U.S. Customs and Border Protection

Slip Op. 13–118

THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. and THE STANLEY WORKS/STANLEY FASTENING SYSTEMS, LP, Plaintiffs, v. UNITED STATES, Defendant, and MID CONTINENT NAIL CORPORATION, Defendant-Intervenor.

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. and THE STANLEY WORKS/STANLEY FASTENING SYSTEMS, LP, Defendant-Intervenors.

Consol. Court No. 11–00102
PUBLIC

[Denying Stanley's Motion for Judgment on the Agency Record; Granting in part and denying in part Mid Continent's Motion for Judgment on the Agency Record; Granting Government's Motion for Partial Voluntary Remand]

Dated: September 3, 2013

Lawrence J. Bogard, Neville Peterson LLP, of Washington, D.C., argued for The Stanley Works (Langfang) Fastening Systems Co., Ltd. and The Stanley Works/Stanley Fastening Systems, LP. With him on the brief was iMeredith A. Dement.

Carrie A. Dunsmore, 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, Civil Division, and *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Nathaniel J. Halvorson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Adam H. Gordon, Wiley Rein LLP, of Washington, D.C., argued for Mid Continent Nail Corporation. With him on the brief were *Robert E. DeFrancesco, III* and *Lori E. Scheetz*.

OPINION

RIDGWAY, Judge:

In this consolidated action, foreign exporters of steel nails The Stanley Works (Langfang) Fastening Systems Co., Ltd. and The Stanley Works/Stanley Fastening Systems, LP (collectively "Stanley") and domestic producer of steel nails Mid Continent Nail Corporation ("Mid Continent") contest the final results, as amended, of the U.S.

Department of Commerce's first administrative review[1] of the antidumping duty order covering steel nails from the People's Republic of China ("PRC"). *See* Certain Steel Nails from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review, 76 Fed. Reg. 16,379 (March 23, 2011) ("Final Results"); Certain Steel Nails from the People's Republic of China: Amended Final Results of the First Antidumping Duty Administrative Review, 76 Fed. Reg. 23,279 (April 26, 2011) ("Amended Final Results").[2]

Pending before the court are three separate motions: Mid Continent's Motion for Judgment on the Agency Record, Stanley's Motion for Judgment on the Agency Record, and Defendant United States' Motion for Partial Voluntary Remand.

Mid Continent contests four aspects of Commerce's Final Results specifically, Commerce's decision not to use the intermediate input methodology when calculating Stanley's normal value, Commerce's decision not to apply adverse facts available to missing factors of production data, Commerce's selection of sources for surrogate financial ratios, and Commerce's selection of data for surrogate electricity values. *See generally* Amended Memorandum in Support of Mid Continent Nail Corporation's Rule 56.2 Amended Motion for Judgment on the Agency Record ("Mid Continent Brief"); Reply Brief of Mid Continent Nail Corporation ("Mid Continent Reply Brief").[3] Stanley and

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[1] The period of review for this first administrative review is January 23, 2008 to July 31, 2009. *See* Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review at 2 (March 14, 2011) (Pub. Doc. No. 381) ("Issues & Decision Memorandum").

[2] Because business proprietary information was submitted in the course of the administrative review, there are two versions of the administrative record a public version and a confidential version. The public version of the record consists of copies of all documents in the record of this action, with confidential information redacted. The confidential version consists of complete, unredacted copies of only those documents that include confidential information.

Documents in the public version of the administrative record are numbered sequentially, and are cited herein as "Pub. Doc. No. ____." Documents in the confidential version of the administrative record are also numbered sequentially, but differently from the public version. Documents in the confidential version of the administrative record are cited as "Conf. Doc. No. ____."

Mid Continent and Stanley filed both public and confidential versions of all briefs. Citations to briefs are to the public versions whenever possible, and except as specified. Citations to the confidential version of a brief are prefaced with "Conf."

[3] Seven of the 10 counts in the Complaint that Mid Continent filed in a companion case contesting the same final results (Court No. 11–00119) were consolidated into the instant action. *See* Order (Sept. 16, 2011) (consolidating Counts II through IV and Counts VII through X of Complaint in Court No. 11–00119 into instant action).

Mid Continent has elected not to pursue certain counts consolidated from Court No. 1100119 specifically, Count IV (which challenged Commerce's selection of surrogate values for sodium hydroxide, labels, and shrink film), Count IX (which alleged that Commerce failed to properly calculate Stanley's reported U.S. indirect selling expenses), and Count X

the Government oppose Mid Continent's motion. *See generally* Memorandum of Plaintiffs The Stanley Works (Langfang) Fastening Systems Co., Ltd. and The Stanley Works/Stanley Fastening Systems, LP in Opposition to Mid Continent's Rule 56.2 Motion for Judgment Upon the Administrative Record ("Stanley Response Brief"); Defendant's Memorandum in Opposition to Plaintiffs' Rule 56.2 Motions for Judgment Upon the Agency Record ("Def.'s Brief").

Stanley, in turn, challenges Commerce's refusal to correct what Stanley maintains is a "ministerial error" relating to the calculation of normal value for Stanley's nails. *See generally* Memorandum of Plaintiffs The Stanley Works (Langfang) Fastening Systems Co., Ltd. and The Stanley Works/Stanley Fastening Systems LP in Support of Their Rule 56.2 Motion for Judgment Upon the Agency Record ("Stanley Brief"); Plaintiffs' Memorandum in Reply to Defendant's and Defendant-Intervenor's Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Stanley Reply Brief").[4] Mid Continent and the Government oppose Stanley's motion. *See generally* Response Brief of Mid Continent Nail Corporation ("Mid Continent Response Brief"); Def.'s Brief.

