U.S. Customs and Border Protection

Slip Op. 14–70

JACOBI CARBONS AB, JACOBI CARBONS, INC., NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON CO., LTD., CHERISHMET INC., BEIJING PACIFIC ACTIVATED CARBON PRODUCTS CO., LTD., DATONG MUNICIPAL YUNGUANG ACTIVATED CARBON CO., LTD., SHANXI INDUSTRY TECHNOLOGY TRADING CO., LTD., CARBON ACTIVATED CORP., CAR GO WORLDWIDE, INC., AND TANGSHAN SOLID CARBON CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and CALGON CARBON CORP AND NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Consol. Court No. 12–00365

[Plaintiffs' motions for judgment on the agency record are denied.]

Dated: June 24, 2014

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. With him on the brief was *Ross Bidlingmaier*.

Francis J. Sailer, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington, D.C., argued for consolidated plaintiffs Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Cherishmet Inc., Beijing Pacific Activated Carbon Products Co., Ltd., Datong Municipal Yunguang Activated Carbon Co., Ltd., and Shanxi Industry Technology Trading Co., Ltd. With him on the briefs were *Mark E. Pardo*, *Dharmendra N. Choudhary*, *Andrew T. Schutz*, and *Kavita Mohan*.

Nancy A. Noonan and *Matthew L. Kanna*, Arent Fox LLP, of Washington, D.C., for consolidated plaintiffs Carbon Activated Corp. and Car Go Worldwide, Inc.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., for consolidated plaintiff Tangshan Solid Carbon Co., Ltd.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. On the brief were *Melissa M. Devine*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

John M. Herrmann, Kelley Drye & Warren, LLP, of Washington, D.C., argued for defendant-intervenors Calgon Carbon Corp. and Norit Americas, Inc. With him on the brief were *David A. Hartquist* and *R. Alan Luberda*.

OPINION

EATON, Judge:

This matter is before the court on the USCIT Rule 56.2 motions for judgment on the agency record of plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (collectively, "Jacobi"),[1] and consolidated plaintiffs[2] Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. ("GHC"), Cherishmet Inc. ("Cherishmet"), Beijing Pacific Activated Carbon Products Co., Ltd. ("BPACP"), Datong Municipal Yunguang Activated Carbon Co., Ltd. ("Datong Municipal"), Shanxi Industry Technology Trading Co., Ltd. ("Shanxi Industry"), Carbon Activated Corp. and Car Go Worldwide, Inc. (collectively, "CAC"), and Tangshan Solid Carbon Co., Ltd. ("Tangshan") (collectively, "plaintiffs"). By their motions, plaintiffs, all of which are producers, exporters, or importers of subject merchandise,[3] challenge the U.S. Department of Commerce's ("Commerce" or the "Department") Final Results in the fourth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("PRC"). Certain Activated Carbon From the PRC, 77 Fed. Reg. 67,337 (Dep't of Commerce Nov. 9, 2012) (final results of antidumping duty admin. review), and accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, "Final Results").

Jacobi, GHC, Cherishmet, BPACP, Datong Municipal, CAC, and Tangshan contest two aspects of the Department's Final Results: (1)

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[1] Jacobi Carbons AB is a foreign producer and exporter of subject merchandise, while Jacobi Carbons, Inc. is the importer of record for Jacobi Carbons AB's merchandise. Compl. ¶ 3 (ECF Dkt. No. 7).

[2] This action includes court numbers 12–00372, 12–00377, 12–00396, and 12–00401. *See* Scheduling Order (ECF Dkt. No. 42).

[3] The subject merchandise is activated carbon, a substance "capable of collecting gases, liquids, or dissolved substances on the surface of its pores." MCGRAW-HILL CONCISE ENCYCLOPEDIA OF SCIENCE &TECHNOLOGY 21 (Sybil P. Parker ed., 2d ed. 1987). Activated carbon is described in the antidumping duty order as follows:

> [A] powdered, granular, or pelletized carbon product obtained by "activating" with heat and steam various materials containing carbon, including but not limited to coal (including bituminous, lignite, and anthracite), wood, coconut shells, olive stones, and peat. . . .
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> The scope of this order covers all forms of activated carbon that are activated by steam or CO2 [(carbon dioxide)] . . . . Unless specifically excluded, the scope of this investigation covers all physical forms of certain activated carbon . . . .
>
> . . .
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> Excluded from the scope of the order are chemically-activated carbons. . . . Chemically activated carbons are typically used to activate raw materials with a lignocellulosic component such as cellulose, including wood, sawdust, paper mill waste and peat.

Certain Activated Carbon From the PRC, 72 Fed. Reg. 20,988, 20,988 (Dep't of Commerce Apr. 27, 2007) (notice of antidumping duty order).

the selection of the surrogate value for carbonized material, which is one of the primary inputs used in the production of subject merchandise;[4] and (2) the selection of the surrogate value for truck freight. *See* Resp't Pls.' Rule 56.2 Mot. for J. on the Agency R. 1–2 (ECF Dkt. No. 47) ("Jacobi's Br."); Mem. in Supp. of Pls.' Rule 56.2 Mot. for J. upon the Agency R. 1 (ECF Dkt. No. 46) ("GHC's Br."[5]); Rule 56.2 Mot. for J. upon the Agency R. of Pls. Carbon Activated Corporation and Car Go Worldwide, Inc. 2 ("CAC's Mot."); Consol. Pl. Tangshan Solid Carbon Co., Ltd.'s Rule 56.2 Mot. for J. on the Agency R. 1–2 ("Tangshan's Mot.").

Shanxi Industry and Tangshan (collectively, "separate rate companies" or "separate rate respondents") are plaintiffs that established their independence from Chinese government control, and as a result, were assigned a separate antidumping duty rate in the Final Results. *See* Final Results, 77 Fed. Reg. at 67,338. The separate rate respondents and CAC[6] claim that, should Commerce recalculate the final dumping margin for the mandatory respondents pursuant to any remand ordered by the court, the Department must also recalculate the rate assigned to the separate rate companies. *See* Mem. of Law in Supp. of Pl. Shanxi Industry Technology Trading Co., Ltd.'s Rule 56.2 Mot. for J. upon the Agency R. 2 (ECF Dkt. No. 44) ("Shanxi Industry's Br."); Tangshan's Mot. 2; CAC's Mot. 2.

Defendant United States opposes plaintiffs' motions and asks that Commerce's Final Results be sustained. Def.'s Resp. to Pls.' and Consol. Pls.' Mots. for J. upon the Agency R. 2 (ECF Dkt. No. 56) ("Def.'s Br."). Defendant-intervenors, Calgon Carbon Corp. and Norit Americas, Inc. (collectively, "defendant intervenors"), each domestic manufacturers of activated carbon, join in opposition to plaintiffs' motions. Def.-Ints.' Resp. in Opp'n to Consol. Pls.' Mots. for J. on the Agency R. 1 (ECF Dkt. No. 58) ("Def.-Ints.' Br."). Jurisdiction lies pursuant to 28

[4] In order to produce steam-activated carbon, the carbonized materials are placed in a furnace and activated through steam at temperatures between 800 and 1,000 degrees Centigrade. Letter from Ross Bidlingmaier, Counsel for Jacobi, to The Honorable Rebecca M. Blank, Acting Secretary of Commerce, U.S. Department of Commerce at 99, PD 29, at bar code 3027303–01 (Sept. 1, 2011), ECF Dkt. No. 43 (Apr. 5, 2013) ("Jacobi's Questionnaire Response"). "This process produces a carbonaceous substance (i.e., activated carbons) with many small pores." Jacobi's Questionnaire Response at 99.

[5] The Department treated GHC and BPACP as a single entity, based on a determination in the first administrative review of the Order. Final Results, 77 Fed. Reg. at 67,338 n.23. Accordingly, Commerce assigned the entity a single rate. Final Results, 77 Fed. Reg. at 67,338 n.23. Thus, although this brief was jointly submitted by GHC, Cherishmet, BPACP, and Datong Municipal, the arguments made in this brief will be represented by reference only to GHC.

[6] The companies from which CAC imported subject merchandise are separate rate companies. CAC's Mot. 2.

U.S.C. § 1581(c) (2006) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I), (B)(iii) (2006). For the reasons set out below, Commerce's Final Results are sustained.

BACKGROUND

On April 27, 2007, the Department issued the antidumping duty order on certain activated carbon from the PRC. Certain Activated Carbon From the PRC, 72 Fed. Reg. 20,988, 20,988 (Dep't of Commerce Apr. 27, 2007) (notice of antidumping duty order) (the "Order"). Following timely requests from defendant-intervenors and other companies, the Department conducted its fourth administrative review of the Order for the period of review ("POR"), April 1, 2010, through March 31, 2011. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 76 Fed. Reg. 30,912, 30,913 (Dep't of Commerce May 27, 2011).

On May 4, 2012, the Department published its Preliminary Results for the review, selecting Datong Juqiang Activated Carbon Co., Ltd.,[7] Jacobi, and GHC as mandatory respondents. Certain Activated Carbon from the PRC, 77 Fed. Reg. 26,496, 26,497 (Dep't of Commerce May 4, 2012) (preliminary results of the fourth antidumping duty admin. review, and intent to rescind in part) ("Preliminary Results"). BPACP, Datong Municipal, Shanxi Industry, and Tangshan each filed separate rate certifications, and Cherishmet and CAC joined as interested U.S. importers. *See* Preliminary Results, 77 Fed. Reg. at 26,501. In the Preliminary Results, Commerce "selected Thailand as the primary surrogate country for the valuation of the [factors of production] and surrogate financial ratios." Mem. from Katie Marksberry, International Trade Specialist, to the File at 1, PD 193, at bar code 3072722–01 (Apr. 30, 2012), ECF Dkt. No. 43 (Apr. 5, 2013) ("Preliminary Results Surrogate Values Mem.").

Following publication of the Preliminary Results, Jacobi, GHC, Cherishmet, and BPACP submitted comments that placed on the record additional data from the Philippines, and urged the Department to use it to value all of the major material inputs. Issues & Dec. Mem. at cmt. 1. In the Final Results, Commerce found that "both the Philippines and Thailand [were] significant producers [of activated carbon] because, in quantity terms, they [were] exporters of goods identical to the subject merchandise, [and] ha[d] production of comparable merchandise as evidenced by the financial statements on the record." Issues & Dec. Mem. at cmt. 1. The Department determined, however, that although otherwise "relatively equal in terms of quality and satisf[action] of all of the surrogate value criteria," the Philippine

[7] Datong Juqiang Activated Carbon Co., Ltd. is not a party to this action.

data (particularly the financial statements) was "clearly superior" to the Thai data because it was "industry-specific, whereas the Thai data [was] for the manufacturing sector in general." Issues & Dec. Mem. at cmt. 1. The Philippine data was also found to be more contemporaneous to the POR than the Thai data. Issues & Dec. Mem. at cmt. 1.

As a result, Commerce departed from its determination in the Preliminary Results, and selected the Philippines as the primary surrogate country to value most of the major material inputs used in the production of subject merchandise, including the carbonized material and truck freight.[8] Final Results, 77 Fed. Reg. at 67,338. Specifically, the Department used Harmonized Tariff Schedule ("HTS")[9] import data, derived from the Global Trade Atlas ("GTA"), from the Philippines under heading HTS 4402 ("Wood Charcoal (Including Shell or Nut Charcoal), Whether or Not Agglomerated") to value carbonized material, and used publicly available data reported in the Cost of Doing Business in Legazpi City, Philippines ("Cost of Doing Business") to value truck freight. Mem. from Emeka Chukwudebe, Case Analyst, to the File at 3, 6, PD 283, at bar code 3104537–01 (Nov. 2, 2012), ECF Dkt. No. 43 (Apr. 5, 2013) ("Final Results Surrogate Values Mem.").

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

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[8] Global Trade Atlas import data from Thailand, however, was found by the Department to be superior for two inputs: bituminous coal and pitch. Issues & Dec. Mem. at cmt. 1; Mem. from Emeka Chukwudebe, Case Analyst, to the File at 2, 3, PD 283, at bar code 3104537–01 (Nov. 2, 2012), ECF Dkt. No. 43 (Apr. 5, 2013) ("Final Results Surrogate Values Mem."). Accordingly, the Department used the Thai data to value bituminous coal and pitch, despite using Philippine data to value all other major factors of production. Issues & Dec. Mem. at cmt. 1; Final Results Surrogate Values Mem. at 2, 3. These findings are uncontested.

[9] The purpose of the HTS is to provide a certain level of organization to the classification of imported goods. "The tariff schedules of signatories to the Harmonized System Convention are required to have tariff categories 'harmonized with the internationally-developed HS nomenclature up to the six-digit level, *i.e.*, to the two-digit chapter, the four-digit heading, and the six-digit subheading levels.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __ n.2, 968 F. Supp. 2d 1255, 1261 n.2 (2014) (internal quotation marks omitted) (quoting *Victoria's Secret Direct, LLC v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1332, 1345 (2013)).

