a product is included within the scope of an order . . . [Commerce] will issue a final ruling[.]" 19 C.F.R. § 351.225(d). If the § 351.225(k)(1) analysis is not dispositive, Commerce will initiate a scope inquiry under § 351.225(e), and apply the five criteria from *Diversified Prods. Corp v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983) as codified in 19 C.F.R. § 351.225(k)(2).[2]

B. *History of the Orders.*

On May 29, 2014, Mid Continent Steel & Wire Inc. ("Mid Continent") petitioned Commerce to impose antidumping and countervailing duties on certain steel nails from Vietnam. Petition for the Imposition of Antidumping and Countervailing Duties Against Certain Steel Nails from India, The Republic of Korea, Malaysia, The Sultanate of Oman, Taiwan, The Republic of Turkey, And The Social Repub-

[2] These criteria are: (1) the physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2); *see Diversified Prods.*, 572 F. Supp. at 889.

lic of Vietnam, (May 29, 2014). Subsequently, after having determined that dumping was occurring, Commerce issued its antidumping and countervailing duty *Orders* covering certain steel nails from the Socialist Republic of Vietnam. The scope language of the *Orders* reads in full:

> The merchandise covered by the Orders is certain steel nails having a nominal shaft length not exceeding 12 inches. Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel. *Certain steel nails may consist of a one piece construction or be constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and may have any type of surface finish, head type, shank, point type and shaft diameter. Finishes include, but are not limited to, coating in vinyl, zinc galvanized, including but not limited to electroplating or hot dipping one or more times, phosphate, cement, and paint*. Certain steel nails may have one or more surface finishes. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the nail using a tool that engages with the head. Point styles include, but are not limited to, diamond, needle, chisel and blunt or no point. Certain steel nails may be sold in bulk, or they may be collated in any manner using any material.
>
> Excluded from the scope of the Orders are certain steel nails packaged in combination with one or more non-subject articles, if the total number of nails of all types, in aggregate regardless of size, is less than 25. If packaged in combination with one or more non-subjected articles, certain steel nails remain subject merchandise if the total number of nails of all types, in aggregate regardless of size, is equal to or greater than 25, unless otherwise excluded based on the other exclusions below.
>
> Also excluded from the scope are certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article falls into one of the following eight groupings: 1) builders' joinery and carpentry of wood that are classifiable as windows, French-windows and their frames; 2) builders' joinery and carpentry of

wood that are classifiable as doors and their frames and thresholds; 3) swivel seats with variable height adjustment; 4) seats that are convertible into beds (with the exception of those classifiable as garden seats or camping equipment); 5) seats of cane, osier, bamboo or similar materials; 6) other seats with wooden frames (with the exception of seats of a kind used for aircraft or motor vehicles); 7) furniture (other than seats) of wood (with the exception of i) medical, surgical, dental or veterinary furniture; and ii) barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements); or 8) furniture (other than seats) of materials other than wood, metal, or plastics (e.g., furniture of cane, osier, bamboo or similar materials). The aforementioned imported unassembled articles are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81, or 9403.89.

Also excluded from the scope of the Orders are certain steel nails that meet the specifications of Type I, Style 20 nails as identified in Tables 29 through 33 of ASTM Standard F1667 (2013 revision).

Also excluded from the scope of the Orders are nails suitable for use in powder-actuated hand tools, whether or not threaded, which are currently classified under HTSUS subheadings 7313.00.20.00 and 7313.00.30.00.

Also excluded from the scope of the Orders are nails having a case hardness greater than or equal to 50 on the Rockwell Hardness C scale (HRC), a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

Also excluded from the scope of the Orders are corrugated nails. A corrugated nail is made up of a small strip of corrugated steel with sharp points on one side.

Also excluded from the scope of the Orders are thumb tacks, which are currently classified under HTSUS subheading 7317.00.10.00.

Certain steel nails subject to the Orders are currently classified under HTSUS subheadings 7317.00.55.02, 7317.00.55.03, 7313.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11,

> 7317.00.55.18, 7317.00.55.19, 7313.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60, and 7317.00.75.00.
>
> Certain steel nails subject to the Orders also may be classified under HTSUS subheading 8206.00.00.00 or other HTSUS subheadings.
>
> While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the Orders is dispositive.

Orders (emphasis added).

C. *Factual and Procedural History of this Case.*

On November 9, 2016, Midwest filed a request with Commerce for a scope ruling that its zinc and nylon anchors should be excluded from the scope of the *Orders*. Certain Steel Nails from the Socialist Republic of Vietnam: Midwest Fastener Scope Request: Zinc and Plastic Anchors, P.R. 1 (Nov. 9, 2016) ("*Scope Ruling Request*"). In its *Scope Ruling Request*, Midwest described its zinc and nylon anchors as follows:

> The anchors are made of two components. These components are a zinc or nylon body, and a steel pin. In both cases, the body is the component that causes the product to function as an anchor when it is expanded against the sides of the hole drilled into the masonry. . . The Zinc Anchors are preassembled so that the pin is physically attached to the zinc body. They cannot be separated without destruction of the anchor. In a Nylon Anchor, the steel pin is not permanently attached to the nylon body. But the pin is not a nail because the head is rounded and slotted like the head of a screw, and the shaft is partially threaded. Moreover, the body, whether zinc or nylon, is the component which gives the anchor its ability to function. This occurs when the pin is driven or screwed, in the case of the nylon anchors, into the body. This causes the body to expand against the sides of the hole into which it is inserted.

Id. at 6, 8–9.

Midwest also cited HQ H030415, a 2010 ruling by Customs and Border Patrol ("CBP"), which determined that steel nail and zinc masonry anchors previous classified under HTSUS 7317 (articles of iron or steel) were properly classified under HTSUS 7907.00.6000 ("Other articles of zinc: Other"). HQ H030415: Classification of Steel Nail and Zinc Masonry Anchors, P.R. 1 (July 13, 2010) at Ex. 1.

Following Midwest's *Scope Ruling Request*, Mid Continent submitted comments arguing that Midwest's zinc and nylon anchors were within the scope of the *Orders*. Letter from The Bristol Group PLLC to Sec'y of Commerce: Petitioner Opposition to Midwest Fastener Scope Ruling Request, P.R. 7 (Dec. 6, 2016) ("Mid Continent Rebuttal"). On December 20, 2016, Commerce issued a letter extending the deadline for issuing a final scope ruling on Midwest's *Scope Ruling Request* to February 13, 2017, "due to complexities of this scope request." Certain Steel Nails from the Socialist Republic of Vietnam: Extension of Time for Scope Ruling, P.R. 8 (Dec. 20, 2016).

On February 13, 2017, Commerce sent a supplemental questionnaire to Midwest requesting: (1) whether the nail component could be separated from the anchor body, (2) product literature on Midwest's anchors, and (3) samples of the zinc and nylon anchors. Request for Additional Information Pertaining to Midwest Fastener's Zinc and Nylon Anchors Scope Ruling Request, P.R. 10 (Feb. 13, 2017). On February 21, 2017, Midwest submitted its response and supplemental materials. Letter from Clark Hill PLC to Sec'y of Commerce: Resp. to Suppl. Questionnaire, P.R. 12–14 (Feb. 21, 2017) ("Midwest Resp."). On March 1, 2017, Mid Continent filed comments in rebuttal to Midwest's response to the supplemental questionnaire. Letter from the Bristol Group PLLC to Sec'y of Commerce: Petitioner Comments to Suppl. Questionnaire Resp., P.R. 15 (Mar. 1, 2017). On April 24, 2017, Commerce issued a second letter, again extending the deadline for issuing a final scope ruling on Midwest's *Scope Ruling Request* to May 26, 2017, "due to the complexities of this scope request." Certain Steel Nails from the Socialist Republic of Vietnam: Extension of Time for Scope Ruling, P.R. 16 (Apr. 24, 2017).

On May 17, 2017, Commerce issued its *Antidumping and Countervailing Duty Orders on Certain Steel Nails from the Socialist Republic of Vietnam: Final Scope Ruling on Midwest Fastener, Corp.'s Zinc and Nylon Anchors*, P.R. 17 (Dep't Commerce May 17, 2017) ("*Final Scope Ruling*"), in which it determined that Midwest's zinc and nylon anchors were included within the unambiguous language of the scope of the *Orders* because they consisted of two components: a steel nail with a zinc or nylon anchor body attached. Specifically, Commerce determined that: (1) a plain reading of the scope covered any nail consisting of two components with any steel content, and (2) that the (k)(1) sources, including the ITC Report, and its prior scope rulings supported its conclusion. *Id.* at 12–13. On June 2, 2017, Commerce instructed CBP to continue to suspend liquidation of entries of certain

steel nails from Vietnam, including Midwest's zinc and nylon anchors. Message No. 7153302: CBP Posted Instructions from Commerce, P.R. 18 (July 27, 2017).

