U.S. Customs and Border Protection

Slip Op. 14–111

DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Before: Richard K. Eaton, Senior Judge
Court No. 13–00391

[United States Department of Commerce's motion to dismiss is denied; plaintiff's motion for summary judgment is granted.]

Dated: September 23, 2014
Amended: October 30, 2014

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

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

David B. Fishberg, Attorney-Advisor, Office of the General Counsel, United States International Trade Commission, of Washington, D.C., argued for defendant United States International Trade Commission. With him on the brief was *Neal J. Reynolds*, Assistant General Counsel for Litigation.

MEMORANDUM AND ORDER

EATON, Senior Judge:

This action concerns the five-year, or "sunset," review of the antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China ("PRC"), for which the United States Department of Commerce ("Commerce" or the "Department") published a notice in the Federal Register on December 2, 2013, and which was initiated on January 23, 2014. Initiation of Five-Year ("Sunset") Review, 78 Fed. Reg. 72,061 (Dep't of Commerce Dec. 2, 2013) ("Initiation Notice"); Diamond Sawblades and Parts Thereof From China Institution of a Five-Year Review, 78 Fed. Reg. 72,116, 72,117 (Int'l Trade Comm'n Dec. 2, 2013). The sole question posed by this case is whether the review was initiated at the proper time.

Before the court is the motion[1] of plaintiff Diamond Sawblades Manufacturers' Coalition ("plaintiff" or the "Coalition"), seeking a ruling declaring that the ongoing review is *ultra vires*, halting that review, and instructing defendants to initiate a sunset review on November 4, 2014. Pl.'s Mot. (ECF Dkt. No. 30). Defendants,[2] the Department and the International Trade Commission ("ITC") (collectively, "defendants"), oppose the motion on the merits, and the Department has separately moved to dismiss the case for lack of subject matter jurisdiction. *See* Def.'s Resp. to Pl.'s Mot. for J. on the Administrative R. (ECF Dkt. No. 40) ("Dep't's Br."); Def. United States International Trade Commission's Resp. in Opp'n to Pl.'s Mot. for J. on the Administrative R. (ECF Dkt. No. 41); Def.'s Mot. to Dismiss Pl.'s Compl. for Lack of Jurisdiction (ECF Dkt. No. 46) ("Dep't's Mot. to Dismiss"). For the following reasons, the Department's motion to dismiss is denied and plaintiff's motion is granted.

BACKGROUND

In 2005, the ITC initiated an injury investigation regarding certain diamond sawblades imported from the PRC and the Republic of Korea ("Korea").[3] *See Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374, 1376 (Fed. Cir. 2010) ("*Diamond Sawblades V*"). The ITC preliminarily determined that there was a reasonable likelihood of injury to a United States industry as a result of the importation of subject merchandise, but then altered its position and found no material injury or threat of material injury in its final determination. *Id.* at 1376–77. For its part, the Department made preliminary and final determinations that diamond sawblades were being sold at less than fair value in the United States. *Id.* at 1376.

The Coalition brought an action in this Court, challenging the ITC's final negative material injury determination and Commerce's less than fair value determinations. *Id.* at 1377. The *Diamond Sawblades* Court remanded the case to the ITC, finding that its negative injury

[1] While styled as a motion for judgment on the agency record, the court will treat plaintiff's motion as one for summary judgment pursuant to USCIT Rule 56.

[2] Although the International Trade Commission has submitted a brief agreeing with, and fully supporting, the arguments made by Commerce, because it makes no arguments of its own, the court will address only those arguments made by the Department. *See* Def. United States International Trade Commission's Resp. in Opp'n to Pl.'s Mot. for J. on the Administrative R. (ECF Dkt. No. 41).

[3] Korea is no longer covered by the antidumping duty order because the Department revoked it with respect to "diamond sawblades from Korea, pursuant to a proceeding under section 129 of the Uruguay Round Agreements Act to implement the findings of the World Trade Organization dispute settlement panel in [the] United States." Diamond Sawblades and Parts Thereof From Korea, 78 Fed. Reg. 36,524, 36,525 (Dep't of Commerce June 18, 2013) (final results of antidumping duty administrative review, 2010–2011) (citation omitted).

determination was insufficiently supported. *Diamond Sawblades Mfrs. Coal. v. United States*, 32 CIT 134, 135, 151 (2008) ("*Diamond Sawblades I*"). On remand, the ITC found a threat of material injury and the *Diamond Sawblades* Court affirmed that determination. *Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 48, 48, 67 (2009) ("*Diamond Sawblades II*").

After the issuance of *Diamond Sawblades II*, Commerce continued the suspension of liquidation of the subject imports of diamond sawblades, but took the position that it was not required to publish antidumping duty orders or direct the collection of cash deposits on ongoing imports of subject merchandise until the appeal of *Diamond Sawblades II* to the U.S. Court of Appeals for the Federal Circuit had been resolved. *Diamond Sawblades V*, 626 F.3d at 1377. Disputing this position, the Coalition petitioned the *Diamond Sawblades* Court for "a writ of mandamus directing Commerce to publish antidumping duty orders and immediately begin collecting cash deposits," and the *Diamond Sawblades* Court granted the writ. *Id.*; *Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 1422, 1452–53, 650 F. Supp. 2d 1331, 1357 (2009) ("*Diamond Sawblades III*").[4] Thereafter, on September 30, 2009, the *Diamond Sawblades* Court issued its judgment directing Commerce to forthwith "issue and publish antidumping duty orders and require the collection of cash deposits on subject merchandise." *Diamond Sawblades III*, 33 CIT at 1422, 1453, 650 F. Supp. 2d at 1331, 1357.

On November 4, 2009, the Department published the antidumping duty order in the Federal Register. Diamond Sawblades and Parts Thereof From the PRC and Korea, 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4, 2009) (antidumping duty orders) ("Antidumping Order"). Therein, the Department stated the effective date of the Antidumping Order as January 23, 2009 and further stated that it would direct U.S. Customs and Border Protection ("Customs") to collect cash deposits for unliquidated merchandise "as of" that date. Antidumping Order, 74 Fed. Reg. at 57,146. Thus, Commerce stated that it would direct the retroactive collection of cash deposits. *See* Antidumping Order, 74 Fed. Reg. at 57,146.

[4] While the appeal in *Diamond Sawblades III* was pending, the Federal Circuit issued an opinion affirming *Diamond Sawblades II*. *Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1362 (Fed. Cir. 2010) ("*Diamond Sawblades IV*"). Thereafter, in *Diamond Sawblades V*, the Federal Circuit affirmed the issuance of the writ of mandamus and rejected the Department's position that it was not required to publish the antidumping duty order until after all appeals relating to the order had been resolved. *Diamond Sawblades V*, 626 F.3d at 1382–83.

Following its publication, the Department conducted three administrative reviews[5] under 19 U.S.C. § 1675(a)(1) (2006), and used November 4, 2009 as the anniversary date of the Antidumping Order's publication. The reason for this choice was given in the notice for the first review. Therein, the Department stated that it chose the November 4 date rather than the January 23, 2009 effective date set out in the Antidumping Order because November was the anniversary for the publication of the Antidumping Order, and its regulations directed the use of that date. Thus, the Department stated:

> Although the effective date of the [Antidumping Order] is January 23, 2009, based on the date of the suspension of liquidation, the Department designates November as the anniversary month for the[] diamond sawblades order[] because this is the month in which the Department published the notice for the[Antidumping Order]. In its regulations, the Department defines the anniversary month as the calendar month in which the anniversary of the date of publication of an order . . . occurs. Therefore, consistent with section 751(a)(1) of the Tariff Act of 1930 [(19 U.S.C. § 1675(a)(1))], as amended, and [19 C.F.R. § 351.213(b)], the first opportunity to request a review of the above-referenced order[] will be in November 2010.

Diamond Sawblades and Parts Thereof From the PRC and Korea, 75 Fed. Reg. 969, 970 (Dep't of Commerce Jan. 7, 2010) (notice of anniversary month and first opportunity to request an administrative review) (citation omitted). The November 4 date was also used in the succeeding administrative reviews. *See, e.g.*, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 78 Fed. Reg. 79,392, 79,392, 79,394 (Dep't of Commerce Dec. 30, 2013).

Although it consistently used November 4 for purposes of initiating administrative reviews, Commerce determined that it would use January 23, 2009 as the date to calculate the five-year period after which to conduct the sunset review, based on the stated effective date

[5] The period of review for the first administrative review of the Antidumping Order was January 23, 2009 through October 31, 2010. Diamond Sawblades and Parts Thereof From the PRC, 78 Fed. Reg. 11,143, 11,143 (Dep't of Commerce Feb. 15, 2013) (final results of antidumping duty administrative review). For the second administrative review of the Antidumping Order, the period of review was November 1, 2010 through October 31, 2011. Diamond Sawblades and Parts Thereof From the PRC, 78 Fed. Reg. 42,930, 42,931 (Dep't of Commerce July 18, 2013) (amended final results of antidumping duty administrative review; 2010–2011). The period of review for the third administrative review was November 1, 2011 through October 31, 2012. Diamond Sawblades and Parts Thereof From the PRC, 79 Fed. Reg. 35,723, 35,723 (Dep't of Commerce June 24, 2014) (final results of antidumping duty administrative review; 2011–2012).

in the Antidumping Order. As a result, when the Department published the notice of initiation of the sunset review on December 2, 2013, it stated that the sunset review would be initiated on January 23, 2014. *See* Initiation Notice, 78 Fed. Reg. at 72,061; Diamond Sawblades and Parts Thereof From China Institution of a Five-Year Review, 78 Fed. Reg. at 72,117. Plaintiff, by its motion, now challenges defendants' decision to use January 23, 2009 as the anniversary date on which to begin conducting the sunset review, rather than November 4, 2009, the actual date of publication.

On July 11, 2014, during the pendency of this action, the Department published its portion of the sunset review that commenced on January 23, 2014, finding "that revocation of the antidumping duty order on diamond sawblades from the PRC would be likely to lead to continuation or recurrence of dumping at weighted-average margins up to 164.09 percent." Diamond Sawblades and Parts Thereof from the PRC, 79 Fed. Reg. 40,062, 40,063 (Dep't of Commerce July 11, 2014) (final results of the expedited sunset review of the antidumping duty order). At this time, the ITC's portion of the review has barely begun. Oral Arg. Tr. 29:23–25, Aug. 5, 2014 (ECF Dkt. No. 51) ("Oral Arg. Tr.").

DISCUSSION

I. Subject Matter Jurisdiction and Motion to Dismiss

The Department has separately moved to dismiss this action for lack of subject matter jurisdiction under the theory that plaintiff now has, and has always had, the ability to obtain complete relief by challenging the final determination once the sunset review is finished. Dep't's Mot. to Dismiss 5 ("[T]he Coalition may challenge the sunset review pursuant to 28 U.S.C. § 1581(c).").

Plaintiff initiated this action under 28 U.S.C. § 1581(i) (2006) and, following the publication of the Department's determination in its portion of the sunset review, on July 11, 2014, plaintiff brought another case under 28 U.S.C. § 1581(c), challenging that determination for the same reasons as those put forward in this case. Compl. ¶ 2 (ECF Dkt. No. 2); Summons, No. 14–00171 (2014), ECF Dkt. No. 1.

Under law developed by this Court and the Federal Circuit, "jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292–93 (Fed. Cir. 2008) (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)). This Court has previ-

ously held that a determination requiring a party to participate in an unlawful unfair trade proceeding is reviewable during the pendency of the proceeding under 28 U.S.C. § 1581(i). *See Dofasco Inc. v. United States*, 28 CIT 263, 268, 326 F. Supp. 2d 1340, 1345 (2004) ("[F]orcing Dofasco to wait until a final determination has been issued before it may challenge the lawfulness of the administrative review, would mean that Dofasco's opportunity for full relief—i.e., freedom from participation in the administrative review—would be lost." (citations omitted)); *see also Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1381, 1388–89 (2014) (recognizing a line of cases in which plaintiffs "sought to stop an allegedly unnecessary or ultra vires administrative proceeding before [they] were burdened with" it and in which jurisdiction under 19 U.S.C. § 1581(i) was confirmed by this Court); *Diamond Sawblades Mfrs.' Coal. v. U.S. Dep't of Commerce*, 38 CIT __, __, 968 F. Supp. 2d 1338, 1342 (2014), *appeal dismissed*, 560 F. App'x 998 (Fed. Cir. 2014). In other words, this Court has found that, when faced with an unlawfully commenced review, waiting for the final determination of the review to challenge its unlawful commencement is "manifestly inadequate," and jurisdiction under section 1581(i) is available.

Despite Commerce's arguments to the contrary, relief under section 1581(i) is still available to plaintiff. As the parties each acknowledged at oral argument, although the Department has completed its part of the sunset review, the ITC's portion of the sunset review is in its nascent stage. Oral Arg. Tr. 29:23–25. Indeed, that process, which counsel for the ITC recognized can be onerous for interested parties, has not entered its most burdensome period. Oral Arg. Tr. 29:23–30:5. Thus, plaintiff still seeks a remedy that 28 U.S.C. § 1581(c) cannot provide, namely being excused from further participation in an ongoing *ultra vires* proceeding.[6]

Accordingly, the court continues to have jurisdiction under 19 U.S.C. § 1581(i) and the Department's motion to dismiss is denied.

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[6] Defendants insist that cases in this Court have held that, where the question is the "timing" of the commencement of agency action, jurisdiction under section 1581(i) is unavailable. Department of Commerce's Reply in Supp. of its Mot. to Dismiss Pl.'s Compl. for Lack of Jurisdiction 3–4 (ECF Dkt. No. 55) (citing *Tianjin Magnesium Int'l Co. v. United States*, 32 CIT 1, 533 F. Supp. 2d 1327 (2008); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 29 CIT 1280, 403 F. Supp. 2d 1287 (2005)). Those cases are distinguishable from the facts presented here, because, in those cases, commencement of the proceeding was clearly left to the discretion of Commerce. Here, defendants' actions are clearly beyond their discretion and are *ultra vires*. In other words, the cases stand for the proposition that jurisdiction can be controlled by the facts. In addition, the *Tokyo* Court found that participation in the early stage of the review would not be burdensome, a far different set of facts than present here. *See Tokyo*, 29 CIT at 1287, 403 F. Supp. 2d at 1294.

II. The Sunset Review was Untimely Commenced

Plaintiff maintains that defendants have acted beyond the scope of their authority by seeking to conduct a sunset review of the Antidumping Order prior to the five-year anniversary of November 4, 2009, the date of publication of the order in the Federal Register. Pl. Diamond Sawblades Manufacturers' Coalition's Mem. in Supp. of its Mot. 27 (ECF Dkt. No. 30) ("Pl.'s Br."). For plaintiff, November 4, 2009, the actual date of publication of the Antidumping Order in the Federal Register, is the date of publication for purposes of 19 U.S.C. § 1675(c)(1). Pl.'s Br. 12. There is no dispute that the actual publication date of the Antidumping Order was November 4, 2009. Pl.'s Br. 12; Dep't's Br. 4. Therefore, plaintiff insists that the plain language of the statute requires the Department to wait until November 4, 2014 to commence the sunset review. Pl.'s Br. 12. For plaintiff, the early commencement is *ultra vires*, and accordingly, the court should direct that the sunset review be halted. Pl.'s Br. 27.

In the Antidumping Order itself, the Department's sole reason given for choosing the effective date of January 23, 2009 was that, "because suspension of liquidation[7] is already in effect for all entries of diamond sawblades from the PRC . . . entered, or withdrawn from the warehouse, for consumption on or after January 23, 2009, the effective date of the[] antidumping duty order[] . . . is January 23, 2009." Antidumping Order, 74 Fed. Reg. at 57,146. It is worth noting that the Department understood that no court directed the use of the January 23, 2009 date. *See* Antidumping Order, 74 Fed. Reg. at 57,146 ("The CIT's order of September 30, 2009, did not address the effective date of any potential antidumping duty orders . . . ."). Nor, for that matter, did plaintiff seek this earlier effective date. Rather, defendants determined, on their own, to use the earlier date and now apparently claim that Commerce was acting within its authority to determine an effective date of January 23, 2009. *See* Dep't's Mot. to Dismiss 5–6. The court finds defendants' position to be untenable and that the sunset review was untimely commenced. Thus, plaintiff's motion is granted.

A. Legal Framework

Under 19 U.S.C. § 1675(c)(1), the Department "and the ITC must review antidumping and countervailing duty orders every five years." *Nucor Corp. v. United States*, 601 F.3d 1291 (Fed. Cir. 2010) (citing 19

[7] Liquidation is "the 'final computation or ascertainment of duties . . . accruing upon entry' of the goods." *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1351 (Fed. Cir. 2006) (alteration in original) (quoting 19 C.F.R. § 159.1) (citing 19 U.S.C. § 1500(d)). Here, liquidation was suspended January 23, 2009.

U.S.C. § 1675(c)(1) (2006)); *see also* 19 C.F.R. § 351.102(b)(49) (2012) (defining the term "sunset review" to mean a review under 19 U.S.C. § 1675(c)) . Pursuant to 19 U.S.C. § 1675(c)(1),

> 5 years after *the date of publication* of . . . an antidumping duty order . . . the administering authority and the Commission shall conduct a review to determine . . . whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury.

19 U.S.C. § 1675(c)(1) (emphasis added) (footnote omitted). Thus, in accordance with the statute, five years "after the date of publication of" the *Diamond Sawblades* Antidumping Order, the Department and the ITC are required to conduct a sunset review to determine whether or not the Antidumping Order should be revoked. Additionally, under the Department's regulations, a notice of initiation of a sunset review of an antidumping duty order must be published "[n]o later than 30 days before the fifth anniversary date of an order . . . ." 19 C.F.R. § 351.218(c)(1) (2012).

