U.S. Customs and Border Protection

Slip Op. 14–114

CERAMARK TECHNOLOGY, INC. Plaintiff, v. UNITED STATES, Defendant, and SGL CARBON LLC and SUPERIOR GRAPHITE CO., Defendant-Intervenors.

Before: Donald C. Pogue,
Senior Judge
Court No. 13–00357

[final determination of circumvention affirmed in part and remanded in part]

Dated: September 24, 2014

Brian W. Stolarz and *Katherine A. Calogero,* Jackson Kelly PLLC, of Washington, DC, for the Plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Stuart F. Delery,* Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Jessica M. Forton,* Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Mary T. Staley and *Katherine E. Wang,* Kelley Drye &Warren LLP, of Washington, DC, for the Defendant-Intervenors.

OPINION

Pogue, Senior Judge:

In this action, Plaintiff, Ceramark Technology, Inc. ("Ceramark") challenges the affirmative final determination of circumvention of an antidumping duty order.[1] Compl., ECF No. 9 at ¶2. In that determination, the Department of Commerce ("Commerce") found that 17 inch diameter graphite electrodes (which Ceramark imports) constitute merchandise altered in form or appearance in such minor respects that it was properly subject to the antidumping duty order for

[1] *Small Diameter Graphite Electrodes From the People's Republic of China,* 78 Fed. Reg. 56,864 (Dep't Commerce Sept. 16, 2013) (affirmative final determination of circumvention of the antidumping duty order and rescission of later-developed merchandise anticircumvention inquiry) ("*Circumvention Final Determination*") and accompanying Issues & Decision Memorandum, A-570–929 (Sept. 10, 2013) ("*I&D Mem.*").

graphite electrodes 16 inches or smaller in diameter.[2]. Plaintiff claims that Commerce's determination is neither in accordance with law nor supported by substantial evidence. Rule 56.2 Mot. for J. on the Agency R. on behalf of Pl. Ceramark Tech., Inc., ECF No. 25 ("Rule 56.2 Mot.").

Plaintiff is correct in part: Because Commerce failed to base its determination on a reasonable reading of the record evidence in context, its determination is not supported by substantial evidence. The court remands for further consideration in accordance with this opinion.

BACKGROUND

I. Antidumping Duty Determination and Order

This action derives from a petition by SGL Carbon LLC and Superior Graphite Co. ("Petitioners" or "Defendant-Intervenors") alleging that imports of small diameter graphite electrodes ("SDGE") from the People's Republic of China ("PRC" or "China") were being dumped in the United States. *[SDGE] from the [PRC],* 73 Fed. Reg. 8287 (Dep't Commerce Feb. 13, 2008) (initiation of antidumping duty investigation) ("*AD Initiation Notice*").

Commerce, having conferred with Defendant-Intervenors to ensure an accurate scope definition reflective of the domestic industry's concerns, limited its investigation to "all [SDGE] of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware." *Id.* at 8287.[3] Commerce made a final affirmative determination of sales at less than fair value based on this scope definition. *[SDGE] from the [PRC],* 74 Fed. Reg. 2049, 2050 (Dep't Commerce Jan. 14, 2009) (final determination of sales at less than fair value and affirmative determination of critical circumstances) ("*AD Final Determination*"). The International Trade Commission ("ITC") similarly made a final affirmative determination of material injury to U.S. industry within this scope definition. *[SDGE] from*

[2] *Circumvention Final Determination,* 78 Fed. Reg. at 56,865. *See Small Diameter Graphite Electrodes from the People's Republic of China,* 74 Fed. Reg. 8775 (Dep't Commerce Feb. 26, 2009) (antidumping duty order) ("*AD Order*").

[3] *See also* Def.'s Resp. to Pl.'s Mot. for J. on the Admin. R., ECF No. 38 ("Def.'s Resp.") at 2 (noting that Petitioners and subsequently Commerce defined the desired scope of the investigation in this way).

China, USITC Pub. 4062, Inv. No. 731-TA-1143 (Feb. 2009) ("*ITC Final Determination*") at 6, 9–10.[4] Drawing on the arguments of the domestic industry, the ITC found "a clear dividing line between [small diameter and large diameter graphite electrodes]," and defined the threatened domestic product as "coextensive with the scope" of Commerce's antidumping duty determination. *Id.* at 10.

Based on the final affirmative determinations of Commerce and the ITC, Commerce issued an antidumping duty order on SDGE from the PRC. *AD Order,* 74 Fed. Reg. at 8775. Commerce again used the same scope definition, with the dividing line between small and large diameter graphite electrodes explicitly and unambiguously specified at 16 inches. *Id.*

II. Circumvention Investigation and Determination

Several years later, at the request of Defendant-Intervenors, Commerce investigated whether imports of graphite electrodes larger than 16 inches but smaller than 18 inches in diameter were being used to circumvent the antidumping duty order on SDGE. *[SDGE] from the [PRC],* 77 Fed. Reg. 37,873 (Dep't Commerce June 25, 2012) (initiation of anticircumvention inquiry) ("*Circumvention Initiation Notice*").[5] Commerce issued an affirmative determination of circum-

[4] The ITC notes that, again, Petitioners argued that the ITC "should find one like product consisting of SDGE, coextensive with Commerce's scope. They stress that there are pronounced differences between SDGE and [large diameter graphite electrodes]." *Id.* at 6.