Midwest filed a complaint with this court contesting the *Final Scope Ruling* and on November 28, 2017, Midwest submitted its Motion for Judgment on the Agency Record and Brief in Support. Compl., June 30, 2017, ECF No. 11; Pl.'s Br., ECF No. 32. Defendant the United States ("the Government") and defendant-intervenor Mid Continent submitted their briefs in opposition on March 7, 2018. Def.'s Br., ECF No. 38; Def.-Inter.'s Br., ECF No. 37. Midwest filed its reply brief on April 9, 2018. Pl.'s Reply, ECF No. 39. Oral argument was held before this court on September 12, 2018. ECF No. 47.

DISCUSSION

The Government argues that (1) the plain meaning of the unambiguous language of the scope of the *Orders* includes Midwest's zinc and nylon anchors; (2) the (k)(1) sources — including the description of the merchandise, the ITC Report, and Commerce's prior scope determinations — support its determination that Midwest's zinc and nylon anchors reasonably fall within the plain meaning of the scope language; (3) Commerce properly did not initiate a (k)(2) formal scope inquiry because the plain meaning of the *Orders* and the (k)(1) factors dispositively include Midwest's anchors within the scope of the *Orders*; and (4) Commerce properly instructed CBP to continue suspension of liquidation of Midwest's zinc and nylon anchors because its anchors had always been subject merchandise under the scope of the *Orders*.

I. *The Unambiguous Language of the Scope of the Orders Does Not Include Midwest's Anchors.*

The Government argues that the plain description of the scope of the *Orders* covering "certain steel nails of two or more components" includes zinc and nylon anchors. Def.'s Br. at 13. Specifically, the Government argues that any nail consisting of one or two components falls within the plain meaning of the scope language because the scope of the *Orders* (1) fails to specify what shall be considered a two-piece nail and (2) fails to specify a steel content specification. *Id.* Therefore, any steel nail is considered subject merchandise. *Id.* Further, the Government argues that the "steel pin" is the critical component because the anchor cannot function without it. *Id.* Therefore, according to the Government, Midwest's products are two-piece nails covered by the plain language of the *Orders*.

As the Federal Circuit has held, the terms of an order govern its scope. *Duferco*, 296 F.3d at 1097; *see Eckstrom Indus*, 254 F.3d at

1072; *Wheatland Tube*, 161 F.3d at 1370. Additionally, "[a]lthough the scope of a final order may be clarified, it can not be changed in a way contrary to its terms." *Duferco*, 296 F.3d at 1097 (quoting *Smith Corona Corp.*, 915 F.2d at 686). For that reason, "if [the scope of an order] is not ambiguous, the plain meaning of the language governs." *ArcelorMittal*, 694 F.3d at 87.

"In determining the common meaning of a term, courts may and do consult dictionaries, scientific authorities, and other reliable sources of information, including testimony of record." *NEC Corp.*, 74 F. Supp. 2d at 1307 (quoting *Holford*, 912 F. Supp. at 561). A nail, as defined by OXFORD'S ENGLISH DICTIONARY (3rd ed. 2003) is "a small metal spike 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." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines a nail as "[a] slim, pointed piece of metal hammered into material as a fastener." Similarly, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED)("WEBSTER'S) (1993) defines a nail as "a slender and usually pointed and headed fastener designed for impact insertion." These definitions present a "single clearly defined or stated meaning": a slim, usually pointed object used as a fastener for impact insertion. *Unambiguous*, WEBSTER'S (1986), *quoted in Meridian*, 851 F.3d at 1381 n.7. Therefore, "nail" is an unambiguous term.

The merchandise here does not fit into the above definitions. Midwest describes its zinc and nylon anchors as: "a zinc or nylon body, and a steel pin." *Scope Ruling Request* at 6. Commerce made its determination based upon the steel pin, arguing "a critical portion of the two-piece anchors (*i.e.*, the nail itself) is, in fact, made of steel." *Final Scope Ruling* at 12. However, Midwest's zinc anchors "cannot be separated without destruction of the anchor," *Scope Ruling Request* at 9, and the nylon anchor "will not function without the pin. That is, the pin expands the nylon body when it is driven or screwed into place," *Midwest Resp.* at 2. As neither of Midwest's anchors are reasonably separable, they are unitary articles of commerce, which Commerce seems to acknowledge in its *Final Scope Ruling*. *Final Scope Ruling* at 12 (describing Midwest's products as "two-piece items" and "steel nail[s] of two components"). Accordingly, the entire product, not just a component part, must be defined as a nail to fall within the scope of the *Orders*.

To be sure, under the *Orders*, "[c]ertain steel nails may . . . be constructed of two or more pieces." Here, however, the entire product is not a nail "constructed of two or more pieces." As stated *supra*, a nail is defined as a fastener inserted by impact into the materials to

be fastened. However, Midwest's anchors are not inserted by impact into the materials to be fastened; rather, "the body is the component that causes the product to function as an anchor when it is expanded against the sides of the hole [pre-]drilled into the masonry." *Scope Ruling Request* at 6; *see also OMG, Inc. v. United States*, 42 CIT ___, Slip Op. 18–63 (May 29, 2018) at 10; *Simpson Strong-Tie Co. v. United States*, 42 CIT ___, Slip Op. 18–123 (Sept. 21, 2018) at 11. Therefore, unlike two-piece nails, Midwest's anchors are not inserted by impact into the materials to be fastened and do not grip by friction in the same manner as a nail.

Trade usage further supports the determination that Midwest's anchors are not nails. Commerce must interpret the language of a scope order in its proper context. *ArcelorMittal*, 694 F.3d at 88. Proper context means that "the terms of the order should be consistent, to the extent possible, with trade usage." *Id.* Because antidumping duty orders apply to imported goods, the proper context is trade usage regarding delivered goods. *Id.* Therefore, Commerce's determination must be reasonable in light of how the industry treats anchors as a unitary article, not individual components.

Commerce's determination that anchors are two piece nails does not reasonably conform to trade usage. The examples provided in the record and in response to Commerce's supplemental questionnaire support Midwest's argument that the nail industry categorizes anchors with steel pins as anchors, entirely apart from nails. *See Scope Ruling Request* at 8; *Mid Continent Rebuttal* at Exs. 4–5; *Midwest Resp.* at Ex. 1. For example, when the word "nail" is used, it is done so to either explicitly or implicitly modify the noun "anchors" as in "Heavy Duty Nail Drive Anchor," "Mushroom Head Nail Drive Anchors," and "Truss Head Nail Drive Anchors." *Mid Continent Rebuttal* at Ex. 5; *Midwest Resp.* at Ex. 1. These examples indicate that industry usage comports with the plain meaning of the word "nail." Thus, according to industry usage, the pin is a nail but the unitary article of commerce is an anchor.[3]

The Government asserts that Commerce reasonably concluded that "the industry describes masonry anchors similar to a variety of other nails in different categories (e.g., finishing nails, masonry anchors, corrugated nails, etc.)." Def.'s Br. at 16–17 (quoting *Final Scope Rul-*

[3] In its rebuttal comments and at oral argument, Mid Continent suggested that trade usage supports Commerce's conclusion that anchors are considered two-piece nails by the relevant industry because some hardware stores sell nails and anchors under the general category of fasteners but distinguish screws by name. *See* Mid Continent Rebuttal at Ex. 4. The court is unpersuaded by this argument. There is no dispute that both anchors and nails are fasteners; the issue is whether anchors are two-piece nails. Mid Continent's record evidence showing that both nails and anchors are categorized as fasteners does not support the conclusion that anchors are considered a type of nail.

ing at 13). However, neither Commerce in its *Final Scope Ruling* nor the Government in its brief furnished support for this proposition.

The court's prior decision in *OMG* supports this conclusion. In that case, this court addressed whether plaintiff OMG's merchandise — a zinc anchor body with a steel pin — fell within the meaning of the term "nail" in the *Orders*. *OMG*, Slip Op. 18–63 at 10–11. The court determined that the OMG zinc anchor was unambiguously excluded from the scope of the *Orders* because: (1) the term "nail" was unambiguous and distinct from the term "anchor"; (2) trade usage regarding delivered products guides interpretation of the proper meaning of the terms of a scope order; (3) the OMG merchandise, as a unitary article of commerce, was an anchor; and (4) the record demonstrated that the nail industry categorized the OMG merchandise as an anchor, not a nail. *Id.*

Similarly, here, Midwest's merchandise consists of an anchor body attached to a steel pin. *Scope Ruling Request* at 6. Although Midwest's merchandise also includes a nylon anchor, the distinction from a zinc anchor is immaterial because neither product is reasonably separable. *Final Scope Ruling* at 4–5; *see also Simpson*, Slip Op. 18–123 at 13. Additionally, as discussed above, both products are categorized as anchors by the nail industry. Therefore, just like OMG's merchandise, Midwest's zinc and nylon anchors, taken as unitary articles of commerce, are not two-piece nails within that word's plain meaning and thus do not fall within the unambiguous scope of the *Orders*. *See OMG*, Slip Op. 18–63 at 11.[4]

CONCLUSION

The court remands to Commerce for further consideration consistent with this opinion.[5] Commerce shall file with the court and provide to the parties a revised scope determination within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court and the parties shall have 15 days thereafter to file reply briefs with the court.

