U.S. Customs and Border Protection

Slip Op. 14–42

CP KELCO OY and CP KELCO US, INC., Plaintiffs, v. UNITED STATES, Defendant, and ASHLAND SPECIALTY INGREDIENTS, G.P., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00079

PUBLIC VERSION

Nancy A. Noonan, Arent Fox LLP, of Washington, DC, argued for plaintiff. With her on the brief were *Matthew J. Clark* and *Matthew L. Kanna*.

Stephen C. Tosini, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, and *L. Misha Preheim*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice. Of counsel on the brief was *Joanna V. Theiss*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Edward M. Lebow, Haynes and Boone, LLP, of Washington, DC, argued for defendant-intervenor Ashland Specialty Ingredients, G.P. With him on the brief was *Nora L. Whitehead*.

OPINION AND ORDER

Goldberg, Senior Judge:

This is a trade case brought under Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006). Plaintiffs CP Kelco Oy and CP Kelco US, Inc. (collectively "Kelco") challenge the dumping margin the U.S. Department of Commerce ("Commerce" or "the agency") assigned their goods during the 2010–2011 administrative review of an antidumping order on carboxymethylcellulose. Specifically, Kelco claims that the targeted dumping inquiry Commerce conducted before calculating the margin was neither in accordance with law nor based in substantial evidence.

The court holds that Commerce was permitted by law to conduct a targeted dumping inquiry during the contested review. The court also finds that Commerce's method for discovering targeted dumping and the application of that methodology to Kelco generally accorded with law and the evidence. Nevertheless, the court concludes that an

element of the agency's targeted dumping analysis—the *de minimis* test—was neither grounded in substantial evidence nor in accordance with law. The court remands to Commerce to conduct the targeted dumping inquiry afresh and to recalculate Kelco's dumping margins consistent with that inquiry.

PROCEDURAL BACKGROUND

In August 2011, Commerce initiated an administrative review of an antidumping order on carboxymethylcellulose from Finland. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. 53,404, 53,405 (Dep't Commerce Aug. 26, 2011).[1] The next year, the Aqualon Company, a petitioner, alleged Kelco had sold its goods for less-than-fair value at prices that differed "significantly among purchasers, regions, and periods of time." Letter from Haynes & Boone LLC to Hon. John Bryson, PD 56 at bar-code 3077453–01 (May 25, 2012), ECF No. 30 (July 2, 2013) ("Pet'r's Allegation"). This practice is known as "targeted dumping." In view of its allegation, Aqualon asked Commerce to compute Kelco's margins using a methodology that accounts for targeted dumping among an exporter's sales. *Id.* at 1-2.[2]

Commerce initially declined to conduct a targeted dumping inquiry when calculating Kelco's margins. Instead, the agency followed standard procedure and assigned Kelco a 5.86% dumping margin in the preliminary results. *See Purified Carboxymethylcellulose from Finland*, 77 Fed. Reg. 47,036, 47,038, 47,042 (Dep't Commerce Aug. 7, 2012) ("*Preliminary Results*"). Later, however, Commerce inquired whether Kelco had engaged in targeted dumping and discovered targeted dumping by time period. Commerce then reassessed Kelco's margins using an alternative methodology and assigned an 11.62% rate. Post-Prelim. Targeted Dumping Analysis Mem. at 3–4, PD 68 at bar-code 3112119–01 (Dec. 21, 2012), ECF No. 30 (July 2, 2013) ("Post-Preliminary Analysis"). The agency confirmed its findings from the targeted dumping inquiry in the final results, settling on a 12.06% dumping margin. *Purified Carboxymethylcellulose from Finland*, 78 Fed. Reg. 11,817, 11,817 (Dep't Commerce Feb. 20, 2013) ("*Final Results*").

Kelco filed a summons with this court to challenge the margin. Summons, ECF No. 1. In the accompanying complaint, Kelco alleges

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[1] Carboxymethylcellulose is "an acid ether derivative of cellulose that in the form of its sodium salt is used as a thickening, emulsifying, and stabilizing agent and as a bulk laxative in medicine." *Merriam-Webster's Collegiate Dictionary* 172 (10th ed. 1993).

[2] Defendant-Intervenor Ashland Specialty Ingredients, G.P. ("Ashland") was previously known as Aqualon Company. *See* Order Granting Consent Mot. to Amend Caption, ECF No. 36 (Sept. 10, 2013).

Commerce's targeted dumping inquiry was neither in accordance with the law nor grounded in substantial evidence. Compl. ¶¶ 19–27, ECF No. 4. Kelco implies that Commerce should use its normal methodology to calculate the dumping margin on remand. *See id.* at 7 (prayer for relief).

LEGAL BACKGROUND

To understand how Commerce's targeted dumping inquiry shaped Kelco's margins, some legal table-setting is needed. In general, Commerce calculates dumping margins by comparing a good's "export price" to its "normal value." *See* 19 U.S.C. § 1677(35). Commerce makes this comparison using one of three methods: the average-to-average methodology ("A-A"), the transaction-to-transaction methodology ("T-T"), or the average-to-transactional methodology ("A-T"). Commerce's preferred method in both investigations and administrative reviews is A-A. 19 C.F.R. § 351.414(b)–(c) (2013). Under this approach, the agency adopts the good's weighted-average U.S. price as the export price. *Id.* § 351.414(d). It then subtracts the export price from the good's weighted-average price in the exporter's home market (i.e., the normal value), yielding a dumping margin. *Id.* Commerce used the A-A methodology to calculate Kelco's margins in the Preliminary Results. *Preliminary Results*, 77 Fed. Reg. at 47,042 n.39.[3]

Commerce may also use the A-T methodology to set margins, but in limited circumstances. In investigations, Commerce may apply A-T only if it finds a "pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and alternative methodologies inadequately explain the pattern. 19 U.S.C. § 1677f-1(d)(1)(B)(i)–(ii). If an exporter's sales meet these criteria, that exporter engaged in targeted dumping. Commerce may then use A-T to compute the exporter's dumping margins, comparing weighted-average normal values to export prices from individual sales. *See* 19 C.F.R. § 351.414(b)(3). Commerce does not offset non-dumped sales against dumped sales when using the A-T method. *See* Issues & Decisions Mem. at Issue 1, PD 80 at bar-code 3118300–01 (Feb. 5, 2013), ECF No. 30 (July 2, 2013) ("I&D Mem."). As a consequence, margins calculated under A-T can be significantly higher than those computed under A-A.

Hence Commerce's method for discovering targeted dumping bears critically on an exporter's margins. The method, widely known as the

[3] Commerce rarely uses T-T to compute dumping margins. *See Calculation of Weighted Average Dumping Margin and Assessment Rate*, 77 Fed. Reg. 8101, 8102 (Dep't Commerce Feb. 14, 2012) (final modification) (discussing investigations).

"*Nails* test," proceeds as follows. In the first step, called the "standard deviation test," Commerce determines "the volume of the allegedly targeted group's (*i.e.*, purchaser, region, or time period) sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted." *Id.* at Issue 2. Standard deviations are calculated on a product-specific basis by control number ("CONNUM"). If more than thirty-three percent of allegedly targeted sales are at least one standard deviation below the average price of all reviewed sales in a given CONNUM, Commerce moves to step two. *Id.*

In step two, the "gap test," the agency considers by CONNUM the sales that passed the standard deviation test. Commerce first calculates the difference between the weighted-average price of allegedly targeted sales and the next higher weighted-average price of sales to a non-targeted group (the "target gap"). Next, Commerce calculates the average difference, weighted by sales volume, between prices to non-targeted groups (the "non-target gap"). Finally, the agency compares the target gap to the non-target gap.[4] If the target gap exceeds the non-target gap for more than five percent of the exporter's sales to the alleged target by volume, Commerce finds that targeted dumping occurred. The agency may then use A-T to calculate the exporter's margins, but only if Commerce cannot account for observed price differences using A-A. *Id.*[5]

Commerce takes a similar approach when it applies the A-T methodology in reviews. *Id.* Unlike the law governing investigations, however, the law governing reviews does not specify which comparative methodology Commerce must use to calculate margins. Instead, the statute explains only how to compute normal values when using the A-T method in reviews. 19 U.S.C. § 1677f-1(d)(2). To fill this apparent gap in the statute, federal regulations require Commerce to apply A-A in reviews unless another method is deemed more appropriate. 19 C.F.R. § 351.414(c)(1); *see also Calculation of Weighted Average Dumping Margin and Assessment Rate*, 77 Fed. Reg. 8101, 8102–04 (Dep't Commerce Feb. 14, 2012) ("*Final Modification*"). Commerce

[4] Commerce does not use the terms "target gap" and "non-target gap" in its analysis. These terms were coined as shorthand for ease of explanation.

[5] There is rulemaking underway concerning whether Commerce may apply A-T to all sales, both targeted and untargeted, when Commerce finds targeted sales in an investigation. *See Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT __, __, 918 F. Supp. 2d 1317, 1325–28 (2013); *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 78 Fed. Reg. 60,240 (Dep't Commerce Oct. 1, 2013). The court is unaware of any similar rulemaking for reviews.

has used A-T instead of A-A in reviews if the *Nails* test reveals that an exporter engaged in targeted dumping.[6]

In this case, Commerce applied the *Nails* test to Kelco's sales during an administrative review. The agency concluded that some of Kelco's sales constituted targeted dumping. Commerce also found—though obliquely—that Kelco's targeted sales comprised more than a *de minimis* share of its total U.S. sales. I&D Mem. at Issue 2. After determining that the A-T methodology yielded higher margins than the A-A approach, Commerce recalculated Kelco's margins using A-T. Commerce assigned Kelco a 12.06% margin in the Final Results, up from 5.86% in the Preliminary Results. *See* Public Mem. of Law in Supp. of Pls.' 56.2 Mot. J. on Agency R. 4–5, ECF No. 28 ("Pls.' Br.").

STANDARD OF REVIEW

The court must review Commerce's determinations to ensure they are supported "by substantial evidence on the record" and "in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). An agency decision is based in substantial evidence if bolstered by "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); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003).

The agency's interpretation of relevant statutes is "in accordance with law" if it passes the two-step test announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the court first determines whether a statute "directly [speaks] to the precise question at issue." *Id.* at 842. The court employs "the traditional tools of statutory construction" in this analysis, relying primarily on the statute's plain meaning and secondarily on the "statute's structure, canons of statutory construction, and legislative history." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (internal quotation marks omitted). Then, if the court finds the statute's meaning unclear, it scrutinizes the agency's interpretation of the statute to determine whether it is permissible. The court defers to the agency if the interpretation is reasonable. *See Chevron*, 467 U.S. at 843–44.

An agency action also fails to accord with law if it is arbitrary. *See U.S. Steel Corp. v. United States*, 37 CIT __, __, 953 F. Supp. 2d 1332, 1336 (2013); *Thai Plastic Bags Indus. Co. v. United States*, 37 CIT __,

[6] Before publishing the *Final Modification* in February 2012, Commerce used A-T without offsets as its default comparative methodology in reviews. 77 Fed. Reg. at 8101. For a history of Commerce's evolving method for calculating margins in administrative reviews, *see Timken Co. v. United States*, Slip Op. 14–24, 2014 WL 763124, at *1–2 (CIT Feb. 27, 2014).

__, 949 F. Supp. 2d 1298, 1302 (2013). Under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), an agency rule is arbitrary if "the agency . . . relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, . . . or is so implausible that it could not be ascribed to . . . the product of agency expertise." *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) (invalidating exercise of agency discretion where agency failed to explain basis of its action).

DISCUSSION

The court evaluates Kelco's claims in light of these standards. First, the court considers whether Commerce was authorized by statute to conduct a targeted dumping inquiry during the administrative review. *See* Pls.' Br. 1–2. The law shows that Commerce was so authorized.

Second, the court assesses whether the method Commerce used to discover targeted dumping was based in substantial evidence and in accordance with law. *See id.* The court holds that Commerce's targeted dumping inquiry was valid in all respects but one: Commerce's *de minimis* test—which functioned either as an additional step of the *Nails* inquiry or as a guidepost in the agency's discretionary analysis—was arbitrary and contrary to law.

I. Commerce Acted in Accordance with Law When It Conducted a Targeted Dumping Inquiry During the Review

Kelco first argues that Commerce was not permitted to conduct a targeted dumping inquiry during the administrative review. Though not so phrased in its brief, Kelco relies almost exclusively on the interpretive maxim *expressio unius est exclusio alterius* to support its claim. *See* Pls.' Br. 7–12; Pls.' Reply Br. 1–9, ECF No. 45 ("Reply Br."). Translated from Latin, the maxim means "to express or include one thing implies the exclusion of the other," suggesting that if Congress grants a right or privilege in one situation, then Congress intentionally withholds that right or privilege in other situations. *Black's Law Dictionary* 620 (8th ed. 2004). In this vein, Kelco asserts that while the statute expressly permits Commerce to conduct targeted dumping inquiries *in investigations*, the law does not authorize such inquiries *in administrative reviews*. Consequently, Congress must have intended to prohibit targeted dumping inquiries in reviews, and Commerce acted contrary to law by applying its targeted dumping analysis to Kelco. Pls.' Br. 9–12; *see also* 19 U.S.C. § 1677f-1(d).

