U.S. Customs and Border Protection

Slip Op. 14–30

DONGTAI PEAK HONEY INDUSTRY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION and SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 12–00411

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: March 21, 2014

Yingchao Xiao, Lee & Xiao, of San Marino, CA, for plaintiff.

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 *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Sapna Sharma*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey, *R. Alan Luberda*, and *Benjamin B. Caryl*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors.

OPINION

TSOUCALAS, Senior Judge:

Plaintiff Dongtai Peak Honey Industry Co., Ltd. ("Peak"), moves for judgment on the agency record contesting the United States Department of Commerce's ("Commerce") determination in *Administrative Review of Honey From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 70,417 (Nov. 26, 2012) ("*Final Results*"). Commerce and defendant-intervenors American Honey Producers Association and Sioux Honey Association oppose Peak's motion. For the following reasons, Peak's motion is denied.

BACKGROUND

Commerce initiated the tenth administrative review of honey from the People's Republic of China ("PRC") in January 2012. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 77 Fed. Reg. 4759 (Jan. 31, 2012). Commerce named Peak a respondent. *Id.* at 4761.

On March 2, 2012, Commerce issued a nonmarket economy ("NME") questionnaire to Peak. *See* NME Questionnaire (Mar. 2, 2012), Public Rec. 11[1] at 1. Peak timely filed its response to section A of the questionnaire, and filed its response to sections C and D of the questionnaire after receiving a one-day extension of the deadline from Commerce. *See* Peak's § A Questionnaire Resp. (Mar. 23, 2012), CR 4–6; Peak's §§ C and D Questionnaire Resp. (Apr. 10, 2012), PR 24.

On April 3, 2012, Commerce issued a supplemental section A questionnaire "addressing certain deficiencies" in Peak's section A questionnaire response. Supplemental § A Questionnaire (Apr. 3, 2012), PR 22 at 1. The deadline for Peak's supplemental section A questionnaire response ("SSAQR") was April 17, 2012. *Id.* at 1.

Peak did not submit its SSAQR by April 17, 2012. Rather, on April 19, 2012, Peak filed a request to extend the deadline to April 27, 2012 ("April 19th Letter"). *See* Rejection of Supplemental § A Questionnaire Resp. and Removal from the Record (May 22, 2012), PR 40 at 1. Peak requested an extension of time because of an overlap with the deadline to file its sections C and D questionnaire response, a national holiday, issues with its translator, issues communicating with its U.S.-based attorneys, and a computer failure. *See* Br. Supp. Pl.'s R. 56.2 Mot. J. Agency R. at 12 ("Pl.'s Br.").

On April 27, 2012, Peak submitted a request for an additional one-day extension of the deadline. PR 40 at 1. Following the close of business on April 27, 2012, Peak submitted its SSAQR to Commerce. *Id.*

Commerce denied Peak's extension request because "good cause [did] not exist . . . to extend retroactively its deadline for the extension request." *Id.* at 2. Specifically, Commerce noted that, although Peak explained why it could not timely file its SSAQR, "Peak provided no explanation as to why it was unable to file its extension request in a timely manner prior to the deadline for its questionnaire response." *Id.* Commerce removed from the record both of Peak's extension requests and the SSAQR. *Id.*

Although Peak requested reconsideration of this decision, Commerce continued to find it appropriate to deny Peak's extension requests and remove them and the SSAQR from the record in its preliminary determination. *Honey From the PRC: Preliminary Re-*

[1] Hereinafter, all public record documents will be designated "PR" and all confidential record documents will be designated "CR" without further specification except where relevant.

sults of Review, 77 Fed. Reg. 46,699, 46,701–02 (Aug. 6, 2012) ("*Preliminary Results*"). Commerce again noted that the April 19th Letter did not address Peak's inability to file an extension request by the deadline. *Id.* It also stated that the deadline was significant in the instant case because it found Peak's U.S. sales non-bona fide in prior reviews and therefore needed time for a full analysis of the information it sought in the supplemental section A questionnaire. *Id.* at 46,701.

Additionally, Commerce preliminarily determined that, without a complete section A questionnaire response, the record lacked sufficient information to calculate a separate rate for Peak. *Id.* at 46,702. As a result, Commerce found Peak "to be part of the PRC-wide entity." *Id.*

Commerce also preliminarily determined that the PRC-wide entity, including Peak, did not cooperate to the best of its ability during the review. *Id.* Therefore, Commerce relied entirely on adverse facts available ("AFA") to determine the dumping margin for the PRC-wide entity. *Id.* Commerce selected a rate of $2.63/kg, which it calculated for Anhui Native Produce Import & Export Corporation ("ANP") during the sixth administrative review of honey from the PRC. *Id.* at 46,703.

In its final determination, Commerce upheld the results of the *Preliminary Review* in their entirety. *See Final Results*, 77 Fed. Reg. at 70,418. *See also Administrative Review of Honey from the PRC: Issues and Decision Memorandum for the Final Results* (Nov. 19, 2012), PR 56 at 1 ("*I & D Memo*").

Peak contests several aspects of the *Final Results*, including: (I) the denial of Peak's extension requests and the removal of those requests and the SSAQR from the record; (II) the decision to impose the PRC-wide rate; (III) the reliance on AFA to calculate the dumping margin; and (IV) the use of the $2.63/kg figure for the AFA rate. *See* Pl.'s Br. at 1–3.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[2] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

This Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might

[2] All further references to the Tariff Act of 1930 will be to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Additionally, "[c]ourts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors." *WelCom Prods., Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1340, 1344 (2012) (citing *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)). "[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

DISCUSSION

I. The Untimely Submissions

The first issue before the court is whether Commerce erred in denying Peak's extension requests and removing the requests and the SSAQR from the record. "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370 (2007). Furthermore, the Court of Appeals for the Federal Circuit ("Federal Circuit") recently held that "[t]he role of judicial review is limited to determining whether the record is adequate to support the administrative action[,]" and therefore "[a] court cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012).

Commerce's regulations state that Commerce "may, for good cause, extend any time limit." 19 C.F.R. § 351.302(b).[3] A party may request an extension "[b]efore the applicable time limit . . . expires." *Id.* at § 351.302(c). "The request must be in writing, . . . and state the reasons for the request." *Id.* If Commerce refuses to extend the time limit, it generally "will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material." *Id.* at § 351.302(d).

[3] The references to and quoted language from 19 C.F.R. § 351.302 reflect the language of the regulation during the underlying review unless otherwise specified by the court. In September 2013, Commerce amended section 351.302 effective for all segments initiated after October 21, 2013. *See Extension of Time Limits: Final Rule*, 78 Fed. Reg. 57,790 (Sept. 20, 2013).

According to Peak, Commerce should have extended the deadline upon Peak's showing of good cause in the April 19th Letter. *See* Pl.'s Br. at 12. Peak argues that the April 19th Letter explained both why it could not prepare its SSAQR before the deadline and why it could not file an extension request before the deadline. *Id.* Relying on prior proceedings in which Commerce granted untimely extension requests, Peak argues that Commerce's refusal to extend the deadline was arbitrary and an abuse of discretion because Commerce departed from a "long practice" of accepting and granting untimely extension requests supported by good cause. *Id.* at 9–12.

Contrary to Peak's insistence, Commerce reasonably determined that Peak's extension requests were unsupported by good cause. Commerce found that Peak failed to comply with the regulations by filing its extension requests after the deadline expired. PR 40 at 2. Although it noted that it accepted untimely extension requests when supported by good cause in prior reviews, Commerce found that the facts of the instant case did not warrant granting Peak's untimely requests. *I&D Memo* at 5–6. Commerce noted that Peak was aware of the deadline in question and its particular importance given the need to determine whether Peak's U.S. sales were bona fide and whether Peak was eligible for a separate rate in the preliminary results. *Id.* at 5. With regards to the April 19th Letter, Commerce stated that Peak's explanation did not adequately demonstrate why it was unable to file the extension request before the deadline expired because all of the causes of delay were known to Peak before the April 17th deadline and could not have prevented Peak from filing an extension request before that date. *Id.* at 6. Essentially, Commerce found that Peak was entirely capable of submitting its extension request on time, but simply failed to do so. *Id.* Because Peak failed to file its extension requests before the deadline to file the SSAQR expired even though it was capable of doing so, Commerce reasonably determined that there was not good cause to retroactively extend the deadline. *See* 19 C.F.R. § 351.302(b); (c).[4] And, because it denied the extension requests, Commerce reasonably determined that Peak's SSAQR was untimely and removed it from the record. *Id.* at § 351.302(d).

Peak also argues that Commerce's refusal "even to look at [Peak's] good cause presentation [was] a deprivation of a statutory right." Pl.'s Br. at 16. However, this argument is both factually incorrect and

[4] Although they do not apply to the instant case, the amendments to section 351.302 impose a new standard for analyzing untimely filed extension requests. *See Extension of Time Limits; Final Rule*, 78 Fed. Reg. at 57,795. The amended regulation reads: "An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists." 19 C.F.R. § 351.302(c) (2013).

inconsistent with law. As noted above, Commerce considered Peak's good cause presentation and found that it was insufficient to warrant retroactively extending the deadline. *See I&D* Memo at 5–6. Furthermore, Commerce's decision to deny the extension request did not violate Peak's "statutory rights." In *PSC VSMPO*, the Federal Circuit found that Commerce's rejection of untimely filed factual information did not violate a respondent's due process rights where the respondent had notice of the deadline and an opportunity to comply. *PSC VSMPO*, 688 F.3d at 761–62. Here, Commerce notified Peak of the deadline to file its SSAQR. PR 22 at 1. As Commerce found, Peak had an opportunity to comply with the deadline but failed to do so. *I&D Memo* at 6. Although this case involves untimely extension requests in addition to an untimely submission of factual information, the Federal Circuit's rationale in *PSC VSMPO* holds: Commerce did not violate Peak's rights because Peak had notice of the deadline and an opportunity to comply, but simply failed to timely file its requests to extend the deadline. *See PSC VSMPO*, 688 F.3d at 761–62.

Finally, Peak claims that Commerce's decision to deny Peak's extension requests was an abuse of discretion because it prevented Commerce from calculating the margin as accurately as possible. Pl.'s Br. at 15–16. Relying on this Court's holding in *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT __, 815 F. Supp. 2d 1342 (2012), Peak argues that Commerce should have extended the deadline because the burden of accepting the SSAQR was "minuscule" and the denial of Peak's request resulted in the application of a margin based on AFA. *Id.*

This argument is flawed. Although Peak's SSAQR would have contained information relevant to the dumping margin determination, Commerce was not required to place it on the record *See PSC VSMPO*, 688 F.3d at 761 ("A court cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result."). As discussed above, Commerce properly determined that Peak's extension requests were untimely submitted and failed to demonstrate good cause to extend the deadline, and therefore removed Peak's requests and SSAQR from the record. *See* 19 C.F.R. § 351.302(b)-(d). Accordingly, the court declines to reverse Commerce's decision. *See PSC VSMPO*, 688 F.3d at 761.

Furthermore, Peak's reliance on *Grobest* is misplaced. In *Grobest*, Commerce rejected the separate rate certification that Amanda Foods filed, without an extension request, ninety-five days after the deadline and seven months before the preliminary determination.

Grobest, 36 CIT at __, 815 F. Supp. 2d at 1365. The Court stated that, when assessing Commerce's decision to reject an untimely submission, it "will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on [Commerce] and the interest in finality." *Id.*, 815 F. Supp. 2d at 1365. The Court held that Commerce abused its discretion by rejecting the certificate because: (1) Amanda Foods demonstrated its separate rate eligibility in all prior segments of the proceeding and therefore "it appear[ed] likely that, but for the untimeliness of its submission, Amanda Foods would have received a separate rate"; and (2) given the minimal analysis of the separate rate certifications Commerce undertook in previous reviews, "every indication suggest[ed] that the burden of reviewing the [separate rate certification] would not be great." *Id.* at __, 815 F. Supp. 2d at 1366–67.