DISCUSSION

I. LEGAL FRAMEWORK

"The United States imposes duties on foreign-produced goods that are sold in the United States at less-than-fair value." *Clearon Corp. v. United States*, 37 CIT __, __, Slip Op. 13–22, at 4 (2013). The Department is responsible for making the fair value determination, and is directed by statute to make a "comparison . . . between the export price or constructed export price[10]and normal value." 19 U.S.C. § 1677b(a) (2006). Where, as here, the merchandise in question is exported from a nonmarket economy country,[11] "the normal value of the subject merchandise [is based on] the value of the factors of production utilized in producing the merchandise and [an] added . . . amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1)(B).

To determine the normal value of the subject merchandise, Commerce is directed to use "the best available information regarding the values of such factors in a [comparable] market economy country or countries considered to be appropriate by the [Department]." *Id.* Commerce's practice, in selecting the best available information for valuing factors of production, is to "choose surrogate values that represent broad market-average prices, prices specific to the input, prices that are net of taxes and import duties, prices that are contemporaneous with the POR, and publicly available non-aberrational data from a single surrogate market-economy." *Clearon*, 37 CIT at __, Slip Op. 13–22, at 7 (citation omitted) (internal quotation marks

[10] Under the statute, the terms "export price" and "constructed export price" are defined as follows:

> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . . . .
>
> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter . . . .

19 U.S.C. § 1677a(a)–(b) (2006).

[11] A nonmarket economy country is a "foreign country that the [Department] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). Because the Department deems the PRC "to be a nonmarket economy country, Commerce generally considers information on sales in [the PRC] and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004).

omitted); *see also* 19 C.F.R. § 351.408(c)(2) (2012) ("[T]he Secretary [of Commerce] normally will value all factors [of production] in a single surrogate country."). The Department's task is to "attempt to construct a hypothetical market value" of the subject merchandise in the nonmarket economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

As an initial matter, defendant and defendant-intervenors claim that plaintiffs failed to exhaust their administrative remedies with respect to certain arguments. They contend that plaintiffs failed to present these arguments during the underlying administrative proceeding, and are thus, prohibited from making them now before the court. Specifically, defendant and defendant-intervenors allege that plaintiffs failed to present their arguments before Commerce with respect to (1) the Philippine surrogate value for truck freight selected by the Department, and (2) claims that the import data under Philippine HTS 4402 is not the best available information when compared to the domestic Cocommunity data[12] and the price data used by Commerce to value carbonized material in prior reviews. Def.'s Br. 27–37; Def.-Ints.' Br. 10–13.

The court finds defendant and defendant-intervenors' exhaustion claims to be unpersuasive. A court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013). "To exhaust its administrative remedies, a party usually must submit a case brief 'present[ing] all arguments that continue in [its] view to be relevant to [Commerce's] final determination or final results.'" *Qingdao Taifa Grp. Co. v. United States*, 33 CIT 1090, 1092–93, 637 F. Supp. 2d 1231, 1236 (2009) (alterations in original) (quoting 19 C.F.R. § 351.309(c)(2) (2012)). This Court has held, however, that requiring exhaustion may be inappropriate under certain circumstances. For instance, "[a] party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level." *Id.* at 1093, 637 F. Supp. 2d at 1236 (citing *LTV Steel Co. v. United States*, 21 CIT 838, 868–69, 985 F. Supp. 95, 120 (1997)).

[12] As shall be seen, the term "Cocommunity data" means data derived from a monthly publication of the Asian and Pacific Coconut Community. Letter from Ross Bidlingmaier, Counsel for Jacobi, to The Honorable John Bryson, Secretary of Commerce, U.S. Department of Commerce at 47, PD 101, at bar code 3041311–01 (Nov. 16, 2011), ECF Dkt. No. 43 (Apr. 5, 2013) ("Jacobi's Surrogate Value Comments").

Here, in the Final Results, Commerce changed the primary surrogate country from Thailand to the Philippines to value most of the major factors of production used in the production of subject merchandise. Issues & Dec. Mem. at cmt. 1. In its Preliminary Results, where it used Thailand as the primary surrogate country, Commerce valued carbonized material using GTA import data derived from Thai HTS 440290, and used publicly available Thai data from a Thai consulting company to value truck freight transportation costs. Preliminary Results Surrogate Values Mem. at 9, 13. Following publication of the Preliminary Results, the parties submitted case and rebuttal briefs to the Department regarding its determinations, and while plaintiffs argued for the use of the Philippine data, they could hardly foresee what use the Department would make of that data.

In the Final Results, Commerce departed from its prior determinations by selecting the Philippines as the primary surrogate country to value most of the factors of production. Issues & Dec. Mem. at cmt. 1. Thus, Commerce valued the carbonized material input using Philippine HTS 4402, and valued truck freight using publicly available data reported in the Cost of Doing Business in Legazpi City, Philippines. Final Results Surrogate Values Mem. at 3, 6. As a result, it was not until after the submission of the parties' case briefs that Commerce made its determination to select the Philippines as the primary surrogate country, and articulated its basis for its selection of sources to value carbonized material and truck freight (i.e., Philippine HTS 4402 and Cost of Doing Business). It is simply too much to ask of the parties to anticipate (1) that Commerce would change the surrogate country between the preliminary and Final Results, (2) the reasons that the Department would state for deciding to change surrogate countries, and (3) precisely how Commerce would value the various inputs. Under similar circumstances, it has been held that a party "is not required to predict that Commerce would accept other parties' arguments and change its decision." *Qingdao*, 33 CIT at 1093, 637 F. Supp. 2d at 1237. Accordingly, because plaintiffs had no realistic opportunity to present their arguments before the Department, the court finds that plaintiffs did not fail to exhaust their administrative remedies.

III. COMMERCE'S CHOICE OF A SURROGATE VALUE FOR CARBONIZED MATERIAL IS IN ACCORDANCE WITH LAW AND SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Cocommunity Data Is Deficient

In the Final Results, the Department found that the Cocommunity[13] price data placed on the record by Jacobi was not the best available information to value the carbonized material input. *See* 19 U.S.C. § 1677b(c)(1)(B). Plaintiffs object to this finding.

When making a "best available information" finding, this Court, among other things, has repeatedly confirmed the importance that the information used to value the factors of production (1) represents a broad market average of prices for the input in question, and (2) be exclusive of taxes and duties. *See, e.g.*, *Jining Yongjia Trade Co. v. United States*, 34 CIT __, __, Slip Op. 10–134, at 23 (2010) ("Commerce's practice, in selecting the best available information for valuing [factors of production], is to select surrogate values which are . . . representative of a broad market average . . . and exclusive of taxes and duties." (citation omitted) (internal quotation marks omitted)).

As noted, in the Final Results, Commerce selected the Philippines as the primary surrogate country to value most of the major factors of production used in the manufacture of activated carbon. Final Results, 77 Fed. Reg. at 67,338. Specifically, the Department used HTS import data derived from the GTA from the Philippines under heading HTS 4402[14] ("Wood Charcoal (Including Shell or Nut Charcoal), Whether or Not Agglomerated") to value carbonized material, one of the important material inputs used in the production of activated carbon. Final Results Surrogate Values Mem. at 3.

Although plaintiffs argue for the use of the Cocommunity data that they placed on the record to value the carbonized material input, it is

[13] Cocommunity is a monthly publication of the Asian and Pacific Coconut Community that contains news, statistical data, and domestic prices for coconut shell charcoal in the Philippines. Jacobi's Surrogate Value Comments at 47. "[T]he [Asian and Pacific Coconut Community] is an independent regional intergovernmental organization which consists of sixteen member countries and accounts for 85–90% of the world production of coconut." Jacobi's Surrogate Value Comments at 47.

[14] In its Issues and Decision Memorandum, Commerce misidentified the tariff heading that it was using as Philippine HTS 4402.90.00. *See* Issues & Dec. Mem. at cmt. 1 ("First, the publicly available import data from the Philippines under HTS 4402.90.00 comes from an approved surrogate country."). Having reviewed the record, however, it is clear that Commerce analyzed the Philippine import data under the four-digit heading, HTS 4402, and not under 4402.90.00. *See, e.g.*, Issues & Dec. Mem. at cmt. 1 (properly naming the section heading two lines above its inadvertent error, as "Philippine GTA Import Data 4402.00.00"); Final Results Surrogate Values Mem. at 3 ("For the final results, we valued carbonized material using GTA data from the Philippines, specifically HTS 4402.00, for a value of 53.73 Ps/Kg.").

clear that the data is deficient in at least two important respects. The Cocommunity data's deficiencies begin with its limited geographical scope for the prices, in the Philippines, of carbonized material derived from coconut shell charcoal. The Cocommunity publication unmistakably indicates that its Philippine prices for coconut shell charcoal are based only on one geographical area. That is, the data came only from the Visayas region.[15] *See* Letter from Ross Bidlingmaier, Counsel for Jacobi, to The Honorable John Bryson, Secretary of Commerce, U.S. Department of Commerce at 51, PD 101, at bar code 3041311–01 (Nov. 16, 2011), ECF Dkt. No. 43 (Apr. 5, 2013) ("Jacobi's Surrogate Value Comments") ("**Coconut Shell Charcoal**: Philippines (Domestic), *Visayas*, Buyer" (emphasis added)). A review of the "Prices of Coconut Products and Selected Oils (US$/MT)" ledger makes that much clear. *See* Jacobi's Surrogate Value Comments at 51.

GHC, in its case brief, acknowledges that the Cocommunity publication lacked countrywide data. GHC's Br. 27 ("[T]he product specific Cocommunity data, even though lacking country wide coverage, represent a far more suitable surrogate value data source."). Thus, the Cocommunity prices are less representative of broad market averages than the GTA data for HTS 4402, which provides nationwide data for imports of carbonized materials that enter the Philippines from its global trading partners. Moreover, despite GHC's assertions, plaintiffs identify no record evidence demonstrating that the Cocommunity data is, in fact, representative of a broad market average. That is, plaintiffs point to no record evidence suggesting that the Visayas region represents a substantial portion of the market for activated carbon in the Philippines, or that these prices are reflective of the national Philippine market for the subject merchandise. It is therefore apparent that the import data represents a broader market average than the Cocommunity data, and that the Cocommunity data fails to provide the "broad market average" of prices reasonably preferred by Commerce when making a best available information finding.

Next, aside from Jacobi's own statements in its surrogate value comments submitted to Commerce, plaintiffs cite no record evidence demonstrating that the Cocommunity prices are tax and duty exclusive. *See* Jacobi's Surrogate Value Comments at 5 ("[T]he data in *Cocommunity* meet the Department's criteria of being specific to the input in question and the data tax exclusive."). As has been noted, that a price be "exclusive of tax and duties" is another important preference for Commerce when considering the "best available infor-

[15] The Visayas is one of three geographical regions, consisting of several islands that make up the Philippines.

mation," so that an "apples to apples" calculation can be made when constructing normal value. The Department has found that import data is "reported on a duty-exclusive, tax-exclusive basis." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 845, 159 F. Supp. 2d 714, 725 (2001); *see also* Issues & Dec. Mem. at cmt. 1 ("Finally, the Department previously has found that data from the [GTA], such as that on the record, is publicly-available, represents a broad market average, and is *tax and duty exclusive*." (emphasis added) (citation omitted)).

The burden of building the administrative record lies with the interested parties. *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted). Thus, the burden, here, rested with plaintiffs to supply Commerce with a probative source showing that the Cocommunity prices were free of tax and duty. Because plaintiffs put no evidence on the record showing that the Cocommunity data was tax and duty free, the data lacks an important criterion looked at in a best available information determination.

Based on the foregoing, the Department's finding that the Cocommunity data lacked two important preferences looked to by Commerce when making a best available information determination was reasonable.

B. Commerce's Past Practice

GHC also contends that Commerce's failure to use the Cocommunity data as the surrogate value for carbonized material marked a departure from an established agency preference and policy to rely on domestic data for the valuation of material inputs, rather than import statistics. GHC's Br. 14 (citing *Tianjin Magnesium Int'l Co. v. United States*, 34 CIT __, __, 722 F. Supp. 2d 1322, 1333 (2010) ("[W]hen the Department has a choice between domestic data and import statistics, Commerce's preference is to use domestic data." (citations omitted)); *Dorbest Ltd. v. United States*, 30 CIT 1671, 1688–89, 462 F. Supp. 2d 1262, 1278–79 (2006), *rev'd on other grounds*, 604 F.3d 1363 (Fed. Cir. 2010); *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 294–303, 366 F. Supp. 2d 1264, 1269–77 (2005)).

While it may be the case that Commerce has a preference for domestic data, the Department, as has been noted, also prefers, whenever possible, to use data that (1) represents a broad market average of prices for the input, and (2) is exclusive of taxes and duties. *Jining*, 34 CIT at __, Slip Op. 10–134, at 23. Had the record contained domestic countrywide data, that was tax and duty free, GHC's claim might have had merit. Here, although the Cocommunity data represented domestic price information, the data (1) was regional and not

countrywide, and (2) was not shown to be tax and duty exclusive. None of the cases relied upon by GHC involved domestic price data that suffered from similar deficiencies as those in the data published in Cocommunity. Thus, these cases do not aid plaintiffs.