A. The Targeted Dumping Statute Is Ambiguous

The court cannot agree. Under *Chevron*, the court must invalidate agency actions that contradict a statute's unambiguous instructions. *See* 467 U.S. at 842–43. But the statute at issue here does not clearly prohibit targeted dumping inquiries in reviews. The court notes first that 19 U.S.C. § 1675—the section that orders Commerce set dumping margins in reviews—says nothing about how those margins should be calculated. Instead, the section only requires Commerce to determine "the normal value and export price . . . of each entry of the subject merchandise, and . . . the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). The provision governing Commerce's margin calculation methodology in reviews also offers little direction: 19 U.S.C. § 1677f-1(d)(2) tells Commerce how to average normal values when using the A-T methodology in reviews, but nothing more. In sum, the statute lacks language to inform the agency's choice between the A-A, T-T, and A-T methodologies in reviews. Given this spare guidance, Commerce was free to use the targeted dumping inquiry to help it choose between AA and A-T to calculate Kelco's dumping margin. *See* Def.'s Opp. to Pls.' M. for J. on Agency R. 8–11, ECF No. 39 ("Resp. Br."); *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996) ("So long as the [agency's] analysis does not violate any statute and is not otherwise arbitrary and capricious, the [agency] may perform its duties in the way it believes most suitable."); *Mid Continent Nail Corp. v. United States*, 34 CIT __, __, 712 F. Supp. 2d 1370, 1376–77 (2010).

Even so, Kelco contends the interpretive maxim *expressio unius* precludes using the targeted dumping inquiry in reviews. 19 U.S.C. § 1677f-1(d)(1) explicitly permits the targeted dumping inquiry in investigations. Section 1677f-1(d)(2), by contrast, does not mention the inquiry in the context of reviews. Kelco points to this disparity as proof that "Congress expressly withheld from [Commerce] the authority to use the targeted dumping exception in administrative reviews. . . . When statutory language contains no ambiguity, [Commerce] cannot create authority that has not been explicitly or implicitly granted." Pls.' Br. 9.

The court does not *see* it that way. As the Supreme Court explained, *expressio unius* arguments "ha[ve] force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (internal quotation marks omitted). Admittedly, the provisions here appear in a series. Section 1677f-1(d)(1)(B) permits targeted dumping inquiries in investigations, but § 1677f-1(d)(2) pro-

vides no such authority for reviews. Nevertheless, § 1677f-1(d)(2) mandates how Commerce must average normal values when using the A-T method to calculate margins in reviews. This implies that the legislature intended to allow A-T to be used in reviews. It thus makes little sense that Congress would prohibit targeted dumping inquiries in reviews, because the inquiry's sole purpose is to help Commerce decide whether to apply the A-T methodology in a given case. The inference to be drawn, if any, is that Congress would allow the targeted dumping inquiry in reviews, not the opposite. *See Barnhart*, 537 U.S. at 168.

FAG Italia S.p.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002), does not mandate a different result. *See* Pls.' Br. 10–12. There, the statute in question authorized Commerce to conduct duty absorption inquiries in administrative reviews, but only during the second and fourth years after an antidumping order first issued.[7] Commerce, however, attempted to conduct duty absorption inquiries in the second and fourth years following a transition order. *FAG Italia*, 291 F.3d at 811.[8] On appeal, the government argued the statute was silent regarding whether Commerce could conduct absorption analyses in reviews following a transition order. This silence, the government explained, served as tacit permission to carry out absorption inquiries following transition orders. *Id.* at 815–16. The Federal Circuit disagreed and held that the statutory silence did not authorize Commerce to conduct the inquiries following transition orders. "The fact that Commerce is empowered to take action in certain limited situations does not mean that Commerce enjoys such power in other instances." *Id.* at 817.

In this vein, Kelco argues Commerce misinterpreted statutory silence in § 1677(d)(2) to permit targeted dumping inquiries in reviews. The comparison to *FAG Italia*, however, is inapt. In *FAG Italia*, the same provision that authorized duty absorption inquiries also limited those inquiries to the second and fourth years following an order. *See* 19 U.S.C. § 1675(a)(4). Congress endowed Commerce with an investigative power and cabined it in the same penstroke. Here, by contrast, the provisions authorizing Commerce to calculate dumping margins in investigations and reviews are separate from provisions

[7] "Duty absorption" occurs when an exporter pays the cost of antidumping duties without passing those costs to U.S. consumers. *FAG Italia*, 291 F.3d at 809. If Commerce finds an exporter has absorbed duties, it may pass those findings to the International Trade Commission for use in assessing material injury. 19 U.S.C. § 1675(a)(4).

[8] A transition order is an "antidumping duty order . . . which is in effect on the date the WTO Agreement enters into force with respect to the United States." *FAG Italia*, 291 F.3d at 811. Transition orders were deemed issued on January 1, 1995, for the purposes of subsequent sunset reviews. *Id.*; 19 U.S.C. § 1675(c)(6)(D).

describing how to perform those calculations. 19 U.S.C. § 1673 empowers Commerce to calculate margins in investigations, and § 1677f-1(d)(1) channels Commerce's exercise of that power. 19 U.S.C. § 1675(a) charges Commerce to compute margins in reviews, and § 1677f-1(d)(2) provides limited mathematical guidance regarding those computations. Paragraphs 1677f-1(d)(1) and (2), in short, were designed to be read in light of their parent provisions and not as a unit. Given this statutory scheme, one cannot easily infer that language authorizing targeted dumping inquiries in investigations bars the agency from conducting similar inquiries in reviews. *See NTN Bearing Corp. v. United States*, 368 F.3d 1369, 1373 (Fed. Cir. 2004) (holding *expressio unius* does not apply when "its application would thwart the legislative intent made apparent by the entire act") (internal quotation marks omitted).

Kelco's case is more akin to *NTN Bearing* than to *FAG Italia*. In *NTN Bearing*, Commerce used cost data from the respondents' affiliates to calculate respondents' inventory carrying costs and difference in merchandise ("difmer") adjustment. *Id.* at 1371–72. The statute, however, expressly authorized Commerce to use affiliate data for other purposes, including to calculate a respondent's production costs and constructed normal value. 19 U.S.C. § 1677b(f). The Federal Circuit nevertheless approved Commerce's use of the affiliate data. The court found that statutory language governing carrying costs and difmer adjustments did not prohibit Commerce from using affiliate data to compute those values. 368 F.3d at 1373. And although the statute expressly referenced affiliate data only in the context of production costs and constructed normal value, the law did not preclude using affiliate data in other contexts. *Id.* Likewise, 19 U.S.C. § 1677f-1(d)(1)(B)—the provision authorizing targeted dumping inquiries in investigations—does not bar Commerce from using targeted dumping inquiries in reviews. Indeed, the statute did not preclude, whether expressly or implicitly, the targeted dumping analysis in the review below.

B. Commerce's Decision to Conduct a Targeted Dumping Inquiry in the Review Was Reasonable

Nor was the agency's decision to conduct a targeted dumping inquiry an unreasonable interpretation of the statute. *See Chevron*, 467 U.S. at 843–44. As discussed above, the statute permits Commerce to use A-T in reviews. *See* 19 U.S.C. § 1677f-1(d)(2). The regulations regarding reviews also allow Commerce, when appropriate, to apply A-T instead of A-A. *See* 19 C.F.R. § 351.414(c)(1). Because neither the statute nor the regulations dictate when using A-T would be "appropriate" in reviews, it was reasonable for Commerce to use the tar-

geted dumping inquiry as a principled way of choosing between A-A and A-T to calculate Kelco's margins.

Kelco nevertheless argues that the agency's interpretation was invalid because antidumping investigations and reviews serve different purposes. *See* Reply Br. 7–8 (citing *Union Steel v. United States*, 713 F.3d 1101, 1109 (Fed. Cir. 2013)). In investigations, Commerce examines overall pricing patterns to decide whether to impose antidumping duties. Reviews, by contrast, exist to determine the amount of those duties. Because the targeted dumping inquiry focuses on "overall pricing patterns," Kelco argues the inquiries are appropriate only in investigations. *Id.* at 8.

Kelco's own citation refutes this argument. In *Union Steel* —a case Kelco offers to illustrate the difference between investigations and reviews—the Federal Circuit upheld Commerce's decision to use the A-A methodology in investigations and the A-T methodology without offsets in reviews. 713 F.3d at 1108–09. But as discussed previously, the targeted dumping inquiry is simply a threshold analysis Commerce conducts before applying A-T to calculate dumping margins. It does not follow that Congress would prohibit targeted dumping inquiries in reviews when the inquiry's purpose is to help Commerce decide whether to apply AT in a given case. The policy differences between investigations and reviews do not render the agency's interpretation of the statute unreasonable.

Because Commerce's interpretation passes both steps of *Chevron*, the court holds that the decision to conduct a targeted dumping inquiry during the review accorded with law.

II. Commerce's Method for Discovering Targeted Dumping Was Not in Accordance with Law

Kelco next claims that Commerce's method for discovering targeted dumping was neither grounded in substantial evidence nor in accordance with law. This argument breaks into three subparts. First, Kelco argues the *Nails* test is itself arbitrary and unsupported by substantial evidence. Second, Kelco alleges Commerce did not base in substantial evidence its decision to apply the *Nails* test to Kelco. Third, Kelco claims Commerce acted arbitrarily by refusing to excuse Kelco's targeted sales from A-T treatment under the *de minimis* test. Of these arguments, only the last persuades.

A. The *Nails* Test Itself Is Neither Arbitrary Nor Unsupported in Evidence

Kelco argues the *Nails* test as applied in administrative reviews is arbitrary and unsubstantiated in evidence. In particular, Kelco al-

leges Commerce failed to explain how the *Nails* test's standard deviation metric and thirty-three and five percent thresholds unmask targeted dumping. Pls.' Br. 13–14.

These arguments do not advance Kelco's case. Under *State Farm,* 463 U.S. at 43, an agency rule is arbitrary if "the agency . . . relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, . . . or is so implausible that it could not be ascribed to . . . the product of agency expertise." The *Nails* test avoids these pitfalls because it identifies targeted dumping as described by statute. Under § 1677f1(d)(1)(B)(i), targeted dumping exists if "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time." As explained in *Mid Continent Nail* in the context of investigations, the *Nails* test's standard deviation analysis pinpoints "pattern[s] of export prices" by measuring "the dispersion of values in an exporter's price data, to aid in identifying which of the exporter's sales were relatively low compared to others." 34 CIT at __, 712 F. Supp. 2d at 1377. The court has upheld Commerce's standard deviation test as a statistically valid means of determining price dispersion. *See id.* at __, 712 F. Supp. 2d at 1377–78. Kelco's arguments give no occasion to abandon this holding in the context of reviews.

Commerce's thirty-three and five percent thresholds are also valid. If thirty-three percent of allegedly targeted prices fall one standard deviation below average prices by CONNUM, then the agency concludes that a "pattern of export prices" existed. *See* I&D Mem. at Issue 2; *Mid Continent Nail*, 34 CIT at __, 712 F. Supp. 2d at 1378. Next, Commerce takes the sales that pass the standard deviation test and determines whether they pass the gap test. I&D Mem. at Issue 2. If sales that pass the gap test comprise five percent of the exporter's sales to the alleged target, Commerce concludes that prices "differ[ed] significantly" among purchasers, regions, or periods of time. *Mid Continent Nail*, 34 CIT at __, 712 F. Supp. 2d at 1378–79. The court has held that these thirty-three and five percent thresholds together identify targeted dumping as defined in 19 U.S.C. § 1677f-1(d)(1)(B)(i). *Id.* Kelco furnished no arguments or record evidence

demonstrating the contrary.[9] The court thus holds that the *Nails* test as applied in reviews is based in substantial evidence and not arbitrary.

B. Commerce's Application of the *Nails* Test to Kelco Was Neither Unsupported in Evidence nor Contrary to Law

Next, Kelco argues that Commerce's choice to deploy the *Nails* test in the review below was contrary to law and unsupported in evidence. It notes that Commerce returned to "case-by-case adjudication" to find targeted dumping after the agency withdrew a targeted dumping regulation in 2008. Pls.' Br. 14; *see Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930, 74,931 (Dep't Commerce Dec. 10, 2008) (interim final rule) (the "Withdrawal").[10] Consequently, Commerce needed to conduct "a specific analysis as to the facts of the present case in order to determine whether the *Nails* test was the most appropriate way to unmask any alleged . . . targeted dumping." Pls.' Br. 14. Kelco says Commerce never undertook this "specific analysis."

These arguments fail to persuade. Under the substantial evidence standard, the court must uphold Commerce's choice if it was based on "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison*, 305 U.S. at 229. Commerce's decision to apply the *Nails* test to Kelco clears this hurdle. In the Preliminary Results, Commerce noted that petitioner Aqualon based its allegation of targeted dumping on record evidence. *See Preliminary Results*, 77 Fed. Reg. at 47,037–38; Pet'r's Allegation 3–7.[11] Even

[9] At oral argument, Kelco called the *Nails* test arbitrary in reviews because Commerce applies A-A using month-to-month comparisons in reviews and twelve-month comparisons in investigations. Oral Argument at 16:18, 38:35. This distinction does not render the *Nails* test arbitrary in reviews, though. First, Kelco never made this argument in its brief. *See* Pls.' Br. 13–14. Second, even if month-to-month A-A comparisons reveal targeted dumping better than annual A-A comparisons, this does not bar Commerce from using the targeted dumping inquiry and the A-T methodology in reviews. *See* 19 C.F.R. § 351.414(c). As recognized in *Union Steel*, 713 F.3d at 1109, Commerce does not average export prices at all under A-T, yielding transaction-specific margins that are likely more accurate even than month-to-month A-A comparisons. Third, and most important of all, A-T is explicitly permitted in reviews under the statute. *See* 19 U.S.C. § 1677f-1(d)(2).