The Government maintains that the Final Results should be sustained in all respects, save one. *See* Def.'s Brief; Defendant's Motion for Partial Voluntary Remand ("Def.'s Remand Motion"). Specifically, the Government requests a partial voluntary remand to permit Commerce to reconsider the selection of financial statements used for Stanley's surrogate financial ratios in the Final Results. *See generally* Def.'s Remand Motion. Mid Continent supports the Government's motion; Stanley opposes it. *See generally* Response of Mid Continent Nail Corporation to Defendant United States' Motion for Partial Voluntary Remand ("Mid Continent Response to Def.'s Remand Motion"); Plaintiffs' Opposition to Defendant's Motion for Partial Voluntary Remand ("Stanley Response to Def.'s Remand Motion").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[5] For the reasons set forth below, Stanley's Motion for Judgment on the Agency Record must be denied, and Mid Continent's Motion for Judgment on the

(which alleged generally that Commerce "erred in other aspects of the Final Results"). *See* Mid Continent Brief at 1 n.2.

[4] In its Complaint and briefs, Stanley also challenged Commerce's use of "zeroing" in calculating Stanley's dumping margin. Stanley Complaint ¶¶ 20–21; Stanley Brief at 13–25, 31; Stanley Reply Brief at 2–14. However, in light of the decision in *Union Steel*, Stanley withdrew its zeroing claim. *See Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013); Order (July 17, 2013) (dismissing Stanley's zeroing claim).

[5] All citations to federal statutes are to the 2006 edition of the United States Code. Similarly, all citations to federal regulations are to the 2008 edition of the Code of Federal Regulations.

Agency Record must be granted in part and denied in part. In addition, the Government's Motion for Partial Voluntary Remand must be granted.

I. *Background*

In September 2009, Commerce initiated its first administrative review of the antidumping duty order on certain steel nails from the People's Republic of China ("PRC"), covering the period of review January 23, 2008 to July 31, 2009. *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 74 Fed. Reg. 48,224 (Sept. 22, 2009). Pursuant to its standard practice, Commerce issued questionnaires to the selected respondents, including Stanley, requesting information from Stanley, among others, about the factors of production consumed in the production of one kilogram of the subject merchandise *i.e.*, finished nails that may be collated (strung together) into strips or coils using materials such as plastic, paper, or wire, to form strips or coils that can be loaded into a nail gun. *See* Response of Stanley to the Commerce Department's Antidumping Duty Questionnaire, Response to Section C (Pub. Doc. No. 159) ("Stanley's Response to Section C Questionnaire"); Response of Stanley to the Commerce Department's Antidumping Duty Questionnaire, Response to Section D (Pub. Doc. No. 160) ("Stanley's Response to Section D Questionnaire"). [6] Stanley reported that all of its nails were collated, the style of collation used in each sale, and the collating material for each style. *See* Stanley's Response to Section C Questionnaire. Stanley then reported the quantities of each factor of production used in producing one kilogram of nails. *Id*.

The primary factor of production for nails is wire rod. *See generally* Surrogate Values for the Preliminary Results (Pub. Doc. No. 287) ("Surrogate Valuation Memorandum for the Preliminary Results"). To

[6] Factors of production "include, but are not limited to . . . hours of labor required, . . . quantities of raw materials employed, . . . amounts of energy and other utilities consumed, and . . . representative capital cost, including depreciation." *See* 19 U.S.C. § 1677b(c)(3); *see also Dorbest Ltd. v. United States*, 604 F.3d 1363, 1367 (Fed. Cir. 2010) (discussing factors of production).

In selecting surrogate values for factors of production, Commerce seeks the "best available information" in accordance with 19 U.S.C. § 1677b(c)(1). Def.'s Brief at 23. In evaluating potential sources, Commerce prefers "investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." Import Administration Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process, at "Data Considerations" (March 1, 2004) ("Policy Bulletin 04.1"); *see also* Issues & Decision Memorandum at 13 (comment 4); Def.'s Brief at 23 (similar).

make nails, wire rod is drawn so that it becomes wire. *Id*. Nail manufacturers either draw the wire rod into wire in their own facilities or contract with companies ("tollers") who draw wire rod into wire as needed. *Id*. In this case, Stanley explained that, as an integrated producer, it contracts with wire drawers to draw a portion of its wire rod into wire rather than itself drawing all of the wire rod that it requires. *See* Stanley's Response to Section D Questionnaire. In addition, Stanley stated that, although it was able to provide data for the "substantial majority" of its subcontractors, it was unable to obtain information from certain of these wire drawers about how much wire rod they consumed to produce the amount of wire supplied to Stanley. *See* Stanley's Response to Section D Questionnaire; Issues & Decision Memorandum at 33 n.90 (comment 17).

Commerce also requested that Stanley report how much wire it used to produce its nails. *See* Supplemental Questionnaire for Section D (Pub. Doc. No. 233). Wire, in contrast to wire rod, is not a factor of production, but, rather, an "intermediate input."[7] *See generally* Surrogate Valuation Memorandum for the Preliminary Results. Stanley provided complete data for its wire consumption. *See* Part 2 of Supplemental Section D Questionnaire Response of Stanley (Pub. Doc. No. 253).