C. Specificity of HTS 4402

Plaintiffs also argue that, when valuing the carbonized material input, the Department was required to employ a surrogate price for the type of carbonized material that they actually used in their production processes.[16] Jacobi's Br. 1–2; GHC's Br. 8–9. Thus, they insist that, even though the Philippine HTS 4402 heading covers the carbonized material derived from shell that Jacobi and GHC used in their processes, the heading cannot be used because it also covers carbonized material made from wood, which, they claim, neither company used in their production of activated carbon.

For plaintiffs, because Commerce used a surrogate value for the carbonized material input that was derived, in part, from a feedstock (i.e., wood) other than those used by Jacobi's and GHC's suppliers (anthracite coal and coconut shell charcoal for Jacobi, and bituminous coal, coconut shell charcoal, "and other carbonized materials" for GHC), HTS 4402 was not the best available information on the record. Jacobi's Br. 2 ("Very simply, the import data for HTS category 4402 cannot possibly be considered the 'best information available' for carbonized material because such import data for HTS category 4402 concerned primarily raw material inputs [(i.e., wood)] that were not used by Jacobi to make the steam activated carbon produced by Jacobi and exported to the United States."); *see* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to Secretary of Commerce, U.S. Department of Commerce at 17, 22, CD 106, at bar code 3046449–01 (Dec. 14, 2011), ECF Dkt. No. 43 (Apr. 5, 2013) ("GHC's Supplemental Section D Response"); Letter from Daniel L. Porter, Counsel for Jacobi, to The Honorable John Bryson, Secretary of Commerce, U.S. Department of Commerce at 10–11, PD 109, at bar code 3041511–01 (Nov. 17, 2011), ECF Dkt. No. 43 (Apr. 5, 2013); Letter from Ross Bidlingmaier, Counsel for Jacobi, to The Honorable Rebecca M. Blank, Acting Secretary of Commerce, U.S. Department of Commerce at 99, 146, PD 29, at bar code 302730701 (Sept. 1, 2011), ECF Dkt. No. 43 (Apr. 5, 2013).

[16] Plaintiffs initially contended that carbonized material derived from wood could not be used to make products covered by the Order, but have since seemingly abandoned this argument when it was pointed out by the other parties that plaintiffs had inaccurately represented to the court the Order's contents. *See* Jacobi's Br. 16–18; Resp't Pls.' Reply Br. in Supp. of their Mot. for J. on the Agency R. 14–15 (ECF Dkt. No. 68); GHC's Br. 13, 18–19; Def.'s Br. 16–17; Def.-ints.' Br. 20–22.

With respect to plaintiffs' legal argument, the court finds that plaintiffs are correct, that the factors of production actually used by a respondent are important, if not controlling, when determining normal value. This is because the purpose of a review is to determine a margin for a respondent's product based on the valuation of the product's factors of production. Were the factors of production of another company used, even to make an identical product, the margin would not be as accurate of a reflection of that respondent's cost of production. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) ("In determining the valuation of the factors of production, 'the critical question is whether the methodology used by Commerce is based on the best available information and establishes the antidumping margins as accurately as possible.'" (quoting *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001)). Thus, although the Order covers activated carbon products manufactured using other inputs, here, the inputs actually used by plaintiffs must be taken into account.

Although plaintiffs are correct in their assessment of the importance of the inputs actually used in the production of their activated carbon, their claims with respect to the HTS 4402 data fail on substantial evidence grounds. As has been noted, both GHC and Jacobi use carbonized material produced from shell and coal in their manufacturing processes. As part of their argument favoring the use of the Cocommunity data over the data obtained from imports under HTS 4402, plaintiffs insist that carbonized material derived from shell, and carbonized material derived from coal, are comparably priced.

Specifically, the Cocommunity data reflects the price for carbonized material derived from shell, while the data for Philippine HTS 4402 includes import data for carbonized material derived from shell, as well as other sources, such as wood. GHC argues that price data for coconut shell charcoal (i.e., the Cocommunity price data) is the best available information, because the Department found, in the initial less-than-fair value investigation and in its final results of remand redetermination in the first administrative review of the Order, that coconut shell charcoal and coal-based carbonized materials are comparably priced. GHC's Br. 15–16 (citing Certain Activated Carbon from the PRC, 72 Fed. Reg. 9,508 (Dep't of Commerce Mar. 2, 2007) (final determination of sales at less than fair value), and accompanying Issues and Decision Memorandum at comment 16 ("In the instant case, as discussed in the *Preliminary Determination*, the Department found that the coconut shell charcoal value, although not identical to the coal-based carbonized material used by respondents, is compa-

rable in that both products are a type of charcoal." (citation omitted) (internal quotation marks omitted)); Final Results of Redetermination Pursuant to Ct. Remand at 10–11, *Calgon Carbon Corp. v. United States*, No. 09–00524 (2011), ECF Dkt. No. 36 ("*Calgon Carbon* Remand Results") ("[O]ur reexamination of the record indicates that coconut shell charcoal shares similar properties with carbonized material and that those similar properties are essential in the production of activated carbon. The expert's report found that coal-based carbonized materials used by Cherishmet and coconut shell charcoal are similar in porosity and adsorption, which are both properties essential in the production of activated carbon. Thus, in this instance, between the two alternative Indian HTS categories, 'Other Cokes of Coal' and 'Coconut Shell Charcoal,' the Department determines that Indian HTS number 4402.00.10 'Coconut Shell Charcoal' results in a better, input-specific price for coal-based carbonized materials." (footnotes omitted)). Thus, for plaintiffs, because both inputs (shell-derived carbonized material and coal-based carbonized material) that they employed in their production processes are comparably priced, they are both covered by the Cocommunity data relating to the price of shell.

Despite the Department's finding as to price comparability between shell charcoal and coal, this finding is not determinative here. First, it is worth noting that the discussion leading up to the comparability finding is less than clear as to whether the price of shell-derived charcoal is comparable to that of coal-based carbonized material, or if the materials themselves are comparable for the use in the manufacture of activated carbon. Although, in the Final Results of Redetermination Pursuant to Court Remand in the first administrative review of the antidumping duty order, the Department concluded "that Indian HTS number 4402.00.10 'Coconut Shell Charcoal' results in a better, input-specific *price* for coal-based carbonized materials," the discussion leading up to this finding does not support the conclusion as to price. *Calgon Carbon* Remand Results at 11 (emphasis added).

Moreover, even if shell-based charcoal and coal-based carbonized materials have comparable prices, the Cocommunity data is only marginally more useful on the basis of specificity than the import data. This is because HTS heading 4402 also encompasses shell-derived carbonized material. Thus, if coconut shell charcoal is "comparable" to coal-derived carbonized material, the import heading covers entries comparably priced with coal-derived carbonized material too. The Cocommunity publication that covers price data for coconut shell charcoal is only more specific to value coal-based carbonized material than HTS 4402 because the import data also covers imports

of wood-based carbonized material. Thus, it is only the possibility that the HTS 4402 data could contain some entries of carbonized material derived from wood that arguably makes this data less comparable to the carbonized materials used by GHC and Jacobi than the Cocommunity data.

This observation leads to plaintiffs' next argument. Plaintiffs contend that the Philippine HTS 4402 import data is less specific than the Cocommunity data because the heading covers carbonized material derived from wood, which they insist, is a material that they did not use in the production of their activated carbon. As noted, plaintiffs argue, and the court has found, that the factors of production actually used by a respondent in an administrative review are important, if not controlling, in determining normal value. Nonetheless, the record here does not support plaintiffs' claim.

Despite arguments to the contrary, the record demonstrates that GHC has used wood as a material in the production of its activated carbon. *See* Letter from Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, to Secretary of Commerce, U.S. Department of Commerce at 44, PD 17, at bar code 3025194–05 (Aug. 19, 2011), ECF Dkt. No. 43 (Apr. 5, 2013) ("We also produce variety high-grade pellet products with the materials of coconut shell, nutshell and *wood*." (emphasis added)). Moreover, Jacobi itself asserted in this review that the carbonized material used to produce the subject merchandise can be derived from coconut shell and coal, as was used by Jacobi and GHC, but also from wood, lignite, and other materials. *See* Letter from Ross Bidlingmaier, Counsel for Jacobi, to The Honorable John Bryson, Secretary of Commerce, U.S. Department of Commerce at 13, PD 159, at bar code 3056304–01 (Feb. 10, 2012), ECF Dkt. No. 43 (Apr. 5, 2013) ("Jacobi's Additional Surrogate Value Information") (listing the "[f]ixed carbon content of raw materials used for the production of activated carbon" to include soft wood, hard wood, coconut shells, lignite, bituminous coal, and anthracite). Thus, contrary to plaintiffs' assertions, the record does not indicate unambiguously that neither Jacobi nor GHC used carbonized material derived from wood in the production of their activated carbon products during the POR.

Based on the foregoing, it appears that the Cocommunity data is only modestly more specific to the carbonized material inputs used in the production of plaintiffs' activated carbon than the import data found under HTS 4402. The court's best available information inquiry, however, does not end here. Despite the specificity conclusion (which remains somewhat uncertain based on the lack of clarity as to

price comparability in the discussion in the *Calgon Carbon* Remand Results), the Cocommunity data is unable to overcome the earlier discussed deficiencies from which it suffers, i.e., that the publication's price data for coconut shell charcoal did not represent a broad market average, and was not shown to be tax and duty exclusive. Put another way, Commerce was not unreasonable in finding that a slight superiority in specificity failed to compensate for the Cocommunity data's deficiencies with respect to the limited breadth of market prices it supplied and the lack of record evidence demonstrating that the publication's prices were tax and duty free.

D. Imports Under HTS 4402

Finally, plaintiffs argue that imports made under HTS 4402 during the POR did not contain any entries of coconut shell charcoal. Jacobi's Br. 19. For plaintiffs, if there were no imports of the input used to produce the carbonized material that they employed in the manufacture of their merchandise, then the surrogate value for that input is not the best available information. GHC's Br. 17–18 ("[D]uring [the] POR . . . there were no imports of coconut shell charcoal under HTS 4402000001. As such, the Department succumbed to a clear error of fact in its belief that the broad basket sub-heading HTS 4402.00 captured imports of coconut shell charcoal. The issue should be remanded to the Department to correct this erroneous finding of fact because it renders the Department's choice as arbitrary and wholly unsupported by substantial evidence.").

Plaintiffs' only support on the record for this assertion, however, appears to be Jacobi's own statement in its surrogate value comments submitted before the Department. *See* Jacobi's Surrogate Value Comments at 4 ("First, there are no data available for coconut shell charcoal from the Philippines imported under [HTS 4402.00.00.01]"); Jacobi's Br. 20; GHC's Br. 17. Beyond this assertion, plaintiffs do not point to any evidence that there were no inputs of shell-derived carbonized material entered during the POR. Thus, plaintiffs have failed to establish their conclusion with probative record evidence.

E. Commerce Reasonably Determined the Surrogate Value for Carbonized Material

Based on the foregoing, the Department's selection of data from Philippine HTS 4402 as the surrogate value for carbonized material in the present review is in accordance with law and supported by substantial evidence. By their arguments, plaintiffs have demonstrated that the Cocommunity data is marginally more specific than the HTS 4402 data. Because of the infirmities in the Cocommunity data, however, it is apparent that Commerce did not err in its selec-

tion of GTA import data from HTS 4402 ("Wood Charcoal (Including Shell or Nut Charcoal), Whether or Not Agglomerated") to provide the surrogate value for carbonized material.

Accordingly, the court finds that the Cocommunity data was not the best available information on the record with which to calculate the surrogate value for carbonized material. In addition, Commerce reasonably determined that the Philippine GTA import data under HTS 4402 represents the best available information with which to value the carbonized material input used in the production of subject merchandise.

IV. COMMERCE'S CHOICE FOR A SURROGATE VALUE FOR TRUCK FREIGHT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In the Preliminary Results, the primary surrogate country selected by the Department was Thailand. Preliminary Results Surrogate Values Mem. at 1. Specifically, "[t]o value the cost of transportation [(truck freight)] from the suppliers to the factory, the Department calculated a contemporaneous per-unit average rate based on publicly available data from Siam Partners Group Company Limited" ("Siam"), a Thai consulting company, for the year 2005, for the transportation of goods by truck from Bangkok to five other provinces in Thailand. Truck Freight: Transportation Costs, Including Fuel Costs and Freight Rates, Preliminary Results Surrogate Values Mem. at 9, Attach. 8 at 55. Commerce computed the per-unit average rate by dividing the cost per metric ton rates by the distance from each province to Bangkok. Preliminary Results Surrogate Values Mem. at 9. The Department then averaged the rates for each province to obtain a cost per metric ton per kilometer rate of 0.903 baht. Preliminary Results Surrogate Values Mem. at 9. Because the Siam data was from 2005, the Department then inflated the rate using the Thai Producer Price Index. Preliminary Results Surrogate Values Mem. at 9. As noted, the POR was April 1, 2010, through March 31, 2011.