[10] The court invalidated the Withdrawal on procedural grounds in *Gold East*, 37 CIT at __, 918 F. Supp. 2d at 1325.

[11] At oral argument, Kelco claimed Aqualon's targeted dumping allegation was inadequate to trigger Commerce's *Nails* inquiry. Oral Argument at 16:58. The court disagrees. As an initial matter, Kelco never made this argument in its brief. *See* Pls.' Br. 14–15. Furthermore, neither the statute nor the regulations specify when Commerce must investigate for targeted dumping or what form a petitioner's targeted dumping allegations must take. *See* 19 U.S.C. § 1677f-1(d)(1)(B); 19 C.F.R. § 351.414(c)(1). In this case, Aqualon based its

so, Commerce initially refused to administer the targeted dumping test to afford the "parties an opportunity to meaningfully comment on the Department's implementation of this recently adopted methodology in the context of this administrative review." *Preliminary Results*, 77 Fed. Reg. at 47,038.

After receiving comments, Commerce decided to run the targeted dumping analysis as Aqualon had petitioned. In the Post-Preliminary Analysis, the agency acknowledged its authority to use A-T under 19 C.F.R. § 351.414(c)(1) and explained how it applied the *Nails* test to Kelco's sales. Post-Preliminary Analysis at 2–3. The Post-Preliminary Analysis further concluded that Kelco engaged in targeted sales by time period. *See id.*

Commerce again explained how it applied the *Nails* test in the I&D Memo, adding that the Court of International Trade had upheld the *Nails* test as reasonable. I&D Mem. at Issue 2. The agency also noted that it used the *Nails* test in reviews of other antidumping orders. *Id.*; *see also Ball Bearings and Parts Thereof from France, Germany, and Italy*, 77 Fed. Reg. 73,415 (Dep't Commerce Dec. 10, 2012) and accompanying I&D Mem. at cmt. 1 ("*Ball Bearings*"); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 78 Fed. Reg. 3396 (Dep't Commerce Jan. 16, 2013) and accompanying I&D Mem. at cmt. 1. The court finds that this evidence—garnered from the review below and other reviews where the *Nails* test was used—sufficed to support Commerce's decision to apply the *Nails* test to Kelco.

Kelco, by contrast, does not identify any specific conclusions Commerce made that were unsupported by evidence or logic. In its brief, Kelco faults Commerce for failing "to state what facts it looked at and how those facts supported" the agency's choice to employ the *Nails* test during the review. Pls.' Br. 15. Yet Kelco does not suggest what more Commerce could have done to shore up its decision. It does not, for example, offer any factors independent of the *Nails* inquiry that would corroborate whether Kelco had perpetrated targeted dumping. Nor did Kelco propose anything better at oral argument, where it made a vague pitch for Commerce to issue supplemental questionnaires before undertaking a *Nails* inquiry. Oral Argument at 17:43. Having considered these arguments and the record, the court finds

targeted dumping allegation on its preliminary application of the *Nails* test to Kelco's sales. *See* Pet'r's Allegation 3–7; Comments of Pet'r Aqualon Company on Post-Prelim. Targeted Dumping Analysis Mem. at 1–2, PD 71 at bar-code 3112811–01 (Jan. 2, 2013), ECF No. 30 (July 2, 2013). Though it seems circular that Aqualon based its claim on the results of the very test Commerce deploys to find targeted dumping, it was not unreasonable for Commerce to launch its own, independent *Nails* inquiry in response to the allegation, however derived.

Commerce's decision to use the *Nails* test below was based in substantial evidence and in accordance with law.

C. Commerce's Use of the *De Minimis* Test Was Arbitrary

Finally, Kelco argues Commerce acted arbitrarily by applying an ill-defined *de minimis* test to Kelco's targeted sales. In reviews of other antidumping orders, Commerce declined to apply the A-T methodology where targeted sales constituted a small fraction—or a *de minimis* portion—of an exporter's total U.S. sales. *See* Pls.' Br. 15–16. Here, Commerce held Kelco's targeted sales were more than *de minimis* but did not explain what "*de minimis* sales" means. The agency consequently applied the A-T methodology to compute Kelco's margins. Kelco says Commerce should have offered some definition of *de minimis* sales before finding that its sales exceeded the *de minimis* threshold. *See id.* at 17–18.

The court agrees with Kelco.[12] As discussed above, agency decisions are arbitrary if they cannot "be ascribed to . . . the product of agency expertise." *State Farm*, 463 U.S. at 43. Administrative decisions are similarly invalid if they fail to state "the basis on which the [agency] exercised its expert discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962); *see also Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 314 F.3d 1373, 1380–81 (Fed. Cir. 2003) (remanding where agency did not articulate rationale for statutory interpretation). Commerce's *de minimis* test founders under either of these standards.

First, Commerce never explained what purpose the *de minimis* test serves in the statutory scheme. Under 19 U.S.C. § 1677f-1(d)(1)(B)(i), Commerce may apply A-T in investigations if an exporter's sales constitute "a pattern of export prices" differing significantly among purchasers, regions, or time periods. In this vein, the *de minimis* test could serve as part of the *Nails* inquiry in investigations and reviews, signaling whether targeted sales are voluminous enough to form a "pattern" of significantly differing prices as described in statute. Post-Preliminary Analysis at 3 (suggesting pattern existed "based on the percentage of U.S. sales found to have been targeted"); Oral

[12] In its brief, Defendant-Intervenor Ashland appeared to challenge whether Commerce is permitted to conduct *de minimis* inquiries in reviews at all. The *de minimis* test, Ashland alleged, "would undermine Commerce's targeted dumping analysis by eliminating its ability to take action at the very first sign of the targeted dumping behavior." Def.-Intervenor's Resp. Br. 14, ECF No. 37. Thus "a *de minimis* principle should not and cannot be applied to targeted dumping." *Id.* At oral argument, however, Ashland stated that it did not contest Commerce's decision to conduct a *de minimis* analysis during the review. Oral Argument at 24:12. The court thus declines to consider whether the statute permitted the agency to conduct a *de minimis* inquiry.

Argument at 25:41 (arguing for Kelco that *de minimis* test is third prong of *Nails* analysis). Alternatively, the *de minimis* test could guide the agency's discretion when deciding whether to apply A-T to an exporter's targeted sales. The statute does not compel Commerce to apply A-T to exporters who made targeted sales. Instead, it states that Commerce "*may* determine" to use A-T when deciding whether such exporters made sales at less-than-fair value. 19 U.S.C. § 1677f-1(d)(1)(B); *see also* Oral Argument at 27:27 (arguing for government that *de minimis* test guides agency's discretion to apply A-A or A-T). The agency could use the *de minimis* test to serve this discretionary function, to identify a pattern of prices, or both. Yet nothing in the record establishes which role the test played in the review below.

Second, Commerce never explained the quantum of an exporter's sales that must be targeted to fall above or below the *de minimis* threshold. In the I&D Memo, Commerce said only that "the percentage of sales by quantity which was found to be targeted in this case is far too high to be considered *de minimis*, and so CP Kelco's argument [regarding the *de minimis* threshold] is not relevant in the context of this case." I&D Mem. at Issue 2.[13] Commerce's Post-Preliminary Analysis also mentioned that Commerce considered applying the A-T methodology only after finding "sufficient sales . . . passed the *Nails* test." Post-Preliminary Analysis at 3. But the Analysis furnished neither a qualitative nor a quantitative explanation of what a "sufficient" number of sales is.

Nor do administrative reviews under other antidumping orders define *de minimis* sales. *See* Pls.' Br. 16. Commerce applied the *de minimis* analysis in a number of proceedings other than the review contested here. *See Certain Frozen Warmwater Shrimp From India*, 78 Fed. Reg. 42,492 (Dep't Commerce July 16, 2013) and accompanying I&D Mem. at cmt. 1 (applying A-T to exporter with "sufficient volume of targeted sales" but A-A to exporter with "insufficient volume of targeted sales"); *Ball Bearings*, 77 Fed. Reg. 73,415 (Dep't Commerce Dec. 10, 2012) (final admin. reviews) and accompanying I&D Mem. at cmt. 1; *Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 77 Fed. Reg. 72,818 (Dep't Commerce Dec. 6, 2012) and accompanying I&D Mem. at cmt. 1. None of these proceedings, however, furnished a useful definition of *de minimis* sales.

In an effort to reduce this ambiguity, the government tries to sketch the contours of the *de minimis* threshold on appeal. In its brief, the

[13] With respect to alleged targeted dumping by customer, Commerce found [[ ]]% of sales by quantity and [[ ]]% of sales by value were targeted. Respecting targeted dumping by time period, (footnote continued) Commerce found [[ ]]% of sales by quantity and [[ ]]% of sales by value were targeted. Confidential Mem. of Law in Supp. of Pls.' 56.2 Mot. J. on Agency R. 17, ECF No. 27 ("Pls.' Confid. Br.").

government cites a *de minimis* provision from a dumping margin regulation to show that Kelco's sales were more than *de minimis*. Resp. Br. 18–19; *see also* 19 C.F.R. § 351.106(c) (treating dumping margins under 0.5% as *de minimis*). As a general rule, however, agencies cannot rely on *post hoc* rationalizations to justify actions taken during administrative proceedings: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Here, although the government cites a potentially relevant *de minimis* provision in its brief, Commerce did not do so anywhere in the record. The court is thus left without a basis to evaluate the *de minimis* test's substance and place in the statutory scheme. *See Burlington*, 371 U.S. at 167–68.

And so the court must return the undercooked *de minimis* dish to the administrative kitchen. On remand, Commerce must define the *de minimis* test's function (i.e., does the test identify a "pattern" of differing prices, does it guide the agency's discretion to apply A-T, or both?). Commerce must then outline the quantitative data, qualitative variables, or other information it considers when determining whether an exporter's targeted sales fall above or below the *de minimis* threshold. Finally, Commerce must use this definition to find whether Kelco's targeted sales pass or fail the *de minimis* test. Conclusory explanations of the variety found in the I&D Memo below will not be accepted.[14]

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[14] The court's decision does not conflict with another recent targeted dumping case, *Timken Co. v. United States*, 2014 WL 763124. There, Commerce found that respondents' targeted sales were *de minimis* and hence insufficient to justify using the A-T methodology to calculate dumping margins. Petitioner Timken alleged Commerce erred by failing to define what *de minimis* targeted sales were. *Id.* at *8.

Rejecting Timken's claim, Judge Restani gave three reasons why Commerce did not need to define *de minimis* sales: (1) Commerce was never presented with and did not consider petitions to specify and justify a *de minimis* threshold; (2) Timken never argued that the targeted sales found were more than *de minimis*; and (3) respondents' targeted sales were small. *Id.* at *9. Judge Restani also noted the government's argument that "Commerce is not obligated to justify relying on" the default A-A methodology to calculate margins in reviews. *Id.* at *8.

Yet unlike the petitioner in *Timken*, Kelco clearly asked Commerce to find its sales were "minimal and insufficient to meet the [*de minimis*] standard." I&D Mem. at Issue 2. To make this finding, the agency needed to have some principled definition of what *de minimis* sales are. *See* Pls.' Br. 18. The record, however, sported no such explanation. Furthermore, although Kelco's targeted sales by time period were appreciable, they were not obviously more than *de minimis*. *See* Pls.' Confid. Br. 17. Finally, Commerce applied A-T to calculate Kelco's margins, departing from the methodology (A-A) the agency normally applies in reviews. *See* 19 C.F.R. § 351.414(c)(1) (mandating A-A in reviews unless "another method is appropriate in a particular case").

CONCLUSION AND ORDER

The law allowed Commerce to scrutinize Kelco's sales for targeted dumping during the review. The law also supported the agency's choice to use the *Nails* test to discover targeted sales. But Commerce could not deny Kelco a *de minimis* exception to its A-T margin calculation methodology without saying what *de minimis* means. The agency must correct this error on remand.

Upon consideration of all papers and proceedings herein, it is hereby:

ORDERED that the final determination of the International Trade Administration, United States Department of Commerce ("Commerce"), published as *Purified Carboxymethylcellulose from Finland*, 78 Fed. Reg. 11,817 (Dep't Commerce Feb. 20, 2013) (final results), be, and hereby is, REMANDED to Commerce for redetermination; it is further

ORDERED that Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record be, and hereby is, GRANTED as provided in this Opinion and Order; it is further

ORDERED that Commerce must issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence, in accordance with law, and supported by adequate reasoning; it is further

ORDERED that Commerce must fully explain the purpose of the *de minimis* test and provide a reasoned definition of the quantum of total sales of subject merchandise that must be targeted for Kelco to fall above or below the *de minimis* threshold discussed in this Opinion and Order; it is further

ORDERED that Commerce must apply the *de minimis* test as defined in the Remand Redetermination to Kelco's targeted sales and recalculate Kelco's dumping margins in accordance with the results of that test; it is further

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

In short, because Commerce used an exceptional methodology to generate Kelco's margins, because Kelco's sales were not clearly more or less than *de minimis*, and because Kelco specifically asked the agency to find its targeted sales were *de minimis*, Kelco's case differs from Timken's. Commerce must provide a principled definition of *de minimis* targeted sales on remand.

