U.S. Customs and Border Protection

Slip Op. 14–21

ARCHER DANIELS MIDLAND COMPANY, CARGILL, INCORPORATED, and TATE & LYLE AMERICAS, LLC., Plaintiffs, v. UNITED STATES, Defendant, and YIXING-UNION BIOCHEMICAL CO., LTD., Defendant-Intervenor.

Before: Judith M. Barzilay,
Senior Judge Consol. Court No. 11–00537
Public Version

[Commerce's Remand Results are sustained.]

Dated: February 24, 2014

Joseph W. Dorn and Patrick J. Togni, *King & Spalding LLP*, for Plaintiffs Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC.

Michael S. Holton, Jeffrey S. Neeley, and Stephen W. Brophy, *Barnes, Richardson & Colburn, LLP*, for Consolidated Plaintiffs RZBC (Juxian) Co., Ltd., RZBC Co., Ltd., and RZBC Imp. & Exp. Co., Ltd.

Stuart F. Delery, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; (*Carrie A. Dunsmore*), Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant United States; *Whitney Rolig*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Counsel.

Richard P. Ferrin and Douglas J. Heffner, Drinker Biddle & Reath LLP, for Defendant-Intervenor Yixing-Union Biochemical Co., Ltd.

OPINION

BARZILAY, Senior Judge:

This case returns to the court following a partial remand of the final results of U.S. Department of Commerce's ("Commerce") first administrative review of the countervailing duty ("CVD") order on citric acid and certain citrate salts from the People's Republic of China ("PRC"). *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 Fed. Reg. 77,206 (Dep't Commerce Dec. 12, 2011) ("*Final Results*"); *see also Issues and Decision Memorandum*, C-570–938 (Dec. 5, 2011), *available at* http://enforcement.trade.gov/frn/summary/PRC/

201131838–1.pdf; *Corrected Issues and Decision Memorandum*, C-570–938 (Feb. 10, 2012) (C.R. Doc. No. INT_055151).[1] The court instructed Commerce to provide further explanation on two issues: (1) the countervailability of the alleged subsidy of steam coal for less than adequate remuneration ("LTAR") and (2) the comparability of benchmark prices to value the benefit from sulfuric acid for LTAR. *See Archer Daniels Midland Co. v. United States*, 37 CIT __, 917 F. Supp. 2d 1331 (2013) ("*Archer Daniels I*").

On remand, Commerce maintains that the alleged subsidy involving steam coal lacks specificity and that it properly selected benchmark prices for the subsidy involving sulfuric acid. *See Final Results of Redetermination Pursuant to Remand*, Docket Entry No. 78 (Aug. 26, 2013) (Public) ("*Remand Results*"). Plaintiffs Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas LLC (petitioners) ("ADM") filed comments challenging Commerce's determination on the specificity requirement. Alternatively, Consolidated Plaintiffs RZBC Co., LTd., RZBC Import & Export Co., Ltd., and RZBC (Juxian) Co., Ltd. (respondents) ("RZBC") filed comments challenging Commerce's determination on sulfuric acid for LTAR.[2] The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons set forth below, Commerce's *Remand Results* are sustained.

I. STANDARD OF REVIEW

When reviewing Commerce's countervailing duty determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is "reasonable and supported by the record as a whole." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotations and citation omitted). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of

[1] Familiarity with the facts and circumstances of the underlying administrative review are presumed.

[2] Defendant-Intervenor Yixing-Union Biochemical Co., Ltd. (another respondent) ("Yixing") filed comments but did not challenge Commerce's determination on sulfuric acid.

drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

II. BACKGROUND

In the underlying administrative review, Commerce investigated whether respondent companies received steam coal and sulfuric acid for LTAR. *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 76 Fed. Reg. 33,219 (Dep't Commerce June 8, 2011) ("*Preliminary Results*"). In the *Final Results*, Commerce concluded that the alleged subsidy on steam coal lacked *de jure* and *de facto* specificity under the statute. *See Issues and Decision Memorandum* at 50–51. In particular, Commerce determined that there was insufficient evidence establishing "predominant" or "disproportionate" use under 19 U.S.C. § 1677(5A)(D)(iii). *See id.* Accordingly, Commerce did not calculate a subsidy rate for the provision of steam coal for LTAR.

Commerce also investigated whether respondents received sulfuric acid for LTAR. It concluded that they did. In its calculation to determine the benefit received from the subsidy, Commerce concluded that the Chinese sulfuric acid market was distorted by government involvement and therefore used "tier 2" benchmarks to establish a market price for sulfuric acid. *See Preliminary Results*, 76 Fed. Reg. at 33,231–32. It solicited information from interested parties pertaining to world market prices for sulfuric acid to serve as a potential benchmark for determining the adequacy of remuneration. *See id.* In the *Final Results*, Commerce calculated a benchmark price for sulfuric acid by averaging world market prices for sulfuric acid from Canada, European Union, India, Thailand, United States, Philippines, and Peru. *See Corrected Issues and Decision Memorandum* at 6; *see also Preliminary Results*, 76 Fed. Reg. at 33,232.

III. DISCUSSION

A. Steam Coal – Specificity Requirement

In *Archer Daniels I*, the court instructed Commerce to provide a better explanation of its determination on the alleged subsidy involving steam coal. *See* 917 F. Supp. 2d at 1340. More specifically, the court could not determine whether Commerce had *deferred* making a final determination under 19 C.F.R. § 351.311 or whether it had issued a final determination on the alleged subsidy providing steam coal for LTAR. It was unclear. The court also instructed Commerce to

provide further explanation of its findings and conclusions on the specificity requirement. On remand, Commerce explained that the "evidence on this record does not support a finding that the provision of steam coal is specific within the meaning of section 771(5A) of the Act." *Remand Results* at 7. The court construes this as a final determination, not a deferral under 19 C.F.R. § 351.311. There is no dispute that alleged subsidy on steam coal lacks *de jure* specificity. Commerce, therefore, limited its discussion to *de facto* specificity:

> [W]e continue to find that the users of steam coal are not limited in number, for the same reasons described in the *Final Results*. Exhibit 6 of the GOC's March 18, 2011, NSA Questionnaire Response indicates that steam coal is, in the words of the Statement of Administrative Action (SAA), "widely used throughout {the} economy.
>
> The next question in our *de facto* specificity analysis is whether an enterprise or industry (or a group of enterprises or industries) was a predominant user of the subsidy or received disproportionately large amounts of the subsidy. Normally, the Department seeks such usage information from the relevant government. Here, although the Department pursued a line of questioning with the GOC touching upon the question of predominance or disproportionality, there was not sufficient evidence, based on the record of the underlying administrative review, indicating that certain industries were the predominant users of steam coal or received disproportionately large amounts of steam coal. Accordingly, in the *Final Results*, we stated that "we do not have sufficient record evidence pointing to predominant or disproportionate use." We continue to find that the evidence on this record does not show predominant or disproportionate use.
>
> Finally, turning to section 771(5A)(iii)(IV) of the Act, we find that there is no evidence on the record that the manner in which the authority providing steam coal has exercised discretion in the decision to provide steam coal indicates that an enterprise or industry (or group thereof) is favored over others.

Remand Results at 6–7.

ADM (petitioners) challenges Commerce's determination on the issue of *de facto* specificity. Specifically, ADM claims that Commerce failed to request information from the GOC about whether a certain "enterprise or industry is a predominant user of the subsidy" and whether a certain "enterprise or industry receives a disproportion-

ately large amount of the subsidy." ADM Comments at 3. ADM argues that Commerce ignored record information indicating that "power generators" are the "predominant users" of steam coal produced in China and therefore consume a "disproportionate share" of the alleged subsidy. ADM Comments at 46, 8. Alternatively, ADM suggests that Commerce should reopen the record to request additional information from the GOC on the issue of "predominant use" and "disproportionate share." ADM Comments at 14.

Under 19 U.S.C. § 1677(5A)(D)(iii), a subsidy is *de facto* specific if one or more of the following factors exist: (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) the enterprise or industry is a predominant user of the subsidy; (3) the enterprise or industry receives a disproportionately large amount of the subsidy; and (4) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others. *Id.*

In the court's view, Commerce reasonably concluded that the provision of steam coal for LTAR lacked *de facto* specificity. The only question here is whether power generators[3] (like Cogeneration) are the "predominant user" or receive a "disproportionate share" of the alleged subsidy on steam coal. *See* 19 U.S.C. § 1677(5A)(D)(iii). Although Commerce attempted to obtain data on steam coal from the GOC during the course of the review, *see Remand Results* at 13, the GOC indicated that it did not collect or maintain such data in the ordinary course of business. *See id.*; GOC First Supplemental Questionnaire Response at 5 (Apr. 27, 2011) (P.D. 139). The GOC did report a list of industries in China that purchased steam coal but it did not include usage data. *See Remand Results* at 12; Government of China New Subsidy Allegation Questionnaire Response at Ex. 6 (Mar. 21, 2011) (P.D. 99). The GOC provided other data on China's coal industry generally, which included a few brief references about steam coal. *See id.* at 8–15. In this review, therefore, there was very little data on the predominant users of steam coal in China. Commerce, in turn, concluded that there was insufficient data to make a finding that power generators are the "predominant users" or receive a "disproportionate share" of steam coal. Considering that the other elements of *de facto* specificity had not been met, Commerce reasonably concluded that the alleged subsidy on steam coal lacked specificity under § 1677(5A)(D)(iii).

[3] Commerce concluded that Cogeneration (a power generator) is the parent company of Yixing (a citric acid producer) and therefore attributed potential subsidies (*i.e.*, steam coal) received by Cogeneration to Yixing. *See Issues and Decision Memorandum* at 62, 65; 19 C.F.R. § 351.525(b)(6)(vi).

ADM, though, suggests that Commerce ignored record evidence demonstrating that the power generation industry is the predominant user of steam coal. The court disagrees. The record data cited by ADM covers the coal industry (in general) and is not specific to steam coal. For example, ADM cites questionnaire responses from the GOC explaining (repeatedly) that the GOC "does not disaggregate the data it collects about the coal industry by different segments of the coal industry." GOC Questionnaire Response at 8 (P.D. 99). Nevertheless, ADM quotes selected language from these questionnaire responses to advance its preferred interpretation of the information provided by the GOC. ADM Comments at 4–5. ADM also urges the court to perform calculations based on data concerning coal generally, to reach the conclusion that power generators are the predominant users of steam coal specifically. ADM Comments at 5 ("The GOC further provided data on the total volume of domestic production of 'coal,' which it asserted covered all forms of coal produced in China, including steam coal. That data showed production volumes of 2.69 billion tons in 2007, 2.80 billion tons in 2008, and 2.97 billion tons in 2009. Thus, the record shows that over 77 percent of domestic coal production in China from 2007 to 2009 was steam coal consumed by steam coal purchasers."). ADM jumps from one data set to another in a series of undeveloped arguments about the steam coal industry in China. ADM Comments at 4–5. These arguments are not persuasive.

The GOC's few references to steam coal are also not helpful. For example, after explaining that it does not maintain data on steam coal, the GOC did reference data compiled by the Coal Transportation and Sale Association, and stated "[w]hile GOC does not maintain particular records regarding the total volume of domestic production of steam coal, this percentage can be calculated by deducting the total volume of imported steam coal, which the GOC maintains records of and provides below, from the total volume of domestic consumption." GOC Questionnaire Response at 10 (P.D. 99). In response to Commerce's follow-up question on this issue, the GOC stated that "[t]he amount of yearly coal purchases for particular industries is not information that is maintained or gathered by the Coal Transportation and Sale Association in the ordinary course of business. The GOC cannot provide the requested information." GOC First Supplemental Questionnaire Response at 5 (P.D. 139). This information is not useful because it provides no insight into the steam coal industry. The court cannot endorse ADM's suggested interpretation of the data submitted by the GOC. Commerce did not ignore this data. It reasonably concluded that it provided little information about the predominant users of steam coal in China. *See Remand Results* at 12–13.

ADM also cites (1) a 2007 speech by an official with the China National Coal Association titled "The 11th Period Five-Year Plan for China's Coal Sector" and (2) an the U.S. Geological Survey, Minerals Yearbook on China for the years 2005, 2007, and 2008. *See* U.S. Department of the Interior, U.S. Geological Survey, Minerals Yearbook- China 2005, 2007, 2008 (P.D. 57 Ex. 19, 20, 24); Guangde Wang, Speech 4 P.R. China, The 11th Period Five-Year Plan for China's Coal Sector (Feb. 6, 2007) (P.D. 57 Ex. 21). Commerce ordinarily seeks usage data from the relevant government authority. *See Remand Results* at 7. These documents, which come from sources other than the GOC, discuss the coal industry in China from a macroeconomic point of view and do not provide sufficient data about the predominant users of steam coal to satisfy the specificity requirement.

But ADM again urges to court to draw specific inferences about steam coal usage from broad macro statements about the coal industry. ADM Comments at 10 ("The USGS Minerals Yearbooks corroborate the data cited by Mr. Wang and state that coal is the key or primary source of energy in China, that approximately 50 percent of the country's total coal output is used by power plants or the country's power sector, and that this figure was growing. . . . That steam coal is used in power generation is not in dispute. Thus, the USGS Minerals Year books provide relevant evidence of steam coal usage which demonstrates that power generators are the predominant users and receive a disproportionate share of the subsidy."). ADM relies on this type of deductive reasoning throughout its brief. ADM Comments at 5–11.

The court, though, cannot draw any meaningful inferences and conclusions about the predominant users of steam coal (during a specific period of review) from these general statements about China's coal industry. The GOC questionnaire responses indicate that references to the coal industry can include both steam coal and coking coal. *See* GOC Questionnaire Responses at 9 (P.D. 99) ("For example, nine of the top 10 coal producers in China produce both steam coal and coking coal."). The court would need information that actually discusses the major users of steam coal or more clearly supports drawing specific inferences about steam coal usage from data on coal generally. Such information does not exist on this record.[4]

[4] ADM also cites several administrative determinations to support its position. ADM Comments at 12. These determinations actually undermine ADM's position because they have distinguishable facts. They involve determinations where Commerce made a finding of "predominant use" or "disproportionate share" based on industry or company specific usage data. Again, there is no such data on this record.

The court will also not order Commerce to reopen the record for another round of questions as suggested by ADM. ADM Comments at 14. This case does not present the type of facts that would justify such a remedy. *See, e.g, Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012) ("*Essar*"). Though ADM makes much of Commerce's "failure" to seek usage data from the GOC, *see Issues and Decision Memorandum* at 50, Commerce did issue two rounds of questionnaires (during the review) to the GOC seeking information about steam coal. *See* GOC Questionnaire Responses (P.D. 99, 139). It received a fairly straightforward answer: the GOC does not possess the specific steam coal data necessary to make an affirmative finding on "predominant use" or "disproportionate share." There is no reason to believe that the GOC will produce new information on this issue. Commerce's determination that the alleged subsidy on steam coal lacks *de facto* specificity is reasonable and therefore supported by substantial evidence.

B. Sulfuric Acid – Factors Affecting Comparability

In *Archer Daniels I*, the court instructed Commerce to address "factors affecting comparability" in its selection of benchmark prices for sulfuric acid. *See* 917 F. Supp. 2d at 1345. The court also instructed Commerce to consider certain record evidence that was not considered because Commerce deemed RZBC's (respondent) arguments on this issue untimely. *See id.* On remand, Commerce concluded that its benchmark for sulfuric acid was comparable to sulfuric acid available in China. Specifically, Commerce explained that

> Contrary to RZBC's claims, the record indicates that RZBC's purchases of sulfuric acid from foreign suppliers (those purchases which RZBC asserted in its case brief should be used as tier-one benchmark prices) were comparable to the inputs related to Petitioners' benchmark prices. Specifically, we note that RZBC imported sulfuric acid under the same harmonized tariff schedule number as the products Petitioners used in their world market price benchmarks. Thus, RZBC's claims that Petitioners' benchmarks are incomparable to the sulfuric acid consumed by RZBC are without merit and, instead, the record shows Petitioners' benchmark prices are of comparable inputs to RZBC's.
>
> In addition, RZBC's claim that it uses "industrial grade" sulfuric acid . . . was not mentioned on the record previously. Based on the record at the time, the Department could not ascertain the validity of this statement or the consequential argument that Petitioners' benchmarks were not comparable to this "industrial grade." Thus, we found RZBC's argument to be un-

timely. On remand, we determine that this argument is simply unsupported by record evidence. RZBC did not cite to any record evidence supporting its argument that it used industrial grade sulfuric acid, and it did not cite to any evidence that the benchmarks submitted by Petitioners (and used by the Department in the *Preliminary Results*) omitted industrial grade sulfuric acid.

Regarding the second point, while the supporting documentation provided by RZBC shows varying prices of non-technical grades of sulfuric acid, it does not show that Petitioners' benchmarks are distorted or incomparable. First, the price information RZBC submitted consists of U.S. price quotes for small quantities of sulfuric acid that, according to RZBC, are used for laboratory purposes. RZBC did not state whether, or provide evidence that, these grades of sulfuric acid are traded internationally. Further, RZBC did not provide any evidence demonstrating that non-technical grades of sulfuric acid were included in Petitioners' benchmarks, nor did it provide evidence demonstrating that those non-technical grades of sulfuric acid comprise a significant percentage of the world benchmark prices presented by Petitioners. Thus, despite RZBC's accusation, the Department could not reasonably conclude that non-technical grades of sulfuric acid were included in Petitioners' benchmarks, or that they distort the benchmarks to a degree that would render them unusable.

On the third point that Petitioners "cherry picked" the benchmark countries, we find that apart from this brief claim, RZBC did not provide any evidence or explanation demonstrating how or why the benchmark countries put forth by Petitioners were poor or distortive selections for tier-two benchmarks. Therefore, RZBC's arguments are unsupported and do not undermine the reasonableness of the countries used for the sulfuric acid benchmark in the *Final Results*.

Finally, we note that RZBC's benchmark comments in the RZBC Rebuttal Comments were filed prior to the Department's initiation of an investigation of the alleged subsidy program and were presented in the context of whether the information put forth in Petitioners' allegation supported a finding of financial contribution or benefit for initiation purposes. These comments were not submitted in response to our Solicitation of Factual Information, and they were not submitted in response to Petitioners' benchmark information in Petitioners' Submission of Factual Information. Apart from its RZBC Case Brief, RZBC did

> not comment on the benchmark selection for this subsidy program subsequent to the Department's initiation of the subsidy program, nor did it take advantage of the opportunity to submit its own benchmark information in response to our explicit invitation for parties to do so. . . . Petitioners' submission of benchmark information in Petitioners' Submission of Factual Information, which the Department ultimately used in the *Preliminary Results* and the *Final Results*, constituted the only benchmark information on the record. Even if RZBC's ultimate view was that the Department should use tier-one benchmarks, if RZBC took issue with the only tier-two benchmarks on the record, it could have submitted its own tier-two benchmark information and still argued for the use of tier-one benchmarks for the *Final Results*. Because it did not do so, however, once we determined that tier-two benchmarks were appropriate in this case (a determination upheld by the Court), we only had Petitioners' benchmarks to select from. Moreover, as explained above, the Department did not find record evidence showing that Petitioners' benchmarks were not suitable. Thus, the use of these benchmarks was and is appropriate in this case.

Remand Results at 9–11.

RZBC challenges Commerce's selection of benchmark prices. RZBC argues that "there is record evidence that shows the Canadian, EU, Thai, Indian, Peruvian and Philippine benchmarks obtained from the 4, 6, and 8 level harmonized system (HS) code subheadings were not obtained at a comparable HS subheading as RZBC's purchases. Other than merely asserting the conclusion that the benchmarks are comparable, neither Commerce, nor Petitioners or any other party, in any submission, cite to record evidence or provide a coherent or reasoned explanation on how the various 4, 6, and 8 level HS code subheadings are comparable with one another, let alone with the 10-digit harmonized tariff system (HTS) number and HS code reported by RZBC." RZBC Comments at 3–4. RZBC claims that "[t]he problem with Commerce's argument (except for possibly the U.S. benchmark price) is that the benchmark prices used in the *Final Results* do not use the *same* HTS number or HS code as reported by RZBC, nor is there any explanation how the HS codes might be comparable." RZBC Comments at 4.

Under the CVD statute, a benefit is conferred where "goods . . . are provided . . . for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). In determining whether goods have been provided for

LTAR, Commerce must identify a benchmark price (market based price) to compare with the price of goods receiving a government subsidy. *See Essar*, 678 F.3d at 1273. Commerce, in turn, "will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good . . . resulting from actual transactions." 19 C.F.R. § 351.511(a)(2)(i). This is known as a "tier 1" benchmark. *See Essar*, 678 F.3d at 1273. Where, as here, there is no market-determined price available to make a comparison, Commerce "will seek to measure the adequacy of remuneration by comparing the government price to a world market price," 19 C.F.R. § 351.511(a)(2)(ii), or, alternatively, Commerce will average such prices to the extent practicable where there is more than one commercially available world market price, with due allowance for factors affecting comparability. *Id.* This is known as a "tier 2" benchmark. *See Essar*, 678 F.3d at 1273.