[5] Defendant-Intervenors challenged pursuant to §§ 781(c)-(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677j(c) (2012) (the minor alterations provision) and 19 U.S.C. § 1677j(d)(2012) (the later developed merchandise provision). (All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, unless otherwise noted.) The merchandise subject to the inquiry were graphite electrodes from the PRC produced and/or exported by Sinosteel Jilin Carbon Co., Ltd. and Jilin Carbon Import and Export Company ("Jilin Carbon" collectively), Beijing Fangda Carbon-Tech Co., Ltd. and Fangda Carbon New Material Co., Ltd. ("Fangda Carbon" collectively), and Fushun Jinly Petrochemical Carbon ("Fushun Jinly"), with diameters larger than 16 inches but smaller than 18 inches and otherwise meeting the definition of the scope of the antidumping duty order. *See Circumvention Initiation Notice,* 77 Fed. Reg. at 37,874 n.7, 37,875–76. Commerce sent questionnaires to the above companies, along with all companies identified in the Comprehensive Service List for Scope Inquiries and the Government of the PRC. *[SDGE] from the[PRC],* Preliminary Analysis Mem., A-570–929 circumvention Inquiry (Apr. 11, 2013) (adopted in 78 Fed. Reg. 22,843 (Dep't Commerce Apr. 17, 2013) (affirmative preliminary determination of circumvention of the antidumping duty order and intent to rescind later-developed merchandise circumvention inquiry) ("*Circumvention Prelim. Determination*")) *reproduced in* App. to Def.'s Resp., ECF No. 44 at Tab 6 ("*Circumvention Prelim. Mem.*")at 2. Fangda Carbon and Fushun Jinly responded that neither they nor their affiliates produced or sold graphite electrodes matching the anticircumvention description. *Id.* Jilin Carbon responded that it produced and exported graphite electrodes with 17 inch diameters. *See Id.* at 2–3. Plaintiff, Ceramark, identified itself as an importer of those electrodes. *Id.* at 3. No one else responded. *Id.* at 2. Commerce accordingly limited the application of its affirmative determination to 17 inch diameter graphite electrodes produced and/or exported by Jilin Carbon, as it had no record evidence of any other producer

vention, finding that 17 inch graphite electrodes constituted a product altered in form or appearance in such minor respects that it should be included with the scope of the SDGE order pursuant to 19 U.S.C. § 1677j(c). *Circumvention Final Determination,* 78 Fed. Reg. at 56,864–65.[6] Plaintiff now challenges this determination. Rule 56.2 Mot., ECF No. 25; Mem. of Points & Authorities in Supp. of Pl.'s [Rule 56.2 Mot.], ECF No. 25–1 at 9.

STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and will therefore uphold Commerce's final affirmative anticircumvention determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of New York v. N.L.R.B.,* 305 U.S. 197, 229 (1938)). Substantial evidence review requires consideration of "the record as a whole, including any evidence that fairly detracts from the substantiality of the evidence," *Gallant Ocean (Thailand) Co. v. United States,* 602 F.3d 1319, 1323 (Fed. Cir. 2010) (internal quotation marks and citation omitted), and asks, in light of that evidence, whether Commerce's determination was reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).[7]

DISCUSSION

I. Antidumping Duty Order Scope and Circumvention

In questions of scope, the language of the antidumping duty order is "the cornerstone of our analysis." *Duferco Steel, Inc. v. United States,* 296 F.3d 1087, 1097 (Fed. Cir. 2002). When the language is ambiguous in application, Commerce may interpret or clarify the order, 19 C.F.R. § 351.225(a),[8] and the court will grant "significant

or product. *Id.* at 3–4; *Circumvention Prelim. Determination,* 78 Fed. Reg. at 22,844 (unchanged in *Circumvention Final Determination,* 78 Fed. Reg. at 56,865).

[6] Having found circumvention under 19 U.S.C. § 1677j(c), Commerce found it unnecessary to determine whether later developed merchandise was circumventing the SDGE antidumping duty order under 19 U.S.C. § 1677j(d). *Id.* at 56,865. Plaintiff does not contest Commerce's decision not to pursue Petitioner's 19 U.S.C. § 1677j(d) inquiry.

[7] *See also Fuwei Films (Shandong) Co., Ltd. v. United States,* __ CIT __, 837 F. Supp. 2d 1347, 1350 (2012) ("Fundamentally, though, 'substantial evidence' is best understood as a word formula connoting reasonableness review.") (citing 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2011).

[8] *See also Tak Fat Trading Co. v. United States,* 396 F.3d 1378,1382 (Fed. Cir. 2005) ("After investigation, Commerce will issue an antidumping order if merchandise has been sold at

deference" to Commerce's interpretation. *Duferco Steel,* 296 F.3d at 1094–95 (citation omitted). It follows that, when circumvention "seriously undermine[s] the effectiveness of the remedies provided" by the antidumping duty regime, S. Rep. No. 100–71, at 101 (1987) (legislative history of 19 U.S.C. § 1677j), Commerce may determine that a product in the penumbra of an order, outside the literal scope of its language, is covered by that order. 19 U.S.C. § 1677j.[9] Nevertheless, Commerce cannot change the order or interpret it "in a way contrary to [its] terms." *Wheatland Tube Co. v. United States,* 161 F.3d 1365, 1370 (Fed. Cir. 1998) (quoting *Smith Corona Corp. v. United States,* 915 F.2d 683, 686 (Fed. Cir. 1990)).[10]