[4] *Meridian Products v. United States*, 890 F.3d 1272 (2018), does not affect this conclusion. In that case, the Federal Circuit determined that the court had not afforded sufficient deference to Commerce's interpretation of the scope language because "Commerce's original scope ruling [wa]s reasonable and supported by substantial evidence" in that case. *Id.* at 1281 (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006) (holding that deference is due "[s]o long as there is adequate basis in support of the [agency's] choice of evidentiary weight")). In this case, however, Commerce's determination that anchors fit within the definition of nails, viewed within the context of the relevant industry, is not reasonable or adequately supported for the reasons already discussed. Thus, Commerce's interpretation of the scope language here is not entitled to deference.

[5] Commerce shall issue appropriate instruction to U.S. Customs and Border Protection regarding the retroactive suspension of liquidation.

SO ORDERED.

Dated: October 1, 2018
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

Slip Op. 18–133

DONG-A STEEL COMPANY, Plaintiff, ATLAS TUBE, Consolidated Plaintiff, and INDEPENDENCE TUBE CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and SEARING INDUSTRIES, SOUTHLAND TUBE INC., BULL MOOSE TUBE COMPANY, and HISTEEL CO., LTD, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 16–00201

[Sustaining a final determination of sales at less than fair value issued by the U.S. Department of Commerce following the antidumping duty investigation of heavy walled rectangular welded pipes and tubes from the Republic of Korea.]

Dated: October 3, 2018

Jarrod M. Goldfeder, Trade Pacific PLLC, of Washington, D.C., argued for Plaintiff Dong-A Steel Company. With him on the brief was *Robert G. Gosselink*. *Jonathan M. Freed* also appeared.

Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., argued for Consolidated Plaintiff and Defendant-Intervenor Atlas Tube and Defendant-Intervenors Searing Industries and Bull Moose Tube Company. With him on the brief was Roger B. Schagrin. Elizabeth J. Drake, John W. Bohn, and Paul W. Jameson also appeared.

Timothy C. Brightbill and *Cynthia C. Galvez*, Wiley Rein LLP, of Washington, D.C., for Plaintiff-Intervenor and Defendant-Intervenor Independence Tube Corporation and Defendant-Intervenor Southland Tube Inc. With them on the brief was *Alan H. Price*. *Adam M. Teslik*, *Christopher B. Weld*, *Derick G. Holt*, *Jeffrey O. Frank*, *Laura El-Sabaawi*, *Maureen E. Thorson*, *Robert E. DeFrancesco, III*, *Stephanie M. Bell*, *Tessa V. Capeloto*, and *Usha Neelakantan* also appeared.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Zachary Simmons*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C. *Mercedes C. Morno*, Of Counsel, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C., also appeared.

Jeffrey M. Winton and *Daniel E. Parga*, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., argued for Defendant-Intervenor HiSteel Co., Ltd. *Amrietha Nellan* also appeared.

OPINION

Choe-Groves, Judge:

This case involves an antidumping duty investigation of heavy walled rectangular welded carbon steel pipes and tubes from the

Republic of Korea ("Korea"). The court reviews a final antidumping duty determination issued by the U.S. Department of Commerce ("Commerce" or "Department") concluding that imports of heavy walled rectangular welded carbon steel pipes and tubes from Korea are being, or are likely to be, sold at less than fair value. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea*, 81 Fed. Reg. 47,347 (Dep't Commerce July 21, 2016) (final determination of sales at less than fair value) ("*Final Determination*"); *see also* Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, A-580 880, (July 14, 2016), *available at* http://enforcement.trade.gov/frn/summary/korea-south/201617313–1.pdf (last visited Sept. 28, 2018) ("Final Decision Memorandum").

Dong-A Steel Company ("DOSCO"), Atlas Tube ("Atlas Tube"), and Independence Tube Corporation ("Independence Tube") filed Rule 56.2 motions for judgment on the agency record. *See* Pl.'s Rule 56.2 Mot. J. Agency R., Feb. 27, 2017, ECF No. 46; Mem. Supp. Rule 56.2 Mot. Pl., Dong-A Steel Company, J. Agency R., Feb. 27, 2017, ECF No. 48 ("DOSCO's Br."); Mot. Atlas Tube J. Agency R. USCIT Rule 56.2, Feb. 27, 2017, ECF No. 45; Public Mem. L. Supp. Atlas Tube's Mot. J. Agency R., Feb. 27, 2017, ECF No. 45 ("Atlas Tube's Br."); Pl.Intervenor Independence Tube Corporation Rule 56.2 Mot. J. Agency R., Feb. 27, 2017, ECF No. 49; Mem. Pl.-Intervenor Independence Tube Corporation Supp. Mot. J. Agency R., Feb. 28, 2017, ECF No. 52 ("Independence Tube's Br."). The motions challenge the following six aspects of Commerce's final antidumping duty determination as unsupported by substantial evidence or not in accordance with the law:

1. the decision to use the earlier of either the invoice date or the shipment date as the "date of sale";
2. the decision to assign full costs to non-prime merchandise;
3. the decision to adjust DOSCO's reported hot-rolled coil costs for merchandise that was identical in all physical characteristics except for paint;
4. the decision to compare merchandise on a theoretical weight basis;
5. the decision to deny a constructed export price offset to DOSCO; and
6. the decision to use the zeroing methodology in Commerce's differential pricing analysis.

Defendant United States ("Government") and Defendant-Intervenor HiSteel Co., Ltd. ("HiSteel") oppose the Rule 56.2 motions and request that the court sustain Commerce's final determination in all respects. *See* Def.'s Resp. Pl.'s Rule 56.2 Mots. J. Agency R., June 22, 2017, ECF No. 58 ("Def.'s Resp."); Resp. HiSteel Co., Ltd. Pl.'s & Pl.-Intervenor's Rule 56.2 Mots. J. Agency R., July 6, 2017, ECF No. 59. The court held oral argument on January 18, 2018. *See* Oral Argument, Jan. 18, 2018, ECF No. 84. For the reasons set forth below, the court upholds Commerce's final determination in its entirety.

PROCEDURAL HISTORY

Atlas Tube, Bull Moose Tube Company, EXLTUBE, Hannibal Industries, Inc., Independence Tube, Maruichi American Corporation, Searing Industries, Southland Tube, and Vest, Inc. (collectively, "Petitioners") filed petitions seeking an antidumping duty order on heavy walled rectangular welded carbon steel pipes and tubes from Korea. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, Mexico, and the Republic of Turkey*, 80 Fed. Reg. 49,202, 49,203 (Aug. 17, 2015) (initiation of less-than-fair-value investigations). Commerce initiated a less-than-fair-value investigation of the subject merchandise from Korea. *See id.* at 49,205. Commerce selected DOSCO and HiSteel as mandatory respondents because they were the two largest publicly-identifiable producers and exporters of heavy walled rectangular welded carbon steel pipes and tubes by volume. *See* Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea (Korea) at 2, A-580–880, (Feb. 22, 2016), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2016–04520–1.pdf (last visited Sept. 28, 2018) ("Preliminary Decision Memorandum"); *see also* Respondent Selection for the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, PD 25, bar code 3302635–01 (Sept. 4, 2015).