For the reasons previously stated, the primary surrogate country selection was changed from Thailand in the Preliminary Results, to the Philippines in the Final Results. Thus, the Department used Philippine data to revalue most of the major factors of production for the subject merchandise, including the cost of truck freight from the suppliers to the factory. *See* Final Results Surrogate Values Mem. at 6. In the Final Results, Commerce "calculated a contemporaneous per-unit average rate based on publicly available data [as reported in] the Cost of Doing Business in Legazpi City, Philippines" from the year 2010. Final Results Surrogate Values Mem. at 6, 53. Commerce computed the per-unit average rate by "taking the average of the high

and low [p]eso per [kilogram] rate, and then dividing that amount by the distance from Legazpi City to Manila" to obtain a rate of 0.01 pesos per kilogram per kilometer. Final Results Surrogate Values Mem. at 6. This rate was substantially higher than that found in the Preliminary Results.

GHC objects to the Department's use of the Philippine data to value truck freight. It argues that, despite the agency's preference to use a single surrogate country, and despite having put the Philippine data on the record itself and urging its use to value all of the factors of production, Commerce should have continued to use the Thai truck freight data used in the Preliminary Results as the surrogate value. *See* GHC's Br. 35–36 (citing *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT __, __, 880 F. Supp. 2d 1332, 1334–35 (2012)); *see generally* Case Br. of Cherishmet Group and Datong Juqiang Activated Carbon Co., Ltd., PD 243 at 3081186–01(June 13, 2009), ECF Dkt. No. 43 (Apr. 5, 2013). GHC claims that the Thai data was superior because, (1) unlike the Philippine data, the Thai data "represent[ed] a broad market average covering a range of prices" compared to the Philippine truck freight data which was based on a single route, (2) "[t]he Philippine data fail[ed] to satisfy the 'specificity' criteria," because the reported data was based on the transportation of "loose cargo," while the Thai data provided a truck freight cost for fully loaded trucks, and (3) the Philippine data is aberrational as compared to the data used in prior reviews of the Order (approximately eight times higher than the value used in any of the three prior reviews). GHC's Br. 31–34.

As noted, Commerce's preference for surrogate information is to use data that is "product-specific, representative of a broad market average, . . . contemporaneous with the POR[,] and exclusive of taxes and duties." *Jining*, 34 CIT at __, Slip Op. 10–134, at 23 (citation omitted) (internal quotation marks omitted). In addition, Commerce's regulations direct that "the Secretary [of Commerce] normally will value all factors [of production] in a single surrogate country." 19 C.F.R. § 351.408(c)(2).

Having taken GHC's arguments into consideration, the court holds that the Department reasonably found that Philippine data was the best available information with which to value truck freight. While the Thai data contains ten different price points, valuing the cost of transportation from Bangkok to five other provinces, and may appear to be more probative in this regard, the Thai data suffers from defects that diminish its worth. *See* Truck Freight: Transportation Costs, Including Fuel Costs and Freight Rates, Preliminary Results Surrogate Values Mem., Attach. 8 at 55.

Although GHC contends that the Philippine data lacked specificity because it was based on the transportation of "loose cargo" rather than that of a "full truckload," the court is unpersuaded. The Thai source is based on the rental cost of a truck carrying ten to twelve tons of cargo. *See* Truck Freight: Transportation Costs, Including Fuel Costs and Freight Rates, Preliminary Results Surrogate Values Mem., Attach. 8 at 55. The source further states that a full cargo load for one of these trucks is thirteen tons. *See* Truck Freight: Transportation Costs, Including Fuel Costs and Freight Rates, Preliminary Results Surrogate Values Mem., Attach. 8 at 55. The Philippine data, on the other hand, reported transportation costs for a truck carrying "loose cargo." *See* Final Results Surrogate Values Mem. at 51. Nowhere in the Philippine data source does it define or explain the relevance or meaning of "loose cargo," nor has GHC offered anything to support its contention that the Philippine data based on the transportation of "loose cargo" is not representative of the transportation costs incurred for a fully loaded truck. Thus, the Thai data appears to represent shipping costs for less than a full truckload of shipments, while there is no record evidence that the Philippine data is not representative of the shipping costs for a full truckload, albeit of loose cargo. Without more, GHC's speculation that the Philippine data lacks specificity cannot be credited.

Additionally, GHC claims that the Philippine data is aberrational when compared to truck freight rates used by Commerce in prior reviews. Its argument is premised on the observation that the surrogate value for truck freight selected in the Final Results is several times higher than the values applied in prior reviews when Indian data was employed. Specifically, the Philippine data is eight times higher than the surrogate value selected in the Preliminary Results, based on the Thai data that GHC contends should be used, and eight times higher than the surrogate values selected in the three prior reviews, from Indian sources. In other words, plaintiffs' objection, unsupported by further record evidence, is that the Philippine prices must not be the best available information because they are too high. Thus, while plaintiffs' observation as to the cost ratios is, no doubt, factually correct, without more it cannot be given much weight.

Despite plaintiffs' arguments, the Philippine source appears to be the best on the record. First, the data is from 2010, and is thus, far more contemporaneous to the POR (April 1, 2010, through March 31, 2011) than the Thai source which supplied its data from August 8, 2005, over four years prior to the POR. *Compare* Final Results Surrogate Values Mem. at 53, *with* Truck Freight: Transportation Costs, Including Fuel Costs and Freight Rates, Preliminary Results Surro-

gate Values Mem., Attach. 8 at 55. Indeed, the Philippine data's contemporaneity was expressly identified by Commerce as one of its principal reasons for abandoning the use of Thailand as the primary surrogate country in favor of the Philippines. *See* Issues & Dec. Mem. at cmt. 1; *see, e.g.*, *Jining*, 34 CIT at __, Slip Op. 10–134, at 23 ("Commerce's practice, in selecting the best available information for valuing [factors of production], is to select surrogate values which are . . . contemporaneous with the POR . . . . This practice has found approval in this Court." (citations omitted) (internal quotation marks omitted)).

Next, although the Philippine truck freight data relied upon by Commerce was based on the price range of a single route, from Legazpi to Manila, there is evidence on the record for a second route, from Legazpi to Naga/Tabaco, with the exact same price range. *See* Final Results Surrogate Values Mem. at 51 (listing price ranges from Legazpi to Manila of 5.00/kg to 8.00/kg, and from Legazpi to Naga/Tabaco of 5.00/kg to 8.00/kg). This suggests that the Legazpi to Manila rate is, in fact, more representative than plaintiffs claim.

Finally, although not absolute, the Department is directed by its regulations to endeavor to value all factors of production with a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2) ("[T]he Secretary [of Commerce] normally will value all factors [of production] in a single surrogate country."). Courts have found that Commerce's single surrogate country preference is strong and must be given significant weight. *See, e.g.*, *Clearon*, 37 CIT at __, Slip Op. 13–22, at 12. This Court and the U.S. Court of Appeals for the Federal Circuit have repeatedly confirmed the reasonableness of the preference to restrict selections for surrogate values to a single surrogate country. *See, e.g.*, *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367–68 (Fed. Cir. 2010) ("For most of the factors of production, Commerce uses the values that prevail in a single market economy country (called a 'surrogate country') that Commerce finds is both (a) economically comparable to the non-market economy country in question and (b) a significant producer of the merchandise in question." (citing 19 C.F.R. § 351.408(c)(2)); *Clearon*, 37 CIT at __, Slip Op. 1322, at 12 ("[T]he court must treat seriously the Department's preference for the use of a single surrogate country." (citations omitted)); *Bristol Metals L.P. v. United States*, 34 CIT __, __, 703 F. Supp. 2d 1370, 1375–76 (2010).

This preference stems from the sensible conclusion that "deriving the surrogate data from one surrogate country limits the amount of distortion introduced into [the Department's] calculations because a domestic producer would be more likely to purchase a product avail-

able" domestically. *Clearon*, 37 CIT at __, Slip Op. 13–22, at 12, 13 ("[T]he use of a 'single surrogate country' is justified when . . . all other factors are 'fairly equal' because minimizing distortion supports a finding that Commerce relied upon the best available information on the record."). Moreover, the process of determining normal value by using data from a market economy country to value factors of production used in manufacturing a product in a nonmarket economy country is inexact enough without adding greater ambiguity, such as the inclusion of a third market and yet another currency. Here, the Department valued most of the major inputs by using Philippine prices, and its preference for valuing factors of production from a single country weighs heavily in favor of valuing truck freight using the Philippine data derived from the Cost of Doing Business.

Accordingly, because (1) the Philippine data is more specific than the Thai dataset on the record, (2) the Philippine data is more contemporaneous to the POR than the competing Thai dataset, (3) the Philippine data, while having fewer data points than the Thai data, is supported by information from two routes, and (4) the court is mindful of Commerce's goal to minimize distortion by means of its strong preference to value factors of production within a single surrogate country, Commerce was reasonable in its choice of the Philippine data as the best available information to value truck freight. Thus, the Department's finding is supported by substantial evidence.

V. COMMERCE'S CALCULATION OF THE SEPARATE RATE IS SUSTAINED

CAC and the separate rate respondents, Shanxi Industry and Tangshan, urge the court, should it remand the Final Results to Commerce, to instruct the Department to recalculate the dumping margin assigned to the separate rate respondents based on any recalculation of the rate assigned to the mandatory respondents. CAC's Mot. 2; Shanxi Industry's Br. 2; Tangshan's Mot. 2. These companies raise no challenge with respect to the manner in which their rate was calculated. *See* Shanxi Industry's Br. 2 ("[I]n accordance with the law, Shanxi's margin was calculated in a manner consistent with the Department's customary practice of assigning dumping margins to non-individually investigated companies based on the margins calculated for the exporters and producers that are individually investigated as mandatory respondents."). Rather, the success of their motions hinges solely on the merits of Jacobi and GHC's underlying motions, challenging the surrogate values selected for carbonized material and truck freight, which the court has found wanting. Because the court sustains the Department's Final Results, the separate rate respondents' motions for judgment on the agency record are

thereby rendered moot. Accordingly, the separate rate calculated by the Department in the Final Results is sustained, and the motions of CAC, Shanxi Industry, and Tangshan are denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the Department of Commerce's Final Results are sustained. Judgment will be entered accordingly.

Dated: June 24, 2014
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 14–71

BORUSAN MANNESMANN BORU SANAYI VE TICARET A. S., Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Court No. 13–00001

[Commerce's Final Results are sustained.]

Dated: June 25, 2014

Morris, Manning & Martin, LLP (*Julie C. Mendoza, Donald B. Cameron, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Sarah S. Sprinkle*), for Plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş.].

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for 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 *Whitney Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Skadden, Arps, Slate, Meagher & Flom LLP (*Jeffrey D. Gerrish, Robert E. Lighthizer, Jamieson L. Greer*), for Defendant-Intervenor United States Steel Corporation.

OPINION

BARZILAY, Senior Judge:

Before the court is Plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A. S.'s ("Borusan") motion for judgment on the agency record under USCIT Rule 56.2, challenging Defendant U.S. Department of Commerce's ("Commerce") final results of the antidumping duty annual review covering welded carbon steel pipe and tube from Turkey.

See Circular Welded Carbon Steel Pipes and tubes from Turkey; Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 Fed. Reg. 72,818 (Dept't Commerce Dec. 6, 2012) ("*Final Results*"), as amended by *Circular Welded Carbon Steel Pipes and Tubes from Turkey; Amended Final Results of Antidumping Duty Administrative Review; 2010 to 2011*, 78 Fed. Reg. 286 Dep't Commerce Jan. 3, 2013) ("*Amended Final Results*"); *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes from Turkey – May 1, 2010, through April 30, 2011*, A489–501 (Nov. 30, 2012), Docket Entry No. 22 (Feb. 15, 2013) ("*Issues and Decision Memorandum*"). Specifically, Borusan challenges Commerce's determination that Borusan engaged in targeted dumping and application of its average-to-transaction comparison methodology. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains Commerce's *Final Results*.