Commerce subsequently published its Preliminary Results. *See generally* Certain Steel Nails From the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review, 75 Fed. Reg. 56,070 (Sept. 15, 2010) ("Preliminary Results"). In the Preliminary Results, Commerce calculated a preliminary dumping margin for Stanley at 6.48% using "facts otherwise available" (or "neutral facts") to fill the gaps in Stanley's wire rod data. *See* Preliminary Results, 75 Fed. Reg. at 56,077.[8]

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[7] Intermediate inputs are distinct from factors of production; and Commerce's criteria for evaluating intermediate inputs differ from those for factors of production. *See* Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 Fed. Reg. 4986 (Jan. 31, 2003) (preliminary results of administrative review).

[8] In addition to its issuance of the Preliminary Results, Commerce also provided detailed explanations of its calculations in its September 7, 2010 Preliminary Calculation Memorandum for Stanley. Preliminary Calculation Memorandum for Stanley (Pub. Doc. No. 290) ("Preliminary Calculation Memorandum"). Using Stanley's reported data to calculate normal value for Stanley, Commerce added the costs of all the factors of production including the plastic, paper, and wire collating material used to collate the nails and obtained a price for the normal value of collated nails stated in terms of dollars per kilogram. *See id*. Commerce explained that it calculated United States price by converting the price of a carton of subject merchandise to the price of a kilogram of subject merchandise, using the weight of the finished nails plus the collating material, so that United States price could be compared to normal value. *Id*.

In addition to wire rod, the Preliminary Results also analyzed Stanley's other factors of production. Electricity**,** for example, plays a major role in the production of nails. *See* Surrogate Valuation Memorandum for the Preliminary Results at 11. As a surrogate value for electricity in calculating the Preliminary Results, Commerce used historical data published by India's Central Electricity Authority in March 2008. *See* Surrogate Valuation Memorandum for the Preliminary Results at 11; Issues & Decision Memorandum at 15 (comment 5). Those data reflected "tax-exclusive electricity rates charged to small, medium, and large industries in India." *See* Surrogate Valuation Memorandum for the Preliminary Results at 11.

Further, because valuing product-specific factors of production does not capture certain overall "general expenses and profits," Commerce must separately reflect in the agency's calculation of normal value (1) factory overhead, (2) selling, general, and administrative expenses ("SG&A"), and (3) profit. 19 U.S.C. § 1677b(c)(1). As with other factors of production, Commerce uses surrogate values to determine a respondent's financial ratios, relying on the financial statements of one or more producers of identical or comparable merchandise, which serve as surrogates for this purpose. *See generally Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 131920 (Fed. Cir. 2010) (providing overview of use of financial statements to determine surrogate financial ratios). In the Preliminary Results here, Commerce relied on the financial statement of a large, multinational Indian producer of fasteners, Lakshmi Precision Screws Ltd. ("Lakshmi"). *See* Surrogate Value Memorandum for the Preliminary Results. According to Commerce, Lakshmi produced "comparable" merchandise, and its financial statement provided the best available information due to the company's use of "an integrated wire-drawing production process with steel wire rod as the main input, which closely mirrors [the process] of the respondents." *See* Surrogate Valuation Memorandum for the Preliminary Results at 15–16.

Between mid-November and mid-December 2010, Commerce conducted a "successful[]" verification of Stanley's factors of production and U.S. sales questionnaire responses, as well as the factors of production data from one of Stanley's unaffiliated wiredrawing subcontractors. *See* Final Results, 76 Fed. Reg. at 16,380; Issues & Decision Memorandum at 36 (comment 18). At verification, Stanley provided Commerce with further information and explanation regarding Stanley's missing factors of production data. *See generally* Verification Report for Stanley (Pub. Doc. No. 352).

Commerce's calculations refer to the weight of nails plus collating material as "CONWGT3U"; the weight of nails alone is identified as "CONWGT4U." *See generally* Preliminary Calculation Memorandum at 1–8.

Following issuance of the Preliminary Results and completion of verification, Commerce solicited and received administrative case briefs and rebuttal briefs from Mid Continent, Stanley, and other interested parties. Final Results, 76 Fed. Reg. at 16,380. In its administrative case brief, Mid Continent challenged Commerce's determination to use "facts otherwise available" (*i.e.*, neutral facts) to substitute for Stanley's missing wire rod data. Mid Continent Case Brief (Pub. Doc. No. 367) at 15. Mid Continent argued that Commerce instead should use the agency's "intermediate input methodology" or apply "adverse facts available." *See generally* Mid Continent Case Brief. Under Commerce's intermediate input methodology, Commerce directly calculates the value of an intermediate input (such as wire) rather than valuing and then adding up all the separate individual factors of production that go into the production of that intermediate input (such as wire rod and wiredrawing services). *See, e.g., Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 45866, 617 F. Supp. 2d 1281, 1289–95 (2009). "Adverse facts available" (or "adverse inferences") are substitutes for missing information that are adverse to the interests of a party that has refused to cooperate with Commerce's information requests. *See, e.g., Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010).

Also discussed in Mid Continent's administrative case brief was electricity. Mid Continent contended that the use of the March 2008 report by the Central Electricity Authority did not reflect the most contemporaneous information, and did not represent the best available information. *See* Mid Continent Case Brief at 53–54. According to Mid Continent, Commerce should have used data released in late March 2009 (which Mid Continent had placed on the record prior to filing its case brief), reflecting "updated electricity pricing in effect for a significant portion of the [period of review]" and "updated energy pricing" for certain Indian consumers. Mid Continent Case Brief at 53.