Peak insists that the burden of accepting the SSAQR would have been smaller than the burden in *Grobest*, as the SSAQR was "relatively small and minor" and "filed only a few days late." Pl.'s Br. at 15. While the Court cannot determine exactly the burden on Commerce had it extended the deadline, the record indicates that the burden would not have been "minuscule," as Peak suggests. Peak filed its SSAQR less than four months before the deadline for Commerce to issue its preliminary determination. *I&D Memo* at 13. The SSAQR would have provided narrative and documentary evidence in response to nine pages of questions concerning Peak's management, shareholders, accounting practices, affiliations, U.S. sales, domestic sales, and merchandise. *See* PR 22 at 4–12. As Commerce explained, this information would have been relevant to Commerce's bona fide sales and separate rate analyses. *I&D Memo* at 13. And, given that Commerce found Peak's U.S. sales to be non-bona fide in two prior reviews, *id.*, the evidence suggests that the analysis of the information that Peak would have provided in the SSAQR would have been more extensive than an analysis of the separate rate certification in *Grobest*. *See Grobest*, 36 CIT at __, 815 F. Supp. 2d at 1367.

Ultimately, Commerce's decision to deny Peak's extension request was consistent with the regulations and therefore within its recognized discretion to set and enforce time limits. *See Yantai Timken*, 31 CIT at 1755, 521 F. Supp. 2d at 1370. Although Commerce exercised this discretion strictly, it neither acted arbitrarily nor abused its discretion because it provided a reasoned explanation of its decision consistent with the regulatory framework and the record. *See Wheatland Tube*, 161 F.3d at 1369. Furthermore, because Commerce properly denied Peak's untimely request for an extension, it properly

removed the extension requests and the untimely SSAQR from the record of the review. *See* 19 C.F.R. § 351.302(d).

II. Separate Rate Eligibility

Also at issue is Commerce's decision to treat Peak as part of the PRC-wide entity. In antidumping duty proceedings involving merchandise from a NME, as is the case here, Commerce presumes that all respondents are government controlled and therefore subject to the country-wide rate. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Commerce does allow respondents to rebut this presumption, however, by establishing the absence of both *de jure* and *de facto* government control. *Id.* Respondents who make this showing are eligible for a separate rate. *Id.*

Peak alleges that Commerce erroneously treated Peak as part of the PRC-wide entity. *See* Pl.'s Br. at 22–25. Relying again on *Grobest*, Peak insists that any information missing from the record relevant to its separate rate eligibility was the result of Commerce's wrongful decision to reject and remove from the record the SSAQR. *Id.* at 23–24. Peak also denies that the record was insufficient to establish Peak's separate rate eligibility, as its initial section A questionnaire response demonstrated the absence of government control and the supplemental section A questionnaire did not solicit relevant information. *Id.* at 24–25.

Peak's reliance on *Grobest* is misplaced because, as noted above, Commerce's decision to remove the SSAQR was consistent with the regulations and within its discretion. *See* 19 C.F.R. § 351.302(d); *Yantai Timken*, 31 CIT at 1755, 521 F. Supp. 2d at 1370. The record lacked certain information regarding Peak's separate rate eligibility because Peak failed to timely file its extension requests and failed to show good cause to extend the deadline. *See* 19 C.F.R. § 351.302(b); (c).

Furthermore, Peak's insistence that its initial section A response was sufficient to demonstrate its separate rate eligibility is unavailing. Although Peak does not actually identify any of the evidence in its section A questionnaire response demonstrating the lack of government control in its brief, *see* Pl.'s Br. at 24, an inspection of Peak's initial section A response does indicate that Peak provided translations of Chinese law and information concerning its ownership and corporate structure. *See* CR 4–6. However, the fact that Peak provided some evidence of its eligibility for a separate rate is insufficient to render Commerce's decision unsupported by substantial evidence. *See Sigma Corp.*, 117 F.3d at 1405. Ultimately, it was Peak's burden to demonstrate the absence of *de jure* and *de facto* government con-

trol. *See id.* The supplemental section A questionnaire contained a "Separate Rates" section soliciting information concerning Peak's shareholders, management, and affiliation with other entities within the Chinese honey industry. *See* PR 22 at 4–6. Because Peak failed to file either its SSAQR with this information or an extension request before the deadline, Commerce reasonably concluded that Peak failed to demonstrate the absence of government control. *See Sigma Corp.*, 117 F.3d at 1405. Accordingly, Commerce's reasonably treated Peak as part of the PRC-wide entity. *Id.*

III. Adverse Facts Available

The next issue is whether Commerce properly relied on AFA to determine the dumping margin for the PRC-wide entity. If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

Peak argues that Commerce erred in its use of AFA to determine the dumping margin for the PRC-wide entity. *See* Pl.'s Br. at 25–29. Relying on this Court's holding in *Nippon Steel Corp. v. United States*, 24 CIT 1158, 118 F. Supp. 2d 1366 (2000) ("*Nippon I*"), Peak contends that Commerce's determination was contrary to law because "an untimely submission of a questionnaire response . . . does not equal a failure to cooperate to the best of [one's] ability, and does not warrant an adverse inference." Pl.'s Br. at 26 (citing *Nippon I*, 24 CIT at 1169, 118 F. Supp. 2d at 1377). Because Commerce simply equated Peak's untimely submission with Peak's failure to cooperate to the best of its ability, Peak insists that Commerce failed to verify the accuracy of the the information contained in the SSAQR and failed to consider the circumstances surrounding the untimely submission. *Id.* at 27–29. Peak suggests that the record actually evidences its full cooperation with the review, as it timely filed its initial questionnaire responses and filed its SSAQR as quickly as possible. *Id.* at 27–28.

Commerce's determination was consistent with the law. "[T]he statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("*Nippon II*"). The Federal Circuit further explained that:

> Before making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the "best of its ability"

> standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries[.] . . . While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.

Id.

Here, Commerce found that "Peak was aware of its responsibilities to meet the established deadline, but nonetheless failed to submit its documents in a timely manner." *I&D Memo* at 15. As noted throughout this opinion, Commerce found that the computer failure, communication problems, translation problems, overlapping deadlines, and national holiday that Peak relied on in the April 19th Letter did not prevent Peak from timely filing an extension request. *Id.* at 15–16. Thus, Commerce determined that Peak "placed itself in a position in which it could not comply with the deadline." *Id.* at 16. Because a "reasonable respondent" would have complied with the deadline in these circumstances, Commerce concluded that Peak evidenced a "reckless disregard for compliance standards," and therefore failed to cooperate with the review to the best of its ability. *Id.*

The court finds that Commerce's determination was reasonable and consistent with the law. Contrary to Peak's argument, Commerce did not simply equate Peak's untimely submission with a failure to cooperate. In fact, the record indicates that Commerce considered the circumstances of Peak's untimely submission. *See id.* at 15–16. It noted that it set the deadline with regard for the time necessary to analyze and verify the information contained in the SSAQR, and found that Peak was aware of the deadline and had the opportunity to request an extension before the deadline expired. *Id.* Given Peak's failure to comply, it is immaterial that Peak timely submitted other sections of the questionnaire. Because Peak was aware of the deadline and had the opportunity to file an extension request prior to its expiration, Peak's failure to do so indicated an inattentiveness or carelessness with regards to its obligations that warranted the use of AFA. *See Nippon II*, 337 F.3d at 1382. Therefore, Commerce's decision to rely on AFA is supported by substantial evidence and in accordance with law. *Id.*

IV. The Adverse Facts Available Rate

The final issue before the court is whether Commerce properly selected the $2.63/kg AFA rate for the PRC-wide entity. When relying on AFA, Commerce may use information from the petition, investi-

gation, prior administrative reviews, or "any other information placed on the record." 19 U.S.C. § 1677e(b). When it "relies on secondary information rather than on information obtained in the course of an investigation or review," Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.* at § 1677e(c). To corroborate secondary information, Commerce must find that it has "probative value." *See KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010). Secondary information has "probative value" if it is reliable and relevant. *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007); *see KYD*, 607 F.3d at 765–67.

Peak argues that the $2.63/kg figure Commerce used rate was neither reliable nor relevant. Pl.'s Br. at 29–30. According to Peak, Commerce should not have relied on a rate from the 2006–2007 administrative review because of "fluctuations in sales prices, production and transportation costs, market conditions, and so forth known to [Commerce] since that review period." *Id.* at 29. Peak also insists that there was no evidence in the record indicating that this rate was reliable. *Id.* at 30.

Peak's argument is unpersuasive. In both its case brief before Commerce and in its brief before this Court, Peak insists that Commerce knows of market fluctuations and other changes in the Chinese honey industry since the 2006–2007 review. *See* Peak's Administrative Case Brief (Sept. 5, 2012), PR 52 at 23; Pl.'s Br. at 29–30. However, Peak provided no evidence of such changes before Commerce, *see* PR 52 at 23, and does not do so here. *See* Pl.'s Br. at 29–30. Peak's bare assertion that such changes occurred is insufficient to undermine Commerce's selection of ANP's rate to determine the margin for the PRC-wide entity. *See Qingdao Maycarrier Imp. & Exp. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1335, 1343 (2013) (Tsoucalas, J.) (citing *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)) (Plaintiff's alternative interpretation of the record, unsupported by any record evidence, was insufficient grounds to overturn Commerce's determination.).

Furthermore, Peak's insistence that the rate was unsupported by substantial evidence in the record is also incorrect. This Court has noted that, "[u]nlike other sources of information, there are no independently verifiable sources for calculated dumping margins, other than previous administrative determinations." *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1314, 587 F. Supp. 2d 1319, 1328 (2008). Therefore, when calculating the AFA rate for the PRC-wide entity, "the reliability of the calculation stems from its basis in prior verified information in previous administrative reviews," and

"[i]f Commerce chooses a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin if it was calculated from verified sales and cost data." *Id.*, 587 F. Supp. 2d at 1328. Here, Commerce calculated the AFA rate using verified sales and cost data for ANP from an administrative review of honey from the PRC covering sales between 2006 and 2007. *I&D Memo* at 18–19. It noted that ANP's data "reflect[ed] the commercial reality of another respondent in the same industry" as Peak. *Id.* at 18. As discussed, Peak failed to provide any evidence indicating that this rate was not reliable. *See* PR 52 at 23; Pl.'s Br. at 29–30. Because Commerce based the AFA rate on ANP's verified sales and cost data and Peak has not identified any evidence indicating that the rate lacked probative value, Commerce's determination was reasonable. *See Peer Bearing*, 32 CIT at 1314, 587 F. Supp. 2d at 1328.

Finally, Peak suggests that the rate Commerce selected was not relevant because it was "not based on [Peak]'s own sales an production data for the current period of review." Pl.'s Br. at 30. Accordingly, Peak argues that Commerce's selection of ANP's rate was a violation of Commerce's duty to "apply the most accurate rates possible to individual respondents." *Id.*

This argument must fail as well. Because Peak was part of the PRC-wide entity, Commerce was not required to calculate a separate AFA rate relevant to Peak. *See Peer Bearing*, 32 CIT at 1313, 587 F. Supp. 2d at 1327 ("[T]here is no requirement that the PRC-wide entity rate based on AFA relate specifically to the individual company."). Therefore, it was not necessary for Commerce to corroborate the AFA rate for the PRC-wide entity using the sales data Peak provided during the review. *Id.* Accordingly, Peak fails to show that Commerce erroneously relied on ANP's rate to calculate the AFA margin for the PRC-wide entity.