B. Plaintiff's Motion Is Granted

The court grants plaintiff's motion for several reasons, namely because (1) the plain language of the statute explicitly directs Commerce to begin a sunset review "5 years after the date of publication of . . . an antidumping duty order" in the Federal Register, (2) the use of the November 4, 2009 date is consistent with the Department's application of the phrase "date of publication" in other parts of the same statute, (3) use of the January 23 date is inconsistent with Commerce's interpretation of the phrase "date of publication" when commencing administrative reviews of the Antidumping Order, (4) defendants' use of the January 23 date does not comport with the unfair trade laws' statutory scheme, and (5) defendants' theory of notice by "constructive publication" is without merit. 19 U.S.C. § 1675(c)(1) (footnote omitted).

1. The Plain Language of the Statute

The plain language of 19 U.S.C. § 1675(c)(1) requires the Department to commence the sunset review of an antidumping duty order five years after the date of publication of the order in the Federal Register. *See* 19 U.S.C. § 1675(c)(1). Although the term "date of publication" is not defined in the statute, plaintiff is correct that the "phrase is no term of art" and that the general understanding of the term "is not an ambiguous definition[. P]ublication of an antidumping

duty order occurs when such an order is communicated to the public, whether in printed form or otherwise." Pl.'s Br. 10. Indeed, defendants concede as much. *See* Dep't's Br. 5.

The word publication is understood by English speakers to mean "[t]he act or process of publishing printed matter." *See* The American Heritage Dictionary of the English Language 1416 (4th ed. 2000). Legal sources do not indicate a contrary meaning. *See, e.g.*, Black's Law Dictionary 1423 (10th ed. 2014) (defining the term "publication" as "[g]enerally, the act of declaring or announcing to the public"). The language of the statute is, thus, a clear and unambiguous directive to the Department.

Indeed, the Department's sunset review regulations do not contain a definition of "date of publication," indicating that Commerce understands the statutory directive to be clear. Moreover, Commerce makes no claim for deference under *Chevron*. *See* Dep't's Br.; Dep't's Mot. to Dismiss. "The so-called *Chevron* line of cases provides guidance to Courts when a statute is silent or ambiguous." *Beijing Tianhai Indus. v. United States*, 38 CIT __, __, Slip Op. 14–104, at 7 (2014) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)). "[A]gencies are entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'" *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (quoting *Chevron*, 467 U.S. at 843). Here, because there is no gap to be filled, the Department has not sought, and is not entitled to, deference under *Chevron*. That is, section 1675(c)'s command to conduct a sunset review "5 years after the date of publication of . . . an antidumping duty order" is not ambiguous. 19 U.S.C. § 1675(c)(1) (footnote omitted). Therefore, the use of any date other than November 4, 2009 as the "date of publication" conflicts with the plain meaning of the statute and, thus, fails as a matter of law. *See* Robert A. Katzmann, Judging Statutes 50 (2014) (noting that, under the canons of statutory construction, "if the language is plain, construction is unnecessary").

2. Consistent Use Within the Same Statute

Next, the use of November 4, 2009 is in keeping with how the Department has interpreted the phrase "date of publication" in other parts of the statute. In particular, 19 U.S.C. § 1675(a)(1) allows administrative reviews of antidumping duty orders to be conducted "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order." 19 U.S.C. § 1675(a)(1). As the Department acknowledges, it has consistently treated the "date of publication" of antidumping duty orders

as the same date for administrative reviews and sunset reviews. Dep't's Br. 12. Indeed, to accept any other result would be to adopt inconsistent definitions of the same term, not only within the same statute, but within the same section of the statute. Thus, the Department's use of January 23, 2009 as the "effective date" of publication would violate the rule of statutory construction that "[t]he same words used twice in the same act are presumed to have the same meaning." Norman J. Singer & J.D. Shambie Singer, Statutes And Statutory Construction § 46:6, at 249 (7th ed. 2007); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (citations omitted) ("[T]he term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions.").

3. Consistent Use Under the Antidumping Order

The court also finds that using the January 23 date for purposes of initiating the sunset review would be inconsistent with how the Department has interpreted "date of publication" with respect to determinations it has made pertaining to administrative reviews under the Antidumping Order itself. Again, pursuant to 19 U.S.C. § 1675(a)(1), "[a]t least once during each 12-month period beginning on the anniversary of the date of publication" of an order, the Department, upon request, shall conduct an administrative review. 19 U.S.C. § 1675(a)(1). As has been noted, for each of the administrative reviews conducted under the Antidumping Order, Commerce has used November 4 as the anniversary date of the "date of publication." *See, e.g.*, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 78 Fed. Reg. at 79,392, 79,394 (identifying the Antidumping Order as having a November anniversary date); Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 78 Fed. Reg. 65,612, 65,613 (Dep't of Commerce Nov. 1, 2013) (noting that the anniversary month for which interested parties can request an administrative review of the Antidumping Order is the month of November). To use the January 23, 2009 date as the date of publication for sunset review purposes would thus be inconsistent with all other "date of publication" determinations made under the Antidumping Order and would thus violate the Department's past practice.

4. Statutory Scheme

In addition, although Commerce and the ITC argue that their use of the January 23 date is consistent with the statutory scheme, this is

decidedly not the case. Dep't's Br. 9. In making their argument, defendants rely on the notion that plaintiff has had the protection of the antidumping laws from January 23, 2009 because the liquidation of entries of diamond sawblades was continued from that date and because cash deposits were retroactively imposed from that date when the Antidumping Order was published on November 4, 2009.

> The protections offered by the order—including cash deposit rates—have covered that period. Waiting until November 2014 to conduct the sunset review would keep the order in place for five years and nine months—far beyond the contemplated five-year mark. Under the statutory scheme described by the [Statement of Administrative Action], Commerce's regulations, and the Federal Circuit's decisions, such a result would be unreasonable.

Dep't's Br. 11. It is worth noting, however, that there is no record evidence that any, let alone all, of the cash deposits were actually retroactively collected. Diamond Sawblades and Parts Thereof from the PRC, 70 Fed. Reg. 77,121, 77,121, 77,134 (Dep't of Commerce Dec. 29, 2005) (preliminary determination of sales at less than fair value, postponement of final determination, and preliminary partial determination of critical circumstances). Thus, there is little to indicate that the domestic producers benefitted from the claimed protections.

In addition, as plaintiff points out, 19 U.S.C. § 1673e(a) mandates that an antidumping duty order contain, among other things, a directive that "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise *at the same time as estimated normal customs duties on that merchandise are deposited*." 19 U.S.C. § 1673e(a)(3) (2006) (emphasis added); Pl.'s Br. 9. Here, for the entries made between January 23, 2014 and November 4, 2014, no antidumping cash deposits were required at the time of entry. Rather, only normal customs duties were imposed. The Department did not order the retroactive collection of cash deposits until the publication of the Antidumping Order in the Federal Register on November 4, 2009. Antidumping Order, 74 Fed. Reg. at 57,145, 57,146. Thus, defendants' proposed use of January 23, 2009 as the anniversary date does not comport with the statutory scheme for collection of cash deposits (and the protection afforded the industry thereby) because they were not collected at the time that normal duties were collected.

More importantly, in making its "statutory scheme" argument, defendants point only to the protections provided to domestic producers by the unfair trade laws. Dep't's Br. 7–11. Although an antidumping

duty order protects domestic producers by imposing duties and providing for the collection of cash deposits, the portion of the statutory scheme providing for sunset reviews fulfills a different intention. The purpose of a sunset review is to determine if the imposition of an antidumping duty order has had the effect of causing those covered by the order to mend their ways, i.e., to discover if they have stopped dumping. Thus, publication of the Antidumping Order put producers and exporters of diamond sawblades on notice that (1) the order was in place, (2) administrative reviews could be requested in the future, and (3) if the Antidumping Order survived, a sunset review would be commenced. This notice, however, was only given to those interested on November 4, 2009.

With respect to sunset reviews, in accordance with our treaty arrangements,[8] Congress chose a five-year period as the time-frame to be examined. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP.NO. 103–316, vol. 6, at 879 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4205. As with administrative reviews, in a sunset review, Commerce looks backward[9] to *see* what the behavior of the producers and exporters has been during a preceding time period. Therefore, in a sunset review, Commerce looks five years back to determine whether the dumping and injury to the domestic industry have subsided in the years following the imposition of the order.

> In determining whether revocation of an order . . . would likely lead to continuation or recurrence of dumping, the Department considers the margins established in the investigation and/or reviews conducted during the sunset review period, as well as the volume of imports for the periods before and after issuance of the order (or acceptance of the suspension agreement).

Enforcement & Compliance Antidumping Manual Ch. 25, at 7 (Oct. 13, 2009) (footnote omitted). Thus, defendants' assertion that the "effective date performs all the legal functions normally associated with publication" is not correct because it ignores the notice function of publication. Dep't's Br. 5–6.

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[8] The Uruguay Record Agreements Act revised the Tariff Act of 1930 by requiring that antidumping and countervailing duty orders be reviewed every five years. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep.No. 103–316, vol. 6, at 879 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4205.

[9] The antidumping statutory scheme is "inherently retroactive." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381 (Fed. Cir. 2008). Thus, the statute "'expressly calls for the retrospective application of antidumping review determinations.'" *SeAH Steel Corp. v. United States*, 34 CIT __, __, 704 F. Supp. 2d 1353, 1362 (2010) (quoting *Am. Permac, Inc. v. United States*, 10 CIT 535, 539, 642 F. Supp. 1187, 1191 (1986)).

Were the court to adopt defendants' use of the January 23, 2009 effective date of the Antidumping Order, the period of useful examination for the now underway sunset review would be shortened to four years and three months. This is because no one was put on notice that the Antidumping Order was in place on January 23, 2009, nor were cash deposits being collected following that date. While defendants rely on the idea that domestic producers gained the protection of the Antidumping Order from January 23, 2009, they ignore the purpose of the Antidumping Order to give notice to foreign producers and exporters (and, more importantly, the importers who actually pay the duties) that it was in effect. Thus, between January 23, 2009 and November 4, 2009, diamond sawblades were entering the United States with the producers and exporters believing that no order was in place and without the burden of cash deposits. Therefore, no producer or exporter was put on notice that its behavior in the five years succeeding January 23, 2009 would be examined to determine whether the Antidumping Order should continue. Because no one was put on notice of the existence of the Antidumping Order until November 4, 2009, defendants' claim that the statutory scheme confirms the use of the January 23 date is unconvincing because it does not take into account either the notice function of publication or the purpose of sunset reviews.

5. Constructive Notice by Publication

Finally, a word is needed on defendants' theory of notice by "constructive publication." According to Commerce and the ITC, notice of the Antidumping Order was "effectively" given on January 23, 2009 because it was "constructively published" on that date. Dep't's Br. 6. They base this claim on their argument that the retroactive collection of antidumping duties fully protected the domestic industry. Dep't's Br. 6 ("Here, however, the order was made retroactively operative, and its protections were made to extend back *before* its *Federal Register* date."). For defendants, this "constructive publication" necessarily provided constructive notice.

Constructive notice by publication is a legal fiction that presumes that persons have read something that they may have never seen. Thus, "[w]hen a court says that the defendant received 'constructive notice[,]' . . . it means that he didn't receive notice but we'll pretend he did." *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005). While constructive notice by publication has its place, the sole case relied on by defendants, for the proposition that the publication on November 4, 2009 somehow provided constructive notice that the Antidumping Order was in effect as of January 23, 2009, does not

support their argument. *See* Dep't's Br. 6 (citing *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT 1541, 1549 n.10, 285 F. Supp. 2d 1371, 1378 n.10 (2003) (citations omitted)). The *Cathedral Candle* Court found that publication in the Federal Register of a notice stating that the ITC was preparing a list of those "potentially eligible" to receive "Byrd"[10] funds resulted in constructive notice to interested parties of the "existence of the list." *Cathedral Candle*, 27 CIT at 1549 n.10, 1550, 285 F. Supp. 2d at 1378 n.10, 1379 ("It is well established by both statutes and cases that publication of an item in the Federal Register constitutes constructive notice of anything within that item. Plaintiffs were on constructive notice of the existence of the list and Customs' request that questions be directed to the ITC *from the time of publication* onward." (emphasis added) (citations omitted)). Nothing in the case indicates that publication can constitute constructive notice effective on a date prior to actual publication. Rather, it holds that constructive notice is effective "from the time of publication onward." *Id.* at 1549 n.10, 285 F. Supp. 2d at 1378 n.10. In other words, the interested parties were put on notice of the existence of the list from the date of publication forward, whether they actually saw the published notice or not, but were not charged with knowledge prior to the date of publication.

The Department and the ITC assert that, on January 23, 2009, the public was somehow put on notice of the Antidumping Order even though it first appeared in the Federal Register over nine months later. Defendants' claim of constructive notice by publication, of course, completely changes that concept. Constructive notice, rather than actual notice, can occur when, for instance, persons are served with process by publication. Then, although those served may never *see* the notice that the law affords, notice is presumed and service is good from the date of publication forward. Here, defendants would change the rule so that *failure* to publish would notify those interested that the Antidumping Order was in place. Defendants cite no law and make no compelling argument to support their notice by "constructive publication" claim. Because no one was put on notice either constructively or actually of the existence of the Antidumping Order until November 4, 2009, this argument fails.

CONCLUSION and ORDER

As the Department points out, it is unlikely that the facts present

[10] Pursuant to the continued Dumping and Subsidy Offset Act of 2000, codified at 19 U.S.C. § 1675c (2000) ("Byrd Amendment"), certain "affected domestic producers" were entitled to distributions of antidumping and countervailing duties collected by the United States.

here will be repeated. *See* Oral Arg. Tr. 16:1–9. If true, then no practice or precedent will be established by this case. Therefore, the time for correcting this one-time mistake has come.

For the foregoing reasons, the Department's motion to dismiss is denied, plaintiff's motion is granted.

Defendants are hereby

ORDERED to rescind the Final Results published by Commerce on July 11, 2014; it is further

ORDERED that defendants cease further activity with respect to the sunset review initiated on January 23, 2014; and it is further

ORDERED that defendants initiate the sunset review of the Antidumping Order on November 4, 2014.

Dated: October 30, 2014
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 14–123

CP KELCO US, INC., Plaintiff, v. UNITED STATES, Defendant, and JUNGBUNZLAUER AUSTRIA AG, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00287
PUBLIC VERSION

[Denying plaintiff's motion for judgment on the agency record.]

Dated: October 22, 2014

Matthew J. Clark, Nancy A. Noonan, Matthew L. Kanna, and *Keith F. Huffman*, Arent Fox LLP, of Washington, DC, for plaintiff.

David A.J. Goldfine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Frederick P. Waite, Kimberly R. Young, and *William M.R. Barrett*, Vorys Sater Seymour and Pease LLP, of Washington, DC, for defendant-intervenor.

OPINION

Goldberg, Senior Judge:

Plaintiff CP Kelco US ("Kelco"), a domestic manufacturer of xanthan gum and petitioner in the antidumping proceeding that underlies this case, challenges the final determination of the International Trade Commission (the "Commission") that domestic industry suf-

fered no present material injury by reason of subject imports. *Xanthan Gum from Austria and China*, 78 Fed. Reg. 43,226 (ITC July 19, 2013) (notice of final determination); *Xanthan Gum from Austria and China*, USITC Pub. 4411, Inv. Nos. 731-TA-1202–1203 (July 2013) (final determination) (including public versions of both the "Views of the Commission" and the "Staff Report," both hereinafter cited by reference to the confidential versions in the administrative record). Kelco's challenge takes the form of a motion for judgment on the agency record, brought pursuant to USCIT Rule 56.2.

For the reasons that follow, the court sustains the Commission's determination.

BACKGROUND

On June 5, 2012, Kelco filed a petition with the Department of Commerce and with the Commission. Kelco alleged that less-than-fair-value imports from Austria and China were materially injuring domestic industry, and were also threatening injury in the future. *Xanthan Gum from Austria and China*, 77 Fed. Reg. 34,997, 34,997–98 (ITC June 12, 2013) (initiation of investigation). When such petitions are filed, the Commission's responsibility is to determine whether the petitioner or domestic industry has actually been, or will likely be, injured. 19 U.S.C. § 1673d(b) (2006). (The Department of Commerce is responsible for making the prior determination that less-than-fair-value importing has or has not occurred. *Id.*) After a hearing and briefing on the matter, the Commission concluded that domestic industry was not suffering material injury, and was only threatened with material injury by those imports emanating from China. Views of the Commission ("Views") at 3, 55–58, 60, CD 2–197 (Aug. 6, 2013), ECF No. 17 (Nov. 4, 2013). The Commission explained this determination in its customary Views of the Commission report. Kelco challenges the Commission's final determination, specifically the finding of no present material injury. Pl.'s Mot. for J. on Agency R. 1–3, ECF No. 25 ("Pl.'s Br.").

Before reaching Kelco's specific claims, it is helpful to first foreground those claims with an outline of the Commission's statutory objective and reasoning. In assessing material injury to domestic industry, the Commission is required to consider three factors: volume of subject imports, the price effects of such imports, and the impact of such imports on domestic producers. 19 U.S.C. § 1677(7)(B)(i)(I)–(III). No one of the statutory factors need be dispositive. *See Copperweld Corp. v. United States*, 12 CIT 148, 156, 682 F. Supp. 552, 561–62 (1988) (Commission is free to assign "to a factor a varying degree of significance depending upon the facts of a particu-

lar case"). The Commission must also check whether the filing of the antidumping petition caused a post-petition change in any of the factors, the theory being that filing can chill less-than-fair-value importing and hide injury. 19 U.S.C. § 1677(7)(I). If the Commission finds post-petition effects, it has discretion to discount the post-petition data in order to reach an accurate injury determination. *Id.*

The Commission structured the Views of the Commission to align with this statutory framework. It considered each factor individually and then post-petition effects before weighing the factors together and concluding that domestic industry had suffered no material injury.