Here, Commerce's selection of "tier 2" benchmarks is not in dispute. The only issue is whether Commerce properly considered factors affecting comparability in its selection of world market prices. More specifically, the court requested that Commerce consider the different grades of sulfuric acid referenced by RZBC. Commerce considered this information and concluded that there was no need to adjust its benchmark price calculation. *See Remand Results* at 9–11. RZBC, though, maintains that Commerce selected overly broad benchmarks to calculate a value for the sulfuric acid used by RZBC. RZBC argues that Commerce should use benchmarks that are more specific to the grade of sulfuric acid used by RZBC. The court is not persuaded.

In the underlying review, Commerce solicited information from the interested parties on world prices of sulfuric acid for the specific purpose of establishing a benchmark price for sulfuric acid. Though RZBC filed comments challenging the subsidy allegation on sulfuric acid, it did not submit its own proposed world market prices for sulfuric acid as requested by Commerce. *See Remand Results* at 20. Only petitioners submitted world market prices (from Canada, EU, Thailand, India, and United States) for 2009, which Commerce used to calculate a benchmark price for sulfuric acid in the *Preliminary Results*. *See id.* at 33,232.

Subsequently, Commerce requested additional world pricing data for 2008. One of the mandatory respondents, Yixing, submitted world market prices from India, Peru, and Philippines for 2008, which, together with benchmark prices submitted by petitioners for 2009,

established the world market price for sulfuric acid.[5] In the *Final Results*, Commerce adjusted its calculation to evaluate the adequacy of remuneration for RZBC covering the 2008–09 period of review. *See Corrected Issues and Decision Memorandum* at 6. Commerce's selection of world market prices for sulfuric acid is consistent with the regulation, provided that it considered factors affecting comparability.

On remand, Commerce properly considered factors affecting comparability. Commerce measured comparability by the Harmonized Tariff Schedule Heading for sulfuric acid. It accepted, as comparable, world market prices (export data) for sulfuric acid under HTS Heading 2807. There is no dispute that RZBC purchases sulfuric acid under HTS Heading 2807 (Sulfuric Acid; Oleum). Some of the world market prices used by Commerce reflect sulfuric acid exports of different varieties under the HTS. For example, Commerce accepted Canadian benchmark prices derived from the 6-digit HTS subheading (2807.00), EU and Indian benchmarks derived from the 4-digit HTS heading (2807), and Thai[6] benchmarks derived from the 8-digit HTS subheading (2807.0000). *See Remand Results* at 17–19. RZBC claims that it purchases sulfuric acid under a 10-digit Chinese HTS subheading (2807.0000.00), which it describes as "industrial grade [[ ]] sulfuric acid purchased in significant quantities with various minimum solutions above [[ ]]." RZBC Comments at 4–5. It contends that Commerce erred by selecting benchmarks prices from the more general HTS provisions that have concentration levels less than 50% and small export quantities. RZBC Comments at 7. Commerce, though, is required only to select benchmarks that are comparable, not identical. *See* 19 C.F.R. § 351.511(a)(2)(ii).

[5] Although it has no bearing on the outcome of this case, there appears to be some confusion about this fact. In the *Remand Results*, Commerce states that the benchmark prices for India, Peru, and the Philippines "were submitted by another mandatory respondent in the underlying review, Yixing Union." *Id.* at 18. This, though, is inconsistent with Commerce's *Corrected Issues and Decision Memorandum*, which states "[w]e received full-year 2008 sulfuric acid world price benchmarks from RZBC, which were based on World Trade Atlas export data for India, Peru and the Philippines. . . . Other than the above-mentioned changes, (using the whole year 2008 sales data, using the 2008 sulfuric acid world price benchmarks RZBC provided . . .), we used the same calculation methodology to calculate RZBC's sulfuric acid benefit as described in the *Preliminary Results*. *See Corrected Issues and Decision Memorandum* at 5–6.

[6] The Thai benchmark information was derived from searches at the 8-digit level under the HTS, which included information about sulfuric acid at the 11-digit level. For example, pricing data on HTS 2807.0000 included pricing data on HTS 2807.0000.202. Commerce did not select the 11-digit data as a benchmark and instead summed the monthly quantities and values for these more detailed subheadings to arrive at a benchmark at the 8-digit level of detail. *See Remand Results* at 15 n.56, 17.

The selected benchmarks are comparable in the sense that they all reflect world market prices for sulfuric acid (a commodity product) under HTS Heading 2807. RZBC has not demonstrated that Commerce's selection of benchmarks at the 4, 6, and 8-digit levels is so distortive as to render Commerce's benchmark calculation unreasonable. Although there may be variations in pricing among different grades and concentration levels of sulfuric acid, RZBC has not provided sufficient evidence of such divisions within the sulfuric acid market. RZBC would need to demonstrate more clearly that including lower grades (and perhaps quantities) of sulfuric acid is inappropriate under the regulation. RZBC's reference to U.S. price quotes for nontechnical grades of sulfuric acid and selected purchase documents are not sufficient. RZBC fails to establish that Commerce's benchmarks unreasonably distort the price of sulfuric acid.

Moreover, the court is unable to identify any authority indicating that Commerce's benchmark selection was improper. It appears to be consistent with past CVD determinations involving the PRC. *See Issue and Decision Memorandum* at 17 n.12; *Preliminary Results*, 76 Fed. Reg. at 33,232 n.10. RZBC takes the stance that Commerce must use benchmark prices at the ten and eleven-digit level of specificity, which implies that Commerce must use benchmark prices that are nearly identical to RZBC's reported purchases to satisfy the regulation. RZBC Comments at 13. The regulation, however, does not manifest such a stringent standard. It requires only that the selected benchmarks be comparable. Considering that sulfuric acid is a commodity product, and that RZBC did not establish clear divisions within the sulfuric acid market, Commerce's selection of benchmark prices for sulfuric acid at the 4, 6, and 8 digit level is consistent with the regulation.

Commerce, for its part, did solicit benchmark information on two separate occasions and accepted world market prices from both petitioners and respondents. Although RZBC disputed Commerce's selection of benchmark prices, and cited some data to support its position, it did not establish evidence sufficient to overcome the deferential standard of review that applies to Commerce's factual determinations. Ultimately, RZBC has not demonstrated that its proposed benchmark calculation is the only reasonable outcome on this administrative record. *See, e.g.*, *Allied Tube and Conduit Corp. v. United States*, 24 CIT 1357, 1371, 127 F. Supp. 2d 207, 220 (2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its factual conclusions as the only reasonable outcome."). Therefore, Commerce's determination on this issue is supported by substantial evidence.

IV. CONCLUSION

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

Dated: February 24, 2014
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 14–24

THE TIMKEN COMPANY, Plaintiff, v. UNITED STATES, Defendant, NTN BEARING CORPORATION OF AMERICA, NTN-SNR ROULEMENTS S.A., SNR BEARINGS USA, INC., MYONIC GMBH, NEW HAMPSHIRE BALL BEARINGS, INC., SCHAEFFLER ITALIA S.R.L, SKF USA, INC., SKF INDUSTRIES S.P.A., and SOMECAT S.P.A., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 12–00415

[Commerce's final results in antidumping duty review declining to apply a targeted dumping remedy sustained.]

Dated: February 27, 2014

Geert M. De Prest, Stewart and Stewart, of Washington, DC, argued for plaintiff. With him on the brief were *Terence P. Stewart* and *Lane S. Hurewitz*.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Diane A. MacDonald, Baker & McKenzie, LLP, of Chicago, IL, argued for defendant-intervenors NTN Bearing Corporation of America, NTN-SNR Roulements, S.A., and SNR Bearings USA, Inc. With her on the brief was *Kevin M. O'Brien*.

John M. Foote, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for defendant-intervenor Schaeffler Italia S.r.l. With him on the brief were *Max F. Schutzman* and *Andrew T. Schutz*.

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, argued for defendant-intervenors SKF USA Inc., SKF Industrie S.p.A., and Somecat S.p.A. With him on the brief were *Michael T. Gershberg*, *Laura R. Ardito*, and *Christopher G. Falcone*.

Jay C. Campbell and *Walter J. Spak*, White & Case, LLP, of Washington, DC, for defendant-intervenors myonic GmbH and New Hampshire Ball Bearings, Inc.

OPINION

Restani, Judge:

This matter is before the court on plaintiff The Timken Company's ("Timken") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Timken challenges various aspects of the U.S. Department of Commerce's ("Commerce") final results rendered in the 2010–2011 review of the antidumping duty orders on ball bearings and parts thereof from France, Germany, and Italy. *Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010–2011*, 77 Fed. Reg. 73,415 (Dep't Commerce Dec. 10, 2012) ("*Final Results*"). For the reasons stated below, the court sustains the *Final Results*.

BACKGROUND

This case requires the court to resolve issues regarding Commerce's analysis of Timken's "targeted dumping" allegations against NTN-SNR Roulements S.A. ("NTN-SNR"), myonic GmbH ("myonic"), SKF Italy ("SKF"), and Schaeffler Italia S.r.l. ("Schaeffler") (collectively "the respondents"). Because the advent of "targeted dumping" allegations in administrative reviews is a recent development, it is necessary to provide some background on the statutory and regulatory framework regarding targeted dumping before addressing Timken's specific arguments in this case.

Until 2012, Commerce's default methodology for comparing home market and export prices in administrative reviews had been the average-to-transaction ("A-T") methodology. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8101 (Dep't Commerce Feb. 14, 2012) ("*Final Modification*"). When applying this methodology, Commerce did not allow transactions with export prices above the home market price to offset transactions with export prices below the home market price. *Id.* The disallowance of offsets is commonly referred to as "zeroing."[1] On February 14, 2012, Commerce announced that it was changing its default comparison methodology in administrative reviews to the average-to-average ("A-A") methodology with offsets in order to comply with World Trade Organization ("WTO") decisions finding the use of zeroing in administrative reviews inconsistent with

[1] For a detailed explanation of the zeroing practice and its history, see *Union Steel v. United States*, 823 F. Supp. 2d 1346 (CIT 2012).

the United States' WTO obligations. *Id.* According to Commerce, this change meant that the default methodology in reviews essentially would mirror its WTO-compliant methodology in antidumping investigations. *Id.* Commerce, however, stated that it would consider the use of other comparison methodologies if the circumstances warranted and that it would examine the same criteria it examines in investigations to determine if another comparison methodology would be more appropriate. *Id.* at 8102. Commerce did not rule out the possibility of using a zeroing methodology if it found such circumstances. *See id.* at 8104, 8106–07.

As explained above, the default comparison methodology in investigations is the A-A methodology. *See also* 19 U.S.C. § 1677f-1(d)(1)(A) (2006).[2] The antidumping statute specifies that in an investigation, however, the A-T methodology may be used if there is "targeted dumping." Specifically, 19 U.S.C. § 1677f-1(d)(1)(B) provides:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—
>
> > (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
> >
> > (ii) the administering authority explains why such differences cannot be taken into account using [the A-A methodology or the T-T methodology].

The "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" is what is referred to as "targeted dumping." If Commerce finds targeted dumping and explains why the default A-A methodology cannot take account of the pattern, Commerce may use the A-T methodology to compare the home market and export prices. Commerce has used this statutory provision as guidance in deciding when to apply the A-T methodology (likely with zeroing) instead of the default A-A methodology in reviews. *See, e.g.*, Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes from Turkey—May 1, 2010, through April 30, 2011,

[2] Although the transaction-to-transaction ("T-T") methodology also is listed as a preferred methodology, Commerce, for practical reasons, rarely employs this methodology. *See* 19 C.F.R. § 351.414(c)(2) (2013) ("The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.").

A-489–501, at 10 (Nov. 30, 2012), *available at* http://enforcement.trade.gov/frn/summary/turkey/2012–29529–1.pdf (last visited Feb. 20, 2014); Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany, and Italy; 2010–2011, A-427–801, A-428–801, A-475–801, at 11–12 (Dec. 4, 2012) ("*I&D Memo*"), *available at* http://enforcement.trade.gov/frn/summary/MULTIPLE/2012–29770–1.pdf (last visited Feb. 20, 2014).

Relevant to this case, Commerce has applied the so-called *Nails*[3] test to determine whether targeted dumping has occurred. The *Nails* test proceeds in two stages, each done on a product-specific basis (by control number or CONNUM). The first stage is referred to as the "standard-deviation" test. *I&D Memo* at 13. If 33% or more of the alleged targeted group's (i.e., customer, region, or time period) sales of subject merchandise are at prices more than one standard deviation below the weighted-average price of all sales under review, those sales pass the standard deviation test and are considered in step two—the "gap" test. *Id.* In performing the gap test, Commerce considers whether the "gap" between the weighted-average sales price to the targeted group and the weighted-average sales price to the next-highest non-targeted group is greater than the average gap between the non-targeted groups. *Id.* If the gap between the targeted group and the next-highest non-targeted group is greater than the average gap, those sales pass the gap test. *Id.* If more than 5% of total sales of the subject merchandise to the alleged target pass both tests, Commerce determines that targeting has occurred. *Id.*

Turning to the facts of the case at bar, this case arises out of Commerce's 2010–2011 review of antidumping duty orders on ball

[3] The *Nails* test derives its name from the cases in which it was first used. *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008); *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008). Commerce may be applying an entirely different test in future reviews. *See, e.g.*, Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Fifth Antidumping Duty Administrative Review, A-570–904, at 21–22 (Nov. 20, 2013), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–28359–1.pdf (last visited Feb. 20, 2014); Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2011–2012, A489–501, at 38–39 (Dec. 23, 2012), *available at* http://enforcement.trade.gov/frn/summary/turkey/2013–31344–1.pdf (last visited Feb. 20, 2014). The court expresses no opinion on a test that was not employed in this case.

bearings and parts thereof from France, Germany, and Italy. *Final Results*, 77 Fed. Reg. at 73,415. While the reviews were proceeding, Commerce announced its change in default methodology for reviews. *See* Timken's Targeted Dumping Analysis for NTN-SNR at 1–2, A-427–801, PD 85 at bar code 3057972–01 (Feb. 21, 2012), ECF No. 47–2 (June 14, 2013). Timken, the petitioner before the agency, in anticipation of the possible application of the modified methodology to the reviews at bar, filed allegations of targeted dumping with Commerce against the respondents on February 21, 2012.[4] *See, e.g.*, *id.* at 1–4.

Commerce's preliminary results did not rule on the targeted dumping allegation and applied the default A-A methodology, which resulted in zero dumping margins for each of the respondents. *Ball Bearings and Parts Thereof From France, Germany, and Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Rescission of Antidumping Duty Administrative Reviews in Part*, 77 Fed. Reg. 33,159, 33,161, 33,164 (Dep't Commerce June 5, 2012). Commerce, however, invited the parties to comment on the targeted dumping allegations and the use of the new default methodology. *Id.* at 33,161–62.

Commerce issued post-preliminary determinations addressing the targeted dumping allegations on October 16, 2012. Post-Preliminary Analysis and Calculation Memorandum, A-427–801, PD 109 at bar code 3101431–01 (Oct. 16, 2012), ECF No. 47–2 (June 14, 2013) ("*Post-Preliminary Results*"). In its analysis, Commerce applied the *Nails* test to determine whether targeted dumping had occurred. *See id.* at 2–3. Commerce found sales that passed both stages of the *Nails* test for each respondent. *Id.* at 3; Timken's Comments on the Post-Preliminary Targeted Dumping Analysis for NTN-SNR at 2, A-427–801, PD 120 at bar code 3104304–01 (Nov. 5, 2012), ECF. No. 47–2 (June 14, 2013) ("*Timken's Post-Preliminary Comments for NTN-SNR*"). In these reviews, Commerce compared the number of sales that passed the *Nails* test to all U.S. sales for each respondent. *See* Post-Preliminary Results Analysis for NTN-SNR at 2, A-427–801, PD 110 at bar code 3101689–01 (Oct. 16, 2012), ECF No. 47–2 (June 14, 2013) ("*Post-Preliminary Analysis for NTN-SNR*"); Post-Preliminary Results Analysis for myonic GmbH at 2, A-428–801, PD 89 at bar code 3101703–01 (Oct. 16, 2012), ECF No. 473 (June 14, 2013) ("*Post-Preliminary Analysis for myonic*"); Post-Preliminary Results Analysis for Schaeffler at 2, A-475–801, PD 151 at bar code

[4] Timken had filed similar allegations in November 2011, before Commerce's change in methodology was finalized. *See I&D Memo* at 5.

3101554–01 (Oct. 16, 2012), ECF No. 47–3 (June 14, 2013) ("*Post-Preliminary Analysis for Schaeffler*"); Post-Preliminary Results Analysis for SKF at 2, A-475–801, PD 155 at bar code 3101698–01 (Oct. 16, 2012), ECF No. 47–3 (June 14, 2013) ("*Post-Preliminary Analysis for SKF*"). For each respondent, Commerce determined that the volume and value of sales that passed the *Nails* test was insufficient as a percentage of the volume and value of all U.S. sales to warrant the use of the alternative A-T methodology. *See Post-Preliminary Analysis for NTN-SNR* at 2; *Post-Preliminary Analysis for myonic* at 2; *Post-Preliminary Analysis for Schaeffler* at 2; *Post-Preliminary Analysis for SKF* at 2.

Timken filed comments with Commerce challenging Commerce's decision to engage in this additional step beyond the two-part *Nails* test and Commerce's use of only the sales that passed the *Nails* test to determine the significance of the targeted dumping. *See, e.g.*, *Timken's Post-Preliminary Comments for NTN-SNR*. Following comments by the parties and a hearing, Commerce issued its final results. *Final Results*, 77 Fed. Reg. at 73,415. Commerce again determined that the volume and value of targeted sales for each respondent was insufficient to consider using the A-T methodology. *See I&D Memo* at 10, 12–15. Commerce therefore applied the default A-A methodology and again found dumping margins of zero for each respondent. *See I&D Memo* at 10; *Final Results*, 77 Fed. Reg. at 73,416. Timken challenges Commerce's analysis of its targeted dumping allegations on several grounds, each of which will be discussed below. Defendant-intervenors argue that Commerce's determination should be sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 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).

DISCUSSION

I. Consistency with Past Practice

The bulk of Timken's argument is that Commerce's decision to compare the results of the *Nails* test to total sales before considering the use of the A-T methodology is inconsistent with Commerce's past practice in applying the *Nails* test. *See* Timken Co.'s Mem. in Supp. of Its Rule 56.2 Mot. for J. on the Agency R., ECF No. 46, 16–33 ("Timken Br."). According to Timken, once Commerce had found sales

that passed the *Nails* test, in prior cases it automatically considered whether the use of the A-T methodology was appropriate by comparing the dumping margins calculated using the A-A methodology to the margins calculated using the A-T methodology. *Id.* at 17–19. Timken alleges that Commerce had explicitly declined in four other cases to engage in a de minimis inquiry in determining whether a pattern exists for purposes of 19 U.S.C. § 1677f-1(d)(1)(B).[5] *Id.* at 18–22(citing Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Multilayered Wood Flooring from the People's Republic of China, A-570–970 (Oct. 11, 2011) ("*Wood Flooring from China*"), *available at* http://enforcement.trade.gov/frn/summary/prc/2011–26932–1.pdf (last visited Feb. 20, 2014); Issues and Decision Memorandum for the Less than Fair Value Investigation of Certain Steel Nails from the United Arab Emirates, A-520–804 (Mar. 19, 2012) ("*Nails from the UAE II*"), *available at* http://enforcement.trade.gov/frn/summary/uae/2012–7067–1.pdf (last visited Feb. 20, 2014); High Pressure Steel Cylinders from the People's Republic of China: Issues and Decision Memorandum for the Final Determination, A-570–977 (Apr. 30, 2012) ("*Steel Cylinders from China*"), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–10952–1.pdf (last visited Feb. 20, 2014); Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea, A-580–868 (Dec. 18, 2012) ("*Washers from Korea*"), *available at* http://enforcement.trade.gov/frn/summary/korea-south/2012–31104–1.pdf (last visited Feb. 20, 2014)). Because Commerce allegedly failed to provide a proper explanation for this change in practice, Timken argues that remand is necessary. *Id.* at 22–33.

The government argues that Commerce's decision in this case is consistent with its prior reasoning. *See* Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 59, 12–16 ("Government Br."). Commerce cited a prior case in which it engaged in a similar sufficiency analysis even after some sales had passed the *Nails* test. *I&D Memo* at 13–14 (citing *Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 76 Fed. Reg. 68,154,

[5] Timken and several of the defendant-intervenors refer to Commerce's sufficiency determination as a de minimis test. *See, e.g.*, Timken Br. 34–35; Resp. of NTN Bearing Corp. of Am., et al., to the Rule 56.2 Mots. of the Timken Co., ECF No. 57, 13. The government denies that Commerce created a de minimis test. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 59, 12. Because of this disagreement regarding the use of the term "de minimis," the court will refer to Commerce's determination as a sufficiency determination.

68,156 (Dep't Commerce Nov. 3, 2011) ("*OBAs from Taiwan*")). Commerce noted that it had previously indicated that it would proceed on a case-by-case basis in determining when to use the A-T methodology and explained that its prior cases did not preclude the analysis undertaken here. *See id.* at 11, 13–15. Commerce further noted that 19 U.S.C. § 1677f-1(d)(1)(B) states that Commerce "may" use the A-T methodology if it finds targeted dumping, but it is not required to do so. *Id.* at 14. The government argues that Commerce's determination was a reasonable exercise of its discretion and otherwise in accordance with law. Government Br. 16–19.