I. STANDARD OF REVIEW

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

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 unam-

biguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. BACKGROUND

Borusan is a manufacturer and exporter of circular welded carbon steel pipes and tubes from Turkey. Borusan and other interested parties requested that Commerce conduct an administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes. On June 28, 2011, Commerce initiated an administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Turkey for the period of May 1, 2010, through April 30, 2011, and selected Borusan as one of the mandatory respondents. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 37,781 (Dep't Commerce June 28, 2011). Before Commerce issued the preliminary determination, one of the petitioners filed an allegation that Borusan engaged in targeted dumping during the period of review. Commerce, however, deferred conducting a targeted dumping analysis and published its preliminary results. *See Circular Welded Carbon Steel Pipes and Tubes From Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 32,508 (Dep't Commerce June 1, 2012). Commerce assigned Borusan a preliminary weighted average dumping margin of zero using its average-to-average comparison methodology ("A-A"). *See id.* at 32,512. Commerce then decided to review the petitioner's targeted dumping allegation and published a post-preliminary determination that analyzed the petitioner's targeted dumping allegation. Commerce applied its *Nails* test and determined that a pattern of export sales prices that differed significantly within the period of review existed. Additionally, after concluding that a sufficient volume of export sales passed the *Nails* test, Commerce determined that the A-A methodology could not take into account the observed price pattern since it found a meaningful difference between the results of the A-A methodology and the average-to-transaction ("A-T") methodology, thus warranting application of the A-T methodology. Accordingly, Commerce assigned Borusan a post-preliminary dumping margin of 2.12%. *See Circular Welded Carbon Steel Pipes and Tubes from Turkey 2010 -- 2011 Administrative Review: Post-Preliminary Analysis and Calculation Memorandum*, A-489–501 (Oct. 22, 2012), Docket Entry No. 69 Tab 8 (Feb. 7, 2014). In the *Final Results*, Commerce concluded that Borusan did engage in targeted dumping, but revised

Borusan's rate and assigned a final dumping margin of 6.05%. *See Final Results*, at 72,820. Commerce revised the final rate to correct a ministerial error and assigned Borusan an amended final dumping margin of 3.55%. *See Amended Final Results*, at 287.

III. DISCUSSION

Borusan argues that Commerce violated 19 U.S.C. § 1677f-1(d)(1)(B) by not considering Borusan's explanation for why its sales demonstrated a pattern of targeted dumping. Pl. Br. 18. More specifically, Borusan argues that targeted dumping "connote[s] a purposeful act or behavior" and therefore takes the position that Commerce must consider whether a respondent intended to engage in targeted dumping to satisfy the statute. *Id.* at 20. Borusan, moreover, relies on the Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") to advance its argument that the statute contains an implicit requirement that Commerce consider the "motive" behind its pricing practices before applying the targeted dumping remedy. Pl. Reply Br. 5 (citing SAA, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. (1994)). Borusan's argument is not persuasive.

Section 1677f-1(d)(1)(B) provides:

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

§ 1677f-1(d)(1)(B). The "'pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time' is what is referred to as 'targeted dumping.'" *Timken Co. v. United States*, 38 CIT __, __, No. 14–24, Slip Op. at 4 (2014). Targeted dumping, therefore, is a statutorily defined pricing pattern that permits Commerce to apply an alternative comparison methodology in antidumping investigations and reviews. The SAA provides:

> New section 771A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed

> export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods, *i.e.*, where targeted dumping may be occurring. Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison. In addition, the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.

SAA at 843.

Commerce has established a methodology known as the *Nails* test to determine whether a pattern exists for purposes of § 1677f-1(d)(1)(B). *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008); *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less than Fair Value*, 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008). The *Nails* test involves a two-step analysis:

> In the first stage of the test, the "standard deviation test," requires the Department to determine the share of the alleged target's (whether purchaser, region, or time period) purchases of identical merchandise, by sales value, that are at prices more than one standard deviation below the average price of that identical merchandise to all customers. The standard deviation and the average price are calculated using a POI-wide average price weighted by sales value to the alleged target, and POI-wide average price weighted by sales value to each distinct non-targeted entity of identical merchandise. If the total sales value that meets the standard deviation test exceeds 33 percent of the sales value to the alleged target of the identical merchandise, then the pattern requirement is met.
>
> In the second stage, the Department examines all the sales of identical merchandise that pass the standard deviation test and determines the sales value for which the difference between the average price to the alleged target and the lowest non-targeted average price exceeds the average price gap (weighted by sales value) observed in the non-targeted group. If the share of these

> sales exceeds five percent of the sales value to the alleged target of the identical merchandise, then the significant difference requirement is met and the Department determines that targeted dumping has occurred.

Memorandum to David Spooner, titled "*Antidumping Duty Investigations of Certain Steel Nails from the Peoples Republic of China (PRC) and the United Arab Emirates (UAE): Post-Preliminary Determinations on Targeted Dumping*," A-520–802 and A-570–909 (April 21, 2008), at 8. The Court has sustained the *Nails* test as reasonable. *See Mid Continent Nail Corp. v. United States*, 34 CIT __, 712 F. Supp. 2d 1370 (2010).

The statute is clear. Contrary to Borusan's claim that targeted dumping connotes purposeful behavior, the language of the statute simply instructs Commerce to consider export sales price (or constructed export sales price) in its targeted dumping analysis. *See* § 1677f1(d)(1)(B). It does not require Commerce to undertake an investigation of the various reasons why a pattern of targeted dumping exists within a given time period. The SAA does not manifest such a requirement either. It reaffirms the language in the statute but adds very little other than what is already expressed in § 1677f-1(d)(1)(B). Therefore, Commerce may make a finding of targeted dumping and apply the targeted dumping remedy based on the pricing pattern described in the statute and specifically articulated in the *Nails* test. The court cannot identify any language in the statute or SAA that might require Commerce to investigate whether a given respondent has a legitimate commercial reason for such a pricing practice. Doing so would add a new element to the targeted dumping analysis, requiring Commerce to also consider whether respondents intended to engage in targeted dumping. The Federal Circuit has rejected this type of intervention. *See Viraj Group v. United States*, 476 F.3d 1349, 1357–58 (Fed. Cir. 2007). The court, therefore, cannot read into the statue some sort of "intent" requirement that does not exist. It would impose a "burden on Commerce that is not required or suggested by the statue." *Viraj Group*, 476 F.3d at 1358. Given that Borusan's claim is predicated on Commerce going beyond what is required by the statute, there is no need to review Commerce's factual determination under the substantial evidence framework.

IV. CONCLUSION

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

Dated: June 25 , 2014
New York, NY

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

Slip Op. 14–73

ZHANJIANG GUOLIAN AQUATIC PRODUCTS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION OF GULF SHRIMP INDUSTRIES, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 13–00388

[Defendant-Intervenor's motion to dismiss is granted.]

Dated: June 26, 2014

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, DC, for Plaintiff.

Robin Lynn Turner, Attorney, Office of the General Counsel, United States International Trade Commission, of Washington, DC, for Defendant. With her on the brief were *Dominic L. Bianchi*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

Terence P. Stewart, *Elizabeth J. Drake*, and *Jennifer M. Smith*, Stewart and Stewart, of Washington, DC, and *Edward T. Hayes*, Leake & Andersson, LLP, of New Orleans, LA, for Defendant-Intervenor.

OPINION & ORDER

Carman, Judge:

Before the Court is Defendant-Intervenor Coalition of Gulf Shrimp Industries' ("Defendant-Intervenor" or "COGSI") Motion to Dismiss ("MTD") (ECF No. 16) for lack of case or controversy under Article III of the Constitution and accordingly lack of subject matter jurisdiction in this court. Defendant the United States supports COGSI's motion to dismiss. ECF No. 20. For the reasons set forth below, the Court grants Defendant-Intervenor's motion to dismiss.

BACKGROUND

This action is one of many challenging the final negative countervailing duty ("CVD") determination of certain frozen warmwater shrimp from various countries. *See Frozen Warmwater Shrimp From China, Ecuador, India, Malaysia, and Vietnam*, 78 Fed. Reg. 64,009 (Int'l Trade Comm'n Oct. 25, 2013) (final determination). The International Trade Commission ("ITC")'s final determination was that the domestic industry "was not injured by reason of imports." Pl.'s Opp'n

to Def.-Int.'s Mot. to Dismiss ("Pl.'s Opp'n") at 3. In its preliminary determination, the ITC "concluded that negligibility was not an issue in the investigations because the subject imports from all countries investigated were not negligible." Compl. ¶ 7 (internal quotations omitted). Plaintiff argued to the agency that the ITC's negligibility conclusion was not accurate for imports from China because the ITC used data that "included imports of nonsubject merchandise." Compl. ¶ 9. The ITC continued to find Plaintiff's imports non-negligible in its final determination. Compl. ¶ 10. Plaintiff prays for a declaration that the ITC's conclusion "on negligibility with respect to China" is erroneous and requests a remand to the ITC regarding negligibility. Compl. ¶ 15.

Defendant-Intervenor COGSI moves to dismiss Plaintiff's Complaint because "[t]he ITC determined the U.S. industry was not injured, and thus no countervailing duty order issued as a result of the ITC's determination." MTD at 2. Defendant-Intervenor argues that Plaintiff "suffered no harm and has no standing, and the Court has no jurisdiction since there exists no true case or controversy." MTD at 3. Defendant-Intervenor points out that "[s]tanding is one of the essential elements of the case-or-controversy requirement" and "[u]nder the United States Constitution, the jurisdiction of federal courts is limited to actual cases or controversies." *Id*. at 2 (internal quotations and citations omitted). Accordingly, Defendant-Intervenor asserts that the Court lacks subject matter jurisdiction to hear Plaintiff's case. *Id*. at 4.

In a parallel case challenging ITC's final injury determination, Plaintiff is the defendant-intervenor and Defendant-Intervenor is the plaintiff. *See COGSI v. United States*, Ct. No. 1300386 (CIT filed Nov. 22, 2013).[1]

JURISDICTION

Plaintiff carries the burden of establishing that jurisdiction lies. *See McNutt v. Gen. Motors Acceptance Corp*., 298 U.S. 178, 189 (1936). In this action, Plaintiff claims jurisdiction is proper pursuant to section 516A(a)(2)(A)(i)(I) of the Tariff Act of 1930, as amended ("the Act"), codified at 19 U.S.C. § 1516a(a)(2)(A)(i)(I). Compl. ¶ 1. Plaintiff brings its claim under the propositions that it already suffered injury "during the provisional measure period" and may "suffer future harm if defendant-intervenor COGSI is successful in its separate appeal" of the ITC's final negative injury CVD determination. Pl.'s Opp'n at 6.

[1] *COGSI v. United States*, Court No. 13–00386, is the lead case in a batch of challenges to this investigation. The court has stayed the balance of the related cases pending the outcome of this lead case.

DISCUSSION

Jurisdiction is at the heart of this action. The jurisdiction of federal courts is constitutionally limited to actions that involve actual cases or controversies. *Royal Thai Gov't v. United States*, 38 CIT ___, ___, 978 F. Supp. 2d 1330, 1332–33 (2014) ("*Royal Thai*")[2] (*citing Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 37 (1976)). A key component of a case or controversy is standing. *See* U.S. Const. art. III, § 2, cl. 1; *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). To establish standing, a plaintiff must demonstrate an "injury in fact" that is "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. A further requirement to establish standing is that the injury is "fairly traceable to the challenged action." *Id*.

It is well-settled in this court that "when a respondent challenges an administrative proceeding in which it has prevailed there is no case or controversy, and thus no jurisdiction lies." *Royal Thai,* 978 F. Supp. 2d at 1333 (citing *Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985)). Similar to the prevailing plaintiff in *Royal Thai*, Plaintiff in this action prevailed at the administrative level but alleges that a live case or controversy exists because it wishes to challenge subsidiary issues from the ITC's determination on which it did not prevail. *See* Pl.'s Opp'n at 7. However, the fact that no CVD order has been issued means that Plaintiff is not suffering any injury due to the errors it alleges the ITC committed. *See Royal Thai*, 978 F. Supp. 2d at 1333 (*citing Lujan*, 504 U.S. at 560). The fact that Plaintiff paid cash deposits while the administrative review was pending does not create an injury sufficient to confer standing under the Constitution or the Court's jurisdictional statute. *See MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 332–33 (1992) (stating that paying deposits [during a countervailing duty investigation] pending court review is an ordinary consequence of the statutory scheme and cannot be addressed while the investigation is pending). The statute requires that the cash deposits be returned. *See* 19 U.S.C. § 1671d(c)(2)(B); *see also Royal Thai*, 978 F. Supp. 2d at 1333 (finding no case or controversy where cash deposits are returned to a prevailing party). Because no cash deposits are due at this time, and all previously paid deposits either have been or will be returned to the

[2] The *Royal Thai* case was recently decided at the Court of International Trade. While *Royal Thai* challenged the Department of Commerce's duty determination rather than the ITC's injury determination, the arguments of both plaintiffs are strikingly similar. *See generally Royal Thai*, 978 F. Supp. 2d at 1330.

subject producers pursuant to statute, Plaintiff cannot claim monetary injury. Without injury, there is no standing and thus no case or controversy.

The mere fact that Defendant-Intervenor appealed the ITC's final negative injury determination in a parallel case, creating the possibility of a future reversal of the ITC's negative injury determination, does not create standing in this case. Speculation of an administrative reversal is hypothetical, and hypothetical harm cannot provide jurisdiction. *See Royal Thai*, 978 F. Supp. 2d at 1333 (citing *Asahi Seiko Co., Ltd. v. United States*, 35 CIT ___, ___, 755 F. Supp. 2d 1316, 1322 (2011)).