Dated: April 15, 2014
New York, New York

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

Slip Op. 14–43

HUBSCHER RIBBON CORP., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 13–00071
PUBLIC VERSION

[Final results of administrative review sustained.]

Dated: April 15, 2014

John J. Kenkel, *Gregory S. Menegaz*, and *J. Kevin Horgan*, deKieffer & Horgan, of Washington, DC, for Plaintiff Hubscher Ribbon Corp., Ltd.

Ryan M. Majerus, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the briefs were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was *Scott D. McBride*, Senior Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Import Administration, of Washington, DC.

Gregory C. Dorris, Pepper Hamilton, LLP, of Washington, DC, for Defendant-Intervenor Berwick Offray, LLC.

OPINION

Gordon, Judge:

This action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering narrow woven ribbons with woven selvedge from the People's Republic of China. *See Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 78 Fed. Reg. 10,130 (Dep't of Commerce Feb. 13, 2013) (final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China, A-570–952 (Dep't of Commerce Feb. 5, 2013) ("*Decision Memorandum*"), *available at* http://enforcement.trade.gov/frn/summary/prc/2013–03236–1.pdf (last visited this date). Before the court is Plaintiff Hubscher Ribbon Corp., Ltd.'s ("Hubscher") motion for judgment on the agency record challenging Commerce's assign-

ment of a total adverse facts available ("AFA") rate of 247.65%. *See* Pl.'s R. 56.2 Mem. in Supp. of Mot. for J. on the Agency R. at 3, ECF No. 33 ("Pl.'s Br."). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court sustains the *Final Results*.

I. Background

During the less than fair value ("LTFV") investigation, Commerce assigned dumping margins of 0.00% to Yama Ribbons and Bows Co., Ltd. ("Yama"), the sole cooperative mandatory respondent, 123.83% for the separate rate respondents, and 247.65% as total adverse facts available ("AFA") for (1) the China-wide entity and (2) the uncooperative mandatory respondent Ningbo Jintian Import & Export Co., Ltd. ("Ningbo"). *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 75 Fed. Reg. 41,808, 41,811 (Dep't of Commerce July 19, 2010) (final determ.) ("*LTFV Final Results*").

The separate rate of 123.83% was the subject of interesting litigation. One of the separate rate respondents, Yangzhou Bestpak Gifts & Crafts Co. ("Bestpak"), challenged the reasonableness of the 123.83% separate rate, which Commerce derived by simply averaging Yama's *de minimis* rate and Ningbo's total AFA rate (which was derived from the petition). The U.S. Court of International Trade ("CIT") was initially skeptical that such a simple average constituted a "reasonable method" to derive the separate rate, assuming there might be other options from the administrative record, and remanded to Commerce for further consideration. *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 35 CIT ___, ___, 783 F. Supp. 2d 1346, 1350–53 (2011), *after remand*, 36 CIT ___, 825 F. Supp. 2d 1346 (2012), *vacated by* 716 F.3d 1370 (Fed. Cir. 2013). On remand, Commerce explained that there was very limited data upon which to determine the commercial reality of the separate rate respondents. *Bestpak*, 36 CIT at ___, 825 F. Supp. 2d at 1350–51. The CIT acknowledged the limited record data and sustained Commerce's explanation as reasonable (supported by substantial evidence), albeit reluctantly. It explained the challenges that limited data pose for Commerce, the interested parties, and the court, especially when drawing conclusions about what constitutes a reasonable measure for the separate rate. *Id.* 36 CIT at ___, 825 F. Supp. 2d at 1350–53.

On appeal the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") rejected the reasonableness of Commerce's simple av-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition, and all applicable supplements.

erage that incorporated a total AFA rate for otherwise cooperative, separate rate respondents, noting that Commerce was to blame for the limited record, having had ample time to select another mandatory respondent when Ningbo withdrew its participation. *Bestpak*, 716 F.3d at 1378–80. On remand Commerce chose to review Bestpak individually and calculate its actual rate. Despite Bestpak maintaining through the course of the litigation that it deserved a zero percent rate, *Bestpak*, 35 CIT at ___, 825 F. Supp. 2d at 1350 ("Bestpak, for its part, requests an order from the court directing Commerce to assign Bestpak a 0% rate."), 716 F.3d at 1381–82 ("Bestpak . . . argued that the sample invoice was evidence of its commercial behavior and strongly supported a determination that Bestpak was entitled to a zero dumping rate."), Bestpak voluntarily dismissed the litigation rather than be individually reviewed, conceding that all its entries would be covered by the 123.83% separate rate. *See* Form 8 Notice of Dismissal, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, No. 10–00295 (USCIT Nov. 13, 2013), ECF No. 76 ("Yangzhou Bestpak will remain subject to the antidumping duty order on narrow woven ribbon with woven selvedge from the People's Republic of China at the antidumping duty rate of 123.83%, and all of Bestpak's entries suspended in this action will be liquidated at that rate."). One wonders what Bestpak's actual rate and commercial reality would have been had Commerce completed the individual review. Would it have been higher than 123.83%? In any event, although seemingly struck down by the Federal Circuit as unreasonable, the 123.83% separate rate now appears to have regained some validity.

In the subsequent first administrative review Commerce selected and examined Hubscher, an exporter, as the only mandatory respondent. No other respondents were individually reviewed. *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 77 Fed. Reg. 47,363, 47,363–64 (Dep't of Commerce Aug. 8, 2012) (prelim. results admin. review) ("*Preliminary Results*"). Hubscher at first cooperated, reporting among its questionnaire responses that Yama produced all of the subject merchandise that Hubscher imported during the period of review. When it came time to submit its cost information, however, Hubscher withdrew from the administrative review. Hubscher Letter Re: Withdrawal from Administrative Review, at 1–2 (Dep't of Commerce May 29, 2012), PD 68.[2]

Commerce then applied total AFA to Hubscher. *Preliminary Results*, 77 Fed. Reg. at 47,367; *Decision Memorandum* at 2. Commerce selected 247.65%, "the highest rate alleged in the petition," as the

[2] "PD" refers to a document contained in the public administrative record. "CD" refers to a document contained in the confidential record.

total AFA rate. *Preliminary Results*, 77 Fed. Reg. at 47,368 ("To determine the relevance of the petition margin, we placed the model-specific rates calculated for the respondents in the LTFV investigation on the record of this segment of the proceeding and compared the 247.65 percent rate with those model-specific rates."); *see also Final Results*, 78 Fed. Reg. at 10,133; *Decision Memorandum* at 8–10 & n.26; Comments and Departmental Position Containing Proprietary Information (Dep't of Commerce Feb. 5, 2013), CD 30 ("*Corroboration Memorandum*"). Although Hubscher admits "that it did not fully participate in the first administrative review and deserves a dumping margin based on 'adverse facts available,'" Pl.'s Br. at 17; *see* 19 U.S.C. § 1677e(a), Hubscher argues that Commerce unreasonably applied the highest petition rate as total AFA. Pl.'s Br. at 3, 17. For the reasons set forth below, the court sustains the *Final Results*.

II. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2014). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2013).

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

III. Discussion

In a total AFA scenario like the one presented here, Commerce typically cannot calculate an antidumping rate for an uncooperative respondent because the information required for such a calculation (in this case the respondent's cost information for the subject merchandise during the period of review) has not been provided. As a substitute, Commerce relies on various "secondary" sources of information (the petition, the final determination from the investigation, prior administrative reviews, or any other information placed on the record), 19 U.S.C. § 1677e(b), (c), to select a proxy that should be a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.LLI de Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*de Cecco*").

When selecting an appropriate total AFA proxy, "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance." *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004). The proxy's purpose "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *de Cecco*, 216 F.3d at 1032. Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (citing *de Cecco*, 216 F.3d at 1032). "Commerce must select secondary information that has some grounding in commercial reality." *Id.* 1323–24.

As *de Cecco* explained, these requirements are logical outgrowths of the statute's corroboration requirement, *see de Cecco*, 216 F.3d at 1032, which mandates that Commerce, to the extent practicable, corroborate secondary information with independent sources reasonably at its disposal. 19 U.S.C. § 1677e(c). In practice "corroboration" involves confirming that secondary information has "probative value," 19 C.F.R. § 351.308(d) (2013), by examining its "reliability and relevance." *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734,

491 F. Supp. 2d 1273, 1278 (2007) (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom* , 70 Fed. Reg. 54,711, 54,712–13 (Dep't of Commerce Sept. 16, 2005) (final results admin. reviews)). More simply, to corroborate the selection of a total AFA rate, Commerce must, to the extent practicable, "demonstrate that the rate is reliable and relevant to the particular respondent" in light of the whole record before it. *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT ___, ___, Slip Op. 12–95 at 27 (July 18, 2012); *PSC VSMPO-AVISMA Corp. v. United States*, 35 CIT ___, ___, 755 F. Supp. 2d 1330, 1336–37 (2011) (citing *Gallant Ocean*, 602 F.3d at 1323–24); *de Cecco*, 216 F.3d at 1032 ("Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.").

Before turning to the specific facts, the court addresses Hubscher's contention that the *Chevron* framework governs the court's review of that Commerce's total AFA selection. For Hubscher, the 247.65% rate represents an unreasonable application of the statute under the second prong of *Chevron*. Pl.'s Br. at 15. The court does not agree that the reasonableness of Commerce's corroboration of the total AFA rate is a *Chevron* issue; it is instead a substantial evidence question in which the court reviews the reasonableness of Commerce's actions against a known legal standard given the facts and circumstances of the administrative record. More specifically, the issue in this case is whether Commerce, to the extent practicable, reasonably confirmed the reliability and relevance of the highest rate in the petition as a reasonable proxy for Hubscher's actual rate plus some built-in increase intended as a deterrent against non-compliance.

Corroboration

The administrative record in the first administrative review had limited information, as did the record for the investigation (an "independent source of information" reasonably at Commerce's disposal). Hubscher, for its part, identifies only "three possible alternatives" to the petition rate: (1) Yama's 0.00% rate, (2) the 123.83% separate rate, and (3) a hypothetical rate calculated using Hubscher's U.S. sales data or Yama's factors of production ("FOP") data from the investigation, with all three rates including some unspecified "factor" added "for deterrence." Pl.'s Reply to Def.'s and Def.-Intervenor's

Resp. Brs. to Pl.'s R. 56.2 Mot. at 6–7; *see* Pl.'s Br. at 25–26.[3] Commerce explained that the first two are not valid alternatives because those rates were assigned to cooperative parties. *See Decision Memorandum* at 10 ("The Department is not required to assign to an uncooperative respondent such as Hubschercorp a rate assigned to cooperative respondents in the same case."). Hubscher's last proposed alternative, a hypothetical rate using Hubscher's U.S. sales data or Yama's FOP data from the investigation, is more illusory than real because Hubscher provides no calculation. Hubscher also apparently failed to make this specific argument before the agency. The *Decision Memorandum* contains no reference to an argument by Hubscher that Commerce should calculate a more reasonable total AFA rate for Hubscher based on its record information. *See Memorandum* at 4–5 (summarizing Hubscher's arguments before Commerce); *see also* 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in submitter's view to be relevant to the final determination."); *Bestpak*, 716 F.3d 1370, 1381.

Along with apparently limited total AFA proxy choices, Commerce had limited data from which to conduct its corroboration. Commerce did, however, attempt to piece together a connection between Hubscher and the petition rate. As Commerce explained, during the period of review Hubscher sourced its subject merchandise from Yama. Yama, in turn, had a number of model-specific transactions during the prior proceeding (the investigation) that fell within the range of the petition rate. *Corroboration Memorandum* at 3. Because Hubscher purchased all of its subject merchandise from Yama, Commerce inferred that Hubscher's commercial reality reflected these higher-margin transactions. *See Decision Memorandum* at 9 n.26 ("[I]t is not unreasonable to infer that Hubschercorp could sell subject merchandise to those companies at the same dumping levels.").