CONCLUSION

Commerce's decision to deny Peak's untimely extension requests and remove the extension requests and Peak's supplemental section A questionnaire response from the record was a proper exercise of its discretion. Additionally, Commerce's decision to treat Peak as part of the PRC-wide entity and its decision to impose a dumping margin of $2.63/kg based on adverse facts available were supported by substantial evidence and in accordance with law. Peak's motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: New York, New York
March 21, 2014

/s/ Nicholas Tsoucalas

NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 14–31

PAPIERFABRIK AUGUST KOEHLER AG, Plaintiff, v. UNITED STATES, Defendant, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 11–00147

[Remanding to the U.S. Department of Commerce the final results of an administrative review of an antidumping duty order on certain lightweight thermal paper from Germany]

Dated: March 25, 2014

F. Amanda DeBusk, *Matthew R. Nicely*, *Eric S. Parnes*, and *Robert L. LaFrankie*, Hughes, Hubbard & Reed, LLP, of Washington, DC, for plaintiff Papierfabrik August Koehler SE.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades*, Assistant Director. Of counsel on the brief was *Jessica M. Forton*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Gilbert B. Kaplan, King & Spalding LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Daniel L. Schneiderman* and *Joseph W. Dorn*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Papierfabrik August Koehler SE contests the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude the first administrative review of an antidumping duty order on certain lightweight thermal paper (the "subject merchandise") from the Federal Republic of Germany ("Germany"). *See Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 22,078, 22,079 (Apr. 20, 2011) ("*Final Results*"). The first administrative review period covers entries of subject merchandise made from November 20, 2008 through October 31, 2009 ("period of review" or "POR"). *Id.*

Before the court is plaintiff's USCIT Rule 56.2 motion for judgment on the agency record, Pls.' Rule 56.2 Mot. for J. on the Agency R. (Nov. 15, 2011), ECF No. 26 ("Pls.' 56.2 Mot."), which both defendant United States and defendant-intervenor Appvion, Inc. ("Appvion")[1] oppose, Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R. (Mar. 6, 2012), ECF No. 39 ("Def.'s Opp'n"); Resp. in Opp'n to Pls.' Rule 56.2 Mot. for J. on the Agency R. (Mar. 7, 2012), ECF No. 42 ("Def.-intervenor's Opp'n").

Plaintiff brings two claims. First, plaintiff claims that the Department's decision in the Final Results not to make downward adjustments in Koehler's home market sales prices to account for certain rebates made on a monthly basis is not supported by substantial evidence and is otherwise not in accordance with law. First Am. Compl. ¶¶ 24–25 (May 20, 2013), ECF No. 83 ("Am. Compl."). Second, plaintiff claims that Commerce unlawfully denied Koehler an opportunity to respond to certain correspondence between U.S. Senators and Representatives and the Secretary of Commerce that was placed on the record on the last day of the agency proceeding giving rise to this action. *Id.* ¶¶ 22–23.

Concluding that the contested determination was contrary to law, the court remands the Final Results for further proceedings.

I. BACKGROUND

Plaintiff Papierfabrik August Koehler SE ("Koehler") is a German producer and exporter of lightweight thermal paper.[2] Compl. 1 (May 13, 2011), ECF No. 6. Koehler and its U.S. affiliate, Koehler America, Inc., participated as respondents in the first administrative review.[3] *Lightweight Thermal Paper From Germany: Notice of Prelim. Results of Antidumping Duty Admin. Review*, 75 Fed. Reg. 77,831, 77,831 (Dec. 14, 2010) ("*Prelim. Results*").

In the antidumping investigation, Commerce determined a 6.5% antidumping duty margin for Koehler, the only producer/exporter investigated. *Lightweight Thermal Paper from Germany: Notice of Final Determination of Sales at Less Than Fair Value*, 73 Fed. Reg. 57,326, 57,328 (Oct. 2, 2008). Commerce issued an antidumping duty order on certain lightweight thermal paper from Germany (the "Or-

[1] On May 13, 2013, defendant-intervenor changed its name from Appleton Papers Inc. to Appvion, Inc. ("Appvion"). *See Letter to Clerk of the Court Re: Papierfabrik AG v. United States, Ct. No. 11–00147* (June 21, 2013), ECF No. 84.

[2] During the course of the litigation, Papierfabrik August Koehler AG ("Koehler") changed from an "AG" to an "SE" corporate form. First Am. Compl. 1 n.1 (May 20, 2013), ECF No. 83 ("Am. Compl.").

[3] Koehler America, Inc., previously a plaintiff in this action, was terminated as a party on May 20, 2013. *See* Order (May 20, 2013), ECF No. 82.

der") on November 24, 2008.[4] *Antidumping Duty Orders: Lightweight Thermal Paper from Germany & the People's Republic of China*, 73 Fed. Reg. 70,959, 70,959–60 (Nov. 24, 2008). In response to requests by Koehler and Appvion, the petitioner in the antidumping investigation, Commerce initiated the first administrative review of the Order on December 23, 2009. *Prelim. Results*, 75 Fed. Reg. at 77,831.

During the first administrative review, Koehler, the sole respondent in that review,[5] reported having made rebates to customers in Germany, its home market, on monthly, quarterly, and annual bases. Koehler's Supplemental Sections A-C Questionnaire Resp. 15 (Apr. 15, 2010) (Admin.R.Doc. No. 44). In the preliminary results of the review ("Preliminary Results"), Commerce, in determining the normal value of Koehler's subject merchandise according to Koehler's sales of the foreign like product in Germany, made adjustments to the home market sales prices for all of the reported rebates and preliminarily assigned Koehler a *de minimis* antidumping duty margin. *Prelim. Results*, 75 Fed. Reg. at 77,835–87.

In response to the Preliminary Results, Appvion submitted a case brief that, *inter alia*, raised various challenges to the Department's preliminary decision to adjust normal value according to the reported monthly rebates. Pet'rs' Case Br. 2–36 (Jan. 27, 2011) (Admin.R.Doc. No. 91). Koehler submitted a rebuttal brief responding to Koehler's comments. Koehler's Rebuttal Br. 4–37 (Feb. 4, 2011) (Admin.R.Doc. No. 96). In the Final Results, issued on April 20, 2011, Commerce continued to adjust normal value for Koehler's reported quarterly and annual rebates but excluded the reported monthly rebates from the normal value calculation and assigned Koehler a 3.77% weighted average antidumping duty margin.[6] *Final Results*, 76 Fed. Reg. at 22,079; Issues & Decision Mem., A-428–840, ARP 10–09, at 21

[4] The antidumping duty order covers "certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of ± 4.0 g/m^2) or less; irrespective of dimensions; with or without a base coat on one or both sides; with thermal active coating(s) on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without a top coat; and without an adhesive backing." *Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 22,078, 22,079 (Apr. 20, 2011) ("*Final Results*") (footnotes omitted).

[5] Initially, Appvion also requested the review of a second producer/exporter, Mitsubishi HiTec Paper Flensburg GmbH, Mitsubishi HiTec Paper Bielefeld GmbH, and Mitsubishi International Corporation (collectively "Mitsubishi"), but Appvion withdrew this request. *Lightweight Thermal Paper From Germany: Notice of Prelim. Results of Antidumping Duty Admin. Review*, 75 Fed. Reg. 77,831, 77,832 (Dec. 14, 2010).

[6] On April 25, 2011, Koehler submitted comments in which it alleged, under 19 C.F.R. § 351.224, that the U.S. Department of Commerce ("Commerce" or the "Department") had made a ministerial error by "disallowing not only those rebates that were applied retroactively for sales made *prior* to written notice of the actual rebate amount, but also by disallowing rebates for sales that were made *subsequent* to written notice to the customer

(Apr. 13, 2011) (Admin.R.Doc. No. 109, *available at* http://enforcement.trade.gov/frn/summary/GERMANY/2011–9574–1.pdf (last visited Mar. 18, 2014) ("*Decision Mem.*").

Plaintiff filed a summons on May 13, 2011 and a complaint on June 3, 2011. Summons 1, ECF No. 1; Compl. 1. With leave of the court, Order (May 20, 2013), ECF No. 82, plaintiff filed an amended complaint on May, 20, 2013,[7] Am. Compl. 1. Plaintiff moved for judgment on the agency record on November 15, 2011, and defendant and defendant-intervenor each filed a brief in opposition on March 6, 2012 and March 7, 2012, respectively. Pls.' 56.2 Mot. 1; Br. in Supp. of Pls.' Mot. for J. on the Agency R. Under Rule 56.2 at 1 (Nov. 16, 2011), ECF No. 27 ("Pls.' 56.2 Mem."); Def.'s Opp'n 1; Def.-intervenor's Opp'n 1. Plaintiff filed its reply to defendant and defendant-intervenor, Pls.' Reply Br., ECF No. 51 (Apr. 23, 2012) ("Pls.' Reply Br."), and requested oral argument, Pls.' Unopposed Mot. for Oral Arg. & Req. for a Closed Hearing, (Apr. 27, 2012), ECF No. 55, which the court held on October 18, 2012, ECF No. 63.[8]

At the oral argument, plaintiff requested leave to file additional briefing related to *Christopher v. SmithKline Beecham Corp.*, 567 U.S. __, 132 S.Ct. 2156 (2012), a decision the U.S. Supreme Court issued after the parties filed all briefs in this action. Oral Tr. 143–47. Plaintiff argued that the decision could have a bearing on the outcome of this action if the court determines that the Department's regulations at issue in this matter are ambiguous. Oral Tr. 144–45. The court, upon the agreement of all parties, permitted supplemental briefing on this limited issue. Order, (Sept. 10, 2013), ECF No. 87. *See also* Def.-Intervenor's Supplemental Br. (Oct. 11, 2013), ECF No. 92 ("Def.-intervenor's Supplemental Br."); Def.'s Supplemental Br. Re-

of the actual rebate amount and *ipso facto*, could not be 'retroactive.'" *Koehler's Letter Alleging Ministerial Error* 1 (Admin.R.Doc. No. 115) (emphasis in original). Commerce denied Koehler's request to correct a ministerial error, clarifying that it intended to exclude the monthly rebates per certain factual findings in the Final Results. *Allegation of Ministerial Errors* 4–5 (May 10, 2011) (Admin.R.Doc. No. 120)

[7] Plaintiff's original complaint included a third claim challenging the Department's use of "zeroing" methodology in the first administrative review. Compl. ¶¶ 26–30 (June 3, 2011), ECF No. 6. On December 10, 2012, the court ordered this action stayed pending the final resolution of all appellate proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248, which raised a challenge similar to plaintiff's zeroing challenge. Order, ECF No. 71. The stay expired when the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals"), which affirmed the Department's use of the zeroing methodology in an administrative review, became final. *See Union Steel v. United States*, 713 F.3d 1101, 1010–11 (Fed. Cir. 2013). Plaintiff, with leave of the court, Order (May 20, 2013), ECF No. 82, deleted the zeroing claim from the amended complaint, Am. Compl. ¶5.

[8] At oral argument, defendant-intervenor withdrew a Motion to Supplement the Administrative Record, which both plaintiff and defendant opposed. In that motion, Appvion sought to place on the record certain information concerning a subsequent administrative review. Oral Tr. 119.

garding Deference Accorded to Commerce's Interpretation of its Own Regulations (Nov. 18, 2013), ECF No. 100 ("Def.'s Supplemental Br."); Pl.'s Response to Supplemental Brs. (Dec. 9, 2013), ECF No. 101 ("Pl.'s Supplemental Br.").

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), 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).[9] When reviewing the final results of an administrative review, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Commerce determines an antidumping duty margin by comparing the normal value of the subject merchandise to the export price (or constructed export price) at which the subject merchandise is sold in the United States. 19 U.S.C. § 1673. When Commerce determines normal value based on the price at which the foreign like product is sold in the home market, Commerce must use as its starting price "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual quantities and in the ordinary course of trade . . . ," *id.* § 1677b(a)(1)(B)(i), and then make certain statutorily-required adjustments, *id.* § 1677b(a)(6), (7). The Department's regulations provide for further adjustments. In pertinent part, the Department's regulation, 19 C.F.R. § 351.401(c), provides as follows:

> *Use of price net of price adjustments*. In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary will use a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable).