Plaintiff alleges that dismissing this case while hearing "COGSI's claims in Court No. 13–00386" would "defy notions of fairness." Pl.'s Opp'n at 8 n.3. This same argument was made by the plaintiff in *Royal Thai* and failed:

> Plaintiff's concerns are misplaced. In the event that COGSI succeeds in its appeal of Commerce's determination, Commerce will be required to publish a redetermination on remand. If this occurs, plaintiff will still have a right to challenge that redetermination, either during the course of any remand or in a new suit, even if this case is dismissed at this juncture.

Royal Thai, 978 F. Supp. 2d at 1334 (citation omitted). Plaintiff in the instant case would have the same right to challenge the redetermination as the plaintiff in *Royal Thai*.

Defendant-Intervenor argues that Plaintiff "asks this Court to issue an advisory opinion on a subsidiary issue when it has suffered no real injury due to [the negligibility] issue and when the relief requested would not redress any such injury." Def.-Int.'s Reply at 5. The Court agrees. The United States Supreme Court has made it clear that the United States Constitution does not permit courts to issue advisory opinions. *See Camreta v. Greene*, 131 S.Ct. 2020, 2038 (2011) ("judicial Power is one to render dispositive judgments, not advisory opinions") (quotations and citations omitted).

Because it has suffered no injury, Plaintiff has no standing and no case or controversy exists. Therefore this Court lacks jurisdiction. Accordingly, the Court grants Defendant-Intervenor's motion to dismiss.

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant-Intervenor's motion to dismiss is granted without prejudice. Judgment to enter accordingly.

Dated: June 26, 2014
New York, NY

/*s*/*Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 14–74

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 08–00189

[Plaintiff's motion to reconsider, alter, or amend judgment and/or amend complaint is denied.]

Dated: June 26, 2014

Gregory H. Teufel and *Jeremy L. S. Samek*, Eckert Seamans Cherin & Mellott, LLC of Pittsburgh, PA for Plaintiff.

Edward F. Kenny and *Jason M. Kenner*, Trial Attorneys, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, NY, for Defendant. With them on the briefs were *Stuart F. Delery*, Assistant Attorney General, and *Amy S. Rubin*, Acting Assistant Director. Of counsel is *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

OPINION & ORDER

CARMAN, JUDGE:

Before the Court is Plaintiff International Customs Products' ("Plaintiff" or "ICP") Motion to Reconsider, Alter, or Amend Judgment and/or To Amend Complaint ("Pl.'s Mot.") (ECF No. 67). Plaintiff moves pursuant to USCIT Rule 59(a)(1)(B) for reconsideration of this Court's Opinion and Order entered on September 4, 2013 in this matter ("Slip Op 13–120") (ECF No. 66) granting Defendant's Motion to Dismiss Plaintiff's Complaint ("Mot. to Dismiss") (ECF No. 17). *See Int'l Customs Prods., Inc. v. United States*, 37 CIT ___, 931 F. Supp. 2d 1338 (2013). In the alternative, pursuant to USCIT Rule 15(a)(2), Plaintiff moves to amend its Complaint. For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

This action and a flurry of related cases have created a long and winding history, with which the reader is presumed to be familiar. A timeline is provided in the underlying decision. *See* Slip Op 13–120 at 3. Only the essential highlights will be reiterated here. ICP seeks

relief from an action taken by U.S. Customs and Border Protection ("Customs" or "Defendant") reclassifying and liquidating 13 entries of Plaintiff's imported product known as "white sauce." Compl. ¶ 1. In 1999, ICP obtained a ruling letter from Customs, NYRL D86228, classifying white sauce under HTSUS 2103.90.90 as "sauces and preparations therefor . . . other . . . other . . . other . . . other," with a duty rate of 6.4% *ad valorem*. *Id.* ¶ 12. In April 2005, Customs issued a "Notice of Action" that 99 entries of white sauce were being reclassified and liquidated under HTSUS 0405.20.3000 as "dairy spread," at the rate of $1.996 per kilogram, plus applicable safeguard duties. *Id.* ¶¶ 13–16, 14. This reclassification had the effect of increasing the duties owed on Plaintiff's entries of white sauce by approximately 2400%. *Id.* ¶ 14. Plaintiff asserts that in issuing the Notice of Action, Customs did not follow various statutory and regulatory requirements, and thereby infringed upon several of Plaintiff's rights. *See generally* Compl. This case is the sixth lawsuit brought by Plaintiff with respect to the classification and liquidation of its 99 entries of white sauce. *Id.* ¶ 6.

In Slip Op 13–120, on motion of the Defendant, the Court dismissed Count I through Count VIII pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction, and Count IX pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Slip Op. 13–120 at 16. Plaintiff moves for reconsideration.

DISCUSSION

I. Motion to Reconsider, Alter or Amend Judgment

Plaintiff moves the Court to reconsider, alter or amend its prior decision pursuant to USCIT Rule 59(a)(1)(B), which is the ordinary mechanism for requests for reconsideration in the Court of International Trade. *See United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT ___, ___, 714 F. Supp. 2d 1296, 1300 (2010). Under its rules, the Court may rehear a decision "for any reason for which a new trial has heretofore been granted in a suit in equity in federal court." USCIT R. 59(a)(1)(B). The grant of a motion for reconsideration is within the sound discretion of the Court. 714 F. Supp. 2d at 1300 (*citing Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). Rehearing is granted only in "limited instances," including: "1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately

present its case." *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2007) (internal quotations and citations omitted)). The purpose of a Rule 59 motion is not to reargue the case, but to correct any "significant flaw" in the prior decision. *Peerless Clothing Int'l, Inc. v. United States*, 33 CIT 1117, ___, 637 F. Supp. 1253, 1256 (2009).

Plaintiff requests reconsideration of the Court's holding in Slip Op 13–120 that the "harshness and unfairness at issue does not rise to the level of unconstitutionality," and argues that the "statutory scheme at issue violates importers' rights under the Due Process Clause of the Fifth Amendment to the Constitution." Pl.'s Mot. at 2. Defendant counters that Plaintiff's claim "amounts to an assertion of an alleged financial impediment to the exercise of a statutory right, rather than the articulation of a constitutional defect." Def.'s Opp'n at 3. While bankruptcy is more a type of financial ruin than a mere impediment, the Court agrees that Plaintiff's constitutional argument was already fully briefed, *see* Pl.'s Opp. to Def.'s Mot. to Dismiss 31–41 (ECF No. 32), and addressed and rejected by the Court, *see* Slip Op 13–120 at 13–16. As declared in the underlying decision, "the Court cannot say that 28 U.S.C. § 2637(a) denies Plaintiff the fundamental process of fairness required by the Fifth Amendment." Slip Op 13–120 at 15–16 (internal quotation and citation omitted). Without "legislative grace, the state of the law remains so today." *Id*. at 15.

Plaintiff has not presented an error or illegality, a serious evidentiary flaw, new evidence, or a claim of an accident, unpredictable surprise or unavoidable mistake that impaired its ability to adequately present its case. Plaintiff appears to instead reiterate arguments already made in its brief opposing the motion to dismiss and fully considered at that time by the Court. Revisiting claims that have already been decided against Plaintiff, without invoking one of the four grounds discussed infra, is an attempt to re-litigate the case. This is not permitted in a motion for reconsideration.

It bears repeating that the Supreme Court long ago established that requiring prepayment of duties as a condition for access to the courts does not violate the Constitution. *Cheatham v. United States*, 92 U.S. 85, 88–89 (1875). The specific statute requiring prepayment of duties in this case, 28 U.S.C. § 2637(a), and its predecessors have long been accepted as a condition attached to the government's waiver of sovereign immunity:

> [T]he requirement to pay all outstanding duties prior to commencing litigation on an import transaction has been a fixture of the customs laws since the Act of February 26, 1845. *See*

> PATRICK REED, *The Role of Federal Courts in U.S. Customs & International Trade Law* 59 (1997). Prior to the implementation of that statute, the same principle of prepayment as the basis for suit against a collector of customs duties was a fixture of common law since at least 1774. *Id.* at 53.

Slip Op 13–120 at 11.

The apparent absurdity of Plaintiff's situation also bears repeating, however. The Court of Appeals for the Federal Circuit ("Court of Appeals") recently issued a decision conclusively affirming that the sole basis for the astronomical assessment against Plaintiff—the Notice of Action announcing the rate advance contrary to the Ruling Letter—was void for failure to comply with 19 U.S.C. §1625(c)'s notice and comment procedures. *International Customs Products, Inc. v. United States*, 748 F.3d 1182 (Fed. Cir. 2014) (stating that "the CIT properly held the Notice of Action is void" and affirming "the CIT's decision ordering reliquidation of the Entry pursuant to the Ruling Letter"). Plaintiff obtained that decision, and the judgment it upheld, by prepaying duties on a single entry of white sauce and bringing suit under the jurisdiction granted by 28 U.S.C. § 1581(a). The rationale undergirding the Court of International Trade's judgment and the Court of Appeals' recent opinion plainly applies to each contested entries of white sauce, but Plaintiff is unable to obtain relief because it cannot prepay the *very duties that the courts have declared invalid*. That is because the Notice of Action resulted in an assessment of approximately $28 million, an amount Plaintiff was unable to pay.

This predicament, stemming in part from the constitutionality of the prepayment statute, also has roots in the jurisdictional holding of the Court of Appeals in a related case. In 2005, Plaintiff challenged the Notice of Action on grounds identical to those ultimately vindicated in the Court of Appeals: that the Notice of Action was void because it violated 19 U.S.C. § 1625(c)'s notice and comment requirement, and the entries should therefore be reliquidated in conformance with Customs' ruling letter. *See Int'l Custom Prods., Inc. v. United States*, Court No. 05–00341, Compl., ECF No. 4. The Court of International Trade ruled that Plaintiff's claim was not a challenge to white sauce classification, cognizable under the Court's jurisdiction via 28 U.S.C. § 1581(a), but a challenge to illegal agency revocation of a binding ruling letter, cognizable under the Court's jurisdiction via U.S.C. § 1581(i). *Int'l Custom Prods., Inc. v. United States*, 29 CIT 617, 626, 374 F. Supp. 2d 1311, 1320 (2005) (noting that Plaintiff was "not disputing Customs' classification of its white sauce as enunciated

in the Notice of Action" but objected 'to the Notice of Action itself and Customs' authority to issue it."). Without discussing the nature of Plaintiff's claim of *ultra vires* agency action, and with no analysis of the true nature of the claim, the Court of Appeals reversed on jurisdictional grounds. *See Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326–28 (Fed. Cir. 2006). It seems that the Court of Appeals assumed that the claim centered on the classification of white sauce rather than the *ultra vires* nature of the agency's action. *See id.* For this reason, Plaintiff has been forced to seek relief via 28 U.S.C. § 1581(a) and comply with its prepayment requirement.

Ultimately, the result here might lead a reasonable mind to question the wisdom of requiring prepayment of all assessments regardless of their size. That is a matter for the democratic process and the legislature. Given that the Supreme Court has spoken on the Constitutionality of the prepayment requirement in Customs disputes, this Court must deny Plaintiff's motion for reconsideration of its ruling on the Constitutional claims.

II. *Motion to Amend*

As an alternative to reconsideration, Plaintiff requests to amend its complaint pursuant to USCIT Rule 15(a)(2). "A party may amend its pleading only with the opposing party's written consent or the court's leave," though "the court should freely give leave when justice so requires." USCIT R. 15(a)(2). Despite that liberal standard, the Court will deny requests to amend a complaint when an amendment would be futile, cause undue delay, has a dilatory motive, is made in bad faith, or would unduly prejudice the opponent. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Based on the discussion above, the Court determines that granting leave to amend the complaint here would be futile and unduly delay resolution of this case.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion to reconsider, alter or amend judgment, and/or amend the complaint, is denied.

Dated: June 26, 2014
New York, NY

/*s*/*Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 14–75

VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS, Plaintiff, and AN GIANG FISHERIES IMPORT AND EXPORT JOINT STOCK COMPANY, ET AL., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, ET AL., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 14–00115

[Order granting Defendant's motion for leave to amend final results.]

Dated: June, 26, 2014

Andrew B. Schroth, *Ned H. Marshak*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Plaintiff.

Matthew Jon McConkey, Mayer Brown LLP, of Washington, DC, for Plaintiff-Intervenors.

Ryan M. Majerus, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for 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 *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce.

Valerie A. Slater, *Henry David Almond*, *Jarrod Mark Goldfeder*, *Nazakhtar Nikakhtar*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, for Defendant-Intervenors.

OPINION AND ORDER

Kelly, Judge:

Defendant, the United States, moves for leave to publish amended final results in the ninth administrative review on certain frozen fish fillets from the Socialist Republic of Vietnam so that the Department of Commerce ("Commerce") can correct errors in the final results that it deems were ministerial. *See* Def.'s Mot. Leave Pub. Amended Final Results 1, June 3, 2014, ECF No. 13 ("Def.'s Mot."). Plaintiff, Vietnam Association of Seafood Exporters and Producers ("VASEP") opposes Defendant's motion. *See* Resp. Opp'n Def.'s Mot. Leave Pub. Amended Final Results, June 23, 2014, ECF No. 28 ("Pl.'s Opp'n"). It argues that what Commerce calls a ministerial error was in fact a methodological modification which is inappropriate to correct after final results are published. Pl.'s Opp'n at 5. Additionally, Plaintiff argues the amended rate for separate rate respondents is not supported by substantial evidence and is contrary to law. Pl.'s Opp'n at 8. Because the court finds that Commerce's proposed correction is ministerial and no prejudice, undue delay, or expense will result from granting leave to amend the final results, Defendant's motion is granted.

BACKGROUND

During antidumping investigations and administrative reviews alike, Commerce generally "determine[s] the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." Section 777A(c)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. 1677f-1(c)(1) (2006).[1] However, if it is not practicable to do so "because of the large number of exporters or producers . . . [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination . . . ." 19 U.S.C. § 1677f1(c)(2). One option is for Commerce to select "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. § 1677f-1(c)(2)(B).

In nonmarket economy cases, Commerce begins with a rebuttable presumption that all respondents are under foreign control and should receive a single countrywide dumping rate.[2] Commerce assigns a separate rate to those respondents that demonstrate an absence of government control. Neither the statute nor Commerce's regulations directly address how Commerce should establish the rate for these separate rate respondents. However, Commerce has developed a practice whereby it follows the statute used in investigations to calculate an all-others rate. This statute provides that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e . . . ." 19 U.S.C. § 1673d(c)(5)(A).[3]

Here, in accordance with 19 U.S.C. § 1677f-1(c)(2), Commerce chose two mandatory respondents, Hung Vuong Group ("HVG") and Vinh Hoan Corporation ("Vinh Hoan"). *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 78 Fed. Reg. 55,676 (Dep't Commerce Sept. 11, 2013) (preliminary results of the antidumping duty administrative review and new shipper review; 2011–2012)

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

[2] See *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013) for a fuller discussion of calculating the all-others rate with respect to nonmarket economy cases.

[3] The statute's reference to "section 1677e" refers to determinations on the basis of facts available. The statute also provides that where all of the margins for the investigated respondents are either zero, de minimis, or are determined entirely under section 1677e, Commerce "may use any reasonable method . . ." to determine the rate. 19 U.S.C. § 1673d(c)(5)(B).

("Preliminary Results"); *see also* Decision Memorandum for the Preliminary Results for Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A-552–801, (Sept. 3, 2013), *available at* http://enforcement.trade.gov/frn/summary/vietnam/2013–22123–1.pdf (last visited June 25, 2014). Commerce published the final results on April 7, 2014. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 79 Fed. Reg. 19,053 (Dep't Commerce Apr. 7, 2014) (final results of antidumping duty administrative review and new shipper review; 2011–2012) ("Final Results"). In the Final Results, Commerce calculated dumping rates of 0.03 dollars per kilogram ("USD/kg") for Vinh Hoan, 1.20 USD/kg for HVG, and 2.11 USD/kg for those respondents who failed to demonstrate their eligibility for a separate rate. Commerce followed its practice and averaged the rates for the two mandatory respondents to calculate a 0.42 USD/kg rate for separate rate respondents in accordance with 19 U.S.C. § 1673d(c)(5)(A).

Certain interested parties timely filed ministerial error allegations pursuant to 19 U.S.C. § 1675(h) and 19 C.F.R. § 351.224(c). *See* Pl.'s Opp'n at 3. On May 9, 2014, Commerce published its intent to correct certain of the ministerial errors alleged by interested parties and one additional ministerial error it found on its own. *See id.*[4] However, Plaintiff filed its summons on May 7, 2014 and complaint on May 16, 2014 challenging the Final Results. *See* VASEP's Summons, May 7, 2014, ECF No. 1; Compl., May 16, 2014, ECF No. 9.[5] Thus, this Court was vested with jurisdiction in accordance with *Zenith Elecs. Corp. v.*

[4] In its unpublished ministerial error allegation memorandum, Commerce explained that it corrected three ministerial errors. *See generally* Pl.'s Opp'n at Ex. 1. First, in response to Vinh Hoan's allegation that Commerce did not include freight in the calculation of the fish oil by-product offset even though Commerce stated its intent to do so in the Final Results, Commerce agreed that this was an inadvertent error and made the correction. *See id.* Second, Commerce found on its own that it made an inadvertent error in copying that caused it to use the incorrect surrogate value for the fish waste input in the calculation of fish oil for Vinh Hoan and corrected the error. *See id.* Third, in response to HVG's allegation that Commerce did not convert a portion of HVG's international freight to pounds resulting in a value on a pounds and kilogram basis, Commerce agreed that it should have calculated international freight on a consistent pounds basis and corrected the error. *See id.*

[5] In addition, several other interested parties commenced actions contesting the Final Results. *See An Giang Fisheries Import and Export Joint Stock Company, et al. v. United States*, Court No. 14–00109 (CIT filed May 5, 2014); *Catfish Farmers of America, et al. v. United States*, Court No. 14–00113 (CIT filed May 5, 2014); *Binh An Seafood Joint Stock Company v. United States*, Court No. 14–00114 (CIT filed May 6, 2014). Defendant has filed parallel motions in each of the aforementioned cases, none of which are opposed.

United States, 884 F.2d 556 (Fed. Cir. 1989) before Commerce published any amended final results.[6]

ANALYSIS

The court has discretion to grant leave for Commerce to amend the Final Results. *See NTN Corp. v. United States*, 32 CIT 1283, 1285, 587 F.Supp.2d 1313, 1315 (2008). As in *NTN Corp.*, the court's decision is guided by the Congressional intent inherent in 19 U.S.C. § 1675(h) as well as its obligation rooted in the USCIT Rules to avoid prejudice, undue delay, and expense. Plaintiff argues that here, Commerce's proposed revision of the parties' rates is the result of a methodological choice and not a ministerial error correction. Thus, Plaintiff argues "granting the Defendant's motion . . . would be prejudicial and procedurally unfair." Pl.'s Opp'n at 5.

Congress specifically required Commerce to establish procedures for correcting ministerial errors "within a reasonable time after" administrative review determinations are made. 19 U.S.C. § 1675(h). Commerce promulgated procedures implementing this directive. *See* 19 C.F.R. § 351.224 (2014).[7] Similar to the statute, the regulations define a ministerial error as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f). The regulations also provide opportunities for the parties to comment on ministerial errors. *See* 19 C.F.R. § 351.224(c). Thus, Congress has expressed a clear intent for Commerce to correct ministerial errors which Commerce has accomplished through its regulations.

Initially, Plaintiff argues that Commerce's proposed corrections are not ministerial errors. As a result of Commerce's proposed corrections, Commerce would adjust the rate for Vinh Hoan to 0.00 USD/kg and for separate rate respondents to 1.20 USD/kg. *See* Pl.'s Opp'n at 4. Rather than attacking the correction Commerce made that triggers these rate adjustments, Plaintiff argues that by adjusting the rates for separate rate respondents from 0.42 USD/kg to 1.20 USD/kg

[6] VASEP also filed a consent motion for preliminary injunction on May 27, 2014 which the court granted in an order dated the same day. *See* Consent Mot. Prelim. Inj., May 27, 2014, ECF No. 10; Order, May 27, 2014, ECF No. 11 ("Order I"). Thus, unliquidated entries of subject merchandise covered by the ninth administrative review are currently enjoined from being liquidated pending a final and conclusive court decision in this litigation. Additionally, Defendant filed a consent motion to suspend the Defendant's obligation to file the administrative record in this action until the pending motion was resolved which the court also granted. *See* Def.'s Consent Mot. Suspend Obl. File Admin. R., June 20, 2014, ECF No. 26; Order, June 20, 2014, ECF No. 27 ("Order II").

[7] Further citations to the Code of Federal Regulations are to the 2014 edition.

Commerce made a methodological choice. As discussed above, in the Final Results, Commerce relied on its practice of following the all-others rate statute for investigations to calculate the rate for separate rate respondents. In the unpublished amended final results, Vinh Hoan's rate changed from 0.03 USD/kg to 0.00 USD/kg as a result of the ministerial error correction. Commerce then, once again, applied the same practice following the same section of the statute to adjust the rate for separate rate respondents. Plaintiff's argument that this was a methodological choice falls flat. Commerce continued applying the exact same methodology that it used for calculating rates for separate rate respondents in the Final Results. Thus, the court finds that Commerce's proposed corrections are ministerial and granting Defendant's motion would further Congress's intent of correcting ministerial errors in a reasonable time after final determinations are issued.

Next, the court considers whether granting Defendant's motion will prejudice any of the parties. The court finds that granting the motion will not prejudice any of the parties because no party will forgo any procedures to which it normally would be entitled. Plaintiff will have the opportunity to raise any challenges to the amended rate after the amended final results are published. Additionally, Defendant-Intervenors, Catfish Farmers of America, et al., who do not oppose this motion, will have the opportunity to contest Vinh Hoan's margin in *Catfish Farmers of America, et al. v. United States*, Court No. 14–00113 (CIT filed May 5, 2014). Finally, denying Defendant's motion would be unfair to the mandatory respondents, Plaintiff-Intervenors, who timely filed ministerial error allegations and would not have the opportunity to have those corrected until a court ordered remand at another point in the proceedings.

Next, the court considers whether granting Defendant's motion will cause any undue delay or expense. On June 20, 2014, the court granted Defendant's consent motion suspending Defendant's obligation to file the administrative record. *See* Order II at 3. The order provides that Commerce shall file the administrative record either forty days from the date the court grants Defendant's Motions for Leave to Publish Amend Final Results or ten days from the date the court denies the motions. *See id.* Moreover, it may be that some parties will need to amend their complaints in this action or one of the related actions after the amended results are published. This thirty day delay and added cost of amending complaints is a cost that the court must consider.[8] However, granting Defendant's motion may also

[8] The delay is only thirty days because Commerce has ten days to file the administrative record if the court denies the motion but will have forty days if the court grants the motion.

save time by avoiding an unnecessary remand. Additionally, the added cost of amending a complaint will be counterbalanced by avoiding unnecessary litigation of the issues that will be corrected in the amended Final Results. Certainly the delay and costs do not outweigh the concerns the court has discussed above. Finally, the court will provide all plaintiffs to this action and the related actions leave to file amended summonses and amended complaints pursuant to USCIT Rules 3(e) and 15(a) without having to pay the fees for filing a new case.

Plaintiff also argues that Commerce's decision to apply the 1.20 USD/kg rate to separate rate respondents was not supported by substantial evidence and was contrary to law. The court will not address the merits of this issue at this time. Plaintiff in this action and the plaintiffs in all the related cases are being granted leave to amend their summonses and complaints. The parties will have the opportunity to address this issue on the merits in their USCIT Rule 56.2 motions.

CONCLUSION AND ORDER

Accordingly, upon consideration of Defendant's motion, Plaintiff's opposition thereto, and all papers and proceedings herein, and upon due deliberation, it is hereby:

ORDERED that Defendant's Motion for Leave to Publish Amended Final Results is granted, it is further

ORDERED that the Department of Commerce shall file the administrative record in accordance with this court's order dated June 20, 2014, listed at ECF No. 27, and it is further

ORDERED that Plaintiff is granted leave to amend its summons and complaint pursuant to USCIT Rule 3(e) and USCIT Rule 15(a) following the publication of the amended final results, and it is further

ORDERED that the injunction entered by the Court by the order dated May 27, 2014, listed at ECF No. 11, remains in effect according to the terms of that order.

Dated: June 26, 2014
New York, NY

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

Slip Op. 14–76

ETHAN ALLEN GLOBAL, INC. AND ETHAN ALLEN OPERATIONS, INC., Plaintiffs, v. UNITED STATES AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 13–00183

[Denying motion to stay]

Dated: June 27, 2014

Jill A. Cramer, *Kristin H. Mowry*, *Jeffrey S. Grimson*, *Sarah Wyss*, and *Rebecca M. Janz*, Mowry & Grimson, PLLC, of Washington, DC, for plaintiffs.

Jessica R. Toplin, Trial Attorney, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director.

Neal J. Reynolds, Assistant General Counsel for Litigation, and *Patrick V. Gallagher, Jr.*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission. With them on the brief was *Dominic L. Bianchi*, General Counsel.

OPINION AND ORDER

Stanceu, Judge:

In this action, plaintiffs Ethan Allen Global, Inc. and Ethan Allen Operations, Inc. (collectively, "Ethan Allen") challenge certain actions by the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP") that denied plaintiffs benefits under the now-repealed Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").[1] Specifically, plaintiffs bring various statutory and as-applied constitutional challenges to the Commission's determination not to include Ethan Allen on a list of parties potentially eligible for "affected domestic producer" ("ADP") status under the CDSOA, which status could have qualified Ethan Allen for distributions of funds collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China ("China"). Compl. ¶¶ 37–43, 51–54 (May 8, 2013), ECF No. 4. Plaintiffs also bring various statutory and as-applied constitutional challenges to CBP's decision not to provide Ethan Allen with annual CDSOA distributions for Fiscal Year 2011 and Fiscal Year 2012. *Id*. Additionally, plaintiffs bring facial challenges to aspects of the CDSOA on First

[1] Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).