DOSCO and HiSteel submitted timely responses to Commerce's initial questionnaire in October and November 2015. *See* HiSteel Response to Section A of Questionnaire, CD 13–17, bar code 3405116–01 (Oct. 13, 2015) ("HiSteel Sec. A Resp."); DOSCO Section A Response, CD 18–23, bar code 3405151–01 (Oct. 13, 2015) ("DOSCO Sec. A Resp."); Response of HiSteel Co., Ltd. to Sections B and C of the Department's September 11 Questionnaire, CD 27, bar code 3412811–02 (Nov. 2, 2015) ("HiSteel Sec. B–C Resp."); Response of HiSteel Co., Ltd. to Section D of the Department's September 11

Questionnaire, CD 32, bar code 3414319–02 (Nov. 5, 2015) ("HiSteel Sec. D Resp."); DOSCO Sections B, C, and D Responses, CD 34–39, bar code 3415176–01 (Nov. 5, 2015) ("DOSCO Sec. B–D Resp."). Commerce issued supplemental questionnaires to DOSCO and HiSteel, for which timely responses were submitted. *See* HiSteel Response to October 19 Supplemental Questionnaire, CD 46–52, bar code 3416611–01 (Nov. 12, 2015) ("HiSteel Suppl. Sec. A Resp."); DOSCO Supplemental Section A Response, CD 53, bar code 3418591–01 (Nov. 19, 2015); HiSteel Response to November 19 Supplemental Section D Questionnaire, CD 60–61, bar code 3427422–01 (Dec. 21, 2015) ("HiSteel Suppl. Sec. D Resp."); DOSCO Supplemental Section D Response, CD 71, bar code 3427490–01 (Dec. 18, 2015); DOSCO Supplemental Sections A–C Response, CD 75–78, bar code 3430118–01 (Jan. 5, 2016) ("DOSCO Suppl. Sec. A–C Resp.").

In its preliminary determination, Commerce assigned weighted-average dumping margins of 2.53 percent to DOSCO and 3.81 percent to HiSteel. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea*, 81 Fed. Reg. 10,585, 10,586 (Dep't Commerce Mar. 1 2016) (preliminary determination of sales at less than fair value and postponement of final determination); Preliminary Decision Memorandum at 2. After considering the parties' arguments in their administrative case and rebuttal briefs, Commerce issued its final determination on July 21, 2016. *See Final Determination*, 81 Fed. Reg. at 47,347. Commerce calculated margins of 2.34 percent for DOSCO and 3.82 percent for HiSteel. *See id.* at 47,348.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), and 28 U.S.C. § 1581(c). The court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Date of Sale

The first issue before the court is whether Commerce erred in deciding to use the earlier of either the invoice date or the shipment date as the "date of sale," rather than using the purchase order date. Atlas Tube and Independence Tube argue that Commerce erred by ignoring both precedent and record evidence and ask the court to find that Commerce's actions were neither supported by substantial

evidence nor in accordance with the law. *See* Atlas Tube's Br. 10; Independence Tube's Br. 2, 7. The Government counters that Commerce's decisions regarding date of sale were reasonable and should be upheld because the dates used best reflected when the material terms of sale were established. *See* Def.'s Resp. 9–14.

Commerce issued antidumping duty questionnaires to DOSCO and HiSteel after selecting the two companies as mandatory respondents in this investigation. *See* Preliminary Decision Memorandum at 2; *see also* Respondent Selection for the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea, PD 25, bar code 3302635–01 (Sept. 4, 2015). DOSCO and HiSteel were required to report the date of sale for home market sales and U.S. market sales in each company's questionnaire response. For home market sales, both DOSCO and HiSteel reported the earlier of the date of shipment from the factory or the date of invoice to the unaffiliated customer as the date of sale. *See* Preliminary Decision Memorandum at 7 (citing DOSCO Sec. B–D Resp. at B-15; HiSteel Sec. B–C Resp. at 12). For U.S. market sales, DOSCO reported the date of shipment from the factory in Korea as the date of sale for constructed export price sales and the date of invoice as the date of sale for export price sales, and HiSteel reported the date of invoice to the first unaffiliated customer as the date of sale for all of its U.S. sales. *See id.*; *see also* DOSCO Sec. B–D Resp. at C-16 (clarifying DOSCO's previous Section A Response and explaining that the date of shipment is the date of sale for constructed export price sales, while the date of invoice is the date of sale for export price sales); HiSteel Sec. B–C Resp. at 49.

Commerce stated that it "has a long-standing practice of finding that, where the shipment date precedes the invoice date, the shipment date better reflects the date on which the material terms of sale are established." *Id.* (footnotes omitted). Accordingly, Commerce decided preliminarily to use "the earlier of the invoice date or the shipment date as the date of sale in both markets, in accordance with [its] practice." *Id.* at 8.

Petitioners disputed the date of sale for U.S. market sales selected by Commerce in the preliminary determination. Petitioners argued that Commerce:

> [S]hould instead use the date of the purchase order because: 1) under the Department's regulations, the Department may use a different date if it better reflects when the respondent establishes the material terms of sale; 2) both respondents intended the terms of sale to be final as of that date; and 3) sales docu-

> mentation submitted by both respondents demonstrates that there were no changes to the material terms of sale after the purchase order date.

Final Decision Memorandum at 4 (footnotes omitted). Petitioners requested that Commerce either request additional information or, pursuant to 19 U.S.C. § 1677e, adjust the reported date of sale using facts available because the purchase order information for DOSCO and HiSteel was not on the record. *Id.* at 5.

In the final determination, Commerce "continue[d] to find that the earlier of factory shipment date or invoice date correctly reflects the date on which the material terms of DOSCO's and HiSteel's U.S. sales are finalized." Final Decision Memorandum at 6. Commerce relied upon the fact that HiSteel reported the invoice date as the date of sale for export price sales, whereas DOSCO reported the invoice date as the date of sale for export price sales and the shipment date as the date of sale for constructed export price sales. *Id.* (citing HiSteel Sec. B–C Resp. at 49; DOSCO Sec. B–D Resp. at C-16). Commerce verified that the prices and/or quantities can and do change after the order date, and both DOSCO and HiSteel provided documentation stating that the changes exceeded the allowable tolerance. *See id.* (citing DOSCO Sec. A Resp. at A-23–A-24; DOSCO Suppl. Sec. A–C Resp. at 3, Ex. SA-4; HiSteel Sec. A Resp. at 21, App'x A-6-B; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea—Sales Verification Exhibits at Ex. 17, CR 253– 258, 262–270, bar code 3451968–40 (Apr. 1, 2016) ("HiSteel Ex. VE-17")). Commerce disagreed with Petitioners' contention that the purchase order date should be used as the date of sale for U.S. market sales because Commerce found "that the portion of any given order that never shipped is a change to the quantity originally ordered by the customer." *Id.* at 6–7. Commerce determined that the purchase order date was not a better reflection of the material terms of sale established by the respondents and their customers than the invoice or shipment date. *See id.*

Commerce must conduct a "fair comparison" of normal value and export price in determining whether merchandise is being, or is likely to be, sold at less than fair value. *See* 19 U.S.C. § 1677b(a); *see also Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983). In doing so, normal value must be from "a time reasonably corresponding to the time of sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A). Commerce has promulgated the following regulation regarding the date that should be used as the date of sale for purposes of comparing normal value and export price:

> In identifying the date of sale of the subject merchandise or foreign like product, [Commerce] *normally* will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, [Commerce] *may use a date other than the date of invoice* if [Commerce] is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i) (2016) (emphasis added). This Court has previously held that the material terms of a sale generally include the price, quantity, and payment terms. *See USEC Inc. v. United States*, 31 CIT 1049, 1055, 498 F. Supp. 2d 1337, 1344–45 (2007). The important factor to determine is when the parties have reached a "meeting of the minds." *Nucor Corp. v. United States*, 33 CIT 207, 249, 612 F. Supp. 2d 1264, 1300 (2009).

In promulgating the implementing regulation, Commerce explained that "as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established" because "price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,348 (Dep't Commerce May 19, 1997). "[A]bsent satisfactory evidence that the terms of sale were finally established on a different date, the Department will presume that the date of sale is the date of invoice. . . . If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale." *Id.* at 27,349. Commerce will rely on the date provided on the invoice "as recorded in a firm's records kept in the ordinary course of business." *Id.* at 27,348. Rather than determine the date of sale for each sale, Commerce prefers to use a single and uniform source for the date of sale for each respondent. *Id.* The party seeking a date other than the invoice date bears the burden of presenting Commerce with sufficient evidence demonstrating that "another date . . . 'better reflects the date on which the exporter or producer establishes the material terms of sale.'" *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1377 n.1 (Fed. Cir. 2003) (citing 19 C.F.R. § 351.401(1)).

Commerce applied its regulatory presumption correctly in favor of the earlier invoice date or shipment date when conducting its date of sale analysis in this case. Commerce considered documents provided by DOSCO and HiSteel that were kept in the ordinary course of business in accordance with 19 C.F.R. § 351.401(i). Evidence on the record established that DOSCO reported the date of shipment from

the factory in Korea as the date of sale for constructed export price sales and the date of invoice as the date of sale for export price sales. Evidence on the record established that HiSteel reported the date of invoice as the date of sale for all of its U.S. sales. *See* Final Decision Memorandum at 6 (citing DOSCO Sec. B–D Resp. at C-16; HiSteel Sec. B–C Resp. at 49). Commerce found that the invoice date or shipment date represented a meeting of the minds because evidence on the record showed that the quantities changed after the purchase order date in amounts greater than the allowable tolerance specified by the contract. *See id.*; *see also* DOSCO Sec. B–D Resp. at C-16; HiSteel Sec. B–C Resp. at 49; DOSCO Sec. A Resp. at A-23–A-24; DOSCO Suppl. Sec. A–C Resp. at 3, Exhibit SA-4; HiSteel Suppl. Sec. A Resp. at 21; HiSteel Sec. A Resp. at App'x A-6-B; HiSteel Ex. VE-17. Thus, because substantial evidence on the record supports Commerce's selection of the invoice date and shipment date as reflecting the meeting of the minds, the court finds that Commerce did not err in its selection of invoice date or shipment date as the date of sale.