II. Commerce's Minor Alteration Analytic Method

With a finding of circumvention, Commerce may include a product "altered in form or appearance in minor respects" within the scope of an antidumping duty order, 19 U.S.C. § 1677j(c), even if that product "might otherwise fall outside the literal scope of the order." *Target Corp. v. United States,* 609 F.3d 1352, 1362 (Fed. Cir. 2010) (emphasis omitted) (relying on *Wheatland Tube*, 161 F. 3d at 1371).[11]

The statute is silent with regard to what factors Commerce should consider when determining whether an alteration is minor. Commerce's practice is to analyze five factors[12] provided in the statute's legislative history (the Senate Report Criteria). *Circumvention Prelim. Mem.* at 5; *I&D* Mem. cmt. 1 at 10. Because the Senate Report Criteria may be insufficient for analysis of any given case,[13] Com-

less than fair value. After an order is published, scope rulings may be necessary when producers . . . need clarification as to the status of their products under the order.").

[9] Circumvention takes two forms, either a product's country of origin has been manipulated (merchandise completed or assembled in the United States and merchandise completed or assembled in other foreign countries), or the product itself has been manipulated (minor alteration of merchandise or later-developed merchandise). 19 U.S.C. §§ 1677j(a)-(d); 19 C.F.R.§§ 351.225(g)-(j).

[10] *See also Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) ("The Commerce Department enjoys substantial freedom to interpret and clarify its antidumping duty orders. But while it may interpret those orders, it may not change them.") (citation omitted).

[11] *See also Nippon Steel Corp. v. United States,* 219 F.3d 1348,1349 (Fed. Cir. 2000) (finding that a minor alteration inquiry is not ultra vires even when products are expressly and unambiguously excluded from an order).

[12] These five factors are: "[1] the overall physical characteristics of the merchandise, [2] the expectations of the ultimate users, [3] the use of the merchandise, [4] the channels of marketing[,] and [5] the cost of any modification relative to the total value of the imported product." S. Rep. No. 100–71, at 100; *Circumvention Prelim. Mem.* at 5. For the application of this test to the instant case, *see Circumvention Prelim. Mem.* at 8–16.

[13] The Senate Report indicates that the list is non-exhaustive. S. Rep. No. 100–71, at 100.

merce will also consider additional context-specific criteria. *Circumvention Prelim. Mem.* at 5.[14] This approach is in keeping with the Senate's directive that Commerce "apply practical measurements regarding minor alterations, so that circumvention can be dealt with effectively," S. Rep. No. 100–71, at 100, and with "Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko Metal Prods., Inc. v. United States,* 43 F.3d 1442, 1443 (Fed. Cir. 1994).

As Commerce's choice of factors is based on the relevant statutory language and legislative history, its minor alterations analytic method cannot be per se unreasonable.[15] Rather, it is in accordance with law.

III. Commerce's Minor Alteration Analytic Method in Application

While Commerce's analytic method is not per se unreasonable, circumvention is an inherently factual determination[16] and therefore must be supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i).

In a minor alterations inquiry, whatever tests are derived and devised, whatever factors are considered, substantial evidence requires review of the record as a whole, including evidence contrary to Commerce's determination, and a finding that, given all the evidence, Commerce has still acted reasonably. *Gallant Ocean*, 602 F.3d at 1323; *Nippon Steel*, 458 F.3d at 1351. A minor alteration must be minor. It must be insignificant.[17] It cannot make the product mate-

[14] Here, Commerce has considered: (1) the circumstances under which the products entered the United States; (2) the timing of entries; and (3) the quantity of merchandise entered. *Circumvention Prelim. Mem.* at 16.

[15] Because the statute does not "directly address the precise question at issue," the court is left to decide whether Commerce's choice of factors is based on "a reasonable construction of the statute." *Yangzhou Bestpak Gifts & Crafts Co. v. United States,* 716 F.3d 1370, 1377 (Fed. Cir. 2013) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984)), and will consider "the express terms of the provision[] at issue, the objectives of [the] provision[], and the objectives of the antidumping scheme as a whole." *Wheatland Tube Co. v. United States*, 495 F. 3d1355, 1361 (Fed. Cir. 2007) (quoting *NSK Ltd. v. United States,* 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1297 (2002)).

[16] *See Certain Cut-to-Length Carbon Steel Plate from the [PRC],* 74 Fed. Reg. 33,991, 33,992 (Dep't Commerce July 14, 2009) (affirmative preliminary determination of circumvention of the antidumping duty order) ("Each circumvention case is highly dependent on the facts on the record, and must be analyzed in light of those specific facts."), unchanged in 74 Fed. Reg. 40,565, 40,566 (Dept. Commerce Aug. 12, 2009) (affirmative final determination of circumvention of the antidumping duty order).

[17] Commerce, in dismissing this requirement, would suggest that it is merely the Plaintiff's construction of the statute, *see I&D Mem.* at 10 ("[W]e disagree with Ceramark's construction of the statute (i.e., that the minor alteration must be 'insignificant')."). This is incorrect. It is the Federal Circuit's construction of the statute. *See Wheatland Tube*, 161 F.3d at 1371 ("In essence, section 1677j(c) includes within the scope of an antidumping duty order

rially different from that specified in the order's scope. *Wheatland Tube,* 161 F.3d at 1371. Otherwise, Commerce would be able to use circumvention to change an order or read it contrary to its terms, and the minor alteration inquiry would upend "the purpose of the antidumping laws" by "allow[ing] Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation." *Wheatland Tube,* 161 F. 3d at 1370–71.[18] Commerce's "total failure to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion renders [a determination] unsupported by substantial evidence." *Allegheny Ludlum Corp. v. United States,* 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000) (citations omitted).