Commerce further analyzed Yama's higher-margin transactions to determine if they were somehow unusual or unusable, and concluded, based on both the number of sales and the quantity of ribbons sold,

[3] The court notes that there may be other alternatives, for example, ones derived directly from Yama's transaction specific margins, such as an average of a subset of those margins, *see, e.g.*, *Qingdao Taifa Group Co. v. United States*, 35 CIT ___, ___, 780 F. Supp. 2d 1342, 1347 (2011) ("Commerce calculated the weighted-average margin of 145.90% using data from the sales of the three models with the highest margins, which accounted for 36% of Taifa's total sales by quantity."); *Lifestyle Enter., Inc. v. United States*, 37 CIT ___,___, 896 F. Supp. 2d 1297, 1301–02 (2013) ("Commerce decided to look at only the top 15% of these ranked Yihua Timber sales. Commerce then took the simple average of these weighted-average dumping margins for each product type to arrive at an 83.55% margin for Orient." (citations omitted)), but Hubscher did not propose any of these alternatives before Commerce. *See Corroboration Memorandum* at 2 ("Hubschercorp does not offer an alternative analysis for the Department to consider . . . .").

that "there is nothing about those transactions that calls into question their commercial nature or suggests that they were aberrational." *Decision Memorandum* at 10; *see also Corroboration Memorandum* at 3 (containing Commerce's analysis of Yama's proprietary data). The number of transactions and the quantity of ribbon in those transactions are not so miniscule as to be immaterial. *Cf., e.g.*, *Dongguan Sunrise Furniture Co. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1216, 1232–34 (2012) (remanding AFA rate to Commerce for further consideration because transactions purporting to corroborate rate were "miniscule").[4] Hubscher has also not argued that those transactions are unusual with respect to quantity or model. *Cf. iScholar, Inc. v. United States*, 35 CIT ___, ___, Slip Op. 11–04 at 5–7 (Jan. 13, 2011) (sustaining Commerce's use of a cooperating respondent's highest transaction-specific margin as the total AFA rate for uncooperative respondent where the transaction fell within the cooperating respondent's usual quantity and range of models sold).

What Commerce did here was analyze the limited available data and infer that Hubscher's commercial reality reflected Yama's higher-margin transactions. Hubscher has chosen not to refute that inference directly, instead arguing generally that Yama's higher-margin, model-specific data cannot be relevant or material given Yama's low calculated rate (0.00%). *See* Pl.'s Br. at 15–26; Pl.'s Reply at 1–9. It is, in effect, a common sense argument that the petition rate of 247.65% cannot be reliable or relevant for any other respondent because the only calculated margin from any segment of the proceeding is Yama's zero. Hubscher argues that even though several of Yama's model-specific transactions (for thousands of yards of ribbon) had margins near or greater than the petition rate, Yama sold millions of yards of ribbon, the vast majority of which had no or low margins, meaning the petition rate of 247.65% is aberrational at best, and punitive at worst. From this vantage point, Hubscher invites the court to declare the petition rate unlawful, confident that Yama's rate reflects everyone's commercial reality. *See* Pl.'s Reply at 3, 5.

The court though is reluctant to accept this invitation. As the *Bestpak* litigation revealed, Yama's rate does not reflect all respondents' commercial reality. After all, in *Bestpak*, an otherwise cooperative separate rate respondent argued all along that it was entitled to

[4] Specifically, Commerce noted that it analyzed [[ ]] Yama model specific transactions that were higher than the petition rate, and that those transactions amounted to [[ ]] percent by quantity of Yama's total yards of ribbon sold during the period of investigation. Commerce also noted that it "did not include in its corroboration analysis a number of Yama's model-specific margins which were *well above* the highest margin of [[ ]] percent (up to a margin of [[ ]] percent)." *Corroboration Memorandum* at 3 (emphasis in original).

Yama's zero, 716 F.3d at 1381, but ultimately voluntarily dismissed the litigation rather than be individually reviewed, conceding that the 123.83% separate rate covered its subject merchandise. *See* Form 8 Notice of Dismissal, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, No. 10–00295 (USCIT Nov. 13, 2013), ECF No. 76. The more pressing problem for Hubscher is its apparent unwillingness to directly address Commerce's inference about Hubscher's commercial reality reflecting Yama's higher-margin transactions. The court anticipated an immediate and vigorous challenge from Hubscher explaining why this inference must be unreasonable. Hubscher is best positioned to explain from the available data that the 247.34% rate simply cannot reasonably reflect *Hubscher's* commercial reality. Recall that Hubscher sourced all its merchandise from Yama. And yet, Hubscher never offers a specific explanation about its *own* "commercial reality" from the available information on the record. The court is left wondering why Hubscher did not do more when Commerce preliminarily assigned it the 247.34% rate corroborated with a small subset of Yama's data. Hubscher did not request that Commerce move the entire Yama data set onto the record for Hubscher to analyze against its *own* record data. That omission, in turn, has left a limited administrative record with limited data against which the court can analyze whether the AFA rate is a reasonably accurate estimate of Hubscher's actual rate albeit with some built-in increase intended as a deterrent against noncompliance. Hubscher, therefore, passed up an important opportunity to crunch Yama's data against its *own* data and create a narrative of its *own* commercial experience to discredit the petition rate as an unreasonable AFA choice. The court cannot understand why Hubscher let this opportunity pass. Is this because Hubscher already knew from analyzing its own cost data (not provided to Commerce) that its "actual" margin was higher than Hubscher could tolerate, perhaps even in the range of the petition rate, or higher, resulting in a litigation strategy to deflect attention away from Hubscher's *own* data, leaving only general arguments about Yama's data?

In the *Final Results*, *Decision Memorandum*, and *Corroboration Memorandum* Commerce has to the extent practicable offered a reasonable path for the court to conclude that the petition rate of 247.34% may very well be a reasonably accurate estimate of Hubscher's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance. In the court's view, Hubscher has left too much unexplained and has not met its burden to demonstrate the unreasonableness of Commerce's corroboration, *see* 28 U.S.C. § 2639(a)(1) ("[T]he decision of . . . the administering authority . . . is

presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.").

Although courts are generally suspicious of petition rates, *see, e.g.*, *de Cecco*, 216 F.3d at 1032–33; *Gallant Ocean*, 602 F.3d at 1324; *but see Universal Polybag Co. v. United States*, 32 CIT at 918–22, 577 F. Supp. 2d at 1298–1301 (sustaining highest rate in petition as total AFA), Congress has not foreclosed their use, *see* 19 U.S.C. § 1677e(b)(1); *de Cecco*, 216 F.3d at 1032 ("the statute explicitly allows for use of 'the petition' to determine relevant facts when a respondent does not cooperate."). Commerce's discretion to use a petition rate as total AFA narrows considerably when the record and "independent sources" of information present numerous calculated rates among various respondents, potentially better informing the "commercial reality" or "actual rate" of a non-cooperative party. That was the case in *Gallant Ocean*, where dozens of voluntary respondents had received calculated rates that in turn informed the Federal Circuit's analysis of the reasonableness of Commerce's use of a petition rate as AFA. *Gallant Ocean*, 602 F.3d at 1323–24. Here, in the investigation and first review, there were *no* voluntary respondents, and only one calculated rate for a mandatory respondent. Commerce noted this difference:

> In the instant case, on the other hand, the Department does not have multiple calculated rates for several respondents, nor were there multiple calculated rates in the original investigation. Furthermore, unlike in the administrative review underlying *Gallant Ocean*, the administrative record here does not contain any information to determine whether a previous respondent was "similarly-sized and similarly-situated" to Hubschercorp, and there are not "abundant resources" from which the Department could determine a different rate.

Decision Memorandum at 10. Hubscher continues to argue that "the facts of its situation mirror" those in *Gallant*. Pl.'s Br. at 17. But they do not. Here there was "no verified sales data on the record for the relevant period of review," as Hubscher "was the only respondent and it failed to cooperate. . . . Under such circumstances, Commerce's corroboration may be less than ideal because the uncooperative acts of the respondent has deprived Commerce of the very information that it needs to link an AFA rate to [respondent's] commercial reality." *Qingdao Taifa Group Co. v. United States*, 35 CIT ___, ___ 780 F. Supp. 2d 1342, 1349 (2011). Congress understood this type of information shortfall might occur when it included the proviso, "to the extent practicable," within Commerce's corroboration requirement.

See 19 U.S.C. § 1677e(c); H.R. Rep. No. 103–826, pt. 1 at 105 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 1994 WL 548728. ("The fact that corroboration may not be practicable in a given circumstance will not prevent the agencies from applying an adverse inference under subsection (b).").

Plaintiff does not argue or suggest that Commerce is to blame for the limited number of calculated rates (or the lack of verified transaction data from other respondents beside Yama). This is understandable. As has often been explained, Commerce does not have subpoena power and cannot compel participation in antidumping proceedings. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) ("Because Commerce lacks subpoena power, Commerce's ability to apply adverse facts is an important one."). Although Commerce may designate mandatory respondents, there is no guarantee those respondents will cooperate or participate. Here, over the course of the investigation and first review, one mandatory respondent cooperated, and two did not. And even Bestpak, one of the separate rate respondents that expended significant time, energy, and expense to litigate the general issue of the separate rate, ultimately chose not to be individually reviewed, voluntarily dismissing its separate rate litigation. *See* Form 8 Notice of Dismissal, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, No. 10–00295 (USCIT Nov. 13, 2013), ECF No. 76. There were eleven other separate rate respondents in the investigation. Another came forward in the instant review. None chose to be voluntarily reviewed. And if Bestpak is an indicator, even if Commerce had designated five mandatory respondents, each may not have cooperated, yielding five additional total AFA rates, five separate corroboration analyses and memoranda, all of which would not further enlighten us about the commercial reality of this particular industry. Commerce's inability to mandate participation in its proceedings means that interested parties bear the primary burden of developing the administrative record. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1325 (Fed. Cir. 2011). In *Gallant Ocean* there were many willing and cooperative voluntary respondents who assumed that burden. Here, there were none.

Since *Gallant Ocean* the Court of International Trade has in two cases suggested that when Commerce assigns a total AFA rate "in multiples of 100 percent, a bit more corroboration or record support is warranted." *Qingdao Taifa Group Co. v. United States*, 34 CIT ___, ___, 760 F. Supp. 2d 1379, 1386 n.7 (2010) (holding unreasonable Commerce's corroboration of total AFA rates of 383.60% and 227.73%), *appeal after third remand*, 780 F. Supp. 2d 1342 (sustaining Commerce's corroboration of lower revised total AFA rate of

145.90%); *Lifestyle Enterprise, Inc. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1286, 1298 (2011) (holding unreasonable Commerce's corroboration of 216.01% total AFA rate: "As the rate becomes larger and greatly exceeds the rates of cooperating respondents, Commerce must provide a clearer explanation for its choice and ample record support for its determination."), *after remand*, 36 CIT ___, 844 F. Supp. 2d 1283, 1288–91 & n.7 (2012) (holding unreasonable Commerce's further attempted corroboration of 216.01% rate: "[Petitioner] could not point to any evidence on or off the record supporting its assertion that any large manufacturing company in any sector was dumping at a rate over 200%. Indeed, the idea that a large profit-seeking corporation deemed separate from the country-wide entity would dump its merchandise at rates over 200% seems inconsistent with commercial reality, absent some evidence to the contrary."), *after second remand*, 36 CIT ___, 865 F. Supp. 2d 1284 (2012) (holding unreasonable Commerce's corroboration of lower revised total AFA rate of 130.81%), *after third remand*, 37 CIT ___, 896 F. Supp. 2d 1297 (2013) (sustaining Commerce's corroboration of lower revised total AFA rate of 83.55%).

Qingdao and *Lifestyles*, two cases that Hubscher does not cite or discuss, both involved proceedings with ample data and "abundant resources," *Gallant Ocean*, 602 F.3d at 1324, which in turn significantly limited Commerce's discretion to choose otherwise high AFA margins in multiples of 100 percent. Commerce's discretion here, however, was no so limited. Commerce designated Hubscher as a mandatory respondent. When Hubscher withdrew, Hubscher knew there were limited AFA proxies from which to choose, and limited data from which to practicably corroborate the rate. Hubscher sourced its entire inventory of subject merchandise from Yama, a fact Commerce utilized to practicably tie the petition rate to Hubscher through Yama's higher-margin transactions, which were near or above the petition rate. Perhaps, over time, as more calculated rates emerge, the highest rate in the petition may be discredited and proven an unreasonable AFA proxy. At this juncture, however, Commerce appears to have reasonably corroborated that rate, "to the extent practicable," and correspondingly, Hubscher has failed to persuade the court that Commerce's selection of that rate and accompanying corroboration is unreasonable.

Government Ownership or Control

Hubscher also argues that 247.65% is "punitive" because Commerce also used the petition rate as the China-wide rate. Pl.'s Reply

at 6–7; *see* Pl.'s Br. at 24–25. According to Hubscher this means that Commerce implicitly found that Hubscher was subject to government ownership or control even though it has no ties to the Government of China. *Id.* This is a straw man argument. Commerce never found, directly or implicitly, that Hubscher was subject to government control. What Commerce did was use the highest rate in the petition twice, first as the China-wide rate in the investigation, and second, as total AFA for Hubscher in the first administrative review. Commerce did not conflate the two, repeatedly referring to Hubscher's AFA margin as the "petition rate," *not* the China-wide rate. *Compare Decision Memorandum* at 4, 6, 9–11 (describing Hubscher's AFA rate as being the highest petition rate, not the China-wide rate), *with LTFV Final Results*, 75 Fed. Reg. at 41,810–11 (continuing preliminary application of the "PRC-wide rate" as AFA to an uncooperative mandatory respondent because of its failure to answer questionnaire regarding government ownership and control); *Lifestyle Enterprise, Inc. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1286, 1298 n.12 (2011) ("This claim lacks merit as Commerce did not assign the PRC-wide rate per se, but rather selected the same rate based on separate considerations."), *after remand*, 36 CIT ___, 844 F. Supp. 2d 1283 (2012), *after second remand*, 36 CIT ___, 865 F. Supp. 2d 1284 (2012), *after third remand*, 37 CIT ___, 896 F. Supp. 2d 1297 (2013); *cf. Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771–73, 387 F. Supp. 2d 1270, 128788 (2005), *after remand* 31 CIT 921, 491 F. Supp. 2d 1326 (2007), *after second remand*, 32 CIT 995 (2008) (remanding selection of country-wide rate as AFA because, among other reasons, Commerce unreasonably made an implicit finding of government ownership or control).