19 C.F.R. § 351.401(c). "'Price adjustment' means any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are

[9] 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.

[*sic*] reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38).

At issue in this case are rebates made to Koehler's home market customers according to a "monatsbonus" *i.e.*, monthly rebate, program. Plaintiff claims that Commerce violated 19 C.F.R. § 351.401(c) when it failed to make corresponding downward adjustments in the starting prices Commerce used in determining normal value, *i.e.*, the prices at which Koehler sold the foreign like product in its home market. Pls.' 56.2 Mem. 11–12. According to plaintiff, Commerce acted contrary to the plain meaning of the pertinent regulations, wrongfully applied its concept of what is a "legitimate" rebate, and imposed an unauthorized "test of what the customer does or does not know about the amount of the rebate at the time of the sale." Pls.' Reply Br. 1. For the reasons discussed below, the court finds merit in plaintiff's claim and will order an appropriate remand.

In the Preliminary Results, Commerce stated that "Koehler reports customer-specific rebates which may apply to all products or be product-specific" and reached a finding that "Koehler paid rebates on a periodic basis (either monthly, quarterly, or annually)." *Prelim. Results*, 75 Fed. Reg. at 77,835. Addressing an allegation by the petitioner (Appvion) that "Koehler has applied a pricing scheme using post-sale adjustments" and that "these are not bona fide rebate adjustments where the customer knows the rebate amount at the time of sale," *id.*, Commerce stated that "based on the evidence on the record of this review, we preliminarily find Koehler's rebates to be bona fide, and we will allow the rebates as reported in Koehler's sales databases," *id.* at 77,836.

In the Final Results, Commerce reversed its position with respect to the monthly (but not the quarterly or annual) rebates Koehler reported, concluding that "the record does not demonstrate that the monatsbonus is a legitimate rebate that should be treated as a price adjustment for this review." *Decision Mem.* 15. Commerce based this conclusion on findings that it summarized by stating that certain "2002/03 written rebate documentation" on the record "does not specifically apply to the monatsbonus," that "the monatsbonus is unique because it differs significantly from Koehler's other rebates," and that "Koehler failed to demonstrate that its customer was aware of the terms and conditions of the monatsbonus prior to the sales." *Id.*

At no point during the administrative review did Commerce find that the monthly rebates reported by Koehler were not actually paid to the home market customers. The Issues and Decision Memorandum ("Decision Memorandum") incorporated into the Final Results raises no question as to whether the monthly rebates were "reflected

in the purchaser's net outlay," 19 C.F.R. § 351.102(b)(38), or whether the monthly rebates were "reasonably attributable" to sales of the "foreign like product" within the meaning of 19 C.F.R. § 351.401(c). *See Decision Mem.* 21–22. Commerce expressly found in the Preliminary Results that Koehler made the rebates at issue, and nothing in the Final Results or Decision Memorandum reversed that finding. *Prelim. Results*, 75 Fed. Reg. at 77,835. To the contrary, the Decision Memorandum implied and, in some places, explicitly acknowledged that the home market customers buying the foreign like product received the monthly rebates. *See*, *e.g.*, *Decision Mem.* 17 ("Furthermore, due to the frequency and significance of the changes to the monthly rebates, which are retroactively applied, we find that Koehler has not provided sufficient support for the Department to accept this price adjustment." (footnote omitted)); *id.* at 20 ("The monthly rebate data reported on the record shows that there are significant adjustments to the rebate percentages which were retroactively applied by Koehler without sufficient documentation to support a finding that the customer was aware of such changes when the sales commenced."). The Decision Memorandum discusses the "monatsbonus" issue in the context of rebates that Koehler made to customers buying the foreign like product but that Commerce refused to recognize as price adjustments.

In the situation presented by this case, Commerce lacked the discretion not to recognize a reduction in the purchaser's net outlay for the foreign like product that satisfied the definition of a "price adjustment" in § 351.102(b)(38). 19 C.F.R. § 351.401(c) ("In calculating . . . normal value (where normal value is based on price), the Secretary *will use* a price that is net of *any* price adjustment, as defined in § 351.102(b) . . . ." (emphasis added)). As plaintiff notes, "[t]he term 'will' is of an 'unmistakably mandatory character.'" Pl.'s Supplemental Br. 3 (citing *Hewitt v. Helms*, 459 U.S. 460, 471 (1983)). Giving as examples "discounts, *rebates*, and *post-sale price adjustments*," the regulations set forth a broad definition of price adjustment encompassing "*any* change in the price charged for . . . the foreign like product" that "are reflected in the purchaser's net outlay."[10] 19 C.F.R. § 351.102(b)(38) (emphasis added). Here, § 351.401(c) did not permit Commerce to use a home market price for the foreign like product

[10] The word "are" that appears in 19 C.F.R. § 351.102(b)(38) possibly should read "is" so as to agree with the singular term "change." Alternatively, it might be possible to read "are reflected" to apply only to the examples listed, but this is a strained reading that is at variance with the intended meaning as shown in the regulatory history, which is discussed herein.

that was *not* net of any price adjustment satisfying the § 351.102(b)(38) definition. The Decision Memorandum reaches the opposite conclusion by relying on irrelevant findings and on erroneous reasoning.

Among the Department's irrelevant findings is that "Koehler has not provided sufficient evidence on the record of its monthly rebate program." *Decision Mem.* 19. Similarly, Commerce found that "Koehler has not provided documentation specifically describing the monatsbonus and the terms and conditions of the monatsbonus (as opposed to longer-term rebates), as reported in this review." *Id*. Both of these findings are directed to the wrong question. Under the regulations, the question is not whether the rebates were made according to a "program" that satisfied the various prerequisites Commerce identified in the Decision Memorandum but whether the monthly rebates actually were made, *i.e.*, whether there were downward adjustments in the prices charged for the foreign like product that were reflected in purchasers' net outlays.

Commerce also found that "Koehler has not demonstrated that its customers had prior knowledge of the rebate program." *Id.* Commerce further found that "Koehler has not provided sufficient evidence on the record to demonstrate that the monthly rebate program was in existence before the sales were made" and "has acknowledged that its customer(s) may not be aware of the precise amount of the rebate prior to a particular sale." *Id.* at 20. Here also, these findings are directed to matters other than whether there was "any change in the price charged for . . . the foreign like product" that was "reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38).

In reaching conclusions from its findings, the Department's reasoning is erroneous in several respects. Beginning with the premise that the "standard for determining the legitimacy of a price adjustment is codified in the regulations, outlined in the Department's antidumping duty questionnaire, and reflected in the Department's prior practice," *Decision Mem.* 15, the Decision Memorandum misinterprets the applicable regulations and misconstrues the discussion of these regulations in the preamble that accompanied promulgation ("Preamble"). *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,344 (May 19, 1997) ("*Final Rule*"). But neither the regulations nor the Preamble supports a regulatory interpretation under which Commerce was free to disregard the rebates at issue in this case. The Decision Memorandum then grounds the Department's decision in a passage from the questionnaire and a practice of the Department regarding rebates, both of which are inconsistent with the regulations.

The Decision Memorandum misapplies the regulations in declining to adjust the home market prices for the monthly rebates. As discussed above, Commerce did not conclude from its various findings that the monthly rebates were not "reflected in the purchaser's net outlay" within the meaning of § 351.102(b)(38) or not "reasonably attributable to the . . . foreign like product" within the meaning of § 351.401(c). In addition, as the court has pointed out, the Decision Memorandum is written from the viewpoint that the monthly rebates were in fact paid to home market customers of the foreign like product. In the circumstances presented by the Department's own findings, the regulations do not merely "allow," but require, Commerce to treat these rebates as post-sale price adjustments. Although § 351.401(b) provides that "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment," Commerce was not empowered by this general provision, which applies to all adjustments (including expenses), not merely price adjustments, to ignore the specific standard established by § 351.401(c) according to which the Secretary must recognize a "price adjustment" as defined in § 351.102(b)(38).

The Decision Memorandum also mistakenly relies on the Preamble to support the Department's decision. When read in context, the pertinent discussion in the Preamble reveals that the Department's intent in promulgating the final rule was that reductions in the price of the foreign like product, such as those at issue in this case, must be reflected in the starting price used to determine normal value.

The Preamble explained that the new § 351.401(c), in the form published in the proposed rule, "restated the Department's practice with respect to price adjustments, such as discounts and rebates."[11] *Final Rule*, 62 Fed. Reg. at 27,344. In proposing the new section, Commerce described "the Department's practice" as follows: "Under paragraph (c), the Department will continue its practice of adjusting reported gross prices for discounts, rebates and certain post-sale adjustments to price that affect the net price." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg 7,308, 7,329 (Feb. 27, 1996) (notice of proposed rulemaking).

[11] The proposed § 401(c) read as follows: "(c) *Discounts, rebates and other price adjustments.* In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary will rely upon a price net of any discounts, rebates, or post-sale adjustments to price that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg 7,308, 7,381 (Feb. 27, 1996) (notice of proposed rulemaking)

The Preamble further explained that Commerce took "several steps aimed at alleviating" confusion concerning the proposed § 351.401(c) and price adjustments generally that Commerce believed was reflected in the comments to the proposed rule. *Final Rule*, 62 Fed. Reg. at 27,344. The Preamble explained that the Department included in the promulgated § 351.102 a new definition of the term "price adjustment." *Id.* Concerning the term "price adjustment" and the definition inserted in § 351.102(b), the Preamble adds that "[t]his term is intended to describe a category of changes to a price, such as discounts, rebates and post-sale price adjustments, that affect the net outlay of funds by the purchaser" and that "such price changes are not 'expenses' as the Department usually uses that term, but rather are changes that the Department *must take into account in identifying the actual starting price*." *Id.* at 27,300 (emphasis added). The Preamble also noted that "price adjustments are neither direct nor indirect expenses, although they impact price as additions or deductions." *Id.*

The Preamble elaborated that "we have made a clarification in [§ 401(c)] itself," adding that the paragraph "now provides that in calculating export price, constructed export price, or a price-based normal value, the Secretary will use a price that is net of any price adjustment that is reasonably attributable to the subject merchandise or the foreign like product." *Id.* at 27,344. The Preamble went on to state that "[t]his use of a net price is consistent with the view that discounts, rebates and similar price adjustments are not expenses, but instead are items taken into account to derive the price paid by the purchaser." *Id.* This Preamble discussion, like the regulation itself, makes clear that Commerce intended to apply a uniform definition of "price adjustment" when determining a starting price, regardless of whether it is the starting price for determining normal value or for determining export price or constructed export price. *Id.*

The Decision Memorandum misconstrues the language and the intent of the Preamble in concluding that "[w]hile the Department's regulations *allow* for post-sale price adjustments that are reasonably attributable to the subject merchandise, the Preamble to the regulations indicates that exporters or producers should not be allowed 'to eliminate dumping margins by providing price adjustments 'after the fact.'" *Decision Mem.* 15 (emphasis added) (citing *Final Rule*, 62 Fed. Reg. at 27,344). The passage in the Preamble from which the Decision Memorandum drew this conclusion reads as follows:

> One commenter suggested that, at least for purposes of normal value, the regulations should clarify that the only rebates Commerce will consider are ones that were contemplated at the

> time of sale. This commenter argued that foreign producers should not be allowed to eliminate dumping margins by providing "rebates" only after the existence of margins becomes apparent.
>
> The Department has not adopted this suggestion at this time. We do not disagree with the proposition that exporters or producers will not be allowed to eliminate dumping margins by providing price adjustments "after the fact." However, as discussed above, the Department's treatment of price adjustments in general has been the subject of considerable confusion. In resolving this confusion, we intend to proceed cautiously and incrementally. The regulatory revisions contained in these final rules constitute a first step at clarifying our treatment of price adjustments. We will consider adding other regulatory refinements at a later date.