SKF argues that Commerce had no duty to explain any departure from the cases cited by Timken. *See* Resp. Br. of SKF USA Inc., SKF Industrie S.p.A., and Somecat S.p.A. Opposing the Rule 56.2 Mot. of the Timken Co., ECF No. 53, 9–15 ("SKF Br."). SKF notes that the cases cited by Timken were all investigations, whereas this case involves a review. *Id.* at 10–11. SKF argues that to the extent that Commerce's practice in investigations might be relevant, three prior decisions[6] do not reflect a well-established practice from which a departure must be explained. *Id.* at 12–14. SKF additionally argues that because Commerce's practice with regard to targeted dumping was in a state of flux and Commerce had stated that it intended to proceed on a case-by-case basis in this area, there could be no presumption of continuity. *Id.* at 14–15.

Schaeffler claims that Timken's arguments based on past practice fail to recognize Commerce's ability to adapt and change its practices and argues that the alleged change here was a relatively minor evolution from previous cases. Resp. of Def.-Intervenor Schaeffler Italia S.r.l. to Pl.'s Mem. in Supp. of Its Rule 56.2 Mot., ECF No. 54, 12–14 ("Schaeffler Br."). NTN-SNR, citing *OBAs from Taiwan*, argues that Commerce's decision is in line with past practice. Resp. of NTN Bearing Corp. of Am., et al., to the Rule 56.2 Mots. of the Timken Co., ECF No. 57, 13 ("NTN-SNR Br.").[7]

---

[6] The final determination in one of the four cases cited by Timken, *Washers from Korea*, was published in the Federal Register approximately two weeks after Commerce's final determination in the challenged reviews. *Compare Final Results*, 77 Fed. Reg. at 73,415 (dated December 10, 2012), *with Notice of Final Determination of Sales at Less than Fair Value: Large Residential Washers From the Republic of Korea*, 77 Fed. Reg. 75,988 (Dep't Commerce Dec. 26, 2012).

[7] NTN-SNR also argues that the results ultimately should be affirmed because Commerce lacked the authority to engage in the targeted dumping analysis at all. *See* NTN-SNR Br. 3–11. NTN-SNR first argues that 19 U.S.C. § 1677f-1(d) limits the targeted dumping analysis to investigations. *Id.* at 3–9. NTN-SNR claims that because the targeted dumping inquiry is described only in the subsection entitled "Investigations" and is absent in the subsection entitled "Reviews," Congress clearly intended for the targeted dumping analysis

The court notes that Commerce's inconsistency in its explanations has generated quite a bit of confusion that is reflected in the briefing of this case. Much of the briefing in this case treated Commerce's sufficiency determination as part of finding the requisite pattern in 19 U.S.C. § 1677f-1(d)(1)(B). This is understandable because Commerce made statements in the record indicating that this was the basis for continuing to use the A-A methodology. *See, e.g.*, *Post-Preliminary Analysis for NTN-SNR* at 2; *I&D Memo* at 10 ("We continue to find, for each respondent, that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods does not

to be limited to investigations. *Id.* NTN-SNR also argues that Commerce's targeted dumping analysis was based on improperly submitted information, in that Timken first filed targeted dumping allegations in November 2011, several months before Commerce's February 2012 *Final Modification* announcing the change in default methodology for reviews. *Id.* at 9–11. NTN-SNR requests that the court reverse Commerce's determination that it may conduct a targeted dumping analysis in a review and order that Timken's targeted dumping allegations be removed from the record. *Id.* at 15.

Even assuming that NTN-SNR may succeed on an argument contrary to that advanced by the agency to support the outcome reflected in the *Final Results*, *see SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."), the court finds these arguments unpersuasive. Turning to NTN-SNR's first argument, 19 U.S.C. § 1677f-1(d)(2), the subsection entitled "Reviews," does nothing more than clarify how Commerce should proceed when it decides to use the A-T methodology (namely, that it should use monthly averages). Section 1677f-1(d)(2) is otherwise completely silent as to how Commerce should conduct its determination of less than fair value in reviews, leaving Commerce substantial discretion as to the methodologies it wishes to employ. *See Union Steel v. United States*, 823 F. Supp. 2d 1346, 1359–60 (CIT 2012), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013). NTN-SNR's reliance on *FAG Italia S.p.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002), is misplaced. In that case, the Court of Appeals for the Federal Circuit ("Federal Circuit") determined that 19 U.S.C. § 1675(a)(4), which authorizes Commerce to make a duty absorption inquiry in the second and fourth administrative reviews of orders entered after the Uruguay Round Agreements Act (URAA) came into effect, did not authorize Commerce to make a similar determination in other years or in reviews of orders entered before the URAA came into effect. *Id.* at 818–19. The Federal Circuit stressed, however, that Commerce lacked a general authority to act that would have authorized Commerce to engage in the disputed inquiry despite the limited scope of 19 U.S.C. § 1675(a)(4). *Id.* at 818 n.18. Commerce certainly has a general authority to conduct an administrative review, and NTN-SNR has failed to put forward any limitation on that authority except for its reference to § 1677f-1(d). As explained above, that section does nothing more than clarify that the averaging period in reviews should be monthly. It places no other limits on the methodologies that Commerce may employ in reviews, leaving Commerce discretion as to the choice of methodologies.

In the light of this broad discretion, Commerce acted reasonably and did not abuse its discretion by basing its practice in reviews on its practice in investigations, which includes the use of the targeted dumping analysis. The court rejects NTN-SNR's second argument because Commerce ultimately based its analysis on Timken's renewed targeting allegations, which were submitted after Commerce had published its *Final Modification*. *See I&D Memo* at 15.

exist . . . ."). Other parts of the record, however, indicate that Commerce found a pattern of significant differences, but did not find the pattern sufficient to invoke its discretionary authority. *See, e.g.*, *Post-Preliminary Results* at 3 ("The Department preliminarily finds, for each respondent, that the pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods is insufficient to consider whether the standard comparison method can account for the alleged targeted dumping."); *I&D Memo* at 13 (stating that Commerce determines that targeting has occurred once sales have passed both prongs of the *Nails* test); *id.* at 14 (noting that § 1677f-1(d)(1)(B)'s inclusion of the word "may" indicates that Commerce is not required to use the A-T methodology even if both prongs of the *Nails* test are satisfied). The government clarified at oral argument and in its supplemental briefing that the *Nails* test finds the requisite pattern and that Commerce's sufficiency determination was made pursuant to its discretionary authority granted by the word "may" in § 1677f-1(d)(1)(B). *See* Def.'s Supplemental Filing Responding to the Ct.'s Questions Regarding Targeted Dumping, ECF No. 81, 7 ("Government Supplemental Br."). Because the government's position is rooted in statements made by Commerce on the record, the court will treat the sufficiency determination as part of Commerce's exercise of its discretionary authority based on the word "may." *See Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) ("A court may uphold an agency's decision of less than ideal clarity if the agency's path may reasonably be discerned." (internal quotation marks and brackets omitted)).

Treating the sufficiency determination in this case as rooted in Commerce's discretionary authority, the court finds little, if any, inconsistency with the cases cited by Timken. First, the language cited by Timken from *Wood Flooring from China* appears to be directed at the issue of whether the A-T methodology should be applied to all sales or only targeted sales. *See Wood Flooring from China* at 32–33. Commerce's reasoning for applying the A-T remedy to all sales is distinct from the issue of whether Commerce should consider the use of the A-T methodology at all.

The language in *Nails from the UAE II* likewise is not instructive as to how Commerce should exercise its discretion. In that case, Commerce explained:

> In calculating margins, pursuant to section 777A(d)(1)(B)(i) of the Act the Department may use the A-T comparison methodology if "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, re-

> gions, or periods of time." This statutory language *does not establish how a pattern of prices should be measured* in terms of the prevalence of underlying sales in relation to all sales. Instead, the statute states that there must be a variance in export prices among purchasers, regions, or periods of time, and that the variance must exhibit a pattern. Thus, *the task of finding a pattern* involves determining the frequency of low prices in a given group of sales, and not whether the sales in that group were frequent in relation to all sales. . . .
>
> Dubai Wire and Precision did not demonstrate why the prices for products corresponding to a small percentage of overall sales *cannot be found to exhibit a pattern* under the statute. We find that the methodology underlying our targeted dumping test *in identifying a pattern* of prices pursuant to section 777A(d)(1)(B)(i) of the Act is reasonable. As indicated correctly by interested parties, this methodology has also withstood judicial scrutiny. Lastly, the targeted sales are not likely to account for a significant portion of sales because, by definition, targeting is an act of selectively pursuing a specific market segment or product.

Nails from the UAE II at 14–15 (emphases added) (citation omitted). This language clearly deals with whether the statutory definition of "pattern" has been met. As explained above, however, Commerce found a pattern using the *Nails* test, but Commerce exercised its discretion because the pattern was not sufficient to warrant considering or applying the A-T methodology. The language from *Nails from the UAE II* does not address Commerce's use of that discretion.

Similarly, the language in *Steel Cylinders from China* addresses the definition of "pattern" as that term is used in 19 U.S.C. § 1677f-1(d)(1)(B). *Steel Cylinders from China* at 31 ("This statutory language *does not establish how a pattern of prices should be measured* in terms of the prevalence of underlying sales in relation to all sales. Instead, the statute states that there must be a pattern of prices that differ among purchasers, regions, or periods of time, and that the difference must be significant. Thus, *the task of finding a pattern* under the *Nails* test involves determining the frequency of low prices in a given group of sales, and not whether the sales in that group were frequent in relation to all sales." (emphases added)).

The language cited by Timken in *Washers from Korea*, which was published after the *Final Results* in this case, is even less helpful to Timken. Again the language focused on by Timken deals with the pattern requirement. *See Washers from Korea* at 22–23 ("As we stated

in *UAE Nails II*, the statutory language of section 777A(d)(1)(B)(i) of the Act *does not establish how a pattern of prices should be measured* in terms of the prevalence of underlying sales in relation to all sales. Instead, the statute states that there must be a variance in export prices among purchasers, regions, or periods of time, and that the variance must exhibit a pattern." (emphasis added)). But Commerce also stated: "If we determined that a sufficient volume of U.S. sales were found to have passed the *Nails* test, then the Department considered whether the average-to-average method could take into account the observed price differences." *Id.* at 20. Commerce further explained:

> With respect to the respondents' contention that the Department should apply a *de minimis* threshold before invoking the average-to-transaction method, we note that the Department has also addressed this argument in previous cases. As we discussed above, we considered the volume of U.S. sales that passed the *Nails* test. However, the Department does not employ a de minimis threshold but rather makes its determination on a case-by-case basis.

Id. at 22 (citation omitted). These latter statements are entirely consistent with Commerce's methodology and analysis in this case.

Commerce also cited *OBAs from Taiwan* as a prior case in which it conducted an additional test beyond the *Nails* test before considering the use of the A-T methodology. *I&D Memo* at 14. In that case, Commerce determined that the number of sales that passed the *Nails* test "was insufficient to establish a pattern of export prices for comparable merchandise that differ significantly among certain customers or regions." *OBAs from Taiwan*, 77 Fed. Reg. at 17,028. Although this is framed as part of the pattern inquiry and Commerce justifies its actions in this case on the word "may," *OBAs from Taiwan* lends support to Commerce's assertion that it previously had considered the number of sales that passed the *Nails* test before considering whether the A-T methodology was appropriate.

The cases supposedly supporting Timken's argument (*Wood Flooring From China*, *Nails from the UAE II*, and *Steel Cylinders from China*) thus are mostly, if not entirely, irrelevant to the issue in this case because they address different aspects of the targeted dumping analysis. One case cited by Timken (*Washers from Korea*) even contains the same analysis that Commerce engaged in during this case, and Commerce pointed to a case (*OBAs from Taiwan*) in which Commerce engaged in a similar analysis as part of the pattern inquiry.

Based on these cases, the court is unable to agree with Timken that Commerce's actions were precluded by its prior cases.

To the extent that some of the reasoning in the discussed cases might be construed as inconsistent with Commerce's actions in this case, the court finds such minor inconsistency insufficient to conclude that Commerce abused the discretion granted to it in selecting an alternative methodology. The statute used by Commerce for guidance in conducting a targeted dumping analysis in reviews states that Commerce "may" use the A-T methodology if the statutory criteria are met. 19 U.S.C. § 1677f-1(d)(1)(B). And Commerce stated in the *Final Modification* that it would "determine on a case-by-case basis whether it is appropriate to use an alternative comparison methodology" in reviews. 77 Fed. Reg. at 8102. "When making a discretionary determination, . . . Commerce can use a case-by-case analysis, so long as it is consistent with its statutory authority." *Qingdao Taifa Grp. Co. v. United States*, 780 F. Supp. 2d 1342, 1350 (CIT 2011) (internal quotation marks omitted). Even if Commerce's analysis conflicts with its prior cases, "Commerce is not required to justify its determination in terms of past alternatives," as long as it acts reasonably. *Id.* Timken's allegations that Commerce's application of the test was unreasonable will be addressed below, but the court holds that Commerce's prior practice did not preclude it from engaging in a sufficiency determination as part of its exercise of discretionary authority.

II. Commerce's Alleged Failure to Explain Its Application of the Sufficiency Test

Timken next argues that Commerce failed to explain the purpose of its additional sufficiency test and failed to state and justify the amount of targeted sales it considers "sufficient." Timken Br. 34–35. Because Commerce failed to provide this reasoning, Timken argues that remand is necessary. *See id.* at 35.

The government explains that Commerce has discretion in deciding whether to apply the A-T methodology even if targeting is found, that Commerce engaged in the challenged additional step to determine whether the pattern found by the *Nails* test was sufficient to exercise that discretion, and that Commerce has not established a de minimis threshold, but rather is proceeding on a case-by-case basis in deciding when to exercise its discretion. Government Br. 11–14. The government additionally argues that Commerce's sufficiency determination in this case was reasonable because Commerce is not obligated to justify relying on the default comparison methodology (i.e., the A-A methodology) and Commerce's experience in conducting the *Nails* test informed its judgment in making that determination. *Id.* at 17–18.

Schaeffler argues that Commerce enjoys broad discretion in determining whether to apply the A-T methodology and that "[a]ny reasonable mind would accept that the minimal number and value of Schaeffler's qualifying sales supports Commerce's conclusion that Schaeffler had not engaged in a pattern of targeted dumping." Schaeffler Br. 10–11. Schaeffler also argues that this additional step is necessary because Commerce could otherwise impose the "draconian remedy" of applying the A-T methodology with zeroing to all sales even though very few sales passed the *Nails* test. *Id.* at 15. NTN-SNR and SKF urge that an additional inquiry is needed to determine whether the amount of sales that pass the *Nails* test truly can be considered a pattern. NTN-SNR Br. 12–14; SKF Br. 23–24. SKF additionally argues that Commerce should be given wide discretion in defining "pattern" on a case-by-case basis and should not be required to set a specific threshold. SKF Br. 24–25

As explained above, Commerce is relying on the word "may" in the statute. With this established, Commerce's sufficiency determination easily can be understood as a methodology by which Commerce decides whether to exercise that discretion. If a relatively insignificant number of sales are identified as targeted, Commerce exercises its discretion and continues to apply the A-A methodology. *See I&D Memo* at 13–14; Government Supplemental Br. 7.[8] The sufficiency

[8] As Schaeffler notes, the reasonableness of making a sufficiency determination would appear to be buttressed by Commerce's practice of applying the A-T methodology with zeroing to all of the respondent's sales, not just those that passed the *Nails* test. *See, e.g.*, *Wood Flooring from China* at 31. Before applying this "remedy" to all of the respondent's U.S. sales, it would appear reasonable for Commerce to consider whether the amount of targeted sales forming the justification for applying that remedy represents a significant portion of the respondent's U.S. sales.

The court notes that a recent opinion of the court held that Commerce's withdrawal of the so-called "Limiting Rule," 19 C.F.R. § 351.414(f)(2) (2007), which limited the A-T remedy in investigations to only targeted sales, violated the Administrative Procedure Act, 5 U.S.C. § 553. *Gold E. Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317, 1327–28 (CIT 2013). Thus, until the amended regulation is renoticed, the A-T remedy likely should be limited to only those sales that pass the *Nails* test, at least in investigations. The court observes, however, that Commerce has continued to apply the A-T methodology with zeroing to all sales in administrative reviews even after *Gold East Paper*, relying in part on the fact that 19 C.F.R. § 351.414(f) referenced only investigations. *See, e.g.*, Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Stainless Steel Plate in Coils from Belgium; 2011–2012, A-423–808, at 3 (Dec. 23, 2013), *available at* http://enforcement.trade.gov/frn/summary/belgium/2013–31345–1.pdf. Should the Limiting Rule be applied to reviews, Schaeffler's arguments regarding the "draconian remedy" of applying the A-T methodology with zeroing to all sales would be rendered moot. In any case, the sufficiency test is justified as a tool in guiding Commerce's discretionary authority based on the record now before the court.

test thus serves as a tool to guide Commerce's exercise of its discretion in choosing whether to depart from its normal practice of using the A-A methodology.

Regarding Timken's argument that Commerce has failed to provide any explanation regarding what amount of targeted sales it considers to be "sufficient," the court has reviewed the record and has concluded that Timken did not present its arguments to Commerce in a manner that compelled Commerce to define a level of sufficiency with specificity. In its post-preliminary results, Commerce made specific findings regarding the percentage of sales by value and by volume that passed the *Nails* test. *See Post-Preliminary Analysis for NTN-SNR* at 2; *Post-Preliminary Analysis for myonic* at 2; *Post-Preliminary Analysis for Schaeffler* at 2; *Post-Preliminary Analysis for SKF* at 2. The court notes that by either measure, the percentages of sales found to be targeted were very small. *See* Timken Co.'s Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R., ECF No. 44, 33, 40 (confidential version). In its comments to Commerce following the post-preliminary results, Timken challenged Commerce's decision to engage in this additional inquiry, but Timken did not argue that the percentages found should be considered sufficient, nor did Timken argue that Commerce erred by failing to set and justify a specific sufficiency threshold. *See Timken's Post-Preliminary Comments for NTN-SNR*; Timken's Comments on Commerce's Targeting Analysis for Schaeffler and SKF, A-475–801, PD 162 at bar code 3104350–01 (Nov. 5, 2012), ECF No. 47–3 (June 14, 2013) ("*Timken's Post-Preliminary Comments for Schaeffler and SKF*"); Timken's Comments on Commerce's Targeting Analysis for myonic GmbH, A-428–801, CD 39 at bar code 3104315–01 (Nov. 5, 2012), ECF No. 48 (June 14, 2013) ("*Timken's Post-Preliminary Comments for myonic*"). Because Commerce was never presented with (and consequently did not consider) arguments asking it to specify and justify a sufficiency threshold, because Timken never argued that the specific percentages found should be considered sufficient, and because the percentages were small, this argument fails.

III. Comparison of Sales that Passed the *Nails* Test to All U.S. Sales

Finally, Timken argues that the use of the sales that passed the *Nails* test as the numerator and all U.S. sales as the denominator in the "ratio" Commerce used in its sufficiency determination is illogical. Timken Br. 36–41. First, Timken argues that because the *Nails* test considers only products sold to an alleged target that are identical to products sold to a non-target, the numerator and denominator used in

this case were inconsistent. *Id.* at 37–38. Timken reasons that products that are sold to only the targeted customer cannot be considered in Commerce's application of the *Nails* test (because there are no non-targeted sales of the same product to compare the prices with), and a numerator drawn from only identical sales is inconsistent with a denominator that includes all sales. *Id.* Next, Timken argues that the *Nails* test finds only evidence of targeted dumping but does not find all targeted sales. *See id.* at 38–40. According to Timken, because the *Nails* test does not identify all targeted sales, using the results of the *Nails* test to determine the extent of targeted dumping is unreasonable. *Id.* Timken suggests that a more reasonable comparison would be to treat all sales to the targeted groups identified by the *Nails* test as targeted sales, and compare that number to total U.S. sales. *Id.* at 40.

The government recognizes that the *Nails* test is limited to comparing sales of identical merchandise, but it argues that Timken has not explained how using comparable merchandise when conducting the *Nails* test would be feasible or preferable to using identical merchandise. Government Br. 20–21. The government counters Timken's arguments that the *Nails* test fails to find all targeted sales by noting that Timken has cited to nothing in the record showing that the *Nails* test is ill-suited to evaluating the pricing patterns in this case. *Id.* at 21. Commerce rejected Timken's suggestion that all sales to the targeted groups be included in the numerator by explaining that only those sales that passed the *Nails* test rightfully can be considered "targeted." *I&D Memo* at 14. SKF characterizes and criticizes Timken's argument as an attack on the ability of the *Nails* test to identify all targeted sales. *See* SKF Br. 26–30.