Atlas Tube and Independence Tube have the burden of proof to demonstrate that another proposed date better reflects the date on which the material terms of sale were established. 19 C.F.R. § 351.401(i). Atlas Tube and Independence Tube argue that the purchase order date best reflects the date of sale because the mandatory respondents and their customers had a meeting of the minds and intended the terms to be final on that date. *See* Atlas Tube's Br. 16–20; Independence Tube's Br. 8–12.

With respect to HiSteel, Atlas Tube and Independence Tube argue that HiSteel and its customer had the necessary meeting of the minds on the purchase order date, demonstrated by HiSteel's sample sales documentation showing that the quantity shipped was within the tolerance level shown on the purchase order. *See* Atlas Tube's Br. 16–17; Independence Tube's Br. 9–10. This argument fails, however, because Commerce considered numerous other documents on the record showing that quantities shipped were outside the level of tolerance of the purchase order and concluded reasonably that there was no meeting of the minds on the purchase order date. For example, a sample direct U.S. sale order submitted by HiSteel showed that the difference in the ordered quantity from the purchase order dated September 18, 2014 and the quantity stated in the commercial invoice dated November 13, 2014 exceeded the permitted tolerance stated in the terms of the purchase order. *See* HiSteel Sec. A Resp. at 21, App'x A-6-B. Commerce cited another example of a direct U.S. sale order where the difference in the quantity listed in the purchase order dated March 25, 2015 and the quantity stated in the commercial

invoice dated May 7, 2015 also exceeded the allowed tolerance. *See* HiSteel Ex. VE-17. For an indirect sale (through the Korean unaffiliated intermediary), the difference between the ordered quantity from the purchase order dated January 12, 2015 and the quantity stated in the bill of lading dated March 15, 2015 appears to be within the permitted tolerance level. *See* HiSteel Sec. A Resp. at 21, App'x A-6-B. HiSteel itself states that "U.S. sales are made pursuant to written purchase orders, which specify the price and estimated quantity," but "[t]he final quantity is not fixed . . . until the merchandise is loaded for shipment to the United States and the invoice is prepared." HiSteel Sec. A Resp. at 21. Atlas Tube and Independence Tube, as the Parties seeking a date other than the invoice date, did not meet their burden of proof to demonstrate that the purchase order date best reflected when the material terms of sale were established. *See Viraj Group*, 343 F.3d at 1377 n.1. The majority of sales documentation considered by Commerce showed that the quantity, a material term of sale, was not established until the invoice date or shipment date. *See USEC Inc.*, 31 CIT at 1055, 498 F. Supp. 2d at 1344–45 (2007). Commerce's selection of the invoice date or shipment date as the date of sale for HiSteel was therefore reasonable and supported by substantial evidence.

With respect to DOSCO, Atlas Tube and Independence Tube argue that DOSCO and its customer had the necessary meeting of the minds on the purchase order date and that the canceled portions of the purchase order should not be considered changes in the material terms of sale. *See* Atlas Tube's Br. 17–18; Independence Tube's Br. 11. Atlas Tube and Independence Tube have the burden to show that the purchase order date better reflects the material terms of sale. *See Viraj Group*, 343 F.3d at 1377 n.1. DOSCO stated that "[f]or U.S. sales, quantity and delivery terms can change up until shipment from DOSCO's factory," and that "[q]uantity can change after the initial purchase order and order confirmation, for instance, because of overruns and shortages." DOSCO Sec. A Resp. at A-23. Documents on the record show that quantities stated in the purchase order differed significantly from the shipped quantities and exceeded the allowed tolerances. *See* DOSCO Suppl. Sec. A–C Resp. at Ex. SA-4. Atlas Tube and Independence Tube contend that the discrepancy in quantity was due to the buyer's cancellation of portions of the order, and that by discounting the canceled portions of the order, the quantities shipped could be viewed as being within the allowed tolerances. Commerce reasoned, however, that "the portion of any given order that never shipped is a change to the quantity originally ordered by the customer." Final Decision Memorandum at 6–7. It was reasonable to

view the canceled portions and difference in shipped quantities to be a variance in the material terms of sale. Because the evidence on the record demonstrated that shipped quantities were significantly fewer than the purchase order quantities and were outside the allowed tolerances, it was reasonable for Commerce to find that Petitioners did not sufficiently establish that there was a required meeting of the minds regarding the quantity of products at the time of the purchase order. *See USEC Inc.*, 31 CIT at 1055, 498 F. Supp. 2d at 1344–45. Commerce's decision to use the earlier of the invoice date or the shipment date for DOSCO was reasonable and supported by evidence on the record. Based on the foregoing, the court affirms Commerce's decision to use the earlier of the invoice date or shipment date as the date of sale.

II. Assignment of Costs for Non-Prime Merchandise

The second issue before the court is whether Commerce's decision to assign full costs to the non-prime heavy walled rectangular welded carbon steel pipe and tube was supported by substantial evidence. The Government argues that Commerce reasonably determined that full costs were appropriate based on the review of record evidence for the non-prime merchandise of both DOSCO and HiSteel. Atlas Tube and Independence Tube argue that Commerce erred by not adjusting the costs for non-prime merchandise reported by DOSCO and HiSteel.

Atlas Tube and Independence Tube argue that full production costs should not be assigned to non-prime merchandise based on: (1) evidence on the record demonstrating that non-prime merchandise was sold at a discount without certification or warranty, and (2) lack of record evidence showing that non-prime products are generally used for the same applications as prime products. Final Decision Memorandum at 13. Commerce reviewed the record evidence and concluded that DOSCO's non-prime products were rusted pipes, and HiSteel's non-prime products consisted of products with minor defects, including dents or weld defects, that prevented HiSteel from certifying the product as free from deformities. *See* Final Decision Memorandum at 15 (Verification of the Cost Response of Dong-A Steel Company in the Antidumping Duty Less Than Fair Value Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea at 21, CD 273, bar code 3456223–01 (Apr. 5, 2016) ("DOSCO Cost Verification Report"); HiSteel Suppl. Sec. D Resp. at 7). Commerce concluded that the record documents showed that DOSCO's non-prime products were used in the same general appli-

cations as prime products, and HiSteel's customers could use the non-prime and prime products interchangeably for any suitable application. *See id.* (citing DOSCO Cost Verification Report at 21; HiSteel Suppl. Sec. D Resp. at 7). Commerce found that the sales prices of DOSCO's and HiSteel's non-prime products do not reflect a significant difference from the sales prices of prime products. *See id.* (citing DOSCO Cost Verification Report at 21; HiSteel Suppl. Sec. D Resp. at App'x SD-4). Based on the record evidence, Commerce elected not to adjust the costs assigned to non-prime products because it found that the costs calculated by DOSCO and HiSteel reasonably reflect the costs associated with the production of the subject merchandise. *Id.*

Atlas Tube and Independence Tube counter that Commerce should have adjusted the costs reported by DOSCO and HiSteel. Atlas Tube and Independence Tube argue that Commerce erred because record evidence established that non-prime merchandise was sold without certification or warranty at a thirty-percent discount from prime merchandise; there was no evidence that non-prime merchandise is generally used for the same applications as prime merchandise; Commerce has a practice of treating non-prime sales as scrap that is not assigned costs; and non-prime merchandise differs from prime merchandise in inventory values. *See* Atlas Tube's Br. 21–25; Independence Tube's Br. 13–15.