Final Rule, 62 Fed. Reg. at 27,344. Commerce has not amended the text of § 351.401(c) or § 351.102(b)(38) since promulgating the final rule in 1997.[12] When read in the entirety and in conjunction with the plain language of the regulations, the Preamble refutes rather than supports the reasoning by which Commerce decided to disregard Koehler's monthly rebates.[13]

Regarding the questionnaire, the Decision Memorandum mentions that "[a]s stated in the Department's initial questionnaire issued to Koehler, '{w}hen the seller establishes the terms and conditions under which the rebate will be granted at or before the time of sale, the Department reduces the gross selling price by the amount of the rebate. (Section 351.102(b) of the regulations)." *Decision Mem.* 15–16 (footnote omitted). The provision the questionnaire cited, 19 C.F.R. § 351.102(b), sets forth in paragraph (38) a definition of "price adjustment" that does not require the seller's having established the rebate terms and conditions at or before the time of sale, and the Preamble clarifies that Commerce, in promulgating the regulations, rejected

[12] A subsequent, non-substantive amendment assigned the regulatory definition of "price adjustment" its current designation, 19 C.F.R. § 102(b)(38). *Antidumping & Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures*, 73 Fed. Reg. 3,640, 3,642 (Jan. 22, 2008).

[13] The court finds no conflict between the regulations, 19 C.F.R. § 351.102(b)(38) and § 351.401(c), and the preamble accompanying promulgation, when properly construed. Were there a conflict, the regulation normally would prevail. Where plain language of a regulation unambiguously resolves a question, resort to regulatory history ordinarily should not be made to support a contrary understanding. *See Roberto v. Dep't of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) ("Because the plain meaning of the regulation is clear, no further inquiry is required into agency interpretations or the regulatory history to determine its meaning.").

the position taken in the questionnaire. In attempting to impose the very requirement Commerce rejected in promulgating the regulations, the questionnaire misapplies § 351.102(b)(38) and its related provision, § 351.401(c).

As to "prior practice," the Decision Memorandum states that "the Department's practice has been to disallow rebates where the respondent cannot demonstrate that the customer was aware of the terms and conditions of the rebate at or before the time of sale." *Decision Mem.* 20 (footnote omitted). The Decision Memorandum explains that respondents are required "'to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of the sale'" in order "'to protect against manipulation of the dumping margins . . . .'" *Id.* at 18 (citing *Certain Corrosion-Resistant Carbon Steel Flat Products & Certain Cut-to-Length Steel Plate from Canada*, 61 Fed. Reg. 13,815, 13,823 (Mar. 28, 1996)). Applying its described practice, the Decision Memorandum places on Koehler the burden of showing entitlement to a price adjustment "by demonstrating that (1) its customers were aware of the terms and conditions of the monatsbonus at the time of sale, and (2) the monatsbonus was established in the ordinary course of business solely for 'legitimate commercial purposes.'" *Id.* at 20. The practice variously described in the Decision Memorandum imposes requirements unsustainable under the governing regulations, 19 C.F.R. § 351.401(c) and § 351.102(b)(38).

Before the court, defendant and defendant-intervenor make a number of arguments in support of the Department's exclusion of the monthly rebates, most of which parallel the erroneous reasoning of the Decision Memorandum. While acknowledging that Commerce rejected a request that the regulations allow only rebates contemplated at the time of sale, defendant argues that "Commerce's practice was, and still is, to require that a company's customers had knowledge of the terms and conditions of a claimed rebate at or before the time of sale." Def.'s Opp'n 16. Defendant submits that this practice "long pre-exists the regulation," Oral. Tr. 34, and that the continuation of this practice before and after Commerce promulgated this regulation "indicates that when Commerce was promulgating this reg[ulation] it understood the reg[ulation] to incorporate its practice." Oral Tr. 53. According to defendant, Commerce "essentially promulgated this regulation in order to restate the Department's practice" and to maintain the status quo. Oral. Tr. 34. Defendant's conception of the history of the regulatory provisions in question is contradicted by the discussion in the Preamble, which described as "new" the definition of the term "price adjustment" that was added in

the final rule. *Final Rule*, 62 Fed. Reg. at 27,346. Certain discussion in the Preamble refers to an intent to restate a practice, but the reference is to the proposed § 401(c), not the final version promulgated, and the practice discussed therein is not as characterized by defendant's argument. *See id.* at 27,344. Nowhere in the Preamble does Commerce express the intent to codify a practice such as defendant describes.

In an attempt to bolster its argument, defendant cites two decisions of this Court, *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 890 F. Supp. 1106 (1995) and *Koenig & Bauer-Albert AG v. United States*, 22 CIT 574, 15 F. Supp. 2d. 834 (1998), *aff'd in part*, *vacated on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001). Def.'s Opp'n 11–12. Both of these cases arose from administrative determinations made prior to the June 18, 1997 effective date of the final rule that instituted § 351.401(c) and § 351.102(b)(38). *Final Rule*, 62 Fed. Reg. at 27,296.

Defendant-intervenor argues that according to the definition in 19 C.F.R. § 351.102(b)(38), which provides that a price adjustment must constitute a change in the price "charged for" the foreign like product, a retrospective rebate cannot be considered a qualified price adjustment because it does not reflect the actual price charged. Def.-intervenor's Supplemental Br. 7–8.[14] This argument misreads the plain language of § 351.102(b)(38), which explicitly provides that "post-sale price adjustments" fall within the definition so long as they "are reflected in the purchaser's net outlay," 19 C.F.R. § 351.102(b)(38), and cannot be reconciled with the regulatory history set forth in the Preamble.

Finally, defendant and defendant-intervenor make various arguments under which they advocate that the court, under Supreme

[14] Defendant-intervenor also advances arguments that Koehler failed to exhaust its administrative remedies in pursuing its claim concerning rebates. Defendant-intervenor submits that Koehler did not include in its rebuttal brief the specific argument that the Department's regulation requires all price adjustments to normal value, including post-sale rebates, "no matter how spurious." Resp. in Opp'n to Pls.' Rule 56.2 Mot. for J. on the Agency R. 6 (Mar. 7, 2012), ECF No. 42. *See also* Oral Tr. 57–60. According to defendant-intervenor, this failure deprived Commerce of a "full and fair opportunity to articulate a construction of the regulation and make whatever factual findings are necessary to address Koehler's arguments as reframed on appeal." Def.-intervenor's Supplemental Br. 10–11. The court rejects this argument because Koehler, during the administrative review, opposed the position taken by defendant-intervenor on the rebates at issue in this case and specifically discussed the effect of the regulations. Koehler's Rebuttal Br. 28–31 (Feb. 4, 2011) (Admin.R.Doc. No. 96). During the review, Koehler could not have opposed the Department's construction of the regulations, which did not appear until the Department issued the Final Results. Moreover, even were the court to have found a failure to exhaust, that failure might have been excused because the issue presented involves construction of the regulations, a pure question of law. *See Agro Dutch Indus. Ltd. v. United States,* 508 F.3d 1024, 1029 (Fed. Cir. 2007).

Court precedent, including *Auer v. Robbins*, 519 U.S. 452 (1997), must give deference to the Department's construction of the applicable regulations and therefore must affirm the decision not to recognize the price adjustments at issue in this litigation. Def.'s Suppl. Br. 5–6; Def.-Intervenor's Suppl. Br. 3–4. Defendant argues that the regulations do not define the term "rebate" and that Commerce therefore is entitled to fill this gap. Def.'s Suppl. Br. 5–6. Defendant-intervenor characterizes the applicable regulations as ambiguous. Def.-Intervenor's Suppl. Br. 3–4. These arguments fail because the regulatory interpretation adopted in the Decision Memorandum is unreasonable. For the reasons the court has discussed, this interpretation is contrary to both the plain meaning and the Department's intent as revealed in the regulatory history. The court is unable to agree that that the regulatory provisions in question are "ambiguous" in the sense contemplated by defendant-intervenor's argument. Defendant's "gap" argument fails because the regulatory definition of the term "price adjustment," not the absence of a definition of the term "rebate," is controlling in this case. The regulatory provisions unambiguously require that rebates and other post-sale downward adjustments in the price charged for the foreign like product that are reflected in the purchaser's net outlay be reflected in the starting price Commerce uses for determining normal value.

In summary, the court must remand the Final Results because they misapply the Department's regulations codified as 19 C.F.R. § 351.102(b)(38) and § 351.401(c). Therefore, the only issue remaining to be decided arises from plaintiff's claim that Commerce violated section 782(g) of the Tariff Act, 19 U.S.C. § 1677m(g), by denying Koehler the opportunity to comment on certain correspondence between the Secretary of Commerce and certain members of Congress concerning the first administrative review. Pls.' 56.2 Mem. 5–6; *see Memo to the File re: Correspondence from U.S. Congressmen* (Admin. R.Doc. No. 107) (Apr. 13, 2011) ("*Congressional Correspondence Memo*"). The correspondence involved in this issue is a March 30, 2011 letter to then-Commerce Secretary Gary Locke co-signed by five members of Congress ("Joint Congressional Letter") and Secretary Locke's individual responses to the letter.[15]

[15] On April 8, 2011, Secretary Locke sent each member a reply letter stating that the Department was considering whether to make adjustments for "certain reported rebates" in the Department's final determination. Letter to Rep. Michael Turner from Gary Locke (Admin.R.Doc. No. 102); Letter to Rep. Reid Ribble from Gary Locke (Admin.R.Doc. No. 103); Letter to Senator Rob Portman from Gary Locke (Admin.R.Doc. No. 104); Letter to Senator Sherrod Brown from Gary Locke (Admin.R.Doc. No. 105); Letter to Senator Herb Kohl from Gary Locke (Admin.R.Doc. No. 106).

The Joint Congressional Letter referred to the Department's preliminary determination to "reduce the dumping margin to zero" and requested "a better understanding of the Department's rationale for this determination." *Congressional Correspondence Memo* 2. The letter elaborated that "[g]iven the importance of the Department's final determination to jobs in the U.S. paper industry, we would specifically appreciate additional information from you regarding how after-the-fact rebates in the German home market are being factored into your analysis and the basis for including home market rebates issued retroactively in your calculations, including any similar precedents." *Id.* The letter also noted that Appvion had made major investment upgrades during 2008 and that the company's Ohio plant had created new jobs. *Id.*

Commerce first notified the parties to the review of the congressional correspondence on April 13, 2010, the date on which the review was completed and the Decision Memorandum was signed and dated. Pls.' 56.2 Mem. 5; *Congressional Correspondence Memo* 1. Plaintiff asks that the court "remand with instructions to reopen the record and provide Koehler an opportunity to comment on the March 30, 2011 letter." Pls.' 56.2 Mem. 34. Plaintiff argues that the shift from a *de minimis* margin in the Preliminary Results to a positive antidumping margin in the *Final Results* and the intervening congressional correspondence together give "at least 'the appearance of 'unlawful political suasion'" that entitles Koehler to an opportunity to comment. Pls.' 56.2 Mem. 34 (citing *Saha Thai Steel Pipe Co., Ltd.* v. *United States,* 11 CIT 257, 261, 661 F. Supp. 1198, 1202 (1987)). Plaintiff also asks the court to take judicial notice of two congressional press releases issued after the Final Results.[16]

In pertinent part, section 782(g) of the Tariff Act provides as follows:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination under section 1671d, 1673d, 1675, or 1675b

[16] Senator Portman and Representative Turner each issued a press release announcing the outcome in the final results of the first review and noting their joint correspondence with the Secretary of Commerce. Senator Portman's April 22, 2011 press release mentioned that Commerce "'reversed [a] preliminary ruling that did not protect Ohio jobs in the paper industry . . . .'" Am. Compl. ¶18. Representative Turner's April 25, 2011 press release stated that Commerce had "reversed a preliminary ruling in order to protect Ohio jobs in the paper industry . . . ." Am. Compl. ¶19.