In addition, Mid Continent's administrative case brief challenged Commerce's reliance on Lakshmi's financial statement for use in calculating the financial ratios, and submitted certain financial data for Sundram Fasteners Ltd. ("Sundram"). *See* Mid Continent Case Brief at 6, 41–46; Mid Continent Surrogate Value Submission (Pub. Doc. No. 301) (exhibit including 2009 and 2010 Limited Annual Reports for Sundram). Mid Continent urged Commerce to use Sundram's data for purposes of the Final Results, emphasizing that like Lakshmi Sundram was a multi-national producer of fasteners, with a financial and production scale comparable to that of Stanley. *See* Mid Continent Case Brief; Mid Continent Surrogate Value Submission.

The Chinese respondents submitted other financial statements as possible sources for surrogate financial ratios, including statements from several significantly smaller Indian companies, including J&K Wire & Steel Industries (Pvt.) Ltd. ("J&K"), Bansidhar Granites Private Limited ("Bansidhar"), and Nasco Steels Private Ltd. ("Nasco"). *See* GDLSK Section A Client's Second Surrogate Value Submission at Exhs. 1–3 (Pub. Doc. No. 299) (financial statements of Bansidhar, J&K, and Lakshmi); Stanley Resubmission of Comments (Pub. Doc. No. 330) (financial statements for Nasco). In its administrative case brief and its rebuttal brief filed with the agency, Mid Continent argued that use of the financial statements of J&K, Bansidhar, and Nasco would be inappropriate. *See generally* Mid Continent Rebuttal Brief (Pub. Doc. No. 370). According to Mid Continent, unlike the companies whose financial statements Mid Continent placed on the record, the production and financial experience of J&K, Bansidhar, and Nasco bore no similarity to that of Stanley. *See id*. at 22–37.

In the administrative case brief that Stanley filed with Commerce, Stanley challenged a number of issues, including Commerce's decision to use zeroing to calculate Stanley's dumping margin in the administrative review (an issue that Stanley initially pursued in this litigation, but has since dismissed). *See* Stanley Case Brief (Pub. Doc. No. 365) at 14–19. However, Stanley's administrative case brief said nothing about Commerce's calculations regarding the weight basis for nails used in calculating normal value. *See* Stanley Case Brief.

After considering the evidence and arguments on the record, Commerce issued the Final Results of the administrative review. *See generally* Final Results, 76 Fed. Reg. 16,379. In the Final Results, Commerce declined to use the intermediate input methodology in calculating Stanley's normal value, and explained that it used facts otherwise available (*i.e.*, neutral facts) rather than adverse facts available to fill the gaps in Stanley's data on wiredrawing factors of production. *See* Issues & Decision Memorandum at 32–36 (comments 17–18). The Final Results found that the use of adverse facts available was not warranted, because Stanley was forthcoming about the deficiencies in its factors of production data and because Commerce had not requested that Stanley make additional attempts to obtain the missing data or demonstrate that it had made such attempts. Commerce therefore did not conclude that Stanley had failed to cooperate by not acting to the best of its ability to comply with an agency request for information. *See* Issues & Decision Memorandum at 34 (comment 17).

As a surrogate value for electricity, the Final Results continued to use the data from India's Central Electricity Authority published in

March 2008. Issues & Decision Memorandum at 15 (comment 5). Commerce explained that the rates in that publication reflected the rates in effect for more of the period of review than the rates contained in the March 2009 data that Mid Continent had placed on the record, and thus were more "contemporaneous." *Id*.

Commerce also reviewed all five financial statements on the record and modified its financial ratio calculations, relying on the financial statements of Bansidhar, J&K, and Nasco. Issues & Decision Memorandum at 11–13 (comment 3). Commerce explained that each of the three companies is an integrated producer of nails, produces nails from steel wire rod, and has invested in the capital equipment necessary to produce nails from steel wire rod. *Id*. Commerce decided not to rely on Lakshmi's financial statement, because the agency had discovered evidence of a countervailable subsidy on the company's financial statements. *Id*.[9] Commerce also declined to use Sundram's financial statements, explaining that Sundram is not an integrated producer of nails and does not consume steel wire rod in its production of nails. Issues & Decision Memorandum at 11 (comment 3).

Following issuance of the Final Results, Stanley submitted ministerial error allegations. *See* Stanley's Request for Correction of Significant Ministerial Errors (Pub. Doc. No. 387). Stanley alleged that the Final Results contained two ministerial errors. *Id*. Stanley first alleged that Commerce had inadvertently calculated depreciation using a "total" rather than an "annual" figure. *Id*. at 2–4. Commerce corrected that error, and adjusted Stanley's margin accordingly. In addition, Stanley alleged a ministerial error concerning the weight basis for nails used in calculating normal value. *Id*. at 5–9. Commerce disagreed with Stanley's second point, explaining that its calculation was intentional, and that there was no ministerial error. *See* Ministerial Error Memorandum (Pub. Doc. No. 393) at 3–4. Commerce further noted that the weight basis used in the Final Results was the same as the weight basis used in the Preliminary Calculation Memorandum for Stanley. *Id*.; *see also* Preliminary Calculation Memorandum for Stanley (Pub. Doc. No. 290) ("Preliminary Calculation Memorandum"). Commerce's Amended Final Results therefore reflected an adjustment to Stanley's margin only for the company's first allegation of ministerial error. *See* Amended Final Results, 76 Fed. Reg. at 23,280. The Amended Final Results adjusted Stanley's margin from 13.9% to 10.63%. *Id*.

This action ensued.

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[9] Commerce generally does not rely on the financial statement of a company "where there is evidence that the company received countervailable subsidies and there are other sufficient[ly] reliable and representative data on the record." Issues & Decision Memorandum at 11 (comment 3).