I. Subject-Import Volume

The Commission's directive in considering subject-import volume is to evaluate "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). Kelco argued in administrative briefing that domestic industry had lost market share to subject imports in three out of five end-use market segments: consumer applications, food and beverage, and industrial applications. According to Kelco, the only reason that domestic industry did not lose market share at the market-wide level was that these segment-specific losses were offset by a market-share gain in the oilfield segment. Pre-hr'g Br. at 19, CD 156 (May 14, 2013), ECF No. 17 (Nov. 4, 2013).[1] Kelco further argued that domestic industry's static overall market share was itself bad news, because apparent domestic consumption had risen, and domestic industry should have captured a preferential share of this growth. *See* Post-hr'g Br. at 3, CD 2–170;174 (May 30, 2013), ECF No. 17 (Nov. 4, 2013).[2]

In the Views of the Commission, the Commission acknowledged that subject-import volume was significant under the statute and had increased in absolute terms. Views at 36–37. The Commission none-

[1] As suggested above, the aforementioned market segments are based on the end use of producers' xanthan gum. *See, e.g.*, Staff Report at III-7 tbl.III-4, CD 2–179 (June 11, 2013), ECF No. 17 (Nov. 4, 2013). This is how the term market segment is used throughout this opinion.

It should be noted that the aforementioned terms are not here used to refer to the segments that are sometimes considered when defining the relevant *product* being imported. That is a separate, prior inquiry. *See, e.g., Bic Corp. v. United States*, 21 CIT 448, 452–54, 964 F. Supp. 391, 397–98 (1997).

[2] Apparent consumption is equal to production plus imports less exports. It is intended to measure total consumption, rather than to measure segment-by-segment consumption. *Apparent Consumption*, Deardorff's Glossary of International Economics (2010), http://wwwpersonal.umich.edu/~alandear/glossary/a.html#ApparentConsumption.

theless emphasized that subject-import market share had remained relatively stable at the market-wide level, though differing trends had manifested in different market segments. *Id.* at 36–37 & n.142.[3]

II. Price Effects

The Commission's statutory task in evaluating price effects has two prongs: The Commission must examine both whether there has been price underselling in the United States and also whether imports have led to price depression or price suppression. 19 U.S.C. § 1677(7)(C)(ii).[4] In administrative briefing, Kelco demonstrated underselling. Post-hr'g Br. at 4–6. Kelco also argued price suppression. *Id.* Kelco's method for detecting price suppression was to compare raw-materials costs to net sales ("NS") values, on the theory that any increase in raw-materials costs not mirrored in increased NS values showed price suppression. Pursuant to this theory, Kelco provided evidence that increases in raw-materials costs had indeed outstripped NS-values gains, and that these increases would have been more noticeable had factory costs not decreased. *Id.* at 4–5. Kelco also noted that this trend was even more acute with respect to domestic industry's domestic sales, where NS average unit values ("AUVs") had actually decreased slightly (while raw-materials costs had still increased). *Id.*

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[3] As reported in the Views of the Commission,

The domestic industry's market share was [[ ]] percent in 2010, [[ ]] percent in 2011, and

[[ ]] percent in 2012. Cumulated subject imports' market share was [[ ]] percent in 2010,

[[ ]] percent in 2011, and [[ ]] percent in 2012. Nonsubject imports' market share was

[[ ]] percent in 2010, [[ ]] percent in 2011, and [[ ]] percent in 2012. Views at 31 (footnotes omitted) (citing Staff Report at C-5 tbl.C-1).

[4] Price suppression occurs when less-than-fair-value imports prevent domestic industry from raising prices when it otherwise would. *See* 19 U.S.C. § 1677(7)(C)(ii)(II). The Commission's normal methodology for determining whether price suppression has occurred is to compare ratios of the cost of goods sold ("COGS") to the value of net sales ("NS") over time ("COGS/NS ratio"). *See Siemens Energy, Inc. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1315, 1335 (2014) (sustaining Commission's decision to use COGS/NS ratio to measure price suppression against substantial-evidence attack, and citing further precedent in support of this position); *Nucor Fastener Div. v. United States*, Slip Op. 13–65, 2013 WL 3033385, at *2 (CIT May 24, 2013) (referring to COGS/NS ratio as "the ratio the [Commission] commonly uses to analyze price suppression"). When the ratios increase (that is, when costs rise relative to sales value), price suppression may be occurring: Presumably a manufacturer facing an increase in costs would respond by raising prices if possible. If raising prices is not possible, it may be because of third-party underselling. Hence, an increase in COGS/NS ratios, also known as a "cost–price squeeze" provides a circumstantial measure of price suppression. *See, e.g.*, *Siemens* 38 CIT at __, 992 F. Supp. 2d at 1335.

Price depression occurs when less-than-fair value imports cause domestic industry to lower its prices. *See* 19 U.S.C. § 1677(7)(C)(ii)(II).

The Commission, in its analysis of price effects, acknowledged subject importers' underselling. Views at 47. But, looking to price depression and price suppression, the Commission concluded that the former was impossible, on grounds that domestic prices had generally [[ ]]. *Id.* at 48 (citing Staff Report at V-6, V-7 tbls.V-1 to V-16, CD 2–179 (June 11, 2013), ECF No. 17 (Nov. 4, 2013)). The Commission further concluded that market-wide prices had not been suppressed, basing this conclusion on patterns in the COGS/NS ratio[5] during the period of investigation ("POI"). *Id.* (cross-referencing Views at 56–58). As the Commission noted, although domestic producers' domestic-sales COGS/NS ratio [[ ]] from 2010 to 2011—at first suggesting price suppression, *see supra* note 4—the same pattern occurred in those producers' export-sales COGS/NS ratio. *Id.* at 56–58. The Commission concluded from this information that domestic-sales price suppression could not have occurred, at least not by reason of subject imports. *Id.* As for the COGS/NS ratio from 2011 to 2012, the Commission noted that, although the domestic-sales ratio [[ ]] while the export ratio [[ ]], the rise in the domestic ratio was too small to credit as price suppressing. *Id.*

III. Impact

The statute requires the Commission to evaluate impact by examining a number of statutorily enumerated domestic performance indicators. 19 U.S.C. § 1677(7)(C)(iii). The Commission recounted the performance-indicator data in detail, and then summarized: "Most of the domestic industry's performance indicators improved or remained stable . . . although some declined." Views at 53.[6] Kelco did not analyze domestic performance indicators in its administrative brief-

[5] For a definition and explanation of this ratio, *see supra* note 4.

[6] As reported in the Views of the Commission,

> The domestic industry's production capacity was constant throughout the POI . . . . Its production increased . . . from 2010 to 2012. Its capacity utilization increased from . . . 2010 to . . . 2011, and declined . . . in 2012, for an overall increase . . . .
>
> By quantity, the domestic industry's U.S. shipments declined from . . . 2010 to . . . 2011, and increased . . . in 2012, for an overall increase . . . . By value, the domestic industry's U.S. shipments declined from . . . 2010 to . . . 2011, but increased . . . in 2012, for an overall increase . . . . The industry's net sales revenues increased from . . . 2010 to . . . 2012 . . . . The domestic industry's end-of-period inventories declined . . . from 2010 to 2012.
>
> Employment-related indicators showed improvement during the POI. The number of production and related workers, hours worked, and wages paid each increased from 2010 to 2012 . . . .
>
> Notwithstanding these improvements, several of the domestic industry's performance indicators deteriorated during the POI. As previously discussed, the domestic industry's share of apparent U.S. consumption declined . . . . There were also some declines in financial performance. The domestic industry's operating income declined . . . from 2010 to 2012. As a ratio to net sales, the domestic industry's operating income declined from . . . 2010 to . . . 2012 . . . .

ing, at least as that briefing is excerpted in Kelco's motion appendix. Confidential App. to Pl.'s Mot. for J. on Agency R., ECF No. 31.

IV. Post-petition Effects

After evaluating the material-injury factors, the Commission is required to consider "whether any change in [those factors] since the filing of the petition . . . is related to the pendency of the investigation." 19 U.S.C. § 1677(7)(I). The reason for this provision is that, as "[t]his court and [the Commission] consistently have recognized[,] the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for affected imports, thus distorting the data on which [the Commission] relies in making its [injury] determination." *USX Corp. v. United States*, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987) (citing *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 53, 592 F. Supp. 1318, 1324 (1984)). Accordingly, if the Commission does find such post-petition effects, it "may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury," thereby curing the skewed injury data. 19 U.S.C. § 1677(7)(I).

Kelco argued in administrative briefing for a post-petition discount. As one argument that the filing of the petition had distorted injury data, Kelco referenced a rise in domestic producers' U.S. shipments. Pre-hr'g Br. at 17–18. Kelco further noted that, even though subject producers' U.S. shipments had also risen, they had not kept pace with increases in U.S. apparent consumption. Post-hr'g Br. at 7–9. The upshot, according to Kelco, was that relative demand for subject imports (absolute demand relative to apparent consumption) declined after filing. *Id.*

Kelco's second post-petition-effects argument was that the petition had buoyed domestic market share by encouraging purchasers to buy domestic product instead of subject imports. According to one domestic producer, [[ ]], several purchasers had shifted from subject imports to [[ ]] expressly because of the filing of the petition. Pre-hr'g Br. at 18–19. Kelco said that this shift in production was the only thing that kept domestic market share afloat. Kelco added that the market-segmented data provided circumstantial evidence of this: Because the shifted purchases were

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Research and development expenditures declined from . . . 2010 to . . . 2011, and increased . . . in 2012, for an overall decline . . . . By contrast, capital expenditures declined from . . . 2010 to . . . 2011, and increased . . . in 2012, for an overall increase . . . .
Views of the Commission at 53–55 (footnotes omitted) (citing Staff Report at VI-8 tbl.VI-6, C-5 tbl.C-1).

all in the oilfield segment, the actual market shares of other segments declined, proving Kelco's hypothetical. Post-hr'g Br. at 5–6.

The Commission analyzed post-petition effects in a footnote:

> Although there is some evidence showing purchasers approached domestic producers with sales inquiries after the petition was filed, the record shows no apparent changes in the subject imports' volume and pricing behavior in the second half of 2012, *i.e.*, after the petition was filed. Accordingly, we decline to give less weight to the annual 2012 data based on a post-petition effect.

Views at 56 n.223. Thus, the Commission, though it acknowledged the arguments Kelco had made at administrative briefing, ultimately concluded that subject producers' volume metrics and pricing indicated that the filing of the petition had had no effect. *Id.*

V. Material-Injury Finding

Having discarded the possibility of post-petition effects, the Commission's next task was to weigh volume, price effects, and impact data together. Doing so, it found no material injury to domestic industry. *Id.* at 55–58. The Commission began at the end, with impact. It recited "a number of [performance] indicators [that had] improved during the POI," and concluded that the overall indicator data did not suggest material injury. *Id.* at 55–56. The Commission next harkened back to its volume analysis. Apparently referencing Kelco's argument that domestic market share should have grown alongside U.S. apparent consumption, the Commission insisted that "[t]here is nothing atypical about [domestic producers'] share[] of total apparent U.S. consumption remaining . . . relatively constant . . . ." *Id.* at 56. Finally, the Commission addressed price effects (and also declines in domestic financial performance, which presumably corresponded to price effects). *Id.* at 56–57. The Commission raised the issue of causation. Any financial decline had not come from subject imports gaining market share because there was no such gain. Rather, domestic "industry's U.S. shipments rose and its market share was essentially stable from 2010 to 2012." *Id.* Nor had subject imports spurred price effects. This the Commission demonstrated through the analysis of domestic-sales and export-sales COGS/NS ratios described above. *Id.* at 57–58. Thus, taking all the data in sum, the Commission found no material injury to domestic industry.

On appeal, Kelco raises two claims with respect to the Commission's conclusion. First, Kelco claims that, even if the Commission was correct in providing no post-petition discount, it erred in its

underlying material-injury analysis. Pl.'s Br. 25–30. Kelco argues that the Commission's use of the COGS/NS ratio to measure price suppression was procedurally improper, and that the Commission's injury analysis was unsupported by substantial record evidence. *Id.*

Second, Kelco claims that the Commission should have provided a post-petition discount. *Id.* at 7–24. Kelco makes three arguments that the Commission's post-petition analysis was procedurally improper: (1) that the Commission's post-petition analysis was too short, Reply Br. 4–6, *see also* Pl.'s Br. 20–23, (2) that the Commission should have (but did not) presume that any detected post-petition effects arose from the petition, Pl.'s Br. 5–8 & n.1, 20–23, Reply Br. 10–11, and (3) that the Commission was procedurally required to segment the market in its post-petition analysis, *see* Pl.'s Br. 7–20. Kelco further challenges the Commission's post-petition-effects analysis on substantial-evidence grounds. *Id.*

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to hear this appeal under 28 U.S.C. § 1581(c) (2006). The court will uphold the Commission's decisions unless those decisions are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

The substantial-evidence standard is best understood as a word formula connoting reasonableness review. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *SSIH Equip. SA v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983)); *accord* 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2013). Accordingly, substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" taking into account the record as a whole. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Nippon Steel*, 458 F.3d at 1351. Because the administrative body at issue must take the record as a whole into account, it must necessarily "address significant arguments and evidence which seriously undermines its reasoning and conclusions." *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001). But the determination remains the administrative body's own to make: This court's function is merely to ascertain "whether there was evidence which could reasonably lead to the Commission's conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

DISCUSSION

The court now considers Kelco's two claims, and sustains the Commission as to both. First, the Commission's underlying determination of no material injury was procedurally and substantively proper. The Commission's use of the COGS/NS ratio to evaluate price effects was in accordance with procedural requirements. And the Commission's injury determination was supported by substantial evidence.

Second, the Commission's finding of no post-petition effects likewise survives Kelco's procedural and substantive challenges. As a procedural matter, the Commission dedicated a sufficient portion of its inquiry to post-petition effects, and moreover had no duty to presume that any post-petition effects were caused by the petition, or to conduct a market-segmentation analysis. The Commission's post-petition-effects determination also satisfies the substantial-evidence standard. In any event, any error in the Commission's post-petition-effects analysis was harmless, because it would not have affected the underlying injury determination.

I. Assuming that the Commission Did Not Err in Finding No Post-petition Effects, its Underlying Injury Determination Was Supported by Substantial Evidence and Otherwise in Accordance with Law

Kelco's first claim is that, regardless of whether the Commission found post-petition effects, it erred in its underlying material-injury analysis. Kelco first raises a procedural argument, that the Commission should have used data other than the COGS/NS ratio to analyze price effects, *see* Pl.'s Br. 29, and that it misused the COGS/NS ratio in any case, *id.* at 24–25. Second, Kelco argues under substantial evidence that the Commission was obligated to consider market-segment data in evaluating material injury. *Id.* at 25–30. The court rejects both arguments.

A. The Commission's Use of the COGS/NS Ratio Was Procedurally in Accordance with Law

Kelco challenges the particular metric by which the Commission evaluated price suppression: the COGS/NS ratio. Kelco levies two arguments, the first implicit, the next explicit. First, Kelco focuses in its briefing on the ratio of raw-materials costs—a subcomponent of COGS—to net sales, thus implying that the Commission should have followed suit. Pl.'s Br. 29. But there is nothing unusual about the Commission's decision to focus on the COGS/NS ratio. *See Siemens Energy*, 38 CIT at __, 992 F. Supp. 2d at 1335; *Nucor*, 2013 WL 3033385, at *2. And the Commission's practice of focusing on the

COGS/NS ratio, rather than a subcomponent ratio, makes good sense: Should an increase in one subcomponent of COGS be offset by a decrease in another subcomponent, domestic industry would not have any need to raise prices to avoid price suppression—the offset would handle that for it. Indeed, as evident from Kelco's own administrative briefing, that happened to a certain extent in this case. Posthr'g Br. at 4–5 (noting that increased raw-materials costs were somewhat offset by decreasing factory and other costs). Kelco's implicit argument against the Commission's COGS/NS methodology therefore fails.

Kelco's second argument against the Commission's use of the COGS/NS ratio is more explicit. Kelco argues that the Commission's inference from the export-sales COGS/NS ratio was improperly drawn because "[t]here is no record evidence suggesting that the domestic industry faces no competition in its export markets." Pl.'s Br. 25. Kelco's point is that if there is competition in the export markets, prices might be suppressed there too, such that comparison between domestic and export markets does not disprove its position that the change in the domestic COGS/NS ratio was caused by the subject imports. But this mischaracterizes the mechanics of the Commission's injury-and-causation inquiry. The Commission's obligation is not to disprove injury (whether in the form of shifts in volume, price effects, other impacts, or some permutation thereof) or causation by subject imports. Rather, the Commission must affirmatively find both injury and causation. *Comm. for Fair Coke Trade v. United States*, 28 CIT 1140, 1168 (2004) ("A finding of material injury requires a causal, not merely temporal, connection between less than fair value sales and material injury."). To make such a finding, the Commission needs evidence. In this case, the Commission noted that it had no evidence that any change in the domestic COGS/NS ratio (an indication of possible price suppression) had been caused by subject imports because such a change also occurred abroad. If Kelco wanted to overcome that absence of evidence, it needed to give proof—either proof of causation in the domestic market, or that there is something more than a mere chance of export-market competition. Therefore, Kelco's second argument against the Commission's use of the COGS/NS ratio also fails, and the whole of the Commission's COGS/NS analysis was procedurally in accordance with law.