IV. Conclusion

For the foregoing reasons Hubscher's motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: April 15, 2014
New York, New York

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

Slip Op. 14–48

BP OIL SUPPLY COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 04–00321

[BP has failed to produce evidence to support its claim that Customs erred in

denying its protests following Customs' rejection of its substitution unused merchandise drawback claim. The court will enter judgment for the United States.]

Dated: April 29, 2014

John J. Galvin and *Jack D. Mlawski*, Galvin & Mlawski, for Plaintiff.

Marcella Powell and *Beverly A. Farrell*, International Trade Field Office, U.S. Department of Justice, of New York, NY, for Defendant.

OPINION

Barnett, Judge:

Plaintiff BP Oil Supply Company brings suit to challenge United States Bureau of Customs and Border Protection's ("Customs") denial of Protest Nos. 5301–03100333 and 5301–04–100162. In the protests, Plaintiff contested Customs' refusal to approve twenty-seven claims for substitution unused merchandise drawback on 41,980,559 barrels of crude petroleum pursuant to 19 U.S.C. § 1313(j)(2). The court held a trial on this matter on March 12, 2014. During trial, Plaintiff entered one exhibit into evidence and presented the testimony of Mr. Bobby Waid. Defendant United States offered no evidence, resting its case after Plaintiff presented its case-in-chief.[1] The parties completed post-trial briefing on March 20, 2014. Based on the findings of fact and conclusions of law below, pursuant to USCIT Rules 52(a) and 58, the court finds that Plaintiff did not produce evidence demonstrating that the imports in question (except for the three types conceded by Defendant) are commercially interchangeable with the substitute merchandise. Plaintiff also did not produce evidence demonstrating that the substitute merchandise is not used. The court will enter judgment for Defendant.

BACKGROUND

Between 1994 and 1996, Plaintiff imported a total of 41,980,559 barrels of crude petroleum oil of various types: "Cabinda" crude petroleum from Angola; "Zaire" crude petroleum from what is now the Democratic Republic of Congo; "Rabi" crude petroleum from Gabon; "Forcados," "Bonny Medium," "Bonny Light," and "Qua Iboe" crude petroleums from Nigeria; "Camo Limon" crude petroleum from Columbia; and "Guafitas," "Mesa," and "Mesa 30" crude petroleums from Venezuela (the "imported merchandise"). Customs liquidated the entries in question under the *eo nomine* provision for "Petroleum oils, crude, Testing 25 degrees API[2] or more" in subheading

[1] After Plaintiff rested its case, Defendant moved for a directed verdict, which the court denied. (Trial Tr. 1:55:40-:50, Mar. 12, 2014.)

[2] API gravity is discussed further below.

2709.00.20, HTSUS. (Compl. ¶¶ 5, 13; Ans. ¶¶ 5, 13; Uncontested Facts ¶¶ 18,[3] 20; Admin. R.[4]) During the following two years, Plaintiff exported identical quantities of Alaskan North Slope ("ANS") crude petroleum (the "substitute merchandise"). (Compl. ¶ 6; Ans. ¶ 6; Admin R.) In 1998 and 1999, Plaintiff filed twenty-seven substitution unused merchandise drawback requests with Customs pursuant to 19 U.S.C. § 1313(j)(2), seeking drawback on the duties, environmental taxes, and merchandise processing fees[5] that it had paid on the imported merchandise. (*See generally* Compl.; Pl.'s Ex. 1.) Customs denied drawback on each entry, citing Plaintiff's failure to establish that the substitute merchandise was commercially interchangeable with the imported merchandise. (*See* Compl. ¶¶ 1–2; Ans. ¶ 1; Summons, ECF No. 1.) On June 24, 2003 and April 8, 2004, respectively, Plaintiff filed Protests 5301–03100333 and 5301–04–100162 to challenge these decisions. (*See* Compl. ¶¶ 1–2; Ans. ¶ 1; Summons.) Customs denied the protests on January 28 and May 10, 2004, respectively. (*See* Compl. ¶¶ 1–2; Ans. ¶ 1; Summons.) Plaintiff appealed to this Court on July 19, 2004. (*See* Summons.)

In November 2010, Plaintiff moved for summary judgment, (ECF No. 51), and Defendant cross-moved for summary judgment in March 2011, (ECF No. 62). On September 16, 2011, the court denied both motions. *BP Oil Supply Co. v. United States*, Slip Op. 11–116, 2011 WL 4343853 (CIT Sept. 16, 2011). In its motion, Plaintiff argued that API gravity category alone sufficed as a matter of law to demonstrate commercial interchangeability between different crude oil types. The court found that Plaintiff presented no "would be admissible" evidence to demonstrate that API classification alone is indisputably sufficient for commercial interchangeability.[6] *Id.* at *4. Similarly, the court found that Plaintiff had not addressed, *inter alia*, "the significance of the apparently undisputed fact that ANS cannot satisfy the New York Mercantile Exchange . . . light sweet crude contract (unlike

[3] The parties had assigned non-sequential, sometimes repeating numbers to each paragraph of uncontested facts in Schedule C of the Pre-Trial Order. For ease of reference and to minimize risk of confusion, the court has assigned consecutive numbers to each paragraph found therein. (*See* ECF No. 156 at 8–10.)

[4] The Administrative Record refers to the record transmitted to the Court by Customs pursuant to 28 U.S.C. § 2635(a) and USCIT Rule 73.1. The Court's treatment of this record is discussed further below.

[5] Plaintiff subsequently abandoned its claim for merchandise processing fee drawback. (Pl.'s Resp. to Def.'s 4th Mot. *in Limine*, ECF No. 149.)

[6] The court notes that at the summary judgment stage, BP relied on a number of exhibits containing evidence that "would be admissible" at trial (USCIT Rule 56(c)(1)); however, at trial, BP did not seek to introduce into evidence any exhibits other than excerpts from its drawback claims.

Bonny Light and Qua Iboe crude), or the fact that ANS apparently cannot be commingled with sweet crude at the Strategic Petroleum Reserve." *Id.* at *3. The court also underscored that some of Plaintiff's drawback documents contained apparent discrepancies and that the meaning of others was simply unclear.[7] *Id.* at *3 n.5, 6. The court concluded that ferreting through these issues would require findings of fact at trial. *Id.* In denying the parties' motions, the court confirmed that Plaintiff would have to demonstrate at trial that the imported and substitute merchandise were commercially interchangeable and that the substitute merchandise was not used and in Plaintiff's possession prior to export. *See id.* at *4, 6.

STANDARD OF REVIEW

Customs decisions enjoy a presumption of correctness, and the burden of proving otherwise lies with the challenging party. 28 U.S.C. § 2639(a); *accord Pillsbury Co. v. United States*, 27 CIT 1628, 1631, 293 F. Supp. 2d 1351, 1354 (2003). "The presumption is a procedural device that allocates the burden of producing evidence . . . . , placing the burden on [the plaintiff] to show that there was insufficient evidence for the factual components of [Customs'] decision." *Chrysler Corp. v. United States*, 592 F.3d 1330, 1337 (Fed. Cir. 2010) (citations omitted). The presumption attaches only to the factual bases of Customs' decisions; the Court reviews the legal aspects of challenged decisions *de novo*. *Pillsbury Co.*, 27 CIT at 1631, 293 F. Supp. 2d at 1354 (citing *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997)).

LEGAL FRAMEWORK

Drawback is a "refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation." 19 C.F.R. § 191.2(i). Drawback is a statutory privilege – not a right – and it is due "*only* when enumerated conditions are met." *Guess?, Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (emphasis added). "Because the drawback statute is a grant of privilege, the construction most advantageous to the interests of the government must be adopted." *Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 793 (Fed. Cir. 2002) (describing *Swan & Finch Co. v. United States*, 190 U.S. 143, 146–47 (1903)).

Substitution unused merchandise drawback allows a party to recoup from Customs ninety-nine percent of any duty, tax, or fee imposed on imported merchandise if the party establishes that:

[7] At trial, Plaintiff did not address these questions identified by the court in 2011.

> (1) the substitute merchandise (for export) is commercially interchangeable with the imported merchandise, (2) the substitute merchandise is either exported or destroyed under supervision, and (3) before such exportation or destruction (i) the substitute merchandise was not used within the United States and (ii) was in the possession of the party claiming drawback.

BP Oil Supply Co., 2011 WL 4343853, at *1 (citing 19 U.S.C. § 1313(j)(2)).

Whether merchandise is "commercially interchangeable" is "an objective, market based consideration of the primary purpose of the goods in question." *Pillsbury Co.*, 27 CIT at 1632, 293 F. Supp. 2d at 1355 (quoting *Texport Oil Co. v. United States*, 185 F.3d 1291, 1295 (Fed. Cir. 1999)). The court must objectively determine "from the perspective of a hypothetical reasonable competitor" if a reasonable competitor would accept either the imported merchandise or substitute merchandise "for its primary commercial purpose." *Id.* (quoting *Texport Oil Co.*, 185 F.3d at 1295). If the competition would accept either, the merchandise is commercially interchangeable. *Id.* In performing this analysis, the court may look to, *inter alia*, governmental and recognized industrial standards, part numbers, tariff classifications, and the relative values of the merchandise. *Texport Oil Co.*, 185 F.3d at 1295; S. Rep. No. 103–189, at 83 (1993); H.R. Rep. No. 103–361, at 131 (1993); 19 C.F.R. § 191.32(c). It may also examine negotiations between commercial actors, the description of the goods on bills of sale or invoices, as well as other relevant factual evidence. *Texport Oil Co.*, 185 F.3d at 1295; *Pillsbury Co.*, 27 CIT at 1633, 293 F. Supp. 2d at 1355–56.

THE EVIDENCE BEFORE THE COURT

As noted above, at trial, Plaintiff introduced only one of the exhibits identified in the Pre-Trial Order, (ECF No. 156), and only one of the two identified witnesses. The exhibit introduced by Plaintiff was comprised of excerpts from duty drawback claims made by Plaintiff and denied by Customs. In some cases, the excerpts did not include the signature page of the drawback claim, in other cases it was clear that the claim had been amended but the amendments were not included in the exhibit, and, in all cases, the Customs entry form (Form 7501) identifying the specific type of oil entered was not included. These additional pages and forms were, however, contained in the administrative record, transmitted to the Court by Customs pursuant to 28 U.S.C. § 2635(a) and USCIT Rule 73.1. Neither Plaintiff nor the Defendant moved the administrative record into evidence

and, with the exception of the excerpts contained in Plaintiff's Exhibit 1, the truth of the assertions contained in the documents comprising the administrative record was not tested at trial.

Section 2635(a) of 28 U.S.C. and USCIT Rule 73.1 require Customs to provide the documents comprising the record of the Customs protest to the Court "as part of the official record." At the same time, 28 U.S.C. § 2640(a)(1) provides that the Court "shall make its determinations upon the basis of the record made before the court" in cases contesting the denial of a protest. Consequently, in prior cases, the Court has found that it "must make its determination on the basis of the record before it, comprising the evidence introduced at trial, rather than that developed by Customs." *Am. Sporting Goods v. United States*, 27 CIT 450, 457 n.17, 259 F. Supp. 2d 1302, 1308 n.17 (2003) (citations omitted); *accord Sol Kahaner & Bro. v. United States*, 65 Cust. Ct. 512, 517–18 (1970); *Steelmasters, Inc. v. United States*, 31 Cust. Ct. 234, 235 (1953). *But see M. Pressner & Co. v. United States*, 26 C.C.P.A. 186, 193 (1938); *N.Y. Merch. Co. v. United States*, 44 Cust. Ct. 144, 148 (1960).

Prior Court decisions on whether the administrative record transmitted to the Court by Customs and made part of the official record must also be considered to have been admitted into evidence are not entirely clear. Many Customs cases have found that the administrative record "may not be considered by the court as establishing the truth of the recitals or statements contained therein" during trial if it has not been moved into evidence. *Alltransp. Inc. v. United States*, 60 Cust. Ct. 55, 58, 278 F. Supp. 746, 749 (1968) (citation omitted); *accord Sol Kahaner & Bro.*, 65 Cust. Ct. at 517–18; *Swift & Co. v. United States*, 33 Cust. Ct. 212, 217 (1954); *Steelmasters, Inc.*, 31 Cust. Ct. at 235; *see also S. S. Kresge Co. v. United States*, 340 F. Supp. 1404, 1406 (Cust. Ct. 1972). Conversely, other cases have held that parties in a Customs protest case do not need to move administrative record documents into evidence during trial, because "having been transmitted to the court with the protest, [they] w[ere] already a part of the record before the court." *N.Y. Merch. Co.*, 44 Cust. Ct. at 148; *accord M. Pressner & Co.*, 26 C.C.P.A. at 193.