The court rejects Timken's claims of inconsistency between the numerator and denominator based upon the *Nails* test's use of only identical merchandise, because Timken has failed to show that this inconsistency actually exists on this record to such an extent that Commerce's use of the ratio was unreasonable. The court notes that Timken's arguments regarding the ratio before Commerce never addressed the possibility that the use of only identical sales in the numerator of the ratio while including all sales in the denominator could create a material inconsistency affecting Commerce's interpretation of the data. *See Timken's Post-Preliminary Comments for NTN-SNR*; *Timken's Post-Preliminary Comments for Schaeffler and SKF*; *Timken's Post-Preliminary Comments for myonic*. Before the court, Timken never referenced any record evidence suggesting that Commerce's use of this ratio would be unreasonable in these particular

reviews because of this alleged discrepancy until its response to the government's and defendant-intervenors' supplemental briefs following oral argument. *See* Resp. to Def.'s and Def.-Intervenors' Supplemental Brs., ECF No. 86, 4 n.8. Even this late evidence was quite meager, as it was dropped in a footnote and discussed the potential distortion for only one of the four respondents. *See id.* Thus, Timken has failed to challenge Commerce's determination with anything more than hypotheticals, and the court will not disturb Commerce's determination on that basis. *See Borden, Inc. v. United States*, 23 CIT 372, 379 (1999), *rev'd on other grounds*, 7 F. App'x 938 (Fed. Cir. 2001).

Timken's argument that the *Nails* test fails to find all targeted sales and thus its results should not be used to determine the extent of targeting, however, was presented to Commerce. The court nevertheless finds this argument unavailing.

Timken argues that the *Nails* test is useful only as a tool to identify whether targeting occurred, not as a tool for identifying targeted sales. *See* Timken Br. 40. There is nothing in the antidumping statute, however, defining a "targeted sale." Commerce uses the *Nails* test to find a "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i). *See I&D Memo* at 12–13. Commerce's use of the *Nails* test to define that pattern has been affirmed by the court as a reasonable interpretation of the statute. *Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378–79 (CIT 2010) ("*Mid Continent Nail*"). Commerce treats only those sales that pass both prongs of the *Nails* test as forming the "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and consequently considers only those sales to be "targeted." *I&D Memo* at 14. Thus, Timken's arguments regarding the ability of the *Nails* test to uncover all targeted sales ultimately amount to an attack on the *Nails* test itself. The court previously upheld the *Nails* test as a reasonable interpretation of the statute in *Mid Continent Nail* in the face of challenges similar to those advanced by Timken and sees no reason to depart from that decision now. *See* 712 F. Supp. 2d at 1378–79 (rejecting claims that "Commerce's use of thirty-three percent in its 'pattern' definition and five percent in its 'differ significantly' definition are seemingly random values with no meaning" that "cause the nails test to overlook obvious targeting").

Because the *Nails* test defines what is a "targeted" sale, Commerce reasonably rejected Timken's suggestion that all sales to the targeted group(s) be included in the numerator. The sales that did not pass the *Nails* test are by definition not part of the pattern identified pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i). *I&D Memo* at 14. In determining whether the identified pattern is sufficient to warrant consideration of the A-T methodology, it would make little sense for Commerce to include sales that did not form part of that pattern in the numerator of the ratio. Commerce's decision to use only those sales that passed the *Nails* test as the numerator thus was reasonable and in accordance with law.

CONCLUSION

For the foregoing reasons, Commerce's *Final Results* are SUSTAINED. Judgment will issue accordingly.

Dated: February 27, 2014
New York, New York

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

Slip Op. 14–25

CHANGZHOU WUJIN FINE CHEMICAL FACTORY CO., LTD., and JIANGSU JIANGHAI CHEMICAL GROUP, LTD., Plaintiffs, v. UNITED STATES, Defendant, and COMPASS CHEMICAL INTERNATIONAL, LLC, Defendant-Intervenor

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 09–00216

[Motion for reconsideration denied.]

Dated: February 28, 2014

Riggle & Craven (*David J. Craven*), for Plaintiffs.

Stuart F. Delery, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Antonia R. Soares*); *Whitney M. Rolig*, Of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Levin Trade Law, P.C. (*Jeffrey S. Levin*), for Defendant-Intervenor.

OPINION AND ORDER

BARZILAY, Senior Judge:

Consolidated Plaintiff Jiangshai Jiangsu Chemical Group, Ltd. ("Jiangsu") moves under USCIT Rule 59 for reconsideration of the court's opinion issued on October 2, 2013. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 37 CIT __, 942 F. Supp. 2d 1333 (2013). The court sustained Commerce's decision to assign an above *de minimis* separate rate to Jiangsu given the limitations presented by the administrative record. Jiangsu, however, claims that the court (1) overlooked data and information about the respondents that suggests separate rate respondents are entitled to a 0% rate; and (2) discounted certain quantity and value data indicating that separate respondents are entitled to a 0% rate. For the reasons set forth below, Jiangsus's motion is denied.

Granting a motion for reconsideration pursuant to USCIT Rule 59 rests within the sound discretion of the court. *Target Stores v. United States*, 31 CIT 154, 156, 471 F. Supp. 2d 1344, 1346–47 (2007). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Royal Thai Gov't v. United States*, 30 CIT 1072, 1074, 441 F. Supp. 2d 1350, 1354 (2006) (quotations and citation omitted). A motion for reconsideration serves as "a mechanism to correct a significant flaw in the original judgment . . . ." *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT __, ___, 714 F. Supp. 2d 1296, 1301 (2010) (quotations and citation omitted). It does not, however, afford a losing party an opportunity "to repeat arguments or to relitigate issues previously before the court." *Id*. "Importantly, the court will not disturb its prior decision unless it is 'manifestly erroneous.'" *Starkey Labs., Inc. v. United States*, 24 CIT 504, 505, 110 F. Supp. 2d 945, 947 (2000) (citation omitted).

Jiangsu has not established that the court committed a clear error. Instead, Jiangsu is attempting to relitigate issues that have already been decided in the court's original decision. The court did not overlook data or the "nature" of respondents as described by Jiangsu. Pl. Br. 3. To the contrary, the court considered that data and concluded that it did not support the outcome sought by Jiangsu (*i.e.*, a 0% dumping margin). The court concluded that Commerce's inferences and assumptions about Kewei's lack of participation were reasonable. More specifically, the court concluded that it was reasonable to infer that had Kewei (a noncooperating mandatory respondent) participated in the investigation, it would have received an actual dumping rate (with no built in increase to deter non-compliance) greater than

0%. The court cited relevant authority supporting such an inference and had no authority before it supporting Jiangsu's preferred interpretation. The court, therefore, sustained Commerce's decision to select Kewei's above *de minimis* rate as the separate rate for Jiangsu and the other separate rate respondents. As noted in the opinion, this is the preferred methodology under the statute.

Likewise, the court did not overlook or discount the Q&V data because it was unverified. Pl. Br. 4. It is not a question of whether the Q&V data is verified or unverified. That is not outcome determinative. The court concluded that it could not endorse Jiangsu's separate rate calculation, which relies on Q&V data cobbled together with other pricing data, to arrive at a rate of 0%. For the court to embrace Jiangsu's separate rate calculation and reject Commerce's chosen methodology, Jiangsu must demonstrate that its proposed calculation is the only reasonable outcome on this administrative record. *See Allied Tube and Conduit Corp. v. United States*, 24 CIT 1357, 1371–72, 127 F. Supp. 2d 207, 220 (2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its factual conclusions as the only reasonable outcome."). The court is not convinced that Jiangsu's separate rate calculation yields a more representative rate. Jiangsu's reliance on Q&Vdata is misplaced. Q&V data is typically used to identify the largest volume producer in selecting mandatory respondents, not to calculate dumping margins. *See* 19 U.S.C. § 1677f-1(c)(2)(B); *see also Pakfood Public Co., Ltd. v. United States*, 34 CIT __, __, 724 F. Supp. 2d 1327, 1336 n.13 (2010). Contrary to Jiangsu's claims, there is not enough data to justify a separate rate of 0%.

The problem in this case is a lack of pricing data at the investigation stage of the administrative proceeding, where Commerce relies on the participation of the mandatory respondents to provide information about their pricing practices. Where, as here, two mandatory respondents are selected and one cooperates (and receives a *de minimis* rate) and the other fails to cooperate (and receives an AFA rate), Commerce is left with very little pricing information to calculate a separate rate. The uncooperative respondent will oftentimes drop out of the investigation before submitting its pricing data. Accordingly, there is margin specific pricing information for the cooperative respondent but limited margin specific information for the uncooperative respondent. Separate rate respondents in such a situation do not automatically get the benefit of the cooperative mandatory respondent's *de minimis* dumping margin simply by qualifying for a separate rate. The statute does not contemplate such a policy. Separate rate respondents, therefore, must avail themselves of potential rem-

edies at the administrative level or accept the risk of receiving a separate rate derived from an undeveloped administrative record. That is what happened here.

Accordingly, it is hereby

ORDERED that Jiangsu's motion for reconsideration is denied.

Dated: February 28, 2014
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 14–26

ATAR S.R.L., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, and NEW WORLD PASTA COMPANY, Defendant-intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 07–00086

[Affirming the final results of an administrative review of an antidumping duty order on certain pasta from Italy, in compliance with a remand issued by the United States Court of Appeals for the Federal Circuit]

Dated: March 3, 2014

David J. Craven, Riggle & Craven, of Chicago, IL, for plaintiff Atar S.r.l.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Deborah King*, Attorney-International, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company.

OPINION

Stanceu, Judge:

Before the court is the mandate issued by the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *Atar S.r.l. v. United States*, 730 F.3d 1320 (Fed. Cir. 2013) ("*Atar*"). CAFC Mandate in Appeal # 13–1001 (Nov. 4, 2013). *Atar* reversed the judgment entered by the court in this case, *Atar S.r.l. v. United States*, 36 CIT__, 853 F. Supp. 2d 1344 (2012), *rev'd*, 730 F.3d 1320 (Fed. Cir. 2013) ("*Atar IV*"), and "remand[ed] for further action consistent with this

opinion," *Atar*, 730 F.3d at 1329–30. The court issues this opinion to explain how it will comply with that mandate and will enter a judgment accordingly.

I. BACKGROUND

The detailed background of this litigation is described in the court's prior opinions and is summarized briefly herein. *See Atar, S.r.l. v. United States*, 33 CIT 658, 637 F. Supp. 2d 1068 (2009) ("*Atar I*"); *Atar, S.r.l. v. United States*, 34 CIT __, 703 F. Supp. 2d 1359 (2010) ("*Atar II*"); *Atar, S.r.l. v. United States*, 35 CIT __, 791 F. Supp. 2d 1368 (2011) ("*Atar III*"); *Atar IV*, 36 CIT at __, 853 F. Supp. 2d at 1344.

In this litigation, plaintiff Atar S.r.l. ("Atar"), an Italian pasta producer, contested the final determination ("Final Results") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the ninth administrative review of an antidumping duty order on certain pasta from Italy (the "subject merchandise"). *See* Compl. (Apr. 5, 2007), ECF No. 8; *Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7,011 (Feb. 14, 2007) ("*Final Results*"). The ninth review covered the period of July 1, 2004 through June 30, 2005. *Final Results*, 72 Fed. Reg. at 7,012.

In the *Final Results*, Commerce assigned Atar a weighted-average antidumping duty margin of 18.18%. *Final Results*, 72 Fed. Reg. at 7,011. In reaching this determination, Commerce calculated the normal value of Atar's subject merchandise according to the constructed value ("CV") method. *Atar I*, 33 CIT at 661, 637 F. Supp. 2d at 1072–73. Commerce used the CV method because it determined that Atar lacked sufficient sales of the foreign like product in its home market during the POR to constitute a viable comparison market and that Atar's selling activity in Angola was insufficient to support use of Angola as a viable comparison market. *Id. See also* 19 U.S.C. § 1677b(a)(4).

In *Atar I*, the court affirmed various determinations that Commerce made in the Final Results.[1] *Id.*, 33 CIT at 662–72, 637 F. Supp. 2d at

[1] In *Atar I*, the court affirmed the Department's decision to use constructed value ("CV") rather than determine normal value based on Atar's selling activity in Angola. *Atar, S.r.l. v. United States*, 33 CIT 658, 662–72, 637 F. Supp. 2d 1068, 1074–81 (2009) ("*Atar I*"). The court also affirmed the Department's decision not to use Atar's profit and indirect selling expense data from Atar's selling activity in Angola in determining CV. *Id.*, 33 CIT at 673–75, 637 F. Supp. 2d at 1083–84. Further, the court rejected Atar's claim that Commerce should have used the data of the only other respondent in the ninth review, Corticella, in determining constructed value ISE and profit. *Id.*, 33 CIT at 675–76, 637 F. Supp. 2d at 1084–85. Additionally, the court affirmed the Department's decision to include the value of certain services rendered to Atar by Atar's principal, a shareholder who decided to forego salary,

1074–81. The court also remanded the Final Results, directing Commerce to reconsider its method of determining CV indirect selling expense (ISE) and profit, according to which Commerce had used the weighted-average ISE and a weighted-average profit rate, both derived from the home market sales data of six respondent companies in the previous (eighth) administrative review. *Id.*, 33 CIT at 672, 637 F. Supp. 2d at 1082. Specifically, *Atar I* concluded that Commerce arbitrarily had excluded from those data all sales that were made below-cost and therefore were outside of the ordinary course of trade. *Id.*, 33 CIT at 681, 637 F. Supp. 2d at 1088. The court noted that Commerce based its decision to exclude below-cost sales only on a general "preference" without grounding the decision in findings of fact pertinent to Atar's sales experience and without demonstrating the reasonableness of this approach. *Id.*, 33 CIT at 681, 637 F. Supp. 2d at 1088. The court directed Commerce to "reconsider, and redetermine as necessary" the constructed ISE and profit calculations and to "reconsider its decision to exclude from those calculations the data derived from home market sales of the respondents in the eighth administrative review that occurred outside the ordinary course of trade." *Id.*, 33 CIT at 686, 637 F. Supp. 2d at 1092.

Responding to the court's remand order in *Atar I*, Commerce redetermined Atar's constructed value ISE and profit by a different method, this time using a weighted average derived from data of only two of the six respondents in the previous (eighth) review. *Atar II*, 34 CIT at __, 703 F. Supp. 2d at 1362–63. Commerce chose the two respondents that had realized an overall profit in the eighth review but did not exclude the below-cost sales of the two chosen respondents. *Id.* Commerce recalculated constructed value ISE and profit and reduced Atar's margin to 14.45%. *Id.* On review of the first remand redetermination in *Atar II*, the court concluded that the Department's revised method, as applied to the calculation of CV profit, did not comply with the statutory "profit cap" requirement set forth in 19 U.S.C. § 1677b(e)(2)(B)(iii) because Commerce "neither identified a profit cap nor made a finding that available data did not allow it to do so." *Id.*, 34 CIT at __, 703 F. Supp. 2d at 1364. The court directed that Commerce, on remand, should redetermine Atar's CV profit "in a way that satisfies both the profit cap and reasonable method requirements" of the statute. *Id.*, 34 CIT at __, 703 F. Supp. 2d at 1370. The court provided Commerce with the option of redetermining constructed value ISE and reserved any ruling on the

when determining Atar's ISE for the CV determination. *Id.*, 33 CIT at 683–85, 637 F. Supp. 2d at 1090–92.

constructed value ISE that Commerce applied to Atar in the first remand redetermination. *Id.*, 34 CIT at __, 703 F. Supp. 2d at 1370.

On remand from the decision in *Atar II*, Commerce did not change the determination it reached in response to *Atar I* but explained its position that the CV profit calculation reached in its previous remand, which was based on the weighted-average profit rate of the two eighth review respondents that earned a profit in the eighth review, established a reasonable profit cap. *Atar III*, 35 CIT at __, 791 F. Supp. 2d at 1371. In *Atar III*, the court concluded that the Department's profit cap, in reflecting the home market sales of only two of the eighth-review respondents, did not satisfy the requirement that a profit cap be based on "the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . . ." *Id.*, 35 CIT at __, 791 F. Supp. 2d at 1374, 1376 (citing 19 U.S.C. § 1677b(e)(2)(B)(iii)). *Atar III* directed Commerce to redetermine, on remand, the profit cap according to a lawful method. *Id.*, 35 CIT at __, 791 F. Supp. 2d at 1380–81. In response to the intervening decision of the Court of Appeals in *Thai I-Mei v. United States*, 616 F.3d 1300 (Fed. Cir. 2010), the court left open the prospect that Commerce might reasonably redetermine CV profit by a method excluding non-ordinary-course sales, provided that Commerce ensured that the result of any such redetermination is "tested according to the profit cap requirement." *Id.*, 35 CIT at __, 791 F. Supp. 2d at 1380.

In response to *Atar III*, Commerce issued a third remand redetermination in which it calculated Atar's CV profit by the same method by which it had done so in the Final Results, *i.e.*, it based the profit rate on a weighted-average of the data from the sales of subject merchandise made in the home market and in the ordinary course of trade by the six respondents in the eighth review. *Atar IV*, 36 CIT at __, 853 F. Supp. 2d at 1347–48. Commerce calculated Atar's profit cap using a weighted-average of the data from the reported home market sales of the six respondents in the eighth review, including below-cost sales, and, because the profit cap as so calculated was lower than the CV profit determination, used the profit cap as Atar's CV profit. *Id.*, 36 CIT at __, 853 F. Supp. 2d at 1348–49. Commerce determined Atar's constructed value ISE according to a weighted-average of the ISE rates calculated for each of the six respondents in the eighth review. *Id.*, 36 CIT at __, 853 F. Supp. 2d at 1350. Commerce then determined a revised margin of 11.76% for Atar. *Id.*, 36 CIT at __, 853 F. Supp. 2d at 1346. Over certain objections raised by Atar, the court

sustained the Department's third remand redetermination in *Atar IV*, 36 CIT at __, 853 F. Supp. 2d at 1352, and issued a judgment to that effect.

II. DISCUSSION

The court must determine what "further action consistent with" the opinion of the Court of Appeals in *Atar* is required to implement the mandate. *Atar*, 730 F.3d at 1330. The court addresses this question below.

As the Court of Appeals stated in *Atar*, "[t]he only question presented in this appeal is whether the trade court erred in rejecting Commerce's exclusion of below-cost sales from its profit cap calculations relating to Atar's subject merchandise." *Atar*, 730 F.3d at 1326. As did the Court of International Trade, the Court of Appeals concluded that the statute in question, 19 U.S.C. § 1677b(e)(2)(B)(iii), did "'not speak directly to the question of how Commerce is to determine' the amount normally realized, nor does it 'direct that data on unprofitable sales be included or excluded.'"[2] *Id.* at 1326 (citing *Atar III*, 35 CIT at __, 791 F. Supp. 2d at 1376).

Proceeding on the basis of this ambiguity, the appellate court applied an analysis based in *Chevron, U.S., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) to conclude that the trade court had erred in failing to defer to the Department's construction of the statute, which the Court of Appeals viewed as reasonable. *Id.* at 1326. Specifically, the Court of Appeals held that "Commerce acted reasonably in excluding below-cost sales data from the prior administrative review when calculating the constructed value profit cap applicable to Atar's subject merchandise under 19 U.S.C. § 1677b(e)(2)(B)(iii)." *Id.* at 1329–30.

As discussed previously in this opinion, Commerce, when making its constructed value profit calculation in its third remand redetermination, reverted to the method it had used in the Final Results. *Atar IV*, 36 CIT at __, 853 F. Supp. 2d at 1347–48. That method was sustained by the trade court in *Atar IV*, 36 CIT at __, 853 F. Supp. 2d at 1349, and was not at issue before the Court of Appeals. In the Final Results, Commerce did not determine a profit cap separately from its original determination of CV profit and excluded below-cost sales in calculating both profit and the profit cap, determining a margin of

[2] Under 19 U.S.C. § 1677b(e)(2)(B)(iii), Commerce may determine constructed value profit "by any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise."

18.18%. *See Atar I*, 33 CIT at 661, 681, 637 F. Supp. 2d at 1072, 1088–89. The Court of Appeals affirmed this method of determining the profit cap in its *Atar* decision. *Atar*, 730 F.3d at 1327–28, 1329.

In the Final Results, Commerce determined Atar's constructed value ISE by using the weighted-average indirect selling expenses derived from the home market data of the six respondent companies in the eighth review. *Atar I*, 33 CIT at 672, 637 F. Supp. 2d at 1082. Commerce returned to this method of determining constructed value ISE in its third remand redetermination. *Atar IV*, 36 CIT at __, 853 F. Supp. 2d at 1350–51. The court affirmed this method in *Atar IV*, *id.*, and the method was not at issue on appeal in *Atar*. All of Atar's other claims brought to contest the Final Results were adjudicated by *Atar I*, which affirmed the Final Results in part and rejected each of these other claims. No questions relating to these claims were at issue before the Court of Appeals in *Atar*. And although plaintiff raised various other objections in response to the Department's remand redeterminations, those objections were addressed, and rejected, in the court's previous opinions.

Based on the above, the court concludes that a further remand to Commerce is unnecessary and that the mandate issued in *Atar* is appropriately effectuated by means of a judgment affirming the Final Results, which the court will enter.