Commerce normally calculates costs "based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with generally accepted accounting principles ["GAAP"] of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). When an exporter or producer has reported costs of downgraded or non-prime merchandise, Commerce determines whether the reported costs reasonably reflect actual costs incurred in producing the merchandise. Commerce seeks to determine whether it is possible to use the non-prime merchandise in the same applications as the prime merchandise. *See Tension Steel Indus. Co., Ltd. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1185, 1194–95 (2016). To make this determination, it is Commerce's stated practice to "analyze the products sold as non-prime on a case-by-case basis to determine whether the downgraded products remain in scope, and likewise can still be used in the same applications as subject merchandise." Final Decision Memorandum at 14. This analysis does not involve judging the relative values and qualities between grades; instead, Commerce determines whether it is possible to use the non-prime product in the same general manner

as its prime counterparts. *See id.* at 14–15. Commerce assigns the same costs of production for non-prime merchandise as prime merchandise if it determines that the non-prime product can be used in the same general applications as its prime product counterparts. *See id.* Commerce offsets costs with the revenue gained from sales of non-prime products (*i.e.*, a scrap offset) if it determines that the non-prime product cannot be used in the same general manner as its prime product counterparts. *See id.*

With respect to DOSCO's non-prime products (such as defective or rusted pipes), Commerce verified that DOSCO allocates the same costs to non-prime products as prime products in its books and records, which were kept in accordance with Korean GAAP. *See* DOSCO Cost Verification Report at 21. The non-prime products were sold at a discount and without a warranty, but evidence on the record includes DOSCO's statements that customers generally use the non-prime products for the same applications as prime products, such as identical light load-bearing applications. *See id.* Despite the discounted sales prices, Commerce determined that "the sales (*i.e.*, market) prices of DOSCO's non-prime products do not reflect a significant difference from the full costs that the company assigns to them in the normal course of business." Final Decision Memorandum at 15 (citing DOSCO Cost Verification Report at 21). The non-prime products are manufactured using the same materials and undergo the same production processes as prime products, indicating that the production costs for both types of products are comparable, if not the same. *See id.* Commerce's decision was supported by the fact that DOSCO documented sales of non-prime products in its sales database in the normal course of its business operation. *See* DOSCO Cost Verification Report at 21. Based on the evidence on the record, Commerce determined that DOSCO's records assigning full costs to non-prime merchandise reasonably reflected the costs associated with the production and sale of non-prime merchandise. The court affirms Commerce's decision to assign full costs to DOSCO's non-prime merchandise.

With respect to HiSteel's non-prime merchandise, HiSteel's production process produces non-prime merchandise in the form of "dents, weld-defects, or other deformations" and other products that "developed excessive surface rust while stored in inventory." *See* HiSteel Suppl. Sec. D Resp. at 6, App'x SD-4; HiSteel Sec. D Resp. at 4. The minor defects prevent the non-prime products from meeting industry specifications. HiSteel Sec. D Resp. at 4. These non-prime products are "sold as off-grade pipe [and] are treated as fully-costed products,

and not as scrap, in HiSteel's normal accounting system." *Id.* The defects of the non-prime products identified at the conclusion of the production process prevent HiSteel "from warranting that the product conforms to the relevant industry specifications and has no defects." HiSteel Suppl. Sec. D Resp. at 6–7. However, "[c]ustomers may use prime and non-prime products in any applications for which they consider the products suitable." *Id.* at 7. HiSteel treats prime and non-prime products as distinct products and maintains records of the actual costs incurred for the production of each. *See id.* at 7, App'x SD-4.

HiSteel provided per-unit inventory values of non-prime and prime products for three styles of pipe: (1) General Structural Rectangular Pipe (400 KS), (2) Structural Rectangular Pipe Gr. B, and (3) General Structural Rectangular Pipe (JIS 490 Hyundai). *See id.* at App'x SD-4. For the three styles of pipe, the per-unit inventory values for prime and non-prime products were similar. The court concludes that Commerce's assessment of the inventory value data and determination that the sales prices did not differ significantly were reasonable.

Commerce determined that "the sales prices of non-prime products do not reflect a significant difference from the sales prices of prime products." Final Decision Memorandum at 15 (citing HiSteel Suppl. Sec. D Resp. at App'x SD-4). Commerce examined evidence on the record that the non-prime products were sold at a discount and without a warranty, but that customers used the non-prime pipe in applications that each individually found suitable. *See* HiSteel Sec. D Resp. at 4. Commerce also noted that HiSteel included its sales of non-prime merchandise in its sales database. *See id.*

Substantial evidence on the record supports Commerce's decision to assign full costs to HiSteel's production of non-prime merchandise. HiSteel's products undergo the same production process during which some products are dented, incorrectly welded, or otherwise deformed. *See* HiSteel Sec. D Resp. at 4–7. HiSteel stated that both prime and non-prime products may be used in any suitable application but cannot warrant that the non-prime products conform to industry specifications. *See id.* at 7. There is no evidence suggesting that the non-prime products are unsuitable for use in the same general applications as prime products. Record evidence established that non-prime products with weld defects or excessive surface rust were generally used by customers for the same applications as prime merchandise. *See* Final Decision Memorandum at 15; *see also* DOSCO Cost Verification Report at 21; HiSteel Suppl. Sec. D Resp. at 7. Commerce's decision was supported by the fact that HiSteel documented sales of non-prime merchandise in its sales database in the

normal course of its business operations. *See* HiSteel Suppl. Sec. D Resp. at App'x SD-4. Based on the evidence on the record, it was reasonable for Commerce to determine that HiSteel's records assigning full costs to non-prime merchandise adequately reflected the costs associated with the production and sale of non-prime merchandise. The court concludes that Commerce's decision to assign full costs to HiSteel's non-prime merchandise was supported by substantial evidence.

III. Adjustment to Reported Hot-Rolled Coil Costs

The third issue before the court is whether Commerce erred in deciding to adjust DOSCO's reported hot-rolled coil costs for products that were identical in all physical characteristics except for paint. Plaintiff argues that Commerce erred in adjusting its reported costs for painted products by ignoring evidence establishing the reasonableness and accuracy of DOSCO's reported raw material costs. *See* DOSCO's Br. 35–39. The Government argues that Commerce acted properly when it determined that DOSCO's records did not reasonably reflect the different production costs for two control numbers that are physically identical except for one being painted. *See* Def.'s Resp. 33–36.

In the preliminary determination, Commerce adjusted DOSCO's reported raw material costs for product control numbers that were identical in all physical characteristics except painting to reflect the same hot-rolled coil costs. *See* Final Decision Memorandum at 50. DOSCO argued that the reported costs were derived from the company's books and that records were kept in accordance with GAAP. *See id.* DOSCO alleged that any recorded differences in cost were attributable to production timing issues and product mix. *See id.* DOSCO explained that because hot-rolled coil prices were higher during the start of the period of investigation, products produced during this period had higher raw material costs compared to those produced at the end of the period of investigation. *See id.* DOSCO's records showed that some product control numbers were produced and sold in limited quantities during the period of investigation. *See* DOSCO Cost Verification Report at 19. In the final determination, Commerce found that the timing of the coil purchase and pipe production influenced the cost, not the pipe's physical characteristics. *See* Final Decision Memorandum at 52–53.

Raw material costs for products shall normally be calculated based on the records of the exporter or producer of the merchandise. 19 U.S.C. § 1677b(f)(1)(A). The statute requires that the records: (1)

must be kept in accordance with the generally accepted accounting principles of the exporting country, and (2) reasonably reflect the costs associated with the production and sale of the merchandise. *Id.* In other words, the statute provides that as a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation, or reject the records if accepting them would distort the company's true costs. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1377 (Fed. Cir. 2001) (citing *Thai Pineapple Pub. Co., Ltd. v. United States*, 187 F.3d 1362, 1366 (Fed. Cir. 1999); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed. Cir. 1995)). Commerce is directed to consider all available evidence on the proper allocation of costs. 19 U.S.C. § 1677b(f)(1)(A).

Physical characteristics are a prime consideration when Commerce conducts its analysis. *Thai Plastic Bags Indus. Co., Ltd. v. United States*, 746 F.3d 1358, 1368 (Fed. Cir. 2014). If factors beyond the physical characteristics influence the costs, however, Commerce will normally adjust the reported costs in order to reflect the costs that are based only on the physical characteristics. *See id.* Commerce interprets the proper allocation of adjustment to costs. *Id.*

DOSCO claims that Commerce's adjustments to its raw material costs for painted products unreasonably and unlawfully ignored verified record evidence establishing the reasonableness and accuracy of DOSCO's reported costs. *See* DOSCO's Br. 35. Plaintiff contends that the specific reported costs from DOSCO's books are the most accurate and should be used to determine the cost of production. *See id.* at 36–37. Commerce does not dispute that DOSCO's accounting practices met Korean GAAP as required by 19 U.S.C. § 1677b(f)(1)(A). The court finds that substantial evidence supports Commerce's conclusion that DOSCO's accounting practices conformed with Korean GAAP. The court's analysis is focused, therefore, upon whether Commerce was reasonable in determining that the reported costs did not reflect the true costs of production for the product control numbers.