B. The Commission's Determination of No Material Injury Was Supported by Substantial Evidence

Kelco next argues that substantial record evidence compelled the Commission to at least acknowledge market-segment data in evalu-

ating material injury. Pl.'s Br. 25–30. By way of clarification, Kelco is not claiming that the Commission is as a matter of law required to segment markets in all of its material-injury determinations. *See, e.g.*, Pl.'s Reply to Def.'s Resps. 11–12, ECF No. 49 ("Reply Br.") ("Defendant construed Kelco's position to mean that the Commission is required to perform a market segment analysis. Defendant mischaracterizes Kelco's argument." (citation omitted)). The Commission is certainly not required to segment the market every time it considers material injury. *See* 19 U.S.C. § 1677(4)(A) ("The term 'industry' means the producers *as a whole* of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." (emphasis added)); *see also Tropicana Prods., Inc. v. United States*, 31 CIT 548, 559–60, 484 F. Supp. 2d 1330, 1341 (2007); *Cleo, Inc. v. United States*, 30 CIT 1380, 1399–1400 (2006); *Comm. for Fair Coke Trade* 28 CIT at 1166–67; *cf. Altx*, 25 CIT at 1113–15, 167 F. Supp. 2d at 1369–71 (holding that the Commission is not required to consider segments of domestic industry injured by dumping separately from those segments perhaps less injured because the producers in the latter segment also import subject imports); *Copperweld*, 12 CIT at 165–66, 682 F. Supp. at 569–70 (holding that the Commission is not required to consider injury to individual producers). *See generally Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1377–78 (Fed. Cir. 2003) (holding that the court cannot compel the Department of Commerce to conduct its analysis in a manner not mandated by statute). Far from it: Segmenting the market can actually thwart the Commission's statutory duty, which is to determine whether the *entire industry*, not *particular producers*, has been injured. *Calabrian Corp. v. U.S. Int'l Trade Comm'n*, 16 CIT 342, 354, 794 F.Supp. 377, 385 (1992) ("That Congress intended for the Commission to consider the entire industry is clear"); *Altx*, 25 CIT at 1114, 167 F. Supp. 2d at 1369–70 ("Although one segment of the industry may benefit from dumping while another segment is harmed, the statute does not permit the ITC to manipulate its material injury analysis in favor of petitioners by focusing exclusively on the segment of the defined industry that is harmed. . . . With regard to evaluating the impact of subject imports, the statute requires the Commission to focus on the 'state of the *industry*.'" (emphasis in original) (citations omitted)); *Copperweld*, 12 CIT at 165–66, 682 F. Supp. at 569 ("Th[e statutory] language makes it manifestly clear that Congress intended the ITC [to] determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports. This language defies the suggestion that the ITC must make a disaggregated analysis of

material injury. Furthermore, it appears that if Congress had intended that the ITC analyze injury on a disaggregated basis, Congress would have made this intention explicit, as it did for example in regard to regional industries."). Given this clear precedent, Kelco is wise to avoid the contention that the Commission is procedurally compelled to segment markets whenever it makes an injury determination.

Rather, Kelco claims that substantial evidence in this particular case required the Commission to segment the market and find material injury. Kelco grounds its claim in the Commission's finding that there was "predominant underselling" during the POI. Views at 47; *see* Pl.'s Br. 29–30; Reply Br. 11–12. According to Kelco, the Commission fashioned a "paradox" when it, despite acknowledging such underselling, nonetheless found neither a loss of domestic market share nor price effects. Pl.'s Br. 29–30; Reply Br. 11. Kelco adds that the solution to this so-called paradox was readily available to the Commission, insofar as Kelco had cited record evidence of segment-specific market-share fluctuations and price effects in its administrative briefing. Pl.'s Br. 25–30; Reply Br. 11–12. Kelco contends that by ignoring this evidence, the Commission violated the *Altx* rule that it "must address significant arguments and evidence which seriously undermines its reasoning and conclusions." Pl.'s Br. 30 (citing *Altx*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374). Furthermore, according to Kelco, the Commission did not ignore such segment-specific effects when analyzing threat of future injury, such that the Commission's omission when analyzing material injury was arbitrary. Pl.'s Br. 29 (citing Views at 50).

The trouble with Kelco's argument is that there was no paradox to be resolved. It must be remembered that the Commission's statutory duty is not to detect injury writ large. *See Altx*, 25 CIT at 1114, 167 F. Supp. 2d at 1369–70. Rather, it is to decide whether there has been an injury to domestic industry as a whole, looking to the enumerated factors and what other evidence the Commission deems appropriate. 19 U.S.C. §§ 1673d(b), 1677(4)(A), 1677(7)(B)(i)–(ii) . And although it may well be an economic truth that underselling always has *some* effect on domestic industry—for example, in specific segments—it is by no means certain that this effect will manifest at the market-wide level. This being the case, it is perfectly permissible for the Commission to acknowledge underselling but still find no market-wide injury. The Commission need not segment the market. *Copperweld*, 12 CIT at 165–66, 682 F. Supp. at 569. Put another way, it is no paradox to say that, despite underselling, domestic industry suffered no injury *of the market-wide kind the Commission is looking for*.

Without a paradox, the Commission's conclusion of no material injury is not undermined. And if the Commission's conclusion is not undermined, then *Altx* does not impose on the Commission a duty to address any evidence or arguments—including Kelco's tendered evidence of segment specific market-share fluctuations and price effects. *Altx*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374. To require the Commission to discuss market-segmented data in such a case would be to add to the Commission's statutory duty—and that is beyond this court's mandate. *Viraj Grp.*, 343 F.3d at 1377–78.

Kelco also raises an arbitrariness challenge to the Commission's decision to forego consideration of segment-specific price effects in its material-injury analysis. Kelco notes that the Commission did look to segment-specific price effects in its threat-of-material-injury analysis. Pl.'s Br. 29 (quoting Views at 50). Because the Commission was then willing to pierce the veil and find a likelihood of future oilfield-segment price depression, Kelco argues, it should have done the same with material injury. *Id.* But neither the change in approach nor the different conclusion about possible future price effects undermines the Commission's present-injury conclusion. Regarding the different conclusion, the present-material-injury and threat-of-future-injury inquiries are statutorily and substantively discrete. *Compare* 19 U.S.C. § 1677(7)(C), *with id.* § 1677(7)(F) (establishing different inquiries with different elements for present-injury and threat analyses). And with respect to the change in approach, this court has afforded the Commission a wide berth in choosing when and when not to consider market-segment data in its injury analyses. In *Cleo*, for example, this court upheld a material injury finding after passing over without comment the Commission's decision to discuss market segments when analyzing volume and price effects, but not impact. 30 CIT at 1400. The court did so even despite the fact that the Commission had provided only the cursory explanation that it had discussed segments "when appropriate." *Id.* The Commission's material-injury analysis was acceptable to the court given the clear statutory language indicating that the Commission's task is to analyze injury to domestic industry as a whole. *See id.* The gap between the Commission's use and nonuse of segmentation is less drastic in this case, insofar as the Commission's only resort to market segments comes under a different statutory heading than the nonuse that Kelco complains of. *See* Pl.'s Br. 29 (quoting Views at 50). Thus, although the Commission's duty to articulate a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), can in some cases require it

to adopt like analyses in like situations, *cf. Altx*, 25 CIT at 1110–12, 167 F. Supp. 2d at 1366–68, the Commission cannot be said to be in breach of that duty in this case.

In any event, the Commission did acknowledge the segment-based market-share trends that Kelco had pointed out—albeit to a limited extent. *Compare* Views at 37 n.142, *with* Posthr'g Br. 5–6. In light of this partial acknowledgement and also the reasoning adduced above, the mere fact that the Commission did not acknowledge segment-specific price-effects trends does not render the Commission's material-injury finding unsupported by substantial evidence. Pl.'s Br. 27–30.

II. The Commission's Determination that the Filing of the Petition Did Not Result in Post-petition Effects Was Procedurally in Accordance with Law and Was Supported by Substantial Evidence

Kelco's second claim is that the Commission should have discounted the injury data that followed the filing of the petition. Pl.'s Br. 4–25; Reply Br. 2–11. As discussed above, the Commission chose not to provide a post-petition discount after it evaluated the possibility in a footnote:

> Although there is some evidence showing purchasers approached domestic producers with sales inquiries after the petition was filed, the record shows no apparent changes in the subject imports' volume and pricing behavior in the second half of 2012, *i.e.*, after the petition was filed. Accordingly, we decline to give less weight to the annual 2012 data based on a post-petition effect.

Views at 56 n.223. Kelco claims that the Commission made the wrong decision, and supports this claim with two arguments: First, the Commission did not follow the proper statutory procedure in evaluating the possibility of post-petition effects, Pl.'s Br. 7–23 & n.1; Reply Br. 4–6, 10–11; and second, as a substantive matter, the Commission's determination of no post-petition effects was not supported by substantial evidence, Pl.'s Br. 7–20. Both arguments are without merit. And even if either argument were meritorious, the Commission's error would be harmless.

A. The Commission's Determination of No Post-petition Effects Was Procedurally in Accordance with Law

Kelco first argues that the Commission's determination of no post-petition effects was procedurally improper, insofar as the Commission

failed its statutory obligation to consider "whether any change in [the injury factors] since the filing of the petition . . . is related to the pendency of the investigation." 19 U.S.C. § 1677(7)(I). Kelco's argument has three prongs: (1) The Commission did not adequately "consider" the possibility of post-petition effects within the meaning of the statute, *see* Reply Br. 4–6, Pl.'s Br. 20–23, (2) the Commission failed to presume that any post-petition effects arose from the filing of the petition, Pl.'s Br. 5–8 & n.1, 20–23, Reply Br. 10–11, and (3) the Commission did not, but was procedurally required to, analyze post-petition effects via a market-segmentation analysis, *see* Pl.'s Br. 7–20.

In the first prong of its argument, Kelco asserts that the Commission's evaluation of post-petition data did not live up to the statutory directive to "consider" post-petition effects. Reply Br. 4–6. According to Kelco, in order to comply with statute, the Commission must collect post-petition data, compile it in the staff report, and discuss it in the Views of the Commission. Reply Br. 4 (citing *Gold East Paper (Jiangsu) Co. v. United States*, 36 CIT __, __, 896 F. Supp. 2d 1242, 1260 (2012)). Specifically, Kelco argues that the Commission should have dedicated more text to post-petition effects, and should have placed such text above the footnote line. Reply Br. 4–6.[7]

Even assuming Kelco is correct about the inquiry required by the term "consider," Defendant's Views of the Commission discussion was sufficient. Contrary to Kelco's contention, the Commission's discussion in the Views of the Commission need not be of some talismanic length or in some preordained place. *See, e.g., Nitrogen Solutions Fair Trade Committee v. United States*, 29 CIT 86, 101, 358 F. Supp. 2d 1314, 1329 (2005) (sustaining Commission's determination that do-

[7] In setting forth its alleged consideration rule, Kelco misquotes *Gold East Paper*. According to Kelco, *Gold East Paper* defines consideration to include "collecting data, compiling the data in the staff report, and discussing those data in the Commission's final views." This quotation is properly attributed to Defendant-Intervenor Jungbunzlauer Austria AG's brief. Def.-Intervenor's. Opp. to Pl.'s Mot. 4, ECF No. 45. The distinction is important, because *Gold East Paper* need not be read to define consideration at all (much less so strictly); the case can be read simply for the proposition that, the facts of that case being as they were, the defendant did enough to satisfy 19 U.S.C. § 1677(7)(I) by taking the three mentioned steps: collecting, compiling, and discussing data. 36 CIT at __, 896 F. Supp. at 1260.

Moreover, even assuming that *Gold East Paper* does set forth a rule on what it means to "consider" post-petition effects, Kelco is still incorrect about how much discussion the case requires the Commission to offer in its final views. According to Kelco, "The [*Gold East Paper*] Court found th[e post-petition effects] claim unfounded based on three pages of discussion in the Commission's final views and the staff report where post-petition effects were evaluated. The Commission's footnote in the present case hardly compares . . . ." Reply Br. 5 (citation omitted). But there was just one paragraph of discussion in the Views of the Commission report at issue in *Gold East Paper*. *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia*, USITC Pub. 4192, Inv. Nos. 701-TA-470–471, 731-TA-1169–1170, at 27 (Nov. 2010) (final determination).

mestic industry neither suffered material injury nor was threatened by such, even when Commission's finding of no post-petition effects was premised on one footnote of analysis in the relevant Views of the Commission report, in which the commission asserted that the alleged effect of the petition began before the petition was filed, *Urea Amonium Nitrate Solutions from Belarus, Russia and Ukraine*, USITC Pub. 3591, Inv. Nos. 731-TA-1006–1008, at 15 n.85 (Apr. 2003) (final determination)). In this case, the Commission offered some discussion of post-petition effects, which was all that it was statutorily required to do. Views at 56 n.223; *see* U.S.C. § 1677(7)(I). Kelco's argument that the Commission did not follow the "consideration" process therefore fails.

The second prong of Kelco's argument is that the Commission, in evaluating post-petition effects, ignored its past practice of presuming that any detected effects had been caused by the filing of the petition. Pl.'s Br. 5–8 & n.1, 20–23, Reply Br. 10–11. This procedural prong of Kelco's argument can be disposed of without reaching the necessary substantive assumption that there were any post-petition effects, because Kelco's purported presumption does not exist.[8]

When an agency does establish a consistent practice, this can sometimes bind it to at least explain any departure therefrom. *E.g.*, *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (holding that agency acts arbitrarily and capriciously when it "consistently followed a contrary practice in similar circumstances and provide[s] no reasonable explanation for the change in practice"). But, as noted, the wrinkle in this case is that Kelco has not sufficiently demonstrated that its claimed practice has ever been adopted by the Commission. Kelco cites but one Commission investigation, *Certain Cold-Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, the Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela*, USITC Pub. No. 3551, Inv. Nos. 701-TA-423–425 & 731-TA-964, 966–970, 973–978, 980 & 982–983, at 9 (Nov. 2002) (final determination), as evidence of the apparent practice, and specifically references language that is at best ambiguous on the issue:

> The statute allows the Commission to reduce the weight accorded to data for the period after the filing of the petition upon considering whether any change in the volume, price effects, or impact of imports since the filing of the petition is related to the

[8] It should be noted, however, that this court does sustain the Commission's conclusion that there were no post-petition effects as being supported by substantial evidence. *See* Discussion Part II.B, *infra*.

> pendency of the investigation. The presumption that such change is related to the pendency of the investigation is rebuttable.

Pl.'s Br. 7 n.1; Reply Br. 10–11. One investigation does not make for a "consistent" practice. And, in any event, the cited language does not prove Kelco's point: A presumption to the detriment of subject importers is mentioned, but nothing is said of how it is imposed or whether such imposition is mandatory—the precise question at issue. *Id.*[9] Thus, Kelco has not established that the Commission has a past practice of presuming that post-petition effects are caused by the filing of the petition.[10]

The final prong of Kelco's procedural argument—that the Commission was required to conduct a market-segmentation analysis as a matter of law—also fails. Just as the Commission is under no procedural obligation to segment the market when conducting its more general material-injury determination, neither must the Commission

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[9] Furthermore, the legislative history of 19 U.S.C. § 1677(7)(I) provides some indication that the presumption mentioned is not mandatory, but is imposed by the Commission at its discretion. In substance, that history says that the Commission *may* presume that post-petition effects result from the petition, and *may* require subject producers to overcome this presumption, on penalty of discounting the post-petition data. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, Vol. 1, at 853–54 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4186.

This legislative history also undermines a perhaps-implied argument that the statutory text (rather than agency practice) requires the Commission to presume that any post-petition effects are caused by the filing of the petition. *See* Pl.'s Br. at 6–7. Another more obvious argument against such a statutory construction is that the statutory text itself does not mention any presumption. 19 U.S.C. § 1677(7)(I). And the would-be statutory argument is further undermined by the Commission's clear discretion to discount or not discount post-petition data should it discover post-petition effects attributable to the filing of the petition. 19 U.S.C. § 1677(7)(I) ("[T]he Commission *may* reduce the weight accorded to the data for the period after the filing of the petition . . . ."); *Altx*, 25 CIT at 1105 n.10, 167 F. Supp. 2d at 1361 n.10 ("[T]he ITC, therefore, is not required to discount the relevant data even if the agency finds a change in data to be related to the pendency of the investigation."). It is unclear why Congress would mandate that the Commission presume that post-petition effects are caused by the filing of the petition, but then allow the Commission discretion to nonetheless provide little or no post-petition discount. *Cf. United Savings Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor.").

[10] Kelco also supports its presumption argument by reciting a statement by Commissioner Aranoff at the hearing below: "The statute tells me that I *can* presume that any improvements are due to the petition and I *can* give them less weight in my determination unless there are facts on the record that can overcome that presumption." Pl.'s Br. 21 (quoting Revised Commission Hr'g Tr. at 260–61, PD 264 (July 30, 2013), ECF No. 17 (Nov. 4, 2013) (emphasis added) (internal quotation marks omitted)); Reply Br. 10–11 (same). It is unclear what Kelco would have this court do with Commissioner Aranoff's statement, which itself is not evidence of past Commission practice. Nor, in any event, does the quoted statement, which treats the presumption as optional, support Kelco's point.

do so when considering post-petition effects. After all, the primary reason that market segmentation is not required in the general material-injury context is that the definition of the term "industry" in 19 U.S.C. § 1677(4)(A)—both on its face and as interpreted by this court—regards industry as a whole. *See, e.g.*, *Cleo*, 30 CIT at 1400. That same term "industry" is used again in 19 U.S.C. § 1677(7)(I), the section that sets forth the court's task in evaluating post-petition effects. There is no reason to believe that the meaning of "industry" should shift from context to context, *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994), all the less so because the term is centrally and uniformly defined. Therefore, the Commission cannot have erred as a procedural matter by declining to segment its analysis of post-petition effects. *See Viraj Grp.*, 343 F.3d at 1377–78.