Dated: March 3, 2014
New York, New York

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

Slip Op. 14–27

UNION STEEL MANUFACTURING COMPANY, LTD., Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, NUCOR CORPORATION, and HYUNDAI HYSCO, Defendant-intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 10–00106

[Affirming in part, and remanding in part, a remand redetermination issued by the U.S. Department of Commerce in an action contesting the final results of an administrative review of an antidumping duty order on certain corrosion-resistant carbon steel flat products from the Republic of Korea]

Dated: March 4, 2014

Brady W. Mills and *Donald B. Cameron*, Morris, Manning & Martin, LLP, of Washington, DC, argued for plaintiff Union Steel Manufacturing Company, Ltd. With them on the brief were *Julie C. Mendoza*, *R. Will Planert*, and *Mary S. Hodgins*, of Washington, DC.

Donald B. Cameron, Morris, Manning & Martin, LLP, of Washington, DC, for consolidated plaintiff Dongbu Steel Company, Ltd. With him on the brief were *Brady W. Mills*, *Julie C. Mendoza*, *R. Will Planert*, and *Mary S. Hodgins*, of Washington, DC.

Donald Harrison, *Andrea Fraser-Reid Farr*, and *John Christopher Wood*, Gibson, Dunn & Crutcher, LLP, of Washington, DC, for plaintiff-intervenor Whirlpool Corporation.

L. Misha Preheim, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, of Washington, DC. Of counsel on the brief was *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Ellen J. Schneider, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, argued for defendant-intervenor and consolidated plaintiff *United States Steel Corporation*. With her on the brief were *Jeffrey D. Gerrish* and *Robert E. Lighthizer* of Washington, DC.

Timothy C. Brightbill, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Nucor Corporation. With him on the brief was *Alan H. Price*, of Washington, DC.

Jarrod M. Goldfeder, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for consolidated plaintiff and defendant-intervenor Hyundai HYSCO. With him on the brief was *J. David Park*, of Washington, DC.

OPINION AND ORDER

Stanceu, Judge:

In this consolidated action, four plaintiffs challenge the determination ("Final Results") the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude the fifteenth administrative review of an antidumping order on certain corrosion-resistant carbon steel flat products ("CORE" or "subject merchandise") from the Republic of Korea ("Korea").[1] *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Admin. Review*, 75 Fed. Reg. 13,490 (Mar. 22, 2010) ("*Final Results*"). The fifteenth review pertained to entries of subject merchandise made during the period of August 1, 2007 through July 31, 2008 ("period of review" or "POR"). *Id.*

[1] Due to the presence of common issues, the court, on May 13, 2010, consolidated three actions under Consol. Court No. 10–00106. Order, ECF No. 46. Consolidated with *Union Steel Mfg. Co., Ltd. v. United States* (Consol. Court No. 10–00106) are *Dongbu Steel v. United States*, (Court No. 10–00109), *Hyundai HYSCO v. United States* (Court No. 10–00127), and *United States Steel Corp. v. United States*, (Court No. 10–00139).

Before the court is a determination (the "Remand Redetermination") Commerce issued in response to the court's remand order in *Union Steel Mfg. Co., Ltd. v. United States*, 36 CIT __, 837 F. Supp. 2d 1307 (2012) ("*Union Steel Mfg. Co., Ltd.*"). *Results of Redetermination Pursuant to Remand* (Sept. 24, 2012), ECF No. 161 ("*Remand Redetermination*").

For the reasons discussed in this Opinion and Order, the court sustains the Remand Redetermination as to: (1) the general and administrative ("G&A") expense ratio Commerce used to determine the cost of production ("COP") of the foreign like product for Union Steel Manufacturing Co., Ltd. ("Union"); (2) the Department's decision to calculate Union's interest expense ratio using financial statements from both the 2007 and 2008 fiscal years; (3) the Department's application of its modified "sales-below-cost" and "recovery-of-costs" tests to calculate Union's normal value; (4) the Department's decision to create separate product categories for laminated CORE and non-laminated, painted CORE for use in a model-match methodology comparing Union's home market and U.S. sales; and (5) the Department's use of the "zeroing" methodology to calculate Union's weighted average dumping margin.

The court orders a second remand for further proceedings to address a number of the Department's decisions in the remand determination: (1) the decision to make a major input adjustment when calculating Union's interest expense ratio; (2) the application of the modified "quarterly cost" methodology wherever used in the normal value calculations for Hyundai HYSCO ("HYSCO"), including the difference-in-merchandise ("DIFMER") adjustments and constructed value ("CV") determinations; (3) the application of the modified "quarterly cost" methodology for all aspects of the normal value calculations for Union except the revised sales-below-cost and recovery-of-costs tests; (4) the decision to depart from the normal method for selecting a comparison month when determining antidumping margins for Union and HYSCO; and (5) the decision to depart from the normal method by selecting the date of shipment, rather than the date of invoice, as the date of sale for certain sales that HYSCO made through a U.S. affiliate, Hyundai HYSCO USA, Inc. ("HHU" or "HYSCO USA").

Finally, pursuant to the court's order in *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1337–38, the court concludes that the second remand redetermination must recalculate the margin for Dongbu based on the redetermined margins for Union and HYSCO.

I. BACKGROUND

The background of this case is provided in the court's previous opinion and is supplemented herein. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1311–12.

Three of the four plaintiffs in this action, Union, HYSCO, and Dongbu Steel Co., Ltd. ("Dongbu"), are Korean producers and exporters of the subject merchandise. Issues & Decision Mem., A-580–816, ARP 07–08, at 2 (Mar. 15, 2010), *available at* http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/2010–6258–1.pdf (last visited Feb. 26, 2014) ("*Decision Mem.*"). Plaintiffs Union and HYSCO were the mandatory respondents in the fifteenth administrative review and plaintiff Dongbu was a non-examined respondent in the fifteenth review. *Id.* United States Steel Corporation ("U.S. Steel"), a petitioner in the fifteenth administrative review, is the fourth plaintiff and a defendant-intervenor in this action. *Id.* at 1; Compl. 1 (Apr. 21, 2010), ECF No. 6 (Court No. 10–00139). Nucor Corporation ("Nucor"), also a petitioner in the fifteenth administrative review, is another defendant-intervenor in this action. *Id.* at 1 n.1.

Union challenged the Department's: (1) exclusive reliance on the 2008 financial statement of Union's parent company to calculate Union's interest expense ratio; (2) application of the quarterly costs and indexing methodologies to various calculations when determining normal value; (3) selection of the comparison month for normal value sales; (4) similar treatment of laminated CORE and non-laminated, painted CORE in the model-match process; and (5) use of zeroing in calculating the weighted average dumping margin for Union. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1310, 1312, 1314, 1324. HYSCO challenged the Department's use of the quarterly costs and indexing methodologies and the Department's decision to use a nonstandard method for determining the comparison month. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1310, 1312, 1324. Dongbu raised the same challenges as Union and HYSCO and sought to be subject to a rate reflecting any modifications to the weighted average dumping margins for Union and HYSCO. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1310, 1335–36.[2] U.S. Steel challenged the Department's determination of the date of sale for the sales of subject merchandise that HYSCO made through a U.S. affiliate. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1310, 1312, 1334.

[2] Plaintiff Dongbu Steel Co., Ltd. ("Dongbu") also claimed entitlement to an individually-determined dumping margin; the court denied relief on this claim due to Dongbu's failure to exhaust administrative remedies. *Union Steel Mfg. Co., Ltd. v. United States*, 36 CIT __, __, 837 F. Supp. 2d 1307, 1334 (2012) ("*Union Steel Mfg. Co., Ltd.*").

After the parties submitted all briefings in this action, defendant United States requested a voluntary remand so that Commerce could reconsider the quarterly cost and indexing methodologies used in the Final Results in light of an intervening decision by this Court.

In the court's previous opinion in this case, *Union Steel Mfg. Co., Ltd.,* it concluded that Dongbu was entitled to a recalculated margin reflecting any changes made on remand to the margins for mandatory respondents HYSCO and Union. *Id*., 36 CIT at __, 837 F. Supp. 2d at 1329–34. The court also concluded that all of the claims brought by Union, HYSCO, and U.S. Steel required a remand. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1337–38. Specifically, the court determined that it could not uphold the Department's decision to use financial data from Union's parent company pertaining only to the 2008 fiscal year when determining Union's interest expense ratio. *Id*., 36 CIT at __, 837 F. Supp. 2d at 1313–21. The court also granted defendant's request for a voluntary remand on the quarterly cost and indexing issues but directed Commerce to reconsider the quarterly cost and indexing methodologies wherever Commerce applied the methodologies in the Final Results—including the sales-below-cost test, "recovery-of-costs" test, constructed value ("CV") determinations, and difference-in-merchandise ("DIFMER") adjustments. *Id*., 36 CIT at __, 837 F. Supp. 2d at 1321–25. As defendant requested, the court also remanded the Department's decisions to: (1) depart from the normal method for selecting the comparison month when comparing U.S. and home market sales of Union and HYSCO; (2) treat Union's laminated CORE and non-laminated, painted CORE as "identical" merchandise in the Department's model-match methodology; (3) use the "zeroing methodology" in determining weighted average margins; and (4) use shipment dates as the date of sale for HYSCO's sales through a U.S. affiliate. *Id*., 36 CIT at __, 837 F. Supp. 2d at 1325–29, 1334–35.

In its Remand Redetermination, filed on September 24, 2012, Commerce redetermined Union's interest expense ratio using both the 2007 and 2008 financial statements of Union's parent company, Dongkuk Steel Mills Company Ltd. ("DSM"). *Remand Redetermination* 7–8. Commerce also modified its application of the quarterly cost and indexing methodologies when determining various aspects of the normal value calculation for Union and HYSCO. *Id*. at 16–18. Commerce added a separate product category for non-laminated, painted CORE in its revised model-match methodology for Union. *Id*. at 32–34. Commerce again found it appropriate to depart from the normal method for selecting the comparison months of normal value sales for Union and HYSCO. *Id*. at 27–29. Commerce also continued to use zeroing when calculating Union's weighted average dumping

margin. *Id*. at 60. Finally, Commerce continued to use the date of shipment as the date of sale for the sales HYSCO made through a U.S. affiliate. *Id*. at 61–62.

In the Remand Redetermination, Commerce revised Union's weighted average dumping margin from 14.01% to 9.85% and HYSCO's weighted average dumping margin from 3.29% to 1.46%. *Id*. at 67. Dongbu's weighted average dumping margin, which was based on the margins for two mandatory respondents, declined from 8.65% to 5.66%. *Id*.

Union, HYSCO, Dongbu, U.S. Steel, Nucor, and defendant each filed comments on the Remand Redetermination.[3] Union Steel's Comments on the U.S. Dept. of Commerce's Sept. 24, 2012 Results of Redetermination Pursuant to Remand (Nov. 30, 2012), ECF No. 169 ("Union's Comments"); Resp. of Hyundai HYSCO to Def.'s Redetermination on Remand (Nov. 30, 2012), ECF No. 170 ("HYSCO's Comments"); Dongbu Steel's Comments on the U.S. Dept. of Commerce's Sept. 24, 2012 Results of Redetermination Pursuant to Remand (Nov. 30, 2012), ECF No. 168 ("Dongbu's Comments"); Comments of U.S. Steel Corp. on the Results of Redetermination Pursuant to Remand Issued by the Dept. of Commerce (Dec. 3, 2012), ECF No. 171 ("U.S. Steel's Comments"); Nucor Corp.'s Comments on Remand Results (Dec. 3, 2012), ECF No. 176 ("Nucor's Comments"). Defendant responded to the various comments on February 15, 2013. Def.'s Resp. to Comments on the Dept. of Commerce's Remand Results, ECF No. 204 ("Def.'s Resp.").

The court held oral argument on May 23, 2013 at which Union, HYSCO, U.S. Steel, Nucor, and defendant United States appeared to address the various remaining challenges to the Remand Redetermination. Order (Mar. 3, 2013), ECF No. 207; Mot. for Oral Argument (Feb. 27, 2013), ECF No. 206; Oral Tr. 3–4 (July 22, 2013), ECF No. 215.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a).[4] When

[3] Plaintiff-intervenor Whirlpool Corporation, a U.S. importer of subject merchandise, did not make any submissions in support of the motions for judgment on the agency record in this action and did not submit comments on the Remand Redetermination.

[4] All statutory citations herein are to the 2006 edition of the United States Code and all citations to regulations are to the 2010 edition of the Code of Federal Regulations.

reviewing the Department's redetermination, 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).

A. Union's Interest Expense and G&A Expense Ratios

When determining the cost of producing the foreign like product ("cost of production" or "COP") in the Final Results, Commerce, according to 19 U.S.C. § 1677b(b)(3), calculated Union's G&A expense ratio using Union's unconsolidated financial statements for fiscal year 2008 and Union's interest ("financing") expense ratio using consolidated financial statements from Union's parent for fiscal year 2008. *Decision Mem.* 42–43. Because both Union and its parent company, DSM, use a fiscal year that matches the calendar year, these financial statements did not correspond precisely with the POR in this administrative review (August 1, 2007 to July 31, 2008). *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1314. In its Rule 56.2 brief, Union challenged the use of the 2008 financial statements on the grounds that these statements "'were aberrational and do not reasonably reflect Union's actual data pertaining to the production and sale of the subject merchandise during the POR.'" *Id.* (citation omitted). Union argued that Commerce should have calculated G&A and interest using only the 2007 statement or, in the alternative, a "blended rate," for instance by combining the 2007 and 2008 financial data using a weighted average. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1314–15 (citation omitted).

In its previous opinion, the court ruled that using only the 2008 DSM financial statement to determine Union's interest expense was unlawful for two reasons. "First, Commerce failed to consider an important aspect of the question before it, which was whether determining Union's interest expense ratio solely on the basis of data in that financial statement produced the most accurate result." *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1317. The court noted that "the interest cost ratio derived from the 2008 financial statement of DSM reflects a five-fold increase from the interest cost ratio derived from the 2007 statement and appears to have been affected significantly by currency-related losses that coincided with a massive post-POR decline in the value of the Korean won." *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1319–20. Second, the court concluded that the Department's use of the 2008 financial statement was based on the incorrect premise "that the Department has a consistent practice of using the single financial statement corresponding to the largest portion" of the POR.

Id., 36 CIT at __, 837 F. Supp. 2d at 1319. The court directed Commerce to "reconsider its decision to base Union's interest expense ratio entirely on data obtained from DSM's 2008 financial statement" and to examine "the relative merits of alternative methods." *Id*., 36 CIT at __, 837 F. Supp. 2d at 1320. Although the court did not identify the same legal infirmities with respect to the G&A expense ratio, the court allowed Commerce to reconsider the G&A expense ratio on remand and deferred any ruling on whether or not that ratio complies with law. *Id*.

1. The Court Sustains the Redetermined G&A Expense Ratio for Union

In the Remand Redetermination, Commerce also examined its G&A expense ratio for Union but continued relying on Union's 2008 financial statement. Commerce stated that "[w]hile the change in Korean won to U.S. dollar exchange rates from the beginning of 2007 to the end of 2008 may be considered aberrational, which directly affected the interest expense rate calculation, there is nothing unusual with the G&A expenses for 2007 and 2008 that would lead us to the same conclusion." *Remand Redetermination* at 8–9. The Department's decision on its G&A expense complies with the courts' remand order and is not contested by any party in this action. The court therefore sustains the G&A expense ratio that Commerce reached in the Remand Redetermination.

2. Commerce Permissibly Based Union's Interest Expense Ratio on the 2007 and 2008 Financial Statements of DSM

In the Remand Redetermination, Commerce reconsidered the interest expense ratio for Union and calculated a new interest expense ratio using both the 2007 and 2008 DSM financial statements, weighted according to the number of months of the POR occurring within each fiscal year.[5] *Remand Redetermination* 7–8. Commerce explained that, notwithstanding the Department's longstanding practice of using data from the fiscal year most closely corresponding to

[5] Because the period of review ("POR") was August 1, 2007 through July 31, 2008, Commerce based the weighted average rate on five months in 2007 and seven months in 2008. *Results of Redetermination Pursuant to Remand* 8 (Sept. 24, 2012), ECF No. 161 ("*Remand Redetermination*"). Commerce articulated its new methodology as follows:

> The blended financial expense rate is the result of a two-step calculation. We first calculated separate financial expense rates for 2007 and 2008. For each of these calculations, we used annual net financial expenses in the numerator and annual [cost of goods sold] in the denominator. We relied on the 2007 rate calculation that was used in the preliminary results, and the 2008 rate calculation that was used for the final determination.

Remand Redetermination 14–15.

the POR, "inclusion of both fiscal years' financial statements helps to ensure, based upon the unique facts present in this review as identified by the [Court of International Trade] in its Remand Order, that financial expenses for both fiscal years that encompass the POR are reflected in the financial expense ratio."[6] *Id*. at 8. The use of this blended calculation of 2007 and 2008 data in the Remand Redetermination significantly reduced Union's interest expense ratio.[7] *Union Steel Accounting Cost Mem.* 2 (Aug. 23, 2012) (Confidential Remand. R.Doc. No. 10).

Union opposes the revised interest expense ratio, arguing that that the data from the 2007 DSM financial statement are superior to a blended calculation using both the 2007 and 2008 statements because the latter approach still includes aberrationally high interest rate expenses that occurred predominantly after the POR.[8] Union's Comments 1–4. Defendant counters that the Department's new method accounts for the whole of the POR while mitigating the potential effect of DSM's post-POR foreign exchange losses. Def.'s Resp. 6–7, 11–12. Defendant also points out that the blended rate methodology is consistent with one favored by Union in its Rule 56.2 brief. *Id.* at 7.

In reviewing the revised financial ratio, the court accords Commerce considerable deference in the choice of methodology. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1346 (Fed. Cir. 2005) ("*Corus Staal*"). The Department's revised approach recognized the need to address the unusual circumstance of the aberrational interest expenses for DSM, which Commerce reasonably related to post-POR decline in the value of the Korean won. By drawing on expense data from both the 2007 and 2008 fiscal years, Commerce accounted for all twelve months of the POR while limiting any distorting effect of the post-POR foreign exchange losses. This approach necessarily includes

[6] Upon reconsidering the interest expense ratio on remand as directed by the court, Commerce chose the blended approach over maintaining its exclusive reliance on the 2008 statement of Dongkuk Steel Mills Company Ltd. ("DSM"). The Remand Redetermination discloses that Commerce made the change voluntarily instead of making the change "under protest," *i.e.*, solely in response to the court's having ruled against its previous method. *Remand Redetermination* 14 ("While the Court's Remand Order may have left open the option to use only DSM's 2008 financial statements, we disagree that it is a feasible option considering the significant devaluation of the Korean won during the year and the fact that the 2008 financial expense rate was significantly higher than that in the previous year.").

[7] The actual interest expense and general and administrative expense ratios are not disclosed in this Opinion and Order due to a claim for proprietary treatment.

[8] At oral argument, Union's attorney stated, consistent with the exhibit Union prepared for its rebuttal brief before Commerce, that the Korean won fell 7% in the seven months of 2008 that include the POR and 26% in the five months afterward. Oral Tr. 131; *Union Steel Rebuttal Br. to U.S. Steel's Post-Prelim. Case Br.*, Ex. 2 (Jan. 27, 2010) (Admin.R.Doc. No. 5219).

in the calculation the finance cost data for twelve months outside of the POR, but no option would allow perfect coverage of the POR on the record facts. No DSM financial statement on the record corresponds temporally with the POR, and neither the 2007 nor the 2008 DSM statement reports monthly, or even quarterly, interest expenses.[9] Both statements report data as of the end of DSM's fiscal year. The court concludes that Commerce reached a decision of the choice of DSM financial statements that must be sustained. The Department's approach to this issue addresses the problem of the aberrational interest expenses but also endeavors to cover the entire POR using a combination of the two DSM financial statements.

According to Union, only by excluding consideration of the 2008 financial statement entirely may Commerce eliminate the distorting effect of aberrational finance costs occurring after the close of the POR. Union's Comments 3–4. Union also argues, as it did when originally contesting the Final Results, that the 2007 financial statement is more appropriate than the 2008 statement. *Id*. at 4–5. Union notes that the majority of the home market reporting period, when calculated according to the so-called "window period" used for average-to-transaction sales comparisons, which includes the POR plus ninety days before and sixty days after the POR, falls in 2007. *Id*.

The court is not persuaded by Union's arguments. Use of the 2007 statement, although eliminating any distortion caused by the fall of the Korean won in the latter months of 2008, would create other distortions by covering only five months of the POR. Union's argument based on the window period—any relevance of which is limited to instances in which there are no home market sales in the corresponding month—does not satisfy the basic objection that the 2007 financial statement covers only the first five months of the POR and thereby fails to cover the seven months of the POR that fell within the 2008 calendar year.[10] Commerce acted within its discretion in using both statements to determine Union's interest expense ratio. Balancing the competing considerations, Commerce thereby addressed the problem of aberrational expenses and also maintained reasonable contemporaneity with the POR.

U.S. Steel and Nucor also oppose the use of both the 2007 and 2008 statements to determine the interest expense ratio. Both defendant-intervenors argue that the Department's revised method departs,

[9] *See Remand Redetermination* 16 ("While [United States Steel Corporation] claims that DSM's financial statements show that the losses were generated, there is no evidence that identifies either the timing or the magnitude of these losses throughout the fiscal year.").