In this case, the Court acknowledges the contents of the administrative record and admits those documents into evidence for the purpose of establishing the claims made by Plaintiff for duty drawback. However, because neither party moved the documents into evidence, and the truth of the contents of those documents was not tested at trial, the court does not take the documents as demonstra-

tive of the truth of the matters asserted within them. *See Alltransp. Inc.*, 60 Cust. Ct. at 58, 278 F. Supp. at 749; 2 Law & Practice of U.S. Regs. of Int'l Trade § 23:316 (2014).

To the extent that Plaintiff has suggested that the Court should take judicial notice of the contents of the administrative record, judicial notice of an adjudicative fact is appropriate when the fact in question is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Here, the administrative record supports Plaintiff's claims to the extent that it documents Plaintiff's request for duty drawback with regard to certain identified entries of crude petroleum and exports of ANS crude oil. In the absence of any supporting testimony, as discussed below, the Court declines to give the documents comprising the administrative record any further weight with regard to the issues in litigation: the commercial interchangeability of the various types of imported merchandise; Plaintiff's possession of the exported substitute merchandise; and the non-use thereof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

A. Undisputed Facts

1. Between 1994 and 1996, Plaintiff imported a total of 41,980,559 barrels of crude petroleum oil of various types: "Cabinda" crude petroleum from Angola; "Zaire" crude petroleum from what is now the Democratic Republic of Congo; "Rabi" crude petroleum from Gabon; "Forcados," "Bonny Medium," "Bonny Light," and "Qua Iboe" crude petroleums from Nigeria; "Camo Limon" crude petroleum from Columbia; and "Guafitas," "Mesa," and "Mesa 30" crude petroleums from Venezuela (collectively, the "imported merchandise"). (Compl. ¶ 5; Ans. ¶ 13; Uncontested Facts ¶ 18; Admin. R.)
2. Customs liquidated the entries in question under the *eo nomine* provision for "Petroleum oils, crude, Testing 25 degrees API or more" in subheading 2709.00.20, HTSUS. (Compl. ¶ 5; Ans. ¶ 13; Uncontested Facts ¶ 18; Admin. R.)
3. Between 1997 and 1999, Plaintiff exported identical quantities of ANS crude petroleum. (Compl. ¶ 6; Ans. ¶ 6; Admin. R.)
4. In 1998 and 1999, Plaintiff filed twenty-seven substitution unused merchandise drawback requests with Customs pursuant to 19 U.S.C. § 1313(j)(2), seeking drawback on the duties, environmental taxes, and merchandise processing fees that it

had paid on the imported merchandise. (*See generally* Compl.; Pl.'s Ex. 1.) The drawback requests related to the following entry numbers: AA6–0303681–2, AA6–0303685–3, AA60303770–3, AA6–0303771–1, AA6–0303772–9, AA6–0303773–7, AA6–0303906–3, AA60303907–1, AA6–0303908–9, AA6–0303910–5, AA6–0304335–4, AA6–0304336–2, AA60304382–6, AA6–0304401–4, AA6–0304559–9, AA6–0304560–7 AA6–0304561–5, AA60304572–2, AA6–0304573–0, AA6–0304574–8, AA6–0304620–9, AA6–0304728–0, AA60304728–0, AA6–0304967–4, AA6–0307197–5, AA6–0307211–4, AA6–0303909–7, and AA6–0304548–2. (Pl.'s Ex. 1.)

5. Customs denied drawback on every entry, citing Plaintiff's failure to establish that ANS crude oil was commercially interchangeable with the imported merchandise. (*See* Compl. ¶¶ 1–2; Ans. ¶ 1; Summons.)
6. Plaintiff challenged these decisions and filed Protests 5301–03–100333 and 5301–04100162 on June 24, 2003 and April 8, 2004, respectively. (*See* Compl. ¶¶ 1–2; Ans. ¶ 1; Summons.) Customs denied the protests on January 28 and May 5, 2004, respectively. (*See* Compl. ¶¶ 1–2; Ans. ¶ 1; Summons.)
7. Plaintiff appealed Customs' denial of its protests to this Court on July 19, 2004. (*See* Summons.)
8. Plaintiff argues that Customs erred in its decisions for the following reasons: (1) the substitute merchandise was commercially interchangeable with the imported merchandise because both were API gravity Class III crude oils; (2) the substitute merchandise was in Plaintiff's possession prior to export; and (3) the substitute merchandise was not used prior to export. (Pl.'s Pretrial Summ. Mem. 1, ECF No. 157.)
9. Crude Oils are classified by their density and sulfur content. Less dense (or "lighter") crudes generally have a higher share of light hydrocarbons – higher value products – that can be recovered with simple distillation. Denser (or "heavier") crude oils produce a greater share of lower-valued products with simple distillation and require additional processing to produce the desired range of products. Some crude oils also have higher sulfur content, an undesirable characteristic with respect to processing and product quality. (Uncontested Facts ¶ 21.)
10. In addition to density and sulfur content, other characteristics – for example, the presence of heavy metals and the crude oil's molecular structure – may affect a crude oil's processing costs and suitability for specific uses. (Uncontested Facts ¶ 21.)

11. "API gravity" expresses the gravity or density of liquid petroleum products. Crude Oil is customarily divided into four classes based upon API gravity. (Uncontested Facts ¶ 2.)
12. Class III crude petroleum has an API gravity between 25.0 and 44.9. (Compl. ¶ 8; Ans. ¶ 8; Uncontested Facts ¶ 19.)
13. The imported merchandise and substitute merchandise fell into the Class III category based on API gravity. (Uncontested Facts ¶ 18; Compl. ¶¶ 5–6; Ans. ¶¶ 5–6.)
14. In commercial transactions, parties refer to crude oils by name, with the understanding that different crude oils have different characteristics. (Uncontested Facts ¶¶ 12, 14.)
15. Refineries in the United States rarely run on a single crude oil type. (Uncontested Facts ¶ 23.) Many choose a mix of crude oils to maximize production of desirable products in accordance with the refinery's limitations. (Uncontested Facts ¶ 23.) Some refineries cannot run ANS crude oil. (Uncontested Facts ¶ 13.)
16. Defendant conceded, based only upon information supplied by its own experts, that Plaintiff's imports of "Cano Limon," "Mesa," and "Mesa 30" crude petroleums are commercially interchangeable with the substitute merchandise. *BP Oil Supply Co.*, 2011 WL 4343853, at *3 (citing Def.'s Mot. to Dismiss & Cross Mot. for Summ. J. 2 n.1).
17. The Trans Alaskan Pipeline System ("TAPS") transports crude oil produced in Alaska's North Slope to Valdez, Alaska. (Uncontested Facts ¶¶ 3, 9.)
18. BP Exploration (Alaska) extracted the ANS crude oil in question, delivered it to pump station 1 of TAPS, at which point possession of the crude oil transferred to BP Pipelines. (Uncontested Facts ¶ 3.)
19. One crude oil stream from the North Slope can have a remarkably higher quality than another stream. (Uncontested Facts ¶ 10; *accord* Trial Tr. 1:37:20-:52, Mar. 12, 2014.)
20. "Crude oil producers . . . have 'a system called a quality bank[,]' which is 'a way to commingle crude streams[,]' and 'the owners of the crude streams agree between themselves what . . . they're going to value the crude stream as." (Uncontested Facts ¶ 6 (citation and quotation marks omitted).) "The Quality Bank is a system to value different crude streams differently based on their specific gravity or their value." (Uncontested Facts ¶ 7 (citation and quotation marks omitted).) "The Quality Bank allows one operator's crude to be valued higher than other operator's [sic] crude." (Uncontested Facts ¶ 8 (citation and quotation marks omitted).)

21. The Quality Bank allows producers to take these physical quality differences and their corresponding differences in monetary value into account. (Uncontested Facts ¶ 8; *accord* Trial Tr. 43:50–44:06, 1:37:20–1:39:40.)
22. Crude oil is tested before entering TAPS and again at Valdez to determine the Quality Bank monetary adjustment that each producer receives for differences in the quality and value between their respective inputs and the commingled output of the pipeline. (Uncontested Facts ¶ 9; *accord* Trial Tr. 43:50–44:06, 1:37:20–1:39:40.)
23. Refineries along TAPS withdraw crude petroleum from the pipeline, process certain fractions of the oil, and return the residual back into TAPS. (Uncontested Facts ¶ 4.)
24. The residual returned to the pipeline is different than the crude petroleum withdrawn from the pipeline. (Uncontested Facts ¶ 5.)
25. A "bill of lading" is a commercially available document issued by a carrier to a shipper, furnishing written evidence regarding receipt of goods, the condition on which transportation of the goods is made, and the engagement to deliver the goods at a prescribed port of destination to the lawful holder of the bill of lading. (Undisputed Facts ¶ 17.)

B. Findings of Fact Established at Trial

26. The substitute merchandise falls within subheading 2709.00.20, HTSUS. (*See* Admin. R.)
27. At trial, the court heard the testimony of Mr. Bobby Waid, a licensed customs broker specializing in duty drawback and Chief Executive Officer of Charter Brokerage, LLC, a licensed customhouse brokerage specializing in imports and exports of bulk commodities, principally petroleum, petroleum products, and other petroleum derivatives. (Trial Tr. 19:45–21:45.) Mr. Waid provided credible testimony about how the drawback documents at issue were completed and the operation of TAPS. He received no compensation for his testimony. (Trial Tr. 48:10-:15.)
28. Mr. Waid's office prepared and filed the drawback claims at bar, and he personally reviewed their preparation and submission. (Trial Tr. 26:00-:30, 29:00-:06, 48:25-:43.)
29. The drawback documents in Plaintiff's Exhibit 1 do not contain the price or values of the imported merchandise or substitute merchandise, their API gravity, sulfur content, distillation properties, or other comprehensive assay information. (Trial Tr.

53:09-:14, 53:38-:43, 53:45–54:33, 57:28-:59, 1:00:45–1:31:05, 1:32:20–1:33:25.) However, API gravity, sulfur, sediment, and water content information from an inspection analysis were included in the drawback applications for all imported merchandise and substitute merchandise. (Trial Tr. 1:48:33–1:50:26; *see* Admin. R.) The crude oil prices are not listed in the Exhibit 1 documents, because Customs assesses duty on crude oil by the barrel, not at an *ad valorem* rate. (Trial Tr. 1:45:40–1:46:11.)

30. The import designation sheets and export summary procedures for each drawback claim do not directly address commercial interchangeability. (Trial Tr. 1:49:45-:52; *see* Pl.'s Ex. 1.)
31. BP Exploration (Alaska) performs a comprehensive assay at an oil field when the field comes online and, thereafter, every eighteen to twenty-four months. (Trial Tr. 38:30:55.)
32. Comprehensive assays reveal, among other factors, the distillation, gas chromatography, metal content, viscosity, API gravity, sediment, sulfur, and water content of the crude oil. (Trial Tr. 39:10–40:30.)
33. Comprehensive assays are not performed on individual crude oil shipments; rather, shipments receive a simpler analysis, which reveals only the API gravity, sediment, sulfur and water content of the crude oil. (Trial Tr. 40:10-:30, 1:48:33–1:50:26.)
34. Nothing in the record drawback documents reveals how much Plaintiff received or had to pay into the Quality Bank when the substitute merchandise was received after it came out of TAPS. (Trial Tr. 1:39:45-:56; *see* Admin. R.)
35. The refineries along TAPS remove four to six percent of the pipeline's crude oil, run it through a distillation tower, take off a distillation cut of diesel and jet fuel, and then reinject the residual materials back into TAPS. (Trial Tr. 35:00–37:55, 1:34:55–1:36:16.)
36. Plaintiff's drawback documents do not contain any document showing the ownership of the substitute merchandise being transferred to Plaintiff at Valdez. (Trial Tr. 47:5548:08, 55:34-:50, 1:00:45–1:31:05; *see* Admin. R.)
37. Each drawback application at issue contains bills of lading documenting the exportation of ANS by Plaintiff, which is listed as the shipper, but not the exporter. (Trial Tr. 47:00:06, 55:34-:50, 1:00:45–1:31:05; *see* Admin R.)
38. At Valdez, crude oil from TAPS is discharged from tanks into vessels, via a vessel's flange, for transport. (Trial Tr. 46:00-:17.)