B. The Commission's Determination of No Post-petition Effects Was Supported by Substantial Evidence

Because the Commission's post-petition-effects determination was procedurally in accordance with law, the only remaining question is whether it was unsupported by substantial evidence. Kelco again founds its substantial-evidence argument on the *Altx* rule that the Commission "must address significant arguments and evidence which seriously undermines its reasoning and conclusions." 25 CIT at 1117–18, 167 F. Supp. 2d at 1374. This time, Kelco alleges that the Commission's conclusion of no post-petition effects was undermined by record evidence of a post-petition decline in relative demand for oilfield-segment imports—evidence that the Commission did not acknowledge. Pl.'s Br. 8–12; Reply Br. 6–7. Kelco further contends that three pieces of record evidence show that the petition was the cause of this decline: (1) reports by C.P. Kelco and [[ ]] that they experienced [[ ]] post-petition effects, Pl.'s Br. 13–15; Reply Br. 10, (2) one prominent oilfield-segment purchaser's shift of [[ ]] of supply from subject imports to domestic supply, Pl.'s Br. 15–18; Reply Br. 7–8, and (3) purchasers and importers' documentation of post-petition changes in subject importers' import volume and pricing behavior, Pl.'s Br. 18–20; Reply Br. 9–10.

The problem, once again, is that the evidence Kelco claims the Commission unduly ignored—evidence of a segment-specific decline in relative demand—is not significant, undermining evidence within the meaning of *Altx*. As shown above in Discussion Part II.A, the Commission's task in evaluating post-petition effects is to look to the industry as a whole. 19 U.S.C. § 1677(4)(A), (7)(I). To hold that

evidence of segment-specific post-petition effects is *Altx* significant, such that it necessarily requires the Commission's consideration, is to amplify the Commission's statutory task. This the court cannot do. *See Viraj Grp.*, 343 F.3d at 1377–78.

Kelco suggests alternatively that it is past Commission practice, not *Altx*, that requires the Commission to consider segment-specific post-petition effects. *See* Pl.'s Br. 11–12 (citing *Certain Activated Carbon from China*, USITC Pub. 3913, Inv. No. 731-TA-1103, at 17 (Apr. 2007) (final determination)). As already noted, past Commission practice can sometimes bind future decision-making. *Consol. Bearings*, 348 F.3d at 1007. But the difficulty is that Kelco's cited investigation does not demonstrate any such past Commission practice. In *Certain Activated Carbon*, the Commission provided a post-petition discount after finding that the filing of the relevant petition triggered a *market-wide* decline in *absolute* demand for, *and* increase in price of, subject imports. *Certain Activated Carbon from China*, USITC Pub. 3913, Inv. No. 731-TA-1103, at 17 (Apr. 2007) (final determination). Thus, *Certain Activated Carbon* does not require the Commission to examine segment-specific effects.

In any event, the Commission *did* respond to Kelco's segment-specific post-petition cause-and-effect evidence. As mentioned above, the Commission evaluated post-petition effects in a footnote. The Commission stated,

> Although there is some evidence showing purchasers approached domestic producers with sales inquiries after the petition was filed, the record shows no apparent changes in the subject imports' volume and pricing behavior in the second half of 2012, *i.e.*, after the petition was filed. Accordingly, we decline to give less weight to the annual 2012 data based on a post-petition effect.

Views at 56 n.223. In this footnote, the Commission acknowledged the causation proof offered by Kelco, albeit in a limited manner. That proof tended to show an [[ ]] in domestic producers' post-petition activity—precisely the "some evidence" that the Commission mentioned. Pl.'s Br. 12–20, 22; Reply Br. 6–11. And the Commission followed this mention with an explanation of why the causation proof did not necessarily lead to a finding of post-petition effect: Looking to the market as a whole, two of the hallmark vectors for evaluating both material injury and post-petition effect—volume and price, 19 U.S.C. § 1677(7)(I)— registered "no apparent change" after the filing

of the petition. Views at 56 n.223.[11] The Commission's reliance on volume, in particular, should not have been unexpected, insofar as the Commission has looked to this metric in the past in considering post-petition effects, and to the approval of this court. *See, e.g.*, *Nitrogen Solutions*, 29 CIT at 101, 358 F. Supp. 2d at 1329 (sustaining Commission's finding of no post-petition effects in which Commission looked primarily to decline in absolute volume of subject imports, determining that the decline predated the petition); *Corus Staal BV v. U.S. Int'l Trade Comm'n*, 27 CIT 459, 463, 470 (2003) (sustaining Commission's finding of post-petition effects in which Commission looked primarily to decline in absolute volume of subject imports). Therefore, even assuming the Commission was required to respond to evidence of segment-specific post-petition effects, it did so. The Commission's post-petition finding survives substantial evidence review.

C. Even Assuming that the Commission's Determination of No Post-petition Effects Was Not Supported by Substantial Evidence or Otherwise Not in Accordance with Law, the Error Is Harmless

Finally, the court notes that any error in the Commission's finding of no post-petition effects was harmless. Even assuming the Commission had found post-petition effects, its ultimate injury finding would not have changed. Def.'s Opp. to Pl.'s Mot. 35–36, ECF No. 36 ("U.S. Br.").

"It is well settled that principles of harmless error apply to the review of agency proceedings." *Intergcargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). Nor does this general rule have any less force when applied to the Commission's determinations of material injury. *See U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1367 (Fed. Cir. 1996) (noting that, even had court agreed with plaintiff that Commission erred in its usage of two pieces of record evidence, the error was harmless because the Commission's determination was supported by substantial other record evidence).

Had the Commission found the post-petition effects alleged by Kelco, it would have had discretionary authority to "reduce the weight accorded to the data for the period after the filing of the petition." 19 U.S.C. § 1677(7)(I). It is not for this court to say how the Commission would have exercised its own statutory discretion in deciding to provide a discount or not. Reply Br. 2–3. Nor can the court

[11] The fact that the Commission expressly acknowledged only two out of the three post-petition-effects factors in its footnote is of no concern. In the material-injury context, the Commission is permitted to value volume, price effects, and impact as it sees fit. *Copperweld*, 12 CIT at 156, 682 F. Supp. at 561–62. There is no reason this should not also be true in the case of post-petition effects.

say what precise level of discretionary discount the Commission might have provided. But the court can consider what the impact on the Commission's material-injury determination would have been had the Commission acted to the full extent of its authority in discounting post-petition data.

The Commission convincingly demonstrates that, even assuming a total discount of post-petition data, its material-injury determination would have remained the same. Had the Commission discounted the post-petition data, it would have looked to earlier data from 2010 or 2011 to detect material injury from less-than-fair-value importation. U.S. Br. 35–36. But the statutory factors that the Commission would have been obligated to consider would have remained the same: volume of subject imports, price effects on domestic industry, and impact on domestic performance indicators. 19 U.S.C. § 1677(7)(I); *see* U.S. Br. 35–36. With respect to each of these statutory factors, the 2010 and 2011 data is not substantially different from the 2012 data. Views at 37 (volume) (citing Staff Report at C-5 tbl.C-1); *id.* at 48, 56–58 (price effects) (citing V-6, V-7 tbls.V-1 to V-16); Staff Report at VI-8 tbl.VI-6, C-5 tbl.C-1 (impact). Nor has Kelco provided evidence that the relevant metrics fluctuated meaningfully during 2012, but before the filing of the petition. *See* Pl. Br. Ex. 3 (summarizing data from the Staff Report at III-7 tbl.III-4, V-7 tbls.V-1 to V-14, showing no change in volume in three out of five market segments between the first and second halves of 2012).

This court has already found that the Commission's determination of no material injury during the entire POI—from 2010 to 2012—was valid under the assumption that the Commission was not obligated to provide a post-petition discount. *See supra* Discussion Part I. If the Commission's determination as to the entire POI is valid, and if the data from 2010 and 2011 is not meaningfully different than the data from 2012, then it must be the case that a determination of no material injury from 2010 to 2011 is also valid. Therefore, it makes no difference whether or not the Commission provided a post-petition discount: The result is the same. The Commission's finding that domestic industry suffers no material injury stands.

CONCLUSION

After carefully reviewing the parties' briefs and the administrative record, the court sustains the Commission's decision in all respects. Judgment will enter accordingly.

Dated: October 22, 2014
New York, New York

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

Slip Op. 14–126

TOSCELIK PROFIL VE SAC ENDUSTRISI A.S., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00371

[On USCIT Rule 56.2 motion, administrative review determination remanded.]

Dated: October 29, 2014

David L. Simon, Law Offices of David L. Simon, of Washington DC, for the plaintiff.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With him on the brief were Stuart Delery, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Gilbert B. Kaplan and *Jennifer D. Jones*, King & Spaulding LLP, of Washington DC, for the defendant-intervenor Wheatland Tube Company.

Jeffrey D. Gerrish and *Robert E. Lighthizer*, Skadden Arps Slate Meagher & Flom, LLP, of Washington DC, for the defendant-intervenor United States Steel Corporation.

OPINION AND ORDER

Musgrave, Senior Judge:

The plaintiff Toscelik Profil ve Sac Endustrisi A.S. ("Toscelik"), a producer of subject merchandise for the Turkish domestic and export markets, appeals from *Circular Welded Carbon Steel Pipes And Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011*, 78 Fed. Reg. 64916 (Oct. 30, 2013) ("*Final Results*"), *see* PDoc 201, including its issues and decision memorandum (Oct. 23, 2013) ("*I&D Memo*"), PDoc 202, and accompanying set of calculations ("*Final Calcs*"), PDoc 205, CDoc 212. Toscelik contests two benchmarks Commerce constructed to measure the benefits Toscelik received, respectively, from two parcels of land it acquired from a Turkish governmental entity. Toscelik received one parcel under a grant in 2008 and purchased the adjacent parcel in

2010. *I&D Memo* at 10, 12. For each parcel, the benefit is calculated as the difference between the price paid and the benchmark value. 19 C.F.R. §351.511(a)(2).

Background

Toscelik was a mandatory respondent for the calendar year 2011 administrative review at bar of the countervailing duty ("CVD") order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 25401, 25403 (Apr. 30, 2012). In its questionnaire response ("QR") of July 29, 2012, PDocs 34, 35, CDocs 7–27, Toscelik reported, *inter alia*, that in 2008 it had received a grant of free land under Turkish Law 5084 in the Organized Industrial Zone (OIZ) of Osmaniye, Turkey. CDocs 29–30. Toscelik had previously reported this grant in the prior administrative review covering year 2010.

In its questionnaire responses, Toscelik also reported having purchased an adjacent parcel from the Osmaniye OIZ in 2010. Toscelik Supplemental Questionnaire Response ("SQR") (Nov. 8, 2012), PDoc137, CDocs142–146, at 1–2. Commerce initiated an inquiry to determine whether the price Toscelik paid for this 2010 parcel was less than adequate remuneration ("LTAR"). New Subsidy Allegation Memorandum (Oct. 9, 2012), PDoc 121, CDoc139.

In its SQR of November 8, Toscelik detailed the location, size, and price for Toscelik's purchases of comparable properties from private-sector sellers and the site in Osmaniye of the 2008 and 2010 parcels. PDoc137, CDocs142–146, at 1–2 & Exhs. 2, 4, 5. The Government of Turkey ("GOT") also submitted a QR. Response of GOT (Jul. 30, 2012), PDocs 36–85. Exhibits 24 and 25 thereto are respectively an English translation of Turkish Law 5084 (Feb. 6, 2004), the law under which Toscelik acquired the two parcels, and a list of the 49 least-developed provinces for which the regional benefits under Law 5084 are available, which includes Osmaniye Province. PDocs 63–64.

Wheatland also presented a "submission of factual information" ("SFI") to Commerce. Wheatland SFI (Aug. 20, 2012), PDocs 100–102. An exhibit thereto contains advertisements for the sale of real estate in Turkey, showing the location, size, and value of properties in various locations as of August 18, 2012. *See id*.

Commerce conducted an on-site verification in February 2013, and its verification report for Toscelik included details of Toscelik's acquisition of the 2008 and 2010 parcels. Verification Report (Mar. 15, 2013), PDoc 177, CDoc 203. Commerce also placed on the record a memo regarding the value of land in Turkey: "Placement of Land

Price Information on Record of Review" (Mar. 26, 2012), PDoc 183. This was the same information that Commerce had used in the 2010 review. *See* Verification Report Exh. 18 (Feb. 20, 2013), CDoc 198.

In general, Commerce allocates non-recurring subsidies pursuant to 19 C.F.R. §351.524 over a period corresponding to the "average useful life" of the renewable physical assets used to produce the subject merchandise ("AUL"). Commerce in this proceeding (again) found the AUL to be 15 years pursuant to 19 C.F.R. §351.524(d)(2) and the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System.[1] Commerce further explained that for non-recurring subsidies, it would apply the "0.5 percent expense test" described in 19 C.F.R. §351.524(b)(2) by comparing the amount of subsidies approved under a given program in a particular year to relevant sales (*e.g.*, total sales or total export sales) for the same year and allocate the amount of subsidies "to the year of receipt rather than allocate[ ] over the AUL period" if the amount of the subsidies is less than 0.5 percent of the relevant sales. *I&D Memo* at 3.

For the preliminary results, Commerce again examined the relevant Turkish law and, as in the prior 2010 review, when considering the benefit from the 2008 parcel grant Commerce used the same benchmark from that prior review -- a weighted average of certain land values -- to value both the 2008 parcel as well as the 2010 parcel.[2] Toscelik accepted the preliminary results as issued and provided no administrative case brief. Wheatland did file, and its case brief argued Commerce should use additional land valuation information provided by Wheatland in its SFI. PDoc 191, CDoc 209. Tosce-

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[1] *I&D Memo* at 3, referencing U.S. Internal Revenue Service Publication 946 (2008), "How to Depreciate Property" at Table B-2: Table of Class Lives and Recovery Periods.

[2] *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Preliminary Results of Countervailing Duty Administrative Review; Calendar Year 2011*, 78 Fed. Reg. 21107 (May 9, 2013), PDoc 185 ("*Preliminary Results*"), with its accompanying preliminary decision memorandum ("Prelim. Decision Memo") dated Apr. 2, 2013, PDoc 180, and accompanying calculations, PDoc 186, CDoc 207. In the *Final Results*, Commerce describes Turkish Law 5084 as concerning the allocation of "free" land and the purchase of LTAR land for the purpose of encouraging the economic development of OIDs under Turkish control in order "to reduce inter-regional disparities and to increase employment in provinces where the development is relatively low". *I&D Memo* at 10. Also in the *Final Results*, Commerce "continue[d] to find that the allocation of free land to Toscelik [in the "organized industrial zone" ("OID") of Osmaniye] by the OIZ authority constitutes a financial contribution" under 19 U.S.C. §1677(5)(D)(ii) and a benefit under 19 U.S.C. §1677(5)(E)(iv), and that Toscelik's LTAR land purchase conferred a financial contribution within the meaning of 19 U.S.C. §1677(5)(D)(iii). *I&D Memo* at 10–12. Commerce also found that the subsidy program was "regionally specific" under 19 U.S.C. §1677(5A)(D)(iv) since it was "limited to companies located in the 49 eligible provinces". These facts are not in dispute.

lik's rebuttal, directed at the issues raised by Wheatland's case brief,[3] opposed changing the benchmark. PDoc 192.

In the *Final Results*, Commerce stated that it "continue[d] to rely upon the land benchmark data used in the prior review." *I&D Memo* at 11. But, Commerce relied on those 2010 prior review benchmark data only in part, apparently, because Commerce "decided . . . to build a more robust data set" by "add[ing] . . . twelve additional data points". *Id*. at 28. Further towards revision, Commerce also agreed with the domestic industry that the benchmark price is "normally" derived from a simple average of the reference land prices available in the record,[4] and that

> [g]iven the lack of sufficient detail regarding the characteristics of the land involved in the transactions underlying the benchmark data -- in particular, the extent to which the composition of our reference data set reflect the broader market, *e.g.*, whether the proportion of large/small tracts in the benchmark data compares to the proportion of large/small tracts throughout Turkey--we have no basis to assume that any one parcel of land among the reference set is more representative than any other parcel for the purpose of deriving a market price by which to determine adequate remuneration for the land in question. Moreover, obtaining more detailed information beyond the general comparability factors such as land-use classification would be impracticable for the Department. Given these inherent limitations, for these final results, we are applying a simple average, which gives all benchmark data on the record equal weight rather than weight based on a factor (or factors) which, in this case, have not been demonstrated to be relevant for an appropriate benchmark price.

Id. at 28–29. Thus, for the *Final Results* Commerce used a "revised" (from the prior review) benchmark for the 2008 parcel and constructed a different benchmark for the 2010 parcel; both benchmarks used simple averaging in the calculation. *Final Calcs*, PDoc 205, CDoc 212.

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[3] *See* 19 C.F.R. §351.309(d)(2) ("[t]he rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments to which it is responding").

[4] *I&D Memo* at 28, referencing *Certain Steel Wire Garment Hangers From the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 77 Fed. Reg. 32930 (Jun. 4, 2012), at "Land Benchmark," unchanged in the *Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 75973 (Dec. 26, 2012), and accompanying issues and decision memorandum at 6.

After publication of the *Final Results*, Toscelik initiated suit, invoking the jurisdiction of 28 U.S.C. §1581(c) via 19 U.S.C. §1516a(a)(2).

Standard of Review

The court will not uphold an agency determination that is unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(B)(i). An agency determination is presumed to be correct, and the burden of proving otherwise before the court rests upon the challenging party. 28 U.S.C. §2639(a)(1).