[10] The months outside the POR affect the margin calculation only in instances in which there are no sales of the foreign like product during the same month of the POR in which a U.S. sale of subject merchandise occurred. *See* 19 C.F.R. § 351.414(e)(2).

without providing a reasoned basis, from the Department's long-standing practice of using the financial statement that corresponds most substantially with the POR. U.S. Steel's Comments 17–26; Nucor Comments 8–12. However, as the court noted in *Union Steel Mfg. Co., Ltd.*, Commerce does not appear to have a consistent practice of using financial statements from the fiscal year most closely corresponding to the POR when calculating interest expense ratios. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1319. Moreover, the Remand Redetermination provides a reasoned basis for the Department's choice to rely on the blended approach rather than the 2008 statement, citing the unusual circumstances occurring in 2008, which included a steep decline in the value of the Korean won after the close of the POR.

U.S. Steel contends that Commerce did not comply with the specific instructions set forth in the court's Opinion and Order, having failed to "address whether using the blended rate would produce a dumping margin that was more accurate than using a rate based only on the 2008 financial statements." U.S. Steel's Comments 20–21. This argument is not persuasive because the Remand Redetermination explains why Commerce considered a blended rate more accurate than one based solely upon the 2008 financial statement. Commerce explained that "including both fiscal years' financial statements helps to ensure, based upon the unique facts present in this review as identified by the [Court of International Trade] in its Remand Order, that financial expenses for both fiscal years that encompass the POR are reflected in the financial expense ratio." *Remand Redetermination* 15. Commerce added that "[t]he Department's methodology of using a blended financial expense rate for these final remand results recognizes the unique circumstances of the significant loss in the value of the Korean won that DSM experienced during 2008." *Id.* at 15–16.

U.S. Steel submits that the decline in the Korean won occurring in 2008 after the close of the POR was not the "key factor" responsible for DSM's 2008 foreign exchange transaction and translation losses. U.S. Steel's Comments 21. U.S. Steel argues that "[t]o the contrary, the foreign exchange transaction and translation losses were due primarily to DSM's substantially expanded commercial activities in 2008." *Id.* In support of this argument, U.S. Steel points to record evidence that "[d]uring fiscal year 2008, DSM's sales increased by fully 50% compared to 2007—a period of extraordinary growth—and its costs to produce such sales," *i.e.*, the cost of goods sold ("COGS"), "increased by over 40%." *Id.* In further support of its argument, U.S. Steel states that "the notes to the 2008 financial statements show that DSM's increased translation losses were based on the company's

enormous expansion of foreign borrowing in 2008," adding that "in 2008, DSM's notes payable in dollars increased by over 100%, and its notes payable in Japanese yen increased by *over 2,578%*." *Id.* at 22–23 (emphasis in original). Even though the 2008 financial statement at issue is not Union's, but DSM's, U.S. Steel also identifies aspects of Union's business activity during the POR in support of an argument that "it is certainly proper to attribute the foreign exchange transaction losses in the 2008 financial statements to interest expense and business activities that took place during the POR." *Id.* at 22.

The court understands U.S. Steel's argument to be, in essence, that Commerce should use only the 2008 DSM financial statement because DSM's increased business activity in 2008, and not the decline in the Korean won following the close of the POR, was the primary cause of the increased foreign exchange translation and transaction losses reflected in that financial statement. This argument does not convince the court that Commerce erred in using a rate derived from DSM's 2007 and 2008 statements. In making its argument, U.S. Steel itself acknowledges "that the foreign-currency related losses account for the vast majority of DSM's 2008 net financial expenses." *Id.* at 22 n.13. U.S. Steel also acknowledges that the increased business activity was related to the foreign exchange-related transaction losses, stating that "[p]lainly, this tremendous burst in business activity would have involved an enormous increase in purchases and sales in other currencies" and that "[a]s a result, it is a key factor in explaining the increases in the foreign exchange transaction losses in the 2008 financial statements." *Id.* at 21. That the increased business activity may have made the currency transaction and translation losses larger than these losses otherwise would have been does not compel a conclusion that the fall in the value of the Korean won, particularly the fall occurring after the close of the POR, was not a key factor in DSM's increased currency transaction and translation losses in the 2008 fiscal year. On this record, Commerce permissibly could infer an effect of post-POR declines in the Korean won because of the unusual level of those declines and the huge increase in the interest expenses DSM incurred from fiscal year 2007 to fiscal year 2008.

U.S. Steel next argues that "[t]here is also no evidence that the translation and transaction losses in question were 'extraordinary' and, as a result, rendered the 2008 financial statements unrepresentative of Union's interest expense during the POR," adding that "[i]t is highly significant that DSM itself treated these gains and losses as ordinary income and expenses in its financial statements." U.S. Steel's Comments 23. This argument fails because there is substan-

tial record evidence to support a finding that the currency-related losses incurred by DSM in fiscal year 2008 were a one-time event justifying the use of both of the DSM financial statements. Under the Department's approach, events transpiring during both fiscal years were factored into the financial ratio. U.S. Steel does not make the case that Commerce was required on this record to use only the 2008 statement to achieve the most accurate margin possible.

3. On Remand, Commerce Must Reconsider its Decision to Make a Major Input Adjustment to Union's Interest Expense Ratio and Address Nucor's Objection to that Decision

Nucor raises other objections to the Department's method for redetermining Union's interest expense ratio. Nucor argues that Commerce should not have made a "major input adjustment" when calculating this ratio, on the premise that the interest expense ratio should reflect actual, not hypothetical, costs. Nucor's Comments 15. "While Nucor agrees with the Department's adjustment to direct materials in order to account for what Union should have theoretically paid to its affiliated party suppliers, Nucor disagrees with the second adjustment made to Union's COGS in calculating the financial ratio." *Id.* According to Nucor, the adjustment resulted in a COP for Union that fails to comply with 19 U.S.C. § 1677b(f)(3) because it "does not fully reflect an arm's length transaction." *Id.*

The Tariff Act allows Commerce to make a major input adjustment to the COP calculation when a major input (in this case, coil steel substrate used to produce CORE that Union obtained from a related party) is obtained from a related party and Commerce has reasonable grounds to believe or suspect that the amount represented as the value of the input is less than the cost of producing the input. 19 U.S.C. § 1677b(f)(3). In determining Union's COP, Commerce made such an adjustment to Union's cost of coil steel substrate by increasing the COGS that it used as the denominator for the ratio pertaining to the direct materials input. *Remand Redetermination* 14–15. Commerce also made the adjustment to the COGS denominator when calculating Union's finance cost ratio. *Id.*

When responding to the draft remand results Commerce circulated for comment before issuing the Remand Redetermination, Nucor objected to the Department's making a major input adjustment when calculating Union's interest expense ratio, on essentially the same grounds asserted here. Nucor's Comments 14–15 (citing *Comments on Draft Remand Results* 8–10 (Sept. 6, 2012) (Remand.R.Doc. No.

13). The Remand Redetermination does not respond to Nucor's objection. Commerce has an obligation to address important factors raised by comments from petitioners and respondents. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) (citation omitted). Because Commerce did not meet this obligation, the court will order Commerce to consider and respond to Nucor's comment in the second remand redetermination.

In responding to Nucor's comment that Commerce should not have made the major input adjustment in determining Union's finance cost ratio, defendant states that "[t]o ensure greater accuracy, the adjustments made by Commerce in its remand calculation of Union's interest expense ratio eliminated th[e] very distortion recognized by the statute." Def.'s Resp. 10. The court must review the Department's decision on the rationale Commerce put forth (absent in this case) rather than defendant's post-hoc rationalization. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

Nucor argues in the alternative that even if it is permissible for Commerce to make a major input adjustment to the interest expense ratio calculation, Commerce still erred by making the adjustment using an impermissible method. According to Nucor, Commerce should not have made the adjustment to the COGS for each of the two fiscal years and instead should have made the adjustment only once, before weighting the average of the resulting ratios, arguing that the Department's method double counted the major input adjustment. Nucor's Comments 13–14; Oral Tr. 164–65. Because the question of how any major input adjustment, if permissible, should be effectuated is dependent on the answer to the primary question Nucor raises, the court defers any consideration of the "double counting" issue pending consideration of the Department's answer to that primary question.

B. Use of Quarterly Cost Averaging Periods

Commerce determines the normal value of subject merchandise when conducting an administrative review of an antidumping duty order and compares that normal value to the export price or constructed export price of the subject merchandise. 19 U.S.C. § 1675(a)(2). In certain circumstances, Commerce, when calculating normal value, may exclude home market sales of the foreign like product that are less than the cost of producing the foreign like

product ("cost of production" or "COP").[11] *Id.* § 1677b(b)(1). Commerce collects data from each respondent to determine the COP on a product-specific "control number" (or "CONNUM") basis. *Decision Mem.* 14–15. Commerce then uses this CONNUM-specific cost information in various aspects of its dumping margin calculations. *Id.* at 14. Normally Commerce will calculate cost as a weighted average over the entire POR, but in some circumstances Commerce determines it is preferable to calculate costs as a weighted average for a shorter period of time, such as on a quarterly basis, as it did in the fifteenth review. *Id.* at 15, 21.

In this action, the circumstance influencing the Department's decision to use quarterly costs was the fluctuating cost for a major input, steel substrate. *Id.* at 22–23. Commerce directed respondents to submit cost data on a quarterly basis; Commerce then used the quarterly data, along with its "indexing" methodology,[12] to calculate the quarterly weighted average cost to produce each foreign like product for each examined respondent. *Id.* at 21, 24.

Union and HYSCO both challenged the Department's application of indexed quarterly cost data to aspects of their respective normal value calculations. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1312. Defendant requested a voluntary remand to allow Commerce to reconsider the quarterly cost methodology as applied to the cost recovery test. Def.'s Mot. for Partial Voluntary Remand 1 (June 21, 2011), ECF No. 130. Commerce indicated that it would review its methodology in light of an intervening decision of this Court. *Id.* (citing *SeAH Steel Corp. v. United States*, 34 CIT __, __, 704 F. Supp. 2d 1353, 1364–70 (2010) ("*SeAH*") (holding that the Department's application of quarterly cost methodology for recovery of costs

[11] The antidumping statute provides that Commerce may disregard home market sales when calculating normal value if certain conditions are met:

> If the administering authority determines that sales made at less than the cost of production—
>
> (A) have been made within an extended period of time in substantial quantities, and
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value.

19 U.S.C. § 1677b(b)(1).

[12] Commerce described its indexing methodology as follows:

> [T]he Department indexed the quarterly material costs to a common period cost level, thereby neutralizing the effect of the significant cost changes for the input between quarters. Then . . . the Department calculated a period of review weighted-average per unit cost. Finally, the weighted average per unit cost for the period of review for the substrate input was indexed back to the appropriate quarter to keep the weighted-average per unit costs consistent with the main input's significantly changing price levels occurring between quarters.

Issues & Decision Mem., A-580–816, ARP 07–08, at 23 (Mar. 15, 2010), *available at* http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/2010–6258–1.pdf (last visited Feb. 26, 2014).

purposes did not comply with section 773(b)(2)(D) of the Tariff Act)).[13] The court granted the request for voluntary remand but also instructed Commerce to reconsider its quarterly cost methodology generally (including the use of indexing), wherever it was used in the Final Results. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1321–25.

1. The Department's Revised Sales-Below-Cost and Cost Recovery Tests

On remand, Commerce continued to use quarterly weighted average COPs to identify Union's and HYSCO's home market sales that were made below cost. *Remand Redetermination* 17. However, Commerce removed indexing from its quarterly cost methodology in most instances, instead relying on "Union's and HYSCO's reported historic quarterly-cost data." *Id.* For the sales-below-cost test, Commerce "compared the un-indexed historical quarterly COPs to sales prices in each respective quarter to determine whether they were below cost." *Id.*

Seeking conformity with the decision in *SeAH*, Commerce also amended its cost recovery test, stating in the Remand Redetermination that it "calculated an un-indexed weighted average per-unit COP for the entire period of review using the historical quarterly costs and production quantities as reported by respondents." *Id.* at 17. In doing so, Commerce "first isolated Union's and HYSCO's sales" that were "disregarded because they failed the below-cost test." *Id.* Commerce then "calculated CONNUM-specific annual weighted average prices" for each of these disregarded sales "and compared them, on a CONNUM-specific basis, to the annual weighted-average un-indexed costs." *Id.* at 17–18. If, on comparison, the annual weighted average price for a CONNUM exceeded the annual weighted average unindexed cost for that CONNUM, Commerce "restored all sales of that CONNUM to the normal value pool of sales available for comparison with U.S. sales." *Id.* As a result, Commerce included a greater number of sales in both Union's and HYSCO's dumping margin calculations in the Remand Redetermination than it had in the Final Results. *Id.* at 18.

[13] The Act provides that "[i]f prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time." 19 U.S.C. § 1677b(b)(2)(D).

i. The Court Sustains the Application of the Department's Revised Sales-Below-Cost and Recovery-of-Costs Tests as Applied to Union

Union does not object to the Department's revised sales-below-cost and cost recovery tests. Union's Comments 5–6; Oral Tr. 6–10. Accordingly, the court sustains this aspect of the Remand Redetermination as it pertains to Union.

ii. Commerce Must Reconsider its Revised Recovery-of-Costs Test as Applied to HYSCO

To calculate the annual weighted average cost under its revised methodology, Commerce combined cost averages for the different quarters of the POR. Where a home market sale occurred in a quarter for which the record contained no cost data for the CONNUM that was sold, Commerce, in its own words, "fill[ed] gaps with a surrogate or indexed cost."[14] *Remand Redetermination* 20. This occurred where a specific CORE product (identified by CONNUM) was sold but not produced in a particular quarter. In such an instance, Commerce substituted cost data pertaining to the actual CONNUM with cost data for a similar CONNUM. *Remand Redetermination* at 17 n.3. In its justification for this practice, Commerce explained that "[b]ecause it is necessary to calculate a POR-average cost for the cost recovery test, it is necessary to include a cost for every quarter in which a sale of a CONNUM occurred." *Id.* at 20.

HYSCO contests the method Commerce used in the Remand Redetermination to calculate annual weighted average costs under the revised recovery-of-costs test. HYSCO's Comments 2–5. Specifically, HYSCO objects to the Department's using as a surrogate the cost data for a similar CONNUM where cost data for the actual CONNUM sold were present on the record, albeit not cost data for the particular quarter in which the sale occurred. *Id.* at 4–5. HYSCO argues that "[t]he Department's method makes no sense when actual costs for those CONNUMs are on the record."[15] *Id.* Defendant counters that the court should uphold the Department's method, maintaining that

[14] Also, where HYSCO reported a sale made before the POR for which the merchandise was entered during the POR, Commerce "calculated the [cost of production] by indexing the first quarter costs back to derive the pre-POR quarterly costs," as there was no quarterly [cost of production] data on the record for these pre-POR sales. *Remand Redetermination* at 17 n.2.

[15] HYSCO also argues that Commerce acted inconsistently in addressing the problem of missing CONNUM-specific quarterly data and the problem caused where there was an absence of pre-POR cost data. Resp. of Hyundai HYSCO to Def.'s Redetermination on Remand 3–4 (Nov. 30, 2012), ECF No. 170 ("HYSCO's Comments"). The court does not address this argument because it orders a remand for other reasons, as discussed herein.

"[h]aving found significant cost changes between quarters, Commerce determined it to be necessary to include a cost—even if a surrogate cost from the most similar CONNUM—for every quarter in which a sale of a CONNUM occurred to obtain the most representative POR-average cost in applying the recovery-of-cost[s] test." Def.'s Resp. 14.

The relevant statutory provision imposes a straightforward rule: a sale of the foreign like product in the home market may not be excluded from the normal value calculation as a sale below cost if the price paid is "above the weighted average per unit cost of production for the period of . . . review." 19 U.S.C. § 1677b(b)(2)(D). Under this rule, Commerce must calculate the weighted average per unit cost of producing the good sold in the home market, and it must do so on a POR-wide (in this case, yearly) basis. The statute makes no exception for a situation in which the COP, or an element of that COP (in this case, the cost of the surrogate), fluctuates significantly during the POR. Nor does the statute provide an exception for a situation in which the good is *sold* but not *produced* in the home market during a period within the POR that is less than one year. Commerce nevertheless determined that where both of these situations existed, it was appropriate to determine "the weighted average per unit cost of production for the period of . . . review," *Id.* § 1677b(b)(2)(D), using data other than data on how much it cost to produce the actual good sold in the home market. *Remand Redetermination* 17 n.3. Commerce is empowered to use "facts otherwise available" when data necessary for a required determination are missing from the record. 19 U.S.C. § 1677e(a). But in this case, the record contained the data required to perform the calculation required by § 1677b(b)(2)(D): cost of production data that pertained to both the CONNUM sold in the home market and the period specified in the statute, *i.e.*, the one-year period of review. *Remand Redetermination* at 17 & n.3. The Department's reasoning that "[b]ecause it is necessary to calculate a POR-average cost for the cost recovery test, it is necessary to include a cost for every quarter in which a sale of a CONNUM occurred," *id.* at 20, is not consistent with the language or purpose of the statute. Because the Department's method does not comply with the rule established by § 1677b(b)(2)(D), the court must order Commerce to perform its recovery-of-costs test for HYSCO in a way that complies with the statutory directive.

2. On Remand, Commerce Must Reconsider its Application of Quarterly Cost Methodology to Union's and HYSCO's DIFMER Adjustments and Constructed Value Determinations

With the exception of the Department's revised recovery-of-costs test, the Remand Redetermination retained the use of the quarterly cost methodology in all instances where it was used in the Final Results, including difference-in-merchandise ("DIFMER") adjustments when comparing similar merchandise and constructed value ("CV") determinations.

In their comments on the Remand Redetermination, neither HYSCO nor Union objected specifically to the Department's use of unindexed quarterly cost data for DIFMER adjustments or CV. However, both maintained general objections to the Department's deviation from the normal method of using POR-wide cost averages. *See* HYSCO's Comments 2–8; Union's Comments 5–6; Oral Tr. 9, 17–18, 25–30; *see also Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1324. As it did in the Final Results, the Department concluded that a 25% or greater fluctuation in the cost of steel substrate together with a "reasonable correlation" with price of the good justified the Department's use of the quarterly cost methodology in the Remand Redetermination, with the exception of the recovery-of-costs test, as discussed *supra*. *Remand Redetermination* 24–26. Both plaintiffs argue that, for various reasons, the circumstances of this administrative review do not warrant the application of shorter cost averaging periods. Union's Comments 5–14; HYSCO's Comments 5–8. For example, both plaintiffs argue that there was not a sufficient nexus between steel substrate costs and CORE prices to justify the use of shorter averaging periods and that the Department's previous practice required more than a reasonable correlation. Union's Comments 10–14; HYSCO's Comments 6–8. Union argues that the 25% threshold for substrate cost fluctuation was met in its case only because Commerce performed a major input adjustment and instead should have looked at actual, not adjusted, costs. Union's Comments 7–9.

The court does not address all of the objections raised by Union and HYSCO because it finds insufficient the Department's explanation for the continued use of quarterly cost averaging periods for DIFMER and CV. That explanation is that it is "the Department's normal practice" to calculate COP, CV, and the DIFMER adjustment "in the same manner." *Remand Redetermination* 20–21. Standing behind its "normal practice" and providing no further explanation, Commerce does not address the question of why using unindexed quarterly cost

data in the specific context of DIFMER and CV ensures a more accurate dumping margin. Also related to the question of accuracy is the fact that the Remand Redetermination does not inform the court whether using quarterly costs influenced the Department's decision to use surrogate costs for CV and DIFMER in the manner similar to that the court found objectionable above, *i.e.*, in the application of the recovery-of-costs test to HYSCO when quarterly CONNUM-specific data were not available. The court directs Commerce to address these matters on remand.

3. Commerce Must Reconsider Its Departure from the Normal Method for the Identification of the Contemporaneous Month

The Department's decision to proceed with a quarterly cost methodology influenced another decision in the Remand Redetermination, which involved the manner of making price-to-price comparisons between home market and U.S. sales. When comparing export prices to home market sales, Commerce is limited in its averaging of home market prices "to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale." [16] 19 U.S.C. § 1677f-1(d)(2). In the Final Results, Commerce followed its standard practice in administrative reviews and calculated dumping margins using an average-to-transaction comparison method according to 19 C.F.R. § 351.414(c)(2). *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1325. Under this method, Commerce compares the price of a weighted average of sales of the foreign like product in the home market to an individual U.S. sale of subject merchandise. 19 C.F.R. § 351.414(b)(3). Generally, Commerce will average, and use for comparison, only those home market sales that incurred during the "contemporaneous month" of the U.S. sale. *Id.* § 351.414(e)(1). Where there are no home market sales of the foreign like product during the same month as the U.S. sale, the Department's regulation prescribes a "normal" method to determine the contemporaneous month: the so-called "90/60-day

[16] Under section 773(a)(1)(A) of the Tariff Act, normal value is to be based on home market prices, made in the ordinary course of trade, existing "at a time *reasonably corresponding to the time of the sale used to determine the export price or constructed export price* . . . ." 19 U.S.C. § 1677b(a)(1)(A) (emphasis added).

window" method.[17] *Id.* § 351.414(e)(2). However, Commerce departed from this "normal" method in the Final Results, concluding that it was inappropriate to compare U.S. sales with home-market sales occurring outside the quarter in which the U.S. sale occurred. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1325–26. Instead, Commerce determined that "it is appropriate in this case to match sales only within the same quarter." *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1326.