After briefing was complete on the merits of Mid Continent's challenge to the Final Results' reliance on the financial statements of Bansidhar, Nasco, and J&K, Commerce in the second administrative review of the same antidumping duty order at issue here refined its practice for determining whether a company is a producer of "comparable" or "identical" merchandise for purposes of analyzing potential surrogates for financial ratios. *See* Issues and Decision Memorandum for Certain Steel Nails from the People's Republic of China: Final Results of the Second Antidumping Duty Administrative Review, 2012 WL 699520 at Comment 2 (Feb. 23, 2012) ("Decision Memorandum for Second Nails Review"). Thereafter, the Government requested a voluntary remand to allow Commerce to reevaluate its determination concerning surrogate financial ratios in this administrative review. *See* Def.'s Remand Motion at 2–3.

II. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, the agency'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 NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (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 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).

While Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319. Nevertheless, "the path of Commerce's decision must be rea-

sonably 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*

Dumping occurs when goods are imported into the United States and sold at a price lower than their "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See Taian Ziyang Food Co. v. United States*, 35 CIT ____, ____, 783 F. Supp. 2d 1292, 1299 (2011) (*citing* 19 U.S.C. §§ 1673, 1677(34), 1677b(a)); *see generally id*., 35 CIT at ____, 783 F. Supp. 2d at 1299–1302. The difference between the normal value of the goods and the U.S. price is the "dumping margin." *See* 19 U.S.C. § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See* 19 U.S.C. § 1673.

Normal value is typically calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods, when the exporting country is a market economy country. *See generally* 19 U.S.C. § 1677b.[10] However, where as here the exporting country has a non-market economy ("NME"), there is often concern that the factors of production used to produce the goods at issue are under state control, and that home market sales may not be reliable indicators of normal value. *See* 19 U.S.C. § 1677(18)(A).

In cases such as this, where Commerce concludes that concerns about the sufficiency or reliability of the available data do not permit the normal value of the goods to be determined in the typical manner, Commerce "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production," including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See* 19 U.S.C. § 1677b(c)(1); *see generally Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1250–51 (Fed. Cir. 2009) (briefly summarizing "factors of production" methodology). The antidumping statute requires Commerce to value

[10] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See, e.g., RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1338 (Fed. Cir. 2002) (discussing 19 U.S.C. §§ 1677b(a)(1)(B)(ii), 1677b(a)(1)(C)); *see also Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1251 n.1 (Fed. Cir. 2009) (explaining exception).

factors of production "based on the *best available information* regarding the values of such factors" in an appropriate surrogate market economy country in this case, India. *See* 19 U.S.C. § 1677b(c)(1) (emphasis added); *see also Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *Ningbo*, 580 F.3d at 1254 (emphasizing that statute mandates that Commerce "shall" use "best available information" in valuing factors of production).

In determining which data constitute the "best available information," Commerce generally looks to the criteria set forth in its "Policy Bulletin 04.1," also known as the "NME Surrogate Country Policy Bulletin." Policy Bulletin 04.1 explains:

> In assessing data and data sources, it is [Commerce's] stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.

See Import Administration Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process, at "Data Considerations" (March 1, 2004).[11]

Within this general framework, the statute "accords Commerce wide discretion in the valuation of factors of production in the application of [the statute's] guidelines." *See Shakeproof*, 268 F.3d at 1381 (internal quotation marks and citation omitted); *see also Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316, 1320 (Fed. Cir. 2010) (same); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (same). Commerce is recognized as the "master of antidumping law." *See Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999); *see also Shakeproof*, 268 F.3d at 1381 (acknowledging "Commerce's special expertise"). And "[t]he process of constructing foreign market value for a producer in a non-market economy country is difficult and necessarily imprecise." *Id*.

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[11] Policy Bulletin 04.1 clearly states that the five specified criteria *i.e.*, "investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data" were developed to serve as a "tie-breaker," if necessary, in Commerce's identification of a surrogate country. *See Taian Ziyang*, 35 CIT at ____ n.8, 783 F. Supp. 2d at 1300 n.8. The criteria were not promulgated for the purpose of guiding Commerce's selection from among alternative data sources *after* a surrogate country has been identified. *Id*. Nevertheless, Commerce has used the criteria for that purpose here and in many other cases. *Id*.

Nevertheless, Commerce's discretion is not boundless. In exercising its discretion, Commerce is constrained by the purpose of the antidumping statute, which is "to determine antidumping margins 'as accurately as possible.'" *See Shakeproof*, 268 F.3d at 1382 (*quoting Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)). And, Commerce's discretion notwithstanding, "a surrogate value must be as representative of the situation in the [nonmarket economy] country as is feasible." *See Nation Ford*, 166 F.3d at 1377 (internal quotation marks and citation omitted). Thus, "[i]n determining the valuation of . . . factors of production, the critical question is whether the methodology used by Commerce is based on *the best available information* and establishes antidumping margins *as accurately as possible*." *See Ningbo*, 580 F.3d at 1257 (emphases added) (*quoting Shakeproof*, 268 F.3d at 1382) (internal quotation marks omitted).

In the present case, Stanley and Mid Continent challenge multiple aspects of Commerce's Final Results in the first administrative review of steel nails from the PRC. As discussed in greater detail below, Commerce's decisions not to use intermediate input methodology, not to apply adverse facts available, and not to "correct" an alleged ministerial error must be sustained. *See* sections III.A, III.B & III.E, *infra*. On the other hand, Commerce's selection of sources for Stanley's surrogate financial ratios and Commerce's valuation of Stanley's electricity must be remanded to the agency for further consideration. *See* sections III.C & III.D, *infra*.