> of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment.

19 U.S.C. § 1677m(g). Defendant argues that Koehler was not entitled to comment on the Joint Congressional Letter under this provision because "the letter did not contain information relevant to Commerce's dumping methodology or dumping calculations, meaning that it contained nothing warranting further comment." Def.'s Opp'n 31. Defendant-intervenor makes the same argument. Def.-intervenor's Opp'n 27. Nonetheless, citing 19 U.S.C. § 1516a(b)(2)(A)(i), defendant explains that the Joint Congressional Letter constitutes information presented to the Secretary during the course of the administrative proceeding and that, therefore, Commerce properly placed the letter on the record. Def.'s Opp'n 32. Defendant further explains that "[a]lthough Commerce ideally would have placed the letter upon the record earlier than April 13, a delay of approximately two weeks is not unreasonable considering the letter's timing near the completion of the review and the fact that it was sent directly to the Secretary." *Id.* Defendant adds that "Commerce made its decision because the evidence and law supported that decision, not because of any congressional statements." *Id.* at 33–34.

The court need not decide whether the Joint Congressional Letter constituted "information" requiring an opportunity for comment within the meaning of 19 U.S.C. § 1677m(g). The court must order a remand because the decision not to recognize as "price adjustments" the payments made to home market customers on a monthly basis was contrary to the Department's regulations, which are controlling on the issue presented and are binding on the court as well as the Department. Because Commerce must take corrective action in the determination it reaches upon remand, plaintiff is receiving an appropriate remedy, and therefore, directing Commerce to reopen the record to allow plaintiff to comment on the Joint Congressional Letter would serve no purpose. Koehler also raises the question of whether the circumstances surrounding the Joint Congressional Letter give the appearance of "unlawful political suasion" but presses this point only to support its argument that § 1677m(g) requires the court to order Commerce to reopen the record so that Koehler may comment on the Joint Congressional Letter. The court holds that the Final Results were contrary to law because the challenged decision was in violation of the Department's regulations, not for any reason related

to the congressional correspondence. Accordingly, the court declines to include in its remand order a directive to reopen the record of the first administrative review.

III. CONCLUSION AND ORDER

The court concludes that the Department's decision not to make downward price adjustments corresponding to the rebates that Papierfabrik August Koehler AG ("Koehler") paid on a monthly basis to customers that purchased the foreign like product in Germany was contrary to law because it did not comply with applicable regulations. Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the final determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in *Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Admin. Review*, 76 Fed. Reg. 22,078 (Apr. 20, 2011) be, and hereby is, set aside as unlawful and remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall file, within ninety (90) days of the date of this Opinion and Order, a new determination upon remand ("remand redetermination") that conforms to this Opinion and Order and redetermines Koehler's margin as necessary; it is further

ORDERED that plaintiff and defendant-intervenor each may file comments on the remand redetermination within thirty (30) days from the date on which the remand redetermination is filed; and it is further

ORDERED that defendant may file a response to the aforementioned comments within fifteen (15) days from the date on which the last comment is filed.

Dated: March 25, 2014
New York, New York

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

Slip Op. 14–32

MERIDIAN PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00018

[Remanding first results of remand of anti-dumping and countervailing duty orders on aluminum extrusions from the People's Republic of China.]

Dated: March 26, 2014

Daniel Cannistra and *Richard P. Massony*, Attorneys, Crowell & Moring LLP, of Washington DC, for the plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. 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 *Joanna Theiss*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington DC.

OPINION AND ORDER

Musgrave, Senior Judge:

The plaintiff Meridian Products LLC, a U.S. importer of refrigerator/freezer trim kits ("Trim Kits"), challenges the *Final Results of the Redetermination Pursuant to Court Remand, Meridian Products, LLC v. United States*, Ct. No. 13–00018 (Aug. 15, 2013) of the International Trade Administration of the U.S. Department of Commerce ("Commerce"). *See Meridian Products, LLC v. United States*, Court No. 13–00018, Slip Op. 13–75 (2013) ("Opinion"). In the Opinion, the court ordered Commerce to reconsider the Trim Kits under the finished goods scope exclusion of the anti-dumping and countervailing duty orders ("Orders") on aluminum extrusions from the People's Republic of China,[1] as applied in the *Valves Ruling, Auto Parts Remand* and *Drapery Rail Kits Remand*.[2]

The plaintiff now moves for a second remand of this action, claiming that Commerce failed to apply the "revised test for finished goods" to the Trim Kits and that Commerce's remand analysis of the Trim Kits was unlawful. Plaintiff's Comments in Response to Redetermination upon Remand ("Pl's Comm. in Resp.") at 1, 10–11. Commerce asks the court to affirm the results of the remand, arguing that it complied with the court's orders in the Opinion and that its remand determination is both supported by substantial evidence and otherwise in accordance with law. Defendant's Response to Comments Regarding the Remand Redetermination ("Def's Reply to Comm.") at 2, 14.

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[1] *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30650 (May 26, 2011) ("AD Order") & *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30653 (May 26, 2011) ("CVD Order") (collectively, "the Orders").

[2] Opinion at 4, referencing Memorandum to Christian Marsh, "Initiation and Preliminary Scope Ruling on Side Mount Valve Controls" (Sep. 24, 2012), *aff'd*, Final Scope Ruling on Side Mount Valve Controls (Oct. 26, 2012) ("*Valves Ruling*"); *Final Results of Redetermination Pursuant to Court Remand*, *Rowley Co. v. United States*, Ct. No. 12–00055 (Feb. 28, 2013) ("*Drapery Rail Kits Remand*"); *Final Results of Redetermination Pursuant to Court Remand Aluminum Extrusions from the People's Republic of China*, *Valeo, Inc.*, *Valeo Engine Cooling Inc., and Valeo Control Corp. v. United States*, Ct. No. 12–00381 (Feb. 13, 2013) ("*Auto Parts Remand*").

Upon review of the remand results, the court finds that although Commerce reasonably defined the "finished goods kit" exclusion methodology, as applied in the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling*[3], its conclusion that the Trim Kits do not qualify as goods intended to "display customizable materials" or "work with removable/replaceable parts" and do not merit application of the methodology from the rulings is not supported by substantial evidence. The court remands to Commerce to evaluate the Trim Kits under the revised finished goods exclusion methodology announced in the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling*.

I. *Background*

A. Scope Ruling on Trim Kits

Commerce published the Orders that covered "[a]luminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys . . .". The Orders contain an exclusion for otherwise subject merchandise that is considered "finished merchandise" or a "finished goods kit." That exclusion is as follows:

> The scope also excludes certain *finished merchandise* containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "*finished goods kit*." A *finished goods kit* is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further processing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product.

76 Fed. Reg. at 30651 and 30654 (italics added).

The scope language also clarifies that an imported product

> [w]ill not be considered a "*finished goods kit*" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product.

[3] Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Final Scope Ruling on Clenergy (Xiamen) Technology's Solar Panel Mounting Systems" (Oct. 31, 2012) ("*Solar Panel Mounting Ruling*").

Id. (italics added). The plaintiff requested a scope ruling[4] on its Trim Kits, which it describes as

> consist[ing] of three different styles of complete aluminum trim kit packages which are utilized as an aesthetic frame around the perimeter of (though not attached to) a major home kitchen appliance. Trim kits enhance the appearance of the cabinetry surrounding the appliance in the consumer's home and lends a customized, "built-in" look. The major appliance units for which the trim packages apply are stand alone freezers, stand alone refrigerators and freezer plus refrigerators.
>
> Trim kits are sold as a package of finished parts which when assembled will make up a customized frame to fit around a single freezer unit or a single refrigerator unit. Each trim kit consists of extruded aluminum forms, made from aluminum alloy having elements corresponding to the alloy series designation published by the Aluminum Association commencing with the number 6. Trim kits include a customer installation kit, consisting of a hexagonal wrench and fasteners used by the user during assembly. A set of instructions written in English, Spanish, and French is also included in the installation kit.

See Complaint at ¶¶ 20–21.[5]

In the *Scope Ruling Request*, the plaintiff argued that Commerce should find that its Trim Kits were excluded from the scope of the Orders as "finished goods kits." *Id.* ¶ 22, referencing *Scope Ruling Request*.

In its final scope determination, Commerce rejected the plaintiff's arguments and found that the Trim Kits were unambiguously included in the scope of the Orders as subject aluminum extrusions identified by reference to their end use.[6] Commerce concluded that

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[4] *See* Letter from Daniel Cannistra, Crowell & Moring LLP, to the Secretary of Commerce, Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Request for Scope Ruling for Refrigerator/Freezer Trim Kits (Nov. 13, 2012) ("*Scope Ruling Request*").

[5] *See also* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Melissa G. Skinner, Director, Office 8, Operations, from Eric B. Greynolds, Program Manager, and John Conniff, Senior Trade Analyst, "Final Scope Ruling on Refrigerator, Freezer Trim Kits" (Dec. 18, 2102) ("*Scope Ruling*") at 2. Meridian emphasizes that the products at issue enter the United States under the Harmonized Tariff Schedule of the United States, subheading 8418.99.8060, which provides for other parts for refrigerators, freezers and other refrigerating or freezing equipment.

[6] *Scope Ruling* at 3, 9–11, *see* Orders, which provide that "[s]ubject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door

the Trim Kits are like the geodesic dome frame kits in a previous ruling[7] and met the initial requirements for the finished good kits exclusion, but it also found that the Trim Kits consisted entirely of aluminum extrusions, fasteners, and extraneous materials and accordingly did not qualify for the exclusion.[8]

B. Remand Request and Results

The plaintiff challenged Commerce's Scope Ruling before this court, and moved for immediate remand pursuant to USCIT Rule 7, arguing that

> Commerce has admittedly changed the way it determines whether a product qualifies for the finished goods exclusion. This change is explicitly stated in Commerce's final scope ruling on side mount valve controls . . . , and it is also apparent in Commerce's redetermination regarding drapery rail kits.

Plaintiff's Motion for Remand (Mar. 12, 2013) ("Pl's Mot. for Remand") at 1, referencing *Valves Ruling, Drapery Rail Kits Remand*. *See* Opinion at 2–3. Commerce opposed the motion as premature, lacking ground for deviation from USCIT Rule 56.2 procedure, and substantively failing the plaintiff's obligation to exhaust administrative remedy. At the time, however, since the issue simply seemed to involve proper, legal administrative interpretation of the scope issue and no third-party interests,[9] and USCIT Rule 1 requires the "just, speedy, and inexpensive determination of every action and proceeding", the court granted the plaintiff's motion and ordered Commerce on remand to "reopen the record and permit the plaintiff to submit arguments . . . as to why the trim kits satisfy the finished goods exclusion under the *Valves Ruling* and the remands in the *Drapery Rail Kits* and *Auto Parts* cases".[10]

On remand, Commerce determined that the "revised" finished goods exclusion analysis from the three referenced rulings was not

thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation".

[7] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Final Scope Ruling on J.A. Hancock, Inc.'s Geodesic Structures" (July 17, 2012) ("*Geodesic Domes Scope Ruling*").

[8] *Scope Ruling* at 5, citing *Geodesic Domes Scope Ruling* at 7. *See also id.* at 11, citing the scope of the Orders.

[9] *Cf. Meridian Products LLC v. United States*, Slip Op. 14–20 (Feb. 19, 2014) (denying USCIT 7 motion for remand in order to consider the applicability *of Mid Continent Nail Corp. v. United States*, 725 F.3d 1295 (Fed. Cir. 2013)).