In contesting the Final Results, Union and HYSCO objected to the Department's deviation from the 90/60-day window period rule. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1325. Reviewing these claims, the court noted that "the Department's decision to use a non-standard method of determining the contemporaneous month was solely a consequence of the decision to apply a non-standard quarterly cost methodology." *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1326. Commerce itself, in its request for voluntary remand, questioned aspects of its quarterly cost methodology in the fifteenth review, and the court ordered Commerce to reconsider the quarterly cost methodology as used in the Final Results. *Id.* at 1325–26. The court also ordered Commerce, on remand, to reconsider the decision to depart from the normal method of determining the contemporaneous month as prescribed in the Department's regulation. *Id.*

On remand, Commerce retained the contemporaneous month methodology it applied in the Final Results. *Remand Redetermination* 27. Commerce explained that it continued to find it "appropriate to depart from the normal method of determining the contemporaneous month" because it continued to "determine that the changes in Union's and HYSCO's [cost of manufacturing] during the POR due to fluctuating raw material input costs [were] significant." *Id.* at 27–28. According to Commerce, "[w]hen significant cost changes have occurred during the POR, these same conditions are typically accompanied by changes in prices as the market reacts to changing eco-

[17] Section 351.414(e)(2) of the Department's regulations describes the "90/60-day window" rule as follows:

> (2) Contemporaneous month. Normally, the Secretary will select as the contemporaneous month the first of the following which applies:
>
> (i) The month during which the particular U.S. sale under consideration was made;
>
> (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product.
>
> (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

19 C.F.R. § 351.414(e)(2).

nomic conditions." *Id.* at 28. In these situations, Commerce argues, "price-to-price comparisons should be made within the shorter cost-averaging period to lessen the margin distortions caused by changes in sales prices which result from significantly changing costs." *Id.* Thus, in the Department's view, "comparing home market sales from one quarter to U.S. sales during another quarter of the POR when the unadjusted comparison market price does not reflect the contemporaneous price changes that have occurred through the date of the U.S. sale distorts the dumping analysis" and it is therefore "appropriate in this case to match sales only within the same quarter." *Id.* at 29.

Both Union and HYSCO continue to oppose the departure from the 90/60-day window period.[18] Union maintains that the Department's methodology is unlawful because the shortened comparison window led to fewer identical sales matches, contravening the statutory preference for matching identical merchandise. Union's Comments 14–19. HYSCO submits that the Department's methodology is unreasonable because the artificial three-month comparison window creates distortions in the final margin that undermine the statutory interest in accuracy. HYSCO's Comments 8–11.

The court concludes that it cannot affirm the Department's departure from the 90/60-day comparison window in favor of a quarterly comparison window on the rationale Commerce provided in the Remand Redetermination. As the Department's regulation, 19 C.F.R. § 351.414(e)(2), establishes a normal method for selecting the comparison month, Commerce must provide an explanation justifying a deviation from this method. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1328 (Fed. Cir. 2009) ("Once Commerce establishes a course of action, however, Commerce is obliged to follow it until Commerce provides a sufficient, reasoned analysis explaining why a change is necessary."); *see also Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) ("[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom."). The rationale Commerce offers does not provide such an explanation.

The Department's methodology raises two issues that the Remand Redetermination fails to resolve. First, by shortening the standard window period by half (*i.e.*, from six months to the three months), the Department's method sacrifices identical matches for the sake of

[18] Neither United States Steel Corporation nor Nucor Corporation addressed the comparison window issue in their written comments on the Remand Redetermination. Comments of U.S. Steel Corp. on the Results of Redetermination Pursuant to Remand Issued by the Dept. of Commerce 1 (Dec. 3, 2012), ECF No. 171; Nucor Corp.'s Comments on Remand Results 1 (Dec. 3, 2012), ECF No. 176.

some form of contemporaneity. It thus caused Commerce to resort more often to matches of similar merchandise or to a CV calculation even though actual price comparisons inherently yield a more accurate margin than do comparisons of similar merchandise or the use of CV. *See* 19 U.S.C. § 1677b(a), (e). The Remand Redetermination explains that cost fluctuations in the price of steel substrate, which Commerce presumed to affect price, justify shortening the comparison window. Commerce, however, provided no reasoning beyond this presumption, nor does Commerce explain how its method produced the most accurate margin possible. The court therefore considers the Department's rationale conclusory. Commerce must address this deficiency on remand.

The second issue raised by the Department's choice of contemporaneous month is whether Commerce permissibly shortened the comparison window period in the particular way that it did: by limiting comparisons of a U.S. sale to home market sales occurring only in the quarter in which the U.S. sale occurred. By doing so, Commerce largely dispensed with the hierarchy, reflected in 19 C.F.R. § 351.414(e)(2), of matching a U.S. sale with earlier months of home market sales before resorting to subsequent months in a situation where no match could be made in the month in which the U.S. sale occurred. The Remand Redetermination does not explain why Commerce chose a method that deviated significantly from this hierarchy by shortening the comparison window. For example, if a U.S. sale made in the first month of a quarter had no match in the month in which it occurred, it could not be matched with a home market sale (or sales) occurring in the immediately preceding month, despite the preference embodied in the regulation for the use of earlier months before the use of later months.[19] Under the regulation, a matchoccurring as early as the third month before the month of the U.S. sale is preferred to a match occurring in the month following the month of the U.S. sale. *See* 19 C.F.R. § 351.414(e)(2).

[19] At oral argument, the court obtained clarification on the Department's methodology and the three potential scenarios that could arise thereunder. First, if a U.S. sale occurred during the first month of a quarter, Commerce looked to foreign market sales in the current month, followed by the two subsequent months, in chronological order, to identify the contemporaneous month (a "0/60 window"). Oral Tr. 53. If a U.S. sale occurred during the second month of a quarter, Commerce looked to foreign market sales in the current month, followed by the month prior and month subsequent, in that order, to identify thecontemporaneous month (a "30/30 window"). *Id*. at 53–54. And if a U.S. sale occurred during the third month of a quarter, Commerce looked to foreign market sales in the current month, followed by the two prior months, in reverse chronological order, to identify the contemporaneous month (a "60/0 window"). *Id*. at 54. If Commerce was unable to find a match of identical products (identified by "control number," or "CONNUM") using its quarterly window period methodology, it applied the same methodology as to matches of similar CONNUMs before resorting to the use of constructed value. *Id.*

Accordingly, in a second remand redetermination, Commerce must reconsider its methodology for identifying reasonably corresponding contemporaneous months for Union's and HYSCO's sales of subject merchandise and, in so doing, address the two specific issues the court has raised.

The cases Commerce cited for the point that courts have sustained its method are not binding on the court. This includes the decision in *Garofalo*, which the United States Court of Appeals for the Federal Circuit ("Court of Appeals") issued pursuant to Federal Circuit Rule 36 and therefore is not precedential. *See* Fed. Cir. R. 36 (allowing entry of a judgment of affirmance without opinion when certain conditions exist and an opinion would have no precedential value). Moreover, the court must consider the methodology on the facts of this case and according to the rationale Commerce put forth.

Finally, the Department's insistence that neither Union nor HYSCO identified unreasonable matches resulting from the Department's methodology does not convince the court that this methodology must be sustained. *See Remand Redetermination* 31. The methodology has the inherent characteristic of reducing the number of identical matches, as defendant concedes.[20] Def.'s Resp. 27 ("[T]he shortened window may not have provided for every identical match that could have been made using the standard window period . . . .").

Before the court, defendant, citing 19 C.F.R. § 351.414, argues that "Commerce reasonably exercised the discretion permitted by the regulation's use of the term 'normally'" after determining that the factual scenario presented warranted a shortening of the comparison window period. Def.'s Resp. 26. Defendant submits that this Court has held that the use of the term "normally" affords Commerce discretion in determining when the normal situation does not apply, based on the circumstances presented. *Id*. (citing *KYD v. United States*, 33 CIT 299, 311, 631 F. Supp. 2d 1371, 1382; (2009), *SeAH*, 34 CIT at __, 704 F. Supp. 2d at 1376). The non-precedential cases defendant cites, like those cited by Commerce in the Remand Redetermination, do not offer the court a basis upon which to sustain the Department's decision as to contemporaneous month. The regulation affords Commerce discretion in its sales comparison methodology, but in this case, the particular method Commerce adopted as an alternative to the normal method raises unanswered questions that relate to the accuracy of the result.

[20] At oral argument, Union's counsel was unable to identify the extent of the Department's use of constructed value resulting from the quarterly comparison window but did indicate that there were fewer identical matches than there would have been under the normal 90/60-day comparison window. Oral Tr. 43–44.

C. The Remand Redetermination Lawfully Determined that the Non-Laminated, Painted CORE May Not Be Compared to the Laminated Core as Products "Identical in Physical Characteristics"

Prior to the court's first opinion in this action, defendant requested, and the court granted, a voluntary remand to allow Commerce to reconsider aspects of the "model-match" methodology applied to Union under section 771(16)(A) of the Tariff Act, 19 U.S.C. § 1677(16)(A).[21] *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1327. The model-match methodology is used by Commerce to compare prices of subject merchandise with home market prices of the foreign like product. Specifically, Commerce wanted to reconsider its decision to treat Union's plastic-laminated CORE (specifically, polyethylene terephthalate (PET) or polyvinyl chloride (PVC) plastic film) as "identical in physical characteristics" with certain painted, non-laminated CORE. *Id.* During the administrative review, Commerce had rejected a proposal made by Union to treat laminated CORE as a separate model-match category. *Id.* Before the court, Union argued that on the basis of obvious physical differences between laminated and painted CORE, the Department's finding that the two groups of products are "identical" is unsupported by substantial record evidence. *Id*. In remanding the issue, the court held that Commerce "may not compare as identical merchandise Union's sales of the painted and non-laminated CORE with Union's sales of laminated CORE absent a finding, supported by substantial evidence on the record, that the physical differences distinguishing the two product groups are minor and not commercially significant." *Id*.

On remand, Commerce altered its model-match methodology so that Union's laminated CORE products and non-laminated, painted CORE products are no longer considered identical in physical characteristics under § 1677(16)(A). *Remand Redetermination* 32–33. Commerce found, based on an examination of Union's antidumping questionnaire responses, that "laminated CORE products by their very nature are not painted products" as the laminated products are "coated by attaching a plastic film to a CORE substrate, and lamination is done in lieu of painting." *Id*. at 35. Commerce also found that "'[l]aminating the steel substantially increases both the production costs and the sales prices of laminated products vis-à-vis other painted products.'" *Id.* at 36 (quoting *Union Steel Questionnaire Resp.*

[21] Section 1677(A) of the Tariff Act directs that Commerce, in determining the foreign like product, first seek to compare a U.S. sale of subject merchandise with a comparison-market sale of merchandise "which is identical in physical characteristics with, and was produced in, the same country by the same person as, that merchandise." 19 U.S.C. § 1677(A).

6 (Feb. 5, 2009) (Admin.R.Doc. No. 4845) ("*Union's Questionnaire Resp.*"). Based on an examination of Union's price and cost data, Commerce noted that "PET film and PVC film are more expensive than the various paints used to produce non-laminated, painted CORE products." *Id.* at 35 (citing *Union Steel Supplemental Questionnaire Response* 15 (Apr. 9, 2009) (Admin.R.Doc. No. 4915) ("*Union's Supplemental Questionnaire Resp.*")). Commerce identified record evidence showing that "Union's customers sometimes require specific characteristics related to PET or PVC film, while other painted products are not suitable" and that "Union specifically distinguishes laminated products from other painted products in product codes." *Id.* at 36 (citing *Union's Supplemental Questionnaire Resp.* at 13–14, B-21). Commerce concluded that because "[r]ecord evidence establishes significant differences in the physical characteristics between laminated CORE products and non-laminated, painted CORE products . . . compelling reasons exist for the Department to alter its classification of the physical characteristics in this remand proceeding." *Id.* at 37.

The Department's separation of laminated CORE products from non-laminated, painted CORE products for purposes of its model-match methodology complies with the court's remand order and is supported by substantial record evidence of the physical and commercial differences between the respective products. No party opposes this redetermined model-match methodology in comments filed before the court. *See* Union's Comments 19–20. The court, therefore, affirms this aspect of the Remand Redetermination.

D. The Court Sustains the Department's Use of Zeroing in the Final Results to Calculate Union's Weighted Average Dumping Margin

In the Final Results, Commerce applied its "zeroing" methodology to calculate Union's weighted average dumping margin, under which it determines a dumping margin for each sale of subject merchandise and then converts negative margins to zero margins before calculating a weighted average percentage margin. *See Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1327–28. Noting that Commerce abandoned the use of zeroing in antidumping investigations while continuing to apply zeroing in periodic administrative reviews, Union challenged the Department's use of zeroing, arguing that Commerce inconsistently and unlawfully interpreted the statutory provision defining "dumping margin," 19 U.S.C. § 1677(35)(A), contrary to basic

rules of statutory construction.[22] *Id*., 36 CIT at __, 837 F. Supp. 2d at 1328 (citation omitted). Defendant requested, and the court granted, a voluntary remand on the zeroing issue in light of the decision of the in *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) ("*JTEKT Corp.*"), in which the Court of Appeals questioned the legality of the Department's construction of section 1677(35)(A) and required the Department to provide an adequate explanation of the Department's inconsistent interpretation of the statute vis-à-vis administrative reviews and investigations. *Id*. The court directed the Department, on remand, to "either modify its decision to apply the zeroing methodology in the fifteenth review or, alternatively, provide an explanation that satisfies the requirements the Court of Appeals imposed in . . . *JTEKT Corp.*" *Id*., 36 CIT at __, 837 F. Supp. 2d at 1329.

In the Remand Redetermination, Commerce continued to use zeroing but, as directed by the court's remand order, provided an explanation as to why it considered the use of that methodology to be in compliance with the Tariff Act despite the Department's discontinuation of zeroing in antidumping duty investigations. *Remand Redetermination* 44, 48–60 (stating that the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act "in a way that accounts for the inherent differences between the result of an average-to-average comparison," as used in investigations, and "the result of an average-to-transaction comparison," as used in administrative reviews).

The Court of Appeals decided *Union Steel, LG Hausys, Ltd. v. United States*, 713 F.3d 1101, 1101 (Fed. Cir. 2013) ("*Union Steel*"), on April 16, 2013, after Commerce had already issued its Remand Redetermination. In *Union Steel*, the Court of Appeals affirmed the Department's use of the zeroing methodology in circumstances analogous to those presented by this case involving an administrative review of an antidumping duty order. The court considers *Union Steel* dispositive of the zeroing issue presented by this case and sustains the use of zeroing in the Final Results.

E. The Court Must Order a Second Remand of the Department's Decision to Use the Date of Shipment as the Date of Sale for HYSCO's Constructed-Export-Price Sales

In the Final Results, Commerce used the date the subject merchandise was shipped from Korea to HYSCO's U.S. affiliate, Hyundai

[22] The relevant statutory provision defines a dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C § 1677(35)(A).

HYSCO USA ("HHU" or "HYSCO USA"), as the date of sale for HYSCO's constructed-export-price ("CEP") sales of subject merchandise. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1334. In contesting the Final Results, U.S. Steel claimed the decision to use the date of shipment as the date of sale, rather than the date that the subject merchandise was invoiced, violated the Department's regulation, 19 C.F.R. § 351.401(i),[23] and was unsupported by substantial evidence. *Id*. Defendant requested, and the court granted, a voluntary remand to allow Commerce to reconsider the date-of-sale decision Commerce made in the Final Results for HYSCO's CEP sales. *Id.*, 36 CIT at __, 837 F. Supp. 2d at 1335. On remand, Commerce again decided to use the date of shipment as the date of sale. *Remand Redetermination* 62.

In opposing the Remand Redetermination, U.S. Steel argues, *inter alia*, that 19 C.F.R. § 351.401(i) implements the congressional intent that the date of sale is the date on which the material terms of sale are established, as demonstrated by the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA"). U.S. Steel's Comments 5–6 (citing *Statement of Admin. Action Accompanying the Uruguay Round Agreements Act* at 810), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4153 ("Article 2.4.1 specifies that currency conversions should be made using the rate of exchange on the date of sale, which is defined as a date when the material terms of sale are established.") According to U.S. Steel, "[t]here is not a single shred of evidence showing that the price to be charged to HYSCO's unaffiliated customer was fixed at the time of shipment or at any time prior to the invoice date: no emails, offers, confirmations, contracts or other documents of any kind." *Id.* at 7.

The Remand Redetermination maintains that using the date of shipment as the date of sale is the Department's consistent and "normal" practice "[i]n cases where the shipment date precedes the invoice date." *Remand Redetermination* 61–62. Commerce explained that "[i]n this administrative review, the Department finds no reason to depart from its normal practice *not* to consider dates subsequent to the date of shipment from the factory as appropriate for date of sale because once merchandise is shipped the material terms of sale are presumed to be established." *Id.* at 62 (emphasis in original).

[23] Section 351.401(i) provides as follows:

> In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary 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).

The court considers, first, whether the decision challenged by U.S. Steel is governed by 19 C.F.R. § 351.401(i). It might be questioned whether this regulation applies to CEP sales, which are sales made to the first unrelated buyer in the United States, 19 U.S.C. § 1677a(b), or whether the regulation applies only to export price sales. Like the transactions at issue in this case, CEP sales typically involve a U.S. reseller affiliated with the exporter or producer, and the invoice may be issued by the reseller after the date the merchandise is shipped to the United States. The first sentence of Section 351.401(i) might be read to contemplate an export price sale in identifying as the presumptive date of sale "the date of invoice, as recorded in the *exporter or producer's* records kept in the ordinary course of business." 19 C.F.R. § 351.401(i) (emphasis added). The second sentence also vaguely suggests an export price sale in referring to a date that "better reflects the date on which the *exporter or producer* establishes the material terms of sale."[24] *Id.* (emphasis added).

Nevertheless, the text of 19 C.F.R. § 351.401(i) does not expressly limit the provision to export price sales, and no other regulatory provision addresses the date-of-sale determination. Notably, the Remand Redetermination does not conclude that the scope or intent of 19 C.F.R. § 351.401(i) is limited to export price sales. Rather, the Remand Redetermination considers the regulation to apply to the CEP issue before the court, *Remand Redetermination* 61, instructing that "Section 351.401(i) of the Department's regulations states that the Department 'normally will use the date of invoice' as the date of sale, unless 'the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'" *Id.* (quoting 19 C.F.R. § 351.401(i)). The Remand Redetermination adds that "[i]f the Department determines that another date better reflects the date on which the exporter or producer establishes the material terms of sale, the Department may use this date." *Id.* The Remand Redetermination proceeds to discuss the Department's date-of-shipment practice in the context of 19 C.F.R. § 351.401(i). *Id.* at 61–66.

Because the Remand Redetermination applies 19 C.F.R. § 351.401(i), as well as the date-of-shipment practice, in deciding the date of sale for HYSCO's CEP sales, the court reviews the Department's decision on the basis Commerce put forth, *i.e.*, as grounded in both the regulation and the claimed date-of-shipment practice. And because the factual situation presented here involves CEP sales,

[24] The reference to only the "exporter or producer" raises a question in that "establishing" the material terms of sale would appear to require the participation of a buyer. However, the general context may recognize the routine situation in which the producer/exporter accepts a customer's order by issuing a commercial document such as an invoice.

applying the regulation to that factual situation requires the court to construe the second sentence of the regulation more broadly than in the literal sense— *i.e.*, the court must construe the sentence to refer to a date on which the material terms of sale were established, despite the limiting reference to the exporter or producer. *See* 19 C.F.R. § 351.401(i) ("However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the *exporter or producer* establishes the material terms of sale.") (emphasis added). This broader construction also conforms to the underlying purpose of the regulation. As U.S. Steel points out, Congress intended the date of sale for antidumping law purposes to be the date on which the material terms of sale are established. *See also Corus Staal*, 502 F.3d at 1376 ("Neither a sale nor an agreement to sell occurs until there is mutual assent to the material terms (price and quantity).").

The second sentence of 19 C.F.R. § 351.401(i) requires a finding of fact. This case, therefore, raises a question of whether the regulation permitted Commerce to use a date of sale other than the date of invoice without making a lawful finding according to that sentence, *i.e.*, a finding supported by substantial record evidence, that some date other than the invoice date (in this case, the date of shipment) better reflected the date on which the material terms of sale were established. It could be argued that the word "normally" in the first sentence of the regulation plausibly could be interpreted to allow deviation from the normal "date-of-invoice" method even in situations other than the specific situation identified in the second sentence. Under such an interpretation, Commerce arguably could rely on its date-of-shipment practice without making the specific finding required by the second sentence. Alternatively, the regulation could be construed such that the only exception to the normal method identified in the first sentence of § 351.401(i), which presumes date of invoice will control, is a finding made pursuant to the second sentence. Supporting the latter construction is the use of the word "however," a word of qualification, to introduce the second sentence and relate the second sentence to the first. This construction, consistent with the SAA and the Antidumping Agreement, links the first sentence (and thereby the regulation as a whole) to the concept of a date on which the material terms of sale are established.