39. If any of these Findings of Fact are more properly denominated Conclusions of Law, they shall be deemed to be so.

II. Conclusions of Law

40. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).
41. Plaintiff timely filed the protests at bar and commenced this action pursuant to 19 U.S.C. § 1514 and 28 U.S.C. § 2636(a), respectively.
42. Defendant has conceded that "Cano Limon," "Mesa," and "Mesa 30" crude oils are commercially interchangeable with the substitute merchandise; however, Plaintiff has not demonstrated that the remaining types of imported merchandise are commercially interchangeable with the substitute merchandise.
43. With regard to the commercial interchangeability criteria articulated in *Texport Oil*, there are no relevant differences between the imported merchandise and the substitute merchandise with regard to part numbers and tariff classifications.
44. With regard to government and recognized industrial standards, all of the types of imported merchandise are designated as Class III based on API gravity, an industry standard. Plaintiff has not established that there are any distinct, relevant government standards.
45. The record demonstrates that there are clear differences in recognized industrial standards between many of the types of imported merchandise and the substitute merchandise. The crude petroleums at issue are referred to by various names based on their geographic source and quality characteristics. Moreover, it appears from the evidence that even crude petroleum from the same field must be assayed to a limited degree on a semi-regular basis, suggesting that even crude petroleum from the same location varies in quality over time. Plaintiff presented no evidence that these differences are not commercially significant "from the perspective of a hypothetical reasonable competitor." *Texport Oil*, 185 F. 3d at 1295.
46. Differences between the crude petroleums in question, such as sediment, water, heavy metal content, and sulfur (sweet versus sour crudes), also affect a crude petroleum's processing costs and suitability for specific uses. Plaintiff has presented no evidence that these differences are not commercially significant "from the perspective of a hypothetical reasonable competitor." *Id.*

47. Plaintiff agrees that (1) domestic refineries often operate on a mixture of crude oils to maximize production of desirable products in light of a refinery's limitations and (2) some refineries cannot process ANS crude oil. Plaintiff has not demonstrated that the imported merchandise and substitute merchandise would be accepted as substitutes for each other by refineries, with their various operating constraints, or any other hypothetical or actual commercial actor.
48. The sole example of market-based crude oil transactions between industry competitors that Plaintiff placed into evidence undermines its case. The Alaskan North Slope crude petroleum placed into TAPS is of remarkably differing qualities and values. Although it is all known by the same recognized industrial standard of "Alaskan North Slope," the inputs into the pipeline are so different that the various producers have established a Quality Bank to financially reconcile the differences in value between producers' inputs into TAPS and the pipeline's commingled output.
49. Thus, the evidence demonstrates that actual market competitors which have extracted crude petroleum known by the same industrial standard from the same region do not treat their crude petroleum as commercially interchangeable absent monetary adjustment. Consequently, the court finds that Plaintiff has not met its evidentiary burden to establish that reasonable competitors would accept ANS crude petroleum as commercially interchangeable with the imported merchandise, various crude petroleums extracted from regions across Western Africa and South America. *See Guess?, Inc.*, 944 F.2d at 858 (noting that exemption from duty is a statutory privilege due only when enumerated conditions are met).
50. Plaintiff also has failed to provide evidence demonstrating that the substitute merchandise qualified as "not used" prior to exportation.
51. When Alaskan North Slope crude petroleum passes through TAPS on its way to Valdez, refineries along the route remove between four and six percent of the oil, refine it in a distillation tower to extract a cut of diesel and jet fuel, and return the residual product into the pipeline.
52. This residual product is commingled in the TAPS stream and is present in all output from the pipeline. Thus, evidence indicates that a portion of the substitute merchandise has been used to manufacture diesel and jet fuel prior to the output from the pipeline being exported as substitute merchandise.

53. Plaintiff offers no evidence to support its position that the manufacturing of petroleum derivatives, with distinct names, characteristics, and uses, from a portion of the substitute merchandise does not constitute "use" of the substitute merchandise.
54. The court, therefore, finds that Plaintiff failed to meet its burden of demonstrating that the substitute merchandise was not used prior to export. *See id.*; *cf.* 19 U.S.C. § 1313(j)(3) (listing "operation[s] or combination[s] of operations . . . *not amounting to manufacture or production*," which do not qualify as "use" for substitution unused merchandise drawback purposes) (emphasis added); 19 C.F.R. § 191.2(q) (defining "manufacture and production" as "[a] process . . . by which merchandise is made into a new and different article having a distinctive 'name, character or use'"); 2 Albert H. Kritzer et al., International Contract Manual § 43:21 (2013) (stating that "simple processes that do not amount to manufacturing or production, such as testing, cleaning, repacking, and reworking, do not constitute 'use'").
55. Plaintiff has not demonstrated that (1) the imported merchandise (except for "Cano Limon," "Mesa," and "Mesa 30") and substitute merchandise are commercially interchangeable, and that (2) the substitute merchandise was not used prior to exportation. For these reasons, Customs properly denied Plaintiff's request for drawback on its duties and environmental taxes.[8] *See* 19 U.S.C. § 1313(j)(2).
56. If any of these Conclusions of Law are more properly denominated Findings of Fact, they shall be deemed to be so.

CONCLUSION

For the reasons stated above, the court finds that Plaintiff has failed to demonstrate that the imported merchandise, except for "Cano Limon," "Mesa," and "Mesa 30" crude oils, is commercially interchangeable with the substitute merchandise. Plaintiff also has failed to show that the substitute merchandise was not used prior to export. Consequently, none of Plaintiff's twenty-seven claims is eligible for substitution unused merchandise drawback under 19 U.S.C. § 1313(j)(2). The court will enter judgment for Defendant.

[8] Because Plaintiff's failure to show commercial interchangeability and non-use is dispositive, the court need not determine whether Plaintiff possessed the substitute merchandise prior to export.

Dated: April 29, 2014
New York, New York

/s/ *Mark A. Barnett*
MARK A. BARNETT
JUDGE

Slip Op. 14–49

WHEATLAND TUBE COMPANY, Plaintiff, and UNITED STATES STEEL CORPORATION Intervenor-Plaintiff, v. UNITED STATES, Defendant, and SEAH STEEL CORP., AND HYUNDAI HYSCO, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00189

JUDGMENT

Musgrave, Senior Judge:

This court's slip opinion 13–146, 37 CIT ___ (2013), having granted the plaintiff's motion for judgment on the agency record compiled *sub nom. Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 77 Fed. Reg. 34344 (June 11, 2012) (final results of antidumping duty administrative review), to the extent of remand to the International Trade Administration, U.S. Department of Commerce ("Commerce") for reconsideration of Commerce's analysis of average transfer price, paid by the defendant-intervenor SeAH Steel Corporation ("SeAH") to its affiliated supplier Pohang Iron & Steel Co. Ltd. ("POSCO") for purchases of hot-rolled coil ("HRC"), for the purpose of calculating the cost of production for subject merchandise pursuant to 19 U.S.C. §1677b(f)(3) and 19 CFR §351.407(b), and Commerce having reopened the record, obtaining information on SeAH's purchases of HRC on a grade-specific basis, analyzing said information together with prior submissions pertinent thereto, determining that the HRC grade-specific transfer price paid by SeAH was above the market price paid for identical grade of HRC as well as POSCO's cost of production for HRC and that no major input adjustment is necessary, resulting in no change to SeAH's weighted-average margin; and, after receipt of no further comments thereon from interested parties following release of those results of redetermination to the parties, having filed with the court said redetermination dated March 6, 2014; and none of the parties having since taken issue with those results; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED, and DECREED that Commerce's Final Results of Redetermination Pursuant to Court Remand filed with the court on March 7, 2014 be, and they hereby are, sustained.
Dated: April 29, 2014
New York, New York

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

Slip Op. 14–50

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., and CLIFF INTERNATIONAL, LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00078

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

Dated: April 29, 2014

Daniel B. Pickard and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, D.C., for the plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for the defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel on the brief was *Nathaniel Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Jeffrey S. Neeley, *Michael S. Holton*, and *Stephen W. Brophy*, Barnes, Richardson & Colburn, of Washington, D.C., for the defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

This opinion addresses two challenges of the plaintiff Diamond Sawblades Manufacturers' Coalition to *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results of 2009–2010 antidumping duty administrative review), *see* accompanying issues and decision memorandum ("I&D Memo") dated February 8, 2013, IAPDoc[1] 353, as administered by the defendant International Trade Administration of the Depart-

[1] The designation "IA" herein preceding the court's conventional citations to the public or confidential administrative record documents (PDoc or CDoc) are to those documents filed with IA Access, the Import Administration Antidumping and Countervailing Duty Centralized Electronic Service System. Reference to record documents without IA designation are to that part of the administrative record compiled prior to implementation of that system.

ment of Commerce ("Commerce"). Both challenges concern the "ATM entity", a group of affiliated companies again "collapsed" for purposes of this review.[2]

The plaintiff's first claim is that the ATM entity should not have been determined, consistent with Import Administration Policy Bulletin 05.1 (Apr. 5, 2005) and administrative practice, to qualify for a separate antidumping duty rate apart from the "PRC-wide" nonmarket economy entity. The defendant requests voluntary remand to reconsider its determination in light of *Advanced Technology & Materials Co. v. United States*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013), *appeal docketed*, No. 14–1154 (Fed. Cir. Dec. 9, 2013), which it argues addresses the same issues contested here. The defendant-intervenors urge that the determination should be sustained as is, but Commerce "may request a remand (without confessing error) in order to reconsider its previous position", and when the "concern is substantial and legitimate, a remand is usually appropriate." *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Commerce's request appears substantial and legitimate, and consistent with the objective of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding", USCIT R. 1, it must be permitted.

The plaintiff's second claim concerns Commerce's decision not to collapse the state-owned enterprise "China Iron & Steel Research Institute" as apparently re-named ("CISRI") within the ATM entity. Commerce noted that CISRI itself is not a producer of subject merchandise, *see* 19 C.F.R. §351.401(f), and observed that it discerned no information on the record showing that CISRI manipulated the prices or export decisions with regards to the ATM entity's sales of subject merchandise, or that CISRI possesses significant potential to manipulate export or pricing decisions of the ATM entity, or that CISRI's employees directed or could have directed the ATM entity's employees to make certain pricing and/or export decisions. In the absence of such information, Commerce stated, it could not find that significant potential for manipulation of price exists. I&D Memo at 16.

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[2] More precisely, pursuant to 19 C.F.R. §351.401(f), *see also* 19 U.S.C. §1677(33) & 19 C.F.R. § 351.102(b)(3), Commerce will collapse two or more affiliated producers into a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and Commerce concludes there is a significant potential for the manipulation of price or production. For purposes of the review at bar, Commerce collapsed into the "ATM entity" a number of affiliated respondents including the defendant-intervenors Beijing Gang Yan Diamond Products Co. ("BGY"), its direct parent, Advanced Technology & Materials Co., Ltd., and BGY's affiliate Cliff (Tianjin) International Ltd. (as apparently then-named). *See generally* Memorandum re: *Diamond Sawblades and Parts Thereof from the People's Republic of China: Determination to Include Additional Companies in the ATM Single Entity* (Nov. 30, 2011), IACDoc 103, IAPDoc 118.

The plaintiff argues that since Commerce's response brief at bar does not offer a defense of this collapsing issue, Commerce's rationale for not collapsing CISRI with the ATM entity is "unclear" and that the matter should therefore be remanded for further explanation and consideration. The plaintiff points out that despite the statement in the I&D Memo at page 16 that Commerce's practice is only to collapse companies with production assets, Commerce has collapsed non-producing companies in the past where the facts of record show that such companies have the ability to manipulate pricing and production among producers/exporters of subject merchandise - *see Honey from Argentina*, 69 Fed. Reg. 30283 (May 27, 2004), and *Certain Warmwater Shrimp From Brazil*, 69 Fed. Reg. 76910 (Dec. 23, 2004) -- wherein Commerce collapsed affiliated resellers with one another and exporters with related processors -- and Commerce's authority to do so has been affirmed. *See*, *e.g.*, *Hontex Enterprises, Inc. v. United States*, 28 CIT 1000, 342 F. Supp. 2d 1225 (2004). These instances, the plaintiff argues, demonstrate that Commerce interprets its regulation flexibly, with the goal of ensuring that the relationships between parties, regardless of how their production assets are distributed, cannot be manipulated to the detriment of trade orders. Further, the plaintiffs argue, Commerce has in fact done so in this very instance, insofar as the collapsed ATM entity includes an entity not found to have either exported subject merchandise or had facilities capable of producing subject merchandise. Pl's Br. at 22–23. The plaintiff argues Commerce should collapse CISRI with the ATM entity as well, since, contrary to the administrative finding of a lack of evidence to suggest that CISRI possesses a significant potential to manipulate pricing and export decisions among ATM entity members, there is "clearly such information in the record" according to the plaintiff, as restated in its brief.

The defendant-intervenors oppose remand of this issue, arguing that CISRI is not an exporter or producer and that the cases the plaintiff relies upon are distinguishable. The plaintiff replies that the defendant-intervenors' arguments, in defense of Commerce's rationale, extends beyond the bounds of what Commerce has expressed on the issue to this point.

Without opining on the parties' respective positions on the particular collapsing issue at bar, the court previously recognized overlap in the factual determinations relevant to the separate rate and collapsing issues. *See*, *e.g., Advanced Tech.*, 938 F. Supp. 2d at 1347–48. If upon remand the collapsing issue remains live after reconsideration

of the separate issue, Commerce is requested to address more fully the parties' respective positions as articulated in their briefs to this court.

Conclusion

In accordance with the foregoing, *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) (final results of antidumping duty administrative review; 2009–2010), shall be, and hereby is, remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings consistent with this opinion. The results of remand shall be due 60 days after a final decision in *Advanced Technology & Materials Co. v. United States*, No. 14–1154 (Fed. Cir. Dec. 9, 2013), comments on the remand results shall be due 30 days thereafter, with any rebuttal due 15 days after any such comments filed. **So ordered**.

Dated: April 29, 2014
New York, New York

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