Commerce had to determine whether the reported costs were a reasonable reflection of the cost of production. *See* 19 U.S.C. § 1677b(f)(1)(A). The two product control numbers in question have identical physical characteristics except for one being painted. *See* Final Decision Memorandum at 50. For each of these products, Commerce traced the direct material costs from the cost buildup worksheets to the weight-averaging worksheets and then divided the total direct material costs for the period of investigation by the total production for the period of investigation. *See* DOSCO Cost Verification Report at 19. Commerce found that the significant cost differences

between the two product control numbers could not be explained by the physical characteristic of one being painted and the other not painted, which was the single physical difference. *See* Final Decision Memorandum at 52 (citing DOSCO Cost Verification Report at 19). DOSCO and Commerce both agree that the differences in the costs were based on (1) the fluctuation of the cost of coil prices during the period of investigation, as the painted product was produced and sold during limited times of the period of investigation, and (2) the differences in the product perimeters and thicknesses that are classified by the same control number. *See id.*; DOSCO's Br. 36–37; DOSCO Cost Verification Report at 5, 19.

Commerce's normal practice is to use the annual average costs of the period of investigation to even out variances in the production costs during different periods of time, as well as fluctuating raw material costs and erratic production levels. Commerce adjusts these costs to ensure different costs between products are the result only of the physical differences. Commerce is permitted to consider all available evidence on the proper allocation of costs, including physical characteristics of the products at issue. *See Thai Plastic Bags*, 746 F.3d at 1368.

Here, Commerce determined that the difference in price was based on the fluctuating raw material costs during the period of investigation because one product was produced mainly during only part of the year, a fact with which DOSCO agrees. *See* Final Decision Memorandum at 51–53. The court finds that it was reasonable for Commerce to use annual average costs in order to even out fluctuations in the production costs over short periods of time for goods that only differed based on one being painted and one not being painted. *See* 19 U.S.C. § 1677b(f)(1)(A). It was appropriate for Commerce to make the adjustment in order to have costs that differ only because of physical characteristics so that Commerce can conduct the sales-below-cost test, calculate constructed value, and assess the difference-in-merchandise adjustment properly. The court finds that Commerce's decision to adjust DOSCO's reported hot-rolled coil costs was reasonable and supported by substantial evidence.

IV. Weight Basis for Comparison Methodology

The fourth issue before the court is whether Commerce erred in deciding to compare merchandise on a theoretical weight basis. DOSCO argues that Commerce should have used actual weight in the final determination. Defendant contends that DOSCO's favored method of using actual weight is based on nominal values, not actual

measurements, and is no more accurate than Commerce's preferred measurement of theoretical weight.

Three types of weight bases were examined in this case. The court adopts DOSCO's terminology, which DOSCO describes as follows:

- **"Scaled Weight":** This reflects the physical weight that a company determines by placing the finished product on a scale.
- **"Actual Weight":** This reflects the weight determined through the use of a standard industry formula that is based on the actual wall thickness of the finished pipe product.
- **"Theoretical Weight":** This reflects a weight determined through the use of a standard industry formula, but is based on the nominal wall thickness of the input coil, and that nominal wall thickness is subject to tolerances that differ vastly between the home market and the U.S. market.

DOSCO's Br. 5.

DOSCO and HiSteel reported the actual weight and theoretical weight of their finished products. *See* DOSCO Sec. A Resp. at A-31–A-32; DOSCO Sec. B–D Resp. at B-19–B-20, C-21–C-22, D-34. DOSCO did not physically weigh the merchandise. DOSCO Sec. A Resp. at A-32; DOSCO Sec. B–D Resp. at B-19, C-21. DOSCO's U.S. customers ordered products based on nominal dimensions and were invoiced based on theoretical weight. *See* DOSCO Sec. A Resp. at A-31–A-32, Ex. A-16. DOSCO argues that actual weight reflects the basis on which DOSCO and its U.S. affiliate set prices and negotiate with its customers. *See* DOSCO's Br. 7. DOSCO states that actual weight is based on the actual measured thickness of the input coil as stated in mill test certificates. *See id.* at 7–8.

In the preliminary determination, Commerce used theoretical weight to compare normal value with export price and constructed export price. *See* Preliminary Decision Memorandum at 4 n.15 (citing Less Than Fair Value Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Preliminary Determination Calculation for Dong-A Steel Company (DOSCO), PD 152, bar code 3444143–01 (Feb. 22, 2016)). DOSCO challenged the preliminary determination, arguing that it was more reasonable and accurate to use actual weight to measure and compare prices, expenses, and costs because it is based on the actual wall thickness of the input coil. *See* Final Decision Memorandum at 7. The coil thickness remains the same throughout the production process and is the same as the final pipe or tube thickness. *See id.* at 7–8. DOSCO cited to mill test certificates from its supplier, stating that "[w]e hereby certify that the material has been

made in accordance with the order and specification." *See* Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea—Sales Verification Exhibits at Exs. 8–22, CD 262–270, bar code 3454562–12 (Apr. 1, 2016).

In its final determination, Commerce determined that the recorded thickness of the input coil is not an actual measured thickness, based on HiSteel's statement that the wall thicknesses of the input coil are theoretical thicknesses that vary within industry tolerances. *See* Final Decision Memorandum at 7 (citing Verification of the Sales Response of HiSteel Co., Ltd. in the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea at 9, CD 275, bar code 3456605–01 (Apr. 6, 2016) ("HiSteel Sales Verification Report"); Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea—Verification Exhibits at Ex. 6, CD 198–251, bar code 3451968–01 (Mar. 24, 2016) ("HiSteel Verification Exhibits")). Commerce relied on a mill test certificate provided by HiSteel's supplier. *See* HiSteel Verification Exhibits at Ex. 6. Commerce's product control number also used nominal product dimensions as reported by the respondents to match sales for comparison purposes. *See* Final Decision Memorandum at 12.

DOSCO objects to Commerce's decision to compare the products on a theoretical weight basis instead of an actual weight basis. *See* DOSCO's Br. 4–16. Plaintiff puts forth three arguments to support why Commerce erred in using the theoretical weight instead of the actual weight: (1) Commerce's conclusion that the actual wall thickness is not an actual measured thickness is contradicted by DOSCO's verified record evidence; (2) Commerce's conversion of DOSCO's data from actual weight to theoretical weight introduced distortions into the antidumping duty calculations; and (3) Commerce failed to articulate a reasonable basis to disregard DOSCO's actual weight. *See id.* at 4–16.

With respect to DOSCO's first allegation, DOSCO objects to Commerce's finding that the actual wall thickness is not an actual measurement. *See id.* at 12–14. Commerce used theoretical weight because HiSteel's verification materials stated that input coil measurements were nominal measurements. *See* Final Decision Memorandum at 13 (citing HiSteel Sales Verification Report at 9 and HiSteel Verification Exhibits at Ex. 6). HiSteel's mill test certificate was nearly identical to DOSCO's mill test certificate. *Compare* Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea—Cost Verification Exhibits at Ex. 12, CD 126, bar code 3446551–01 (Mar. 4, 2016) *with* HiSteel Verification Exhibits at Ex. 17. The court finds that Commerce was reasonable in considering

the nearly identical language from DOSCO's and HiSteel's mill test certificates, along with HiSteel's statement that coil measurements are nominal, to mean that if one is based on nominal measurements, then so is the other. The mill test certificates and HiSteel's statement are sufficient evidence for Commerce to have reached a reasonable conclusion that the actual weight is based on nominal weight. The court concludes that Commerce's choice to use theoretical weight was reasonable and based upon evidence on the record.

With respect to DOSCO's second allegation, DOSCO argues that Commerce's conversion of the submitted data from actual weight to theoretical weight was unreasonable because it introduced distortions into the antidumping duty calculations. *See* DOSCO's Br. 14–16. According to DOSCO, Commerce should have used actual weight, which represents weight that was calculated from actual measurements of coil thickness and would have prevented the introduction of distortions into the calculation. *See id.* Commerce supported its decision to use theoretical weight based in part on the fact that DOSCO sold products to its U.S. customers using nominal dimensions and admitted that it invoiced on a theoretical weight basis. *See* DOSCO Sec. A Resp. at A-31–A-32, Ex. A-16; DOSCO's Br. 10. Ordering based on nominal dimensions and invoicing on a theoretical weight basis are consistent with using theoretical weight. Commerce has a "general preference for making sales comparisons on the basis on which U.S. sales were made." *Certain Welded Stainless Steel Pipe From the Republic of Korea*, 57 Fed. Reg. 53,693, 53,698 (Dep't Commerce Nov. 12, 1992) (final determination of sales at less than fair value). Commerce's decision to use theoretical weight is supported by evidence on the record that U.S. customers ordered and were billed using nominal values. *See* DOSCO Sec. A Resp. at A-31–A-32, Ex. A-16; DOSCO's Br. 10.