The plain language of 19 C.F.R. § 351.401(i) is susceptible to both interpretations. Therefore, the court considers it appropriate to examine the Department's stated intent at the time it promulgated the regulation. In the preamble to the 1997 promulgation notice ("Preamble"), Commerce explained that in "[i]n paragraph (i) [of §

351.401], we merely have provided that, absent 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." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,349 (May 19, 1997) ("*Preamble*"). The Preamble thus explains the intended relationship of the two sentences in 19 C.F.R. § 351.401(i). Commerce intended the presumption in favor of invoice date to apply except in the circumstance identified in the second sentence, *i.e.*, when Commerce can make a finding of fact based on "satisfactory evidence" that "the terms of sale were finally established on a different date." *Id.* The Preamble underscores this point by stating that a respondent "will be free to argue that the Department should use some date other than the date of invoice, but the respondent must submit information that supports the use of a different date" and that a respondent's description of its selling processes, like all submitted information, "will be subject to verification." *Id.* The Preamble clarifies that the second sentence of 19 C.F.R. § 351.401 requires a case-specific factual determination, not a mere presumption based solely on the sequence of the date of shipment and the date of invoice.

In the second sentence, the regulation refers to "a different date" than the date of invoice but makes no specific reference to the date of shipment. In fact, the Preamble discusses the Department's reasons for rejecting the suggestion of some commenters that "if the Department uses a uniform date of sale, it should use date of shipment rather than date of invoice." *Id.* The Preamble responded to the suggestion as follows:

> For several reasons, the Department has not adopted this suggestion. First, date of shipment is not among the possible dates of sale specified in note 8 of the AD Agreement.[25] Second, based on the Department's experience, date of shipment rarely represents the date on which the material terms of sale are established. Third, unlike invoices, which can usually be tied to a company's books and records, firms rarely use shipment documents as the basis for preparation of financial reports. Thus, reliance on date of shipment would make verification more difficult.

Preamble, 62 Fed. Reg. at 27,349. In this way, the Preamble casts doubt on the notion that the date-of-shipment practice conforms to

[25] The Antidumping Agreement, to which the passage refers, states that "[n]ormally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale." Agreement on Implementation of Article VI of the General Agreement on Tariffs & Trade 1994 (Antidumping Agreement), 1868 U.N.T.S. 201, Annex 1A, Art. 2.4.1, n.8.

the regulation. It is questionable that Commerce, at the time of promulgation, intended 19 C.F.R. § 351.401(i) to authorize a practice under which the date of sale is presumed to be the date of shipment, which according to Commerce "rarely represents the date on which the material terms of sale are established." *Id.* At the time of promulgation, Commerce explicitly recognized that the shipment date may precede the invoice date but still rejected the notion that the shipment date should be presumed to control in that circumstance. Addressing a comment that shipment date, not invoice date, should be presumed to control because use of the latter as the date of sale could lead to manipulation of dumping calculations by respondents, Commerce opined that "most firms have a standard invoicing practice (*e.g.*, three days after shipment, every two weeks)." *Id.* Despite these indications to the contrary, the Remand Redetermination applies the general principle that "once merchandise is shipped the material terms of sale are presumed to be established." *Remand Redetermination* 62. By so doing, the Remand Redetermination adopted a presumption in favor of the shipment date even though Commerce intended when promulgating § 351.401 that the presumption would be in favor of the invoice date, regardless of the sequence of the two dates.

Although it appears that the Department's date-of-shipment practice is inconsistent with the interpretation of 19 C.F.R. § 351.401(i) in the Preamble, the court need not decide the question of whether the regulation renders that practice impermissible *per se.* Rather, it is sufficient for the court to conclude that the Department may not substitute the presumption on which this practice is based, *i.e.*, that material terms of sale are established as of the date of shipment, in lieu of a finding under the second sentence of § 351.401(i) that is supported by substantial record evidence. The regulation presumes that date of invoice will control in the absence of a finding in the particular circumstances of a case "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).

In applying the date-of-shipment practice to determine a uniform date of sale for HYSCO, the Remand Redetermination concluded that there was an absence of evidence that the sales prices "actually changed" after the date of shipment and also found that the "price remained stable after the date of shipment." *Remand Redetermination* 62. These findings do not satisfy the condition imposed by 19 C.F.R. § 351.401(i), which does not permit Commerce to base a decision to use the date of shipment as the date of sale on an *absence* of record evidence that the sales prices changed after the date of ship-

ment. The finding that the "price remained stable after the date of shipment," even if presumed valid, would not establish conclusively the intent of the three parties to the HYSCO sales as to when the material terms of sale were established. Moreover, this finding is unsupported by substantial record evidence. At oral argument, counsel for defendant did not dispute that Commerce reached the finding based on certain sales documentation pertaining to a single sale. Oral Tr. 100. This evidence is minimally probative on the question of whether prices were stable after shipment and even less probative on the larger question of whether the parties intended the prices to be established as of the time of shipment.

The Remand Redetermination also finds that "[t]he evidence with regard to price shows that the transfer price from HYSCO to HYSCO USA did not vary from the offer to the commercial invoice, which was issued on the shipment date." *Remand Redetermination* 65 (citing *HYSCO Section A Questionnaire Resp.*, Ex. A-10 (Feb. 12, 2009) (Admin.R.Doc. No. 4850) ("*HYSCO's Section A Resp.*"). This evidence, which does not pertain directly to the prices at issue, has little probative weight on the question of whether the parties intended the price to an unaffiliated customer to be established as of the date of shipment.

More probative on the question of when the three parties to the HYSCO sales intended to establish the material terms of sale is HYSCO's Section A Questionnaire Response. The questionnaire response on page A-22 describes the HYSCO's U.S. sales process as follows:

> Upon receipt of the customer's inquiry, HHU will begin to negotiate the terms of sale with the customer, while making a corresponding inquiry with HYSCO. Although the negotiations may continue *until actual shipment*, once an initial agreement is reached between the customer and HHU as well as between HHU and HYSCO, HYSCO issues an order confirmation and schedules production of the merchandise. Once production is complete, HYSCO ships the merchandise to the United States, while issuing the relevant sales documentation, including the commercial invoice, packing list, and mill certificate, to HHU . . . . Upon arrival of the merchandise in the United States, HHU issues an invoice to the customer and is responsible for collecting payment from the customer.

Id. at A-22 (emphasis added). The questionnaire response elaborated further on page A-23 that "[n]egotiations with customers can continue through the entire sales process" and that "[f]or U.S. sales, quantity

can also change up until the merchandise is shipped from HYSCO's factory, and price can change up until HHU issues its invoice to the unaffiliated U.S. customer." *HYSCO's Section A Resp.* at A-23, A-24. According to defendant, the passage on page A-22 indicates that negotiations do not continue after actual shipment. Oral Tr. 96–97. The court, however, looks at both of the passages quoted and concludes that there is not substantial evidence to support a finding that the prices to the unaffiliated buyers in HYSCO's sales were established as of the date of shipment. The passage on page A-22 suggests, but does not state definitively, that negotiations did not continue after shipment. The passage on page A-23 speaks directly to that question, clarifying that price, as opposed to quantity, could change until HHU issues the invoice. Notably, the sentence in the passage on page A-22, on which defendant relies for its contention that negotiations did not continue after shipment, states that production is scheduled according to what is described as an "initial" agreement, suggesting that the "agreement" reached as of that point is subject to change after production. *See HYSCO's Section A Resp.* A-22 ("Although the negotiations may continue until actual shipment, once an *initial* agreement is reached between the customer and HHU as well as between HHU and HYSCO, HYSCO issues an order confirmation and schedules production of the merchandise." (emphasis added)). The two passages can be read to be consistent with one another, and together they connote that quantity is established as of the date of shipment but price is not. As Commerce itself acknowledged in the Remand Redetermination, "nothing on the record refutes HYSCO's statement that negotiations for sales to U.S. customers continued *after shipment* . . . ." *Remand Redetermination* 62 (emphasis added).

The Remand Redetermination discusses record evidence but does not explicitly find that the parties to the HYSCO sales intended all material terms of sale to be established on the shipment date.[26] It is in this respect that the date-of-shipment practice was unlawful as applied to HYSCO's CEP sales in the fifteenth review: Commerce impermissibly interpreted § 351.401(i) to be satisfied by the presumption underlying that practice, applying the principle that "once merchandise is shipped the material terms of sale are presumed to be

[26] This case is distinguishable from *U.S. Steel Corp. v. United States*, 37 CIT __, Slip Op. 13–156 (Dec. 27, 2013), which affirmed the Department's decision to use shipment date as the date of sale for a respondent in the seventeenth administrative review of the same antidumping duty order at issue here. *Id.* In contrast to the facts in this case, which concerns the fifteenth administrative review, the respondent in *U.S. Steel Corp.* confirmed that it "and its unaffiliated customers generally set price and quantity terms through e-mail correspondence" prior to shipment and that changes to material terms could only be made before shipment. *Id.,* 37 CIT at __, Slip Op. 13–156, at 8–9 (citations omitted).

established." *Remand Redetermination* 62. This principle is contrary to § 351.401(i) as explained in the Preamble. The regulation presumes invoice date, not shipment date, is the date of sale absent a valid finding that some other date better reflects the date on which the material terms of sale were established.

In contrast, the Department's decision to use date of shipment for HYSCO's sales relies on a regulatory interpretation of § 351.401(i) that requires no such finding and instead is satisfied by a presumption that the date of shipment is the date on which the material terms of sale are established. The court does not grant this interpretation the measure of deference afforded by *Auer v. Robbins*, 519 U.S. 452, 461 (1997), because "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. __, __, 132 S. Ct. 2156, 2169 (2012) (quoting *Auer*, 519 U.S. at 462).[27] Instead, the court examines the Department's interpretation for "those factors which give it the power to persuade" in accordance with the level of deference afforded by *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Because the Remand Redetermination devotes only scant attention to 19 C.F.R. § 351.401(i), *Skidmore* deference to a regulatory interpretation in the Remand Redetermination does not suffice to sustain the department's decision on date of sale.

Defendant argues that "Commerce's normal practice is *not* to consider dates subsequent to the date of shipment," a practice which, according to defendant, "has been 'implicitly approved by the courts.'" Def.'s Resp. 39 (quoting *Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 638, 647, 491 F. Supp. 2d 1222, 1231 (2007) (citing *AIMCOR v. United States*, 141 F.3d 1098, 1104–05) (Fed. Cir. 1998))). However, none of the cases defendant cites holds that the date-of-shipment practice, as described in the Remand Redetermination, is permissible under 19 C.F.R. § 351.401.

Defendant also argues that 19 C.F.R § 351.401(i) "establishes only a presumption that Commerce use the date of invoice as the date of

[27] In *Auer v. Robbins*, 519 U.S. 452 (1997), the United States Supreme Court held that an agency's interpretation of its own regulation is entitled to deference unless it is "plainly erroneous or inconsistent with the regulation." *Id.* at 461. The Supreme Court declined to grant *Auer* deference in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. __, 132 S. Ct. 2156 (2012), to an interpretation by the Department of Labor of its own regulation and instead reviewed the interpretation for persuasiveness, deciding that the interpretation lacked "the hallmarks of thorough consideration." *Id.* 567 U.S. at __, 132 S. Ct. at 2169. The Supreme Court concluded that the interpretation "should instead be given a measure of deference proportional to its power to persuade." *Id.*, 567 U.S. __, __, 132 S. Ct. 2156, 2160 (2012) (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

sale." *Id.* at 40. Implicit in this argument is that the presumption established by the regulation may be rebutted by something short of a finding that a date other than the date of invoice better reflects the date on which the material terms of sale were established. For the reasons the court has discussed, the regulation is properly interpreted according to the intent Commerce had at the time of promulgation, under which the second sentence is exhaustive of the situations in which the normal practice described in the first sentence will not apply.

Defendant argues, further, that "available record evidence establishes that price remained stable for at least a period of time," noting the Department's finding that "[t]he transfer price from HYSCO to HYSCO USA did not vary from the offer to the commercial invoice, which was issued on the shipment date." Def.'s Resp. 41. According to defendant, "[w]hile Commerce normally does not use transfer price as a basis for United States price, the way in which Commerce relied upon that information in the remand results is reasonable because it is the only evidence on the record indicative of HYSCO's actual price-setting behavior." *Id.* This argument ignores the presence on the record of HYSCO's Section A Questionnaire Response, which indicates that prices could change up until the invoice is issued to the unaffiliated purchaser.

Regarding the questionnaire response, defendant at oral argument cited the above-quoted passage on page A-22 as creating an ambiguity on whether negotiations on price could continue after the date of shipment. Oral Tr. 96–97. Defendant suggested, in addition, that pages A-22 and A-23 could be read to be consistent with one another and to mean "that the price per unit doesn't change once the product is shipped, but because quantity can vary slightly within a certain tolerance level . . . the end, the total price may change at the end of the day." *Id.* at 105. These arguments rest on a *post hoc* rationale not articulated in the Remand Redetermination, which itself conceded that no record information rebuts HYSCO's statement that negotiations for sales to U.S. customers continued after shipment. *Remand Redetermination* 62. The court must review the Department's decision on the rationale the agency puts forth. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). Moreover, as the court discussed *supra*, the evidence of record does not support a finding that the parties to the sales intended the price term to be established as of the date of shipment. Defendant's argument that the statement on

page A-23 of the questionnaire response that the price term could change up until the invoice was issued refers only to the total price on the shipment, and not the per-unit price, is not convincing because it is based on a strained reading of the questionnaire response. There is no indication in the questionnaire that HYSCO intended the statement it made on page A-23 to be limited in the way defendant suggests.

Defendant also suggested at oral argument that reliance on the invoice date in the fifteenth review might have caused some sales to be unexamined because Commerce used date of shipment as the date of sale in the previous review. Oral Tr. 100–01. If Commerce shared this concern, it chose not to mention it in the Remand Redetermination. In any event, the problem that defendant identifies does not allow the court to disregard 19 C.F.R. § 351.401(i), a regulation that is binding on both the court and Commerce, and which controls the disposition of the date of sale claim U.S. Steel raises in this case.

In support of the Department's use of the date of shipment in the First Remand Redetermination, HYSCO argues that substantial record evidence supported "the conclusion that the date of shipment from HYSCO's factory in Korea, which preceded the date of invoice to the unaffiliated U.S. customer, reflects the date on which HYSCO established the material terms of sale for U.S. sales." HYSCO's Comments 11. The record lacks substantial evidence to support such a conclusion. Most significantly, HYSCO's statement on page A-23 of the Section A Questionnaire Response is to the contrary, and, as the Remand Redetermination acknowledged, nothing on the record refutes that statement. *Remand Redetermination* 62. Contending that it "met its burden of establishing that the date of sale occurred on a date after the invoice date," HYSCO points to the sample sales documentation it provided and the fact that Commerce did not seek additional documentation. HYSCO's Comments 12 (quotations omitted). According to HYSCO, "[t]he Department typically will not change its date of sale methodology unless it finds that a date of sale was determined erroneously or the respondent changed its business practice, neither of which applied here." HYSCO's Comments 12. *See also* Oral Tr. 124. This argument misses the essential point that Commerce, regardless of its "typical" methodology, was required to determine the date of sale in this review in compliance with 19 C.F.R. § 351.401(i).

In summary, the court concludes that Commerce erred in using the date of shipment as the date of sale for HYSCO's sales without a valid finding satisfying the second sentence of 19 C.F.R. § 351.401(i). On

remand, Commerce must redetermine HYSCO's margin according to a method of determining the date of sale that complies with the Department's regulation.

F. On Second Remand, Commerce Must Recalculate the Rate Assigned to Dongbu to Incorporate Any Adjustments Resulting from Changes in the Margins for Union and HYSCO

In the Final Results, Commerce assigned to Dongbu a margin of 8.65%, a simple average of the margins assigned to Union and HYSCO. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1335. In moving for judgment on the agency record, Dongbu incorporated the arguments raised by Union and HYSCO, seeking the benefit of any modifications to the margins assigned thereto on remand.[28] *Id*., 36 CIT at __, 837 F. Supp. 2d at 1335–36. The court ordered Commerce, on remand, to reflect any changes to the margins for Union and HYSCO in the margin applied to Dongbu. *Id*., 36 CIT at __, 837 F. Supp. 2d at 1336. The court noted, additionally, that the Department's recalculation of the rate applicable to Dongbu also must incorporate any modifications to the rate applied to HYSCO as a result of U.S. Steel's claim regarding the date of sale. *Id*.

In the Remand Redetermination, Commerce recalculated the rate assigned to Dongbu to reflect changes to the weighted average dumping margins calculated for Union and HYSCO arising from the final remand results. *Remand Redetermination* 66. Commerce indicated that Dongbu's rate remains "a simple average of the revised weighted average dumping margins calculated for the mandatory respondents." *Id*.

In its comments on the Remand Redetermination, Dongbu incorporates by reference those comments filed by Union Steel and HYSCO while asking the court to order Commerce, on second remand, to recalculate Dongbu's margin to incorporate any additional changes made to Union's and HYSCO's margins. Dongbu's Comments 2. Because Dongbu's request is appropriate in light of Dongbu's status as an unexamined respondent, the court will require Commerce, on second remand, to recalculate Dongbu's margin based on any changes to Union's and HYSCO's margins. As Dongbu is to receive the benefit of any downward revisions to the weighted average dumping margins for Union or HYSCO, it also must be made subject to any increases in those margins. Accordingly, any changes in Union's and HYSCO's

[28] Because Dongbu's motion for judgment on the agency record limited the claim to those arguments raised by Union and HYSCO, the court concluded that other claims set forth in Dongbu's complaint that were not raised in Union's or HYSCO's motions for judgment on the agency record had been abandoned. *Union Steel Mfg. Co., Ltd.*, 36 CIT at __, 837 F. Supp. 2d at 1336.

margins should be reflected in the derivative margin applied to Dongbu, including any changes resulting from the reconsideration of U.S. Steel's claim challenging HYSCO's date of sale.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court affirms in part, and remands in part, the Remand Redetermination, *Results of Redetermination Pursuant to Remand* (Sept. 24, 2012), ECF No. 161, issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in the fifteenth administrative review of an antidumping order on certain corrosion-resistant carbon steel flat products ("CORE") from the Republic of Korea. Accordingly, upon consideration of the Remand Redetermination, the comments of the parties thereon, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination submitted by Commerce on September 24, 2012, be, and hereby is, affirmed in part and remanded in part for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that the Remand Redetermination be, and hereby is, sustained as to: (1) the general and administrative ("G&A") expense ratio Commerce used to determine the cost of production of the foreign like product for Union Steel Manufacturing Co., Ltd. ("Union"); (2) the Department's decision to calculate Union's interest expense ratio using financial statements from both the 2007 and 2008 fiscal years; (3) the Department's application of its modified "sales-below-cost" and "recovery-of-costs" tests to calculate the normal value of Union's subject merchandise; (4) the Department's decision to create separate product categories for laminated CORE and non-laminated, painted CORE for use in a model-match methodology comparing Union's home market and U.S. sales; and (5) the Department's use of the "zeroing" methodology to calculate Union's weighted average dumping margin; it is further

ORDERED that on remand, Commerce, in accordance with this Opinion and Order, shall reconsider its decision to make a major input adjustment when calculating the interest expense ratio for Union and address Nucor Corporation's related objections; it is further

ORDERED that on remand, Commerce, in accordance with this Opinion and Order, shall reconsider the application of its modified "quarterly cost" methodology to (1) the revised "sales-below-cost" and "recovery-of-costs" tests used in the normal value calculations applied to Hyundai HYSCO ("HYSCO") and (2) the constructed value determinations and difference-inmerchandise ("DIFMER") adjustments applied to Union and HYSCO; it is further

ORDERED that, on remand, Commerce, in accordance with this Opinion and Order, shall reconsider the decision to depart from the "normal" method prescribed by regulation, 19 C.F.R. § 351.414(e)(2), for identifying the reasonably corresponding contemporaneous month used in comparing Union's and HYSCO's U.S. and home market sales; it is further

ORDERED that, on remand, Commerce, in accordance with this Opinion and Order, shall reconsider the decision to depart from the normal date prescribed by regulation, 19 C.F.R. § 351.401(i), when determining date of sale for HYSCO's U.S. sales sold through its U.S. affiliate, Hyundai HYSCO USA, Inc.; it is further

ORDERED that, on remand, Commerce shall redetermine the weighted average dumping margins for Union and HYSCO as necessary and shall redetermine the margin for Dongbu Steel Company, Ltd., as a non-examined respondent, based on any adjustments made to Union's or HYSCO's weighted average dumping margins in the results of the second remand; it is further

ORDERED that Commerce shall file the results of the second remand within ninety (90) days of the date of this Opinion and Order; it is further

ORDERED that plaintiffs, plaintiff-intervenor, and defendant-intervenor each may file comments on the results of the second remand within thirty (30) days from the date on which these results are filed; and it is further

ORDERED that defendant may file any response to those comments on the results of the second remand within fifteen (15) days from the date on which the last comment is filed.

Dated: March 4, 2014
New York, New York

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