Discussion

In 1998, Commerce announced that it would amortize a non-recurring benefit over its "average useful life" ("AUL"), calculated by the formula provided in 19 C.F.R. §351.524(d). *Countervailing Duties*, 63 Fed. Reg. 65348, 65395–97 (Nov. 25, 1998). Amortization attributes "the" benefit over each successive administrative POR. *See Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1363 (Fed. Cir. 2006) ("[a]mortization of a non-recurring subsidy is not inconsistent with preserving the integrity of separate PORs; it simply reflects that a non-recurring subsidy received in one POR may provide a 'benefit' in other PORs"). The variables of the regulatory formula are the AUL, the discount rate, and the amount of "the" benefit to be amortized pursuant to the formula. *See*, *e.g.*, *Final Calcs*, CDoc 212.

I. The Benchmark for the 2008 Parcel

Pointing out that Commerce appears to have conducted "hundreds" of CVD administrative reviews and does not cite a single case in which it has ever amended a benefit-stream calculation in "mid-amortization" but has in fact denied a number of requests to do so,[5] Pl's Reply at 1–2, Toscelik argues Commerce's revision to the benchmark for the 2008 parcel was unlawful and against the principle (not to mention the principal) of amortization. *See generally* Pl's 56.2 Br.

The government cites *Notice of Final Affirmative CVD Determination: Certain Cold-Rolled Carbon Steel Flat Products From the Republic of Korea*, 67 Fed. Reg. 62102 (Oct. 3, 2002), and accompanying final issues and decision memorandum at comment 9, as an instance where Commerce changed a benchmark. Def's Resp. at 13. The case does not appear analogous, however, since Commerce therein simply changed a benchmark between the preliminary determination and the final determination of the same segment of the proceeding. That

[5] *See, e.g., Magnola Metallurgy, Inc. v. United States*, 508 F.3d 1349, 1356 (Fed. Cir. 2007); *Norsk Hydro Canada, supra; Certain Carbon Steel Products from Sweden; Final Results of Countervailing Duty Administrative Review*, 62 Fed. Reg. 16549, 1649–50 (Apr. 7, 1997) ("*Steel from Sweden*").

is procedurally distinguishable from recalculating the value of a benefit upon which Commerce has already made a final determination including a final determination as to its amortization schedule.

Wheatland argues Toscelik "inappropriately conflates the legal standards governing the selection and establishment of the AUL with the legal standards governing Commerce's benchmark determination." Def-Int's Resp. at 21. Wheatland claims that the selection of an AUL is different from selection of other elements of the benefit calculation because the AUL involves time while the other elements determine the size of the benefit. *Id*. at 21–22. That seems to be a distinction without a difference, however: the benefit calculation is a formula; each element of the formula is determined in the initial analysis of the subsidy program; and there is nothing in the regulation to suggest that any of the terms of the formula, once determined, is ever subject to change, since a change in terms is antithetical to the principle of amortization. *Steel from Sweden* rather appears to uphold that principle. *See* 62 Fed. Reg. at 1649–50 ("if a subsidy has already been countervailed based on an allocation period established in an earlier segment of the proceeding, it does not appear reasonable or practicable to reallocate that subsidy over a different period of time").

Referencing *Iron-Metal Castings From India; Final Results of CVD Administrative Review*, 62 Fed. Reg. 32297 (Jun. 13, 1997), Wheatland attempts to persuade that Commerce's selection of a different discount rate in that POR than the rate used in earlier review(s) equates to a change to the calculation of a benefit stream. The argument is not persuasive. The *Castings From India* benefit pertains to short-term export credits that are expensed in the year received, not amortized over a period of time, and "[a]mortization of a non-recurring subsidy is not inconsistent with preserving the integrity of separate PORs; it simply reflects that a non-recurring subsidy received in one POR may provide a 'benefit' in other PORs." *Norsk*, 508 F.3d at 1363.

Commerce and Wheatland acknowledge that the benefit of the 2008 parcel was conferred upon Toscelik at a certain and particular point in time,[6] but they appear to contest the propriety of "fixing" its amortization over time. That is, they implicitly appear to argue for discrete and severable benefit periods and adjustable pro-ration or benefits within each period. Commerce, for example, justifies its determination to revise the benchmark for the 2008 parcel on the ground that each administrative review is a separate segment of proceedings, with its own unique facts,[7] and it simply "corrected" its

[6] *See*, *e.g.*, Def's Resp. at 2–3; Def-Int's Resp. at 23.

[7] *See, e.g*., *Shandong Huarong Machinery Co. v. United States*, 29 CIT 484, 491 (2005).

land benchmark averaging methodology to align with its predominant methodology in deriving land benchmarks. Def's Resp. at 11, referencing *I&D Memo* at 28–29.

This contention amounts to *post hoc* rationale with respect to changing the benchmark for the 2008 parcel. Regardless, the selection of "correct" methodology for the allocation of "the" benefit is appropriate at the outset of its selection --which is rather the whole point of amortization and 19 C.F.R. §351.524. The same is true with respect to valuing the LTAR benefit conferred by Toscelik's purchase of the 2010 parcel: yearly revaluation of the benefit would be inconsistent with the regulatory definition of the benefit of "the" grant. 19 C.F.R. §351.505(a) provides: "In the case of a grant, a benefit exists in the amount of the grant." The use of the singular means that a grant has only a singular benefit amount, and in the absence of clear indication to the contrary, a singular benefit amount is not variable and subject to recalculation in successive reviews. *See also* 19 C.F.R. §351.511(c) ("[i]n the case of the provision of infrastructure, the Secretary will normally treat the benefit as non-recurring and will allocate the benefit to a particular year in accordance with § 351.524(d)"). Had Commerce intended otherwise, there would have been no reason to create a multi-year benefit-stream formula.

Having thus established the benchmark for the 2008 parcel and the benchmark's AUL amortization schedule in the prior review, use of that benchmark and schedule became final and unappealable.[8] As a "tribunal" of this matter, Commerce thereby established the law of the case, which must be abided,[9] unless, in this subsequent review, it can be demonstrated that Commerce's prior determination is "clearly erroneous and would work a manifest injustice." *See Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (citation omitted). No party has done so in this case. Consistent with its "obligation to examine the record in each individual segment of a proceeding", *e.g.*, Def's Resp. at 9, Commerce does not argue, for example, that there has been any significant change in the "U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System" since the prior administrative review that would require revision of the relevant AUL. And the fact that "Wheatland put twelve land parcel values on the record of this

[8] *Cf. Magnola*, 508 F.3d at 1353, quoting Commerce: "once a determination has been made regarding whether a non-recurring subsidy was specific (or not) at the time of bestowal, then that finding holds for the duration of the subsidy benefit barring any new facts or evidence pertaining to the circumstances of the subsidy's bestowal."

[9] Indeed, "[g]iven that Commerce undertakes annual reviews, it would be duplicative and wasteful for later reviews to revisit matters subject to review in prior PORs. Revisiting issues that were resolved in prior review proceedings would impair the finality of any one annual review, potentially prolonging a CVD dispute far beyond the year to which it relates." *Norsk*, 472 F.3d at 1361.

segment that were not on the record of the prior review", Def's Resp. at 11, does not render Commerce's original calculation of the benchmark for the 2008 parcel inaccurate, let alone clearly erroneous or manifestly unjust. And while Wheatland's administrative case brief argued that a weighted average can result in distortions and that Commerce's "standard" practice is to use a simple average,[10] Commerce's consideration of the issue simply amounted to "agree[ment] with Petitioners that the Department normally derives the benchmark price from a simple average of the reference land prices available in the record", *I&D Memo* at 28, not proclamation of clear error or manifest injustice.

Due to Commerce's rationale for the acceptance of the petitioners' figures in the revised benchmark for the 2008 parcel, Toscelik also complains Commerce ignored "abundant" evidence on the record of Toscelik's actual purchase of comparable properties located reasonably close to Osmaniye province as well as record evidence of actual land-transaction values in Osmaniye (in contrast to mere offers for sale),[11] and that was not in accordance with regulation. Further, Toscelik also complains that the parcels from Istanbul and Yalova are "outliers" that should not have been included in the revised 2008 parcel benchmark data set, not merely because of their "extreme" (as compared to the other benchmark data) values but because they are located in more highly developed areas of Turkey and not in the less developed areas covered by Turkish Law 5084.

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[10] Wheatland Case Brief, PDoc 191, at 3–6, referencing preliminary and final determinations in *Drawn Stainless Steel Sinks From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 Fed. Reg. 13017 (Feb. 26, 2013) and accompanying issues and decision memorandum at "E. Benchmarks for Land" section; *Certain Steel Wire Garment Hangers From the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 75973 (Dec. 26, 2012) and accompanying issues and decision memorandum at 6–7; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63788 (Oct. 17, 2012) and accompanying issues and decision memorandum at 6, 13–14 and cmt. 11; *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 16428 (Apr. 1, 2010) and accompanying issues and decision memorandum at footnote 23 and cmt. 9.

[11] *E.g.*, Pl's 56.2 Br. at 11, 21–25, referencing, *inter alia*, Toscelik SQR, Nov. 8, 2012, at Exhs. 1–5, PDoc137, CDocs 142–146. On the issue of whether exhaustion of administrative remedy should apply with respect to administrative consideration of this data as argued by Wheatland (in which the government did not join), the court finds the doctrine inapplicable in this instance for the reasons stated in Toscelik's reply brief, and as elucidated at oral argument. *See, e.g.*, Pl's Reply at 14–20.

Apart from the "propriety" of revising the 2008 parcel benchmark in the first instance, *see supra*, the court agrees that the record does not reflect Commerce's consideration on whether these parcels are appropriate for inclusion therein even if revision would be considered proper. *Cf. Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 37 CIT ___, ___, 929 F. Supp. 2d 1324, 1328 (2013) ("*Zhongya Aluminum*") ("the amenities currently advertised as available in the general region have absolutely *no bearing on the condition of the specific plot as it existed* when Zhongya assumed the land use rights in 2006") (italics added). If Commerce reaches this issue on remand, Commerce must explain why the Turkish government's schematization is an inappropriate basis on which to apply the comparability analysis required by 19 C.F.R. §351.511(a)(2), address the aspect of the Istanbul and Yalova properties' listings as "agricultural land" in the appropriateness of their inclusion, *see* PDoc 99, and also address Toscelik's proffered evidence and claim of "relatively nearby and manifestly similar properties." *See* Pl's Reply at 10, referencing CDocs 142–146.

For the above reasons,[12] the matter must be remanded with instruction to either restore use of the benchmark and amortization schedule established for the 2008 parcel or explain why its use would be clearly erroneous and would work a manifest injustice. Any revision to the 2008 benchmark, if properly explained, must also be accompanied by adequate consideration of "similarity . . . and other factors affecting comparability" in accordance with 19 C.F.R. §351.511(a)(2).

III. The Benchmark for the 2010 Parcel

Regarding the benchmark for the 2010 parcel, Toscelik claims a number of parcels are double-counted, resulting in an arbitrary benchmark unsupported by the record. *See Final Calcs*, PDoc 205, CDoc 212. Commerce seeks voluntary remand of this issue. The defendant-intervenors oppose, but Commerce's reason therefor appears substantial and legitimate. Def's Resp. at 25–26. Remand for that purpose is appropriate. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

Toscelik also argues the 2010 parcel's benchmark construction was arbitrary and capricious. The rationale indicated in the *I&D Memo* is essentially that "more is better"; that the addition of twelve data points to the existing nine data points in the benchmark from the

[12] The court has considered the parties' other arguments on these issues but finds in the interest of brevity that their discussion would not further this opinion thereon.

prior review makes for a "more robust data set."[13] Toscelik contends that since the 2008 and 2010 parcels are adjacent to one another and are of nearly identical square-meter size and features, they constitute "similar situations" that ought to merit the same benchmark, albeit indexed to the relevant difference in yearly value as in the preliminary results.

Commerce responds that despite their proximity several "material differences" distinguish the two parcels, namely the fact that the GOT conveyed the parcels to Toscelik at different times, and that one was conveyed for free and the other for LTAR. Apart from again being impermissibly *post hoc*, the temporality of the transactions appears to be of little relevance to land benchmarking, which is supposed to be accomplished through proper "comparables."[14] *See* 19 C.F.R. §351.511(a)(2). And aside from the relevance of temporality, Commerce does not explain why the benchmarks used for the 2008 property (one 2009 parcel, five 2010 parcels, and one 2011 parcel) are temporally inappropriate to use in benchmarking a 2010 property, particularly since the 2009 and 2011 parcels are indexed to 2010 values. *See* Preliminary Calculations, PDoc 186. Furthermore, as Toscelik argues, the amount of the benefit conveyed in any particular transaction, while also *post hoc*, is irrelevant to what the value of the benchmark should be. The amount Toscelik paid would change the value of the benefit, not the benchmark.

On remand, Commerce is requested to address such concerns in its selection of the appropriate parcels for purposes of constructing the 2010 parcel benchmark. In addition, the fact that the 2008 parcel and the 2010 parcel are adjacent and of approximate size in square meters suggests, *a fortiori*, the propriety of comparing them to the same benchmark, which is what Commerce did in the preliminary determination, albeit temporally indexed for the 2010 parcel. That is not to imply that the use of different benchmarks for purposes of valuing the benefits conferred by the acquisition of the two properties (*i.e.*, a "vertical" comparison) should be precluded, but if on remand different benchmarks are determined to be used, in the final results the reasonableness of the benchmarks selected will be adjudged by the same proximate relationship to each other, most relevantly in value (*i.e.*, a "horizontal" comparison), as the adjacent 2008 parcel and 2010 parcel

[13] Toscelik argues the addition should equate to 21 data points, whereas the *Final Results* only have 8 data points for the 2008 benchmark and 9 data points for the 2010 benchmark, certainly not the "more robust data set" (or sets) claimed. Pl's 56.2 Br. at 20 n.7.

[14] As Commerce's own benchmarking method indicates, using "comparables" of proximate parcels (*e.g.*, in location, terrain, size, features) is an accepted proposition for purposes of land and realty valuation. *See, e.g., Morris v. C.I.R.*, 761 F.2d 1195 (6th Cir. 1985); *Childers v. United States*, 116 Fed. Cl. 486 (2013).

in realty reality bear to each other. *See also supra & infra*.

III. Weighted Versus Simple Average, and Other Matters

In addition to its argument regarding reliance upon "cherry-picked" values above, Toscelik also complains that by switching from a weighted average to a simple arithmetic average Commerce effectively increased the 2008 benchmark tenfold as well as doubled the 2010 benchmark. Regarding the general explanation for selecting a simple average versus a weighted average quoted above, *I&D Memo* at 28–29, the impracticability of obtaining "more detailed information beyond the general comparability factors such as land-use classification" does not appear facially unreasonable to explain resorting to a simple average, but the provision of such information is an incumbence upon the parties to undertake, not Commerce. The papers presented do not otherwise provide sufficient commentary for the benefit of the court's understanding.

Specifically, regarding Commerce's first and more general point, it is unclear why it is necessary that the data of record must "reflect the broader market . . . throughout Turkey". The issue goes beyond whether weighted or simple averaging is appropriate: why is it the case that the composition of the "reference data set" must constitute proportional representation of large/small tracts throughout Turkey before a determination can be made as to which parcels are the most comparable to "the land in question"? Commerce also does not elaborate on what more "sufficient detail regarding the characteristics of the land involved in the transactions underlying the benchmark data" would be necessary for that purpose, which also appears close to admitting that such data are inappropriate for use in benchmarking in the first place.

For Commerce to have taken the (proper) position elsewhere that land is unique, it makes little sense to obfuscate the uniqueness of "the land in question" by requiring that its "comparables" be tied to or derived from (what appears to be) an "average" or "standard" set of data representative of the entirety of Turkish lands as opposed to an approximation of appropriately comparable parcels of land for "the land in question," and the "necessity" of constructing a "broad market" representation of such entirety especially conflicts with the administrative finding that the benefits conferred by Turkish Law 5084 are limited to the 49 underdeveloped provinces that include Osmaniye, not the other and more-developed areas of the country. *Cf. Zhongya Aluminum, supra*.

Wheatland argues that use of a simple average for land benchmarking, not only with respect to the 2010 property, is consistent with

policy. Whether that is true, it was not administratively offered as a reason for doing so with respect to the 2010 parcel benchmark. Remand being required in any event, further clarification on the advantages and disadvantages of simple versus weighted averages in the context of land benchmarking would assist the parties and the court, but Commerce shall not be precluded from reconsidering anew, in its discretion on remand, the benchmark that would be proper for the 2010 parcel.

Conclusion

For the foregoing reasons, this matter will be remanded to the International Trade Administration, U.S. Department of Commerce, for further proceedings not inconsistent with this opinion. A separate order to this effect will issue.

So ordered.

Dated: October 29, 2014
New York, New York

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

Slip Op. 14–127

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and EHWA DIAMOND INDUSTRIAL CO., LTD., SH TRADING, INC., and SHINHAN DIAMOND INDUSTRIAL CO. LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 06–00248

[Sustaining remand results on investigation of sales at less than fair value of diamond sawblades and parts from the Republic of Korea.]

Dated: October 29, 2014

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, D.C., for plaintiff Diamond Sawblades Manufacturers Coalition.

Jeffrey S. Grimson, *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Daniel R. Wilson*, Mowry & Grimson, PLLC, of Washington, D.C., for the consolidated-plaintiff Hyosung D&P Co., Ltd.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., 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 *Aman Kahar*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Bruce M. Mitchell, Andrew B. Schroth, Max F. Shutzman, Mark E. Pardo, Ned H. Marshak, Andrew T. Schutz, and *John M. Foote*, Grunfeld, Desiderio, Lebowitz, Silverman & Kledstadt, LLP, of Washington, D.C., for defendant-intervenor Ehwa Diamond Industrial Co., Ltd.

Michael P. House and *Sabahat Chaudhary,* Perkins Coie, LLP, of Washington, D.C., for defendant-intervenors SH Trading Inc. and Shinhan Diamond Industrial Co. Ltd.

OPINION

Musgrave, Senior Judge:

Familiarity is here presumed with the prior opinion, 37 CIT ___, Slip Op. 13–130 (Oct. 11, 2013), remanding several issues concerning the administrative investigation of sales at less than fair value of *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006), as amended by *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 75 Fed. Reg. 14126 (Mar. 24, 2010).

I. *Background*

The order of remand provided 115 days for filing final results of redetermination. One week before due, the defendant, International Trade Administration, U.S. Department of Commerce ("Commerce"), moved to extend that deadline by about a month. The reasons therefor included averment that "personnel that originally handled this matter are no longer assigned to the case, and a new set of people has had to familiarize themselves with the issues." ECF No. 154 (Feb. 4, 2014) at 3. The motion was granted, albeit belatedly (*cf. id*. *with* Slip Op. 13–130 at 52), and in the meantime Commerce had requested certain information from Ehwa Diamond Industrial Co., Ltd. ("Ehwa") and from SH Trading Inc. and Shinhan Diamond Industrial Co. Ltd. (collectively "Shinhan"). After receiving extensions from Commerce, Ehwa and Shinhan submitted their respective responses on February 14, 2014. On February 24, 2014 and February 28, 2014, in response to Ehwa's and Shinhan's responses Diamond Sawblades Manufacturers Coalition ("DSMC") also requested extensions of time to submit factual information, for which Commerce established a deadline of February 28, 2014 and March 4, 2014, respectively.

The record does not reflect receipt of any factual information from the DSMC directed to Ehwa and Shinhan's responses by that time, but on March 14, 2014, Commerce requested additional information from Ehwa and Shinhan regarding their Section E questionnaire responses. On March 26, 2014, Commerce moved for a second extension of time for filing the remand results, which was also granted. ECF No. 154 (Mar. 27, 2014). On April 11, 2014, after receiving extensions of time from Commerce, Ehwa and Shinhan submitted

their Section E questionnaire responses. On April 22, 2014, and April 24, 2014, the DSMC requested extensions of time to submit factual information in response to Ehwa's and Shinhan's responses for which Commerce established a deadline of April 25, 2014, which was later extended until April 28, 2014. Commerce received factual information from the DSMC on April 28, 2014. On May 5, 2014, Commerce established a deadline for Shinhan and Ehwa to submit rebuttal comments to the DSMC's factual information submission, and also requested additional information from Ehwa. After yet another deadline extension, Commerce received rebuttal comments from Ehwa and Shinhan on May 9, 2014 and additional information from Ehwa on May 12, 2014.

On May 23, 2014, upon release of its draft results of redetermination Commerce established an extremely short schedule within which interested parties were to submit comments. Commerce did not receive comments on its draft results by the deadlines established, so it dated and issued its final results of remand ("RR") as of June 18, 2014, which are summarized as follows.

Commerce recalculated Ehwa's United States indirect selling expense ("ISE") ratio, using the information obtained at verification for ISEs incurred by Ehwa's U.S. affiliates, and recalculated Ehwa's margin based on this revised ISE ratio that reportedly includes expenses incurred by both the Stone and Construction Division and the Industrial Division. RR at 3–5.

Commerce reconsidered its determination not to include Ehwa's inter-company expenses with the company-specific expenses of selling to unaffiliated customers. This resulted in reallocation of total reported ISEs among the sales of Ehwa's U.S. sales affiliates. RR at 5–9.

Commerce requested Ehwa and Shinhan to provide, or supplement the record for, further-manufactured ("FM") sales, cost (section E questionnaire responses), and constructed value (section D questionnaire responses) data for any FM sales if their value-added calculations so required (*i.e.*, 65-percent-or greater value added in the United States). *See* 19 U.S.C. §1677a(e); 19 C.F.R. §351.402(c). Commerce incorporated the FM sales and cost data, as well as the home and U.S. sales and cost data from the original investigation, and used the programs from the final section 129 determination[1] for its margin calculations. By incorporating this data, Commerce claims it also

[1] *See Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof from the Republic of Korea*, 76 Fed. Reg. 66892 (Oct. 28, 2011).

accounted for the costs of further manufacture or assembly in the constructed export price profit ("CEP profit") and margin calculations. RR at 10–17.

Commerce also reexamined the inputs Ehwa and Shinhan obtained from their affiliate suppliers for purposes of the major input rule.[2] *See* 19 U.S.C. §1677b(f)(3). Analyzing those inputs in accordance with that rule's "transactions disregarded" predicate, 19 U.S.C. §1677b(f)(2), Commerce found them "not major in relation to the total cost of producing the merchandise under consideration." RR at 19. With regard to Ehwa's inputs, as part of its analysis Commerce found the record at hand distinguishable from the "two percent" major input finding of *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 61 Fed. Reg, 38139, 38162 (Jul. 23, 1996) (comment 12), because that determination involved "a unique product that required tens of thousands of inputs, each of which accounted for a very small portion of total production cost", in contrast to diamond sawblades, which have "have relatively few inputs . . . and a small number of raw material inputs account for the majority of the production cost (*e.g.*, coils used to produce the cores, diamond segments, labor [*sic*], and factory overhead [*sic*])." RR at 21 (citations omitted). With regard to Shinhan's inputs from its non-market economy ("NME") affiliate (and the DSMC's original case-brief argument that such transactions should be re-valued using NME surrogate value methodologyfor purposes of determining whether they are major inputs), Commerce found that it could not consider the inputs "major," as compared to the total cost of manufacturing, even when adjusted by the higher of the transfer price or Shinhan's own cost of production for the input.[3] RR at 26–27. Commerce also determined Shinhan's remaining affiliates' input transactions not major when compared or adjusted to available mar-

[2] When determining whether an affiliate-supplied input is major, Commerce considers what (continued...) percentage of the input is procured from the affiliated party as well as what percentage the input represents in the total cost of manufacturing. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador*, 69 Fed. Reg. 76913 (Dec. 23, 2004), and accompanying issues and decision memorandum at cmt. 28.

[3] Commerce further explains that it assumes that where a company has the production capability, the "market" price they are willing to pay for the input likely would not be significantly higher than their own cost to produce the input; as such, it deems a respondent's own cost of producing the input as a reasonable surrogate when market price is unavailable. *See* RR at 24.

ket values or surrogate market values (if market values were unavailable) for them as well as the affiliates' cost of production.[4] RR at 27–30.

Additionally, Commerce provided a fuller explanation of why the costs of purchases of a particular input from unaffiliated NMW suppliers were not adjusted. After identifying and describing what it considers the relevant facts of record on the issue, Commerce reiterated its determination that the existence, *arguendo*, of any NME-to-ME pricing distortion(s) had a negligible impact on Ehwa's reported total production costs. RR 30–33.

Commerce further addressed the issue of accepting during verification Shinhan's offer of consolidated financial statements of its parent company, Technoplus Co. Ltd. ("TPC"). Technically, those were belated, since the request for the statements was covered by Commerce's questionnaire response request. Slip Op. 13–130 at 41, referencing PDoc 312 (Apr. 4, 2006). Commerce's position here is that up until the time it undertook verification, it had not provided Shinhan notice of the nature of the deficiency and a remedial opportunity in accordance with 19 U.S.C. §1677m(d), and therefore their acceptance at verification was "reasonable". RR at 33–36.

Commerce thus claims it reviewed the facts on the record and redetermined the issues pertaining to Ehwa's ISEs and Ehwa's and Shinhan's FM sales, pursuant to the order of remand. The final results of Ehwa's and Shinhan's recalculated margins are "0.00" for both.

II. *Discussion*

The DSMC argue they were unable to obtain and analyze all of the remand information and draft comments thereon within the time frame provided by Commerce, and accordingly requested an extension of time, on June 2, 2014, in order to submit their comments. *See* Remand PDoc 43. By June 9, 2014, Commerce had not taken action on that request, so on that date the DSMC attempted to submit these arguments: that Commerce had failed to adequately explain or support its determination on remand not to apply the major input rule or to adjust the costs of purchases from unaffiliated non-market

[4] Commerce's hierarchy for establishing market price in the application of the transactions disregarded and major input rules, 19 U.S.C. §§ 1677b(f)(2) and (3), respectively, is to rely on a respondent's purchases of the input from unaffiliated parties, or if those are unavailable then the affiliate's sales of the input to unaffiliated parties, or if those are unavailable then "any reasonable method" to confirm that the affiliated prices reflect arm's length transactions. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 Fed. Reg. 17422 (Mar. 26, 2012) and accompanying issues and decision memorandum at cmt. 16.

economy suppliers; that the calculations provided by Commerce as to the major input rule did not, in fact, show that the relevant inputs were not significant or that they did not merit adjustment or other consideration; that Commerce had not provided a reasoned basis, in light of the zero margins calculated on remand, for finding that it was "[im]practical" to apply the major input rule and that any distortion resulting from unadjusted NME supplier prices would be "negligible." *See* DSMC Cmts., Ex. 2. According to the DSMC, "[i]mmediately subsequent to the DSMC's submission of its comments, the agency issued a letter rejecting the DSMC's [earlier submitted] extension request as untimely filed." DSMC Comments at 3, referencing Remand PDoc 44. Two days later, Commerce also rejected the DSMC's substantive comments. *See* Remand PDoc 46.

Consideration of the DSMC's substantive arguments here appears precluded by the doctrine of exhaustion. *See Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006).[5] Procedurally, the DSMC claim they could not have provided meaningful analysis and commentary on the draft of the remand results (the final version of which is 37 pages) within the two "business" days administratively provided, or even after Commerce released its draft results -- at 5:00 p.m. on the Friday just before the start of this year's Memorial Day weekend. Arguing that their situation is distinct from *Sichuan Changhong Electric Co. v. United States*, 30 CIT ___, 466 F. Supp. 2d 1323, 1328–29 (2006) (holding a four-day comment period not unreasonable), on the ground that in that case the party concerned had actually been able to provide meaningful commentary within that time frame, the DSMC essentially move pursuant to USCIT Rule 60(b)(1), without so stating, for relief from a "final proceeding" to require Commerce to consider the points they desired to make. *See, e.g.*, *Roquette Freres v. United States*, 6 CIT 329, 331 (1983) ("Jurisdiction once vested in the court is neither so fleeting nor illusory as to dissipate upon the court's exercise of its inherent discretionary power to require further deliberation by the administrative body."). The defendant and defendant-intervenors point out, however, that if the comment schedule of this matter appeared unreasonable,[6] a request for an extension during

[5] "[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against *objection made at the time appropriate under its practice*." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (italics added). That, of course, begs the question here.

[6] Ehwa also notes that the amount of time provided for commenting on the draft results is consistent with the amount of time "usually" provided by Commerce for such comments. Ehwa Br. at 4 n.2, referencing Draft Results of Redetermination at 14, C-580–869, IA Access Barcode 3217073 (filing draft results at 5:18 p.m. July 22, 2014 and requesting comments

the allotted time would have been a palliative course. *Cf.* 19 C.F.R. §351.302 (extension of time limits).

Agencies are generally "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978) (internal quotes and citation omitted). That includes setting deadlines for commentary on remand results. On the one hand, the fact that the records of both proceedings referenced by Ehwa show requests for extensions of time to respond to their respective draft remand results does not support finding the imposition of such short deadlines for providing comments on draft remand results reasonable. *See* C-580–869, IA Access Barcode 3217352; A-570–888, IA Access Barcode 3211465. On the other hand, notwithstanding the DSMC's arguments as to the complexity and number of issues actually addressed on remand, the court is not in a position to decide whether the draft remand results before the court inherently *required* further comment from the parties at the time they were issued, a standard by which the reasonableness of the deadline for comments announced at that time ought also be adjudged without veering into consideration of the DSMC's substantive arguments. The draft and final remand results do not appear patently erroneousness in their own right, and the papers do not argue sufficient equitable reasons for ordering further administrative consideration. Since the results of remand appear in accordance with the prior opinion, they will be sustained and judgment to that effect entered.

So ordered.

Dated: October 29, 2014
New York, New York

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

Slip Op. 14–128

CS WIND VIETNAM CO., LTD. and CS WIND CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 13–00102

no later than July 25, 2014); Draft Results of Redetermination at 19, A-570–888, IA Access Barcode 3210652 (filing draft results at 10:37 a.m. June 23, 2014 and requesting comments no later than June 25, 2014).

[Commerce's Results of Redetermination in antidumping duty investigation sustained in part and remanded in part.]

Dated: November 3, 2014

Bruce M. Mitchell, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for the plaintiffs. With him on the brief were *Andrew B. Schroth, Ned H. Marshak, Dharmendra N. Choudhary*, and *Kavit Mohan*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Senior Attorney, Office of the Chief Counsel for Trade Compliance and Enforcement, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein, LLP, of Washington, DC, for the defendant-intervenor. With him on the brief were *Alan H. Price* and *Daniel B. Pickard*.

OPINION

Restani, Judge:

This matter is before the court following a remand to the Department of Commerce ("Commerce") in *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271 (CIT 2014). The court remanded to Commerce for it to: 1) reconsider the appropriate surrogate value for Plaintiffs CS Wind Vietnam Co., Ltd. and CS Wind Corporation's (collectively "CS Wind") steel input; 2) reconsider the carbon dioxide surrogate value; 3) reconsider the calculation of overhead expenses for the surrogate financial ratios, specifically Commerce's treatment of jobwork charges and income line items; 4) re-determine the appropriate adjustment to CS Wind's U.S. sales price to account for the discrepancy in the reported weights of CS Wind's wind towers; and 5) reconsider the calculation of brokerage and handling ("B&H") costs. On remand, Commerce has failed to explain adequately its treatment of jobwork charges and income line items in calculating overhead expenses and, accordingly, this issue is remanded to Commerce for reconsideration or further explanation. In all other respects, Commerce's Results of Redetermination Pursuant to Court Order, ECF No. 57 ("*Remand Results*"), are supported by substantial evidence and are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinion, although they are summarized below. *See CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1275–95.

After a petition was filed by defendant-intervenor Wind Tower Trade Coalition ("WTTC"), Commerce conducted an antidumping

("AD") investigation into certain wind towers from Vietnam. *Id.* at 1275. Much of the investigation focused on selecting surrogate values for valuing CS Wind's factors of production ("FOPs"). *Id.* at 1275–76. These surrogate values were used to compute the normal value, representing the cost of CS Wind's production if it had operated in a market economy. *Id.* at 1276. Commerce published its final affirmative AD duty determination and accompanying Issues & Decision Memorandum in December 2012. *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Determination of Sales at Less than Fair Value*, 77 Fed. Reg. 75,984 (Dep't Commerce Dec. 26, 2012) ("*Final Determination*"); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Utility Scale Wind Towers from the Socialist Republic of Vietnam, A-552–814, (Dec. 17, 2012), *available at* http://enforcement.trade.gov/frn/summary/vietnam/2012–30944–1.pdf (last visited Oct. 20, 2014) ("*I&D Memo*"). CS Wind was assigned a weighted-average dumping margin of 51.50 percent. *Final Determination*, 77 Fed. Reg. at 75,988.

In its motion for judgment on the agency record, CS Wind presented six arguments challenging Commerce's *Final Determination* : 1) Commerce lacked substantial evidence and acted contrary to law when it used Global Trade Atlas ("GTA") import data rather than Steel Guru Indian domestic prices ("Steel India") data to value steel plate; 2) Commerce impermissibly valued carbon dioxide based on GTA import data; 3) Commerce improperly calculated surrogate financial ratios by failing to offset certain expenses with related income line items; 4) Commerce acted contrary to law and without substantial evidence in rejecting the market economy input prices paid for flanges, welding wire, and wire flux; 5) Commerce impermissibly adjusted normal value based on a weight discrepancy and then incorrectly adjusted the U.S. sales price; and 6) Commerce used an inflated document preparation fee in calculating B&H expenses. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1276. In ruling on CS Wind's motion for judgment on the agency record, the court remanded to Commerce and ordered Commerce to reconsider 1) the data selected to calculate the steel plate surrogate value, 2) the data selected to calculate the carbon dioxide surrogate value, 3) the surrogate financial ratio calculations treating jobwork expenses and income differently, 4) the adjustment to U.S. sales price based on the weight discrepancy, and 5) the calculation of B&H expenses. *Id.* at 1284, 1285, 1286–87, 1291, 1295–96. The court rejected the remainder of CS Wind's challenges.

On remand, Commerce reconsidered the record evidence and amended several of its surrogate value and U.S. price determina-

tions. *Remand Results* at 2–21. First, Commerce concluded that the GTA data were not the best available data with respect to either steel plate or carbon dioxide values. *Remand Results* at 5, 13–14. Regarding steel plate, Commerce determined that because only a small portion of the prices included in the GTA data were for S355 grade steel (the type of steel used by CS Wind), it was not in fact the best information available. *Remand Results* at 5–6. Instead, Commerce determined that the Steel India data were better because those data were comprised solely of IS2062 grade, a comparable grade to S355. *Id.* For carbon dioxide, Commerce determined that the SICGIL Indian Ltd. ("SICGIL") financial statement provides greater specificity for surrogate value calculation because it provides pricing information for carbon dioxide gas, the particular input used by CS Wind. *Remand Results* at 14. In reconsidering overhead expenses in calculating surrogate financial ratios, Commerce attempted to include in overhead only the portion of jobwork charges not associated with erection and civil income activities. *See* Remand Results at 16–18. In recalculating its weight adjustment to CS Wind's U.S. sales price, Commerce limited the adjustment to free-of-charge components to correct the mathematical error identified by the court in *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1289–91. *Remand Results* at 19. Finally, Commerce recalculated B&H costs on a per-kilogram basis using the actual weight of CS Wind's shipments. *Remand Results* at 21.

CS Wind agrees with Commerce's *Remand Results* except as to Commerce's revised surrogate financial ratios based on the jobwork charges calculations. Pls.' Cmts. in Resp. to the Dep't of Commerce's Final Results of Redetermination 2–14, ECF No. 62 ("Pls.' Cmts."). WTTC contests each of Commerce's determinations on remand. Def.-Intvnr.'s Cmts. on Results of Redetermination Pursuant to Remand 6–32, ECF No. 65 ("Def.-Intvnr.'s Cmts.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2013). The court will uphold Commerce's redetermination in an antidumping investigation 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).

DISCUSSION

I. Redetermination of Steel Plate Surrogate Value

In antidumping cases involving a non-market economy ("NME"), Commerce "shall determine the normal value of the subject merchan-

dise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). "[T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.* Furthermore, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

"Nowhere does the statute speak directly to any methodology Commerce must employ to value the factors of production, indeed the very structure of the statute suggests Congress intended to vest discretion in Commerce by providing only a framework within which to work." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999); *see QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (recognizing that Commerce is entitled to deference in interpreting the undefined term "best available information"). Specifically, "[w]here Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable." *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F. Supp. 2d 1362, 1377 (2009).

Nonetheless, selection of the best available information must be in line with the overall purpose of the antidumping statute, which the Court of Appeals for the Federal Circuit has explained to be "determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). In calculating normal value in the NME context, the particular aim of the statute is to determine the non-distorted cost of producing such goods. *See Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 316–17 (1992).

In past investigations and reviews, Commerce has indicated that it prefers surrogate values which are period-wide, representative of a broad market average, specific to the input in question, net of taxes and import duties, contemporaneous with the period of investigation ("POI"), and publicly available. *See I&D Memo* at 9. Commerce also has "a strong preference for valuing all FOPs in the primary surrogate country." *Id.*

In its *Final Determination*, Commerce determined that the best available data from which to value CS Wind's steel plate input were

GTA Indian import statistics utilizing India Harmonized Tariff Schedule ("HTS") line 7208.51.10, the tariff category for "flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated, other, not in coils, not further worked than hot rolled: of a thickness exceeding 10 mm: plates." *I&D Memo* at 7; *Remand Results* at 2. Commerce used the GTA data because the data were contemporaneous, from the primary surrogate country (India), from an HTS category that includes the relevant grade of steel plates (S355), net of taxes and duties, and publicly available. *I&D Memo* at 9. The GTA data, however, represent a basket average of numerous grades of steel, of which only 4 percent are of the same grade utilized by CS Wind: S355. Def.'s Resp. to Cmts. on Redetermination Pursuant to Court Remand 12, ECF No. 73 (Def.'s Resp.); *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1284. Because the court determined that Commerce had impermissibly disregarded other sources of data for valuation and corroboration purposes, it remanded to Commerce to consider those sources. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1284.

On remand, Commerce valued CS Wind's steel plate input using a surrogate value derived from the Steel India data. *Remand Results* at 2. Commerce found that the Steel India data were representative of a broad market average form the primary surrogate country, exclusive of all duties and taxes, publicly available, and contemporaneous with the POI. *Remand Results* at 4. Commerce also determined that the Steel India data were more product specific than the GTA data because although the Steel India data did not include data for the exact grade of steel used by CS Wind, it only included prices for a grade of steel that is comparable to S355, namely IS2060. *Remand Results* at 5–6. In contrast, up to 96 percent of the steel prices included in the GTA data were not comparable to S355. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 18; *Remand Results* at 6. Commerce additionally noted the Steel India data's product specificity because, unlike the GTA data, the Steel India data contain prices for the specific thicknesses of steel plate used by CS Wind and are based on domestic data, which Commerce prefers over import statistics. *Remand Results* at 6 (citing *Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1333 (CIT 2010)). Finally, the prices derived from Steel India are corroborated by several other data sources. *Remand Results* at 6–11; Def.'s Resp. 10.

In contesting the *Remand Results*, WTTC argues that IS2062 is not comparable to S355 such that the Steel India data are not more product specific than the GTA data. Def.-Intvnr.'s Cmts. 8–27. WTTC

specifically argues that because S355 is structural steel plate with additional alloying elements that command a price premium, it cannot be comparable to IS2062, which is a commodity grade steel. *Id.* at 12. Record evidence, however, supports Commerce's conclusion that IS2062 does have similar characteristics and end uses as S355. The evidence includes the fact that IS2062 is listed as structural steel plate in at least one source cited by WTTC. *WTTC Pre-Preliminary Comments on Steel Plate*, Ex. 1, P.R. 252–54 (July 10, 2012). Additionally, IS2062, along with grade ASTM A36, is contained in a list of grades appropriate for wind towers, and IS2062 is included on a list of grade fit for high tensile applications. *CS Wind's Post-Preliminary Surrogate Value Submission*, Exs. 3E & 3M, P.R. 302–304 (Sept. 17, 2012). Record evidence also suggests that ASTM A36 is equivalent to IS2062. *Id.* at Ex. 3E (identifying A36 and IS2062 as wind tower steel); Def.-Intvnr.'s Cmts. 16 ("Indian grade IS2062 and European grades S235 and 275 are equivalent to U.S. ASTM grade A36 . . . ."). The comparability of the two steel grades is further supported by the original petition, which stated that "[t]he primary inputs utilized in the production of a wind tower is carbon quality steel plate (often ASTM Grade A36) utilized to form the tower structure." *Petition for the Imposition of Antidumping and Countervailing Duties*, Vol. IV 21, P.R. 2–4 (Dec. 29, 2011). Further, WTTC has failed to address several of the GTA data's shortcomings identified by Commerce that made the Steel India data preferable, whether or not it has some defects. *See Remand Results* at 5–6, 11, 24–25.

"Where Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable." *Catfish Farmers of Am. v. United States*, 33 CIT 1258, 1273, 641 F. Supp. 2d 1362, 1377 (2009). Here, Commerce acted reasonably in selecting the Steel India data because it covers only steel that is of a comparable grade to S355 in that it is appropriate for use in wind towers, is specific as to the thickness used by CS Wind, is based on domestic prices, and is generally corroborated by other data sets on the record. Commerce's decision was reasonable in the light of the fact that although the GTA data preferred by WTTC contained a small amount of the specific grade used by CS Wind, it also included a host of other grades that might not be suitable for wind towers, was not specific as to thickness, and was based on import prices. Accordingly, Commerce's use of the Steel India data as the steel plate surrogate value is sustained.

II. Redetermination of Carbon Dioxide Surrogate Value

In the *Final Determination*, Commerce relied on GTA Indian import data to value CS Wind's carbon dioxide gas input, using the tariff heading for "carbon dioxide: other." *I&D Memo* at 45–46. Commerce chose this data over more specific data found in the SICGIL financial statement, which was limited to carbon dioxide gas. *Id.* Initially, Commerce had found the SICGIL data to be "reflective of the primary surrogate country, specific to the input in question, and net of taxes and import duties." *Id.* at 45. Commerce, however, was "not able to determine . . . whether or not the SICGIL price data is representative of a broad market average." *Id.*. Commerce further found fault with the SICGIL data because it was not contemporaneous with the POI. *Id.*

The court remanded this issue to Commerce because Commerce failed to address CS Wind's argument that the SICGIL financial statement showed that the quantity of carbon dioxide gas produced by SICGIL was more than twice the annual quantity of all carbon dioxide imports in the relevant tariff category, according to the GTA data. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1285. On remand, Commerce determined that the SICGIL financial statement provides a better source of pricing information for carbon dioxide gas than the GTA data upon which Commerce based its *Final Determination*. *Remand Results* at 13–14.

WTTC challenges Commerce's use of the SICGIL data based on the known and acknowledged infirmities of the data, namely that it is not clear whether they represent a broad market average and that they are not contemporaneous with the POI. Def.-Intvnr.'s Cmts. 27. In reconsidering the SICGIL data, Commerce relied on the specificity of the carbon dioxide input in the SICGIL data, carbon dioxide gas, which is the exact input used by CS Wind. *Remand Results* at 14. Commerce also noted that SICGIL is a large producer of carbon dioxide gas. *Id.* at 14, 28. In contrast, the GTA data are not limited to imports of the specific type of carbon dioxide (i.e., gas) that CS Wind uses. *See id.* Although the data relied upon by Commerce might not have completely satisfied all of Commerce's preferences in evaluating surrogate value sources, the court cannot find on this record that Commerce acted unreasonably in giving greater weight to the specificity of the product over the lack of contemporaneity and the concerns regarding whether the SICGIL data are based on broad market averages. *See Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1504, 460 F. Supp. 2d 1338, 1359 (2006) (upholding Commerce's use of data found by Commerce to be more accurate even though data was not as contemporaneous as data determined to be less accurate).

Because this selection is supported by substantial evidence, the *Remand Results* are sustained on this issue.

III. Surrogate Financial Ratios

In its *Final Determination*, Commerce calculated surrogate financial ratios using Ganges Internationale's ("Ganges") financial statements. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1285. In calculating surrogate financial ratios, Commerce's practice has been to offset expense line items associated with the general operations of the company with related income line items. *Id.* at 1286–87 (citations omitted). In its *Final Determination*, Commerce treated the line item for "Jobwork Charges (including Erection and Civil Expenses)" in the financial statement as part of overhead expenses, but did not include the erection income and civil income line items as corresponding offsets to overhead. *Id.* Commerce rejected CS Wind's ministerial error allegation regarding this decision, but the court held that treating the charges and associated income line items differently was unsupported by substantial evidence and remanded the issue to Commerce with instructions to either include or exclude both from the overhead calculation. *Id.*

On remand, Commerce continued not to offset the total erection and civil income line items against total Jobwork Charges, but revised the surrogate financial ratios in an attempt to exclude from overhead expense the portion of jobwork charges associated with erection and civil income. *Remand Results* at 16. According to Commerce, because Commerce typically includes only miscellaneous income items as an offset in calculating the surrogate financial ratios and the portion of jobwork charges relating to erection and civil income arose from separate revenue generating activities, it was proper not to offset erection and civil income directly against all jobwork charges. *Remand Results* at 16–17. Rather, because erection and civil income do not relate to general manufacturing, excluding the portion of jobwork expenses relating to those line items from overhead was the preferable course of action. *Id.* This is a reasonable approach in theory and could satisfy the court's remand direction. *See CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1287. In actually calculating the portion of jobwork expenses related to erection and civil income, however, Commerce may have erred.

In seeking to identify the portion of jobwork charges not relating to erection and civil income activities, Commerce identified all the income items reflected in the financial statements that reasonably could be associated with jobwork. *Remand Results* at 17–18. Commerce then determined the percentage of the total income reasonably

associated with jobwork comprised of erection and civil income. *Id.* Commerce then applied the resulting 8.28 percent to the total jobwork charges to determine the value of jobwork charges to be excluded from overhead. *Id.* at 17.

Both WTTC and CS Wind challenge Commerce's jobwork methodology. WTTC claims that none of the line items Commerce excluded in calculating the portion of jobwork associated with erection and civil income should have been so treated, and that at a minimum, the court should require Commerce to provide a more detailed explanation for its decision. Def.-Intvnr.'s Cmts. 29. CS Wind argues that the line items identified as being associated with jobwork income have no nexus with jobwork and accordingly Commerce's methodology is overbroad. Pls.' Cmts. 5–7. Specifically, CS Wind argues that "Sale of Finished Goods" and "Sale of Scrap" should not have been included in calculating the total income associated with jobwork because by including those line items, Commerce conflated the value of the finished good with the value of the jobwork, and incorrectly assumed that all finished goods must have been produced through jobwork. *Id.* at 8. CS Wind further alleges that "Miscellaneous Income" was improperly included as jobwork income because to include it in the calculation is contrary to Commerce's normal practice of categorizing miscellaneous income as part of general operations and offsetting it against selling, general, and administrative expenses. *Id.* at 9. Finally, CS Wind argues that only a portion of "Services income from TSP activities" should have been included in calculating total income associated with jobwork. *Id.* at 10. According to CS Wind, had Commerce looked only at the face of the financial statements and used common sense, it would have calculated total income associated with jobwork by summing "Sales of Jobwork," "Erection Income," and "Civil Income." *Id.* at 11. Using this method, CS Wind calculated that erection and civil income account for 98.65 percent of jobwork income. *Id.* at 12.

As indicated, in theory Commerce's methodology complies with the remand order, but in practice, Commerce is still treating expense and income line items differently without stating an acceptable reason. The financial statement schedule explaining jobwork charges as "including Erection and Civil Expenses" provided substantial evidence for Commerce's conclusion that only a portion of jobwork charges relate to erection and civil income. *CS Wind Request to Correct Clerical Errors*, Ex. 1 at 5, C.R. 245 (Dec. 26, 2012). For similar reasons, WTTC's argument that it was not reasonable for Commerce to conclude that a portion of jobwork expenses relates to erection and civil income is without merit. *See id.*

In determining which income line items could be associated with jobwork, Commerce asserts that it eliminated income line items "where jobwork costs reasonably could not have been incurred in the generation of [erection and civil] income." *Remand Results* at 32. Even though Commerce "does not look beyond the face of the financial statement" to determine what each item includes or to what activities it relates, Commerce still has failed to provide a reasoned analysis for its decision. *See CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1287. Given that there is a specific income line item for "Sales of Jobwork," that seemingly would encompass the income from jobwork, Commerce's explanation for how and why it included other line items in calculating the total income associated with jobwork is insufficient and not supported by substantial evidence. Commerce has failed to provide an adequate reasoned explanation for the line items it included as relating to jobwork expenses because the line item for "Sale of Jobwork" ostensibly would encompass the income from jobwork not captured in the "Erection Income" and "Civil Income" line items. Commerce's entirely cursory rejection of CS Wind's arguments regarding why the other line items should be excluded from the jobwork calculation is insufficient to support its determination. *See Remand Results* at 34. Accordingly, Commerce's calculation of the surrogate financial ratios is remanded for recalculation or further explanation.

IV. U.S. Sales Price Adjustment

In its *Final Determination*, Commerce made parallel adjustments based on facts available to CS Wind's normal value and export price to account for an unexplained discrepancy between the total weight of CS Wind's reported FOPs and total "Packed Weight" of the finished product. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1276; *I&D Memo* at 29–33. Commerce was able to determine that a discrepancy regarding the weight of the internal components included in the wind towers was the reason for the difference, but was unable to identify which internal components (self-produced, purchased, or free-of-charge) were underreported. *Remand Results* at 18. The court originally sustained the adjustment to normal value, but held that the adjustment to U.S. sales price to account for the inclusion of free-of-charge components in the calculation of normal value was not "mathematically sustainable." *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1287–91. The court found that because Commerce multiplied the weight shortfall for the free-of-charge components by the combined weighted-average surrogate value for all internal components instead of by the weighted-average surrogate value for only the free-of-charge compo-

nents, Commerce had miscalculated the adjustment. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1290–91.

On remand, Commerce revised its calculation to reflect the weighted-average surrogate value of only the free-of-charge components in accordance with the court's ruling. *Remand Results* at 19; Def.'s Resp. 23–24. WTTC continues to argue that Commerce's initial adjustment was proper. Def.-Intvnr.'s Cmts. 30–31. As explained in the court's previous opinion, such an adjustment does not fit the purpose of Commerce's adjustment to U.S. price, namely to cancel out the inclusion of the free-of-charge components in normal value. *See CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1290–91. The *Remand Results* regarding the U.S. sales price adjustment thus comply with the court's order, appear to be mathematically correct, and are supported by substantial evidence.

V. B&H Costs

Originally, in accordance with its normal methodology, Commerce used the World Bank's Doing Business India 2012 report to allocate B&H costs on a per-kilogram basis based on the costs of importing a hypothetical full 20-foot, 10,000 kg container. *CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1294–95. The court determined that such a methodology was illogical as applied to CS Wind's document preparation costs given the unique shipping method used to transport wind towers. *Id.* Rather than being shipped in containers, the towers are stacked in a pyramid on the ship making any reliance on containerization for cost analysis inapplicable. Accordingly, the court indicated that a reasonable way to convert B&H costs would be to calculate a per-kilogram surrogate value allocating the $415 document cost indicated in the Doing Business Report over the weight of the entire wind tower shipment. *Id.*

On remand, Commerce allocated the $415 document cost based on the average weight of CS Wind's shipments. *Remand Results* at 20–21. Such a method does not inappropriately create a proportional increase in B&H fees based on the weight of the shipment, which was the court's concern in its prior ruling. *See CS Wind Vietnam Co.*, 971 F. Supp. 2d at 1295. WTTC argues that Commerce inappropriately abandoned the 20-foot container methodology, but ignores the fact that the court specifically indicated that commercial reality made Commerce's normal methodology inapplicable in this case. *See* Def.-Intvnr.'s Cmts. 31–32. Accordingly, Commerce fully complied with the court's order and its calculation is supported by substantial evidence. The *Remand Results* are therefore sustained with respect to B&H costs.

CONCLUSION

In conclusion, Commerce's *Remand Results* are sustained as to Commerce's surrogate values for the steel plate and carbon dioxide inputs, Commerce's calculation of the U.S. sales price adjustment, and Commerce's calculation of B&H costs. The *Remand Results* are remanded as to the surrogate financial ratios calculation and Commerce is instructed to reconsider and provide further explanation for its calculation of the portion of jobwork charges associated with erection and civil income.

Commerce shall file its remand determination with the court before or on January 5, 2015. The parties shall have until February 5, 2015 to file objections, and the government will have until February 20, 2015, to file its response.

Dated: November 3, 2014
New York, New York

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