[10] Opinion at 4, *see Valves Ruling*, *Drapery Rail Kits Remand*, and *Auto Parts Remand*.

applicable to the Trim Kits because they are not analogous to the goods considered in those rulings.[11] Commerce continued to find that the Trim Kits are included in the scope of the Orders as subject aluminum extrusions identified by reference to their end use, and that they did not qualify under the finished goods exclusion.[12]

The plaintiff requests further remand, arguing that Commerce did not apply the revised test in the rulings as ordered but instead created new limitations for the "finished goods exclusion."[13] The plaintiff contends that even if these limitations exist, the Trim Kits are analogous to the products covered under the limitations.[14] The plaintiff also argues on several grounds that the remand was unlawful.[15] Commerce filed its reply to the plaintiff's comments and argues that the remand results should be confirmed in all respects. Commerce argues that it fully complied with the courts instructions in the Opinion, and that its determinations are otherwise in accordance with law and supported by substantial evidence. Def's Reply to Comm. at 2, 14.

II. *Jurisdiction and Standard of Review*

Jurisdiction is proper pursuant to 28 U.S.C. § 1581(c) (2006). The court sustains Commerce's determination upon remand if it "complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, 33 CIT 934, 637 F. Supp. 2d 1183, 1185 (2009), citing 19 U.S.C. §1516a(b)(1)(B)(i) (2000). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), *see also Micron Tech., Inc v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). To support judicial review, "the path of Commerce's decision must be reasonably discernable". *Jinan Yipin Corp., Ltd. v. United States*, 35 CIT ___, 800 F. Supp. 2d 1226, 1233 (2011), quoting *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009), citing

[11] Remand at 11–16, 23, Def's Reply to Comm. at 5–6.

[12] *See* Remand at 10–23. Commerce determined the Trim Kits are analogous to carpet trim, an item explicitly covered by the language of the Orders.

[13] *See* Remand at 7–9, Pl's Comm. in Resp. at 1, 4–6, 10–11.

[14] *Aluminum Extrusions for the People's Republic of China: Comment Following Remand Regarding Refrigerator/Freezer Trim Kits* (July 1, 2013) ("Pl's Remand Submission") at 4, Remand at 9, 15, Pl's Comm. in Resp. at 5.

[15] Pl's Comm. in Resp. at 1–2,7–11. Plaintiff contends the remand was unlawful because Commerce erroneously conducted its analysis as though Trim Kits were made entirely of aluminum extrusions, based its decision on the drafter's intent which is a factor outside of the permissible regulatory interpretive considerations, and conducted its evaluation in a manner that is in conflict with its own general principle of interpretation.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (explaining that "it is well settled that an agency must explain its action with sufficient clarity to permit 'effective judicial review,'" and that "[f]ailure to provide the necessary clarity requires the agency action be vacated"), quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973).

III. *Discussion*

A. Agency-defined Methodology

On remand, the definition of revised finished goods exclusion methodology from the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling* expressed by Commerce was reasonable and supported by the language of the rulings. The plaintiff's contention that Commerce created an unsupported limitation for the finished goods exclusion and effectively applied the wrong finished goods test on remand fails to recognize the entirety of the language of the ruling, as well as the rationale expressed for the revision to the exclusion. [16]

As reflected in the language of the Orders and discussed in the *Solar Panel Mounting Ruling*, Commerce generally requires a product to meet two criteria to be excluded as a "finished goods kit." To qualify, the product must (1) include all of the necessary parts to fully assemble a final finished good with no further processing or fabrication, such as cutting or punching, and (2) be capable of assembly "as is" into a finished product. *See Solar Panel Mounting Ruling* at 9, *see also* scope of Orders. The plaintiff argues that the proper revised test for a "finished goods kit," as applied in the *Drapery Rail Kits Remand*, is "[i]n order for [the product] to be excluded from the scope of the Orders, it must be ready for installation and require no further finishing or fabrication".[17]Citing to the *Solar Panel Mounting Ruling*, the plaintiff claims that Commerce also evaluates if a kit contains all the necessary parts to fully assemble a finished good "as is" into a finished product when applying the test.[18] The plaintiff contends that on remand, instead of identifying the new test or providing an analysis of the test criteria, Commerce created a limitation for the application of the criteria to products intended to "display or incorporate interchangeable and customizable materials" or "work with

[16] Pl's Comm. in Resp. at 1–5, Def's Reply to Comm. at 6–9.

[17] The plaintiff claims this test is also supported by the methodology adopted in the *Valves Ruling* and applied in the *Auto Parts Remand*. Pl's Comm. in Resp. at 1–6, *see* Remand at 7–8, citing Pl's Remand Submission at 2–3, citing *Valves Ruling* at 7–8.

[18] Remand at 8–9, referencing Pl's Remand Submission at 3, citing *Solar Panel Mounting Ruling* at 8.

removable/replaceable components." The plaintiff argues that such a limitation is not supported by the scope language or prior scope rulings, and that Commerce provides no evidence to support considering a product's ability to display customizable materials as having any bearing on whether it is a finished good.[19] Thus, the plaintiff maintains, such a limitation erroneously "foreclose[s] [Commerce's] application of the finished goods analysis to Meridian's products".[20]

Commerce's conclusions in its antidumping and countervailing duty determinations are entitled to deference if reasonable and supported by substantial evidence. *See Mitsubishi Materials Corp. v. United States*, 17 CIT 301, 303–04, 820 F.Supp. 608, 613 (1993) (citations omitted). On remand, Commerce determined that the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling* established that,

> a finished goods kit which is designed to *display* ***or*** *incorporate customizable materials* ***or*** *work with removable/replaceable components* will be excluded if it contains, at the time of importation, all of the parts necessary to assemble a final finished good for such purposes.

Remand at 14 (bolding added; original emphasis otherwise). It can reasonably be inferred from the remand language that Commerce intends for three types of goods to be considered full-assembly final-finished goods even if they are imported without a part of the kit, provided they contain at the time of importation all of the parts necessary to assemble a final finished good "for such purposes." The *Drapery Rails Remand* and *Solar Panel Mounting Ruling* provide support for Commerce's determination to limit the application of the revised methodology to these types of goods.

The *Drapery Rails Remand* supports Commerce's determination by demonstrating that two types of goods qualify as a "finished goods kit" capable of creating a fully assembled finished good even when imported without a customizable part of the kit; (1) those products that are "designed to *incorporate* customizable goods" and (2) those products that are "designed to *display* customizable goods" (italics added). At issue in the ruling were "drapery rail kits" consisting of an aluminum rail, threaded round bracket, and a decorative bracket and finials to be used for functional and aesthetic drapery purposes. Commerce analyzed if the kits, designed with the intent of attaching or incorporating curtains or drapes and containing all of the pieces required for a consumer to install and use the product for drapery

[19] *See* Remand at 8–9, Pl's Comm. in Resp. at 4–6.

[20] Pl's Comm. in Resp. at 1.

purposes, were properly excludable from the Orders as a "finished goods kit."[21] In making its determination, Commerce considered the *Banner Stands*[22] and *EZ Wall Systems Rulings* [23] that involved wall display units designed to exhibit interchangeable and customizable graphical materials. It found that the drapery rail kits were analogous to the display units in the rulings and the picture-frame-with-backing-and-glass express exclusion, and that like these products the drapery rail kits "contain all of the parts necessary to assemble a drapery rail system, save for the decorative drapes or curtains that may be affixed at a later date, and are designed to meet the specifications of the end customer."[24] Relying on a rationale similar to the one it expressed in the two display-unit rulings, Commerce concluded that it would be "unreasonable to require that the drapery rail kits at issue be accompanied at the time of importation with decorative drapes that are intended to be customizable" to qualify for the "finished goods kit" exclusion.[25]

The *Solar Panel Mounting Ruling* cited on remand further supports Commerce's interpretation of the revision to the finished goods exclusion methodology. In the ruling, Commerce permitted a third type of good to be excluded from the scope of the Orders: one that "work[s] with removable or replaceable components", to qualify as a final finished good fully assembled "as is" even if it is imported without the "non-essential" component intended to be removable or replaceable.[26] Commerce determined that a kit that enables solar panels to be mounted on roofs or grounds to "create" useful solar panel systems, and which is generally compatible with solar panels available in the

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[21] *Drapery Rail Kits Remand* at 4, 5, 8, *see* Remand at 12.

[22] Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Final Scope Ruling on Banner Stands and Back Wall Kits" (Oct. 19, 2011) ("*Banner Stands Ruling*") at 9–10.

[23] Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Final Scope Ruling on EZ Fabric Wall Systems" (Nov. 2011) ("*EZ Wall Systems Ruling*") at 9–10.

[24] *Drapery Rail Kits Remand* at 7–9, citing the scope of the Orders ("just as with a photograph inserted into a completed picture frame (i.e., a frame containing glass and backing) or material containing a graphical image that is affixed to a display unit, . . . the drapes that are attached to the assembled drapery railing kits at issue constitute readily interchangeable materials that can change with users' needs.") (citation omitted).

[25] *Id.* at 8–9. *See Banner Stands Ruling* at 10 ("it is evident that the banner stands and back wall kits at issue are designed to incorporate interchangeable graphic materials that can change with users' needs. Therefore, we find it would be unreasonable to require that the products at issue must be accompanied with affixed graphical material that cannot be removed or altered at a later date."); *see also EZ Wall Systems Ruling* at 10 ("[a]s in the Banner Stands Scope Ruling, we find it would be unreasonable to that the fabric covers with graphics accompany the EZ wall systems").

[26] *See* Remand at 12–14; *see also Solar Panel Mounting Ruling* at 9.

market, qualified as a "finished good kit."[27] In so determining, Commerce restated the "two" criteria from the scope to be evaluated to determine if a product qualifies as a "finished goods kit": (1) if all of the necessary parts to fully assemble a finished good with no further fabrication were included, and (2) if the product can be assembled "as is" into a finished product.[28]

Commerce found that the solar mounting system kits contained all of the parts necessary to fully assemble a finished product without further fabrication. It then concluded that although the solar panel mounting kit was imported without the solar panel, the kit could be fully assembled "as is" as required by the second criteria because, "like picture frames, banner stands and back wall kits", the mounting systems are "designed to work with removable/replaceable components" and the kits "need not include these non-essential parts to constitute a finished good."[29]

Contrary to the plaintiff's arguments, the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling* are not evidence of Commerce changing the way it determines whether all products qualify for the finished goods exclusion. Rather, the court finds that the rulings indicate Commerce has adjusted its methodology for determining if certain types of products qualify for the finished goods kit exclusion in order to avoid unreasonable results when applying the Orders.[30] The court finds that Commerce's remand definition of the

[27] *Id*., citing *Solar Panel Mounting Ruling* at 6–9. The unassembled solar panel mounting systems consists of extruded aluminum rails, cast aluminum kedges, galvanized steel posts and non-aluminum fasteners.

[28] *Solar Panel Mounting Ruling* at 8.

[29] Remand at 12–13, citing *Solar Panel Mounting Ruling* at 6, 9.

[30] The court notes that on remand Commerce appears to have taken a similar approach to interpreting the revised finished goods kit methodology as applied in the *Valves Ruling* and the *Auto Parts Remand*, in order to avoid cases where the previous approach may lead to an "absurd result" for products it determined were subassemblies. Commerce ultimately concluded here on remand that the rulings demonstrate "a subassembly will be excluded if it contains, at the time of importation, all of the parts necessary to assemble a final finished good." Remand at 13. In that process, it referenced the *Valves Ruling*, where it reasoned that requiring all parts needed to assemble a downstream product to be present for it to qualify as a "finished good kit" may in some instances expand the scope of the Orders, which are intended to cover aluminum extrusions. *See* Remand at 10–12, citing *Valves Ruling* at 7, citing scope of the Orders. Commerce's specific reference to the *Valves Ruling* drew attention to its revision of its "finished goods kit" and "subassemblies" analyses and "the manner in which it determines if a given product is a 'finished good' or 'finished goods kit.'" *Id.,* citing *Valves Ruling* at 6–7. In the *Valves Ruling*, Commerce defined a subassembly as "partially assembled merchandise" that is "designed to work with other parts to form a larger structure or system". Commerce determined that the scope language, which includes aluminum extrusion components that form subassemblies "as imported as part of the finished goods kit", as well as the language defining "finished goods kits" both indicated that subassemblies may be excluded from the scope if they enter as finished goods or

"finished goods kit" methodology, as applied in the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling*, reflects the rulings and scope language, is reasonable, and is supported by substantial evidence.