A. *Intermediate Input Methodology*

Mid Continent challenges Commerce's normal value calculation for Stanley's nails, arguing that in light of Stanley's missing factors of production data Commerce erred by applying its "factors of production" methodology, and instead should have used the agency's "intermediate input" methodology. *See generally* Mid Continent Brief at 7–11; Mid Continent Reply Brief at 1–4. Mid Continent contends that this case fits comfortably within both of the two exceptions to Commerce's standard factors of production methodology. *See* Mid Continent Brief at 8–11; Mid Continent Reply Brief at 2–4. However, for the reasons described below, Mid Continent's arguments must be rejected.

In NME antidumping proceedings, Commerce typically "determine[s] the normal value of the subject merchandise on the basis of the *value of the factors of production* . . . based on the best available information regarding the values of such factors in a market economy

country." 19 U.S.C. § 1677b(c)(1) (emphasis added). However, in some situations, Commerce resorts to an alternative approach for determining normal value the so-called intermediate input methodology. *See generally Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 458–466, 617 F. Supp. 2d 1281, 1289–95 (2009) (recognizing Commerce's discretion to rely on intermediate input methodology under certain circumstances).

There are two exceptions to Commerce's factors of production methodology that can give rise to a need for the intermediate input methodology the insignificant share exception and the significant element exception. *See* Issues & Decision Memorandum at 35 (comment 18) (discussing two exceptions); *see also* Issues and Decision Memorandum for Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 2003 WL 24153843 at Comment 3 (June 23, 2003) ("Fish Fillets Decision Memorandum") (same); Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Ball Bearings and Parts Thereof from the People's Republic of China, 2003 WL 24153825 at Comment 6 (March 6, 2003) ("Ball Bearings Decision Memorandum") (same); *Zhengzhou Harmoni Spice Co.*, 33 CIT at 461 n.14, 617 F. Supp. 2d at 1292 n.14 (same). As detailed below, neither exception applies here.[12]

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[12] Mid Continent's other arguments challenging Commerce's decision not to apply the intermediate input methodology are also unavailing.

Mid Continent contends that Commerce failed to articulate a satisfactory rationale for rejecting complete data for wire that could have been used if Commerce had relied on the intermediate input methodology. Mid Continent Brief at 11. However, as Commerce explained in its Issues and Decision Memorandum, the amount of steel wire consumed by a company such as Stanley, which is an integrated producer, is not necessarily reflective of its costs. Def.'s Brief at 15 (*citing* Issues & Decision Memorandum at 36). Based on this consideration and Commerce's "successful[]" verification of Stanley's subcontractor's wiredrawing factors of production, Commerce found use of Stanley's wiredrawing factors of production to be "more accurate" than Mid Continent's proposed intermediate input methodology. Issues & Decision Memorandum at 36 (comment 18). Mid Continent's contention that Commerce did not satisfactorily address why factors of production data are preferable to intermediate input data for Stanley thus has no merit.

In addition, Mid Continent argues that using Stanley's incomplete factors of production data "fundamentally inhibits the accuracy of the traditional factors of production methodology, and thus undermines the accuracy of the margin calculations." Mid Continent Reply Brief at 2. Mid Continent faults Commerce for not articulating its reasons for concluding that the amount of missing wiredrawing data was small. *Id*. at 4. Yet the missing portion of data represented less than one-third of the wiredrawing costs, and by Mid Continent's own admission wiredrawing services accounted for an insignificant percentage of the normal value of Stanley's nails. *See* Mid Continent Amended Conf. Brief at 9; Mid Continent Conf. Reply Brief at 2–3; *see also* Stanley Conf. Response Brief at 22. Mid Continent's arguments are not persuasive.

1. *The Insignificant Share Exception*

Mid Continent contends that Commerce should have applied the intermediate input methodology based on the insignificant share exception. *See* Mid Continent Brief at 8–9; Mid Continent Reply Brief at 3. Commerce invokes the insignificant share exception as an alternative to the agency's standard factors of production methodology where "the factors [of production] used to produce an intermediate input represent a small or insignificant share of total output" and where the improvement to the overall accuracy of the normal value calculation "will be too small to justify the burden of valuing the factors." Issues & Decision Memorandum at 35 (comment 18).

Mid Continent's argument for the application of the exception is that the wiredrawing services of Stanley's subcontractors constituted an insignificant share of total output cost. *See* Mid Continent Brief at 9 (arguing that, "based on the database that [Commerce] used for its *Preliminary Results*," wiredrawing services "by no means constitute[d] a significant share of the total output cost"); *see also* Mid Continent Reply Brief at 3.[13] However, in making its argument, Mid Continent misapplies the requirements for the insignificant share exception by focusing solely on whether one of the factors of production (wiredrawing services) was insignificant, rather than on whether the factors of production, taken together, represented such an insignificant share of total output that calculating values for each of them would not be worthwhile in valuing the intermediate input wire.

The insignificant share exception does not apply merely because, as Mid Continent contends, one of the factors of production (wiredrawing services) for the intermediate input (drawn wire) represented an insignificant share of total output. When considering whether to apply the insignificant share exception, Commerce focuses on the significance of the intermediate input itself (or, in other words, *all* of the factors of production that make up the intermediate input), not on the significance of any one particular factor of production used to produce the intermediate input. *See* Stanley Response Brief at 23. As stated in Wooden Bedroom Furniture from the PRC, Commerce "appl[ies] a surrogate value to an intermediate input"

> when the *intermediate input* accounts for an insignificant share of total output, and the potential increase in accuracy to the overall calculation that results from valuing each of the [factors

[13] Mid Continent explains that, based on its own calculations, the wiredrawing factors of production (exclusive of wire rod) comprise [[ ]]% and [[ ]]% of the total cost and normal value, respectively, of Stanley's nails. *See* Mid Continent Amended Conf. Brief at 9; Mid Continent Conf. Reply Brief at 9; *see also* Stanley Conf. Response Brief at 22.