Here, Commerce has either ignored or dismissed record evidence that, on its face, indicates that the alteration at issue – a one inch increase in graphite electrode diameter – is neither minor nor an alteration. Specifically: Commerce has not reasonably considered the prior commercial availability of the product.[19] *See, e.g.*, Ceramark Initial Questionnaire Resp., A-570–929 Anticircumvention Inquiry (Aug. 3 2012), *reproduced in* Pub. App. to Mem. of Points of Authorities in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Pub. App. to Rule 56.2 Mot."), ECF No. 28–2 at Tab 2, at 3 (citing Exs. 1 & 2 to *id.,* respectively *[Nat'l Elec. Mfrs. Ass'n ("NEMA")] Standards Publication Nos. CG 1–1993: Manufactured Graphite / Carbon Elecrtrodes* (Jan. 26, 1993) at 2, 8; *NEMA Standards Publication No. CG 1–2001: Manufactured Graphite / Carbon Electrodes* (2002) at 7); Jilin Carbon Initial Questionnaire Resp., A-570–929 Anticircumvention Inquiry (July 25, 2012) ("Jilin Resp."), *reproduced in* Pub. App. to Rule 56.2 Mot., ECF No. 28–5 at Tab 5, at 2, 8, 11–12 (citing same 1993 and 2001 NEMA standards); Ceramark's 1st Supp. Questionnaire Resp., A-570–929 Anticircumvention Inquiry (Oct. 17, 2012) ("Ceramark's

products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order's literal scope.") (citations omitted).

[18] It would "also indirectly encourage manipulation of the antidumping duty process" by incentivizing petitioners to "narrowly define subject merchandise" to get a positive injury determination, and "later broaden an order's reach through use of a minor alteration inquiry. Congress could not have intended this result." *Deacero S.A. de C.V. v. United States*, __ CIT __,942 F. Supp. 2d 1321, 1332 n.6 (2013) ("*Deacero I*").

[19] Commerce declined to make finding as to whether 17 inch graphite electrodes were commercially available prior to the order. Instead, Commerce reasoned that the prior existence of aproduct "does not preclude the Department from conducting a minor alterations anticircumvention analysis," and therefore has "no relevance" to the minor alteration inquiry. *I&D Mem.* cmt. 1 at 11 (citation omitted). The first is correct, but the second does not follow. There is a difference between not precluding and having no relevance. An alternate product is not necessarily the same as an altered product, *see Hysla v. United States,* 22 CIT 44, 48–49 (1998) (not reported in the Federal Supplement), and prior existence, while not dispositive, may help distinguish between the two.

Supp. Resp."), *reproduced in* Pub. App. to Rule 56.2 Mot., ECF No. 28–7 at Tab 7, at 6–7. Commerce also has not considered the importance of diameter as a defining characteristic of graphite electrodes. *See, e.g.,* Ceramark's Supp. Resp., ECF No. 28–7 at Tab 7, at 2–6; Jilin Resp., ECF No. 28–5 at Tab 5, at 8–13. Moreover, Commerce has not considered the choice made by Defendant-Intervenors (the original petitioners in the antidumping duty investigation), its own corresponding choice, and the ITC's decision to explicitly and unambiguously exclude[20] 17 inch graphite electrodes from the SDGE antidumping duty investigation, injury determination, and order.[21] *See AD Initiation Notice,* 73 Fed. Reg. at 8287; *AD Final Determination,* 74 Fed. Reg. at 2050; *AD Order,* 74 Fed. Reg. at 8775; *ITC Final Determination*, USCIT Pub. 4062 at 6, 9–10.[22]

[20] Defendant-Intervenors argue that even when "the scope descriptor in question is a number," it "does not make a clear and unambiguous exclusion because Commerce has an appropriate practice of looking behind numeric descriptors to determine the meaning of the scope language." Resp. Br. of Def.-Intervenors SGL Carbon LLC & Superior Graphite Co., ECF No. 40 ("Def. Intervenor Resp. Br.") at 31. They cite *Certain Pasta from Italy,* 64 Fed. Reg. 43,152, 43,153 (Dept. Commerce Aug. 9, 1999) (notice of preliminary results and partial rescission of antidumping duty administrative review) in support. *Id.* In *Certain Pasta from Italy,* however, the scope of the order was broadened to accommodate "allowable industry tolerances," not, as here, differences in nominal diameter. *Certain Pasta from Italy,* 64 Fed. Reg. at 43,153. *Cf. NEMA Standards Publication No. CG 1–2001: Manufactured Graphite/ Carbon Electrodes* (2002), *reproduced in* Pub. App. to Rule 56.2 Mot., ECF No. 28–2 at Tab 2 Ex. 2, at 2 (setting the range, the allowable industry tolerances, of 16-inch (400 mm) graphite electrodes at 409 to 403 mm – 17 inches (431.8 mm) is not within this range)); Int'l Electrotechnical Comm'n, *International Standard: Graphite Electrodes for Electric Arc Furnaces – Dimensions and Designation* (2005), *reproduced in* Pub. App. to Rule 56.2 Mot., ECF No. 28–6 at Tab 6 Attachment 1, at 17 (distinguishing the nominal diameter of 400 mm from the actual diameter specification range of 409 mm and 403 mm).

[21] Commerce found that "the ITC's limitation of its injury analysis to [graphite electrodes] with diameters of 16 inches and below [did] not preclude [Commerce's] determination that the importation of Jilin Carbon's 17-inch [graphite electrodes] is circumventing [the order on SDGE from the PRC]." *I&D Mem.* cmt. 1 at 10. However, Commerce also notes that the question of whether 17 inch diameter graphite electrodes were injuring the domestic market was not before the ITC and the ITC had "no known data concerning domestically produced 17 inch electrodes before[it] in its injury investigation." *Id.* at 9 (quoting an explanatory memorandum from the ITC). Defendant-Intervenors claim that the domestic industry did not contemplate including 17-inch graphite electrodes at the time they drafted their petition "[b]ecause 16 inches was the upper limit of SDGE in the market." Def.-Intervenor Resp. Br. at 31. While petitioners and Commerce need not anticipate every possible modification — after all, scope and circumvention inquiries are available because "descriptions of subject merchandise contained in the Department's determinations must be written in general terms," 19 C.F.R. § 351.225(a) — Commerce still cannot interpret an order contrary to its terms. *Wheatland Tube,* 161 F. 3d at 1371. "[T]he minor alterations provision is not a vehicle for companies to expand an order in a way that petitioners avoided at the outset." *Deacero S.A.P.I. de C.V. v. United States,* Slip Op. 14–99, 2014 WL 4244349 at *4 (CIT Aug. 28, 2014) (citations omitted) ("*Deacero II*").

[22] *Cf. Deacero I,* __ CIT at __, 942 F. Supp. 2d at 1330–32; *Deacero II,* 2014 WL 4244349 at *3–7.

Without having given due consideration to relevant evidence before it, Commerce has not based its decision on a reasonable reading of the record evidence.[23] Thus, Commerce's failure to consider evidence that supports the possibility of an alternative conclusion has rendered its determination unsupported by substantial evidence.

CONCLUSION

Accordingly, because Commerce failed to base its determination on a reasonable reading of the record, its determination is not supported by substantial evidence. The court remands for further consideration in accordance with this opinion. Commerce shall have until November 5, 2014 to complete and file its remand redetermination. Plaintiff shall have until November 19, 2014 to file comments. Defendant and Defendant-Intervenor shall have until December 1, 2014 to file any reply.

IT IS SO ORDERED.

Dated: September 24, 2014
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 14–115

JIAXING BROTHER FASTENER CO., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 12–00384

[Remand results sustained.]

Dated: September 25, 2014

Gregory S. Menegaz, J. Kevin Horgan, and *John J. Kenkel* for deKieffer & Horgan, PLLC, of Washington, DC for Plaintiffs Jiaxing Brother Fastener Co., Ltd., aka Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice for Defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M.*

[23] The Defendant argues that consideration of additional factors "would usurp Commerce's discretion to interpret an ambiguous portion of [19 U.S.C. § 1677j(c)]." Def.'s Resp. at 11. But this is not a question of factors. Rather, it is a question of facts. The court does not seek to impose its own "interpretation of how to best effectuate the overall statutory scheme on the record before it." *Id.* at 13. Rather, the court seeks to ensure that Commerce "examine the record and articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts,* 716 F.3d at 1378 (citation omitted). Commerce may reasonably interpret an ambiguous statute; it may not fail to support its determinations with substantial evidence.

McCarthy, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Frederick P. Waite and *Kimberly R. Young* for Vorys, Sater, Seymour and Pease LLP of Washington, DC for Defendant-Intervenor Vulcan Threaded Products Inc.

OPINION

Gordon, Judge:

This action involves the second administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering steel threaded rod from the People's Republic of China ("PRC"). *See Certain Steel Threaded Rod from the People's Republic of China*, 77 Fed. Reg. 67,332 (Dep't of Commerce Nov. 9, 2012) (final results second admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for Final Results of Second Administrative Review of Certain Steel Threaded Rod from the People's Republic of China, A-570–932 (Nov. 5, 2012), *available at* http://enforcement.trade.gov/frn/summary/PRC/2012–27438–1.pdf (last visited this date) ("*Decision Memorandum*"). Before the court are the Results of Redetermination, ECF No. 39 ("*Remand Results*"), filed by Commerce pursuant to *Jiaxing Brother Fastener Co. v. United States*, 38 CIT ___, 961 F. Supp. 2d 1323 (2014) ("*Jiaxing I*"). Familiarity with the court's decision in *Jiaxing I* is presumed. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

Plaintiffs Jiaxing Brother Fastener Co., Ltd., aka Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. (collectively, "Plaintiffs") challenge Commerce's continued selection of Thailand as the primary surrogate country. For the reasons that follow, the court sustains Commerce's *Remand Results*.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

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

Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2014). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2014).

II. Discussion

In both the *Final Results* and the *Remand Results*, Commerce selected Thailand over the Philippines as the primary surrogate country and used Thai data to value all of Plaintiffs' factors of production. Commerce did so in part because it believed a Thai company called Capital Engineering Network Public Company Limited ("CEN") could serve as an adequate proxy for Plaintiffs' overhead, SG&A, and profit ratios. Plaintiffs contend that Commerce's use of CEN arbitrarily conflicts with *Steel Wire Garment Hangers from the People's Republic of China*, 77 Fed. Reg. 66,952 (Dep't of Commerce Nov. 8, 2012) (prelim. results third admin. review) ("*Wire Hangers*"), a preliminary determination in a proceeding involving merchandise similar to steel threaded rod that Commerce issued one day prior to the *Final Results* contested here. Pl.'s Comments on Remand Determ. 1–2, ECF No. 43 ("Pls.' Br.").

In *Wire Hangers*, Commerce selected the Philippines over Thailand as the primary surrogate country because of concerns over the available Thai data, and in particular, problems it identified with a CEN financial statement. Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review of Steel Wire Garment Hangers from the People's Republic of China, A-570–918, at 14–16 (Nov. 8, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–27337–1.pdf (last visited this date) ("*Wire Hangers Memorandum*"). Specifically, based on that financial statement, Commerce found that CEN's principal business is investment, not

manufacturing like the respondent. *Id.* at 14–15. Commerce also noted that only one of CEN's four subsidiaries produced wire, and that the record did not indicate whether that one subsidiary "draws wire from steel rod, [or] produces any downstream products from wire that can be considered comparable" to wire hangers. *Id.* at 15. By contrast, the Philippine financial statements on the *Wire Hangers* record suggested that those Philippine companies did manufacture comparable merchandise. Commerce concluded that the Thai financial statements were "less appropriate" for calculating the respondent's financial ratios than the Philippine financial statements, and in turn selected the Philippines as the primary surrogate country. *Id.* at 14–16.

Plaintiffs argue that *Wire Hangers* is "a highly comparable case" to this administrative review, and that "it is purely arbitrary and capricious for [Commerce] to now find in this case that [CEN] is comparable to steel wire processing companies like those that produce steel threaded rods (as opposed to wire hangers)." Pls.' Br. at 1, 8. Plaintiffs' reasoning is straightforward. Given that wire hangers and steel threaded rod can both be produced from steel wire rod, how could Commerce find that CEN's wire subsidiary produces merchandise comparable to steel threaded rod but not merchandise comparable to wire hangers? How could Commerce also suggest that CEN's business is too diverse to be an adequate financial surrogate for a wire hanger manufacturer but not too diverse to be an adequate financial surrogate for a steel threaded rod manufacturer? Most importantly, how can CEN be an adequate proxy for any manufacturer if its principal business is investment? *See* Pls.' Br. at 2–12.

The court in *Jiaxing I* agreed that the *Final Results* appeared to contradict Commerce's contemporaneous position in *Wire Hangers* as well as Commerce's own financial surrogate selection criteria. *Jiaxing I*, 38 CIT at ___, 961 F. Supp. 2d at 1332. In the *Remand Results*, Commerce now offers a detailed explanation of why the record in this review supports a conclusion it could not draw from the record in *Wire Hangers*:

> While the Department expressed concern in *Hangers* regarding the comparability of the financial statements for the same Thai company at issue in this review (albeit for a different year), in that case we were considering the manufacturing process for steel wire garment hangers, not steel threaded rod. Unlike in *Hangers*, the record in this case reflects that the Thai company, [CEN], produces prestressed concrete wire. Specifically, CEN's financial statements indicate that its business involves "Manufacturing and distributing prestressed concrete wire, pre-

stressed concrete strand wire and welding wire." In the original antidumping duty investigation of steel threaded rod from the PRC, the Department found that downstream products of wire rod that are drawn from wire rod are comparable merchandise to steel threaded rod.

Further, the Department was concerned, in part, in *Hangers* that the Thai company produced non-comparable merchandise as well as comparable merchandise. After review the record in this case, the Department found that the Philippine companies, like the Thai company, all produce non-comparable merchandise, as well as comparable merchandise. Specifically, APO Industries, Inc. produces nails, but also produces piano hinges; Benedicto Steel Corporation produces prestressed concrete wire and nails, but also produces tin plate, metal screen, pots and other non-comparable merchandise; and Sterling Steel Incorporated produces nails, but also produces other non-comparable hardware goods such as iron pipes and wire netting.

. . . .

. . . With respect to the concern expressed in *Hangers* that CEN is a holding company, the Department examined the record of this case and acknowledged that CEN's statements are consolidated statements, and that the wire subsidiary produces comparable merchandise. However, while the RMB/IFI Group claims that the Philippine companies primarily produce comparable merchandise and only produce a few non-comparable products, and therefore are in no way similar to CEN, the RMB/IFI Group provided no record evidence (such as information within the companies' financial statements listing revenue by specific products) to demonstrate the percentage of comparable versus non-comparable merchandise produced or sold by these Philippine companies as compared to CEN. Therefore, record evidence does not demonstrate that the Philippine companies are more representative of respondents' production experience than the Thai company. An examination of the actual financial ratios themselves further confirms that the financial ratios from the CEN statements are not dissimilar to the ratios from the Philippine companies as the RMB/IFI Group suggests.

With respect to the concern expressed in *Hangers* that CEN did not draw steel wire rod, the Department's analysis in that case was focused on the manufacturing process for steel wire garment hangers, not steel threaded rod. The analysis criteria in

> *Hangers* cannot be indiscriminately applied to this case without consideration to differences in inputs and production processes. The scope of steel threaded rod covers products not only drawn from wire rod but also round bar. Unlike *Hangers*, for the producers of steel threaded rod, the main inputs consumed in the production process can either be wire rod or round bar depending on the gauge of steel threaded rod produced. Moreover, in *Hangers*, the discussion of consumption of wire rod is an element of the Department's analysis of any differences in the level of integration between the respondents and the potential surrogate companies. Such analysis is necessarily specific to that record. Hence, the RMB/IFI Group's argument solely relying on consumption of wire rod in determining comparability is not appropriate for steel threaded rod.
>
> More to the point, the case history of steel threaded rod proceedings addresses this concern. In the original antidumping duty investigation of steel threaded rod from the PRC, while the Department initially rejected the financial statements of an Indian company Rajratan Global Wire Ltd. ("Rajratan") based on the belief that Rajratan did not produce downstream products of wire rod, the Court remanded that decision to the Department. On remand, the Department found that Rajratan did produce comparable products to steel threaded rod based on the evidence that Rajratan produced prestressed concrete wire and tyre bead wire. As a result, the Department included the financial statements of Rajratan in the calculation of financial ratios, which the Court sustained. In this administrative review of the same order, CEN's financial statements indicate its business involves "Manufacturing and distributing prestressed concrete wire, prestressed concrete strand wire and welding wire." Because the Department, with the Court's approval, previously determined in an earlier segment of this proceeding that prestressed concrete wire is comparable merchandise to steel threaded rod, it is appropriate to use CEN's financial statements and Thai data in general in this administrative review.

Remand Results at 6–7, 14–16 (footnotes omitted).

In short, as Commerce explains, the record and circumstances of this administrative review are not so similar to *Wire Hangers* as to require the same result. The CEN data at issue in this review is *not* the same as the CEN data in *Wire Hangers*. *Remand Results* at 6. The *Wire Hangers* review focused on a CEN *financial statement* from *2011*

whereas this record features a CEN *annual report* from *2010*. Defendant-Intervenor clarifies that the 2010 annual report on this record includes CEN's 2010 financial statement as well as extra details about the operations of CEN's subsidiaries. Def.-Intervenor's Resp. Br. 3–6 & n.1, ECF No. 44. Commerce also explains that steel threaded rod and wire hangers do not have identical manufacturing processes or inputs. As a consequence, although the *Wire Hangers* record did not support a finding that CEN's wire subsidiary produced merchandise comparable to wire hangers, *Wire Hangers Memorandum* at 14–15, Commerce here can and does show that CEN's wire subsidiary produces prestressed concrete wire, a product that Commerce previously found to be comparable to steel threaded rod. *Remand Results* at 6, 15–16. Further, unlike the Philippine financial data on the record in *Wire Hangers*, the Philippine financial statements here carry one of the same critical shortcomings as the CEN data. Each Philippine company on this record produces non-comparable merchandise to some degree, just like CEN. *Id.* at 6–7, 14–15. Commerce reasonably explains why these differences merit a different surrogate country choice in this review than the choice it made in *Wire Hangers*.

Although Commerce reasonably explained its different choices here than in *Wire Hangers*, Plaintiffs' other arguments challenging the adequacy of the available Thai surrogate data do test the reasonableness of selecting Thailand as the primary surrogate country.[2] As Plaintiffs explain, Commerce has a stated preference is to use multiple financial statements to calculate surrogate financial ratios. Here, the record contains only *one* Thai source, the 2010 CEN annual report, as opposed to *three* usable Philippine sources. Plaintiffs also show that CEN's income derives from its ownership of numerous other companies, not manufacturing, and that only one of CEN's four subsidiaries produces comparable merchandise. Pls.' Br. at 2–7. To this extent, the CEN data on this record does appear to present some of the same problems undercutting CEN's "suitability for calculating financial ratios" that Commerce expressed in *Wire Hangers*. *Wire Hangers Memorandum* at 14–16. Moreover, as Plaintiffs argue, financial ratios have in some instances proved determinative in the selection of a surrogate country. *See id.* at 10–12 (citing *Certain Steel Nails from the People's Republic of China*, 78 Fed. Reg. 16,651 (Dep't of

[2] Among its other objections to the adequacy of CEN as a financial surrogate, Plaintiffs assert that CEN's wire-producing subsidiary is operating at a loss. Pls.' Br. at 7–8. As Defendant correctly explains, however, this argument is not properly before the court because Plaintiffs failed to raise it at any point during proceedings at Commerce. *See Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008).

Commerce Mar. 18, 2013) (final results third admin. review)). Plaintiffs also repeat the same persuasive arguments that led the court in *Jiaxing I* to observe that the Philippine hydrochloric acid ("HC1") data "simultaneously appear to undermine the reasonableness of relying on Thai import statistics and offer an apparently better means of valuing Plaintiffs' [HC1] input." *Jiaxing I*, 38 CIT at ___, 961 F. Supp. 2d at 1334.

In remanding the *Final Results*, the court in *Jiaxing I* questioned how Commerce could reasonably select Thailand despite problems with the Thai financial and HC1 data and despite the apparent superiority of alternative Philippine data on the record. *Id.* at ___, 961 F. Supp. 2d at 1334–45. In response, Commerce now explains why it believes other advantages in the Thai surrogate data outweigh these shortcomings:

> When multiple different factors regarding data quality are present in evaluating SVs from various countries, the Department must weigh the balance of the evidence. Given that steel threaded rod is a type of steel fastener drawn from steel wire rod or steel round bar, in this case, these steel inputs are the most important FOPs to consider in the proper valuation of steel threaded rod. In fact, *nearly all of the manufacturing costs were derived from the main steel inputs, and consist of a large majority of the NV*. In circumstances where the importance of one input dominates all other inputs, the Department will take into consideration the significant impact that the primary input has on NV, when considering the overall data quality of one surrogate country versus another. As noted in the *Final Results*, Thai import data for steel wire rod provide for specific grades of steel based on carbon content that can be matched to the grade of steel wire rod consumed by the RMB/IFI Group, whereas Philippine import data provide broad categories that are not as specific to the steel wire rod consumed by the RMB/IFI Group. Moreover, in this review, the Department can value all FOPs with the available Thai data set whereas the Philippine data set are missing packing materials including polyethylene bag, plastic cap, carton, paper tube and staples. Therefore, it is reasonable for the Department to find that the totality of facts in this review lead to a different conclusion in selecting Thailand as the primary surrogate country as compared to the decision the Department made in *Hangers*. In this review, the superior quality of Thai data for the main input, steel wire rod, outweighs any

other strengths contained in the Philippine data (*i.e.*, more financial statements, or the alleged superiority of the data for HC1, which the Department disputes).

Based on the discussions above, having examined the quality of financial statements and the quality of HC1 import data from the Philippines, in view of the totality of the facts, the Department continues to find that Thailand offers better surrogate data to value the RMB/IFI Group's FOPs overall. In determining the appropriate SVs, the Department strongly favors selecting all SVs from a single country, pursuant to 19 CFR 351.408(c)(2). The Department will only introduce data from a secondary surrogate country into the calculation if there were no primary SV, or if the primary SV was unreliable based on record evidence. As the Department continues to find Thailand to be the appropriate primary surrogate country, the Department finds that Thai financial statements and HC1 import statistics constitute the best available information because they meet the Department's criteria in selecting SVs and are from the primary surrogate country, with no evidence demonstrating that they are aberrant or otherwise unreliable.

. . . .

As explained above, in *Hangers*, the Department's decision in selecting the Philippines was not based on financial statements alone. While the Department generally finds that financial ratios are critical and sometimes decisive in the selection of primary surrogate country, this is not always the case. As discussed above, the Department considers several criteria and makes a primary surrogate country determination based on the totality of circumstances. Here, the Court explicitly asked the Department to consider whether Thailand's apparently more specific steel input data outweighs the apparent comparative strengths of the Philippine HC1 and financial data. Based on the analysis above, the superior quality of Thai data for the main input, steel wire rod, outweighs any other strengths contained in the Philippine data, with the result that the overall accuracy of the calculation is best enhanced by reliance on a more specific steel surrogate value than on the financial statements or the Philippine HC1 surrogate value. To do otherwise as suggested by the RMB/IFI group would ignore the totality of the evidence in this case and lead to a less accurate result. . . . In reweighing the

> totality of the evidence in this case, the Department once again arrives at the conclusion that Thailand best serves as the primary surrogate country.

Remand Results at 11–12, 16–17 (emphasis added, footnotes omitted).

Commerce has a regulatory preference is to "value all factors [of production] in a single surrogate country," 19 C.F.R. § 351.408(c)(2) (2014), as well as a policy "to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable." Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Sodium Hexametaphosphate from the People's Republic of China, A-570–908, at 4 & n.15 (Sept. 19, 2012), *available at* http://enforcement.trade.gov/frn/summary/prc/2012–23832–1.pdf (last visited this date). The administrative record contained available, but imperfect, surrogate data for all major inputs sourced from both Thailand and the Philippines, including Thai and Philippine steel import data. When comparing the carbon content of steel contained in the Thai and Philippine import data to the carbon content of the steel wire rod input Plaintiffs actually used, however, Commerce found that the Thai data turned out to be more specific to Plaintiffs' steel inputs than the Philippine data. And as Commerce detailed in a business proprietary memorandum it produced during the remand proceedings and summarized in the *Remand Results*, the steel input accounts for *almost all* of Plaintiffs' manufacturing costs and *most* of Plaintiffs' normal value. *Remand Results* at 11 (citing Contribution of FOPs to the Calculation of Normal Value at 1 (Dep't of Commerce Mar. 28, 2014)). Due to the steel input's outsized impact on Plaintiffs' normal value, Commerce reasonably prioritized that input in making its surrogate country selection. The Thai steel data's superior quality therefore supports Commerce's choice of Thailand as the primary surrogate country and Commerce's use of Thai data to calculate Plaintiffs' normal value.

Commerce's rationale for why it would tolerate relative weaknesses in the Thai financial and HC1 data makes sense. Neither input influences Plaintiffs' normal value nearly as much as the steel input, meaning a reasonable mind could conclude as Commerce did that "the overall accuracy of the calculation is best enhanced by reliance on a more specific steel surrogate value than on the financial statements or the Philippine HC1 surrogate value." *Remand Results* at 16; *see generally Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371, 1378 (Fed. Cir. 2014) ("Because Commerce reasonably chose one of two imperfect data sets, the Trade Court erred in substituting its own

judgment for Commerce's."). A reasonable mind could likewise conclude that Commerce's regulatory preference to value all inputs from a single surrogate country favors using Thai data to value all of Plaintiffs' inputs despite some apparent relative superiority of the Philippine financial and HC1 data.

The court sustains Commerce's reasonable selection of Thailand as the primary surrogate country and use of Thai data to calculate Plaintiffs' normal value. Judgment will be entered accordingly.

Dated: September 25, 2014
New York, New York

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