B. Application of Methodology

Although on remand Commerce reasonably defined the methodology applied in the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling*, it has failed to provide substantial evidence to support a rational connection for its conclusion that the analysis from the rulings, as so construed, is not applicable to the Trim Kits.[31] As discussed *supra*, the language Commerce used to describe its revised methodology in the remand reasonably allows for the application of the revised analysis to three types of goods: goods that are "designed to display . . . customizable materials," or goods "designed to incorporate customizable materials," or goods "designed to . . . work with removable or replaceable components."[32] On remand, Commerce concluded that although the Trim Kits include all the necessary parts to assemble a finished trim kit, may be assembled "as is", and require no further fabrication or finishing, they are not analogous to the products in the rulings because they do not "incorporate or display customizable materials and therefore the reasoning of the *Drapery Rail Kits and Solar Panel Mounting Systems Remand* does not apply." *Id.* The court finds that Commerce provides substantial evidence to support its determination that Trim Kits do not "incorporate" customizable material. However, the court also finds that Commerce fails to

finished goods kits and require no further finishing or fabrication. Commerce thus concluded that the fire hose valve kit in question, for assembly into a fire truck after importation and containing all the parts necessary to assemble a completed side mount valve and requiring no further finishing or fabrication prior to being assembled, qualified as a "finished goods kit" even without the fire truck accompanying the kit at import. *Valves Ruling* at 7–8.

Commerce also referenced as support for its redetermination the *Auto Parts Remand*, in which it applied the methodology of the *Valves Ruling* in determining certain auto parts for heating/cooling systems of a car as subassemblies because they were "inherently part of a larger whole." It found that the auto parts qualified as finished goods because they were both ready for installation with no additional fabrication or finishing required, and that they were ready for assembly without any additional hardware or parts even considering that they were imported without a car. *See* Remand at 11–12, citing *Auto Parts Remand* at 10.

[31] *See Amanda Foods*, 33 CIT 1407, 1417, 647 F.Supp.2d 1368, 1379 (2009), cited by *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013).

[32] Remand at 13–16, Def's Reply to Comm. at 5–6, 8–9, 13, Pl's Comm. in Resp. at 6.

point to substantial evidence to support the finding that the Trim Kits are not intended to "display" an appliance or "work with removable or replaceable components."

The plaintiff contends that its Trim Kits, when affixed to the cabinetry surrounding an appliance, are akin to the products evaluated in the rulings and serve the purpose of the "aesthetic enhancement of stainless steel refrigerators and freezers". The plaintiff argues that, like the drapery rails in the *Drapery Rail Kits Remand*, the banner stand displays in the *Banner Stands Ruling*, and the solar panel kits in the *Solar Panel Mounting Ruling*, the Trim Kits are designed to enhance the use of the removable or interchangeable components they display. The plaintiff also claims the Trim Kits meet the "finished goods kits" criteria under the rulings, because the kits can be assembled "as is" into a finished good and are sold separately from customizable appliances. *See* Remand at 6, 9, 15, *see also* Pl's Remand Submission at 4–6, 8. The plaintiff contests that Commerce did not provide an explanation of why the customizable nature of Trim Kits is not instructive in qualifying those as excluded finished goods, when Commerce determined that the "customizable" nature of the drapery rail kits considered in the *Drapery Rail Kits Remand* was crucial to exclusion of those products from the scope of the Orders.[33]

Commerce opposes the plaintiff's argument, claiming that the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling* did not evaluate if the kits "enhanced" a customizable material, as Meridian avers, but instead rested its consideration on whether the kits "incorporated the customizable materials."[34] Addressing the criteron that a kit must "incorporate" a customizable good, Commerce distinguishes a Trim Kit, which is affixed to cabinetry surrounding an opening for an appliance, from goods that are "incorporated" by being hung, mounted or inserted onto or into the imported kit.[35] After conducting its analysis of why a Trim Kit does qualify as a good that "incorporates" a customizable appliance, Commerce concludes that the Trim Kits do not "display *or* incorporate a refrigerator" (italics

[33] *See* Remand at 9, citing Pl's Remand Submission at 6.

[34] Remand at 15, citing *Drapery Rail Kits Remand* at 8 (describing the product as being "designed to incorporate readily interchangeable drapers or curtains that can change with users' needs and are intended to be customizable["]) and *Solar Panel Mounting Ruling* at 9 (describing the product as being "designed to work with removable/replaceable components".).

[35] Remand at 15, citing Scope of the Orders; *Banner Stands Ruling* at 10. Commerce referenced to the drapes in the *Drapery Rail Kits Remand* that were "incorporated" by hanging on a rail, the solar panels being mounted on mounts in the *Solar Panel Mounting Ruling*, and a picture "inserted" into a picture frame with glass and backing for photo frames expressly included in the Orders.

added). *Id.* The analysis and explanations in the remand provide the court with sufficient clarity on how Commerce reached its determination that Trim Kits do not "incorporate" a refrigerator, but the same cannot be said for Commerce's determination that the Trim Kits do not "display" an appliance. *See Timken U.S. Corp. v. United States*, 421 F.3d at 1355 (citation omitted).

Commerce provides no analysis, outside of conclusory statements, to support its conclusion that an "aesthetic frame" designed to "enhance the appearance of the cabinetry surrounding the appliance in the consumer's home and lend[ ] a customized, 'built-in' look" is not intended to "display" a "customizable" freezer or refrigerator unit. To support its determination, Commerce only states that the "aesthetic" function of the plaintiff's Trim Kits does not place the kits in the same category as picture frames or drapery rail kits because the same could also be said for carpet trim, a product expressly included in the Orders that enhances a floor and that can be used with interchangeable carpets. Remand at 15. But in the *Drapery Rail Kits Remand*, Commerce expressly states that the decorative bracket and finials of the drapery rail kit serve both a functional and aesthetic purpose. Arguably, a decorative drapery rail aesthetically enhances the appearance of a drape, and a picture frame aesthetically enhances the appearance of a photograph, and both can be used with interchangeable materials. Here, however, Commerce provides no analysis on why a photo frame is a means to display a customizable photograph or why a graphic display unit or a drapery rail are means to display their respective customizable components, and why a Trim Kit is not a means to do likewise.[36] The mere conclusory statement that the Trim Kits share a characteristic with a good expressly included in the Orders does not amount to substantial evidence on the record that the goods do not in fact "display" a customizable material. The court finds no direction for distinguishing between those goods which "incorporate" and those goods which "display," and it is left without direction as to the meaning of the latter term as well as Commerce's reasoning behind this portion of its remand determination. Commerce fails to adequately address in its remand what is required for a product to qualify as one designed to "display" a customizable good and has not explained with sufficient clarity why Trim Kits do not meet this criterion.

Commerce also fails to expressly conclude or analyze in its remand if, like the products in the *Solar Panel Mounting Ruling*, the Trim Kits are designed to "work with removable/replaceable components"

[36] *See, e.g.*, Remand at 16, stating only that the Trim Kits are not a "means to display customizable materials".

that can change with user needs.[37] As discussed *supra*, Commerce concluded that the reasoning of the *Solar Panel Mounting Ruling* does not apply to Trim Kits. However, it arrived at this conclusion only after it had evaluated if the Trim Kits "incorporate" customizable materials, without mentioning if the kits "work with removable/replaceable components" or otherwise conducting a separate analysis for this criterion. *See* Remand at 15. After conducting its "incorporate" analysis, Commerce acknowledges that the Trim Kits can be assembled "as is," but it concludes the fact that they are sold separately from an appliance irrelevant because the same can be said of the carpet trim and fence posts, products expressly covered by the Orders. However, Commerce provides no explanation or analysis for this determination, and the court is unsure of the significance -- if any -- that Commerce places on this quality when determining a good's ability to "work with removable/replaceable components." This feature is also, it would seem, present in the solar mounting system sold separately from the solar panels it is designed to work with that formed the basis of the *Solar Panel Mounting Ruling*. Commerce does not provide any explanation to distinguish these products as they relate to Trim Kits or explanation or analysis of what is required of a product to qualify as "work[ing] with removable/replaceable components," or why the appliances the Trim Kits ascetically enhance do not constitute "non-essential" removable or replaceable parts for purposes of applying the revised "finished goods kit" analysis from the *Solar Panel Mounting Ruling*.[38] In other words, Commerce's analysis falls short of that minimally cleared path that would enable the reader to understand the logic of the remand.

Therefore, the court cannot conclude that Commerce's determination that the Trim Kits are not analogous to the products designed to "work with removable/replaceable components" in the *Solar Panel Mounting Ruling* or designed to "display customizable materials" in the *Drapery Rail Kits Remand*, and its determination that the methodology or logic of these rulings does not apply to the Trim Kits, are supported by substantial evidence. The court agrees that it did not

[37] Remand at 12–14, referencing *Solar Panel Mounting Ruling* at 6, 9. As mentioned, Commerce explains that in the *Solar Panel Mounting Ruling* it found that "like picture frames, banner stands, and backwall kits, the mounting systems are designed to work with removable/replaceable components".

[38] Remand at 12–13, referencing *Solar Panel Mounting Ruling* at 6, 9. As discussed *supra*, in the *Solar Panel Mounting Ruling*, it was determined that the mounting systems which worked with removable/replaceable components did not need to include the "non-essential parts", being solar panels, to constitute a finished good.

"direct or require Commerce find that Meridian's trim kits are excluded" in the Opinion,[39] and it here expresses no view on the correctness of the *Drapery Rail Kits Remand* or *Solar Panel Mounting Ruling* (or any other prior ruling, for that matter), it only here observes that Commerce's ruling on remand evinces inconsistency therewith. On further remand, Commerce must support its remand decision with findings of fact grounded in substantial evidence of record,[40] and if it again reaches the same conclusion, it must sufficiently explain why the Trim Kits do not meet the "additional criteria identified" in the prior scope rulings in order for the court to understand and review the analysis.[41]

III. Conclusion

As it stands, the administrative redetermination that the Trim Kits do not constitute a "finished goods kit" excluded from the scope of the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China relies upon incomplete analysis that is in conflict with substantial evidence of record. *See Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d at 1378, *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The matter must therefore be, and hereby is, remanded again. On remand, Commerce shall proceed from a clean slate on the question of whether the Trim Kits fall within the scope of the Orders, fully taking into account the prior relevant scope rulings in accordance with the foregoing. Commerce shall submit its remand results no later than 60 days after the date of this order, and the parties shall submit their proposed scheduling order(s) for comments on the second remand results within 10 days thereafter.

So ordered.

Dated: March 26, 2014
New York, New York

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

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[39] Def's Reply to Comm. at 6, 9.

[40] *Union Steel v. United States*, 33 CIT 1392, 1399, 645 F. Supp. 2d 1298, 1305 (2009) *opinion set aside on reconsideration*, 35 CIT ___, 804 F. Supp 2d 1356 (2011) *judgment entered*, Slip Op. 13–105, 35 CIT ___ (Aug. 8, 2013).

[41] Remand at 16. *See Int'l Imaging Materials, Inc. v. U.S. International Trade Comm'n*, 29 CIT __, Slip. Op. 06–11 at 13 (Jan. 23, 2006).