> of production] is outweighed by the resources, time, and burden such an analysis would place on all of the parties to the proceeding.

Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China, 2008 WL 8608280 at Comment 29 (Aug. 11, 2008) ("Wooden Bedroom Furniture Decision Memorandum") (emphasis added).[14]

Further, Mid Continent contends that, in refusing to apply the exception here, Commerce wrongly focused on whether wire rod represented a significant share of total output. Mid Continent Brief at 11 (stating that Commerce conducted "the wrong analysis" by noting that "the main factor used to value the intermediate good, drawn wire, is rod, which represents a significant share of total output"). But Mid Continent's argument is unavailing. By focusing on the significance of wire rod as a factor of production in its decision that the insignificant share exception does not apply here, Commerce indicated that not all of the factors used to produce wire represent insignificant shares of total output, and that, accordingly, the insignificant share exception did not apply. Issues & Decision Memorandum at 35 (comment 18).[15]

In sum, Commerce reasonably found that, because the main factor of production (wire rod) for the intermediate input (drawn wire) "represents a significant share of total output," the insignificant share exception did not apply and could not justify a departure from the agency's standard factors of production methodology. Issues &

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[14] In Wooden Furniture from the PRC, Commerce decided not to use the intermediate input methodology in valuing bun feet and veneered boards, because Commerce found that "if [the agency] did not use a [factors of production] buildup for the veneering service and for valuing bun feet from subcontractors to whom [the producer] provided wood, it would lead to an inaccurate result." Wooden Bedroom Furniture Decision Memorandum at Comment 29. Similarly, here, Commerce found that using the verified factors of production for Stanley's drawn wire rather than Mid Continent's "proxy calculation" (*i.e.*, intermediate input methodology calculation) would lead to a "more accurate" result. Issues & Decision Memorandum at 36 (comment 18).

[15] Mid Continent further argues that Commerce "overlook[ed] the fact that the outside wire drawers did not own the wire rod Stanley did." Mid Continent Brief at 11 (noting that "Stanley made quite a point during the review of specifically treating drawing services as the *only* thing it acquired from the [subcontractors]"). Mid Continent's argument misses the mark because the focus of the insignificant share exception here is not whether outside services comprised an insignificant share of total output, but (as described above) whether the factors used to produce drawn wire, taken together, represent an insignificant share of total output. Thus, when determining whether the insignificant share exception applies, Commerce would not only consider the wiredrawing services factors of production but also the wire rod factors of production.

Decision Memorandum at 35–36 (comment 18). Mid Continent's argument to the contrary is without merit.

2. *The Significant Element Exception*

Mid Continent also contends that Commerce should have applied the intermediate input methodology based on the significant element exception. *See* Mid Continent Brief at 8–11; Mid Continent Reply Brief at 2–3, 4. Commerce invokes the significant element exception where a significant portion of the costs of the factors of production for an intermediate input cannot be accounted for by Commerce. Issues & Decision Memorandum at 35 (comment 18). Mid Continent's argument for the second exception is that the intermediate input methodology should be applied because factors of production data were missing for what Mid Continent contends was a significant portion of the wire consumed by Stanley. Mid Continent Brief at 8–11; Mid Continent Reply Brief at 2–3, 4.[16] However, Commerce's decision to reject the significant element exception as a basis for departing from the agency's standard factors of production methodology was reasonable.

The wiredrawing factors of production of Stanley's subcontractors account for only a small portion of the normal value of Stanley's nails, and the wire drawers whose factors of production Stanley did not report accounted for less than one-third of Stanley's drawn wire. Stanley Response Brief at 24. In other words, Commerce had factors of production data that accounted for more than two-thirds of Stanley's drawn wire. *Id*. at 24–25. As such, Commerce did not act unreasonably by deciding that the missing wiredrawing factors of production data were not significant enough to merit the application of the intermediate input methodology through the significant element exception. As the "master of antidumping law" with "special expertise," Commerce must be afforded some discretion under circumstances such as these. *See Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999); *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001).

In sum, Commerce reasonably found that neither of the two exceptions was applicable here, and that, based on agency practice, it would not be appropriate to apply the intermediate input methodology given the circumstances of this case. Mid Continent's arguments for use of Commerce's intermediate input methodology therefore must be rejected.

[16] Stanley did not submit data for [[ ]] of its subcontractors. As a result, Commerce was missing factors of production data for [[ ]]% of Stanley's total wire consumed during the period of review. Mid Continent Amended Conf. Brief at 9.

B. *Adverse Facts Available*

Mid Continent also contests Commerce's decision not to apply adverse facts available to Stanley's missing wiredrawing factors of production. *See generally* Mid Continent Brief at 12–19; Mid Continent Reply Brief at 4–7. Mid Continent argues that Stanley improperly withheld factors of production data. *See* Mid Continent Brief at 12, 14–18; Mid Continent Reply Brief at 4–7. Mid Continent further contends that Commerce's decision not to apply adverse facts available here was inconsistent with its decisions in other administrative proceedings. *See* Mid Continent Brief at 18–19. In addition, Mid Continent asserts that Commerce's choice of data to replace the missing wiredrawing factors of production was not based on substantial evidence. *See* Mid Continent Brief at 12–14; Mid Continent Reply Brief at 6. However, for reasons discussed below, Mid Continent's arguments are without merit.