The court finds that Commerce reasonably determined that theoretical weight is based on a nominal value, and it was reasonable for Commerce to determine that utilizing theoretical weight would not decrease any distortions in the calculation compared to actual weight. The court concludes that Commerce's choice to use theoretical weight rather than actual weight is reasonable and supported by evidence.

V. DOSCO's Claim for a Constructed Export Price Offset

The fifth issue before the court is whether Commerce erred in deciding to deny a constructed export price offset to DOSCO. DOSCO argues that it provided Commerce with a complete record to support its claim for a constructed export price offset, and that Commerce's

denial was unreasonable given the evidence on the record. *See* DOSCO's Br. 16–23. DOSCO contends that substantial record evidence demonstrated that the home market level of trade was at a distinct and more advanced level compared to the constructed export price level of trade. *See id.* The Government contends that DOSCO failed to meet the requirements and support its claim for a constructed export price offset. *See* Def.'s Resp. 23–32.

As part of its statutory mandate to conduct a "fair comparison" of normal value and export price, Commerce must make two types of adjustments to normal value based on differences in the level of trade. The first type is a level of trade adjustment, 19 U.S.C. § 1677b(a)(7)(A), and the second type is a constructed export price offset, 19 U.S.C. § 1677b(a)(7)(B). Commerce will grant a constructed export price offset when "normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine . . . a level of trade adjustment." *Id.* When these two conditions are present, Commerce must lower the normal value "by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made." *Id.*

Commerce's regulation delineates how the agency will determine whether the home market level of trade is at a more advanced stage of distribution than the level of trade of the sale to the U.S. affiliate. *See* 19 C.F.R. § 351.412(c)(2). Commerce compares the selling activities that the company incurs in selling to the first unaffiliated home market customers to the selling activities that the company incurs in selling to its U.S. affiliate. *Id.* Commerce must find that "sales are made at different marketing stages." *Id.* "Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing." *Id.* The company bears the burden of presenting evidence to support the grant of a constructed export price offset. *See id.* § 351.401(b)(1) ("The interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 533, 556, 616 F. Supp. 2d 1354, 1374 (2009) ("While it is Commerce's responsibility to determine if a petitioner qualifies for a [constructed export price] offset, it is the responsibility

of the respondent requesting the [constructed export price] offset to procure and present the relevant evidence to Commerce.").

When calculating the normal value for price comparability, Commerce determined that DOSCO did not qualify for a level of trade adjustment because DOSCO only had one home market level of trade, which DOSCO does not contest. *See* DOSCO's Br. 17. Commerce denied DOSCO a constructed export price offset in its preliminary determination and upheld that finding in its final determination. *See* Preliminary Decision Memorandum at 8–9; Final Decision Memorandum at 49. The Department analyzed specific selling activities falling under four general selling functions: (1) sales and marketing, (2) freight and delivery, (3) inventory maintenance and warehousing, and (4) warranty and technical support. *See* Preliminary Decision Memorandum at 12; Final Decision Memorandum at 46. In support of a constructed export price offset grant and to show an advanced level of trade in the home market, DOSCO reported additional selling activities: sales forecasting, strategic/economic planning, personnel training/exchange, advertising, inventory maintenance, sales/marketing support, and market research in the home market. *See* Preliminary Decision Memorandum at 11; Final Decision Memorandum at 46. Commerce found that although additional selling activities took place, these activities were not substantially different from those performed with respect to DOSCO's U.S. sales such that the home market sales and U.S. sales occurred at two different marketing stages. *See* Preliminary Decision Memorandum at 12; Final Decision Memorandum at 46. Commerce concluded further that DOSCO failed to provide sufficient documentation showing how frequently it performed each of the reported additional selling activities despite Commerce's request for more information. *See id.* at 47 n.171; *see also* DOSCO Section A–C Supplemental Questionnaire at 2–3, PD 103, bar code 3423796–01 (Dec. 4, 2015); DOSCO Suppl. Sec. A–C Resp. at 4–5, Ex. SA-5. The court concludes that Commerce's decision to deny a constructed export price offset to DOSCO was reasonable and supported by substantial evidence on the record.

DOSCO claims that Commerce should have translated documents that were submitted in Korean. *See* DOSCO's Br. 22. Commerce's regulation clearly requires DOSCO to provide translations of documents that are important to any claims made in the investigation. 19 C.F.R. § 351.303 contains procedural rules regarding documents submitted to Commerce for consideration in an antidumping or countervailing duty proceeding. Subsection (e) reads:

> Translation to English. A document submitted in a foreign language must be accompanied by an English translation of the

> entire document or of only pertinent portions, where appropriate, unless the Secretary waives this requirement for an individual document. A party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.

19 C.F.R. § 351.303(e). The court is not persuaded by DOSCO's allegation that Commerce should have requested more documents from DOSCO or that Commerce should have translated documents provided in Korean. The court concludes that Commerce acted reasonably when it determined that the record did not support the grant of a constructed export price offset because DOSCO failed to provide adequate documentation, did not provide English translations, submitted documents that were outside the period of investigation or not clearly involving the current products, and did not state clearly that the documents were intended to support a constructed export price offset.

DOSCO proffers that Commerce was unreasonable for failing to explain how the facts of the current case differ from numerous prior instances in which Commerce has granted constructed export price offsets for similarly situated respondents. *See* DOSCO's Br. 30–32. DOSCO argues also that Commerce should have considered DOSCO's indirect selling expenses, as Commerce did in other prior determinations. *See id.* at 32–33. Commerce is not bound to a specific formula to determine whether to grant a constructed export price offset. *See* 19 C.F.R. § 351.412(c)(2). Prior Commerce investigations may exemplify Commerce's past practices, but are not dispositive. *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011); *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009). Commerce may deviate from past practices if it provides a reasonable explanation for its methodology. Commerce's "explanations do not have to be perfect, [but] the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore Ltd.*, 557 F.3d at 1319–20. Each investigation is fact-specific and may lead to results that vary on a case-by-case basis. The court holds that Commerce's denial of a constructed export price offset was reasonable and supported by evidence on the record.

VI. Use of "Zeroing" in the Differential Pricing Analysis

The sixth issue before the court is whether Commerce erred in deciding to use the zeroing methodology in its differential pricing analysis. DOSCO argues that Commerce's use of zeroing in the pre-

liminary and final determinations is not in accordance with the law because it violates the World Trade Organization ("WTO") Antidumping Agreement.

Commerce's discretion to use zeroing has been upheld as a reasonable interpretation of "dumping margin" in 19 U.S.C. § 1677(35)(A). *See Union Steel v. United States*, 713 F.3d 1101, 1109 (Fed. Cir. 2013); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005). Under 19 U.S.C. § 3533, a regulation or practice of Commerce "may not be amended, rescinded, or otherwise modified" based upon a panel or appellate body decision of the WTO. *See Corus Staal BV*, 395 F.3d at 1348 (quoting *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004)) ("WTO decisions are 'not binding on the United States, much less this court.'").

DOSCO argues that Commerce's use of zeroing is not in accordance with the law because it violates the WTO Antidumping Agreement. *See* DOSCO's Br. 34–35 (citing *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R (Mar. 11, 2016)). DOSCO contends that Commerce has the ability to discontinue the use of zeroing as a discretionary practice. *See id.* at 34–35 (citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1366 (Fed. Cir. 2011)). Commerce is not bound by adverse WTO decisions, as Congress has devised a separate process by which an adverse WTO ruling may be implemented. *See* 19 U.S.C. §§ 3533(g)(1), 3538(b). "[I]f U.S. statutory [or regulatory] provisions are inconsistent with [WTO treaties], it is strictly a matter for Congress." *Corus Staal BV*, 395 F.3d at 1348 (Fed. Cir. 2005); *see also Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008). The WTO's adverse ruling regarding the practice of zeroing has not been implemented into U.S. law, thus Commerce has no obligation to refrain from using zeroing in this case. The court concludes that Commerce's decision to use the zeroing methodology was reasonable and in accordance with the law.

CONCLUSION

For the reasons set forth above, the court concludes the following:

1. The court sustains Commerce's decision to use the earlier of either the invoice date or the shipment date as the "date of sale";
2. The court sustains Commerce's decision to assign full costs to non-prime merchandise;
3. The court sustains Commerce's decision to adjust DOSCO's reported hot-rolled coil costs for products that were identical in all physical characteristics except for paint;

4. The court sustains Commerce's decision to compare merchandise on a theoretical weight basis;
5. The court sustains Commerce's decision to deny a constructed export price offset to DOSCO; and
6. The court sustains Commerce's decision to use the zeroing methodology in its differential pricing analysis.

The court denies the Rule 56.2 motions for judgment on the agency record filed by DOSCO, Atlas Tube, and Independence Tube. Judgment will be issued accordingly.

Dated: October 3, 2018
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE