U.S. Customs and Border Protection

Slip Op. 14–131

INTERNATIONAL FRESH TRADE CORP., Plaintiff, v. UNITED STATES, Defendant.

PUBLIC VERSION
Before: Donald C. Pogue,
Senior Judge
Court No. 14–00213

[preliminary injunction denied]

Dated: November 10, 2014

Robert T. Hume and *Carol Wyzinski,* Hume & Associates LLC, of Ojai, CA, for the Plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Joyce R. Branda,* Acting Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Patricia M. McCarthy,* Assistant Director. Of counsel was *Chi Choy,* Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Pogue, Senior Judge:

In this action, Plaintiff International Fresh Trade Corp. ("IFTC") moves to enjoin U.S. Customs and Border Protection ("Customs" or "CBP") from imposing a single transaction bond requirement on Plaintiff's entries of fresh garlic from the People's Republic of China ("PRC"). Pl.'s Appl. for a TRO & Mot. for a Prelim. Inj., ECF No. 7 ("Pl.'s Br."), at 1. Plaintiff's entries are subject to an antidumping duty order (A-570–831). *Id.* Customs' enhanced bond requirement would equal Plaintiff's potential antidumping duty liability as calculated at the PRC-wide rate ($4.71/kg) rather than the expected $0.24/kg cash deposit rate otherwise applicable to Plaintiff's combination of exporter (Jining Yongjia Trade Co., Ltd. ("Yongjia")) and producer (Jinxiang County Shanfu Frozen Co., Ltd. ("Shanfu")). *Id.* at 1–2; Am. Compl., ECF No. 16, at ¶ 1. As Plaintiff has not established its entitlement to a preliminary injunction, its motion is denied.

BACKGROUND

In 1994, the U.S. Department of Commerce ("Commerce") issued an antidumping duty order on fresh garlic from the PRC (A-570–831). *Fresh Garlic from the [PRC],* 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order). This order set the PRC-wide rate at 376.67 percent (which translates to a cash deposit rate of $4.71/kg). Id. at 59,210; Ex. 3 to Pl.'s Br. (Undated Port of San Francisco Information Notice), ECF No. 7–1 ("Information Notice").[1] This rate is still in use today. Information Notice, ECF No. 7–1. In 2006, Yongjia began shipping fresh garlic from the PRC to the United States. *See Fresh Garlic from the [PRC],* 73 Fed. Reg. 56,550, 56,552 (Dep't Commerce Sept. 29, 2008) (final results and rescission, in part, of twelfth new shipper reviews) ("*Twelfth NSR*"). Yongjia requested a new shipper rate ("NSR") from Commerce, and, following investigation, was granted a combination rate with its producer, Shanfu,[2] of 18.88 percent (which translates to a cash deposit rate of $0.24/kg) ("Yongjia/Shanfu NSR"). *Id.;* App. to Mem. Supp. Def.'s Opp'n to [Pl.'s Appl.] for TRO & [Mot.] for Prelim. Inj. ("Def.'s App.") (CBP Cash Deposit Instructions for Fresh Garlic from China, A-570–831 (Oct. 15, 2008)), ECF No. 24–1, at A4.[3] Yongjia did not export fresh garlic to the United States again until 2014,[4] with Plaintiff as importer. Ex. 4 to Pl.'s Br. (Decl. of Hung Nam Huynh, Vice President of IFTC), ECF No. 7–1 ("Huynh Decl."), at ¶¶ 4–6. Because of what appeared to be discrepant information in the imports' phytosanitary certificates, Customs requested further documentation to verify the identity of the producer and shipper of the entries. Def's App. (Decl. of Marc Dolor,

[1] For further discussion of the calculation of the PRC-wide cash deposit rate calculation *see Fresh Garlic from the [PRC],* Issues & Decision Mem., A-570–831, ARP 06–07 (June 8, 2009) (adopted in 74 Fed. Reg. 29,174 (Dep't Commerce June 19, 2009) (final results and partial rescission of the 13th antidumping duty administrative review and new shipper reviews)) cmt. 8 at 31–32.

[2] A combination rate is a rate that applies only to a specific combination of producer and exporter. *See* 19 C.F.R. §351.107(b)(1) (2014).

[3] *See also* Pl.'s Br., ECF No. 7, at 3, 4.

[4] For administrative reviews in which Yongjia timely certified it had no shipments during the period of review, *see Fresh Garlic from the [PRC],* 75 Fed. Reg. 34,976, 34,977 (Dep't Commerce June 21, 2010) (final results and partial rescission of the 14th antidumping duty administrative review); *Fresh Garlic from the [PRC],* 76 Fed. Reg. 37,321, 37,323 (Dep't Commerce June 27,2011) (final results and final rescission, in part, of the 2008–2009 antidumping duty administrative review); *Fresh Garlic from the [PRC],* 77 Fed. Reg. 11,486, 11,489 (Dep't Commerce February (partial final results and partial final rescission of the 2009–2010 administrative review); *Fresh Garlic from the [PRC],* 78 Fed. Reg. 36,168, 36,170 (Dep't Commerce June 17, 2013) (final results of antidumping administrative review; 2010–2011); *Fresh Garlic from the [PRC],* 79 Fed. Reg. 36,721, 36,724 (Dep't Commerce June 30, 2014) (final results and partial rescission of the 18th antidumping duty administrative review; 2011–2012).

Senior Import Specialist, Area Port of San Francisco, CBP), ECF No. 24–1 at A83 ("Dolor Decl."), at ¶¶ 6–16. The documents indicated that the producer, Shanfu, had undergone changes, including restructuring, that potentially rendered it a different entity and ineligible for the Yongjia/Shanfu NSR. *Id.* at ¶¶ 18–21; Def's App. (Decl. of Richard J. Edert, International Trade Specialist, National Targeting and Analysis Group, Office of International Trade, CBP), ECF No. 24–1 at A72 ("Edert Decl."), at ¶¶ 8–9. Because of this uncertainty, Customs has denied entry until Plaintiff posts additional bonding to make its cash deposit rate commensurate with its potential antidumping duty liability (the $4.71/kg PRC-wide rate). Dolor Decl., ECF No 24–1 at A83, at ¶ 22; Edert Decl., ECF No. 24–1 at A72, at ¶ 10; Information Notice, ECF No. 7–1 at Ex. 3 (providing Plaintiff with notice that "[t]o ensure entries are filed correctly and to protect [the] revenue [of the United States]," Customs may require that the importer provide an "additional single transaction bond [for each entry] to cover antidumping duties" at the PRC-wide rate of $4.71/kg). Plaintiff challenges this determination as arbitrary and capricious, asserting jurisdiction under 28 U.S.C. § 1581(i) (2012).[5] *See* Pl.'s Br., ECF No. 7, at 1; Am. Compl., ECF No. 16.

Plaintiff sought a temporary restraining order ("TRO") and preliminary injunction to prevent Customs from imposing the heightened bonding requirement. Pl.'s Br., ECF No. 7, at 1. The court held an evidentiary hearing on October 1, 2014, *see* Hr'g, ECF No. 29, and subsequently denied Plaintiff's request for a TRO, Conf. Tr. of Hr'g, ECF No. 31, at 64:15–16.

DISCUSSION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008) (citation omitted). To obtain a preliminary injunction, the Plaintiff must establish that (1) it is likely to suffer irreparable harm without a preliminary injunction, (2) it is likely to succeed on the merits, (3) the balance of the equities favors the Plaintiff, and (4) the injunction is in the public interest. *Id.* at 20; *Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed. Cir. 1983). No one factor is dispositive, *FMC Corp. v. United States,* 3 F.3d 424, 427 (Fed. Cir. 1993), but likelihood of success and irreparable harm are "[c]entral to the [Plaintiff's] burden." *Sofamor Danek Grp., Inc. v. DePuy-Motech, Inc.,* 74 F.3d 1216, 1219 (Fed. Cir. 1996). The court evaluates a request for a preliminary injunction on a "sliding scale" — "the more

[5] All further citations to the U.S. Code are to the 2012 edition.

the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits [it] need show" to get the injunction. *Qingdao Taifa Grp. Co. v. United States,* 581 F.3d 1375, 1378–79 (Fed. Cir. 2009) (quotation marks and citation omitted).

I. Plaintiff Has Not Established a Clear Threat of Irreparable Harm.

"Plaintiff bears an extremely heavy burden" to establish irreparable harm. *Shandong Huarong Gen. Grp. Corp. v. United States,* 24 CIT 1279, 1282, 122 F. Supp. 2d 1367, 1369 (2000) (citation omitted). Harm is only irreparable when there is no adequate remedy at law, *see Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 381 (1992), when "no damages payment, however great," can address it, *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (citations omitted). Further, the threat of irreparable harm must be immediate and viable — "[a] preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great." *Zenith Radio,* 710 F.2d at 809 (quotation marks and citation omitted).[6] Plaintiff has not met this burden.

Plaintiff alleges inability to pay the required cash deposit,[7] and, in the absence of a preliminary injunction, continued denied entry, mounting demurrage and storage charges,[8] loss of reputation amongst customers (including threatened litigation for failure to deliver), financial inability to re-export, and loss of the imports themselves (as the garlic is spoiling pending release). Huynh Decl., ECF No. 7–1 at Ex. 4, at ¶¶ 10–13; Add. Huynh Decl., ECF Nos. 10 & 10–1, at ¶¶ 6–9, 11–13. All this, Plaintiff claims, threatens to "virtually put both the [Plaintiff] and [Yongjia] out of business." Add. Huynh Decl., ECF Nos. 10 & 10–1, at ¶ 9. While these harms are potentially

[6] *See also Winter,* 555 U.S. at 22 (holding that movant must "demonstrate that irreparable injury is *likely* in the absence of an injunction") (emphasis in original) (citations omitted)).

[7] Plaintiff has not offered evidence that it tried to obtain a single transaction bond in lieu of paying the full cash deposit. Normally, an importer can obtain a single transaction bond from a surety for a small percentage of the bond value. *See* Mem. Supp. Def.'s Opp'n to [Pls.' Appl.] for TRO & [Mot.] for Prelim. Inj., ECF Nos. 19 (pub. version) & 24 (conf. version) ("Def.'s Br."), at 16; [Def.'s] Resp. to Ct.'s Req., Sept. 30, 2014, ECF No. 25, at ¶ 1. However, it seems that given the level of risk in this industry at this time, bonds are only available for full collateral. *See Kwo Lee, Inc. v. United States,* Slip Op. 14–121, 2014 WL 5369391, at *3 (Oct. 16, 2014). Accordingly, IFTC's claimed inability to pay the cash deposit rate suggests an equal inability to obtain the requisite bonding.

[8] Demurrage is, *inter alia*, "[a] charge due for the late return of ocean containers or other equipment." *Black's Law Dictionary* 526 (10th ed. 2014). Plaintiff lists the other storage charges as "per diem charges, monitoring of the refrigeration units, [and] the expense of fuel or plug in charges." Add. Decl. of Hung Nam Huynh, Vice President of IFTC, ECF Nos. 10 & 10–1 ("Add. Huynh Decl."), at ¶ 12.

irreparable,[9] Plaintiff has failed to prove that they are immediate and viable: Plaintiff's evidence on irreparable harm consists solely of two affidavits from its vice president. Huynh Decl., ECF No. 7–1 at Ex. 4; Add. Huynh Decl., ECF Nos. 10 & 10–1. Without more, affidavits from interested parties may be considered "weak evidence, unlikely to justify a preliminary injunction." *Shree Rama Enters. v. United States,* 21 CIT 1165, 1167, 983 F. Supp. 192, 195 (1997).[10] Plaintiff has produced neither independent evidence nor witnesses for cross examination to support its affidavits. Plaintiff also has not provided financial statements to prove lack of necessary capital reserves, and Plaintiff has not shown that it sought and was denied financing to meet its enhanced bonding obligations. *See Shandong Huarong,* 24 CIT at 1290–91, 122 F. Supp. 2d at 147 (citing *Chilean Nitrate Corp. v. United States,* 11 CIT 538, 541 (1987) (not reported in the Federal Supplement).[11] Further, Plaintiff has failed to adequately explain why it did not use the available and appropriate administrative remedy – a Department of Commerce changed circumstances review, *see infra* Section II — to address the matter raised here. Accordingly, Plaintiff has not established a clear threat of irreparable harm.[12]

---

[9] Financial loss alone is not irreparable, *Sampson v. Murray,* 415 U.S. 61, 90 (1974), but "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities" are irreparable. *Celsis In Vitro,* 664 F.3d at 930 (citations omitted); *CPC Int'l, Inc. v. United States,* 19 CIT 978, 979, 896 F. Supp. 1240, 1243 (1995) (Irreparable harm occurs where "compliance with a ruling of Customs . . . would cause the importer to incur costs, expenditures, business disruption or other financial losses, for which the importer has no legal redress to recover in court, even if the importer ultimately prevails on the merits in contesting the ruling."). Bankruptcy is an irreparable harm because, in addition to the obvious economic injury, loss of business renders a final judgment useless, depriving the movant of effective and meaningful judicial review. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932(1975); *Queen's Flowers de Colombia v. United States,* 20 CIT 1122, 1127, 947 F. Supp. 503, 507 (1996); *McAfee v. United States,* 3 CIT 20, 24, 531 F. Supp. 177, 179 (1982) ("It is difficult for this court to envision any irreparable damage to a plaintiff and his business more deserving of equitable relief than the [very] loss of the business itself.").

[10] *See also Atari Games Corp. v. Nintendo of Am., Inc.,* 897 F.2d 1572, 1575 (Fed. Cir. 1990) ("As general rule, a preliminary injunction should not issue on the basis of affidavits alone." (citations omitted)).

[11] *Cf. Companhia Brasileira Carbureto de Calcio v. United States,* 18 CIT 215, 217 (1994) (not reported in the Federal Supplement (finding insufficient showing of irreparable harm where "[n]o hard evidence was submitted to the court indicating what specific effect loss of [sales] would have upon [movant]").

[12] *See Shree Rama,* 21 CIT at 1167–68, 983 F. Supp. at 195 ("If the court were to grant plaintiffs' motion on so little documentary evidence, it would essentially be holding that any substantial increase in deposit rates before a final court decision constitutes irreparable harm *per se.* Future petitioners would be able to forestall the application of new deposit rates in many, if not most, antidumping or countervailing duty determinations contested in court.").

II. Plaintiff Has Not Established a Sufficient Likelihood of Success on the Merits.

Even assuming, *arguendo*, that Plaintiff had produced the requisite evidence to make a strong showing of irreparable harm, it would still need to establish some chance of success on the merits, *FMC Corp.,* 3 F.3d at 427, by raising, at the very least, questions that are "serious, substantial, difficult and doubtful." *Timken Co. v. United States*, 6 CIT 76, 80, 569 F. Supp. 65, 70 (1983) (internal quotation marks and citations omitted). Plaintiff has not done so here.

On the merits, Plaintiff challenges Customs' determination that it must provide enhanced bonding. Am. Compl., ECF No. 16, at ¶ 1. Plaintiff again faces a high burden. Customs has broad authority to protect the revenue of the United States, *see* 19 U.S.C. § 1623, and has promulgated extensive bonding regulations, following notice and comment rule making, pursuant to that authority. *See Customs Bond Structure; Revision,* 49 Fed. Reg. 41,152 (Oct. 19, 1984); 19 C.F.R. Ch. I, Pt. 113. This includes 19 C.F.R. § 113.13(d) (2014), which allows for enhanced bonding determinations. The court will only set aside Customs' enhanced bonding determination if the agency's decision is arbitrary and capricious. 5 U.S.C. § 706(2)(A).[13] Arbitrary and capricious is a narrow standard of review: "The court is not empowered to substitute its judgment for that of the agency," *Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971), but rather ensures that Customs has "articulate[d] a rational connection between the facts found and the choice made," *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 285 (1974) (internal quotation marks and citation omitted).

Plaintiff argues that Customs' enhanced bonding determination is arbitrary and capricious because it applies the PRC-wide rate, rather than the Yongjia/Shanfu NSR, when Customs has "provided no evidence and made no claims that Yongjia and/or its supplier were not independent of Chinese government control or were subject to the [adverse facts available] rate." Pl.'s Br., ECF No. 7, at 6. This argument misapprehends the facts found and choices made, obfuscating an otherwise rational connection between the two. Under 19 C.F.R. § 113.13(d), Customs can require additional security equal to an importer's potential antidumping duty liability. *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 33 CIT 1137, 1160, 637 F. Supp. 2d 1270, 1291 (2009). While Yongjia and Shanfu do have an NSR, *Twelfth NSR,* 73 Fed. Reg. at 56,552, it is a combination rate and only applies to the specified producer/exporter together. *See* 19

[13] The court reviews actions brought under 28 U.S.C. § 1581(i) (such as here) as provided in the Administrative Procedures Act, 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e).

C.F.R. § 351.107(b)(1). Otherwise, the PRC-wide rate applies. *See Twelfth NSR,* 73 Fed. Reg. at 56,552. Customs, considering evidence that Shanfu underwent changes that, for antidumping duty purposes, potentially rendered the company a different entity (Shanfu LLC),[14] determined that it could not verify Shanfu's identity. Dolor Decl., ECF No. 24–1 at A83, ¶¶ 16–18. Accordingly, it applied the Yongjia/unknown producer rate (the PRC-wide rate) and required bonding equal to Plaintiff's potential antidumping duty liability. *Id.* at ¶ 21–22; Edert Decl., ECF No 24–1 at A73, ¶¶ 6–10; Information Notice, ECF No. 7–1 at Ex. 3. It made no determination, nor did it need to, regarding Chinese government control or the applicability of the PRC-wide rate to Shanfu.

Plaintiff also argues that it provided Customs with evidence that the present Shanfu LLC was effectively the same entity as the NSR Shanfu and, therefore, is its successor-in-interest. [Pl.'s] Mem. Concerning Changes to the Producer of Pl.'s Fresh Garlic, ECF No. 27 ("Pl.'s Mem. re Changes"), at 3–6. Regardless of the strength of this evidence, this is not Customs' decision to make. Customs cannot make substantive determinations under the antidumping duty laws. Its role is purely ministerial. Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,274–75 (Dec. 3, 1979) (announcing transfer from Customs to Commerce of, *inter alia*, all substantive functions under 19 U.S.C. §§ 1671 *et seq.*), *effective under* Exec. Order No. 12,188 of January 2, 1980, 45 Fed. Reg. 989, 993 (1980). Rather, Commerce makes such determinations. 19 U.S.C § 1675(b) (providing for changed circumstances review). Plaintiff further argues that the changes to Shanfu were so insignificant as not to require a substantive determination. Pl.'s Mem. re Changes, ECF No. 27, at 2–3. However, Commerce routinely uses changed circumstances review to

[14] These changes include a restructuring as the business had a [[

]], and a change in name (however minor), as well as changes in [[

]]. Ex. I to Dolor Decl. (Letter from Robert T. Hume, Counsel to Yongjia and Plaintiff, to Marc Dolor, Senior Import Specialist, Port of San Francisco, CBP (August 27, 2014)), ECF No. 24–1 at A191 ("Hume Letter"), at A194–96 (providing Shanfu's company history); Supp. App to Def.'s Br., ECF Nos. 26 (conf. version) & 32 (pub. version) (providing the exhibits submitted with the Hume Letter by Yongjia to Customs, including business documents (with translations) evidencing the changes to Shanfu); *see also* Edert Decl., ECF No. 24–1 at A72, at ¶ 8; Ex. B to Edert Decl., ECF No. 24–1 at A79 (annotated screen captures of PRC government website indicating changes to Shanfu); Dolor Decl., ECF No. 24–1 at A83, at ¶¶ 16–18, 23; Ex. F to Dolor Decl. (Email from Nick Hong to Marc Dolor), ECF No. 24–1 at A122 (with attached documents, providing additional evidence of changes); Decl. of Wang Hua (Shanfu's general manager), ECF No. 30, at ¶¶ 2–6 (discussing changes to Shanfu).

make successor-in-interest determinations address changes comparable to those evidenced for Shanfu — including renaming and restructuring.[15]

Plaintiff, therefore, has failed to raise a serious or substantial question that suggests Customs' determination was arbitrary and capricious, and has therefore failed to establish its likelihood of success on the merits.

III. The Balance of the Equities Does Not Favor the Plaintiff.

Before granting a preliminary injunction, the court "must balance the competing claims of injury and must consider the effect" that granting or denying relief will have on each party. *Winter,* 555 U.S. at 24 (internal quotation marks and citation omitted). Here, Plaintiff alleges that denying a preliminary injunction will cause it substantial economic injury, including possible bankruptcy, but fails to provide sufficient evidence to establish a viable threat of that irreparable harm.[16] Customs, meanwhile, alleges that granting a preliminary injunction will threaten substantial economic injury in the form of lost revenue to the United States. *See* Def.'s Br., ECF No. 19, at 31; 19 U.S.C. § 1623. As Plaintiff has not established irreparable harm and

[15] For examples within this antidumping duty order (A-570–831), *see Fresh Garlic from the [PRC],* 79 Fed. Reg. 63,381 (Dep't Commerce) (Oct. 23, 2014) (initiation of changed circumstances review ("CCR")) (initiation of CCR to make successor-in-interest determination after name change of garlic producer/exporter); *Fresh Garlic from the [PRC],* 69 Fed. Reg. 58,892 (Dep't Commerce Oct. 1, 2004) (notice of final results of antidumping duty CCR) (granting successor-in-interest status following a CCR for a name change). For further examples, *see Certain Lined Paper Products from India,* 79 Fed. Reg. 35,726 (Dep't Commerce June 24, 2014) (final results of CCR) (granting successor-in-interest status after CCR for name change); *Certain Lined Paper Products from India,* 79 Fed. Reg. 40,709 (Dep't Commerce July 14, 2014) (initiation and preliminary results of antidumping duty CCR) (preliminary grant of successor-in-interest status after CCR for a merger); *Certain Frozen Warmwater Shrimp from Thailand,* 74 Fed. Reg. 52,452 (Dep't Commerce Oct. 13, 2009) (final results of antidumping duty CCR and notice of revocation in part) (granting successor-in-interest status after CCR for acquisition); *Brake Rotors from the [PRC],* 70 Fed. Reg. 69,941 (Dep't Commerce Nov. 18, 2005) (final results of CCR) (granting successor-in-interest status following CCR); *Polychloroprene Rubber from Japan,* 69 Fed. Reg. 67,890 (Dep't Commerce Nov. 22,2004) (notice of final results of antidumping duty CCR) (denying successor-in-interest status following CCR); *Polychloroprene Rubber from Japan,* 67 Fed. Reg. 58 (Dep't Commerce Jan. 2, 2002) (notice of final results of CCR) (granting successor-in-interest status following CCR for restructuring and renaming); *Industrial Phosphoric Acid from Israel,* 59 Fed. Reg. 6944 (Dep't Commerce Feb. 14, 1994) (final results of CCR) (granting successor-in-interest status following CCR).

[16] *See* discussion *supra* Section I.

Customs claims an at least comparable economic injury, the balance of the equities cannot be said to favor either (and therefore does not favor the Plaintiff).[17]

IV. Granting the Plaintiff a Preliminary Injunction Does Not Serve the Public Interest.

The court "should pay particular regard for the public consequences" when "employing the extraordinary remedy of injunction." Winter, 555 U.S. at 24 (internal quotation marks and citations omitted). Here, the public has a strong interest in protecting the revenue of the United States and in assuring compliance with the trade laws. *See* 19 U.S.C. § 1623. Enhanced bonding pending litigation serves both these interests. Additional security covers potential liabilities and protects against default, ensuring the correct antidumping duty is paid.[18] Cf. Shandong Huarong, 24 CIT at 1286, 122 F. Supp. 2d at 1372 ("The public has an interest in ensuring the fair application of the antidumping laws while simultaneously guaranteeing foreign exporters will not default in the satisfaction of their import obligations.").

Plaintiff argues that a preliminary injunction serves the public interest because it ensures the "proper and equitable enforcement of the trade laws, ensuring the correct antidumping duties are collected." Pl.'s Br., ECF No. 7, at 10 (citation omitted). While the public interest is served by the accurate and effective, uniform and fair enforcement of trade laws, *Union Steel v. United States,* 33 CIT 614, 622, 617 F. Supp. 2d 1373, 1381 (2009); *Ceramica Regiomontana, S.A. v. United States,* 7 CIT 390, 397, 590 F. Supp. 1260, 1265 (1984), use of available administrative remedies is an essential premise of this enforcement, *see* 28 U.S.C. § 2637 (requiring, with limited exception, exhaustion of administrative remedies before an action may be commenced before this Court). Moreover, the court "endeavor[s] to ensure these ends whether an injunction is in place or not." *Olympia Indus.,* 30 CIT at 18. Accordingly, granting Plaintiff's preliminary injunction does not serve the public interest.

---

[17] *See Olympia Indus., Inc. v. United States,* 30 CIT 12, 19 (2006) (not reported in the Federal Supplement) (finding that "because both parties face hardship should their arguments with respect to the issuance of an injunction not succeed, the balance of hardships does not aid plaintiff").

[18] "[T]he United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported." 19 C.F.R. § 351.212. At entry, importers make a cash deposit of the estimated antidumping duties, *id.* at 351.211(b)(2), but if, as here, the antidumping duty rate is challenged by an interested party, the final antidumping duty rate (and thus amount owed) will be assessed pursuant to an administrative review, *id.* at §§ 351.213, 351.211(b)(1), or, if appealed to this Court, assessed according to the final decision in the action, 19 U.S.C. § 1516a(e)(2).

CONCLUSION

Plaintiff has not demonstrated entitlement to a preliminary injunction. Plaintiff has not established irreparable harm or likelihood of success on the merits, and the balance of equities and public interest do not favor the Plaintiff. Accordingly, Plaintiff's motion is DENIED.

Dated: November 10, 2014
New York, NY

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

Slip Op. 14–134

JIANGSU JIASHENG PHOTOVOLTAIC TECHNOLOGY CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Consol. Court No. 13–00012[1]

[affirming in part and remanding in part the Department of Commerce's final results of antidumping investigation]

Dated: November 20, 2014

Francis J. Sailer, Mark E. Pardo, Andrew T. Schutz,and *Brandon M. Petelin*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Plaintiff and Defendant-Intervenor Jiangsu Jiasheng Photovoltaic Technology, Co., Ltd.and Defendant-Intervenor Hanwha Solarone (Qidong) Co., Ltd.

Timothy C. Brightbill, Tessa V. Capeloto, and Laura El-Sabaawi, Wiley Rein LLP, of Washington, DC, for Plaintiff and Defendant-Intervenor SolarWorld Industries America, Inc.

L. Misha Preheim, Senior Trial Counsel, and *Melissa M.* Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were Stuart F. Delery, Assistant Attorney General, Jeanne E. Davidson, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Rebecca Cantu*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

John M. Gurley, Diana Dimitriuc Quaia, and *Tina Termei,* Arent Fox LLP, of Washington, DC, for Defendant-Intervenors Changzhou Trina Solar Energy Co., Ltd., Trina Solar (U.S.), Inc., Wuxi Suntech Power Co., Ltd., Suntech America, Inc., Suntech Arizona, Inc., JA Solar Technology Yahngzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd., and JingAo Solar Co., Ltd.

Neil R. Ellis, Richard L.A. Weiner, Brenda A. Jacobs, Rajib Pal, and *Raphaelle E. Monty,* Sidley Austin LLP, of Washington, DC, for Defendant-Intervenors Yingli Green Energy Americas, Inc. and Yingli Green Energy Holding Co., Ltd.

Gregory S. Menegaz, J. Kevin Horgan, and *John J.Kenkel,* deKieffer & Horgan PLLC, of Washington, DC, for Defendant-Intervenors Ningbo Komaes Solar Technol-

[1] This action is consolidated with *SolarWorld Indus. Am., Inc. v. United States*, Ct. No. 13–00006. Order June 12, 2013, ECF No. 18.

ogy Co., Ltd., Ningbo Etdz Holdings Ltd., Ningbo Qixin Solar Electrical Appliance Co., Ltd., LDK Solar Hi-Tech (Nanchang) Co., Ltd., and LDK Solar Hi-Tech (Suzhou) Co., Ltd.

OPINION AND ORDER

Pogue, Senior Judge:

This consolidated action arises from the United States Department of Commerce's ("Commerce") antidumping investigation of crystalline silicon photovoltaic cells ("CSPC") from the People's Republic of China ("PRC" or "China").[2] Plaintiff Jiangsu Jiasheng Photovoltaic Technology Company, Limited ("Jiasheng") challenges Commerce's determination, in its investigation, to reject Jiasheng's application for "separate-rate status."[3] In addition, Plaintiff SolarWorld Industries America, Incorporated ("SolarWorld") challenges 1) Commerce's decision, in constructing a home market or "normal value",[4] to calculate the cost of aluminum frames (a component used to make the subject merchandise) based on goods classified under Thai Harmonized Tariff Schedule ("HTS") Heading 7604, rather than Thai HTS Heading 7616; and 2) Commerce's determination to grant separate-rate status to certain respondents.[5]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[6] and 28 U.S.C. § 1581(c) (2012).

For the reasons presented below, Commerce's *Final Results* are

---

[2] *See [CSPC], Whether or Not Assembled into Modules, from the[PRC],* 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part) ("*Final Results*") and accompanying Issues & Decision Mem., A-570–979, Antidumping Duty ("AD") Investigation (Oct. 9, 2012) ("*I&D Mem.*"). The subject merchandise includes solar cells used to make solar energy panels and modules. *See [CSPC], Whether or Not Assembled into Modules, from the [PRC],* 76 Fed. Reg. 70,960, 70,965 (Dep't Commerce Nov. 16, 2011) (initiation of antidumping duty investigation) ("*Notice of Initiation*") (Appendix I: Scope of the Investigation) (providing a full description of the merchandise covered by this investigation); *id.* at 70,960 (noting that the period of investigation ("POI") was April 1, 2011, through September 30, 2011).

[3] Mem. of L. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 41 ("Jiasheng's Br."). *See infra* Discussion Section I.A of this opinion (explaining "separate-rate status").

[4] *See infra* note 65 (explaining the process for constructing "normal" comparison prices in investigations of merchandise from the PRC).

[5] *See* Pet'r-Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 43 (conf. version) & 44 (pub. version) ("SolarWorld's Br.").

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

sustained against the challenges presented here,[7] except with regard to separate rate issues for which Commerce has requested a voluntary remand.[8] Commerce's request for remand is granted. Following a statement of the standard of review, each challenge to the *Final Results* presented in this action is addressed in turn.

STANDARD OF REVIEW

The court will sustain Commerce's antidumping determinations if they are supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *SKF USA, Inc. v. United States,* 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938), and the substantial evidence standard of review can be roughly translated to mean "is the determination unreasonable?" *Nippon Steel Corp. v. United States,* 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quotation and alteration marks and citation omitted). In this context, substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted).[9]

"It is not for [the courts] to reweigh the evidence before the [agency]," *Henry v. Dep't of the Navy,* 902 F.2d 949, 951 (Fed. Cir. 1990), but there must be a rational connection between the facts found based on the record evidence and the choices made in the agency's determination. *See Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). Although the reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given, [the court] will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974) (citations omitted).

---

[7] These *Final Results* are also subject to challenges presented in two additional actions before this Court, *SolarWorld Indus. Am., Inc. v. United States,* Ct. No. 13–00219, and *Changzou Trina Solar Energy Co. v. United States,* Consol. Ct. No. 13–00009. *See* Severance & Consolidation Order June 12, 2013, ECF No. 18.

[8] Def.'s Mot. for Voluntary Remand, ECF No. 81 ("Def.'s Mot.").

[9] *See also, e.g., Technoimportexport, UCF Am. Inc. v. United States,* 16 CIT 13, 18, 783 F. Supp. 1401, 1406 (1992) ("When Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly.").

In addition, where the agency is vested with discretion to set the procedures by which it administers its governing statute,[10] the court reviews such decisions for abuse of discretion. *See, e.g., Dongtai Peak Honey Indus. Co. v. United States,* __ CIT __, 971 F. Supp. 2d 1234, 1239 (2014). "An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors." *Id.* (quoting *Wel-Com Prods., Inc. v. United States,* 36 CIT __, 865 F. Supp. 2d 1340, 1344 (2012) (citing *Star Fruits S.N.C. v. United States,* 393 F.3d 1277, 1281 (Fed. Cir. 2005))). In abuse of discretion review, "an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." *See SKF USA Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001).

DISCUSSION

I. Commerce's Rejection of Jiasheng's Application for Separate-Rate Status

A. Background

Because Commerce considers the PRC to be a non-market economy ("NME"),[11] when investigating merchandise from China, the agency presumes that the export operations of all Chinese producers and exporters are controlled by the PRC government, unless respondents show otherwise.[12] As a result, Commerce's practice is to assign to all exporters from the PRC a single "countrywide" antidumping duty rate unless they affirmatively demonstrate eligibility for a "separate

[10] *See, e.g., Yantai Timken Co. v. United States,* 31 CIT 1741,1755, 521 F. Supp. 2d 1356, 1370 (2007) ("Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits.") (quotation marks and citation omitted).

[11] *See Notice of Initiation,* 76 Fed. Reg. at 70,962 ("The presumption of NME status for the PRC has not been revoked by[Commerce] and, therefore, in accordance with [19 U.S.C.1677(18)(C)(i)], remains in effect for purposes of the initiation of this investigation.").

[12] *See Yangzhou Bestpak Gifts & Crafts Co. v. United States,* 716 F.3d 1370, 1373 (Fed. Cir. 2013) ("[In] [p]roceedings involving a nonmarket economy, such as China, . . . Commerce begins with a rebuttable presumption that all respondents in the investigation are under foreign government control and thus should receive a single countrywide dumping rate.") (citation omitted); *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* 77 Fed. Reg. 31,309, 31,315 (Dep't Commerce May 25,2012) (preliminary determination of sales at less than fair value, postponement of final determination and affirmative preliminary determination of critical circumstances) ("*Prelim. Results*") ("In proceedings involving NME countries, [Commerce]has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single AD rate.") (citation omitted).

rate."[13] Applying this practice, in announcing the initiation of this investigation, Commerce reminded respondents that to obtain "separate-rate status," exporters and producers must submit a separate-rate application ("SRA"), and that a timely response to Commerce's questionnaire regarding the quantity and value of exported merchandise ("Q&V questionnaire") is a pre-requisite to separate-rate eligibility.[14]

Commerce sent Q&V questionnaires to 75 PRC-based producers and exporters.[15] The United Parcel Service ("UPS") confirmed delivery of the Q&V questionnaire to Respondent-Plaintiff Jiasheng on November 12, 2011, seventeen days prior to the stated response deadline.[16] This correspondence apprised Jiasheng of Commerce's investigation and requested information on the quantity and U.S. dollar value of Jiasheng's sales of subject merchandise to the United States during the POI.[17] The cover letter sent with the questionnaire informed Jiasheng that its response was due no later than November

[13] *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373(Fed. Cir. 2002) ("Commerce determined that NME exporters would be subject to a single, countrywide antidumping duty rate unless they could demonstrate legal, financial, and economic independence from the Chinese government (referred to by Commerce as 'the NME entity'). . . . Under [this] NME presumption, a company that fails to demonstrate independence from the NME entity is subject to the countrywide rate, while accompany that demonstrates its independence is entitled to an individual rate as in a market economy.") (relying on *Sigma Corp. v. United States,* 117 F.3d 1401, 1405 (Fed. Cir. 1997) ("[I]t was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy.")) (additional citations omitted).

[14] *Initiation Notice,* 76 Fed. Reg. at 70,964 (citing Import Admin., U.S. Dep't Commerce, *Separate-Rates Practice &Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries,* Policy Bulletin No. 05.1 (Apr. 5, 2005) ("*Commerce Policy 5.1*"), *available at* http://enforcement.trade.gov/policy/bull05–1.pdf (last visited Oct. 22, 2014)); *Commerce Policy 5.1* at 4 ("Firms to whom [Commerce] sends a Quantity and Value ('Q&V') questionnaire, which is used in certain investigations to select mandatory respondents, must respond to the Q&V questionnaire to receive consideration for a separate rate.").

[15] *Notice of Initiation*, 76 Fed. Reg. at 70,964.

[16] *See* Mem. re Issuance of Quantity and Value Questionnaires, *[CSPC], Whether or Not Assembled into [Modules,] from the [PRC],* A-570–979, AD Investigation (Dec. 8, 2011), *reproduced in* Pub. App. of Docs. in Supp. of Def.'s Opp'n to Pls.' Mots. for J. on the Agency R. ("Def.'s App."), ECF No. 56–1 at P.D. 225 (listing UPS tracking number 1ZA610W90498461594 for the Q&V questionnaire sent to Jiasheng, and listing that tracking number as delivered and signed for on November 12, 2011, at 4:10pm); *Notice of Initiation,* 76 Fed. Reg. at 70,964 ("A response to the quantity and value questionnaire is due no later than November 29, 2011.") (footnote omitted).

[17] Quantity & Value Questionnaire, *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Nov. 9, 2011) ("*Jiasheng Q&V Quest.*"), *reproduced in* App. to Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Jiasheng's App."), ECF No. 45 at Doc. 15.

29, 2011,[18] and the questionnaire warned that failure to timely respond would forfeit Jiasheng's opportunity to be considered for separate-rate status in this investigation.[19]

In addition, the cover letter notified Jiasheng that instructions for responding to the Q&V questionnaire were included in the package as Attachment III, and advised Jiasheng to utilize the included check list (Attachment V) "to make certain [that Jiasheng] fully complie[s] with all filing requirements."[20] Paragraph A.1 of the General Instructions included in Attachment III to the Q&V questionnaire received by Jiasheng states that "[a]ll submissions must be made electronically using [Commerce's] IA ACCESS website at http://iaaccess.trade.gov."[21] Paragraph A.3 explains that "[a]n electronically filed document must be received successfully in its entirety by IA ACCESS by 5 p.m. Eastern Time (ET) on the due date, unless an earlier time is specified."[22] The check list included in Attachment V warns respondents: "*Do not* submit your response via email or facsimile. Your response must be electronically filed using IA [ACCESS] unless you meet one of the exceptions listed under the 'Manual Filing' section of the General Instructions."[23]

Commerce received timely-filed Q&V questionnaire responses from 80 exporters – who all filed their responses using Commerce's IA ACCESS website[24] – but not from Jiasheng. Rather, on November 30, 2011, at 10:59 local time (i.e., after the November 29, 2011, deadline), Jiasheng sent an email message to one of the contact persons listed on

---

[18] Cover Letter to *Jiasheng Q&V Quest.*, ECF No. 45 at Doc. 15.

[19] *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15, at 2 ("[Commerce] will not give consideration to any separate-rate status application made by parties that fail to timely respond to the Quantity and Value Questionnaire . . . .").

[20] Cover Letter to *Jiasheng Q&V Quest.*, ECF No. 45 at Doc. 15.

[21] Attach. III to *Jiasheng Q&V Quest.*, ECF No. 45 at Doc. 15.

[22] *Id.*

[23] Attach. V to *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15,at ¶ 4. (emphasis in original). The manual filing exceptions apply to unusually large documents or data files, or when the IAACCESS system is unable to accept filings. *See* Attach. III to Jiasheng Q&V Quest., ECF No. 45 at Doc. 15, at ¶ C.1. It is undisputed that these manual filing exceptions are not relevant to this case. *See* Oral Arg. Tr., ECF No. 83, at 7 (Jiasheng's counsel's concession that the manual filing exceptions refer to a "different issue").

[24] Mem. re Resp't Selection, *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Dec. 8, 2011) ("*Resp't Selection Mem.*"), *reproduced in* Def.'s App., ECF No. 56–1 at P.D. 275, at 2 (noting also that nine of the 80 Q&V questionnaire responses were rejected as improperly filed and those respondents were provided with an opportunity to correct the filing deficiencies, as well as that "many of the companies to which [Commerce] issued Q&V questionnaires did not respond to the questionnaire"). *But see Prelim. Results,* 77 Fed. Reg. at 31,309 ("Commerce received timely responses to its Q&V questionnaire from 76 companies.").

the Q&V questionnaire.[25] This email invited the official to "check the attachment" and apologized for the late submission, without providing any explanation.[26]

Nine days after receiving the questionnaire responses through IA ACCESS, on December 8, 2011, Commerce completed its analysis of the 80 submissions and selected two respondents for individual examination (the "mandatory respondents"), pursuant to 19 U.S.C. § 1677f-1(c)(2)(B).[27] In doing so, Commerce made its selection without relying on data from a number of companies that had timely but deficiently submitted their responses through IA ACCESS.[28] Rather, Commerce permitted those companies to properly re-file their Q&V questionnaire responses by December 14, 2011, in order to preserve their eligibility for a separate rate.[29] Because Jiasheng did not timely submit its Q&V questionnaire response through IA ACCESS, Jiasheng was neither contacted by Commerce nor permitted an opportunity to preserve separate-rate eligibility by properly filing its Q&V questionnaire response.[30]

Jiasheng then retained counsel and ultimately filed its Q&V questionnaire response through IA ACCESS on December 12, 2011.[31]

---

[25] *See* Ex. A (email correspondence) to Letter re Commerce's Rejection of Jiasheng's Q&V Resp. & Separate Rate Appl., *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Feb. 29, 2012) ("*Jiasheng's Feb. 29 Protest*"), *reproduced in* Jiasheng App., ECF No. 45 at Doc. 2; *see also* Cover Letter to *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15 (naming two contact persons, and providing their phone numbers and email addresses, to whom to direct "any questions or comments").

[26] Ex. A to *Jiasheng's Feb. 29 Protest*, ECF No. 45 at Doc. 2.

[27] *See Resp't Selection Mem.,* ECF No. 56–1 at P.D. 275, at 4–5;19 U.S.C. § 1677f-1(c)(2)(B) ("If it is not practicable to make individual weighted average dumping margin determinations [for each known exporter and producer of the subject merchandise] because of the large number of exporters or producers involved in the investigation . . ., [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to . . .exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.").

[28] *See Resp't Selection Mem.*, ECF No. 56–1 at P.D. 275, at 2 n.4.

[29] *See* Letters to Certain Resp'ts, *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Dec. 9, 2011), *reproduced in* Jiasheng's App., ECF No. 45 at Docs. 4–12; *see also supra* note 14 and accompanying text.

[30] *I&D Mem.* cmt. 45 at 103 ("Jiasheng failed to officially file a Q&V questionnaire response on the record of the case by the deadline for doing so; thus there was nothing on the record for [Commerce] to examine for filing deficiencies.").

[31] Jiasheng's Br., ECF No. 41, at 20.

Because this was the first filing of Jiasheng's response within the electronic filing system for this investigation, Commerce rejected the filing as untimely.[32]

Meanwhile, in December 2011 through January 2012, Commerce received 68 timely-filed SRAs from companies who had also timely filed their Q&V questionnaire responses through IA ACCESS.[33] Although Jiasheng also submitted an SRA by the applicable deadline, using IA ACCESS, Commerce rejected the submission because Jiasheng had not timely filed a Q&V questionnaire response.[34] In explaining its decision to reject Jiasheng's SRA, Commerce emphasized that both the notice of initiation for this investigation and the specific Q&V questionnaire received by Jiasheng explicitly required respondents to timely file Q&V questionnaire responses as a precondition for separate rate eligibility.[35]

Those respondents that timely filed their Q&V questionnaire responses through IA ACCESS and whose separate-rate applications demonstrated sufficient independence from government control[36] were ultimately assigned an antidumping duty cash deposit rate of 25.96 percent, which was lower than that assigned to the PRC-wide entity.[37] This lower 25.96 percent separate rate reflected an average of the rates calculated for the two mandatory respondents, who also

---

[32] *See* Letter re Rejection of Jiasheng's Q&V Questionnaire Resp., *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Jan. 6, 2012) ("*Jiasheng Q&V Rejection*"), *reproduced in,* Def.'s App., ECF No. 56–1 at P.D. 356 (informing Jiasheng that its submission dated December 12, 2011, was rejected as untimely filed).

[33] *See Prelim. Results*, 77 Fed. Reg. at 31,310, 31,315.

[34] *See* Letter re Rejection of Jiasheng's Separate Rate Appl., *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Feb. 10, 2012) ("*Jiasheng SRA Rejection Letter*"), *reproduced in,* Jiasheng's App., ECF No. 45 at Doc. 14 (informing Jiasheng that its separate rate questionnaire response dated January 17, 2012, was rejected because Jiasheng had not timely filed a Q&V questionnaire response and "a timely response to the Q&V Questionnaire is necessary to be considered for receipt of a separate rate"); *Prelim. Results,* 77 Fed. Reg. at 31,317 (explaining that Commerce did not grant a separate rate to Jiasheng because Jiasheng failed to submit a timely response to Commerce's Q&V questionnaire).

[35] *Jiasheng SRA Rejection Letter,* ECF No. 45 at Doc. 14, at 1 (quoting *Initiation Notice,* 76 Fed. Reg. at 70,964 ("[R]espondents [must] submit a response to both the quantity and value questionnaire and the separate rate application by the respective deadlines in order to receive consideration for separate-rate status."); *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15, at 2 ("[Commerce] will not give consideration to any separate-rate status application made by parties that fail to timely respond to the Quantity and Value Questionnaire . . . .")).

[36] *See supra* notes 11–13 and accompanying text.

[37] *See Final Results*, 77 Fed. Reg. at 63,794–95.

qualified for separate rates.[38] The PRC-wide entity, on the other hand, comprised of all the remaining companies that did not qualify for a separate rate,[39] including Jiasheng, was assigned a 249.96 percent rate based on an adverse inference.[40] Commerce judged this rate, which was the highest dumping margin alleged in the petition to

[38] *See id.* at 63,794 ("The separate rate is normally determined based on the weighted-average of the estimated dumping margins established for exporters and producers individually investigated, excluding zero and *de minimis* margins or margins based entirely on adverse facts available ('AFA'). [citing 19 U.S.C. § 1673d(c)(5)(A)] In this investigation, both [mandatory respondents] have estimated weighted-average dumping margins which are above *de minimis* and which are not based on total AFA. Because there are only two relevant weighted-average dumping margins for this final determination, using a weighted-average of these two margins risks disclosure of business proprietary information ('BPI') data. Therefore, [Commerce] has calculated both a simple average and a weighted-average of the two final dumping margins calculated for the mandatory respondents using public values for sales of subject merchandise reported by respondents and used the average that provides a more accurate proxy for the weighted-average margin of both companies calculated using BPI data, which in this investigation is 25.96 percent.") (additional citation omitted).

[39] *See id.* at 63,794 ("Because [Commerce] begins with the presumption that all companies within an NME country are subject to government control, and because only the mandatory respondents and certain Separate Rate Applicants have overcome that presumption, [Commerce] is applying a single antidumping rate to all other exporters of subject merchandise from the PRC. Such companies have not demonstrated entitlement to a separate rate.") (citation omitted).

[40] *Id.* at 63,794–96 (finding that the PRC-wide entity "failed to cooperate to the best of its ability" because "certain PRC exporters/producers did not respond to [Commerce]'s requests for information and did not establish that they were separate from the PRC-wide entity"; accordingly employing an adverse inference when determining the dumping margin for the PRC-wide entity, pursuant to 19 U.S.C. § 1677e(b); and explaining that, when determining rates based on an adverse inference, Commerce's practice is "to select a rate that is sufficiently adverse as to. . . induce respondents to provide [Commerce] with complete and accurate information in a timely manner") (quotation marks and citation omitted); *see* 19 U.S.C. § 1677e(b) ("If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce], [the agency] . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."); *Yangzhou Bestpak,* 716 F.3d at 1373 ("Commerce may use adverse inferences when calculating a rate if an investigated respondent refuses to cooperate by impeding the investigation or not properly providing information. Commerce typically concludes that some part of the countrywide entity has not cooperated in the proceeding because those that have responded do not account for all imports of the subject merchandise. Commerce is required to corroborate chosen AFA rates to ensure that they fall within the purportedly acceptable range of margins determined.") (citing 19 U.S.C. § 1677e(b)-(c)); E. Sea Seafoods LLC v. United States, __ CIT __, 703 F. Supp. 2d 1336, 1354 n.15 (2010) ("[I]n most, if not all, cases involving a country-wide NME antidumping duty rate, the country-wide margin has been calculated using adverse inferences.") (citation omitted).

initiate these proceedings, to be derived from data that were "within the range of the U.S. prices and normal values for the respondents in this investigation."[41]

Jiasheng now challenges Commerce's determination to reject its SRA and assign to Jiasheng the PRC-wide rate. *See* Jiasheng's Br., ECF No. 41. Jiasheng does not challenge the PRC-wide rate itself, claiming only that this rate was improperly applied to Jiasheng. *See id.;* Oral Arg. Tr., ECF No. 83, at 13 (Jiasheng's confirmation that it is not challenging the China-wide rate).

B. Analysis

Commerce has discretion to set and enforce deadlines and reject untimely filed submissions,[42] and may make its determinations "us-[ing] facts otherwise available" when, *inter alia*, a respondent "fails to provide [requested] information by the deadlines for submission of the information or in the form and manner requested." 19 U.S.C. 1677e(a)(2)(B).[43] Here, Commerce used facts otherwise available (i.e., the presumption of government control attaching to all exporters from NME countries like the PRC) because Jiasheng failed to provide information requested of it by the applicable deadline. *See I&D Mem.* cmt. 45 at 105. Jiasheng argues that its SRA, which was filed using IA ACCESS by the deadline provided for respondents who timely filed Q&V responses, contained the information necessary to determine Jiasheng's actual separate-rate eligibility, in the form and manner requested by Commerce.[44] Jiasheng therefore contends that Commerce inappropriately used "facts otherwise available" when the actual information was in fact timely and properly submitted on the record of this investigation.[45]

But as Commerce explained, the agency unambiguously and consistently requires respondents to properly and timely file Q&V responses as a precondition for separate-rate eligibility, because doing so prevents respondents from circumventing the mandatory respon-

[41] *Final Results*, 77 Fed. Reg. at 63,795 (citation omitted).

[42] *See NTN Bearing Corp. v. United States,* 74 F.3d 1204, 1207(Fed. Cir. 1995) ("Inasmuch as Congress has not specified the procedures [Commerce] must use to obtain information, it is within the discretion of [the agency] to promulgate appropriate procedural regulations.") (citation omitted); *Yantai Timken,* 31 CIT at 1755, 521 F. Supp. 2d at 1371 ("In order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations.") (citation omitted).

[43] Reliance on this statutory provision is subject to the requirements of 19 U.S.C. §§ 1677m(c)(1), 1677m(d), and 1677m(e), which are discussed below.

[44] *See* Jiasheng's Br., ECF No. 41, at 14–15, 23.

[45] *See id.*

dent selection process and benefitting from the all-others separate rate without the risk or burden of individual investigation.[46] Because Commerce has broad discretion to set the procedures it needs in order to adequately perform and enforce its regulatory role, and because the agency's basis for this particular procedure is reasonable, Commerce's policy of requiring timely Q&V responses as a precondition of separate-rate eligibility is not a *prima facie* abuse of the agency's discretion.

Because Commerce's policy of predicating the timeliness of separate-rate applications on timely Q&V data submission is not a *prima facie* abuse of discretion, the next question raised by Jiasheng's challenge is whether Commerce's application of its policy in this case amounts to an abuse of discretion. In evaluating such an as-applied challenge to Commerce's timeliness requirements and procedures, the court asks "whether the interests of accuracy and fairness outweigh the burden [resulting from the late submission] placed on [Commerce] and the interest in finality."[47] In support of its argument that Commerce abused its discretion by rejecting Jiasheng's SRA in the circumstances presented here, Jiasheng relies on this Court's decisions in *Grobest*, __ CIT __, 815 F. Supp. 2d 1342, and *Artisan Mfg. Corp. v. United States,* __ CIT __, 978 F. Supp. 2d 1334 (2014).[48] But the facts of this case are distinguishable from the issues presented in those actions.

In *Grobest,* an NME company that was wholly-owned by a market economy company had qualified for a separate rate in an antidumping investigation, and had then maintained separate-rate status in three subsequent administrative reviews by timely filing certifications of no material changes.[49] Then, in the fourth review, that company untimely submitted the same certification that it had consis-

[46] *See I&D Mem.* cmt. 45 at 104–05; Oral Arg. Tr., ECF No. 83, at 32–33. Because Commerce generally makes its separate-rate determinations after selecting the mandatory respondents (based on Q&V submissions), without this link between separate-rate eligibility and timely Q&V data submission respondents would be free to submit their SRAs without having made any Q&V submissions. In this way, respondents would be able to avoid the possibility of detailed examination that accompanies selection as a mandatory respondent, but nonetheless benefit from the separate rate, which is usually based on the mandatory respondents' rates. *See supra* note 38 (explaining Commerce's practice for calculating separate rates).

[47] *Grobest & I-Mei Indus. (Vietnam) Co. v. United States,* __ CIT __, 815 F. Supp. 2d 1342, 1365 (2012).

[48] *See* Jiasheng's Br., ECF No. 41, at 10–16 (relying on *Grobest*); Pl.'s Notice of Supplemental Auth., ECF No. 79 (advising the court of the decision in *Artisan,* and requesting that the court "take this decision into account in its deliberations").

[49] *Grobest,* __ CIT at __, 815 F. Supp. 2d at 1364 (noting that the company in question, "Amanda Foods," received separate-rate status in the initial investigation, which it

tently used over all the years during which its merchandise had been subject to the antidumping duty order.[50] Under such circumstances, Commerce's sudden rejection of the certification, without any evidence of an intervening change and where "every indication suggest[ed] that the burden of reviewing the [separate rate certification] would not be great," was an abuse of discretion.[51]

But Jiasheng's case is not analogous. Here Commerce had no prior history to rely on, and the issue before the court is not the rejection of a certification of continued separate rate eligibility in the absence of changed circumstances, but rather the untimely attempt to establish such eligibility in the first instance, under circumstances that would impose a significant burden on the agency (requiring Commerce to either begin its already-completed mandatory respondent selection process anew, or else undermine the agency's policy objective by permitting Jiasheng's effective circumvention of that process).

Nor is this case analogous to the facts in *Artisan,* where Commerce abused its discretion by rejecting a response filed via IA ACCESS after 5:00pm on the day of the deadline but before 9:00am on the following day.[52] Here, rather than properly submitting its response via IA ACCESS before the start of business on the day after the deadline, Jiasheng emailed its late response, despite clear instructions not to do so, and made no IA ACCESS filings until two weeks after the deadline.

---

retained "in all subsequent reviews prior to the fourth by filing [certifications of no material changes]"); *id.* at 1366 (noting that Amanda Foods' separate-rate status in the investigation and three subsequent reviews was based on evidence that this company "was wholly owned by foreign entities located in a market economy country"); *see id.* at 1364 ("If an exporter or producer received a separate rate in a prior review and has not undergone relevant changes, it may submit a separate-rate certification ('SRC') to maintain separate-rate status in subsequent reviews. All other companies seeking separate-rate status must file a separate-rate application ('SRA').") (citations omitted).

[50] *See id.* at 1366 ("Amanda Foods received separate-rate status in the initial investigation and has maintained that status in each subsequent review prior to the fourth due to it being wholly foreign-owned; . . . [Amanda Foods' late certification in the fourth review shows that] it remains wholly foreign-owned."); *id.* at 1367 (finding that "the late-filed SRC appears to maintain the status quo").

[51] *Id.* at 1367.

[52] *Artisan,* __ CIT at __, 978 F. Supp. 2d at 1338; *see also id.* at 1345 ("On the record evidence, . . . [the relevant] Q&V information was unavailable to Commerce only between the 5:00pm close of business on the due date, April 11, 2012, and a time at or near the beginning of the next business day. Such a brief period could not have delayed the investigation in any meaningful way.") (citation omitted); *id.* at 1344 (narrowing the holding to the particular facts of that case).

Commerce's instructions, received by Jiasheng seventeen days before the filing deadline, clearly stated that 1) Q&V questionnaire responses were to be filed only by using the IA ACCESS website,[53] and were *not* to be emailed under any circumstances[54]; and 2) failure to timely file the Q&V questionnaire response would forfeit the opportunity to be considered for a separate rate.[55] Moreover, at the close of the IA ACCESS filing deadline, Commerce had received data from 80 respondents, which it then processed to select mandatory respondents within nine days, in order to adhere to a schedule for completing the investigation within the statutory time limitations.[56] Then, just as Commerce was compiling, organizing, and analyzing all of this information, Jiasheng sent a brief, uninformative email, with no explanation, attempting to submit its questionnaire response as an attachment, despite very clear instructions – followed by the vast majority of the respondents in this investigation – not to do so.[57] By the time of Jiasheng's actual untimely response, filed using IA ACCESS on December 12, 2011,[58] the investigation was already well under way.[59]

---

[53] Attach. III to *Jiasheng Q&V Quest.*, ECF No. 45 at Doc. 15,at ¶¶ A.1, A.3.

[54] Attach. V to *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15, at ¶ 4; *see also* Attach III to *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15, at ¶ A.1 ("If an exception to the electronic filing requirement applies, you must address and *manually* submit your response to the address indicated on the cover page of this questionnaire.") (emphasis added).

[55] *Jiasheng Q&V Quest.,* ECF No. 45 at Doc. 15, at 2; *see supra* note 19 (quoting relevant language).

[56] *See Resp't Selection Mem.,* ECF No. 56–1 at P.D. 275; *I&D Mem.* cmt. 45 at 104.

[57] It is true that the Q&V questionnaire had provided the email address along with an invitation for questions or comments. But the questionnaire also emphatically stated that the response was not to be emailed under any circumstances and must be submitted via IA ACCESS by November 29, 2011. The logical reading of this is that any questions or comments were to be sent in advance of the filing deadline, and that the email addresses provided were not to be used to submit the required responses.

[58] *See supra* notes 31 and 32 (providing relevant citations).

[59] *See Prelim. Results,* 77 Fed. Reg. at 31,309–10 (demonstrating that by December 12, 2011, Commerce had already selected the mandatory respondents, issued its antidumping questionnaires to those companies, and was starting to receive timely separate rate applications); *see also I&D Mem.* cmt. 45 at 104 ("The fully extended deadline for issuing the preliminary determination is less than six months from the due date for Q&V questionnaire responses. During this period [Commerce] must choose mandatory respondents, analyze questionnaire responses, issue and analyze supplemental questionnaire responses, calculate dumping margins for the respondents, and in this case, analyze nearly 70 SRAs and a significant amount of comments on various issues including scope, separate rates and critical circumstances. Jiasheng officially filed its Q&V questionnaire response almost two weeks after the due date for such responses."). *Compare with Artisan,* __ CIT at __, 978 F. Supp. 2d at 1345; *see supra* note 52 (quoting relevant language from *Artisan*).

Jiasheng argues that the Commerce official to whom Jiasheng emailed its late response should have opened the attachment, realized it was Jiasheng's attempt at filing the

Jiasheng's failure to follow Commerce's instructions and file its response through IA ACCESS by the November 29, 2011, deadline is also what distinguishes Jiasheng from the nine respondents who had timely, though deficiently, filed their Q&V questionnaire responses through IA ACCESS, and who were therefore permitted an opportunity to re-file and thus preserve their separate-rate eligibility.[60] Accordingly, Commerce's disparate treatment of Jiasheng vis-à-vis these nine companies is not arbitrary, as Jiasheng suggests,[61] because it has a reasonable basis. The nine companies that followed instructions and timely filed their responses through IA ACCESS were included within Commerce's initial data compilation and analysis, whereas Jiasheng did not enter that system until two weeks later. Given this distinction, Commerce did not act arbitrarily in treating Jiasheng differently from these nine companies.

Finally, while Commerce's use of "facts otherwise available" (here, the presumption of government control) pursuant to 19 U.S.C. § 1677e(a)(2)(B) is subject to the requirements of 19 U.S.C. §§ 1677m(c)(1), 1677m(d), and 1677m(e), none of these latter provisions is applicable on the facts presented. Section 1677m(c)(1) provides that if an interested party promptly notifies Commerce that it is unable to comply with the agency's request, "together with a full explanation and suggested alternative forms in which such party is able to submit the information," then Commerce "shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." 19 U.S.C. § 1677m(c)(1). This provision is not applicable here because, although

---

questionnaire response, promptly contacted Jiasheng to alert the company of its error, and then permitted Jiasheng to properly re-file and so preserve separate-rate eligibility. *See, e.g.,* Jiasheng's Br., ECF No. 41, at 19. But Jiasheng's own failure to provide a timely explanation for its improper filing attempt precluded any such response. *See infra* note 60. Moreover, Commerce notified Jiasheng of its improper filing promptly after Jiasheng's response was finally filed through the IA ACCESS website. *See Jiasheng Q&V Rejection,* ECF No. 56–1 at P.D. 356 (informing Jiasheng, on January 6, 2012, that its December 12, 2011 filing was rejected as untimely).

[60] *See I&D Mem.* cmt. 45 at 103 ("While Jiasheng argues that it should have been notified that its Q&V questionnaire response was improperly filed because nine other respondents[] were notified of filing deficiencies in their Q&V questionnaire responses, these nine respondents submitted timely Q&V questionnaire responses through IA ACCESS, albeit each of their submissions had certain filing deficiencies. [In contrast,] Jiasheng failed to officially file a Q&V questionnaire response on the record of the case by the deadline for doing so. . . ."); *id.* at 105 ("The nine companies referenced by Jiasheng met the filing deadline. Jiasheng did not.").

[61] *See, e.g.,* Jiasheng's Br., ECF No. 41, at 14; Pl.'s Br. inReply to Def.'s & Pet'r-Pl.'s Opp'n to Pl.'s Mot. for J. on the Agency R. Pursuant to Rule 56.2, ECT No. 71, at 6.

Jiasheng received Commerce's request seventeen days prior to the submission deadline, Jiasheng neither notified Commerce of any anticipated difficulties nor provided any explanation therefor or offered any alternatives.[62]

Similarly, Section 1677m(e) – which provides that Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce]" if the five conditions listed in 19 U.S.C. § 1677m(e)(1)-(5) are met – is inapplicable because Jiasheng did not submit the information requested of it "by the deadline established for its submission," *see* 19 U.S.C. § 1677m(e)(1), and did not demonstrate "that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce]," *see id.* at § 1677m(e)(4).

Finally, Section 1677m(d) requires the agency to promptly inform a party whose submission is determined to be deficient and, "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency . . . ." 19 U.S.C. § 1677m(d). Commerce satisfied this requirement when it informed Jiasheng that its December 12, 2011, IA ACCESS filing was untimely,[63] and reasonably determined that permitting Jiasheng's tardy entry into the investigation was no longer practicable by the time of its late IA ACCESS submission, "in light of the time limits established for the completion of investigations." *See* 19 U.S.C. § 1677m(d); *I&D Mem.* cmt. 45 at 104. Accordingly, Commerce reasonably applied Section 1677e(a) to rely on facts otherwise available when Jiasheng failed to timely submit the information requested of it and did not properly submit such information until a time when its consideration was no longer practicable.

---

[62] *See* Ex. A to *Jiasheng's Feb. 29 Protest,* ECF No. 45 at Doc. 2 (reproducing Jiasheng's initial email to Commerce, sent on November 30, 2011 (i.e., the day after the deadline for filing Q&V questionnaire responses), apologizing for the late submission and inviting the agency official to "check the attachment," without providing any explanation). Accordingly, Section 1677m(c)(1) is not applicable because Jiasheng did not, "promptly after receiving [Commerce's request] for information, notif[y] [Commerce] that [Jiasheng] [was] unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which[Jiasheng] [was] able to submit the information." *See* 19 U.S.C.§ 1677m(c)(1).

[63] *Jiasheng Q&V Rejection*, ECF No. 56–1 at P.D. 356.

II. Commerce's Valuation of Aluminum Frames

A. Background

In its investigation, Commerce calculated surrogate values for the factors of production ("FOPs") used by the two mandatory respondents, Trina Solar and Wuxi Suntech,[64] to produce subject merchandise.[65] Commerce valued all surrogate FOPs using data from Thailand, the primary surrogate market economy country selected for this investigation.[66] Among the FOPs required for producing the subject merchandise are the aluminum frames used to encase photovoltaic cells into solar panels.[67] For the *Final Results* of this investigation, Commerce "valued Trina [Solar]'s and Wuxi Suntech's aluminum frames using Thai HTS categories covering alloyed aluminum profiles."[68] Specifically, Commerce valued Trina Solar's frames using Thai HTS subheading 7604.29.90001 (aluminum alloy non-hollow profiles), based on Trina Solar's verified description of its frames as non-hollow >alloyed aluminum profiles.[69] Because Wuxi Suntech de-

[64] Defendant-Intervenors Changzhou Trina Solar Energy Co., Ltd. ("Trina Solar") and Wuxi Suntech Power Co., Ltd. ("Wuxi Suntech") were "the two companies reporting the largest quantity of solar cell sales to the United States during the [POI]," *Prelim. Results,* 77 Fed. Reg. at 31,309, and were accordingly selected as mandatory respondents in this investigation. *Id.* (unchanged in the *Final Results,* 77 Fed. Reg. at 63,791). *See* 19 U.S.C. § 1677f-1(c)(2)(B) (permitting Commerce to limit its individualized examination to the "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined" if "it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation or review").

[65] Because Commerce treats China as an NME country, the agency determines the home market or "normal" value of merchandise from China by using surrogate market economy data to calculate production costs, including FOPs, and profit. *See* 19 U.S.C.§ 1677b(c)(1). In doing so, Commerce's valuation of the FOPs must 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 [agency]." Id.

[66] *See I&D Mem.* cmt. 4 at 19–20.

[67] *See I&D Mem.* cmt. 16.

[68] *Id.* at 62 & n.233 (noting that "interested party comments regarding the appropriate [surrogate value] for this material input [were] limited to specificity," and that "parties have not commented on contemporaneity, the inclusion or exclusion of taxes and import duties, public availability, etc."); *see I&D Mem.* cmt. 39 at 92 ("It is [Commerce]'s stated practice to choose a surrogate value [pursuant to 19 U.S.C. § 1677b(c)(1)] that represents country-wide price averages specific to the input, which are contemporaneous with the period under consideration, net of taxes and import duties, and based on publicly available, non-aberrational, data from a single surrogate [market economy] country.") (citations omitted).

[69] *Id.* at 62 & n.236 (citing Ex. 74 to Trina Solar's Verification Report). *See also* Ex. 2 (extracts from Thai HTS Chapter 76) to [Trina Solar's] Additional surrogate Info., *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (July 9, 2012), *reproduced in* Def.'s App., ECF No. 56–2 at P.D. 1267 ("*Thai HTS Ch. 76*").

scribed its frames as hollow alloyed aluminum profiles, Commerce valued Wuxi Suntech's frames using Thai HTS subheading 7604.21 (aluminum alloy hollow profiles).[70] SolarWorld argues that these determinations are not supported by substantial evidence, contending that the sole reasonable choice of "best available" information regarding this FOP was to value Trina Solar and Wuxi Suntech's aluminum frames using Thai HTS category 7616.99 (articles of aluminum not elsewhere specified).[71]

To SolarWorld, HTS category 7616.99 is the sole reasonable choice here because of a ruling issued prior to the POI by U.S. Customs and Border Protection ("Customs"), in response to a request by Wuxi Suntech's U.S. affiliate for guidance on classifying its "extruded aluminum frames for solar panels" for U.S. tariff assessment purposes.[72] In this ruling, Customs determined that, based on the description provided by Wuxi Suntech, its aluminum frames would be assessed tariff rates based on USHTS subheading 7616.99.5090 (articles of aluminum, other).[73]

In its preliminary determination, however, Commerce explained that it "is not bound by U.S. Customs classifications for U.S. imports when selecting import values from surrogate countries" but must instead "select a value using the best available information."[74] Commerce determined that HTS subheading 7616.99 was not the best information available regarding the market value of Trina Solar and Wuxi Suntech's aluminum frames because "HTS category 7616.99 is an 'other' category and could reflect imports of numerous types of products"[75] – such as pencil ferrules, textile yarn spools, or spouts and cups for latex collection – that are very different (in nature and

[70] *Id.* at 62 & n.237 (citing Wuxi Suntech's Apr. 25, 2012, submission at resps. to questions 35–36).

[71] SolarWorld's Br., ECF No. 44, at 10–21.

[72] *Id.* at 10 (quoting Ex. 1 (Customs Ruling N139353 Jan. 13, 2011 ("*Customs Ruling N139353*")) to [SolarWorld's] Comments on Trina [Solar]'s 2d Supplemental Surrogate Questionnaire Resp., *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570979, AD Investigation (Apr. 20, 2012), *reproduced in* App. to Pet'r-Pl.'s Br. Supp. Rule 56.2 Mot. for J. on the Agency R.("SolarWorld's App."), ECF Nos. 46 (conf. version) & 47 (pub. version) at Tab 3).

[73] *Customs Ruling N139353*, ECF No. 47 at Tab 3 Ex. 1.

[74] Factor Valuation Mem., *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (May 16, 2012) ("*Prelim. SV Mem.*"), *reproduced in* SolarWorld's App., ECF No. 47 at Tab 16, at 3. *See supra* note 65 (discussing relevant statutory framework).

[75] *Prelim. SV Mem.*, ECF No. 47 at Tab 16, at 3.

value) from the aluminum frame inputs in question.[76] Instead, Commerce determined that because "aluminum window frames are structurally similar to the frames used in modules,"[77] the best information for valuing aluminum frames is provided by Thai HTS category 7610.10 ("aluminum doors, windows and their frames and thresholds for doors"[78]), "which reflects imports of a product most similar to the aluminum frames used [by the respondents]."[79]

In its final determination (reached after considering additional briefing from interested parties), however, Commerce changed course and concluded that HTS category 7610.10 did not in fact provide the best available information for valuing the aluminum frames used to manufacture the subject merchandise, because that category covers items specific to doors and windows rather than the type of aluminum used in solar panel frames.[80] Instead, Commerce determined to value Trina Solar's frames using Thai HTS subheading 7604.29.90 (other aluminum alloy non-hollow profiles), and to value Wuxi Suntech's frames using Thai HTS subheading 7604.21 (aluminum alloy hollow profiles), noting that "both respondents have consistently described their aluminum frames as alloyed aluminum profiles."[81] In continuing to reject SolarWorld's proposal to value the aluminum frames using HTS category 7616.99, Commerce reiterated its prior position that this category did not provide the best available information regarding the market value of the aluminum frames in question because "HTS category 7616 covers a number of inputs, such as ferrules used in pencils, slugs, bobbins, spools, reels, spouts, cups,

[76] *See* Def.'s Opp'n to Pls.' Rule 56.2 Mots. for J. Upon the Agency R., ECF Nos. 54 (conf. version) & 55 (pub. version) ("Def.'s Br."), at 38 (emphasizing that "the descriptions for the sub-categories under HTS 7616.99 indicate that this category includes a number of products that are wholly unrelated to the aluminum frame inputs used by Trina [Solar] and Wuxi Suntech, including 'ferrules used in the manufacture of pencils' (HTS 7616.99.20), 'slugs' (HTS 7616.99.30), 'bobbins, spools, reels and similar supports for textile yarn' (HTS 7616.99.40), and 'spouts and cups for latex collection' (HTS 7616.99.60)") (citing *I&D Mem.* cmt. 16 at 63; *Thai HTS Ch. 76,* ECF No. 56–2 at P.D. 1267 Ex. 2).

[77] *Prelim. SV Mem.*, ECF No. 46 at Tab 16, at 3.

[78] *See I&D Mem.* cmt. 16 at 63 (discussing HTS category 7610.10).

[79] *Prelim. SV Mem.*, ECF No. 46 at Tab 16, at 3.

[80] *See I&D Mem.* cmt. 16 at 63 ("We agree that HTS category 7610.10 ('aluminum doors, windows and their frames and thresholds for doors') does not specify the types of aluminum frames used in solar cell modules."); *id.* at 61 (noting the Petitioner's argument that HTS category 7610.10 should not be used to value respondents' aluminum frames because that category "covers many items unrelated to aluminum frames; items that are not used by respondents"); *id.* (noting Trina Solar's argument that HTS category 7610.10 should not be used to value respondents' aluminum frames because that category "covers specific items related to doors and windows, rather than the type of aluminum used in solar panel frames").

[81] *Id.* at 63; *see Thai HTS Ch. 76*, ECF No. 56–2 at P.D. 1267 Ex. 2.

handles for traveling bags, cigarette cases or boxes, and blinds, which are dissimilar to the aluminum frames used by respondents."[82]

B. Analysis

SolarWorld argues that Commerce's decision to classify Wuxi Suntech and Trina Solar's aluminum alloy frames under Thai HTS category 7604 is not reasonable because 1) Commerce did not choose to calculate surrogate market economy values for the frames by using the same HTS category as that chosen by Customs for U.S. tariff assessment[83]; 2) other Customs rulings purportedly demonstrate that HTS category 7604 "covers base level products of uniform shape that require further working and processing before assembly into finished goods"[84] whereas the frames at issue are not of uniform cross-section and are "fully processed units, ready for simple and final assembly"[85]; and 3) Commerce's determination to value the mandatory respondents' aluminum frames using Thai HTS category 7604 does not follow from the reasons provided by the agency, because category 7616, like category 7604, also covers alloyed aluminum products, such that the alloyed constitution of respondents' aluminum frames cannot serve as a basis for determining to value such merchandise using category 7604 rather than 7616.[86] Each argument is addressed in turn below.

1. *Customs Ruling N139353*

SolarWorld first argues that *Customs Ruling N139353* was the best available information regarding the surrogate market value of the aluminum frames used to produce the subject merchandise. SolarWorld's Br., ECF No. 44, at 10–14.

SolarWorld claims that Commerce has an established practice of relying on Customs classification rulings in similar cases, from which it has here deviated without adequate justification.[87] But while SolarWorld emphasizes that Commerce has often used Customs' U.S. tariff classification rulings to support Commerce's determinations when calculating surrogate FOP values, both in past cases and with

[82] *I&D Mem.* cmt. 16 at 63.

[83] SolarWorld's Br., ECF No. 44, at 10–14.

[84] *Id.* at 15.

[85] *Id.* at 16; *see also id.* at 17–20.

[86] *Id.* at 21.

[87] *See id.* at 12–14. SolarWorld identifies a range of other instances where Commerce has accepted Customs rulings as the "best available information" to establish surrogate FOP values, as well as several other surrogate value determinations in this investigation that have relied on Customs classification rulings for support. *Id.* at 12 n.4.

regard to other surrogate values in this case, Commerce explains that its "practice," in those cases as here, is to "carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case-by-case basis."[88] The fact that Commerce has at times found support for its surrogate value choices in Customs classification rulings does not lead to the conclusion that Commerce must follow such rulings in every case. On the contrary, as this Court has previously held, "[t]he statute's silence regarding the definition of 'best available information' provides Commerce with 'broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis.'"[89]

2. Appropriateness of Thai HTS Category 7604

Next, SolarWorld argues that Thai HTS category 7604 was an unreasonable choice for calculating appropriate surrogate market economy values for respondents' aluminum frames because SolarWorld interprets that category to cover solely products with a "uniform cross-section along their whole length,"[90] which must also "require further working and processing before assembly into finished

[88] Def.'s Br., ECF No. 55, at 40 (alteration omitted) (quoting Issues & Decision Mem., *Certain New Pneumatic Off-the-Road Tires from the [PRC],* A-570–912, ARP 10–11 (Apr. 9, 2013) (adopted by 78 Fed. Reg. 22,513 (Dep't Commerce Apr. 16, 2013) (final results of antidumping duty administrative review)) cmt. 5.A at 13–14). *See also Issues* & Decision Mem., *Certain Preserved Mushrooms from the [PRC],* A-570–851, ARP 04–05 (July 5, 2006) (adopted by 71 Fed. Reg. 40,477 (Dep't Commerce July 17, 2006) (final results and final partial rescission of the sixth administrative review)) cmt. 1 at 3 ("[Commerce] must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the 'best' surrogate value is for each input.") (citing Issues &Decision Mem., *Freshwater Crawfish Tail Meat from the [PRC],* A-570–848, ARP 99–00 (Apr. 22, 2002) (adopted by 67 Fed. Reg. 19,546 (Dep't Commerce Apr. 22, 2002) (notice of final results of antidumping duty administrative review, and final partial rescission of antidumping duty administrative review)) at "Surrogate Value Information – Introduction").

[89] *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (quoting *Timken Co. v. United States,* 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001)). *See also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) ("The Act simply does not say – anywhere – that the [FOPs] must be ascertained in a single fashion. The Act requires that [Commerce's] determination 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.'") (quoting 19 U.S.C. § 1677b(c)(1)).

[90] SolarWorld's Br., ECF No. 44, at 16 (quotation marks and citation omitted).

goods,"[91] whereas respondents' frames require only simple assembly and are not of uniform cross-section by virtue of having been mitered for assembly.[92]

But as Commerce explains, SolarWorld's claim – which relies on Customs rulings applying HTS category 7604 to unfinished aluminum articles[93] – is unpersuasive. The fact that HTS category 7604 has been applied in the past to unfinished articles does not support the conclusion that Thai HTS category 7604 covers solely unfinished merchandise that is different in nature and value from the aluminum frames at issue.[94] "While other HTS categories identify whether they contain finished or unfinished items, HTS category 7604 does not specify whether it contains finished or unfinished aluminum profiles."[95] Moreover, Note 1(b) to Chapter 76 ("Aluminum and Articles Thereof") of the HTS provides that aluminum profiles (such as those covered by category 7604 ("aluminum bars, rods and profiles")) includes products that "have been subsequently worked after production (otherwise than by simple trimming or descaling), provided that they have not thereby assumed the character of articles or products of other headings."[96] This description reasonably supports Commerce's decision that Thai HTS category 7604 covers products most similar in

---

[91] *Id.* at 15.

[92] *Id.* at 16–17.

[93] *See id.* at 15 (relying on three Customs rulings classifying unfinished aluminum extrusions under HTS category 7604). SolarWorld also relies on Note 1(b) to HTS Chapter 76 ("Aluminum and Articles Thereof"), SolarWorld's Br. at 16, which defines "profiles" as "[r]olled, extruded, drawn, forged or formed products, coiled or not, *of a uniform cross section along their whole length*, which do not conform to any of the definitions of bars, rods, wire, plates, sheets, strip, foil, tubes or pipes," USHTS (2012) Ch. 76 Note 1(b) (emphasis added). But that same note also provides that "[t]he expression ['profiles'] also covers cast or sintered products, of the same forms, which have been subsequently worked after production (otherwise than by simple trimming or descaling), provided that they have not thereby assumed the character of articles or products of other headings." *Id.*

[94] *See I&D Mem.* cmt. 16 at 63 ("While [Customs] rulings on the record supporting the use of HTS category 7604 concern unfinished aluminum articles, this does not necessarily mean that HTS category 7604 would only contain unfinished aluminum profiles.").

[95] *Id.*

[96] *See supra* note 93. *See also* 4 World Customs Organization, *Harmonized Commodity Description and Coding System Explanatory Notes* 76.04 (5th ed. 2012) ("These products [i.e., aluminum bars, rods an profiles], which are defined in Notes 1(a) and 1(b) to [Chapter 76], correspond to similar goods made of copper. The provisions of the Explanatory Note to heading 74.07 ["Copper bars, rods, and profiles"] apply therefore, *mutatis mutandis*, to this heading."); id. at 74.07 ("[Products under this heading] may also be worked (e.g., drilled, punched, twisted, or crimped), provided that they do not thereby assume the character of articles or of products of other headings.") (emphasis omitted). During oral argument, counsel for SolarWorld suggested that the frames in question could not reasonably be valued by reference to merchandise covered by Thai HTS category 7604 because such frames have "assumed the character" of products covered by Thai HTS category 7616.99.

nature and value to the aluminum solar panel frames in question, despite the fact that such frames have been mitered, drilled, and notched in the ways described in the record evidence cited by SolarWorld.[97]

3. Alloyed Aluminum Profiles

Finally, SolarWorld argues that Commerce's determination to value the mandatory respondents' aluminum frames using Thai HTS category 7604 does not follow from the reasons provided by the agency, because category 7616, like category 7604, also covers alloyed aluminum products, such that the alloyed constitution of respondents' aluminum frames cannot serve as a basis for Commerce's decision to value such merchandise using category 7604 rather than 7616.[98] But Commerce did not choose HTS category 7604 over category 7616 based simply on the alloyed nature of respondents' aluminum frames, but rather it did so based on its determination that category 7604 covers products most similar in nature and value to the aluminum frames at issue, whereas category 7616.99 covers many diverse products whose natures and values are not reasonably comparable to such frames.[99]

Commerce weighed the available information before it and reasonably determined that the best available information regarding the market value of respondents' aluminum frames is provided by merchandise covered by Thai HTS category 7604 ("aluminum bars, rods, and profiles"), rather than Thai HTS category 7616.99 ("Other articles of aluminum: Other"[100]) because "both [mandatory] respondents have consistently described their aluminum frames as alloyed aluminum profiles"[101] and category 7604 specifically covers alloyed aluminum profiles, whereas category 7616.99 is a catch-all category that covers many diverse aluminum products – such as reels, cups,

---

See Oral Arg. Tr., ECF No. 83, at 17–18. But Commerce reasonably concluded that the simple mitering of the respondents' alloyed aluminum profiles, in preparation for their assembly into solar panel frames, does not transform such profiles to assume the character of the myriad different products covered by the catch-all "other" HTS 7616.99 category. *See I&D Mem.* cmt. 16 at 63.

[97] *See* [SolarWorld's] Rebuttal Br. on Gen. Issues, *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Aug. 6, 2012), *reproduced in* SolarWorld's App., ECF Nos. 46 & 46–1 at Tab 20, at 56–57 (photographs of subject aluminum frames showing worked sections consistent with this description).

[98] SolarWorld's Br., ECF No. 44, at 21.

[99] *See I&D Mem.* cmt. 16 at 63.

[100] *See Thai HTS Ch. 76*, ECF No. 56–2 at P.D. 1267 Ex. 2.

[101] *I&D Mem.* cmt. 16 at 63.

bag handles, and cigarette cases – whose value is not reasonably comparable to that of respondent's aluminum solar panel frames.[102] Because this determination comports with a reasonable reading of the record evidence in this case, it is sustained.

III. Commerce's Determination to Grant Separate-Rate Status to Certain Respondents

As noted above, when investigating merchandise from NME countries, Commerce presumes that all companies operating within such countries are controlled by the government and should accordingly receive a single countrywide rate, unless respondents affirmatively demonstrate both *de jure* (in law) and *de facto* (in fact) autonomy during the POI.[103] Commerce's essential inquiry with regard to whether a particular respondent's circumstances warrant the grant of separate-rate status focuses on whether, "considering the totality of circumstances," the respondents in question "had sufficient independence *in their export pricing decisions* from government control to qualify for separate rates."[104] To that end, the relevant *de jure* autonomy "can be demonstrated by reference to legislation and other governmental measures that decentralize control,"[105] and the relevant *de facto* autonomy "can be established by evidence that [the] exporter sets its prices independently of the government and of other exporters, and that [the] exporter keeps the proceeds of its sales."[106] In both its *de jure* and *de facto* determinations, Commerce may make

---

[102] *Id.*

[103] *See supra* notes 11–13 and accompanying text. With regard to evidentiary support for relevant *de jure* autonomy, Commerce generally looks for evidence such as "(1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies." *I&D Mem.* cmt. 6 at 26 (citing *Sparklers from the[PRC],* 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) (final determination of sales at less than fair value)). With regard to *de facto* autonomy, Commerce examines "(1) whether export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses." *I&D Mem.* cmt. 6 at 31; *see also* Def.'s Br., ECF No. 55, at 44–45 (citing *Silicon Carbide from the [PRC],* 59 Fed. Reg. 22,585, 22,587 (Dep't Commerce May 2, 1994) (final determination of sales at less than fair value) ("*Silicon Carbide from China*")).

[104] *Certain Cut-to-Length Carbon Steel Plate from Ukraine,* 62 Fed. Reg. 61,754, 61,759 (Dep't Commerce Nov. 19, 1997) (notice of final determination of sales at less than fair value) ("*Steel from Ukraine*") (emphasis added).

[105] *Sigma*, 117 F.3d at 1405 (citation omitted).

[106] *Id.* (citation omitted).

reasonable inferences from the record evidence. *See Daewoo Elecs. Co. v. United States,* 6 F.3d 1511, 1520 (Fed. Cir. 1993) (explaining that substantial evidence may include "reasonable inferences from the record") (quotation marks and citation omitted).

Here, recognizing that "within the NME entity, companies exist which are independent from government control to such an extent that they can independently conduct export activities," *I&D Mem.* cmt. 6 at 26 (citation omitted), Commerce granted a number of separate-rate applications in this investigation, finding that "the evidence placed on the record of this investigation by [these respondents] . . . demonstrates both *de jure* and *de facto* absence of government control with respect to each company's respective exports of the merchandise under investigation." *Final Results,* 77 Fed. Reg. at 63,794.

SolarWorld claims that Commerce's determinations to grant some of these SRAs were not supported by substantial evidence. SolarWorld's Br., ECF No. 44, at 22–40.[107] Specifically, SolarWorld challenges (1) Commerce's determination to grant separate-rate status to

[107] As discussed above, *see supra* notes 12–13 and accompanying text, Commerce requires SRAs from NME respondents to rebut the presumption of government control. SolarWorld has no statutory claim to require Commerce to apply this presumption in a particular way, or indeed to require Commerce to apply it at all. The presumption of government control does not appear in the statute. It is a policy espoused by Commerce to effectuate 19 U.S.C. § 1677b(c), *see Commerce Policy 5.1, supra* note 14, which in turn simply grants Commerce permission to disregard NME respondents' actual home market prices where the agency determines that "available information does not permit the normal value of the subject merchandise to be determined under [19 U.S.C. § 1677b(a), i.e., by using "the price at which the foreign like product is first sold . . . for consumption in the exporting [or a third] country]." 19 U.S.C. § 1677b(c)(1). (Not only does the statute omit any mention of a "countrywide rate," it moreover requires Commerce to calculate individual dumping margins "for each known exporter and producer of the subject merchandise." 19 U.S.C. § 1677f-1(c)(1). The only exception to this rule is the "large number" exception, pursuant to which Commerce may limit its investigation to a set of representative respondents and assign to all remaining respondents the "all others" rate (usually an average of the individually-examined respondents' rates). *See id.* at §§ 1677f-1(c)(2); 1673d(c)(5).) While the presumption of NME government control is a policy within Commerce's sound discretion, *see Sigma,* 117 F.3d at 1405–06 (holding that "it was within Commerce's [discretionary] authority to employ a presumption of state control for exporters in a nonmarket economy" because "[t]he antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources") (citing 19 U.S.C.§§ 1677(18)(B)(iv)-(v)), its application must necessarily be as fact-intensive and as flexible as the circumstances demand. *See, e.g., Cope v. Scott,* 45 F.3d 445, 450 (D.C. Cir. 1995) ("[F]lexibility is the essence of [agency] discretion."). See also Jiangsu Changbao Steel Tube Co. v. United States, __ CIT __, 884 F. Supp. 2d 1295, 1311–12 & n.21 (2012) (opining that, although Commerce's NME presumptions were upheld by the decision in *Sigma* in 1997, the issue may be worth revisiting); *Qingdao Taifa Grp. Co. v. United States,* __ CIT __,760 F. Supp. 2d 1379, 1384–85 (2010) (holding that Commerce's reliance on a presumption of government control, without evidence, is incompatible with the agency's duty to support its decision with substantial evidence).

certain companies that either did not disclose the full extent of their ownership or "for whom [China's State-Owned Assets Supervision and Administration Commission ('SASAC')] appears at some point in the chain of ownership,"[108] arguing that these companies categorically failed to rebut the presumption of *de jure* government control;[109] and (2) Commerce's determination to grant separate-rate status to certain companies whose chain of ownership included the SASAC, the Communist Party of China ("CPC"), the National People's Congress ("NPC"), and/or the Chinese People's Political Consultative Conference ("CPPCC"), contending that the record does not support Commerce's findings that these companies operated free from *de facto* "direct government involvement in the activities of the board members or in the day to day operations of the company"[110] during the POI, and claiming that Commerce improperly failed to address "significant arguments and evidence which seriously undermine[] its reasoning and conclusions."[111]

Commerce has requested a voluntary remand to reevaluate the evidence and reconsider the separate rate eligibility of four specific separate-rate recipients whose separate-rate status SolarWorld challenged.[112] As this motion is both unopposed and based on a "substantial and legitimate" concern,[113] Commerce's motion for a voluntary remand to reconsider the separate rate eligibility of these four respondents is granted. SolarWorld's remaining challenges to Commerce's grant of separate rates in this case are addressed in turn below.

---

[108] *I&D Mem.* cmt. 6 at 26 (discussing the Petitioner's (i.e., SolarWorld's) argument); *see id.* at Table of Abbreviations and Acronyms (deacronymizing "SASAC").

[109] *See* SolarWorld's Br., ECF No. 44, at 22–33.

[110] *I&D Mem.* cmt. 6 at 32 (discussing *de facto* findings challenged by SolarWorld).

[111] Pet'r-Pl. [SolarWorld]'s Reply to Resps. to SolarWorld's Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 73 (conf. version) & 74 (pub. version), at 12 (quoting *Altx, Inc. v. United States,* 370 F.3d 1108, 1113 (Fed. Cir. 2004)). *See* SolarWorld's Br., ECF No. 44, at 33–40.

[112] Def.'s Mot., ECF No. 81, at 2.

[113] *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("[E]ven if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position. . . . [I]f the agency's concern is substantial and legitimate, a remand is usually appropriate."). Here, Commerce's stated concern is consistency of agency action with "other pending cases where a similar issue is presented." Def.'s Mot., ECF No. 81, at 3 (citing *Diamond Sawblades Mfrs.' Coalition v. United States,* Ct. No. 13–00078 and *Diamond Sawblades Mfrs.' Coalition v. United States,* Ct. No. 13–00241, and noting that the court granted a similar remand request in Ct. No. 13–00078) (citing *Diamond Sawblades Mfrs.' Coalition v. United States,* Slip Op.14–50, 2014 WL 1673757 (CIT Apr. 29, 2014)).

A. Commerce's De Jure *Determinations*

1. *De Jure* Autonomy of Companies Indirectly Owned by China's SASAC

SolarWorld argues that four of the separate-rate recipients failed to establish *de jure* autonomy from the PRC government because, although none of these companies is *directly* owned by China's SASAC, the SASAC appears at some point in these companies' chain of ownership, such as when the company is owned by other companies that are in turn SASAC-owned.[114] Because this portion of SolarWorld's challenge concerns the same four respondents with respect to whose separate rate eligibility the court has now granted Commerce's voluntary remand request,[115] the court will reserve judgment in this respect until Commerce has had an opportunity to effect its reconsideration and the parties have had an opportunity to submit their comments. In the interest of expedition, however, some clarification may be relevant here.

Specifically, SolarWorld argues that Commerce gave insufficient weight to evidence that Chinese laws permit the government to intervene in Chinese companies' operations in a variety of ways.[116] But by definition, the laws of an NME country will generally permit the government of such country to intervene in the operations of its

[114] *See* SolarWorld's Br., ECF No. 44, at 27 (naming the four separate-rate recipients whose separate-rate status is challenged based on these companies' links to SASAC); *I&D Mem.* cmt. 6 at 26 (noting that "these companies are not directly owned by SASAC," but rather these companies "are owned by SASAC-owned companies or for whom SASAC appears at some point in the chain of ownership"). According to SolarWorld's uncontested description of this institution, the SASAC is "a central governmental body in China" that was "created to represent the state's shareholder interests in state-owned enterprises ('SOEs')." SolarWorld's Br., ECF No. 44, at 27 (quotation marks and citation to SolarWorld's submission to Commerce below omitted). SolarWorld argues that Commerce's findings of *je dure* autonomy with regard to companies owned by other companies that are in turn owned by the SASAC (or for whom SASAC may appear at some point in the chain of ownership) are not supported by substantial evidence because certain provisions of Chinese laws and regulations "confer upon SASAC the authority to appoint or remove the responsible persons of its invested enterprises," *id.* at 30 (quotation and alteration marks and citation omitted); to "nominate candidates for the director of the board or supervisor" and "instruct those directors/representatives to exercise voting rights in accordance with SASAC's instructions," id. (quotation marks and citation omitted); and generally provide investors, including the government, with the power to intervene in companies' operations in a variety of ways. *See id.* at 29–31.

[115] *Compare* SolarWorld's Br., ECF No. 44, at 27, *with* Def.'s Mot., ECF No. 81, at 2.

[116] *See* SolarWorld's Br., ECF No. 44, at 29–32. *See, e.g., id.* at 30 (arguing that Chinese laws and regulations "make clear that there is a *de jure possibility* of a general manager appointed by a board under SASAC's effective control") (quotation marks and citation omitted; emphasis added).

companies.[117] Thus to require NME companies to prove complete legal autonomy would introduce an internal inconsistency into the analysis. Instead, as Commerce explained in this case,[118] the agency determines whether the legal possibility exists to permit the company in question to operate as an autonomous market participant, notwithstanding any residual authority for *potential* governmental intervention,[119] and if so, whether that company should be exempted from the NME system-wide analysis because it in fact managed its production, pricing, and profits as an autonomous market participant.[120] Here, Commerce first determined that, as a matter of *de jure* possibility, the

---

[117] *See* 19 U.S.C. § 1677(18)(A) (defining "nonmarket economy country" as a foreign country that "does not operate on market principles of cost or pricing structures"); *Qingdao Taifa Grp. Co. v. United States,* 33 CIT 1090, 1101, 637 F. Supp. 2d 1231,1243 (2009) ("The statute applies special rules to NME countries because prices and costs are not reliable in valuing goods from NME countries 'in view of the level of intervention by the government in setting relative prices.'") (quoting *ICC Indus., Inc. v. United States,* 812 F.2d 694, 697 (Fed. Cir. 1987)) (additional citations omitted).

[118] Admittedly, Commerce's articulation of its separate-rates analysis has not been a model of clarity. *Cf., e.g., Advanced Tech. & Materials Co. v. United States,* Slip Op. 11–122, 2011 WL 5191016, at *13 (CIT Oct. 12, 2011) ("*Advanced Tech I*") (remanding Commerce's separate-rates analysis because the court could not decide on the reasonableness of Commerce's practice in this regard "without [Commerce]'s full explanation of [this] practice, which [was] not evident from [the] determination [at issue in that case] (or any other, for that matter)"); *Advanced Tech. & Materials Co. v. United States*, __ CIT __,885 F. Supp. 2d 1343, 1350–53 (2012) ("*Advanced Tech II*")(adjudicating challenges to the results of the remand ordered in Advanced Tech I, and opining that Commerce's separate-rates analysis appeared to conflate the *de jure* and *de facto* analyses where Commerce did not clearly articulate the focus of its determination and failed to delineate whether Chinese law created actual restrictions on individual firms' export price-setting autonomy or merely allowed for the possibility thereof).

[119] *See I&D Mem.* cmt. 6 at 26 ("The existence of government ownership does not necessarily indicate *de jure* control over pricing decisions . . . . [A]n absence of *de jure* government control over [export] activities [may be demonstrated] through the absence of restrictive stipulations associated with the companies' business licenses and export certificates of approval
. . . ."); *cf., e.g.,* Issues & Decision Mem., *Certain Circular Welded Carbon Quality Steel Line Pipe from [the PRC],* A-570–935, AD Investigation (Mar. 23, 2009) (adopted by 74 Fed. Reg. 14,514 (Dep't Commerce Mar. 31, 2009) (final determination of sales at less than fair value)) cmt. 11 at 20 (granting a separate-rate application, over petitioners' objections, because there was credible record evidence that the respondent in question was both legally permitted to operate autonomously in managing its production and pricing, and in fact did so operate, and explaining that "[t]he information submitted by petitioners addresse[d] only *speculative and potential control* by SASAC over [this respondent]") (emphasis added). When the *de jure* analysis is properly construed in this way, it is not clear that Commerce regularly conflates its *de jure* and *de facto* government control analyses, as SolarWorld suggests. *See* SolarWorld Br., ECF No. 44, at 32–33 (relying on *Advanced Tech II,* __ CIT __, 885 F. Supp. 2d 1343); *see also supra* note 118 (providing context for *Advanced Tech II*).

[120] *See I&D Mem.* cmt. 6 at 26 ("[Commerce] has recognized, over time, that within the NME entity, companies exist which are independent from government control to such an

respondents in question *could have* acted as sufficiently autonomous market participants to deserve separate rates; then, having made this threshold determination, Commerce determined that the evidence in the record reasonably supported the conclusion that these respondents in fact *did* act sufficiently autonomously in terms of managing production and profit and setting prices during the POI.[121]

Commerce requests and is granted permission to reconsider the record evidence regarding whether certain respondents were sufficiently autonomous from the Chinese government in the conduct of their export activities as to qualify for rates separate from the PRC-wide entity. In doing so, Commerce need not require proof of complete freedom from any mere legal possibility of government control.

2. *De Jure* Autonomy of Companies that Did Not Disclose the Full Extent of their Ownership

SolarWorld also argues that Commerce's decision to grant separate-rate status to certain respondents that did not provide exhaustive details of their indirect ownership was unreasonable and arbitrary in light of Commerce's prior practice.[122] Specifically, SolarWorld argues that a number of respondents who received separate rates "revealed that they were ultimately held by a legal entity, such as a holding company or limited partnership," but then "failed to disclose the

---

extent that they can independently conduct export activities.") (citing *Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries,* 69 Fed. Reg. 77,722 (Dep't Commerce Dec. 28,2004) ("*Separate-Rates Practice*")). *See also Separate-Rates Practice,* 69 Fed. Reg. at 77,723 ("[Commerce's separate-rates] test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level.") (citations omitted); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States,* 25 CIT 1150, 1174, 178 F. Supp. 2d 1305, 1331 (2001) ("The essence of a separate rates analysis is to determine whether the exporter is an autonomous market participant, or whether instead it is so closely tied to the communist government as to be shielded from the vagaries of the free market.") (footnote omitted).

[121] *See Prelim. Results,* 77 Fed. Reg. at 31,316–17 (unchanged in the *Final Results,* 77 Fed. Reg. at 63,794); *I&D Mem.* cmt. 6 at 26–27, 31–33. Thus in this case, the path of Commerce's analysis may be reasonably discerned. *See, e.g., I&D Mem.* cmt. 6 at 27 (finding a permissive *de jure* space for export pricing autonomy by emphasizing evidence that the PRC government's reach did not extend "as a matter of law to such day-to-day activities as export pricing of the companies in question"); *id.* at 32 ("[Commerce] issued supplemental questionnaires to numerous separate rate respondents and reviewed the respondents' SRAs and supplemental questionnaire responses and found no evidence of direct government involvement in the decisions of the board members, the selection of management, or in the operations of any respondents granted a separate rate in the [*Prelim. Results,* 77 Fed. Reg. at 31,316–17].").

[122] SolarWorld's Br., ECF No. 44, at 24–27.

controlling shareholders of such entities."[123] SolarWorld contends that Commerce must deny separate-rate status to respondents "who failed to report the ultimate owner(s) of their parent company because the ultimate ownership of the company could point to relevant government control."[124]

In response, Commerce explains that the weight of the evidence on record supports the agency's determination that these separate-rate recipients operated their export activities independently of government control during the POI.[125] Commerce emphasizes that the agency is neither required, nor permitted by its resource constraints, to exhaustively detail every aspect of a company's indirect ownership when the evidence is otherwise sufficient to reasonably find the existence of relevant autonomy over export activities.[126]

For example, Trina Solar – a Defendant-Intervenor in this action and one of the respondents whose separate-rate status is challenged by SolarWorld on grounds of failure to provide exhaustive details of ultimate ownership[127] – submitted evidence, which was verified by Commerce, that its parent company is a foreign entity incorporated outside of China,[128] in the Cayman Islands, which "has been listed on

[123] *Id.* at 24. *See also id.* ("The companies that failed to provide sufficient evidence to rebut the presumption of government control by not providing ownership information are Trina [Solar]; Chint Solar; Shanghai BYD; Solarone Qidong; Solarone Hong Kong; Motech; ten-Ksolar; Zhejiang Jiutai; CEEG Shanghai; Jatison Solar; CSG PV; CEEG Nanjing; Ningbo Komaes; and China Sunergy.").

[124] *I&D Mem.* cmt. 6 at 31 (discussing SolarWorld's argument in this regard).

[125] *Id.* at 31–33.

[126] *Id.;* Def.'s Br., ECF No. 55, at 47; Oral Arg. Tr.,ECF No. 83, at 36–37 (emphasizing that Commerce requested and received "substantial information from these companies regarding their owners, their direct owners and the owners of those companies[,] and with respect to companies that are listed on public exchanges or owned by companies that are listed Commerce did ask for some information regarding shareholders [but it did not] obtain information regarding every single shareholder from every single entity that might be in that [ownership] chain," and arguing that doing the latter was "not a requirement here" because "at some point Commerce has to draw the line"); *id.* at 37 (noting that, for "most companies," Commerce requested information regarding "the top ten shareholders"); *id.* (arguing that requiring Commerce to exhaustively investigate every single entity in a respondent company's ownership chain, no matter how far removed, would "require Commerce to conduct an inquiry that is far more robust than Commerce could in fact conduct given the time constraints and administrative burdens that it has").

[127] *See supra* note 123 (quoting SolarWorld's list of separate-rate recipients challenged on this ground).

[128] In Commerce's practice, a full separate-rate analysis is generally considered unnecessary for wholly foreign-owned companies. *See, e.g., Petroleum Wax Candles from the [PRC],* 72 Fed. Reg. 52,355, 52,356 & n.3 (Dep't Commerce Sept. 13,2007) (final results of anti-dumping duty administrative review).

the New York Stock Exchange since December 2006."[129] Ownership of this parent company was in turn revealed to be "in two forms: ordinary shares and ADRs [American Depository Receipts] (one ADR is the equivalent of 50 ordinary shares),"[130] and Commerce examined the ordinary share ownership, which was tracked by the parent company's "secretary company," and the ownership of ADRs by institutional shareholders, which was "tracked by Ipreo, a market intelligence company, at the beginning of the POI, and by Bank of New York Mellon at the end of the POI."[131] Although Trina Solar was unable to identify the ultimate shareholders of its parent company's largest shareholder, and noted that "holders of ADRs are not obligated to identify their individual shareholders,"[132] Commerce found that the evidence was sufficient to conclude that there was no "Chinese government ownership among [Trina Solar's parent company's] top 75 institutional shareholders or among the largest ordinary shareholders, which together represent approximately 70 percent of all outstanding shares of [Trina Solar's publicly traded non-Chinese parent company]."[133]

In another example, Hanwha Solarone (Qidong) Company, Limited ("Hanwha") – another Defendant-Intervenor/respondent in this action whose separate-rate status SolarWorld challenges on grounds of failure to provide exhaustive details of ultimate ownership[134] – submitted evidence that, during the POI, it was wholly owned by a company domiciled in Hong Kong, which was in turn wholly owned by a company domiciled in the British Virgin Islands, which was in turn wholly owned by a company registered in the Cayman Islands and listed on the NASDAQ exchange.[135]

---

[129] Verification of the Sales & Factors of Prod. Info. Submitted by [Trina Solar], *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (July 19, 2012) ("Trina Solar Verif. Rep."), reproduced in App. to Def.-Intervenor [Trina Solar]'s Resp. to Pet'r-Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 68 & 68–1 (conf. version) & 70 (pub. version), at Tab 5, at 5.

[130] *Id.* at 6.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Hanwha is referred to in SolarWorld's brief as "Solarone Qidong" and "Solarone Hong Kong." *See supra* note 123 (quoting SolarWorld's list of separate-rate recipients challenged on this ground); [Hanwha's] Resp. Br. in Opp'n to Pet'r-Pl.'s Rule 56.2Mot. for J. on the Agency R., ECF No. 63 ("Hanwha's Br."), at 1 n.1 (explaining name discrepancy).

[135] Hanwha's Br., ECF No. 63, at 2–3 (quoting [Hanwha's] Separate Rate Application, *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (Jan. 17, 2012), *reproduced in* Ex. 1 to App. to [Hanwha's Br.], ECF No. 65 at Doc. 1 Ex. 1, at 8–9).

The Government maintains that, as with Trina Solar and Hanwha, Commerce obtained sufficient information regarding the ownership of each separate-rate recipient in this investigation to reasonably conclude that the Chinese government did not exercise control over these companies' export activities during the POI.[136] And while SolarWorld speculates that, notwithstanding all this evidence, the Chinese government is nevertheless exerting control over these companies through ownership of shares at least two steps removed from the companies themselves (e.g., in the case of Trina Solar, shares invested in a company which in turn holds shares in a company which ultimately owns the company in question), Commerce has determined that the weight of the evidence suggests the contrary conclusion, and SolarWorld has not pointed to any specific non-speculative evidence to cast doubt upon this determination.[137] Accordingly, because Commerce has considered and relied upon sufficient evidence to reasonably support the agency's conclusion that the respondents in question were sufficiently autonomous from government control over their export activities to qualify for a separate rate, and because SolarWorld presents no specific evidence to impugn these reasonable determinations, Commerce's findings with regard to these separate-rate recipients are supported by substantial evidence.

SolarWorld also argues that Commerce's decision to grant separate-rate status to these respondents was arbitrary because, in the past, Commerce has denied such status to respondents who submitted ownership evidence that was later contradicted at verification.[138] But the issue presented here is not analogous to the prior decisions on which SolarWorld relies because the respondents in those cases had submitted ownership information that was contradicted at verifica-

[136] *See supra* note 126; *see also* Oral Arg. Tr., ECF No. 83, at 36 (emphasizing that, for each separate-rate recipient, Commerce received "documentation of price negotiations and other interactions with customers . . .; bank statements, financial documents, articles of incorporation, [and, in many instances,] documentation of ownership by foreign entities").

[137] *See* SolarWorld's Br., ECF No. 44, at 25 (speculating that "it is impossible to fully explore the issue of control unless all of a company's government ownership is revealed" but identifying no evidence to impugn the sufficiency of the evidence considered by Commerce when inferring that the likelihood of indirect Chinese government control of these companies was too small to warrant a fully exhaustive inquiry into indirect ownership, beyond the extensive inquiry already performed by the agency).

[138] *See id.* at 26 (relying on Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from the [PRC],* A-570–893, NSR 2/06–7/06 (Dec. 17, 2007) (adopted by 72 Fed. Reg. 72,668 (Dep't Commerce Dec. 21, 2007) (final rescission of antidumping duty new shipper review)) ("*Shrimp from China New Shipper*") cmt. 1; Issues & Decision Mem., *Porcelain-on-Steel Cooking Ware from the [PRC],* A-570–506, ARP 03–04 (Apr. 21, 2006) (adopted by 71 Fed. Reg. 24,641 (Dep't Commerce Apr. 26, 2006) (notice of final results of antidumping duty administrative review)) ("*Cooking Ware from China*") cmt. 1).

tion, whereas here there was no similar impeachment of any of the evidence submitted by the challenged separate-rate recipients.[139]

In both of the prior cases upon which SolarWorld's argument relies, the record revealed material discrepancies between the information initially provided by the respondents and that ultimately obtained at verification.[140] These material discrepancies impugned the reliability of evidence that had been previously accepted to preliminarily rebut the presumption of government control. Finding such evidence to have been discredited, Commerce found that the record did not contain reliable evidence to rebut the presumption of government control, and accordingly denied those respondents separate-rate status.[141]

Here, on the other hand, the record contains credible evidence – which was not subsequently invalidated or discredited – of a *de jure* space for the respondents' *de facto* autonomy from government control. Based on this evidence, Commerce concluded that the presumption was rebutted.[142] Specifically, the respondents "placed on the record laws, regulations, business licenses, export licenses, and other

[139] *Cf. Shrimp from China New Shipper* cmt. 1 at 7–9 (detailing the information that was discredited at verification, including information relating to the respondent's "salesnegotiation and sales execution process"); *Cooking Ware from China* cmt. 1 at 4–5 (explaining that the respondent in that case provided evidence at verification that contradicted the evidence it had previously submitted, and that verification produced evidence of a material undisclosed affiliation, which the respondent had concealed by refusing to answer Commerce's repeated requests for information).

[140] *See supra* note 139.

[141] *Compare Shrimp from China New Shipper* cmt. 1 at 10 ("[Commerce] found at verification information contrary to [the respondent's] description of the sales negotiation and sales execution process . . . . As a result, [this respondent] has not affirmatively proven that it is free from *de facto* government control . . . ."), *and Cooking Ware from China* cmt. 1 at 5 ("[The respondent in question] did not disclose the existence of an affiliate despite [Commerce]'s numerous requests both in its questionnaires and at verification to identify any affiliates . . . . Because [this respondent] chose not to disclose the existence of this affiliate, and it was not discovered until the middle of [the respondent]'s one-week verification, [Commerce] was not able to fully question and consider this affiliate's relationship with the PRC government through written questions and at verification."); *id.* at 6 ("[Because this respondent] withheld information requested by [Commerce] and significantly impeded the proceeding by not providing accurate or complete responses to [Commerce]'s questions regarding the identity of the respondent's affiliates[,] . . . we find that [this respondent] did not affirmatively demonstrate that it operates free of government control."), *with supra* notes 126 and 136 and accompanying text (detailing the extent of unimpeached evidence relied on by Commerce in granting separate-rate status to the challenged recipients).

[142] *See Prelim. Results,* 77 Fed. Reg. at 31,316–17 (discussing the evidence). Because a presumption is not evidence, *see, e.g., Amanda Foods (Vietnam) Ltd. v. United States,* __ CIT __, 714 F. Supp. 2d 1282, 1295 (2010) (discussing relevant case law analyzing the evidentiary status of presumptions) (quoting, *inter alia, A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 1037 (Fed. Cir. 1992) ("[A]presumption compels the production

documents demonstrating [sufficient] *de jure* independence from the government on the relevant issues"[143] to satisfy Commerce's threshold inquiry, and therefore to reasonably support Commerce's decision to move on to consider whether these companies in fact availed themselves of the autonomy that these legal documents appear to permit. Given these circumstances, Commerce reasonably determined that its threshold *de jure* criteria were satisfied by the challenged separate-rate recipients who submitted sufficient proof of legal autonomy without providing even more extensive information regarding their ultimate chain of ownership (e.g., not reporting some far-removed ultimate owner(s) of their respective parent companies), and the agency moved on to examining the evidence of these companies' *de facto* autonomy. As Commerce explained, "[a]bsent evidence of *de facto* control over a company's export activities, even if one of the respondents in question had identified the government among one of its ultimate owners, government ownership alone would not have warranted denying the company separate rate status."[144] Accordingly, Commerce's challenged *de jure* determinations with regard to these respondents are also sustained.[145]

---

of [a] minimum quantum of evidence from the party against whom it operates, nothing more. In sum, a presumption is not evidence.") (citation omitted)), the presence of any credible rebutting evidence dispenses with the presumption, such that only *conflicting evidence* may now weigh against the evidence submitted in support of separate-rate eligibility. Put differently, the question presented here concerns the reasonableness of Commerce's weighing of the totality of reliable evidence before it, whereas that presented in *Shrimp from China New Shipper* and *Cooking Ware from China* concerned Commerce's resort to a presumption in the absence of any reliable evidence at all.

[143] *I&D Mem.* cmt. 6 at 31 (citing *Prelim. Results*, 77 Fed. Reg. at 31,317).

[144] *I&D Mem.* cmt. 6 at 31–32. *See also id.* at 33 (quoting *Structural Steel Beams from the [PRC],* 66 Fed. Reg. 67,197, 67,199 (Dep't Commerce Dec. 28, 2001) (notice of preliminary determination of sales at less than fair value and postponement of final determination) ("As stated in [*Silicon Carbide from China,* 59 Fed. Reg. at 22,587], ownership of the company by a state-owned enterprise does not require the application of a single rate.") (unchanged in the final determination, 67 Fed. Reg. 35,479 (Dep't Commerce May 20, 2012) (notice of final determination of sales at less than fair value))); *id.* at 32 (explaining that Commerce "found no evidence of direct [*de facto*] government involvement in the decisions of the board members, the selection of management, or in the operations of any respondents granted a separate rate in the [*Prelim. Results,* 77 Fed. Reg. at 31,316–17]").

[145] SolarWorld also makes a policy argument that the effect of denying separate rates when ownership information proves unverifiable, as in *Shrimp from China New Shipper* and *Cooking Ware from China,* combined with permitting respondents to receive separate rates without complete ownership disclosure, will be to encourage respondents to withhold relevant information. SolarWorld's Br., ECF No. 44, at 27. But this argument overlooks a crucial distinction between the facts of this case and those of *Shrimp from China New Shipper* and *Cooking Ware from China*. In those prior cases, the respondents in question either submitted contradictory information in response to Commerce's specific requests, or

B. Commerce's De Facto *Autonomy Determinations*

SolarWorld additionally argues that Commerce improperly granted separate-rate status to certain respondents whose senior managers and/or board directors held membership or positions in certain state-owned enterprises or governmental entities during the POI. Essentially, SolarWorld believes that the potential for governmental control through such managers or board directors categorically precludes a finding that such companies in fact acted autonomously in conducting their own export activities.[146] The core of SolarWorld's argument is that these respondents failed to establish *de facto* autonomy because 1) some of these companies' shareholders are SOEs (i.e., wholly state-

---

else withheld information specifically requested of them. *See, e.g., Shrimp from China New Shipper* cmt. 1 at 7–8 (explaining that the respondent in question had withheld ownership information that had been specifically and repeatedly requested by Commerce, which then ultimately did not come to light until verification); *id.* at 8 ("[Commerce] found at verification information contrary to [the separate-rate applicant's] description of the sales negotiation and sales execution process . . . ."); *Cooking Ware from China* cmt. 1 at 5 (explaining that the respondent in question "did not disclose the existence of an affiliate despite [Commerce]'s numerous requests both in its questionnaires and at verification to identify any affiliates . . . ."); *see also I&D Mem.* cmt. 6 at 32 n.117 (noting these distinctive facts). Here, by contrast, the challenged separate-rate recipients neither withheld any information in response to Commerce's follow-up questionnaires nor submitted any information that was later discredited. Rather, Commerce concluded that the evidence submitted in support of these respondents' claims to *de jure* autonomy during the POI was sufficient for that determination, and did not seek any additional information. This in no way limits Commerce's authority to request relevant information and respond appropriately to a respondent's failure to provide such information. Accordingly, this is not a case that will "incentivize respondents to withhold information from the agency completely," SolarWorld Br., ECF No. 44, at 27, because this matter does not affect respondents' incentives to provide the information requested of them.

[146] *See* SolarWorld's Br., ECF No. 44, at 34–40 (relying on [SolarWorld's] Case Br. on Gen. Issues, *[CSPC], Whether or Not Assembled into Modules, from the [PRC],* A-570–979, AD Investigation (July 30, 2012) ("*SolarWorld's Case Br.*"), *reproduced in* SolarWorld's App., ECF Nos. 46 & 47 at Tab. 19, at 88–114). Cf., e.g., SolarWorld's Case Br., ECF Nos. 46 & 47 at Tab. 19, at 93 (arguing that a certain respondent failed to demonstrate relevant *de facto* autonomy because a manager who also held positions within the parent state-owned enterprise had "the legal authority" to influence the company's decisions); *id.* at 96 (arguing that another respondent failed to demonstrate relevant *de facto* autonomy because its Articles of Association "authorize" decision-making by persons who may also hold positions in state-owned enterprises); *id.* at 99 (arguing the same with regard to another respondent); *id.* at 102–03 (arguing that companies whose senior managers and board members include members of the NPC should be categorically denied separate-rate status because "NPC members are government officials and *can* control a company's export activities when in senior management positions of a company") (emphasis added); *id.* at 103–05 (arguing that certain respondents failed to demonstrate relevant*de facto* autonomy because these companies employ high-level officials who are members of the NPC); *id.* at 106–13 (arguing that certain respondents failed to demonstrate relevant *de facto* autonomy because some of their company officials are also government officials, implying the *possibility* of effective government control of these companies' export activities through these officials).

owned companies), with the power to recommend or appoint the company's board members and senior managers; and 2) some of these companies' senior managers or board directors contemporaneously also held membership or positions within organizations such as the CPC, NPC, and/or CPPCC.[147] But these facts alone are not dispositive of the *de facto* autonomy inquiry, because they speak solely to the *possibility* for governmental control over export activities through these persons, not whether such control was in fact reasonably likely to have been exercised during the POI.

Fundamentally, SolarWorld's arguments regarding the *de facto* autonomy of the challenged separate-rate recipients suffer from the same analytical defect as its arguments regarding *de jure* autonomy – namely that, in an NME country, there will usually be state involvement and *authority* to intervene in commercial affairs.[148] But this fact alone does not necessarily lead to the conclusion that all NME producers and exporters should be categorically treated as in fact setting their prices according to some centralized strategy.[149]

Here, each of the challenged separate-rate recipients submitted evidence that "(1) [t]heir [export prices] are not set by, and are not subject to, the approval of a governmental agency; (2) they have authority to negotiate and sign contracts and other agreements; (3) they have autonomy from the government in making decisions regarding the selection of management; and (4) they retain the proceeds of their export sales and make independent decisions regarding the disposition of profits or financing of losses."[150] Moreover, "[a]ll of the

[147] *See* SolarWorld's Br., ECF No. 44, at 34–40 (relying on *SolarWorld's Case Br.,* ECF Nos. 46 & 47 at Tab 19); *SolarWorld's Case Br.*, ECF Nos. 46 & 47 at Tab 19, at 89–113.

[148] *Cf., e.g., Advanced Tech II,* __ CIT at __, 885 F. Supp. 2d at 1355 ("'[G]overnmental control' in the context of the separate rate test appears to be a fuzzy concept . . . since a 'degree' of it can obviously be traced from the controlling shareholder [which is often a state-owned enterprise], to the board, to the general manager, and so on along the chain to 'day-to-day decisions of export operations,' including terms,financing, and inputs into finished product for export."); *see also id.* at 1353–54 n.9 ("Commerce concluded that 'SASAC *solely* provides oversight and is not intended to *direct* day-today business operation' (italics added), but how can that be the case if any SASAC-appointed/nominated 'responsible person' or director or even manager within SASAC's 'invested enterprises' (including 'a company with State-owned equity' . . .) has had a hand or vote that results in 'guiding' or 'supervising' or 'overseeing' any of such enterprise's operational activities including its export activities? That is, where does'oversight' end and 'day-to-day business operation' begin, or does the exception swallow the rule?").

[149] *See supra* note 120 (quoting relevant authorities).

[150] *Prelim. Results,* 77 Fed. Reg. at 31,316–17 (unchanged in the *Final Results,* 77 Fed. Reg. at 63,794); *I&D Mem.* cmt. 6 at 31 (noting that all of the challenged separate-rate recipients "provided information demonstrating an absence of *de facto* control of their export activities") (referencing the *Prelim. Results*).

separate rate respondents at issue reported that neither SASAC nor the government was involved in the activities of the board of directors."[151]

Upon examination of this record, Commerce concluded that, despite SolarWorld's challenges to the agency's analysis in the Preliminary Results, "the evidence placed on the record of this investigation by the [s]eparate [r]ate [a]pplicants that were granted separate rate status in the Preliminary Determination [continues to demonstrate] both *de jure* and *de facto* absence of government control with respect to each company's respective exports of the merchandise under investigation." Final Results, 77 Fed. Reg. at 63,794. "The record does not show that the membership or position of senior managers or board directors of certain [separate-rate applicants] in [organizations such as the CPC, CPPCC, or NPC] resulted in a lack of autonomy on the part of the respondent[s] to set prices, negotiate and sign agreements, select management, or decide how to dispose of profits or financing of losses," *I&D Mem.* cmt. 6 at 35, and "there is no record evidence of PRC government direction with respect to the day-to-day export related operations of any of the companies with senior board members or managers in the CPC, CPPCC, [or] NPC . . . ." *Id.* at 36.

Our standard of review does not require more. Commerce has reasonably exercised its responsibility for investigating, questioning, and verifying the respondents' submitted data and evidence,[152] as well as for determining the appropriate treatment for producers and exporters from NME countries.[153] Because Commerce possesses both expertise and relevant first-hand knowledge – sending follow-up questionnaires and conducting on-sight verification as needed – the court will not reweigh the evidence before the agency.[154] Here, Commerce relied on certifications from the companies, each of which

[151] *I&D Mem.* cmt. 6 at 27 (footnote omitted).

[152] *See* 19 U.S.C. §§ 1673b(b), 1673d(a); *see also Max Fortune Indus. Ltd. v. United States,* __ CIT __, 853 F. Supp. 2d 1258, 1263 (2012) ("In an antidumping administrative review, Commerce is the expert factfinder . . . .") (citing *Nippon Steel,* 458 F.3d at 1358); *British Steel PLC v. United States,* 20 CIT 663, 702, 929 F. Supp. 426, 457 (1996) ("As the fact-finder in these complex investigations, Commerce is charged with surveying the record and making a determination; the agency's decision need not be the most correct, nor the one the Court would have reached had the Court considered the evidence *de novo*.")(citations omitted).

[153] *See* 19 U.S.C. § 1677b(c). Notably, the antidumping statute exempts Commerce's NME designations from judicial review, *id.* at § 1677(18)(D), further supporting Commerce's general authority with regard to NME matters.

[154] *Cf., e.g., Usinor Sacilor v. United States,* 215 F.3d 1350 (Fed. Cir. 1999) (Table) ("Our review of the record indicates that the [Court of International Trade] evaluated and weighed the evidence in order to make its own [factual] determination. . . . That was error. It was not proper for the court to conclude that evidence that it considered 'persuasive'

affirmed that they independently managed their own sales negotiations and set their own export prices.[155] As needed, Commerce sent follow-up inquiries, all of which were answered to Commerce's satisfaction.[156] The agency's conclusion was that, despite the systemic cross-contamination of personnel between the government and the commercial sector within the PRC, these companies exhibited sufficient localized control over their own export activities during the POI to warrant individualized rates.[157]

Beyond emphasizing the legal and practical *possibility* that the company officials who are also in some capacity government officials *could have* influenced these companies' export sales negotiations during the POI,[158] SolarWorld has not pointed to any specific evidence that, in influencing the companies' operations pursuant to their duties as *company* officials (including through the selection of management and preparation of profit distribution plans), these persons were directing the companies' export pricing decisions based on the will of the PRC government.[159] Commerce concluded that, on the

---

eclipsed contrary evidence that Commerce thought persuasive.") (citing *Trent Tube Div., Crucible Materials Corp. v. United States,* 975 F.2d 807, 815 (Fed. Cir. 1992) (noting that a court reviewing a factual determination for substantial evidence does not reweigh the evidence or reconsider questions of fact anew); *Henry,* 902 F.2d at 951 (noting that, when reviewing agency determinations for, *inter alia*, whether such determinations are supported by substantial evidence, "[i]t is not for this court to reweigh the evidence before the [agency]")).

[155] *See supra* note 150 and accompanying text (quoting relevant text from Commerce's determinations in this proceeding).

[156] *See Prelim. Results,* 77 Fed. Reg. at 31,317 ("[Commerce] has examined the record, including responses to supplemental questionnaires that were issued to a number of separate rate applicants, and . . . determined to grant these companies a separate rate.") (unchanged in the *Final Results,* 77 Fed. Reg. at 63,794).

[157] *See id.* In this case, where Commerce limited its individualized examination pursuant to the "large number" exception, *see* 19 U.S.C. § 1677f-1(c)(2), the individualized rate for all non-individually examined separate-rate recipients was the "all others" rate, *see* 19 U.S.C. § 1673d(c)(5). *See Prelim. Results,* 77 Fed. Reg. at 31,318 (unchanged in the *Final Results,* 77 Fed. Reg. at 63,795).

[158] *See supra* notes 146 and 147 and accompanying text (discussing SolarWorld's specific arguments regarding *de facto* autonomy).

[159] SolarWorld argues that requiring it to produce such evidence in challenging Commerce's grant of separate-rate applications would impermissibly shift the burden of proof to the domestic industry, when the burden is properly on the respondents to rebut the presumption against their autonomy. *See, e.g.,* SolarWorld Br., ECF No. 44, at 33; *Sigma,* 117 F.3d at 1406 ("[B]ecause exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control.") (quoting *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production should belong to the party in possession of the necessary information.") (citation omitted)). But, as previously mentioned, *see supra* note 142 (discussing the evidentiary status of presumptions), the submission of relevant credible

evidence presented, it was more likely that these companies had autonomy over their own export price negotiations, and that grouping them within the countrywide entity would be accordingly inappropriate.[160] Commerce credited evidence, which was never persuasively contradicted, that the companies themselves negotiate and set their U.S. export prices, notwithstanding the dual roles played by some company officials as both company managers and members of government, and the agency concluded that these companies negotiated and set their U.S. export prices during the POI separately, both from each other and from any centralized countrywide mind. This conclusion is at least as reasonable as the one SolarWorld suggests Commerce should have reached instead – i.e., that the relatively low-level government officials holding high-level positions within these companies were in fact all conduits effectuating a countrywide governmental price-setting scheme.

Accordingly, because Commerce's conclusions regarding these companies' *de facto* autonomy to set export prices during the POI are consistent with a reasonable reading of the record presented here, these conclusions are supported by substantial evidence, and are therefore sustained.

CONCLUSION

For all of the foregoing reasons, this matter is remanded for reconsideration of the separate rate eligibility of the four respondents named in Commerce's request for voluntary remand, consistent with

---

evidence (i.e., evidence that is both relevant to the presumed fact and not subsequently discredited) disposes of the presumption, which is not evidence and only operates in the absence of relevant credible evidence. Here Commerce relied on evidence submitted by the challenged separate-rate recipients, and the investigation did not reveal – and SolarWorld does not point to – any specific evidence to the contrary.

[160] After all, the purpose of an antidumping duty order is solely to encourage exporters to sell (and importers to buy) at fair prices. *See, e.g., Ad Hoc Shrimp Trade Action Comm. v. United States,* __ CIT __, 925 F. Supp. 2d 1367, 1373 (2013) (noting that "the antidumping deposit [imposed upon publication of an AD order, *see* 19 U.S.C. § 1673e(a)(3)] merely serves to provide an incentive to ensure fair export prices"). The pertinent inquiry, therefore, is who actually sets the export prices? SolarWorld quotes a statement made by Commerce, in a 1997 investigation of merchandise from Ukraine, to suggest that "[t]he purpose of applying one countrywide rate in an NME context is to prevent an NME government from later circumventing an antidumping order by controlling the flow of subject merchandise through exporters which have the lowest margin." SolarWorld's Br., ECF No. 44, at 23 (quoting *Steel from Ukraine,* 62 Fed. Reg. at 61,759). This is true as far as it goes. But in the same document, Commerce explains that the essence of its separate-rate analysis is whether, "considering the totality of circumstances," the respondents in question "had sufficient independence *in their export pricing decisions* from government control to qualify for separate rates." *Steel from Ukraine,* 62 Fed. Reg. at 61,759 (emphasis added).

this opinion. Commerce's *Final Results* are sustained against all other challenges presented in this consolidated action. Commerce shall have until February 18, 2015, to file its remand results. The parties shall have until March 4, 2015, to file their comments, and until March 18, 2015, to file any replies.

It is SO ORDERED.

Dated: November 20, 2014
New York, NY

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

Slip Op. 14–135

ALBEMARLE CORP., Plaintiff, and NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CALGON CARBON (TIANJIN) CO., LTD., CALGON CARBON CORP. and NORIT AMERICAS INC., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 11–00451

[Affirming a redetermination issued upon remand in an action contesting the final results of an administrative review of an antidumping duty order on certain activated carbon from the People's Republic of China]

Dated: November 24, 2014

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff Albemarle Corp. and plaintiff-intervenor Ningxia Huahui Activated Carbon Co., Ltd. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, and *Sarah M. Wyss*.

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, DC, for plaintiff Shanxi DMD Corp. With him on the brief were *John J. Kenkel* and *J. Kevin Horgan*.

Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for plaintiffs Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd. and Cherishmet Inc. With him on the brief were *Mark E. Pardo*, *Andrew T. Schutz*, and *Kavita Mohan*.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Devin S. Sikes*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Craig A. Lewis, Hogan Lovells U.S. LLP, of Washington, DC, for defendant-intervenor Calgon Carbon (Tianjin) Co., Ltd.

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

OPINION

Stanceu, Chief Judge:

This consolidated action arose from judicial challenges to a final determination that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in an antidumping duty proceeding.[1] The contested determination (the "Final Results") concluded the third administrative review of an antidumping duty order (the "Order") on certain activated carbon (the "subject merchandise") from the People's Republic of China ("China" or the "PRC"). *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review*, 76 Fed. Reg. 67,142 (Int'l Trade Admin. Oct. 31, 2011) ("*Final Results*"). The third administrative review applies to entries of subject merchandise that were made between April 1, 2009 and March 31, 2010 (the "period of review" or "POR"). *Id.*

Before the court is the Department's decision ("Remand Redetermination") issued pursuant to the court's order in *Albemarle Corp. v. United States*, 37 CIT __, __, 931 F. Supp. 2d 1280, 1282–83 (2013) ("*Albemarle*").[2] Final Results of Redetermination Pursuant to Ct. Remand (Jan. 10, 2014), ECF No. 96 ("*Remand Redetermination*"). For the reasons discussed in this Opinion, the court is affirming the Remand Redetermination.

---

[1] The cases consolidated under this action are *Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. et al v. United States*, Court No. 11–00468 and *Shanxi DMD Corp. v. United States*, Court No. 11–00475. Order (Jan. 26, 2012), ECF No. 34.

[2] Also before the court are two motions pertaining to a brief filed by defendant-intervenors Calgon Carbon Corporation and Norit Americas, Inc. (collectively "CCC") that responds to the Remand Redetermination comments filed by plaintiff Albemarle Corporation ("Albemarle"). *See* Def.-intervenors' Responsive Comments on Remand Redetermination (Feb. 27, 2014), ECF No. 108. Albemarle moves to strike CCC's response brief from the record of this case. Mot. to Strike 1 (Feb. 28, 2014), ECF No. 110. CCC concedes that its response brief contravened the terms of the court's order in *Albemarle Corp. v. United States*, 37 CIT __, __, 931 F. Supp. 2d 1280, 1282–83 (2013), but asks that the court accept the filing as supplemental briefing and allow additional briefing from the other parties to this litigation. Def.-intervenors' Mot. to Accept Supplemental Br. 1 (Feb. 28, 2014), ECF No. 111. Because all parties already have had the opportunity to comment on the Remand Redetermination, the court determines that permitting additional briefing would not promote the judicial economy and efficiency of this case. *See* USCIT R. 1. Moreover, CCC's supplemental brief argues in support of a determination that the court has concluded it will sustain; *see* part II.B of this Opinion. The court reaches this conclusion without considering the brief in question. Therefore, the court will grant Albemarle's Motion to Strike and deny CCC's Motion for Supplemental Briefing.

I. BACKGROUND

The court's opinion in *Albemarle* provides detailed background information on this case that is supplemented herein. *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1283–88.

A. The Parties to the Consolidated Action

This consolidated case arose from challenges to the Final Results by three plaintiffs: (1) Albemarle Corporation ("Albemarle"), a U.S. importer of subject merchandise produced and exported from China by plaintiff-intervenor Ninxia Huahui Activated Carbon Co., Ltd. ("Huahui"); (2) Shanxi DMD Corporation ("Shanxi DMD"), a Chinese exporter of subject merchandise; and (3) Cherishmet, Inc., a U.S. importer affiliated with Chinese exporters Ningxia Guanghou Cherishmet Activated Carbon Products Company, Ltd. ("GHC") and Beijing Pacific Activated Carbon Products Company, Ltd. ("BPAC"). *Albemarle*, 37 CIT at ___, 931 F. Supp. 2d at 1283–84.

Defendant-intervenor Calgon Carbon (Tianjin) Co., Ltd. ("CCT") is a Chinese producer and exporter of subject merchandise. CCT is a subsidiary of defendant-intervenor Calgon Carbon Corporation and Norit Americas, Inc. (collectively "CCC"), a domestic producer of activated carbon and the petitioner in the antidumping investigation that resulted in the issuance of the Order. *Albemarle*, 37 CIT at ___, 931 F. Supp. 2d at 1284.

B. Procedural History

In the third administrative review, Commerce examined individually, and assigned individual calculated margins to, only two producer/exporters ("mandatory respondents"): CCT, which is a party to this case, and Jacobi Carbons AB ("Jacobi"), which is not. *Certain Activated Carbon from the People's Republic of China: Prelim. Results of the Third Antidumping Duty Admin. Review, & Prelim. Rescission in Part*, 76 Fed. Reg. 23,978, 23,979 (Int'l Trade Admin. Apr. 29, 2011) ("*Prelim. Results*"). In the preliminary phase of the third administrative review, Commerce determined a preliminary margin of zero for Jacobi and a $0.05/kg. preliminary margin for CCT. *Id.*, 76 Fed. Reg. at 23,990. Based on CCT's margin, Commerce determined preliminary margins of $0.05/kg. for respondents Shanxi DMD, BPAC, GHC, and Huahui, each of which Commerce had chosen not to examine but which qualified for a "separate rate," i.e., a rate other than the rate assigned to the government of China and government-affiliated entities.[3] *Id.*

[3] The International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") makes the rebuttable presumption that all companies operating within

In the Final Results, Commerce assigned to each of the two examined respondents a margin of "$0.00/kg.," which Commerce described as "*de minimis*." *Final Results*, 76 Fed. Reg. at 67,145. Commerce determined a final margin of $0.44/kg. for Huahui based on the individual margin Huahui had been assigned as a mandatory respondent in the final results of the previous (second) administrative review of the Order, and determined a margin of $0.28/kg. for unexamined respondents Shanxi DMD, BPAC and GHC, which was also based on the final results of the second administrative review. *Id*.

In *Albemarle*, the court granted defendant's motion for a voluntary remand that would allow Commerce to reconsider two surrogate values (for carbonized material and for coal and fines by-products) affecting the calculation of CCT's margin. *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1297. Also, the court in *Albemarle* ordered Commerce to reconsider the method used to determine the margins for unexamined respondents Shanxi DMD, BPAC and GHC and redetermine those margins in accordance with the court's opinion and order. *Id.* Third, the court ordered Commerce to reconsider the decision Commerce made in the Final Results to assign a per-unit, as opposed to an *ad valorem*, margin to Shanxi DMD and redetermine this margin in accordance with the opinion and order. *Id.* In *Albemarle*, the court reserved any decision on whether the $0.44/kg. margin assigned to Huahui was permissible but did not preclude Commerce from reconsidering that margin on remand. *Id.* at __, 931 F. Supp. 2d at 1293.

Commerce filed the Remand Redetermination with the court on January 10, 2014. *Remand Redetermination* 1. Pursuant to the court's order in *Albemarle*, the parties have submitted briefs addressing various issues raised by the Remand Redetermination. Pl. and Pl.-intervenor's Comments on Final Results of Redetermination Pursuant to Ct. Remand (Feb. 12, 2014), ECF No. 100 ("Albemarle's Comments"); Comments of Def.-intervenor Calgon Carbon (Tianjin) Co., Ltd. Regarding Final Results of Redetermination Pursuant to Ct.

---

the People's Republic of China ("China" or the "PRC") to be under government control, and because the PRC government did not cooperate in the Department's conducting of the review giving rise to this action, Commerce, pursuant to 19 U.S.C. § 1677e(b), determined a "PRC-wide" margin of $2.42/kg. for application to all Chinese exporters and producers of the subject merchandise that did not establish their entitlement to a "separate rate," i.e., a rate other than the PRC-wide rate, by demonstrating their *de jure* and *de facto* independence from government control. *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review*, 76 Fed. Reg. 67,142, 67,145 (Int'l Trade Admin. Oct. 31, 2011) ("*Final Results*"). The Chinese producer/exporters of the subject merchandise at issue in this case were among the eight producer/exporters who so qualified.

Remand (Feb. 12, 2014), ECF No. 102 ("CCT's Comments"); Def.-intervenors' Comments on Remand Redetermination (Feb. 12, 2014), ECF No. 103 ("CCC's Comments"); Def.'s Reply to the Parties' Remand Comments, ECF No. 109 ("Def.'s Reply").

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a(a)(2)(B)(iii), including an action contesting the Department's issuance, under section 751 of the Tariff Act, 19 U.S.C. § 1675(a), of the final results of an administrative review of an antidumping duty order.[4] The court will sustain the Department's redetermination if it complies with the court's remand order, is supported by substantial evidence on the record and is otherwise in accordance with the law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

In the Remand Redetermination, Commerce reassessed its surrogate value determinations for CCT's carbonized material and for CCT's coal and fines by-products. *Remand Redetermination* 1–2. Accordingly, Commerce recalculated CCT's weighted average dumping margin to reflect the redetermined surrogate values, resulting in a margin of $0.004/kg. for CCT, which remained *de minimis*. *Remand Redetermination* 10, 25. Commerce assigned redetermined zero margins to unexamined respondents Shanxi DMD, BPAC and GHC, which were based on the zero/*de minimis* margins for mandatory respondents Jacobi and CCT. *Remand Redetermination* 13, 25. Commerce left unchanged the $0.44/kg. margin it assigned to Huahui in the Final Results.

No party contests the Department's redetermined surrogate values, which the court affirms for the reasons discussed in subparts II.C and II.D of this Opinion. The margins to be assigned to GHC, BPAC, and Shanxi DMD, and the margin to be assigned to Huahui, are the only issues that remain contested in this litigation. In subpart II.A of this Opinion, the court affirms the Department's assignment of zero margins to GHC, BPAC, and Shanxi DMD. In subpart II.B, the court affirms the Department's assignment of the $0.44/kg. margin to Huahui. Because Commerce determined Shanxi DMD's margin to be zero, and because the court affirms that margin in this Opinion, Shanxi DMD's challenge to a per-unit margin is now moot.

[4] All statutory citations to the Tariff Act of 1930 are to the 2006 edition of the United States Code, unless otherwise indicated.

A. The Court Affirms the Redetermined Margins for GHC, BPAC, and Shanxi DMD

The Tariff Act provides generally that Commerce, in an antidumping duty investigation or a review of an antidumping duty order, "shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." Section 777A(c)(1) of the Tariff Act, 19 U.S.C. § 1677f-l(c)(l). However, if "it is not practicable" to calculate individual dumping margins for every exporter or producer "because of the large number of exporters or producers involved" in the review, Commerce may limit the number of examined respondents. Section 777A(c)(2) of the Tariff Act; 19 U.S.C. § 1677f-1(c)(2). In the third administrative review, Commerce chose CCT and Jacobi for individual examination out of ten companies that qualified for a separate rate "because it found that these two respondents were the largest producer/exporters of subject merchandise during the POR." *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1292 (footnote omitted).

In the Final Results, Commerce assigned an antidumping duty margin of $0.28/kg. to unexamined respondents GHC, BPAC, and Shanxi DMD. *Final Results*, 76 Fed. Reg. at 67,145 & n.26. As it explained in an Issues & Decision Memorandum ("Decision Memorandum") incorporated by reference in the Final Results, Commerce obtained this margin from the immediately preceding, i.e., second, administrative review of the Order, in which it had assigned a margin of $0.28/kg. to nine unexamined, separate rate respondents. *Issues & Decision Mem*. at 5, A-570–904, (Oct. 24, 2011), *available at* http://enforcement.trade.gov/frn/summary/prc/2011–28158–1.pdf (last visited Nov. 18, 2014) ("*Decision Mem.*"). In the second administrative review, Commerce calculated the $0.28/kg. margin as a simple average of the margins it determined for the two mandatory respondents it examined individually in that review, which were Jacobi ($0.11/kg.) and Huahui ($0.44/kg.). *Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 Fed. Reg. 70,208, 70,211 & n.10 (Int'l Trade Admin. Nov. 17, 2010).

No statutory or regulatory provision addresses the method by which Commerce is to determine margins for respondents that are reviewed, but not individually examined, in an administrative review of an antidumping duty order. Rather, Congress left the method of determining such margins to the Department's discretion. That discretion is broad but not unfettered. According to long-standing precedent of the Court of Appeals for the Federal Circuit ("Court of

Appeals"), "[a]n overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible." *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) ("*Bestpak*") (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)); *Parkdale Intern. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007); *Lasko v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (citation omitted).

Bestpak involved an all-others rate Commerce applied to uninvestigated "separate rate" respondents in an antidumping investigation. The Court of Appeals concluded that the margin applied to these uninvestigated respondents not only must be determined "as accurately as possible," *Bestpak*, 716 F.3d at 1379, but also must be one that "reflects economic reality," *id.* 716 F.3d at 1378. Rejecting the 123.83% margin Commerce applied to the separate rate respondents, which Commerce calculated by taking a simple average of a zero/*de minimis* margin assigned to an investigated respondent and a 247.65%, adverse inference margin assigned to an uncooperative respondent, the Court of Appeals held that the record lacked "substantial evidence to support the calculated margin as being a reasonable reflection of Bestpak's potential dumping margin." *Id.*, 716 F.3d at 1375, 1378.

Bestpak arose from an antidumping investigation, not a review as does this case. Nevertheless, the court considers the objectives of obtaining the most accurate margin possible and of ensuring that the margin reflects economic reality, both of which the Court of Appeals in *Bestpak* viewed as fundamental to the antidumping statute, to be as valid in a review as they are in an investigation. To meet the *Bestpak* standard, the margins assigned to Shanxi DMD, BPAC and GHC must be a reasonable reflection of the potential dumping margins of these respondents.

For the Final Results, Commerce stated in the Decision Memorandum that in selecting the $0.28/kg. margin it had been guided by section 735(c)(5) of the Tariff Act, 19 U.S.C. § 1673d(c)(5), which provides the methodology for calculating the "all-others" rate that is applied to uninvestigated producer/exporters in an antidumping investigation. *Decision Mem.* 4 ("Generally, we have looked to section 735(c)(5) of the Tariff Act . . . , which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not individually examine in an administrative review."). Under paragraph (A) of § 1673d(c)(5), Commerce determines the all-others rate in an investigation by cal-

culating "the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776, [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(A). Because it assigned zero/*de minimis* margins to both respondents it examined in the third review, Commerce could not apply the paragraph (A) method in the review to determine an all-others rate for the separate rate respondents.

The paragraph (A) method is subject to an exception in paragraph (B), which provides that if all of the individually investigated companies' margins "are zero or *de minimis* margins, or are determined entirely under section 776, [19 U.S.C. § 1677e]," then Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(B). Commerce expressly cited the paragraph (B) exception in the Decision Memorandum: "Section 735(c)(5)(B) of the Act also provides that, where all margins are zero, *de minimis*, or based on total facts available, we may use 'any reasonable method' for assigning the rate to non-selected respondents." *Decision Mem.* 4. Commerce added that "[o]ne method that section 735(c)(5)(B) of the Act contemplates as a possibility is 'averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.'" *Id.* (quoting 19 U.S.C. § 1673(c)(5)(B)). In the Final Results, Commerce rejected that "possibility."

Commerce explained that it has a practice of "excluding zero and *de minimis* margins when calculating the separate rate margin." *Decision Mem.* 4. Choosing to follow this practice in the Final Results, Commerce stated that "[b]ased on the facts of this case, we determine that a reasonable method for determining the margin for separate rate companies in this review is the average of the margins, other than those which are zero, *de minimis*, or based on total facts available, that we found for the most recent period in which there were such margins," *i.e.*, the second administrative review. *Id.* at 5. As Commerce also explained, "the Department does not consider the rates calculated in the current review [i.e., the zero/*de minimis* margins calculated for Jacobi and CCT] to reasonably reflect the potential dumping margins of the separate rate companies." *Id*. According to Commerce, "no data on the record exists to determine whether the non-selected companies' pricing behavior matches that of the manda-

tory respondents in the current review." *Id.* Acknowledging that it had departed from its practice by assigning a zero margin to separate rate respondents in one administrative review, *Honey from Argentina: Final Results of Antidumping Duty Admin. Review & Determination Not to Revoke in Part*, 73 Fed. Reg. 24,220 (Int'l Trade Admin. May 2, 2008), Commerce identified that review as the only instance in which it had done so voluntarily in its recent history. *Decision Mem.* 6. Commerce further stated in the Decision Memorandum:

> As seen in recent cases, the Department has found for case-specific reasons that using a calculated rate from a prior segment more reasonably reflects the potential dumping margins of non-selected companies than does a *de minimis* or zero rate from an ongoing segment because the margins from the previous review more accurately capture recent and potential pricing behavior of non-selected companies, given that these companies were not selected for individual examination and that there is no data on the record to determine whether the non-selected companies' pricing behavior matches that of the mandatory respondents in the ongoing review.

Id. Commerce added that the only other instance in which it had departed from the practice in recent history by assigning zero/*de minimis* margins to unexamined respondents was in response to a remand order that this Court entered in *Amanda Foods (Vietnam) Ltd. v. United States*, 34 CIT __, 714 F. Supp. 2d. 1282 (2010) ("*Amanda Foods 2010*"). *Decision Mem.* 6. Commerce explained that in that instance it assigned a *de minimis* separate rate "under protest" and "only after the Department reopened the record, requested further information from the plaintiff, and performed additional data comparisons to information on the record." *Id.* (citing *Amanda Foods (Vietnam) Ltd. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1286, 1292 (2011) ("*Amanda Foods 2011*")). Commerce further explained that "the Department has not undertaken such steps in this case and, therefore, finds it inappropriate to rely on *Amanda Foods 2011* as applicable precedent." *Decision Mem.* 6–7.

In *Albemarle*, the court rejected the $0.28/kg. margin for Shanxi DMD, BPAC and GHC and the reasoning Commerce put forth. Noting that "Commerce reverted to a margin it determined in *another* review for *other* respondents," the court concluded that the $0.28/kg. margin "was not based on data pertaining to any pricing behavior that occurred in the third POR" and "does not reflect commercial reality with respect to Shanxi DMD, BPAC, and GHC." *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1291 (emphasis in original). The court stated that

"[t]he Department's statement that this margin is based on a 'contemporaneous examination of individually-reviewed respondents exclusive of zero, *de minimis* and facts available margins, and reasonably reflects potential dumping margins for the non-selected companies,' *Decision Mem.* 5, is factually incorrect when viewed in the context of the record evidence of the third review." *Id.* at __, 931 F. Supp. 2d at 1291. Responding to the Department's conclusion that there were "no data on the record to determine whether the non-selected companies' pricing behavior matches that of the mandatory respondents in the instant review," the court observed that no data on the record demonstrated that the pricing behavior of the three non-selected companies matched the pricing behaviors of the mandatory respondents in the previous review, from whose individually-determined margins the $0.28/kg. was calculated. *Id.* at __, 931 F. Supp. 2d at 1292–93. The court directed Commerce to "reconsider its method of determining the margins" for Shanxi DMD, BPAC, and GHC, and to redetermine those margins in accordance with the court's order. *Id.* at __, 931 F. Supp. 2d at 1296–97.

In response to the court's order, Commerce decided to average the zero and *de minimis* rates calculated for Jacobi and CCT and to assign the result, i.e., zero, as the margins for GHC, BPAC, and Shanxi DMD. The court affirms the Department's decision to assign these margins, which were derived from the actual margin Commerce determined in the Final Results for Jacobi, and the actual margin Commerce determined in the Remand Redetermination for CCT, based on record information pertaining to factors of production and examined sales occurring in the relevant period of review, i.e., April 1, 2009 to March 31, 2010.[5] In this case, the margins Commerce determined for Jacobi and CCT are no less actual, calculated margins because they were *de minimis*. Because they were calculated from record data for examined sales made during the correct period, they are necessarily a more "reasonable reflection of [the] potential dumping margin," *Bestpak*, 716 F.3d at 1378, that GHC, BPAC, and Shanxi DMD would have been assigned in the third review, had they been examined, than is the margin of $0.28/kg., which bears no relationship to the relevant POR.

CCC opposes, on various grounds, the Department's decision to assign zero margins to GHC, BPAC and Shanxi DMD. CCC argues, first, that Commerce "misinterpreted this Court's opinion and re-

[5] The *de minimis* margin assigned to Jacobi, as determined in the decision under review, was not contested in this case. As discussed elsewhere in this Opinion, CCT's margin remained *de minimis* after redetermination, upon remand, of the surrogate values contested in this litigation.

mand order as making factual findings and requiring the Department to assign GHC, BPAC, and Shanxi DMD a zero percent separate rate on remand." CCC's Comments 4. According to CCC, another remand is appropriate because of the Department's "mistaken belief that the Court dictated the separate rate to be assigned to GHC, BPAC, and Shanxi DMD." *Id.* at 7. The court must reject this argument. As discussed below, the text of the Remand Redetermination does not support CCC's conclusion that Commerce considered itself under a judicial directive to assign zero antidumping duty margins to GHC, BPAC, and Shanxi DMD.[6]

The Remand Redetermination states that "[t]he Department respectfully disagrees with the Court's holdings in this *Remand Opinion and Order*," adding that "[h]owever, under protest, the Department has averaged the zero and *de minimis* rates calculated for Jacobi and CCT in this administrative review and assigned the resulting zero dumping margin to GHC, BPAC, and Shanxi DMD." *Remand Redetermination* 13 (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)). The Remand Redetermination does not go so far as to conclude that the court directed Commerce to assign zero margins to GHC, BPAC, and Shanxi DMD. Instead, Commerce expresses disagreement with "the Court's holdings," explaining that it "followed the Court's logic, under protest, to its natural conclusion." *Id.* Implicitly acknowledging an alternative to its assigning zero margins to these three unexamined respondents, Commerce disagreed with CCC's comment, submitted in response to a draft

[6] Nothing in the court's opinion and order in *Albemarle* correctly could have been construed by Commerce as a directive to assign zero margins to GHC, BPAC, or Shanxi DMD. Regarding CCC's other point, the Remand Redetermination does not state that the court made factual findings. Instead, disagreeing with comments CCC submitted to Commerce on a draft version of the remand decision, the Remand Redetermination attributed to the court's decision in *Albemarle* "substantive assessments" that the *de minimis* margins assigned to the mandatory respondents were more representative of industry-wide pricing behavior and more reflective of commercial realities during the POR than the $0.28/kg. margins Commerce assigned. Final Results of Redetermination Pursuant to Ct. Remand at 20 (Jan. 10, 2014), ECF No. 96 ("*Remand Redetermination*"). In any event, the opinion and order in *Albemarle* did not draw its own findings of fact from the record evidence and instead took issue with the Department's reasoning. The observations the court made concerning the record described the *absence* of evidence to support the Department's choice and were not directed to any contested factual issue. The court observed that the *de minimis* margins Commerce assigned to the two mandatory respondents in the third review were derived from data pertaining to sales occurring during the POR for that same review, which the $0.28/kg. margin was not; this point was not the subject of a factual dispute in the case. *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1292 ("While the *de minimis* margins assigned to Jacobi and CCT at least reflect commercial realities prevailing in the pertinent POR, the same cannot be said for the margin Commerce assigned to Shanxi DMD, BPAC, and GHC.").

version of the Remand Redetermination, that it should reopen the record to obtain pricing and other information from GHC, BPAC, and Shanxi DMD. *Id.* at 21; *see* CCC's Comments 13. The Remand Redetermination rejects this option on the ground that Commerce previously stated it has resources sufficient only to examine two respondents and that "obtaining this information would consume resources which we previously stated we do not have." *Remand Redetermination* 21.

When read in the entirety, the Remand Redetermination is correctly interpreted as protesting that the court remanded for reconsideration the Department's decision to assign the 0.28/kg. margin, and the logic by which the court did so, rather than protesting a directive to assign zero margins to GHC, BPAC, and Shanxi DMD. *See id.* (rejecting CCC's comment, submitted on the draft version of the decision, that Commerce should remove the "under protest" language and stating that "[a]s an initial matter, the Department may protest when ordered to make a remand redetermination") & n.66 (citing *Viraj*, 343 F.3d 1371). Commerce appears to have viewed reopening the record as a possible alternative to assigning zero margins to GHC, BPAC, and Shanxi DMD that was available to it on remand, albeit one Commerce chose not to pursue due to resource constraints. Having noted the absence of meaningful record evidence concerning the sales of these three respondents, having rejected the option of reopening the record in an effort to redress that absence, and also having noted the court's rejecting as unreasonable the Department's decision to assign $0.28/kg. margins in the Final Results to GHC, BPAC, and Shanxi DMD, the Remand Redetermination disagreed with CCC "that the CIT has left us other options to pursue on remand." *Remand Redetermination* 20. That is not the same as the Department's concluding that it was under a court order to assign the zero margins.

CCC next argues that the court should issue a second remand because the decision to assign the zero margins was unsupported by substantial record evidence. CCC's Comments 7. Based on the premise that the decision lacks evidentiary support, CCC further argues that "[t]he Department's refusal to re-open the record on remand to obtain pricing and other relevant data to determine if the mandatory respondents' commercial reality was representative of the separate rate respondents was unreasonable and improper." *Id.* at 12. According to CCC, among the types of information missing from the record is information "concerning the factors of production consumed in manufacturing the subject merchandise exported to the United States by GHC, BPAC, and Shanxi DMD" that is "necessary to deter-

mine the 'commercial reality' faced by these separate rate respondents and whether that commercial reality bears a rational relationship to the margins assigned to the mandatory respondents." *Id.* at 10 (citing *Bestpak*, 716 F.3d at 1380). On the subject of the Department's obtaining the missing information in general, CCC argues that "[o]nly by collecting this information will the Department be able to analyze whether the zero margins calculated for Jacobi and CCT are, in fact, reflective of the commercial reality for the separate rate respondents." *Id.* at 14. The court rejects these arguments as well.

The record contains evidence consisting of data Commerce used to calculate the *de minimis* margins Commerce assigned to Jacobi and CCT in the third review and in the remand proceeding, respectively. These data pertain to sales and factors of production that are contemporaneous with the POR and are individual to the two highest-volume respondents in the review. Because unexamined respondents are just that—unexamined—the statute, in 19 U.S.C. § 1677f-1(c)(2), must be read implicitly to contemplate that Commerce may be required to assign margins to one or more respondents for which the record lacks data pertaining to sales during the POR from which an individual margin could be separately calculated or separately estimated. And as the Court of International Trade reasoned in *Amanda Foods (Vietnam) Ltd. v. United States*, 36 CIT __, __, 837 F. Supp. 2d 1338, 1346 (2012), an average of *de minimis* rates of mandatory respondents may serve as a reasonable all-others rate in an administrative review because it is supported by substantial evidence on the record of the review, in the form of the record information underlying those very rates. For these reasons, the court disagrees with CCC's argument that it must order a second remand on the ground that the record lacked substantial evidence in support of the zero margins assigned by the Remand Redetermination to GHC, BPAC, and Shanxi DMD. The court also disagrees with CCC's argument that Commerce improperly decided not to reopen the record. Were the court now to adopt the extraordinary remedy of ordering Commerce to reopen the record in a second remand, in the circumstances presented it would be, in effect, an order to conduct some form of "examination" of unexamined respondents. As the court discussed above, Congress, in enacting 19 U.S.C. § 1677f-1(c)(2), implicitly contemplated that Commerce may be required to assign margins to one or more respondents for which the record lacks individual data pertaining to sales during the POR. In summary, the circumstances presented do not support a conclusion that the decision to assign zero

margins to GHC, BPAC, and Shanxi DMD is unreasonable for lack of substantial evidence or because of the Department's decision not to reopen the record.

Related to its arguments on the state of the record evidence, CCC also makes the argument that the decision to assign the zero margins was "not adequately explained," and therefore "arbitrary and capricious," on the ground that the Remand Redetermination fails to explain how that decision is supported by substantial evidence. CCC's Comments 11. This argument is unconvincing.

Even though it indicated disagreement with the logic employed by the court in *Albemarle*, the Remand Redetermination adopted that logic as an explanation for the decision Commerce made on remand, stating as follows:

> In assigning GHC, BPAC and Shanxi DMD zero dumping margins, we follow the Court's logic, under protest, to its natural conclusion—because Jacobi and CCT's margins are "more representative of industry-wide pricing behavior during the POR" and "more contemporaneous" than the non-POR margins relied upon in *AR3 Final Results* [i.e., the Final Results of the third administrative review], applying the Jacobi and CCT's margins to CCT, BPAC and Shanxi DMD will achieve a "more representative" result than would relying upon non-POR margins.

Remand Redetermination 13. Responding to a comment CCC made on the draft version of the remand decision in opposition to the zero margins, the Remand Redetermination also reasons that "the contemporaneity of the mandatory respondents' dumping margins—the only margins calculated during this POR—demonstrates that these margins reasonably reflect potential dumping margins for companies not individually investigated (without a company-specific rate calculated in the immediately preceding review) during the same time." *Id.* at 19. The court must view the Department's explanation in light of the circumstances presented by the state of the record and the Department's need to determine, in the context of 19 U.S.C. § 1677f-1(c), antidumping duty margins for CCT, BPAC and Shanxi DMD—none of which was an examined respondent. When so viewed, the explanation Commerce provided is not deficient and therefore not a valid basis upon which the court may order a second remand.

B. Commerce Permissibly Determined the Margin it Assigned to Huahui

In the third administrative review, Commerce assigned Huahui, as an unexamined respondent, a $0.44/kg. margin corresponding to the $0.44/kg. margin Huahui had been assigned as a mandatory respondent in the second administrative review. In *Albemarle*, the court "reserve[d] any decision on whether the margin assigned to Huahui was permissible," reasoning that "Commerce may or may not decide to assign Huahui a different margin based on other decisions it makes upon remand." *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1293.

The Remand Redetermination provides the following explanation for the decision to continue to assign to Huahui, as an unexamined respondent in the third administrative review, the $0.44/kg. margin based on the margin calculated for Huahui in the previous review:

> We decline to reconsider Huahui's dumping margin and continue to find that, for the reasons provided in the IDM [Decision Memorandum] and the Government's response in opposition to the summary judgment motions, the margin assigned to Huahui is reasonably reflective of potential dumping margins during the POR, especially given that (1) the margin is specific to Huahui and temporally proximate to the third administrative review (i.e., separated at most by twelve months) and (2) zero or *de minimis* dumping margins had never previously been calculated for mandatory respondents during the course of the subject antidumping duty order.

Remand Redetermination 22.

The court concludes that Commerce applied a reasonable method to determine the margin for Huahui in the third administrative review. The Department's method relies upon data that were specific to Huahui's sales and factors of production. The data pertained to the previous, not the current, period of review, but analogous data pertaining to the POR for the third review are absent from the record because Huahui was an unexamined respondent in the third review. In the words of *Bestpak*, 716 F.3d at 1378, Commerce permissibly could conclude that the $0.44/kg. margin is a "reasonable reflection" of the potential margin of Huahui in the third review, had Huahui been an examined respondent.

Albemarle opposes the assignment to Huahui of the $0.44/kg. margin, which it describes as lacking "the reasonableness and rational explanation required by law," and argues that "the Court should remand the issue to Commerce to assign Huahui the same rate it has

determined on remand for every other separate rate respondent in the current review." Albemarle's Comments 4. The court disagrees.

As the court discussed previously, Commerce must be afforded considerable discretion in choosing a method of determining a margin for an unexamined respondent in an administrative review. Commerce chose a margin that was calculated in the preceding review and was individual to Huahui. It chose this margin over a margin derived from the margins calculated for the two mandatory respondents in the current review or a margin calculated in some other way. In rejecting the option of assigning Huahui the zero margin assigned to other unexamined respondents, Commerce chose specificity to Huahui over contemporaneity. Because the Department's choice was not an unreasonable one, the court concludes that Commerce acted within its discretion.

Albemarle raises various objections to the Department's decision. It cites the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, vol. 1 at 873 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4040, 4021, ("*SAA*") as providing that "the expected method is to 'weight average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.'" Albemarle's Comments 4 (quoting *SAA* at 873, 1994 U.S.C.A.A.N. at 4201). The language Albemarle quotes pertains to a statutory provision, 19 U.S.C. § 1673d(c)(5), governing the selection of an all-others rate in an antidumping duty investigation, not a review. Although Commerce stated in the Decision Memorandum that it obtains guidance from this investigation-related provision in selecting an all-others rate in a review, *Decision Mem.* 4, Commerce was not required to follow the "expected method." Moreover, the Statement of Administrative Action itself provides, in the sentence following the quoted language, that "if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." *SAA* at 873, 1994 U.S.C.A.A.N. at 4201.

Characterizing the Department's decision to assign the $0.44/kg. margin as unreasonable, Albemarle argues that "[i]t defies logic and the parameters of the law for Commerce to single out one respondent for a margin while determining that no other individual respondent has an antidumping rate above *de minimis*." Albemarle's Comments 5. This argument is unpersuasive because Commerce had a reasonable basis to distinguish Huahui from the unexamined producer/exporters to which it assigned the zero margins: Huahui was individually examined and assigned a calculated antidumping

duty margin in the previous administrative review. Commerce was within its discretion in considering that margin to be reasonably reflective of Huahui's potential margin in the third review. The decision was, therefore, neither illogical nor outside the "parameters" of the Department's authority under the statute.

Albemarle makes various arguments to the effect that Commerce failed to provide a satisfactory explanation for choosing to assign Huahui the rate from the previous review instead of the zero rate. The court does not consider the explanation provided in the Remand Redetermination to be a ground upon which to overturn the Department's decision. Most significant in that explanation is the Department's reasoning that "the margin is specific to Huahui and temporally proximate to the third administrative review," *Remand Redetermination* 22, which reflects consideration of two relevant factors: the specificity of the margin to Huahui and the reasonable proximity in time to the third review. As to the latter factor, Albemarle argues that "[s]urrogate values, and calculated dumping margins themselves, can change wildly from review to review," Albemarle's Comments 6. Although Albemarle is correct in implying that, on the record of the third review, no one can know to what degree a potential margin for Huahui in the third review would have varied from the individually-determined margin in the second review, Commerce still was within its discretion in balancing the factor of contemporaneity with the specificity of the $0.44/kg. margin to Huahui.[7]

Albemarle next argues that the court's reasoning for rejecting the $0.28/kg. margin assigned to unexamined respondents GHC, BPAC, and Shanxi DMD applies equally to the $0.44/kg. margin assigned to Huahui in the third review as an unexamined respondent. Albemarle's Comments 13–16. But the reasoning does not apply equally. The $0.28/kg. margin Commerce assigned to GHC, BPAC, and Shanxi DMD was neither "based on data pertaining to any pricing behavior that occurred in the third POR" nor "based on any data pertaining to these respondents." *Albemarle*, 27 CIT __, 931 F. Supp. 2d at 1291. Only the former, not the latter, consideration applied with respect to the assignment of a margin for Huahui in the third review.

Albemarle argues, further, that the decision to assign the $0.44/kg. margin to Huahui in the current review is unreasonable because one of the reasons given in the Remand Redetermination, which is the

[7] Additionally, Albemarle could have challenged Huahui's non-selection as an examined respondent in the third administrative review, provided Huahui properly had requested to be reviewed as a voluntary respondent under 19 U.S.C. § 1677m(a). Had such a request been denied, Albemarle would have been in a position to challenge that denial before the court. *See Dupont Teijin Films China LTD v. United States*, 38 CIT __, __, Slip Op. 14–106 at 29–31 (Sept. 11, 2014).

Department's assertion that zero or *de minimis* margins never had been calculated previously for mandatory respondents, is self-contradictory, irrelevant, and baseless. Albemarle's Comments 11–13. According to Albemarle, "[i]f Commerce believes temporal proximity is paramount, it cannot also reject the fully contemporaneous *de minimis* /zero rates for all other respondents *in this review* in favor of a margin that is from a prior period, no matter how near that period may be" because "Commerce cannot have it both ways." *Id.* at 12. Albemarle adds that "it is wholly unreasonable to conclude," based on a finding that no previous mandatory respondents had received a zero or *de minimis* margin, "that the separate rate companies' margins must be frozen in time at rates calculated in earlier reviews." *Id.* at 12.

As to the assertion that "Commerce cannot have it both ways," the rationale Commerce gave for its decision as to Huahui is not self-contradictory. Commerce did not say that temporal proximity is paramount in all situations; instead, in the specific context of selecting a margin for GHC, BPAC, and Shanxi DMD in the remand proceeding, it chose a contemporaneous margin (zero) over a margin derived from the previous review ($0.28/kg.). On remand, Commerce continued to follow a different rationale as to Huahui, and it did so in part for the reason the court discussed above: unlike those three respondents, Huahui had been assigned an individually-determined margin in the previous review. The characterization of the rationale as "baseless" and "irrelevant" is also unconvincing. The absence of zero or *de minimis* margins for any mandatory respondent in earlier reviews would not, in itself, be a reason sufficient to support the Department's decision as to the margin to be applied to Huahui. But it does not logically follow that the Department's restating this rationale from the Decision Memorandum compels the court to order a remand. That Huahui's most recently calculated margin was not *de minimis*, and that no margin calculated for any respondent (including Huahui) in a review prior to the third review was *de minimis*, cannot fairly be characterized as "irrelevant" considerations.

Finally, Albemarle raises various arguments to distinguish the administrative decisions relied upon by Commerce in the *Final Results*. Albemarle's Comments at 16–17 & n.4. Because Albemarle failed to raise these arguments in its motion for judgment upon the agency record, *see generally* Mem. of P. & A. in Support of Rule 56.2 Mot. for J. on the Agency R. by Pl. Albemarle Corp. and Intervenor-Pl. Ningxia Huahui Activated Carbon Co., Ltd. (May 21, 2012), ECF No. 45, it is

precluded from raising them here.[8] *See Novosteel SA v. United States,* 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (holding that a party waives an argument if not raised in its principal judgment brief). Regardless, neither the court nor Commerce is bound by agency determinations in unrelated administrative reviews.

C. The Court Sustains the Department's Redetermined Surrogate Value for CCT's Carbonized Material Input

In the Final Results, Commerce determined a surrogate value for CCT's carbonized material input[9] using Global Trade Atlas ("GTA") statistics on imports under Indian Harmonized Tariff Schedule ("HTS") subheading 4402.90.10 ("Coconut Shell Charcoal"),[10] which had an average unit value ("AUV") of 3,796.54 Indian rupees per metric ton ("Rs/MT"). *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1286. Commerce chose these statistics as the "best available information," 19 U.S.C. § 1677b(c)(1), to value CCT's carbonized material over other data on the record.[11] *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1286.

Prior to issuing its opinion on the Final Results, the court informed defendant that the record as filed appeared to lack the evidence on which Commerce had relied for its choice of the "best available information," specifically, an expert report regarding the similarities between coconut shell charcoal and coal-based carbonized materials. *Id.* at __, 931 F. Supp. 2d at 1287. Defendant sought, and the court granted, a voluntary remand so that Commerce could place the relevant evidence on the administrative record "and consider comments from the parties in the first instance." *Id.* at __, 931 F. Supp. 2d at 1287–88.

---

[8] Although Albemarle's motion for judgment on the agency record contains language adopting the arguments made by the other consolidated plaintiffs in their respective motions for judgment on the agency record, those motions do not make the arguments Albemarle is attempting to make here. *See e.g.* Mot. for J. on the Agency R. (May 18, 2012), ECF No. 42; Consol. Pls.' Rule 56.2 Mot. for J. upon the Agency R. (May 18, 2012), ECF No. 44.

[9] "Carbonized material" is the principal input used to produce activated carbon and can be "most any solid material that has a high carbon content" including "coal, wood, coconut shells, olive stones, and peat." *Certain Activated Carbon from China,* Inv. No. 731–TA–1103, USITC Pub. 3913, at I–5 (Apr. 2007) (Final). The most common carbonized material used to produce activated carbon in the United States and China is coal. *Id.*

[10] For the third administrative review, Commerce selected India as the primary surrogate country for valuing examined respondents' factors of production; a selection no party challenges. *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1284.

[11] The record also contained Global Trade Atlas ("GTA") import data for Indian HTS subheading 2704.00.90, "Other Cokes of Coal," which yielded an average unit value ("AUV") of 13,865.83 rupees per metric ton ("Rs/MT"). *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1286.

Commerce placed the report on the record on September 3, 2013 and provided an opportunity for the parties to comment. *Remand Redetermination* 1–2, 4; *Mem. from Bob Palmer to the File*, ECF No. 114–1 (Pub. Remand. R. Doc. No. 1). No party disputed the validity of the report or its core findings.[12] *Remand Redetermination* 22–23.

On remand, Commerce again valued CCT's carbonized materials according to the Indian HTS "Coconut Shell Charcoal" data, explaining that the data result in a "better, input-specific price for coal-based carbonized materials." *Remand Redetermination* 8. No party contests the Department's redetermination. Accordingly, because the Department's redetermination complies with the court's opinion and order in *Albemarle*, and because no party opposes, the court sustains this aspect of the Remand Redetermination.

D. The Court Sustains the Department's Redetermined Surrogate Value for CCT's Coal and Fines By-Products

In the Final Results, Commerce determined surrogate values for CCT's coal and fines by-products, which result from CCT's production of carbonized materials, using GTA Indian HTS import data.[13] *Remand Redetermination* 8–9. Based on these data, Commerce assigned CCT's coal by-product an AUV of 4,860.88 Rs/MT and its fines by-product and AUV of 11,319.90 Rs/MT. *Albemarle*, 37 CIT at __, 931 F. Supp. 2d at 1288–89. Albemarle challenged these surrogate values, arguing, *inter alia*, that they "result[ed] in an unreasonable and inappropriate inversion in which the downstream by-products are valued considerably higher than the upstream carbonized material." *Id.* at __, 931 F. Supp. 2d at 1289 (citation omitted). Without confessing error, defendant requested a voluntary remand so that Commerce could reconsider the by-product surrogate values, which the court granted. *Id.*

On remand, Commerce found no record evidence to show that CCT's by-products underwent further treatment or manufacturing "such that higher values than that of the main input may be considered reasonable." *Remand Redetermination* 10. Accordingly, Commerce capped both surrogate values at the value assigned to CCT's carbon-

[12] Although Albemarle submitted comments to Commerce on the new record evidence, these comments were limited to whether Commerce had used the "best available information" and did not question the report's validity. *Letter from Albemarle to the Sec'y of Commerce* (Sept. 10, 2013), ECF No. 116–1 (Pub. Remand Rec. Doc. No. 2).

[13] Commerce "valued CCT's coal and fines by-products generated during the production of carbonized materials using two GTA sources – import data under Indian HTS number 2701.19.90 'Other Coal W/N Pulvrsd But Ntagldmrtd' . . . and Indian HTS number 2714.10 'Bituminous Or Oil Shale And Tar Sands,' . . . respectively." *Remand Redetermination* 8 (footnote omitted).

ized material input.[14] *Id*. Because the Department's redetermination complies with the court's opinion and order in *Albemarle*, and because no party opposes, the court sustains this aspect of the Remand Redetermination.

III. CONCLUSION

For the reasons stated in the foregoing, the court affirms the Department's Remand Redetermination and will enter judgment accordingly.

Dated: November 24, 2014
New York, New York

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

Slip Op. 14–136

PLASTICOID MANUFACTURING INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 12–00407

[Granting Plaintiff's Motion for Judgment on the Agency Record]

Dated: November 24, 2014

Matthew P. McCullough, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for Plaintiff. With him on the brief was *Daniel L. Porter*.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Elika Eftekhari*, Import Trade Administration, U.S. Department of Commerce, of Washington, D.C.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Plasticoid Manufacturing Inc. – a U.S. seller of "cutting and marking straight edges" – contests the determination of the U.S. Department of Commerce that straight edges imported by Plasticoid are within the scope of the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of

[14] Commerce set the cap according to data under the Indian Harmonized Tariff Schedule subheading 4402.00.10 "Coconut Shell Charcoal." *Remand Redetermination* 10.

China ("PRC"). *See* Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Aluminum Rails for Cutting and Marking Edges (Nov. 13, 2012) (Doc. No. 15) ("Scope Ruling").[1]

Pending before the Court is Plasticoid's Motion for Judgment on the Agency Record, in which Plasticoid argues that the straight edges at issue should be exempt from the coverage of the antidumping and countervailing duty orders ("the Orders") pursuant to language that defines the scope of the Orders to exclude "finished merchandise." *See generally* Plaintiff's Memorandum of Points and Authorities in Support of [Its] Motion for Judgment on the Agency Record ("Pl.'s Brief"); Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Pl.'s Reply Brief").

The Government opposes Plasticoid's motion and maintains that Commerce's Scope Ruling is supported by substantial evidence and is otherwise in accordance with law, and therefore should be sustained. *See generally* Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[2] For the reasons summarized below, Plasticoid's Motion for Judgment on the Agency Record must be granted, and this matter must be remanded to Commerce for further consideration.

I. *Background*

The central issue in this action is whether Commerce properly determined that the straight edges imported by Plasticoid are within

[1] Although the first page of the Scope Ruling is dated "November 23, 2012," that date is not correct. *See* Scope Ruling at 1; *see also* Plaintiff's Memorandum of Points and Authorities in Support of [Its] Motion for Judgment on the Agency Record at 1 ("Pl.'s Brief") (specifying incorrect date for Scope Ruling); Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record at 2 ("Def.'s Brief") (same). As specified on the last page of the Scope Ruling, and as indicated in the Federal Register notice, the correct date is November 13, 2012. *See* Scope Ruling at 12; Notice of Scope Rulings, 78 Fed. Reg. 32,372, 32,373 (May 30, 2013).

Because the challenged determination concerns both the antidumping and countervailing duty orders on aluminum extrusions from the PRC, the administrative record of the scope proceeding (which is entirely public) consists of two parts – one for the scope proceeding concerning the antidumping duty order and the other for the scope proceeding concerning the countervailing duty order. All documents filed under the case number for the antidumping duty order, A-570–967, were also filed under the case number for the countervailing duty order, C-570–968. However, the numbering of the documents differs. *But see* Def.'s Brief at 2 n.1 (mistakenly stating that the documents filed under antidumping duty case number and "the documents filed under the countervailing duty case number are identically numbered"). For ease of reference, citations to the administrative record reflect the numbering of documents as filed under the case number for the antidumping duty order, A-570–067, and are noted as "Doc. No. ____."

[2] All citations to statutes are to the 2006 edition of the United States Code.

the scope of the antidumping and countervailing duty orders on aluminum extrusions from the PRC, which Commerce published in May 2011. *See* Scope Ruling at 1, 12; Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011) ("Antidumping Duty Order"); Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order, 76 Fed. Reg. 30,653 (May 26, 2011) ("Countervailing Duty Order").

A. *The Terms of the Antidumping and Countervailing Duty Orders*

In general, the Antidumping Duty Order and the Countervailing Duty Order cover "aluminum extrusions which are shapes and forms, produced by an extrusion process," which are imported from the PRC. Antidumping Duty Order, 76 Fed. Reg. at 30,650.[3] The Orders explain that aluminum extrusions "are produced and imported in a wide variety of shapes and forms," and may be "finished (coated, painted, etc.), fabricated, or any combination thereof." *Id*. The Orders also state that "[s]ubject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation," such as "window frames, door frames, solar panels, curtain walls, or furniture." *Id*., 76 Fed. Reg. at 30,650–51. Aluminum extrusions "that are attached (*e.g.*, by welding or fasteners) to form subassemblies" and that otherwise meet the definition of aluminum extrusions are also included in the scope of the Orders, unless they are partially assembled merchandise "imported as part of [a] finished goods 'kit,'" as discussed below. *Id*., 76 Fed. Reg. at 30,651.

The Orders further note that subject aluminum extrusions "may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks," and state that "[s]uch goods are subject merchandise [*i.e.*, are covered by the Orders] if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation." Antidumping Duty Order, 76 Fed. Reg. at 30,651.

The language of the Orders expressly excludes from their scope certain merchandise that would otherwise be covered, where the merchandise is a finished good at the time of importation (the so-called "finished merchandise" exclusion) or where the merchandise as imported includes all parts or components needed to assemble a final

[3] Citations in this section are to the Antidumping Duty Order only. However, the language establishing the respective scopes of the antidumping and countervailing duty orders are identical. Accordingly, all provisions discussed in this section appear in both Orders.

finished good (the so-called "finished goods kits" exclusion). Antidumping Duty Order, 76 Fed. Reg. at 30,651.

In particular, the finished merchandise exclusion exempts from the scope of the Orders "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." Antidumping Duty Order, 76 Fed. Reg. at 30,651. Similarly, the exclusion for finished goods kits exempts from the scope of the Orders "finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit,'" which is defined to mean "a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, . . . and is assembled 'as is' into a finished product." *Id*. The two exclusions largely parallel one another, with one exclusion addressed to finished merchandise that is already assembled at the time of importation, while the other exclusion is addressed to finished merchandise that is unassembled.

One additional provision of the Orders is important to the analysis in this case – the so-called "fasteners exception" to the exclusion for finished goods kits. According to the fasteners exception, "[a]n imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the [Orders] merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product." Antidumping Duty Order, 76 Fed. Reg. at 30,651.

B. *The Straight Edges Imported by Plasticoid*

Plasticoid entered a small volume of finished aluminum cutting and marking straight edges ("straight edges") from China in 2011 – the same year that the Orders were published – believing that the merchandise was not within the scope of the Orders. The straight edges that Plasticoid imported are used in drafting and cutting applications in the drafting and arts industries. As imported, the straight edges required no further manufacturing or assembly. Nor did they require mounting or use in combination with any other component, apparatus, or fixture. Each straight edge consisted of a single hollow extrusion made of aluminum alloy, and was no more than 42.125 inches long, less than 1.5 inches wide, and less than 0.4 inches tall. The straight edges featured the flatness and straightness required for precision drafting and cutting uses, and were available in a wide

range of finishes. *See* Scope Ruling Request Submitted by Plasticoid Manufacturing Inc.: Aluminum Extrusions from the People's Republic of China (PRC) at 3, 6–7 (Oct. 9, 2012) (Doc. No. 2) ("Scope Ruling Request").

The top of each straight edge had a curved face, and one or more beveled edges to facilitate precise marking and cutting. Along the bottom face of each straight edge were grooves, to allow for smooth gliding on work surfaces. Similarly, the wall thickness at certain points along the length of the straight edge was less than 0.77 millimeters, minimizing the weight of the straight edge in order to maximize ease of use and maneuverability. Other features included textured finger grips along the length of the straight edge, for ease of manipulation and to help prevent the user's fingers from slipping into the cutting or marking path. Machined holes made it easy to mount the straight edge, or to hang it for storage when not in use, if a user wished to do so. Scope Ruling Request at 7. Technical drawings and photos of the straight edges are included in the record. *See id.* at Exhs. 1 & 2.

C. *The Scope Proceeding*

Plasticoid received a notice from U.S. Customs and Border Protection in 2012, seeking additional duties on the imported straight edges based on the Orders on aluminum extrusions from the PRC. Plasticoid responded by filing a request for a scope ruling with Commerce, arguing that the straight edges were excluded from the scope of the Orders, relying on both the plain language of the Orders themselves and various scope determinations that Commerce had issued. *See* Scope Ruling Request at 3.

In its Scope Ruling Request, Plasticoid explained that, as imported, the straight edges were finished and ready for use, with no need for any other part, component, or element. In addition, Plasticoid argued that the fact that each straight edge consisted of a single aluminum extrusion did not detract from the fact that the straight edges are finished, end use goods, and were – in and of themselves – suited for the specific purpose for which they were produced. And Plasticoid stated that the straight edges reflected exactly the type of "downstream products that have been converted into finished merchandise" that the Aluminum Extrusions Fair Trade Committee (*i.e.*, the domestic industry "Petitioner" that initiated the underlying antidumping and countervailing duty investigations) identified as being outside the scope of the Orders in those underlying investigations. *See generally* Scope Ruling Request at 3–4.

To determine whether a particular product is included within the scope of an antidumping or countervailing duty order, Commerce first considers the description of the product set forth in the scope ruling request and the plain language of the order at issue, together with the information listed in 19 C.F.R. § 351.225(k)(1) – specifically, the descriptions of the merchandise included in the petition, in the records of the initial investigation, and in determinations of Commerce and the International Trade Commission ("ITC"), including prior scope determinations. *See* Scope Ruling at 1–2; *King Supply Co. v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012) (noting that, "while the plain language of the . . . order is paramount, Commerce must also take into account [the materials specified in § 351.225(k)(1)]"); *Walgreen Co. v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) (stating that "it is the language of Commerce's final order that defines the scope of the order," albeit with the aid of other materials); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (explaining that "a predicate for the interpretive process is language in the order that is subject to interpretation"); 19 C.F.R. § 351.225(k)(1) (2012).[4]

If Commerce determines that its § 351.225(k)(1) analysis is sufficient to decide the matter, then Commerce issues a final scope ruling. If that analysis is not dispositive, Commerce considers the five additional criteria set forth in 19 C.F.R. § 351.225(k)(2), known as the "*Diversified Products* criteria" – (1) the physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. *See* 19 C.F.R. § 351.225(k)(2); *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983).

D. *Commerce's Scope Ruling*

In this case, Commerce found its analysis under 19 C.F.R. § 351.225(k)(1) to be dispositive – that is, Commerce concluded that the description of the straight edges in Plasticoid's Scope Ruling Request, together with the scope language and the descriptions of the subject merchandise in the Orders at issue, as well as prior scope rulings addressing those Orders, provided an adequate basis for an agency determination.[5] Commerce therefore found it unnecessary to consider

[4] All citations to federal regulations are to the 2012 edition of the Code of Federal Regulations.

[5] The Scope Ruling stated that Petitioner did not submit comments to Commerce concerning Plasticoid's Scope Ruling Request. *See* Scope Ruling at 1. However, that statement is in error. Petitioner in fact did submit such comments at the agency level, although it elected

the *Diversified Products* criteria set forth in § 351.225(k)(2) here. *See* Scope Ruling at 10.[6]

In its Scope Ruling, Commerce concluded that Plasticoid's straight edges fell squarely within the scope of the Orders. Scope Ruling at 12. Commerce began its analysis by noting that the straight edges "[met] the description of subject extrusions" that is set forth in the Orders, and by highlighting the scope language concerning products referred to by their "end use" and products "ready for use at the time of importation." *See id*. at 10–11.

The Scope Ruling stated that the straight edges did not qualify for the finished merchandise exclusion, characterizing the straight edges as "mere[] aluminum extrusions that meet the physical description of subject merchandise, referred to by their end use" and analogizing them to "door thresholds" and "carpet trim" – both of which are listed in the Orders as examples of products that are in-scope and referred to by their "end use." Scope Ruling at 10; *see also id*. at 11 (emphasizing that the scope language of the Orders states that aluminum extrusions "identified by reference to their end use" are subject to the Orders if they "otherwise meet the scope definition").

The Scope Ruling deemed "irrelevant" Plasticoid's point that the straight edges had "an independent function" and were "not an element of a larger system, or lack[ing] an integral component," unlike door thresholds and carpet trim (which are listed in the Orders as examples of products that are in-scope), and unlike the products at issue in the Cleaning Systems Scope Ruling, the Railing Systems Scope Ruling, and the Fence Sections Scope Ruling (all of which

---

not to intervene in this forum. *See* Aluminum Extrusions from the People's Republic of China: Comments in Opposition to Scope Ruling Request Regarding Cutting and Marking Straight Edges (Nov. 9, 2012) (Doc. No. 14) ("Petitioner's Opposition to Scope Ruling Request on Straight Edges"). In its comments filed with Commerce, Petitioner characterized the straight edges as "nothing more than fabricated aluminum extrusions," and argued generally that they are not "finished merchandise" excluded from the scope of the Orders because they "do not consist of assembled or completed parts" and are not "composed of aluminum extrusion(s), as well as other parts." *Id*. at 3, 5. Petitioner further asserted that exclusion of the straight edges from the scope of the Orders "would lead to an absurd result," in that – according to Petitioner – "[n]early any aluminum extrusion with at least one straight edge could be used as a straight edge . . . and could be claimed as a 'finished' aluminum extrusion intended for such uses." *Id*. at 7.

[6] In its Scope Ruling Request, Plasticoid similarly expressed the view that its request could be resolved under 19 C.F.R. § 351.225(k)(1), based solely on the scope language of the Orders and prior scope rulings issued by Commerce, such that resort to the *Diversified Products* criteria in § 351.225(k)(2) was unnecessary. Of course, Plasticoid argued that any analysis – whether under § 351.225(k)(1) or § 351.225(k)(2) – would lead Commerce to conclude that Plasticoid's straight edges were excluded from the scope of the Orders. *See generally* Scope Ruling Request at 8, 12–13.

Commerce had previously found to be within the scope of the Orders). According to the Scope Ruling, those items were "merely aluminum extrusions referred to by their end use." *See* Scope Ruling at 10–11; Final Scope Ruling on Certain Cleaning System Components (Oct. 25, 2011) ("Cleaning Systems Scope Ruling"), *currently on appeal*, *Rubbermaid Commercial Products LLC v. United States*, Court No. 11–00463; Final Scope Ruling on Certain Modular Aluminum Railing Systems (Oct. 31, 2011) ("Railing Systems Scope Ruling"); Final Scope Ruling on American Fence Manufacturing Company LLC's Fence Sections, Posts and Gates (Dec. 2, 2011) ("Fence Sections Scope Ruling").

In addition to the scope language in the Orders concerning products referred to by their "end use," the Scope Ruling also pointed to the scope language concerning products "ready for use at the time of importation." Scope Ruling at 10–11. The Scope Ruling stated that the scope language of the Orders expressly covers products that match the Orders' description of subject merchandise, without regard to whether the products are "identified by reference to their end use," and even if they are "ready for use at the time of importation." *Id*.

The Scope Ruling further stated that the straight edges did not qualify for the finished merchandise exclusion for the same reason that Commerce decided that geodesic dome kits did not meet the exclusion for finished goods kits – that is, both the straight edges at issue here and the geodesic domes at issue in one of Commerce's previous scope rulings consisted solely of aluminum extrusions. Scope Ruling at 11; Final Scope Ruling on J.A. Hancock Co., Inc.'s Geodesic Structures (July 17, 2012) ("Geodesic Domes Scope Ruling").

Although the Scope Ruling was silent on the bulk of Plasticoid's arguments, it did acknowledge Plasticoid's position that the straight edges are "downstream products that have been converted into finished merchandise," and are thus exactly the type of product that, in the Precision Machine Parts scope proceeding, Petitioner indicated that it had intended to exclude from the scope of the Orders. *See* Scope Ruling at 11; Final Scope Ruling on Precision Machine Parts at 9 (March 28, 2012) ("Precision Machine Parts Scope Ruling"). However, the Scope Ruling's treatment of Plasticoid's claim was nonresponsive.

Specifically, the Scope Ruling seized on the fact that, in the Precision Machine Parts proceeding, Commerce "found that products which have undergone specialized machining processes may be considered subject merchandise because the scope [language of the Orders], as well as the International Trade Commission's (ITC) investi-

gation, includes aluminum extrusions that have been 'fabricated.'" Scope Ruling at 11; Precision Machine Parts Scope Ruling at 14–15; *see also id*. at 17. The Scope Ruling then observed that the straight edges had "machined holes, a process which is specifically discussed in the scope [language] of the Orders," and stated that such fabrication "does not exclude [the straight edges] from the scope of the Orders" – though Plasticoid never claimed that it did. *See* Scope Ruling at 11.

This action ensued.

II. *Standard of Review*

In an action contesting a scope ruling, Commerce's determination must be upheld except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Sango Int'l, L.P. v. United States*, 567 F.3d 1356, 1362 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same).

Moreover, any evaluation of the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Further, although Commerce "enjoys substantial freedom to interpret and clarify its . . . orders" via scope rulings, and is entitled to "significant deference," Commerce "cannot 'interpret' an . . . order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *See Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); *Global Commodity Group LLC v. United States*, 709 F.3d 1134,

1138 (Fed. Cir. 2013); *Duferco Steel*, 296 F.3d at 1095 (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)). Antidumping and countervailing duty orders thus "may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel*, 296 F.3d at 1089.

In addition, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319–20. Nevertheless, "the path of Commerce's decision must be reasonably discernable" to support judicial review. *Id*. (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

III. *Analysis*

Plasticoid contends that the Scope Ruling erred in concluding that the straight edges at issue are within the scope of the antidumping and countervailing duty orders on aluminum extrusions from the PRC, impermissibly expanding the scope of the Orders. In particular, Plasticoid criticizes Commerce for failing to address Plasticoid's claim that the straight edges are "finished merchandise" within the meaning of the Orders and the intent of Petitioner, and are thus outside the scope of the Orders pursuant to the "finished merchandise" exclusion. Similarly, Plasticoid faults each of the three reasons set forth in the Scope Ruling as a basis for Commerce's determination.

As outlined below, a number of Plasticoid's arguments merit Commerce's further consideration.

A. *Plasticoid's Claim and the "Finished Merchandise" Exclusion*

Plasticoid claims broadly that, in the Scope Ruling here, Commerce has interpreted the Orders in a manner that is fundamentally at odds with their meaning, structure, and intent, as manifest in the language and history of the Orders and Commerce's prior scope rulings. Plasticoid's overarching "theme" is that the Orders reflect a bright line distinction between mere "parts, elements or components" and "assemblies" containing aluminum extrusions (which are within the scope of the Orders) and "stand-alone," "finished, end use products" that are "fully functional independent of any other part, component, or element" (which are excluded). Pl.'s Brief at 7, 11, 12.[7] According to

[7] *See also*, *e.g.*, Pl.'s Brief at 6 (referring to "the scope's inclusion of mere parts and components," and emphasizing that none of the specified exemplars "function[s] as an

Plasticoid, this distinction is reflected in the Orders' two exclusions for "finished merchandise" and "finished goods kits."

Relying on the scope language of the Orders, Plasticoid first asserts that the straight edges at issue "are final finished merchandise plainly contemplated by the [finished merchandise] exclusion," which – "expressly and unambiguously" – exempts from the scope of the Orders "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry." Pl.'s Brief at 5; Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654. Plasticoid emphasizes that the straight edges "consist of a single part – [a] finished aluminum extrusion," that they "require no other part, component, or assembly after entry into the United States," and that they "have no other commercial use" except as straight edges for precision

---

independent finished product"); *id*. at 7 (referring to "[t]he inclusion of parts, elements and components within the order[s] as distinguished from downstream products converted into finished merchandise"); *id*. (stating that prior scope rulings demonstrate that "[w]here the merchandise was simply one element or lacked an integral component, Commerce found that it was within the scope of the order[s]," but that "[w]here the product was fully functional independent of any other part, component, or element, . . . Commerce determined that the product was outside the scope of the order[s]"); *id*. at 11 (arguing that "[t]o the extent the scope rulings referenced by Commerce [in the determination at issue here] distinguished between parts or assemblies and stand-alone, finished goods, all share the common theme that parts or assemblies are within the scope, and stand-alone, finished goods are excluded from the scope"); *id*. (noting that "Commerce's analysis . . . never addresse[d] the distinction between parts and finished goods found in the scope language [of the Orders] and [Commerce's] scope determinations"); *id*. at 12 (asserting that Commerce ignored fact that specified "exemplars [listed in the Orders] are simply parts, elements or components, while [Plasticoid's] straight edges are finished, end use products"); *id*. at 13–14 (arguing that instant Scope Ruling "has included as part of [the] scope definition finished merchandise intended for use[] not as a part or component of some broader assembly or system, but for final independent end use," and asserting that Commerce has failed to recognize the distinction in the scope language "between the express inclusion of parts and the express exclusion of finished goods"); Pl.'s Reply Brief at 2 (arguing that Scope Ruling "fail[ed] to distinguish between (a) downstream products that have been converted into finished merchandise expressly excluded from the [Orders] and (b) mere parts and components . . . covered by the [Orders]"); *id*. at 4–5 (referring to "Commerce's scope determinations concerning parts or components as distinguished from downstream *finished* merchandise"); *id*. at 5 (asserting that scope language of Orders reflects "clear concern focused on aluminum extrusions that consist of loose, primary or intermediate parts, as distinguished from 'final finished goods'"); *id*. at 6 (arguing that "Petitioner[] recognized the difference between aluminum extrusion *parts* which are downstream products . . . , and downstream products *that have been converted into finished merchandise*," and that Petitioner[] w[as] concerned only about "parts"); *id*. at 6–7 (arguing that straight edges are "not the primary or intermediate downstream product (*i.e.*, parts) intended to be included within the scope of the order[s] and [are] readily distinguished from products that are"); *id*. at 7 (reiterating distinction between "*parts* subject to the [Orders]" and "finished merchandise not subject to the [Orders]").

drafting and art applications. Pl.'s Brief at 5; *see also* Pl.'s Reply Brief at 6–7, 10.

Plasticoid further argues that the straight edges are readily distinguished from merchandise that the scope language of the Orders expressly identifies as in-scope merchandise, such as "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks." Pl.'s Brief at 6; Pl.'s Reply Brief at 7–8; Antidumping Duty Order, 76 Fed. Reg. at 30,651 (indicating that "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" are within the scope of the Orders "if they otherwise meet the scope definition," even if "they are ready for use at the time of importation"); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (same). Plasticoid argues that each of those listed examples "represents a product that may itself be 'finished,' but is just one element or component of a broader system," and that "[n]one of the [listed] examples function[s] as an independent finished product." Pl.'s Brief at 6.[8] In contrast, Plasticoid notes, the straight edges here are not "just one element or [an] integral component" of some "larger system or finished product." *Id*. Plasticoid concludes that the straight edges thus "differ significantly from the examples [of in-scope merchandise] provided in the scope language" of the Orders. *Id*.

Apart from its reliance on the express language of the Orders themselves (discussed above), Plasticoid also looks to scope rulings that Commerce has rendered in other cases, which, Plasticoid maintains, "confirm the conclusion that [the] straight edges are excluded" from the scope of the Orders. Pl.'s Brief at 7; *see generally id*. at 7–11. Specifically, Plasticoid states that – in every scope ruling addressing either the exclusion for finished merchandise or the exclusion for finished goods kits – Commerce has focused on whether the merchandise was "merely . . . one element of a larger system" or whether the merchandise was "a final finished good," either after assembly (if a kit) or, if not, at the time of importation. *Id*. at 7. According to Plasticoid: "Where the merchandise was simply one element [of a larger system or finished product] or [where the merchandise] lacked an integral component, Commerce found that it was within the scope

[8] Illustrating its point that each of the listed items is "just one element or component of a broader system" and not "an independent finished product," Plasticoid explains:

> Fence posts are just one piece of a fencing system, as [Commerce] has found in numerous scope determinations . . . . In similar fashion, electrical conduits are merely components of an enclosed wiring system. Door thresholds operate in collaboration with an overall door unit. Likewise, carpet trim has no function independent of the carpet it is fitted to. The same may be said for heat sinks.

Pl.'s Brief at 6.

of the [Orders]. Where the product was fully functional independent of any other part, component, or element, . . . Commerce determined that the product was outside the scope of the [Orders]." *Id*.[9] Plasticoid argues that applying that rationale to the straight edges here leads inexorably to the conclusion that they are excluded from the scope of the Orders. In particular, Plasticoid emphasizes that the straight edges as imported are ready for use – not in the sense that they are finished and ready for installation in "some larger system or product," but, rather, because "their intended end-use application requires only the straight edge itself." *Id*. at 9. "The straight edge, in and of itself, is the finished merchandise." *Id*.[10]

---

[9] As one example involving the finished merchandise exclusion, Plasticoid cites the Cleaning Systems Scope Ruling. *See* Pl.'s Brief at 7–8. Commerce there found that mop frames and mop handles were within the scope of the Orders, reasoning that, absent mop heads or mop cloths, the mop frames and mop handles were not "completed cleaning device[s]" and thus were not "final, finished good[s]" for purposes of the finished merchandise exclusion. Cleaning Systems Scope Ruling at 9.

In addition, Plasticoid cites the Baluster Kits Determination, the Awnings Scope Ruling, and a line of scope rulings addressing fencing and railing kits, all of which involved the exclusion for finished goods kits. Pl.'s Brief at 7–9; Def.'s Brief at 16 (noting that Baluster Kits Determination and Awnings Scope Ruling addressed exclusion for finished goods kits); Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the People's Republic of China at 27–28 (comment 3.H) (April 4, 2011) ("Baluster Kits Determination"); Final Scope Ruling on Certain Retractable Awning Mechanisms at 9–10 (Oct. 14, 2011) ("Awnings Scope Ruling"); Final Scope Ruling on Ameristar Fence Products' Aluminum Kitted Fences at 5–6 (Aug. 15, 2012); Final Scope Ruling on Origin Point Brands, LLC's Fence Panels, Posts and Gates at 9–12 (Dec. 13, 2011) ("Fence Panels, Posts, and Gates Scope Ruling"); Final Scope Ruling on Ameristar Fence Products' Aluminum Fence and Post Parts at 6 (Dec. 13, 2011); Fence Sections Scope Ruling at 10–12; Railing Systems Scope Ruling at 14–17.

Plasticoid posits that, in cases involving the exclusion for finished goods kits, "[t]he key factor is whether such kits provide all the necessary parts and components to assemble a final finished product." Pl.'s Brief at 8. As such, in the Baluster Kits Determination, Commerce found that the subject "packaged collection" of individual balusters was merely "a single element of a railing or deck system" and thus did not constitute a "finished product" for purposes of the finished goods kits exclusion. Baluster Kits Determination at 28. Similarly, in the Awnings Scope Ruling, Commerce determined that, without a textile awning (which was not included with the merchandise as imported and had to be purchased separately), the retractable awning mechanism there at issue lacked an "integral component[]" and thus did not fall within the finished goods kits exclusion. Awnings Scope Ruling at 9–10. And, in the rulings involving fencing and railing kits, Commerce concluded that the products in question did not meet the requirements for exclusion as finished goods kits because, as Plasticoid puts it, "none of the products at issue provided all the parts and components necessary to assemble a complete fencing or railing system." Pl.'s Brief at 8.

[10] As an aside, Plasticoid notes that the Scope Ruling at issue here includes a synopsis of select prior scope determinations, including the Baluster Kits Determination, the Cleaning Systems Scope Ruling, the Railing Systems Scope Ruling, the Fence Sections Scope Ruling, and the Banner Stands Scope Ruling. *See* Pl.'s Brief at 9–10 (citing Scope Ruling at 5–8); Baluster Kits Determination; Cleaning Systems Scope Ruling; Railing Systems Scope Ruling; Fence Sections Scope Ruling; Final Scope Ruling on Banner Stands and Back Wall

In addition to its arguments based on the language of the Orders and on Commerce's prior scope rulings, Plasticoid also invokes the intent of Petitioner, which undergirds the Orders. Specifically, Plasticoid claims that the straight edges are "precisely the type of merchandise [that] Petitioner[] [in the underlying antidumping and countervailing duty investigations] sought to exclude from the scope of the [Orders]" – "namely 'downstream products that have been converted into finished merchandise'" (a reference to the position taken by Petitioner in the Precision Machine Parts Scope Ruling). Pl.'s Brief at 5–6 (quoting Precision Machine Parts Scope Ruling at 9); *see also* Pl.'s Brief at 13; Pl.'s Reply Brief at 2, 5–7.

Commerce's response in the instant Scope Ruling was a complete *non sequitur*. Commerce first noted that, "in the Precision Machine Parts Scope Ruling, [Commerce] found that products which have undergone specialized machining processes may be considered subject merchandise because the scope [language of the Orders], as well as the International Trade Commission's (ITC) investigation, includes aluminum extrusions that have been 'fabricated.'" Scope Ruling at 11 (citation omitted). Commerce concluded that "[h]ere, Plasticoid's products have machined holes, a process which is specifically

---

Kits (Oct. 19, 2011) ("Banner Stands Scope Ruling"). Plasticoid argues that "each synopsis underscores why straight edges . . . should be excluded" from the scope of the Orders; and Plasticoid faults Commerce for failing to "acknowledge[] how [the agency's] own characterizations of these prior scope rulings set straight edges apart." Pl.'s Brief at 9–10.

Plasticoid emphasizes that, in the Scope Ruling here, "Commerce note[d] that 'the baluster kits represented a packaged *collection of individual parts*, which *comprised a single element of a deck system*, and, therefore, *did not represent a finished product*.'" Pl.'s Brief at 10 (emphases added by Plaintiff) (quoting Scope Ruling at 5). Plasticoid similarly highlights the fact that, in the instant Scope Ruling, "Commerce note[d] that the products [at issue in the Cleaning Systems Scope Ruling] were 'merely *subassemblies* ' and designed to 'function collaboratively [with other products] to form *a completed cleaning device*,' but the 'components to make *a final cleaning device* were not part of a packaged combination at the time of importation.'" Pl.'s Brief at 10 (emphases added by Plaintiff) (quoting Scope Ruling at 5). Plasticoid further emphasizes that the Scope Ruling's synopsis of the Railing Systems Scope Ruling stated that "the product in that case 'cannot be classified as anything other than *parts*, as opposed to *stand-alone*, *fully-finished products*.'" Pl.'s Brief at 10 (emphases added by Plaintiff) (quoting Scope Ruling at 6). In addition, Plasticoid points to the Scope Ruling's synopsis of the Fence Sections Scope Ruling, where "Commerce . . . reaffirmed that the case turned on the fact that the products at issue 'did not contain all the parts necessary to fully assemble *a finished product*.'" Pl.'s Brief at 10 (emphasis added by Plaintiff) (quoting Scope Ruling at 6). And, in contrast, Plasticoid observes that, in discussing the Banner Stands Scope Ruling, Commerce here "noted that the 'products at issue *contained all the parts* required to assemble a *completed exhibition frame*' and therefore met the exclusion for finished good[s] kits." Pl.'s Brief at 10 (emphases added by Plaintiff) (quoting Scope Ruling at 7).

discussed in the scope [language] of the Orders," and thus "[such] fabrication does not exclude Plasticoid's products from the scope of the Orders." *Id*. But, contrary to Commerce's implication, Plasticoid was not arguing that the straight edges are excluded from the scope of the Orders by virtue of their fabrication. Commerce thus offered no substantive response to Plasticoid's reliance on the intent of Petitioner as manifest in the Precision Machine Parts Scope Ruling. *See* Pl.'s Brief at 13 (noting, *inter alia*, that Scope Ruling's discussion of Precision Machine Parts Scope Ruling is "nonsensical and misses the point"); *see also* Pl.'s Reply Brief at 2, 5–7 (discussing Precision Machine Parts Scope Ruling and its significance here).

In the Precision Machine Parts Scope Ruling, Commerce explained that Petitioner had advised that "the scope [of the Orders] was crafted to encompass all downstream products that have undergone subsequent processes, such as drawing, finishing, fabricating, etc." and that Petitioner had acknowledged that the scope might "indeed cover many thousands of aluminum parts." Precision Machine Parts Scope Ruling at 9. On the other hand, Commerce explained, Petitioner had also emphasized that "the scope does not encompass downstream products *that have been converted into finished merchandise*." *Id*. (emphasis added).[11] In the instant Scope Ruling, notwithstanding Plasticoid's pointed reference to the intent of Petitioner as expressed in the Precision Machine Parts Scope Ruling, Commerce made no attempt to explain the critical distinction that Petitioner there drew between "downstream products that have undergone subsequent processes" (which are intended to be within the scope of the Orders) and "downstream products that have been converted into finished merchandise" (which are intended to be excluded). Commerce gave no indication as to what Petitioner possibly could have been referring to which would be more "finished" than the straight edges at issue here. Nor did Commerce explain how the straight edges could have been any further "downstream" – or any more "finished" – than they were.

[11] Commerce has repeatedly stated that the intent of petitioners is generally accorded substantial weight in defining the scope of an order. *See generally*, *e.g.*, Awnings Scope Ruling at 5 n.6 (explaining, *inter alia*, that, under statutory scheme, Commerce "owes deference" to petitioners' intent in establishing scope of order, and that – in exercising agency's authority to define or clarify scope of order – agency must do so "in a manner which reflects the intent of the petition"); Final Scope Ruling on Clenergy (Xiamen) Technology's Solar Panel Mounting Systems at 5 n.10 (Oct. 31, 2012) ("Solar Panel Scope Ruling") (same); Fence Panels, Posts, and Gates Scope Ruling at 5–6 n.10 (same); Fence Sections Scope Ruling at 6 n.14 (same); Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the People's Republic of China at 19 (comment 3.A) (April 4, 2011) (similar).

B. *The Stated Reasons for Commerce's Scope Ruling*

Other than Commerce's "non-sensical" response to Plasticoid's reference to the Precision Machine Parts Scope Ruling, the instant Scope Ruling never directly addressed Plasticoid's arguments that its straight edges are "finished merchandise" within the meaning of the Orders and are thus excluded from the scope of the Orders pursuant to the finished merchandise exclusion. Instead, Commerce predicated its ruling on three other provisions of the Orders, discussed below in turn.[12]

1. *Extrusions "Identified With Reference to Their End Use"*

The Scope Ruling first stated that Plasticoid's straight edges do not fall within the finished merchandise exclusion because "[t]he scope [of the Orders] expressly includes aluminum extrusions which are *identified by reference to their end use*." Scope Ruling at 10 (emphasis added). Specifically, the Orders state:

---

[12] The Government contends that "Commerce reasonably determined that . . . the products do not meet the finished merchandise exclusion." Def.'s Brief at 6; *see also id*. at 9 (asserting that "Commerce determined that the straight edges . . . do not constitute merchandise excluded under the finished merchandise exclusion"). It is true that the Scope Ruling stated that the straight edges "do not meet the exclusion for 'finished merchandise.'" *See* Scope Ruling at 12. But it is also true that Commerce in fact did not address whether the straight edges constitute "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry."

Unlike Commerce, the Government responds directly to Plasticoid's arguments that its straight edges are "finished merchandise" within the meaning of the finished merchandise exclusion. Specifically, in its brief, the Government argues that "Plasticoid's straight edges do not qualify for the 'finished merchandise' exclusion because they do not consist of parts that are fully and permanently assembled and completed at the time of entry." The Government continues: "To find, as Plasticoid proposes, that a single piece of aluminum extrusion falls within the finished merchandise exclusion would render the Orders' phrase 'as parts that are fully and permanently assembled and completed at the time of entry' meaningless." *See* Def.'s Brief at 6–7. In other words, according to the Government, the finished merchandise exclusion is limited to "products that consist of multiple parts that have been fully and permanently assembled at the time of entry," and thus does not apply to the straight edges here because each straight edge consists of "a single piece of hollow aluminum extrusion." *Id*. at 10; *see generally id*. at 10–13, 15, 16.

Whatever the merits of the reasoning set forth in the Government's brief, that reasoning played no part in Commerce's Scope Ruling and is therefore *post hoc* rationale. Recording of Oral Argument at 9:07–9:55 (counsel for Plasticoid noting that Government's argument highlighting scope language's reference to multiple "parts" and merchandise that has been "assembled" constitutes impermissible *post hoc* rationale). It is well settled that an agency determination cannot be sustained on the basis of a rationale supplied after the fact by litigation counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). As the Supreme Court has underscored, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.

> Subject extrusions may be *identified with reference to their end use*, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language [elsewhere in the scope language of the Orders]). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphasis added); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (emphasis added). According to the Scope Ruling, "[l]ike the door thresholds or carpet trim" listed in the Orders as examples of extrusions referred to by their end use, Plasticoid's straight edges "are merely aluminum extrusions that meet the physical description of subject merchandise, referred to by their end use: as cutting and marking edges." Scope Ruling at 10.

As Plasticoid notes, however, the Scope Ruling is "overly-simplistic" in relying on the "end use" language in the Orders as a basis for concluding that the straight edges are in-scope. *See* Pl.'s Brief at 5. Much as it has done in other scope rulings, Commerce here sought to invoke the "end use" language as an all-purpose "catch all" to "capture Plasticoid's product within the scope of the orders." Pl.'s Reply Brief at 7. But, contrary to Commerce's implication, "[t]he scope language simply indicates that aluminum extrusions subject to the [Orders] 'may' be identified by their end use. It does not state that where aluminum extrusions are identified by their end use the finished goods exclusion does not apply." Pl.'s Brief at 11. Plasticoid argues that the fact that its straight edges are identified by their end use does not diminish their status as "a downstream product [that has been] converted into finished merchandise." *Id*. at 6, 12; *see also* Pl.'s Reply Brief at 6, 7–8.

Plasticoid observes that the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" listed in the Orders as examples of extrusions referred to by their end use may (at least in one sense) be "finished," but – in reality – are merely elements or components of larger systems or finished products. In the words of Plasticoid, "[n]one of the examples function[s] as an independent finished product." Pl.'s Brief at 6, 12; *see also* Pl.'s Reply Brief at 6–7. The straight edges, by contrast, are not merely a single "element or integral component of a larger system or finished product" but instead themselves "function as independent finished product[s]." Pl.'s Brief at 6, 12; *see also* section III.A, *supra*. The Scope Ruling sought to dismiss Plasticoid's distinction out of hand, arguing (in a rather

circular fashion) that "the fact that [the straight edges] are not an element of a larger system, or lack an integral component . . . is irrelevant" because the referenced exemplars (*i.e.*, "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks") "are merely aluminum extrusions referred to by their end use." Scope Ruling at 10; *see also id*. at 11 (pointing out "the express inclusion of subject extrusions in the scope of the Orders that may be identified by reference to their end use"); Def.'s Brief at 6, 14–15 (asserting that "Commerce reasonably determined that, regardless of their identification by their end use . . . , [the straight edges] do not meet the finished merchandise exclusion," and disputing Plasticoid's comparison of its merchandise to exemplars listed in Orders). Again, as Plasticoid notes, "Commerce's analysis is far too simplistic." Pl.'s Reply Brief at 7–8.

Commerce's reliance on the "end use" language is, in any event, misplaced. Plasticoid does not argue (and has never argued) that its straight edges are excluded from the scope of the Orders merely because the straight edges are "identified by reference to their end use." It would be equally ridiculous for Commerce to suggest that merchandise that is identified by reference to its end use is *ipso facto* within the scope of the Orders.

As Petitioner aptly observed in the Refrigerator/Freezer Trim Kits proceeding, in fact "[t]he scope of the Orders does not include or exclude [products] based on their end uses." Final Scope Ruling on Refrigerator/Freezer Trim Kits at 9 (Dec. 17, 2012) ("Refrigerator/Freezer Trim Kits Scope Ruling"), *currently on appeal*, *Meridian Products, LLC v. United States*, Court No. 1300–018.[13] And, significantly, the Orders expressly exclude from their scope a number of products that are specifically identified by reference to their end use, including "finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654; *see also* Pl.'s Brief at 11 (highlighting the Orders' express exclusion of finished merchandise identified by reference to end use).

Contrary to Commerce's statements in the Scope Ruling, the fact that Plasticoid's straight edges are "identified by reference to their end use" does not preclude them from constituting "finished merchandise" for purposes of the finished merchandise exclusion. Moreover, nothing in the Scope Ruling responded substantively to the distinc-

[13] Petitioner reiterated this point in the instant scope proceeding: "[T]he scope . . . does not include or exclude [products] based on their end uses." Petitioner's Opposition to Scope Ruling Request on Straight Edges at 6.

tions that Plasticoid draws between its merchandise and the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" listed in the Orders as exemplars of in-scope products.

2. *Extrusions "Ready for Use at the Time of Importation"*

Commerce's Scope Ruling also underscored "the fact that [Plasticoid's] products are *ready for use at the time of importation*," asserting that this fact "does not, by itself, result in the products' exclusion from the Orders." Scope Ruling at 10–11 (emphasis added); *see also* Def.'s Brief at 6 (arguing that "Commerce reasonably determined that, regardless of . . . whether they are ready for use at the time of importation, [the straight edges] do not meet the finished merchandise exclusion"). Commerce noted that the scope language in the Orders "indicates that products otherwise meeting the scope definition for subject merchandise are covered under the Orders," without regard to whether the products are "ready for use at the time of importation" (Scope Ruling at 11):

> Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language [elsewhere in the scope language of the Orders]). Such goods are subject merchandise if they otherwise meet the scope definition, *regardless of whether they are ready for use at the time of importation*.

Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphasis added); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (emphasis added); *see also* Def.'s Brief at 9–10 (noting that products "ready for end use at the time of exportation" are not excluded if they otherwise "meet the physical description" in the Orders).

Notably, however, Plasticoid does not claim (and has never claimed) that the fact that its straight edges are "ready for use at the time of importation" is alone sufficient to exclude them from the scope of the Orders. Rather, Plasticoid emphasizes that the use for which its merchandise is "ready . . . at the time of importation" is fundamentally different than the use for which the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" listed in the Orders are ready at the time those products are imported.

As Plasticoid explains, the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" listed as exemplars in the Orders are "ready for use at the time of importation" in the sense that they are "ready to be installed in some larger system or product." *See* Pl.'s Brief at 9. On the other hand, use of Plasticoid's straight edges

upon importation "requires only the straight edge itself." *Id*. Unlike the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks," the straight edges are not part of any larger system or product. "The straight edge, in and of itself, is the finished merchandise." *Id*.

Commerce's reliance on the language of the Orders concerning "read[iness] for use at the time of importation" thus provided no greater support for the Scope Ruling than the language concerning "end use," discussed above. Nowhere in the Scope Ruling did Commerce address the merits of Plasticoid's observations concerning the straight edges' "read[iness] for use at the time of importation" and the relative "read[iness]" of the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" listed in the Orders. Moreover, even Commerce does not contend that "read[iness] for use at the time of importation" is irrelevant to a product's status as "finished merchandise" for purposes of exclusion from the scope of the Orders. By referring to merchandise that is "fully and permanently assembled and completed at the time of entry," the finished merchandise exclusion essentially requires that excluded products be "ready for use at the time of importation."

Notwithstanding anything in the Scope Ruling, the fact that Plasticoid's straight edges are "ready for use at the time of importation" does not preclude them from constituting "finished merchandise" for purposes of the finished merchandise exclusion. Commerce's emphasis on "readiness for use" as a basis for ruling the straight edges in-scope is unavailing.

3. *The "Fasteners Exception" to the "Finished Goods Kits" Exclusion*

As Commerce's third and final reason for concluding that Plasticoid's straight edges do not fall within the Orders' exclusion for "finished merchandise," the Scope Ruling cited the "fasteners exception" to the "finished goods kits" exclusion. *See* Scope Ruling at 11. In relevant part, the Orders state:

> The scope . . . excludes [1] finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes [2] finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of

> the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. *An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the* [*Orders*] *merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product*.

Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphasis added); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (emphasis added).

On this issue, the Scope Ruling here relied heavily on the Geodesic Domes Scope Ruling, which involved both the finished goods kits exclusion and the fasteners exception to that exclusion. *See generally* Scope Ruling at 11; Geodesic Domes Scope Ruling. As the instant Scope Ruling explained, Commerce found that the product in that case – a kit for the construction of a geodesic dome, consisting of a set of extruded aluminum pipes (color-coded and cut to various lengths, with crimping and boring at the ends), together with the necessary fasteners and assembly instructions – "contained all the parts necessary to assemble a complete geodesic dome and, thus, met the 'initial requirements for . . . the finished goods kit exclusion.'" Scope Ruling at 11 (quoting Geodesic Domes Scope Ruling at 7); *see also* Geodesic Domes Scope Ruling at 5. Commerce nonetheless found the geodesic dome kits to be covered by the Orders, due to the fasteners exception, which provides that "[a]n imported product will not be considered a 'finished goods kit' . . . merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product." Commerce reasoned that, because (other than the fasteners and the assembly instructions) the geodesic dome kit consisted entirely of aluminum extrusions, the fasteners exception to the finished goods kits exclusion was applicable, precluding the exclusion of the geodesic dome kit from the scope of the Orders. *See* Scope Ruling at 8, 11; Geodesic Domes Scope Ruling at 7.

In the Scope Ruling at bar, Commerce emphasized that Plasticoid's straight edges "consist entirely of aluminum extrusions." Scope Ruling at 11. By analogy to the Geodesic Domes Scope Ruling, Commerce concluded that – because each of the straight edges consists of a single aluminum extrusion – the straight edges therefore "do not meet the exclusion for finished merchandise." *Id*.; *see also* Def.'s Brief at 12–13.

Plasticoid protests that, as a matter of law, the fasteners exception that is at the heart of the Geodesic Domes Scope Ruling is, on its face,

limited to the finished goods kits exclusion. And, as Plasticoid emphasizes, Plasticoid's claim is that the straight edges qualify for a different exclusion – *i.e.*, the finished merchandise exclusion. *See generally* Pl.'s Brief at 10–11, 12; *see also* Defendant's Response to Comments Regarding the Second Remand Redetermination at 12 n.7 (Aug. 8, 2014), filed in *Meridian Products, LLC v. United States*, Court No. 13–00018 (highlighting fact that "[t]he orders identify the finished goods kit exclusion and the finished merchandise exclusion as two separate exclusions").[14] Moreover, Plasticoid argues that there are dispositive factual differences between the merchandise at issue in the Geodesic Domes Scope Ruling and the merchandise here, above and beyond the fact that the Geodesic Domes Scope Ruling involved a kit and this case does not. In particular, Plasticoid contends that, aside from the fasteners (and the assembly instructions), the geodesic dome kits were "simply a collection of aluminum extrusion parts with no independent end use" and were "therefore very different from the straight edges at issue here." Pl.'s Brief at 12–13. [15] Neither of these points was addressed in Commerce's Scope Ruling. Nor does the Government address them in its brief.

In addition, neither the Scope Ruling here nor any authority cited in the Scope Ruling articulated any real rationale for the rule set forth in the Geodesic Domes Scope Ruling and applied in this case. Among other things, Commerce has not directly addressed Plasticoid's claim that the purpose of the fasteners exception is "to limit the ability to circumvent the [Orders] by shipping parts, elements and components under cover of the 'finished goods kits' exclusion by simply resorting to the nominal act of adding fasteners to the shipment." Pl.'s Brief at 7.

Although the Scope Ruling and the Geodesic Domes Scope Ruling said little or nothing about the rationale for the fasteners exception and the manner in which it has been applied by Commerce, other scope rulings have shed some modest light on the matter. In the March 2014 Scope Ruling on Curtain Wall Units, for example, Commerce stated that it had determined that, "because the scope [of the Orders] expressly covers aluminum extrusions, it would be inconsis-

[14] *But see*, *e.g.*, Final Scope Ruling on Kitchen Appliance Door Handles With Plastic End Caps and Kitchen Appliance Door Handles Without Plastic End Caps at 19–20 (Aug. 4, 2014) ("Scope Ruling on Kitchen Appliance Door Handles With and Without Plastic End Caps") (rejecting argument that fasteners exception applies only to exclusion for finished goods kits, and not to exclusion for finished merchandise).

[15] Plasticoid dismisses the geodesic dome kits as "generic extruded aluminum tube[s]" and "non-descript article[s] of extruded aluminum," and argues that "[t]here is no comparison" between its straight edges and those kits. Pl.'s Reply Brief at 8–9 (comparing and contrasting straight edges and geodesic dome kits, and analyzing implications for scope of Orders).

tent with the scope to exclude a kit that consists only of aluminum extrusions and fasteners." Final Scope Ruling on Curtain Wall Units that are Produced and Imported Pursuant to a Contract to Supply a Curtain Wall at 24 (March 27, 2014).

Similarly, in the second remand determination filed in *Meridian Products* (a challenge to the Refrigerator/Freezer Trim Kits Scope Ruling), Commerce explained that its first remand determination rested on the agency's conclusion that "permitting finished goods that consist entirely of aluminum extrusions to be excluded as finished goods would gut the scope [of the Orders], which covers aluminum extrusions." Final Results of Redetermination Pursuant to Court Remand at 7 (dated June 13, 2014) ("Meridian Second Remand Determination"), filed in *Meridian Products, LLC v. United States*, Court No. 13–00018. To much the same effect is the Kitchen Appliance Door Handles Scope Ruling, where Commerce stated that "to consider a product which consists only of aluminum extrusions as a finished goods kit or [as a] final, finished good would mean that the exception to the scope of the Orders would swallow the scope, because any aluminum extrusion product, as long as it can be identified by end use, could be considered a final product" – a result deemed "contrary to the scope itself, which covers aluminum extrusions." Final Scope Ruling on Meridian Kitchen Appliance Door Handles at 14 (June 21, 2013) ("Kitchen Appliance Door Handles Scope Ruling").[16]

Although "[Commerce's] explanations do not have to be perfect," *NMB Singapore*, 557 F.3d at 1319–20, "the path of Commerce's decision must be reasonably discernable" to support judicial review. *Id*.

[16] *See also*, *e.g.*, Scope Ruling on Kitchen Appliance Door Handles With and Without Plastic End Caps at 20 (asserting that "determining that a product which consists only of aluminum extrusions and fasteners satisfies the finished good exclusion would permit this exclusion to the Orders to swallow the scope, because any aluminum extrusion product, as long as it can be identified by end use, could be considered a finished product" – again, a result deemed "contrary to the scope itself, which covers aluminum extrusions"); Final Results of Redetermination Pursuant to Court Remand at 19, 22 (dated Aug. 14, 2013) ("Meridian First Remand Determination"), filed in *Meridian Products, LLC v. United States*, Court No. 13–00018 (stating that "if the inclusion of minor [non-extrusion] accessories in a kit could render it non-subject, importers could easily evade the Order[s] by including one piece of extraneous plastic in a 'kit' which [otherwise] consists only of aluminum extrusions"; asserting that "permitting finished goods that consist entirely of aluminum extrusions to be excluded as finished goods kits would gut the scope [of the Orders], which covers aluminum extrusions," and arguing that, under such a hypothetical exclusion, "it is possible if not likely that any aluminum extrusion product, when merely packaged with other extraneous non-aluminum extrusion parts, could be excluded from the scope of the Orders"); Def.'s Brief at 12 (arguing that, "[i]f a single piece of extruded aluminum, such as Plasticoid's product, constituted 'finished merchandise' under the exclusion, the scope of the Orders could be construed to exclude all aluminum extrusions").

(citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). The path of Commerce's decision is not sufficiently discernable on the record of this proceeding.

Lastly, even if Commerce had spelled out in the Scope Ruling here some reasonable version of the rationale that the agency has since provided in other scope determinations – *i.e.*, the expressed concern about the potential for the exclusions to "gut" or "swallow" the scope of the Orders – any articulated rationale also must be substantively sound. At least on the existing record, it is unclear why other scope language in the Orders (such as the restrictions limiting the finished merchandise exclusion to only that "finished merchandise" that is "fully and permanently assembled and completed at the time of entry") would not suffice to keep the proverbial floodgates firmly closed. *See*, *e.g.*, Final Scope Ruling on Rheetech Sales & Services Inc.'s Screen Printing Frames with Mesh Screen Attached at 13 (Aug. 7, 2014) (recognizing that "the mere existence of non-extruded parts along with extruded aluminum parts does not necessarily render merchandise outside of the scope [of the Orders]," and emphasizing that "the scope [language of the Orders] includes additional criteria in the finished good exclusion that must be satisfied for merchandise to fall outside the scope"); Final Scope Ruling on Fan Blade Assemblies at 17 (July 25, 2014) (same).[17]

Among other things, any sound rationale must be consistent with the history and intent of the Orders. The gravamen of the Geodesic Domes Scope Ruling, as applied in this case and others, amounts to a *per se* rule that any merchandise that consists of 100% aluminum extrusions falls within the scope of the Orders, even if the merchandise is "finished" and is "fully and permanently assembled and completed at the time of entry," and would otherwise qualify for the finished merchandise exclusion. As Commerce explained in the Awnings Scope Ruling, however, Petitioner and the agency rejected the concept of such a rule in the course of the underlying antidumping and countervailing duty investigations. *See* Final Scope Ruling on Certain Retractable Awning Mechanisms at 5 (Oct. 14, 2011) ("Awnings Scope Ruling").

Specifically, in response to a proposal that would have required that both finished merchandise and finished goods kits fall within the scope of the Orders whenever the merchandise in question comprised

[17] *See also* Pl.'s Reply Brief at 1, 8–10 (challenging credibility of assertion that excluding merchandise such as straight edges at issue here will effectively "eviscerate" the Orders, and arguing that exclusion will not "lead to an onslaught of miscellaneous aluminum extrusion imports").

70% or 75% (or more) aluminum extrusions by weight, Commerce "agreed with Petitioner that kits and furnished products are excluded from the scope [of the Orders], *regardless of the percentage content of aluminum extrusions*." Awnings Scope Ruling at 5 (emphasis added). Commerce stated unequivocally that "[f]inished merchandise and unassembled kits containing aluminum extrusions are specifically excluded from the scope [of the Orders], *with no specification as to the percentage content of aluminum extrusions*." *Id*. (emphasis added). Commerce thus concluded that "finished products and unassembled kits that contain[] all the components for [a] finished product, *regardless of the percentage content of aluminum extrusions by weight* [,] are excluded from the scope" of the Orders. *Id*. (emphasis added).[18] Any reasonable rationale for a rule that automatically places within the scope of the Orders all merchandise that consists of 100% aluminum extrusions – without regard to any other characteristics of that merchandise – must take into account the history of the Orders and the intent of Petitioner as reflected in that history.

In addition, a sound rationale guards against absurd results. Based on the apparent rationale of the Scope Ruling here, on the Geodesic Dome Scope Ruling, and on other scope determinations interpreting the Orders to date, it seems that Commerce would conclude that Plasticoid's straight edges would have satisfied the requirements for exclusion as finished merchandise if a cap (or caps) made of plastic or other non-extruded aluminum material had been affixed to one or both ends of each straight edge at some point in time prior to importation, whether for decorative or protective purposes, or for some

[18] *See also*, *e.g.*, Defendant's Response to Comments Regarding the Second Remand Determination at 18–19 (Aug. 8, 2014), filed in *Meridian Products, LLC v. United States*, Court No. 13–00018 (discussing implications of unsuccessful proposal to require that merchandise comprising some specific percentage of aluminum extrusions by weight be included within scope of Orders, and attaching as an Addendum a copy of the relevant Preliminary Determination, which predated the Orders); Final Scope Ruling on Signature Partners Inc.'s Auto Trim Kits at 11 (July 16, 2014) (stating that Commerce has "declined to consider the value or percentage of aluminum extrusions in determining whether products satisfy the exclusion for finished goods kits"); Meridian First Remand Determination at 19, 22 (dated Aug. 14, 2013), filed in *Meridian Products, LLC v. United States*, Court No. 13–00018 (agreeing "that the percentage of aluminum content is irrelevant to determining whether merchandise is subject to the scope of the Orders"); Solar Panel Scope Ruling at 5 (similar to discussion in Awnings Scope Ruling); Fence Panels, Posts, and Gates Scope Ruling at 5 (same); Fence Sections Scope Ruling at 5–6 & n.13 (similar); Railing Systems Scope Ruling at 14 (explaining that, during underlying antidumping and countervailing duty investigations, Commerce "indicated that fencing products would be excluded regardless of the percentage content of aluminum extrusions by weight," provided that requirements for finished merchandise exclusion or finished goods kits exclusion were met); Banner Stands Scope Ruling at 11 & n.21 (reaffirming statement in Preliminary Scope Comments that "finished goods kits are excluded from the scope of the Orders, without reference to the percentage of aluminum extrusions").

other reason. *See*, *e.g.*, Recording of Oral Argument at 1:29:17–1:30:30 (probing whether simple expedient of adding plastic caps to ends of straight edges would result in exclusion of straight edges from scope of Orders).[19] Such caps could not reasonably be viewed as "fasteners such as screws, bolts, etc." *See* Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654. *Compare* Final Scope Ruling on Kitchen Appliance Door Handles With Plastic End Caps and Kitchen Appliance Door Handles Without Plastic End Caps at 17–20 (Aug. 4, 2014) ("Scope Ruling on Kitchen Appliance Door Handles With and Without Plastic End Caps") (concluding that plastic end caps on kitchen appliance door handles functioned "analogous to a washer" (a form of "fastener"), such that door handles (which were comprised entirely of aluminum extrusions) were not excluded from the scope of the Orders).

This matter must be remanded to Commerce to permit the agency to reconsider Plasticoid's arguments on this point, as well as the bases for the agency's Scope Ruling, including, in particular, Commerce's interpretation and application of both the fasteners exception and the Geodesic Domes Scope Ruling in light of the specific circumstances of this case. As set forth below, remand will afford Commerce the opportunity to articulate on the record a clear, coherent rationale for a reasonable interpretation of the relevant scope language in the Orders, mindful of, *inter alia*, the history of the Orders and the intent of Petitioner as reflected in that history. In addition, as Commerce weighs the importance of maintaining the integrity of the Orders, Commerce shall also give appropriate consideration to any potential for unintended consequences, if not outright absurd results, that may be inherent in, or flow from, its interpretation.

C. *Summary*

In light of the foregoing analysis, this matter must be remanded to Commerce for further consideration. On remand, Commerce shall advise whether – but for the fasteners exception and the Geodesic Domes Scope Ruling and its progeny – the straight edges at issue would be considered "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry" and therefore would be excluded from the scope of the Orders.

---

[19] *See also* Recording of Oral Argument at 1:58:16–1:58:50 (counsel for Government stating that, if narrow piece of aluminum extrusion were "fully and permanently assembled into a piece of wood," to fashion a sort of wooden ruler, that product would fall within finished merchandise exclusion).

Further, Commerce shall respond point-by-point to Plasticoid's arguments that the straight edges constitute "finished merchandise" within the meaning of the Orders and within the intent of Petitioner as expressed in the Precision Machine Parts scope proceeding, where Petitioner differentiated "downstream products that have undergone subsequent processes" (which are intended to be in-scope) from "downstream products that have been converted into finished merchandise" (which are intended to be excluded). Commerce shall fully explain its understanding of the meaning of "downstream products that have been converted into finished merchandise" as that phrase was used by Petitioner (setting forth the bases for the agency's interpretation), and shall detail why the straight edges here are not such "downstream products . . . converted into finished merchandise," explaining specifically how the straight edges could have been any further "downstream" or any more "finished" than they were.

In this context, Commerce also shall respond to Plasticoid's overarching claim that the Orders clearly differentiate between "mere" parts, elements, components, and assemblies containing aluminum extrusions (which are in-scope) and "stand-alone," "finished, end use products" that are "fully functional independent of any other part, component, or element" (which are out-of-scope), and shall address the distinctions that Plasticoid draws between its straight edges and the "fence posts, electrical conduits, door thresholds, carpet trim, [and] heat sinks" listed as exemplars in the Orders.

To the extent that, on remand, Commerce continues to rely on the fasteners exception and the Geodesic Domes Scope Ruling, Commerce shall explain in detail the bases for its remand determination, explaining the purpose of the fasteners exception, and responding to each point that Plasticoid has raised, including Plasticoid's argument that the fasteners exception applies only to the finished goods kits exclusion (and not to the finished merchandise exclusion), as well as Plasticoid's argument that there are essential factual differences between the merchandise at issue in the Geodesic Domes Scope Ruling and the merchandise here (other than the fact that the Geodesic Domes Scope Ruling involved a kit and this case does not).

Finally, on remand, Commerce shall articulate for the record a clear and coherent rationale for a reasonable and substantively sound interpretation of the relevant scope language in the Orders, which shall be grounded in the language of the Orders, and which shall address relevant history and the intent of Petitioner as reflected in that history, including the rejection of a proposal in the underlying investigations that would have added to the draft Orders a provision

expressly including within the scope of the Orders all merchandise with aluminum extrusion content above a specified percentage.

To the extent that Commerce may conclude that its interpretation is necessary to avoid "gutting" the scope of the Orders (or to avoid having the exclusions "swallow" the scope of the Orders), Commerce shall detail the basis for that conclusion, explaining specifically how different competing interpretations would affect the outcome of a range of prior scope rulings and detailing why relevant scope language in the Orders (such as the restrictions limiting the finished merchandise exclusion to only that "finished merchandise" that is "fully and permanently assembled and completed at the time of entry") is not sufficient to ensure the integrity of the Orders.

Further, Commerce shall explain whether Plasticoid's straight edges would satisfy the requirements for exclusion as finished merchandise if a cap (or caps) made of plastic or other nonextruded aluminum material had been affixed to one or both ends of each straight edge at some point in time prior to importation, whether for decorative or protective purposes, or for some other reason (and, if not, why not). More generally, the rationale developed by Commerce on remand shall give careful consideration to and shall clearly identify and discuss any potential for unintended consequences and/or absurd results associated with its interpretation of the language of the Orders, as well as any other matters that Commerce may deem appropriate.

IV. *Conclusion*

For the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record must be granted, and this matter remanded to the U.S. Department of Commerce for further action not inconsistent with this opinion.

A separate order will enter accordingly.

Dated: November 24, 2014
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
JUDGE

Slip Op. 14–137

WHEATLAND TUBE COMPANY, Plaintiff, and UNITED STATES STEEL CORPORATION, ALLIED TUBE AND CONDUIT, and TMK IPSCO TUBULARS, Plaintiff-Intervenors, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 12–00298

[Section 129 final determination remanded.]

Dated: November 26, 2014

Gilbert B. Kaplan and *P. Lee Smith*, King & Spalding LLP of Washington, DC for Plaintiff Wheatland Tube Company.

Robert E. Lighthizer, *Jeffrey D. Gerrish*, *Stephen J. Narkin* and *Nathaniel B. Bolin*, Skadden Arps Slate Meagher & Flom LLP of Washington, DC for Plaintiff United States Steel Corporation.

Roger B. Schagrin, and *John W. Bohn*, Schagrin Associates of Washington, DC for Plaintiff-Intervenors Allied Tube and Conduit and TMK IPSCO Tubulars.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Gordon, Judge:

This action involves a U.S. Department of Commerce ("Commerce") final determination in a proceeding conducted under Section 129 of the Uruguay Round Agreements Act ("Section 129") and covering the simultaneously-imposed antidumping and countervailing duty orders on circular welded carbon quality steel pipe ("CWP") from the People's Republic of China. *See New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 77 Fed. Reg. 52,683 (Dep't Commerce Aug. 30, 2012) (Sec. 129 Implementation) ("*Implementation Notice*"); *Section 129 Proceeding Pursuant to the WTO Appellate Body's Findings in WTO DS379 Regarding the Antidumping and Countervailing Duty Investigations of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China* (July 31, 2012) ("*Final Determination*"). Commerce initiated the Section 129 proceeding at the request of the U.S. Trade Representative partly in response to the World Trade Organization's ("WTO") Dispute Settlement Body ruling that four sets of

simultaneously-imposed antidumping and countervailing duty orders on Chinese imports, including the orders on CWP, may have resulted in overlapping remedies. *Implementation Notice*, 77 Fed. Reg. at 52,683–84; *see* Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 611, WT/DS379/AB/R (Mar. 11, 2011) ("*WTO AB Report*").

Before the court are the motions for judgment on the agency record of Plaintiff Wheatland Tube Company ("Wheatland"), Consolidated Plaintiff-Intervenor United States Steel Corporation ("U.S. Steel"), and Consolidated Plaintiff-Intervenors Allied Tube and Conduit ("Allied") and TMK IPSCO (collectively, "the Domestic Interested Parties"). The Domestic Interested Parties challenge Commerce's decision to adjust the antidumping duty on U.S. CWP imports from China to account for overlapping remedies with the countervailing duty order. Mem. in Support of Mot. of Consol. Pl.-Intervenor U.S. Steel Corp. for J. on the Agency R. under R. 56.2 1–2, ECF No. 39 ("US Steel Br."); *see* Mem. in Support of Mot. of Pl. Wheatland Tube Co. for J. on the Agency R. 1–2, ECF No. 41 (joining in and supplementing U.S. Steel's arguments) ("Wheatland Br."); R. 56.2 Br. of Pl.-Intervenors Allied Tube & Conduit & TMK IPSCO Tubulars in Support of their Mot. for J. on the Agency R. 1–2, ECF No. 43 (same) ("Allied & TMK Br."); *see also* Reply Br. in Support of Pl.'s & Pl.-Intervenors' Mots. for J. on the Agency R. under R. 56.2 at 1–9, ECF No. 58 ("Joint Reply").

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(vii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vii) (2012),[1] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court remands this action to Commerce for further consideration.

I. Background

Section 129 of the Uruguay Round Agreements Act ("URAA") sets forth procedures for managing adverse rulings and recommendations of the WTO's Dispute Settlement Body. Under Section 129, the U.S. Trade Representative must consult with Congress and Commerce to decide whether to implement the rulings and recommendations that arise from an adverse finding in a Dispute Settlement Panel or Appellate Body report. If the United States decides to implement the rulings and recommendations, the U.S. Trade Representative will request that Commerce make a determination "not inconsistent with" the Panel or Appellate Body report. *See* 19 U.S.C. § 3538(b).

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

"A Section 129 determination amends, rescinds, or modifies the application of an agency regulation or practice in a specific antidumping, countervailing duty, or safeguards proceeding." *U.S. Steel Corp. v. United States*, 33 CIT 593, 596, 627 F. Supp. 2d 1374, 1377 (2009). It also "stands apart from the agency determination it would alter or amend." *Advanced Tech. & Materials Co. v. United States*, 37 CIT ___, ___, Slip Op. 13–42 at 4 (Mar. 28, 2013) (citing Statement of Administrative Action accompanying the Uruguay Rounds Agreements Act, H.R. Doc. No. 103–316, Vol. 1 at 1025, 1027 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4312–14), *aff'd* 541 Fed. App'x 1002 (Fed. Cir. 2013). Section 129 proceedings are similar to other trade proceedings in that Commerce must "provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination." 19 U.S.C. § 3538(d). There are a few noteworthy differences. Commerce must consult with Congress and the U.S. Trade Representative before implementing a final determination. *Id.* § 3538(b)(3). Furthermore, the United States, through Commerce, must implement an adverse ruling within a "reasonable period of time" under WTO rules. *See* Agreement Under Article 21.3(b) of the DSU, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 1, WT/DS379/11 (July 8, 2011).

A. Section 129 Implementation

Historically, Commerce did not apply countervailing duties to imports from non-market economy countries. *See generally Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1313–16 (Fed. Cir. 1986) (explaining that government payments in Soviet-style non-market economies are not countervailable because they are not "bount[ies]" or "grant[s]" under the statute). This changed in 2007 when Commerce announced that it would apply countervailing duties to subject merchandise from China. *See* Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China—Whether the Analytical Elements of the *Georgetown Steel* Opinion Are Applicable to China's Present-Day Economy, 4–5 (Dep't of Commerce Mar. 29, 2007), *available at* http://enforcement.trade.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf. Commerce explained that recent changes in China made it "possible to determine whether the Government [of China] has bestowed a benefit upon a Chinese producer (*i.e.*, the subsidy can be identified and measured) and whether any such benefit is specific." *Id.* at 10. Commerce, however, still classified China as a non-market economy in trade proceedings.

On July 22, 2008, Commerce published antidumping and countervailing duty orders on CWP from China. *See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't of Commerce July 22, 2008) (antidumping duty order); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,545 (Dep't of Commerce July 22, 2008) (amended final countervailing duty determination and order). Commerce refused to consider whether the simultaneous imposition of antidumping and countervailing duty orders may have resulted in overlapping, or double counting, of remedies. *See* Issues and Decision Memorandum for the Final Determination of Sales at Less than Fair Value of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, A-570–910, at 21–22 (Dep't of Commerce, June 5, 2008), *available at* http://enforcement.trade.gov/frn/summary/prc/E8–12608–1.pdf (last visited this date). Commerce reasoned that there was no "demonstration . . . that the AD [antidumping] duty that would be imposed would constitute a double remedy for practices already addressed by the CVD [countervailing duty] investigation." *Id.* at 22. Commerce also explained that it lacked the authority to account for double remedies because "Congress provided no AD adjustment for CVDs imposed to offset subsidies that are not export subsidies." *Id.* ; *see* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, C-570–911, at 101 (Dep't of Commerce, May 29, 2008), *available at* http://enforcement.trade.gov/frn/summary/prc/E8–12606–1.pdf (last visited this date).

China promptly challenged the CWP and three other sets of simultaneously imposed antidumping and countervailing duty orders before the WTO's Dispute Settlement Body. The WTO Appellate Body ultimately found that the United States had acted inconsistently with its international obligations in several respects, including the potential imposition of overlapping remedies:

> When investigating authorities calculate a dumping margin in an antidumping investigation involving a product from an NME [non-market economy], they compare the export price to a normal value that is calculated based on surrogate costs or prices from a third country. Because prices and costs in the NME are considered unreliable, prices, or, more commonly, costs of production, in a market economy are used as the basis for calculating normal value. In the dumping margin calculation, investigating authorities compare the product's constructed normal value (not reflecting the amount of any subsidy received by the

> producer) with the product's actual export price (which, when subsidies have been received by the producer, is presumably lower than it would otherwise have been). The resulting dumping margin is thus based on an asymmetric comparison and is generally higher than would otherwise be the case.
>
> . . . .
>
> . . . [Commerce] made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties. . . . [Commerce] dismissed China's claim of double remedies on the ground that *inter alia* it had no statutory authority to make adjustments in the context of countervailing duty investigations. Therefore, [Commerce] did not initiate any examination of whether double remedies would arise in the four investigations at issue and refused outright to afford any consideration to the issue or to the submissions pertaining to the issue that were presented to it.
>
> . . . .
>
> . . . Consequently, we *find* that, in the circumstances of the four sets of antidumping and countervailing duty investigations at issue, by virtue of [Commerce's] imposition of anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, without having assessed whether double remedies arose from such concurrent duties, the United States acted inconsistently with its obligations under Article 19.3 of the *SCM* agreements.

WTO AB Report ¶¶ 542, 604, 606 (emphasis in original) (footnotes omitted); *see id.* ¶ 611. The WTO Appellate Body noted that while "double remedies would *likely* result from the concurrent application of antidumping duties calculated on the basis of an NME methodology and countervailing duties," double remedies would not "*necessarily* result in every instance of such concurrent application of duties." *Id.* ¶ 599 (footnotes omitted, emphasis in original).

The U.S. Trade Representative then announced the United States' intention to comply with the WTO's rulings and recommendations, and requested that Commerce make a determination "not inconsistent with" the *WTO AB Report*. *See Implementation Notice*, 77 Fed. Reg. at 52,684 (citing 19 U.S.C. § 3538(b)(2)); Communication from China and the United States concerning Article 21.3(c) of the DSU,

United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS/379/10 (May 13, 2011). Commerce initiated the underlying Section 129 proceeding on August 16, 2011. *Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: "Double Remedies" Analysis Pursuant to the WTO Appellate Body Findings WTO DS379*, 6 (May 31, 2012), PD 120[2] ("*Preliminary Determination*").

Although the U.S. Trade Representative and the Government of China originally agreed that the reasonable period of time for Commerce to implement the *WTO AB Report* would expire on February 25, 2012, several intervening events delayed resolution of the double remedies issue. *Id.* at 4. On December 19, 2011, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") invalidated Commerce's imposition of countervailing duties in the non-market economy context. *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 737–45 (Fed. Cir. 2011), *vacated as abrogated by statute by* 678 F.3d 1308 (2012), *after remand*, 37 CIT ___, 942 F. Supp. 2d 1343 (2013). In response Congress enacted legislation authorizing Commerce to impose countervailing duties in the nonmarket economy context, but directed Commerce to estimate and apply an offset to antidumping duties in the event of double counting. *GPX*, 678 F.3d at 1311; *see* Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112–99, 126 Stat. 265, 19 U.S.C. §§ 1671, 1677f-1 (2012).

Commerce continued the underlying Section 129 proceeding on March 28, 2012, when it sent questionnaires to the Government of China. *Preliminary Determination* at 6–7. Commerce ultimately issued the *Final Determination* on July 31, 2012, and after consulting with Congress and the U.S. Trade Representative, published the *Implementation Notice* on August 30, 2012. Commerce calculated and applied a double counting offset of 63.07% of the value of those countervailable subsidies that affected CWP producers' variable costs. This action followed.

B. Commerce's Double Remedy Determination

Given the numerous adverse WTO rulings and recommendations, and their potential impact on four sets of outstanding antidumping and countervailing duty orders, Commerce issued multiple preliminary and final determinations during the Section 129 proceeding.

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

Implementation Notice, 77 Fed. Reg. at 52,683–84 (listing preliminary and final determinations). This action involves only the concurrent orders on CWP from China. Pl.'s Compl. ¶ 2, ECF No. 10.

As noted above, during the proceeding Commerce issued questionnaires to the Government of China that requested information on whether the CWP antidumping and countervailing duty orders double counted trade remedies. Commerce issued similar questionnaires for the three other sets of simultaneously imposed antidumping and countervailing duty orders. The Government of China provided similar responses to each double remedy questionnaire, but provided little information specific to the CWP industry. *Preliminary Determination* at 7–8.

For its analytical framework, Commerce considered 19 U.S.C. § 1677f-1(f)(1) as "a matter of initial impression." *Id.* at 7. Under section 1677f-1(f)(1):

> If the administering authority determines, with respect to a class or kind of merchandise from a nonmarket economy country for which an antidumping duty is determined using normal value pursuant to section 1677b(c) of this title, that –
>
> > **(A)** pursuant to section 1671(a)(1) of this title, a countervailable subsidy (other than an export subsidy referred to in section 1677a(c)(1)(C) of this title) has been provided with respect to the class or kind of merchandise,
> >
> > **(B)** such countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period, and
> >
> > **(C)** the administering authority can reasonably estimate the extent to which the countervailable subsidy referred to in subparagraph (B), in combination with the use of normal value determined pursuant to section 1677b(c) of this title, has increased the weighted average dumping margin for the class or kind of merchandise,
>
> the administering authority shall, except as provided in paragraph (2), reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority under subparagraph (C).

19 U.S.C. § 1677f-1(f)(1).

Commerce preliminarily concluded that the CWP countervailable subsidies reduced the price of CWP imports by approximately 63.07%:

> Because of the high degree of similarity in industry conditions across a highly disparate group of manufactured products in

these section 129 proceedings, the Department will take the information provided by the [Government of China, or "GOC,"] as representative of those in China's manufacturing sector, as a whole, during the POI [period of investigation]. In light of the compressed schedule of these section 129 proceedings after passage of [19 U.S.C. § 1677f-1(f)(1)], there was insufficient time for the Department to make further inquiries of the GOC to seek additional support for and/or explanation of certain GOC statements. For example, although the GOC described a long-run pricing principle, there is no description on the record regarding short-run pricing dynamics, nor documentation about how specific production cost accounting categories are impacted by subsidies and which of these cost impacts, if any, factor into pricing in the short-run.

Therefore, in order to further understand short-run pricing dynamics, the Department considered Credit Lyonnais Securities Asia (CLSA)-Markit's monthly China PMI report on Manufacturing (the Report). The Report notes that during the POI, manufacturers in China changed output prices in response to increases in input costs over the previous month, and that only *part* of the cost increases were passed on to customers in the form of higher selling prices. Moreover, the types of input cost increases that purchasing managers reported during the POI were related to changes in variable costs, such as direct labor, raw materials, and other inventoried production inputs.

Given the variable cost-(short-run) price link noted in the Report, the Department considered evidence from the record of the original AD and CVD investigations and found that for the CWP industry, purchases of hot-rolled steel were booked in the direct raw materials inventory at the cost of acquisition. Since direct raw materials constitute a variable cost of production, the record in this proceeding—which includes the Report and evidence from the original investigations—indicates a subsidy-(variable) cost-price link in the case of input price subsidies. The Department, however, has found no other evidence on the record of the investigations with respect to other subsidies and the cost categories that they may impact. Therefore, for the purposes of this 129 proceeding, estimation of the extent that domestic subsidies to producers in China resulted in lower export prices, *i.e.* the extent of subsidy pass-through, will be limited to subsidies that

> are likely to have impacted variable cost, and the extent of cost pass-through will be used as a proxy for the extent of subsidy pass-through.
>
> In order to estimate the extent to which changes in such variable costs were reflected in prices during the POI, as described in the Report, the Department calculated the average ratio of (a) rolling, monthly, year-on-year changes in production input costs to (b) rolling, monthly year-on-year changes in ex-factory prices, for the POI, using data for the manufacturing sector in China available through Bloomberg's electronic terminal. As a proxy for the change in input production costs, the Department used changes in an aggregate production input price index. And as proxy for changes in ex-factory prices, the Department used changes in an aggregate producer price index for the manufacturing sector in China. . . .
>
> We recognize that the extent of input price inflation pass-through is an inexact proxy for the extent of subsidy pass-through, not only because input price inflation and subsidies push cost in opposite directions, but because the impact of input price inflation may be more uniform and systematic in nature. As indicated above, the Department's administration of the new statutory provision may evolve with the benefit of time and experience. The Department therefore intends in future inquiries, where appropriate and where time permits, to reassess this analytical approach, if merited.
>
> . . .
>
> The above-described approach leads us to conclude that approximately 63.07 percent of the value of the subsidies that have impacted variable costs, as identified above, were "passed through" to export prices for the CWP industry during the POI. Based upon this finding, we are able to identify the portion of each CVD rate determined in the proceeding estimated to have increased cash deposit rates in the companion AD proceeding.

Preliminary Determination at 8–10 (emphasis in original) (footnotes omitted).

Commerce essentially used generalized Chinese domestic price data to conclude that certain countervailable subsidies reduced the average price of U.S. CWP imports. Relying on similarities in industry conditions affecting each of the four kinds of products under review, Commerce first decided to treat China's entire manufacturing

sector as a proxy for the CWP industry. Commerce then found that variable input cost increases across Chinese manufacturing, which included "labor, raw materials, and other inventoried production inputs," correlated with proportionally smaller domestic output price increases. Commerce also found that CWP producers booked inputs at the price of acquisition, whether they were affected by the relevant subsidies or not. Given these identified relationships, Commerce inferred that certain subsidies reducing Chinese CWP producers' input costs would correspondingly reduce Chinese domestic CWP prices (in the same way increased input prices caused ex-factory price increases across Chinese manufacturing). *See Preliminary Determination* at 9–10. Commerce thus treated Chinese *domestic* price behavior as a proxy for U.S. CWP *import* price behavior, effectively presuming that changes in Chinese domestic prices correspond with identical changes in CWP import prices. *See id.* Notably, Commerce did not supplement the record with or analyze any actual U.S. CWP import price data in reaching its preliminary conclusions.

U.S. Steel, Wheatland, Allied, and TMK IPSCO, along with other domestic interested parties to the Section 129 proceeding, objected to several aspects of Commerce's determination. Among other things, they argued that the statute placed the burden on the Government of China to "demonstrate" the subsidy's effect on the average price of imports of the class or kind of merchandise, and that the Government of China failed to do that here. In response, Commerce agreed that under normal circumstances, "the burden is on a respondent to demonstrate its entitlement to a particular adjustment," but explained that "[t]he unique nature of these particular section 129 proceedings . . . placed certain limitations on [Commerce's] ability to solicit and receive information from parties with respect to any alleged overlap of AD and CVD remedies." *Final Determination* at 14. "Despite those constraints," according to Commerce, "the [Government of China] and respondent parties did provide information necessary to [Commerce's] determinations to make adjustments under [19 U.S.C. § 1677f-1(f)] as part of these proceedings." *Id.* Nevertheless, Commerce conceded that it did "supplement the record with publicly available information . . . to aid in its economic analysis." *Id.*

The Domestic Interested Parties also challenged Commerce's double remedy methodology. Among the factual submissions supporting their comments, the Domestic Interested Parties included U.S. import price data and explanation and argumentation about the economics of subsidy pass-through. *Final Determination* at 11–15,

17–24, 2731; *see also* Wheatland Tube Company New Factual Information Relating to the Department's Preliminary Double Remedy Analysis, Exs. 1, 10–11 (Dep't of Commerce June 11, 2012), PD 129 ("Wheatland Factual Submission"). In the *Final Determination* Commerce acknowledged that Chinese "export prices/U.S. import prices of subject merchandise may be the more appropriate price measure," but nevertheless declined to analyze those measures, instead continuing to rely on Chinese domestic price data to determine the offset to the CWP antidumping duty:

> The Department agrees with Allied Tube/TMK IPSCO that PRC export prices/U.S. import prices of subject merchandise may be the more appropriate price measure. That said, the Department has not switched to PRC export/U.S. import data for purposes of the [ratio change test, or "RCT"] in these proceedings for the following reason. The RCT should, to the extent possible, (1) match price and cost to the subject merchandise and (2) pair cost and price series from the same universe, or group, at the firm, industry or sector level. Only in this manner can the Department ensure that the cost series and price series are actually associated with one another. To accomplish this, the Department relied on manufacturing sector data from the same source, with similar coverage: manufacturing sector variable costs and manufacturing sector prices. Switching to PRC export/U.S. import data as suggested by Allied Tube/TMK IPSCO would nullify this matching and, in fact, reduce the validity of the measurement given the possibly opposite trends in domestic and export prices identified by Allied Tube/TMK IPSCO. In order to ensure a true "apples-to-apples" cost and price comparison, the Department elected to match the price and cost series rather than rely upon a sub-group or subset of the overall manufacturing sector for prices when the cost series is measured using the entire group. Furthermore, data constraints precluded the Department from disaggregating U.S. import data to ensure a one-to-one mapping.

Final Determination at 14–15, 25 (footnotes omitted).

Before the court, Domestic Interested Parties raise several arguments: (1) that the statute places a clear and unambiguous burden on the Government of China to establish the requisites of the double remedy offset, which the Government of China failed to meet; (2) that Commerce's methodology in applying a double remedy offset violates the clear and unambiguous statutory requirements of 19 U.S.C. § 1677f-1(f); (3) that in any event, Commerce's finding that the record

"demonstrates" that the CVD order on CWP reduced the average U.S. import prices of CWP is unsupported by substantial evidence (unreasonable); and (4) that Commerce's estimation of the double remedy offset is unreasonable. *See* U.S. Steel Br. at 4–6; Wheatland Br. at 1–2; Allied & TMK Br. at 1–2.

II. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2014). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2014). In reviewing Commerce's finding, conclusion, or determination for substantial evidence (reasonableness), it is axiomatic that the court must first understand Commerce's explanation underlying the agency action. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

Additionally, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping and countervailing duty statutes. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the

contrary or unreasonable resolution of language that is ambiguous."). The court first considers whether Congressional intent on the issue is clear. *Dupont*, 407 F.3d at 1215. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("[T]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000))); *see, e.g.*, *Dorbest v. United States*, 604 F.3d 1363, 1371–75 (Fed. Cir. 2010); *AK Steel Corp. v. United States*, 226 F.3d 1361, 1366–74 (Fed. Cir. 2000); *Delverde v. United States*, 202 F.3d 1360, 1363–70 (Fed. Cir. 2000). When a "court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Under *Chevron's* second prong, the court must defer to Commerce's reasonable construction of the statute. *See, e.g.*, *United States v. Eurodif S.A.*, 555 U.S. 305, 887–90 (2009); *Union Steel v. United States*, 713 F.3d 1101, 1106–10 (Fed. Cir. 2013).

III. Discussion

The court begins by addressing two threshold legal issues raised by Domestic Interested Parties that implicate the *Chevron* framework: (1) whether the statute places a burden on a respondent, such as the Government of China, to demonstrate that double remedies have occurred; and (2) whether Commerce's use of *indirect* evidence to first find, and then offset, double remedies in the CWP orders was consistent with the statute's requirement that the record demonstrate that a countervailable subsidy has "reduced the average price of imports of the class or kind of merchandise." 19 U.S.C. § 1677f1(f)(1)(B).

A. Burden to Demonstrate

Domestic Interested Parties advance a lengthy *Chevron* step one argument that the statute places a burden on an interested party, such as the government of China, to "demonstrate" the requisite condition for a double counting offset (the countervailable subsidy's effect on the average price of imports). Wheatland Br. at 3–10; U.S. Steel Br. at 25–26; *see* Allied & TMK Br. at 1–2. The court though is not persuaded that the statute's vague present perfect passive clause—"has been demonstrated"—establishes Domestic Interested Parties' hoped for clear statutory burden. The present perfect tense in

the passive voice describes something that has happened in the past, but may leave unclear, as in this case, the identity of the actor, i.e., by whom the thing was done. Paul J. Hopper, *A Short Course in Grammar* 190–94 (1999); Henry Weihoffen, *Legal Writing Style* 111 (2d ed. 1980). It also places emphasis on the object of the verb—here, the existence of the condition for a double counting offset—rather than the subject. *See* Hopper, *supra*, at 192–94. Congress could have mandated that a party claiming an offset "shall" or "must" demonstrate that the countervailable subsidy reduces the average price of imports of the class or kind of merchandise, but Congress instead chose the following conditional construct: "If [Commerce] determines . . . that . . . [a] countervailable subsidy *has been demonstrated* to have reduced the average price of imports of the class or kind of merchandise during the relevant period[,] . . . [Commerce] shall . . . reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by [Commerce] under subparagraph (C)." 19 U.S.C. § 1677f-1(f)(1)(B) (emphasis added). That formulation—with the actor unknown—is vague enough to allow Commerce some discretion to allocate evidentiary burdens for establishing the statutory criteria for a double remedy offset.

In the proceeding below Domestic Interested Parties also cited Commerce's AD/CVD regulation, 19 C.F.R. § 351.401(b)(1), which generally imposes on an interested party "in possession of the relevant information . . . the burden of establishing . . . the amount and nature of a particular adjustment." *Id.* Domestic Interested Parties contended that respondents (which include the government of China) failed to carry their burden to establish the requisite reduction in CWP import prices caused by the countervailed subsidies. *Final Determination* at 13–14. Commerce acknowledged the argument and the regulation, but explained that the "unique nature of these particular section 129 proceedings" made it difficult to solicit and receive information from the interested parties. *Id.* at 14. Commerce further explained:

> [U]ncertainty accompanying the GPX litigation at the Federal Circuit as well as questions regarding the Department's authority under domestic law to come into compliance with the [WTO]'s findings and recommendations compressed an already short time frame available to the Department to complete this proceeding. Because section 777A(f) of the Act was enacted only in March 2012, the Department had little time or flexibility to develop and hone its practice in applying the new law for the first time in these proceedings. To the extent that such constraints may have limited the Department's ability to make

> follow-up requests for information from the GOC or other interested parties, the Department was nevertheless able to supplement the record with publicly available information such as the CLSA Report and HSBC Report to aid in its economic analysis

Id. (footnotes omitted).

Before the court, Domestic Interested Parties again cite the regulation, and repeat their argument that the Government of China failed to meet their evidentiary burden.[3] The court does not agree. Commerce reasonably explained the unique circumstances of its Section 129 proceeding that made solicitation and receipt of information from interested parties suboptimal, causing Commerce to supplement the record on its own.

During the proceeding Commerce issued questionnaires to the Government of China and the Government of China supplied answers and information about its manufacturing sector generally but did not supply information specific to the CWP industry. Commerce supplemented the administrative record on its own with the entire administrative records from the underlying CWP investigations as well as other information from publicly available economic sources. Commerce then analyzed that collective information and shaped it into a "determination." Contrary to the arguments of the Domestic Interested Parties, the statute's plain language simply does not isolate Commerce's double counting analysis to information or arguments supplied from any particular source or party. Additionally, Commerce is generally empowered to augment the administrative record on its own, *see generally* 19 C.F.R. § 351.301(c)(4), and it did so here. The court, therefore, does not agree with the Domestic Interested Parties that Commerce improperly looked beyond the Government of China's arguments and submissions to determine whether double counting "has been demonstrated" on an administrative record that Commerce helped develop.

B. "Has Been Demonstrated" Indirectly

Domestic Interested Parties also argue that the "clear and unambiguous requirements of" 19 U.S.C. § 1677f-1(f)(1)(B) compelled Com-

[3] Domestic Interested Parties do not raise or challenge Commerce's interpretation of its regulation, which is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.* , 325 U.S. 410, 414 (1945); *Gonzales v. Oregon* , 546 U.S. 243 (2006); *Christensen v. Harris County* , 529 U.S. 576, 588 (2000); *Auer v. Robbins* , 519 U.S. 452, 461 (1997); *American Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010). Domestic Interested Parties have not argued that Commerce's interpretation of 19 C.F.R. § 351.401(b)(1) is plainly erroneous or inconsistent with the regulation.

merce to use only CWP firm or industry-level data in the agency's analytical framework. U.S. Steel Br. 4–20; Wheatland Br. at 4–10; Allied & TMK Br. at 3–6. Specifically, Domestic Interested Parties fault Commerce for using manufacturing sector-wide data showing a correlation between Chinese domestic input price increases and Chinese domestic ex-factory price increases to conclude that certain countervailable subsidies reduced the average price of U.S. CWP imports.

Although the court understands Domestic Interested Parties' *Chevron* step one argument that the statute, in effect, requires *direct* evidence of a reduction of the average price of CWP imports, the court does not agree that the statute speaks with such clarity or precision. Congress did not specifically require the existence of *direct* evidence that the CVD order reduced the average price of imports of the merchandise, but instead, as explained above, used a somewhat vague present perfect passive conditional construct: if Commerce determines "such countervailable subsidy *has been demonstrated* to have reduced the average price of imports of the class or kind of merchandise." 19 U.S.C. § 1677f-1(f)(1)(B). In practice, the simplest and likely best way to "demonstrate" the requisite reduction in import prices is through *direct* import price data at the firm or industry level (the class or kind of merchandise). But this is not the same as saying that the statute mandates the use of direct import price data. In the court's view the statute does not prohibit Commerce from attempting to "demonstrate[]" that the countervailed subsidies caused a reduction in average U.S. CWP import prices through indirect evidence of broad-based manufacturing data in China. With that said, however, choosing that circuitous route may be difficult to justify as reasonable (supported by substantial evidence).

And that is really the central issue in this case. Does substantial evidence support Commerce's finding that the administrative record "demonstrate[s]" that the subsidies countervailed by the CWP order reduced the average price of CWP imports? More specifically, was it reasonable for Commerce to ultimately "presume" the requisite statutory criterion was satisfied when the Domestic Interested Parties' argument and evidence appears to show the contrary? It is to this question that the court now turns.

C. Reasonableness of Commerce's Finding

Commerce found that the administrative record "demonstrated" a reduction in average import prices without any analysis, and a clearly stated avoidance, of *direct* import price data. Domestic Interested Parties take dead aim at Commerce's finding, arguing that "Com-

merce's analysis demonstrates, at most, that changes in the cost of inputs used in the production of all goods manufactured in China resulted in changes in the overall average of the prices of all goods sold in China." U.S. Steel Br. at 5. According to Domestic Interested Parties, Commerce's analysis of the record does not explain whether: (1) the subsidies affected prices for the *class or kind of merchandise*, CWP; (2) the subsidies affected the price of *imports* of any kind, let alone the price of U.S. CWP imports; and (3) the subsidies' effect was a price *reduction*. *See* U.S. Steel Br. at 4–6; Wheatland Br. at 1–2; Allied & TMK Br. at 1–2.

As Domestic Interested Parties argue, Commerce's focus on broad Chinese domestic manufacturing data encompassing millions of products does not directly implicate the statute's specific requirement that a "subsidy . . . reduced the average price of imports of the class or kind of merchandise." 19 U.S.C. § 1677f-1(f)(1)(B); *see* Joint Reply at 2; U.S. Steel Br. at 21–22; Allied & TMK Br. at 4–8. Commerce made a series of inferences when concluding that the indirect evidence "demonstrated" a reduction in import prices, among them a *presumption* that any reduction in Chinese domestic prices resulting from a countervailable subsidy would be accompanied by a "corresponding reduction" in "export prices . . . to some degree." *Final Determination* at 16.

Instead of confronting Domestic Interested Parties' challenge head on, Commerce and its counsel offer apologia about a lack of time and industry level data. *See, e.g.*, *id.* at 22 (reiterating its preliminary position that "there was insufficient time for the Department to make further inquiries of the GOC or conduct a *de novo* investigation of individual firms, including with respect to industry- or firm-specific price and cost data, which may have provided a basis to further refine the pass-through estimate"); Def.'s Combined Resp. to Pl.'s and Pl.-Intervenors' Mots. for J. on the Agency R. 6, 1011, 14–15, 17. In fairness, Commerce found itself in difficult circumstances. Commerce had to harmonize four sets of antidumping and countervailing duty determinations with numerous adverse WTO rulings that communicated an expectation of a "likely" double counting remedy for respondents. Commerce had a short timeframe prior to implementation. Finally, Commerce was operating under a brand new statutory framework that limited Commerce's discretion to apply a double remedy offset. Alongside the important motivation to bring the U.S. into compliance with the WTO rulings, Commerce also had to heed the Congressional command to "demonstrate" that the countervailable subsidies reduced the average price of U.S. CWP imports.

Commerce chose to make this demonstration indirectly through a presumption that U.S. import prices and Chinese domestic output

prices respond similarly to changes in Chinese domestic input prices. Had the Domestic Interested Parties remained silent during the proceeding, the court may have been able to accept as reasonable Commerce's decision to use increases in broad price indexes in place of more specific CWP figures because of the discernable (though tenuous) path Commerce provided to justify its approach. Unfortunately for Commerce, the Domestic Interested Parties litigated the issue vigorously, and the *Final Determination* gives insufficient attention to the arguments and evidence challenging Commerce's presumption.

Domestic Interested Parties argued below that prices in the Chinese domestic market and the U.S. import market respond differently to changes in input prices. *Final Determination* at 13, 15, 21–24. Domestic Interested Parties supported this claim with evidence detailing aggregate U.S. import price data for all imports from China, which according to Allied and TMK IPSCO, show that "Chinese input prices *are not correlated at all* with changes in the prices of U.S. imports sourced from China," unlike the Chinese output prices Commerce relied upon. Allied & TMK Br. at 6 (emphasis added). Allied and TMK IPSCO illustrated before Commerce that U.S. import prices and Chinese input prices appear to have moved in *opposite directions* over much of the relevant time period. *Id.* at 6–7. Domestic Interested Parties further supported their claim with an affidavit from an economist explaining that Chinese producers are less likely to pass on price decreases than increases to U.S. customers, particularly decreases that competing US producers would not experience, such as Chinese countervailable subsidies. Wheatland Factual Submission, Ex. 1 at 4–8. Finally, Domestic Interested Parties placed CWP import price data on the record. Wheatland Factual Submission, Ex. 11. Although Domestic Interested Parties did not provide a detailed analysis of CWP import price data themselves, they maintain that Commerce acted unreasonably in failing to address and analyze this data directly. *See* U.S. Steel Br. at 20–25; Wheatland Br. at 4–10; Allied & TMK Br. at 3–10.

Recall from the discussion above that Commerce chose to use generalized Chinese domestic price data to conclude that certain subsidies reduced the average price of U.S. CWP imports. Commerce relied on submissions from the Government of China showing similarities in industry conditions affecting CWP and the other products under review to conclude that China's entire manufacturing sector could serve as a proxy for the CWP industry. Commerce then found that variable input cost increases across all Chinese manufacturing correlated with proportionally smaller domestic output price increases.

Commerce inferred from that relationship that countervailable subsidies reducing Chinese CWP producers' input costs would, presumably, reduce Chinese domestic CWP prices to the same extent. Commerce explains that this presumption is similar to its historical practice in market economy cases where Commerce "generally refrain[s] from speculating about the effect of a subsidy" and does not make any adjustments for potential double remedies. *Final Determination* at 15–16. In that setting when calculating dumping margins on the same merchandise, Commerce treats countervailable domestic subsidies as if they had an identical effect on domestic output prices (normal value) and export prices. *See id.*; 19 U.S.C. § 1677(5)(C). Commerce notes that this familiar and administrable means of accounting for the price effects of subsidies is consistent with the WTO's conclusion that double remedies were "likely" in part because Commerce's non-market economy framework captures all reductions in export price caused by countervailable subsidies, but not similar reductions in domestic output prices. *See WTO AB Report* ¶ 542.

This is all well and good, but the court does not believe that Commerce has sufficiently addressed why its "presumption" outweighs record evidence appearing to show that domestic output prices and export prices are not correlated, *see, e.g.*, Wheatland Factual Submission, Exs. 1, 10–11; TMK IPSCO Submission of Evidence re "Double Remedies" Att. 1 (Dep't of Commerce June 11, 2012); *see* Allied & TMK Br. at 6 (summarizing data). Commerce has left too much unexplained. Commerce does not analyze or comment upon Domestic Interested Parties' economist's opinion. Commerce also does not analyze U.S. import data specific to CWP. Rather, Commerce avoids Domestic Interested Parties' U.S. import price data by explaining that it believes the Chinese domestic ex-factory price data is a superior data source for *estimating* subsidy pass-through:

> Only [by using Chinese domestic input and output price indexes] in this manner can the Department ensure that the cost series and price series are actually associated with one another. To accomplish this, the Department relied on manufacturing sector data from the same source, with similar coverage: manufacturing sector variable costs and manufacturing sector prices. Switching to PRC export/U.S. import data as suggested by Allied Tube/TMK IPSCO would nullify this matching and, in fact, reduce the validity of the measurement given the possibly opposite trends in domestic and export prices identified by Allied Tube/TMK IPSCO. In order to ensure a true "apples-to-apples" cost and price comparison, the Department elected to match the price and cost series rather than rely upon a sub-group or subset

> of the overall manufacturing sector for prices when the cost series is measured using the entire group. Furthermore, data constraints precluded the Department from disaggregating U.S. import data to ensure a one-to-one mapping.

Final Determination at 25. Commerce acknowledges that Domestic Interested Parties' record data may demonstrate "*possibly opposite trends* in domestic and export prices" over the relevant period. *Id.* (emphasis added). Yet, when Commerce chose to use Chinese output prices as a proxy for U.S. import prices to "demonstrate" the requisite reduction, Commerce presumes that the countervailable subsidies caused corresponding reductions in Chinese output prices and U.S. import prices "to some degree." *Id.* at 16. The court is missing something. The court does not understand how Commerce may reasonably presume that Chinese domestic prices behave similarly to U.S. import prices when record data also appears to exhibit "possibly opposite trends."

Perhaps the answer lies in how one may reasonably interpret the differing data sets on the record. Although Commerce achieves a match between the price and cost series at the broader manufacturing level, Commerce does not really explain in detail why this particular association disqualifies consideration of the more specific industry/product CWP pricing data on the record. The implication is that there may be no way to demonstrate the behavior of the CWP pricing data in response to the countervailable subsidies. The court, however, wonders whether Commerce's decision to focus on manufacturing level data and "presume" that broad-based Chinese domestic ex-factory prices covering millions of products can reasonably serve as a proxy for the average price of U.S. CWP imports when the statute requires a "demonstration" of a reduction in prices at the industry/product level, and more specific CWP pricing data appears available on the record. The court must therefore remand the *Final Determination* to Commerce for further explanation. *See State Farm* 463 U.S. at 43 (agency must articulate "a rational connection between the facts found and the choice made"); *see also Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1355–56, 1363 (Fed. Cir. 2010) (noting distinction between remanding for further explanation pursuant to *State Farm* and remanding because decision is unsupported by substantial evidence).[4]

---

[4] The court does not yet reach Domestic Interested Parties' challenge to Commerce's estimation of the double remedy offset as unreasonable. *See* U.S. Steel Br. at 4–6; Wheatland Br. at 1–2; Allied & TMK Br. at 1–2.

IV. Conclusion

Accordingly, it is hereby

ORDERED that Commerce's assessment of double remedies is remanded for further consideration in accordance with this Opinion; it is further

ORDERED that Commerce shall file its remand results on or before Wednesday, February 25, 2015; it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: November 26, 2014
New York, New York

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