Amendment grounds. *Id.* at ¶¶ 44–50.

Plaintiffs request that the court stay these proceedings pending the final resolution of a petition for a writ of certiorari seeking U.S. Supreme Court review of *Ashley Furniture Indus., Inc. v. United States*, 734 F.3d 1306 (Fed. Cir. 2013) ("*Ashley*"). Pl. Ethan Allen Global, Inc./Ethan Allen Operations, Inc.'s Substitute Mot. to Continue the Stay of All Proceedings 1 (Mar. 14, 2014), ECF No. 21–1 ("Pls.' Stay Mot."). Plaintiffs initially filed a motion to stay these proceedings until April 3, 2014, which was the *Ashley* appellants' deadline to file a petition for a writ of certiorari. Mot. for Stay of Proceedings 1 (Feb. 19, 2014), ECF No. 17. Plaintiffs seek to withdraw their earlier motion and ask for leave to file a substitute motion that requests a stay pending the final resolution of the petition for certiorari. Pl. Ethan Allen Global, Inc./Ethan Allen Operations, Inc.'s Mot. to Withdraw its Feb. 19, 2014 Mot. for Stay of Proceedings & Mot. for Leave to File Substitute Mot. to Continue the Stay of All Proceedings 2 (Mar. 14, 2014), ECF No. 21. Defendants United States and the ITC oppose both motions. Defs.' Resp. in Opp'n to Pls.' Mot. to Stay 1 (Mar. 4, 2014), ECF No. 18; Defs.' Resp. in Opp'n to Pls.' Mot. to Withdraw its Mot. to Stay & Mot. for Leave to File Substitute Mot. to Continue the Stay 1 (Mar. 28, 2014), ECF No. 22.

As a preliminary matter, the court grants plaintiffs' request to withdraw its earlier motion to stay these proceedings and file a substitute motion. For the reasons discussed herein, the court denies plaintiffs' substitute motion to stay these proceedings.

I. BACKGROUND

In 2003, the ITC initiated an investigation to determine whether imports of wooden bedroom furniture from China were causing or threatening to cause material injury to a domestic industry. *See* Compl. ¶¶ 20–21. During this investigation, the ITC distributed questionnaires to potential ADPs, including Ethan Allen. *See id.* at ¶ 22. In its questionnaire responses, Ethan Allen indicated that it took no position on the petition that resulted in the antidumping duty order on imports of wooden bedroom furniture from China.[2] *Id.* Subsequently, the ITC excluded Ethan Allen from the list of ADP's potentially eligible for CDSOA distributions under the order. *See id.* at ¶ 27. On July 20, 2011, Ethan Allen filed a certification with Customs requesting CDSOA distributions for Fiscal Year 2011, which Customs

[2] *See Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Dep't of Commerce Jan. 4, 2005).

subsequently denied. *Id.* at ¶ 32. On June 27, 2012, Ethan Allen filed another certification with Customs, this time requesting CDSOA distributions for Fiscal Year 2012, which Customs also denied. *Id.* at ¶ 33.

Plaintiffs commenced this action on May 8, 2013. Summons, ECF No. 1; Compl. On May 22, 2013, the court granted defendants' unopposed motion to stay these proceedings pending issuance of a mandate by the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Ethan Allen Global, Inc. v. United States*, CAFC Court No. 2012–1200. Order, ECF No. 12. That case concerned an appeal of this Court's decision in *Ethan Allen Global, Inc. v. United States*, 36 CIT __, 816 F. Supp. 2d 1330 (2012) ("*Ethan Allen*"), in which this Court dismissed Ethan Allen's claims challenging the denial of CDSOA distributions for Fiscal Year 2006 through Fiscal Year 2010. On August 19, 2013, the Court of Appeals decided *Ashley*, a consolidated opinion affirming the judgments entered in *Ethan Allen* and in *Ashley Furniture Indus., Inc. v. United States*, 36 CIT __, 818 F. Supp. 2d 1355, both of which involved claims similar to those brought by plaintiffs in the instant action. *Ashley*, 734 F.3d at 1306. After denying petitions for rehearing and rehearing en banc, the Court of Appeals issued its mandate in *Ashley* on January 10, 2014. On May 2, 2014, the *Ashley* appellants filed a petition for a writ of certiorari seeking Supreme Court review of the decision by the Court of Appeals in *Ashley*. *See* Pet. for a Writ of Certiorari, U.S. Sup. Ct. Docket No. 13–1367.

II. DISCUSSION

The court has jurisdiction over this matter pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4) (2006). The power to stay a case "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("*Landis*"). Decisions concerning when and how to stay a case rest "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In exercising that discretion, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

Plaintiffs have failed to demonstrate that the circumstances of these proceedings weigh in favor of a stay. Plaintiffs contend that a stay is warranted in this instance because, in plaintiffs' view, the

outcome of the *Ashley* appellants' petition for a writ of certiorari "will have a direct impact" on these proceedings. Pls.' Stay Mot. 2. This is because, according to plaintiffs, "the factual and legal issues underlying the above-captioned case are substantially similar" to those in *Ashley*. *Id.*

Plaintiffs' argument that the petition "will have a direct impact" on the instant case is mere speculation. The court can have no assurance that the Supreme Court is likely to grant the *Ashley* appellants' petition. Plaintiffs, therefore, have not shown that a stay of this action would promote judicial economy and efficiency rather than simply cause delay.

III. CONCLUSION AND ORDER

Upon consideration of all papers and proceedings herein, and upon due deliberation, it is

hereby

ORDERED that plaintiffs' motion to withdraw its February 19, 2014 motion and file a substitute motion to stay further proceedings in this action be, and hereby is, granted; and it is further

ORDERED that plaintiffs' March 14, 2014 substitute motion to stay further proceedings in this action be, and hereby is, denied.

Dated: June 27, 2014
New York, New York

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

Slip Op. 14–77

STANDARD FURNITURE MANUFACTURING CO., INC., Plaintiff, v. UNITED STATES AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 13–00202

[Denying motion to stay]

Dated: June 27, 2014

Jill A. Cramer, *Kristin H. Mowry*, *Jeffrey S. Grimson*, *Sarah Wyss*, and *Rebecca M. Janz*, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff.

Jessica R. Toplin, Trial Attorney, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director.

Neal J. Reynolds, Assistant General Counsel for Litigation, and *Patrick V. Gallagher, Jr.*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission. With them on the brief was *Dominic L. Bianchi*, General Counsel.

OPINION AND ORDER

Stanceu, Judge:

In this action, plaintiff Standard Furniture Manufacturing Co., Inc. ("Standard") challenges certain actions by the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP") that denied plaintiff benefits under the now-repealed Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").[1] Specifically, plaintiff brings various statutory and as-applied constitutional challenges to the Commission's determination not to include Standard on a list of parties potentially eligible for "affected domestic producer" ("ADP") status under the CDSOA, which status could have qualified Standard for distributions of funds collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China ("China"). Compl. ¶¶ 47–59 (May 14, 2013), ECF No. 4. Plaintiff also brings various statutory and as-applied constitutional challenges to CBP's decision not to provide Standard with annual CDSOA distributions for Fiscal Year 2011 and Fiscal Year 2012. *Id.*.

Plaintiffs request that the court stay these proceedings pending the final resolution of a petition for a writ of certiorari seeking U.S. Supreme Court review of *Ashley Furniture Indus., Inc. v. United States*, 734 F.3d 1306 (Fed. Cir. 2013) ("*Ashley II*"). Pl. Standard Furniture Mfg. Co., Inc.'s Mot. to Continue the Stay of All Proceedings 1 (Feb. 13, 2014), ECF No. 24 ("Pl.'s Stay Mot."). Also before the court is plaintiff's motion to supplement the motion to stay with additional exhibits demonstrating the *Ashley II* appellants' intent to file a petition for a writ of certiorari at the Supreme Court. Pl. Standard Furniture Mfg. Co., Inc.'s Mot. to Supplement its Feb. 13, 2014 Mot. to Continue the Stay of All Proceedings 1 (Mar. 13, 2014), ECF No. 26. Defendants United States and the ITC oppose both motions. Defs.' Resp. in Opp'n to Pl.'s Mot. to Stay 1 (Mar. 4, 2014), ECF No. 25 ("Defs.' Stay Opp'n"); Defs.' Resp. in Opp'n to Pl.'s Mot. to Supplement its Mot. to Stay 1 (Mar. 19, 2014), ECF No. 27.

[1] Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).

For the reasons discussed herein, the court denies plaintiff's motion to stay these proceedings. The court also denies as moot plaintiff's motion to supplement because the *Ashley II* appellants have filed the relevant petition with the Supreme Court.

I. BACKGROUND

In 2003, the ITC initiated an investigation to determine whether imports of wooden bedroom furniture from China were causing or threatening to cause material injury to a domestic industry. Compl. ¶ 23. During this investigation, the ITC distributed questionnaires to potential ADPs, including Standard. *Id.* at ¶ 24. In its questionnaire responses, Standard indicated that it opposed the petition that resulted in the antidumping duty order on imports of wooden bedroom furniture from China.[2] *Id.* Subsequently, the ITC excluded Standard from the list of ADP's potentially eligible for CDSOA distributions under the order. *Id.* at ¶¶ 35, 38. On July 18, 2011, Standard filed a certification with Customs requesting CDSOA distributions for Fiscal Year 2011, which Customs subsequently denied. *Id.* at ¶¶ 8, 36–37. On July 25, 2012, Standard filed another certification with Customs, this time requesting CDSOA distributions for Fiscal Year 2012, which Customs also denied. *Id.* at ¶¶ 10, 39–40.

Plaintiff commenced this action on May 14, 2013. Summons, ECF No. 1; Compl. On May 28, 2013, the court granted defendants' unopposed motion to stay these proceedings pending issuance of a mandate by the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *Ashley Furniture Indus., Inc. v. United States*, CAFC Court No. 2012–1196. Order, ECF No. 11. That case concerned an appeal of this Court's decision in *Ashley Furniture Indus., Inc. v. United States*, 36 CIT __, 818 F. Supp. 2d 1355 (2012) ("*Ashley I*"), in which this Court dismissed a domestic wooden furniture producer's claims challenging the denial of CDSOA distributions on grounds similar to those brought by plaintiff in the instant case. On August 19, 2013, the Court of Appeals decided *Ashley II*, a consolidated opinion affirming the judgments in *Ashley I* and in *Ethan Allen Global, Inc. v. United States*, 36 CIT __, 816 F. Supp. 2d 1330 (2012), which also involved claims similar to those in the instant action. *Ashley II*, 734 F.3d at 1306. After denying petitions for rehearing en banc, the Court of Appeals issued its mandate in *Ashley II* on January 10, 2014.

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[2] *See Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Dep't of Commerce Jan. 4, 2005).

Plaintiff filed its motion to stay these proceedings on February 13, 2014, Pl.'s Stay Mot. 1, which defendants oppose, Defs.' Stay Opp'n 1. On May 2, 2014, the *Ashley II* appellants filed a petition for a writ of certiorari seeking Supreme Court review of the decision by the Court of Appeals in *Ashley II*. *See* Pet. for a Writ of Certiorari, U.S. Sup. Ct. Docket No. 13–1367.

II. DISCUSSION

The court has jurisdiction over this matter pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4) (2006). The power to stay a case "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("*Landis*"). Decisions concerning when and how to stay a case rest "within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citations omitted). In exercising that discretion, the court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 257.

Plaintiff has failed to demonstrate that the circumstances of these proceedings weigh in favor of a stay. Plaintiff contends that a stay is warranted in this instance because, in plaintiff's view, the outcome of the *Ashley II* appellants' petition for a writ of certiorari "will have a direct impact" on the above-captioned matter. Pl.'s Stay Mot. 2. This is because, according to plaintiff, "the factual and legal issues underlying Standard's case are substantially similar" to those addressed in *Ashley II* and the petition for a writ of certiorari "could result in a substantive opinion on the merits by the Supreme Court." *Id.*

Plaintiff's argument that the petition "will have a direct impact" on the instant case is mere speculation. The court can have no assurance that the Supreme Court is likely to grant the *Ashley II* appellants' petition. Plaintiff, therefore, has not shown that a stay of this action would promote judicial economy and efficiency rather than simply cause delay.

III. CONCLUSION AND ORDER

Upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's March 13, 2014 motion to supplement the February 13, 2014 motion to stay further proceedings in this action be, and hereby is, denied as moot; and it is further

ORDERED that plaintiff's February 13, 2014 motion to stay further proceedings in this action be, and hereby is, denied.

Dated: June 27, 2014
New York, New York

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