When an interested party or any other person withholds information requested by Commerce, fails to provide requested information by the relevant deadline or in the manner and form requested, significantly impedes a proceeding, or provides information that cannot be verified, or when necessary information is for some other reason not available on the record of a proceeding, Commerce is authorized to fill in the information gaps using "facts otherwise available" (*i.e.*, facts that substitute for missing information). 19 U.S.C. § 1677e(a). Commerce may rely on neutral (*i.e.*, non-adverse) "facts otherwise available" to fill these gaps, or, 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," Commerce may rely on "adverse facts available" (*i.e.*, facts that are adverse to the interests of that party). 19 U.S.C. § 1677e(b).

In its Issues and Decision Memorandum here, Commerce explained its rationale for not applying adverse facts available. According to Commerce, because Stanley complied with Commerce's requests for information to the best of its ability during the course of the review and was able to provide factors of production data from unaffiliated wiredrawing subcontractors accounting for a substantial majority of drawn wire consumed during the period of review, Commerce had no reason to apply adverse facts available in this case. *See* Issues & Decision Memorandum at 33 & n.90 (comment 17); *see also* Stanley Response Brief at 6–7.

Mid Continent asserts that, contrary to Commerce's finding, Stanley did not act to the best of its ability to cooperate with Commerce, and withheld factors of production data for at least one of its unaf-

filiated wiredrawing subcontractors. *See* Mid Continent Brief at 12, 14–18; Mid Continent Reply Brief at 4–7.[17] However, record evidence supports Commerce's determination. From the beginning of Commerce's individual investigation of Stanley, Stanley was forthcoming with Commerce about the factors of production data that it possessed for the subcontractor in question and the reason why it was not submitting that data. For instance, in response to a questionnaire from Commerce, Stanley reported that despite multiple attempts it had been unable to obtain information that would allow it to verify the factors of production data that it possessed for the subcontractor. Supplemental Questionnaire for Section D at 12–13 (Conf. Doc. No. 109).[18] Similarly, Stanley explained that it would have essentially been impossible to obtain the requested information from another of its subcontractors. *Id*.[19] In light of Stanley's forthcoming response to Commerce's only questionnaire requesting factors of production data on Stanley's wiredrawing subcontractors, and in light of Stanley's multiple attempts to obtain verifiable data, it cannot be said that Commerce erred in concluding that Stanley cooperated with the agency and acted to the best of its ability.[20]

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[17] Specifically, Mid Continent contends that Stanley "withheld requested [factors of production] information in its possession for at least [[ ]] of its wire drawers." Mid Continent Amended Conf. Brief at 13.

[18] As Stanley explained to Commerce:

> Stanley and its representatives have expended much effort and made repeated visits to the [[ ]] remaining sub-contractors that provided wire drawing services for which the Department requested [factors of production] data . . . . Despite the fact that wiredrawing is not [[[ ]]]'s principal business, Stanley's representatives were able to obtain all of [[ ]]'s wiredrawing [factors of production] data and most of the necessary accounting records for [[ ]]. However, despite repeated requests from Stanley's representative and three on-site meetings, company officials have repeatedly refused to provide the company's financial statements or certain additional accounting records that are necessary to confirming their data.

Supplemental Questionnaire for Section D at 12–13.

[19] As Stanley explained to Commerce:

> The remaining wiredrawing sub-contractor, [[ ]] first refused to provide any production and cost data. Following repeated inquiries and three on-site meetings, [[ ]] demonstrated to Stanley's representatives that it exists as an informal business entity that operated under a business license borrowed from another company and that it did not have actual, separable accounting records.

Supplemental Questionnaire for Section D at 13.

[20] Mid Continent suggests that, in determining whether to apply adverse facts available, Commerce is required to evaluate "whether [the] respondent has put forth its maximum effort to provide [Commerce] with full and complete answers to all inquiries in an investigation." Mid Continent Brief at 15 (*quoting Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). But, although Stanley did not submit certain unverifiable data to Commerce, nothing on the record indicates that Stanley did not put forth its maximum effort to provide Commerce with the data it requested.

Mid Continent fares no better on its claim that Commerce should have applied adverse facts available here based on Commerce's determination in a previous administrative proceeding Activated Carbon from the PRC. Mid Continent Brief at 18; *see also* Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China, 2007 WL 765248 at Comment 20 (Feb. 23, 2007) ("Activated Carbon Decision Memorandum"). For the same two reasons noted by Commerce in its Issues and Decision Memorandum in this proceeding, Activated Carbon from the PRC is distinguishable from the instant case, and Mid Continent's argument is unavailing. *See* Issues & Decision Memorandum at 34 (comment 17).

As Commerce explained here, "the extent by which the respondents failed to provide [factors of production] data [in Activated Carbon from the PRC] was much more significant than Stanley's inability to obtain [factors of production data] from certain wiredrawing subcontractors." Issues & Decision Memorandum at 34 (comment 17). In Activated Carbon from the PRC, a respondent failed to report factors of production data from two direct and three indirect suppliers, and Commerce applied partial adverse inferences for the missing data. Activated Carbon Decision Memorandum, 2007 WL 765248 at Comment 20. The situation here involves fewer subcontractors. *Id*.[21] In addition, the respondent in Activated Carbon from the PRC failed to provide factors of production data for the producers of the subject merchandise itself, while, in this case, Stanley did not provide factors of production data for part of its production process that is subcontracted out to unaffiliated parties. Issues & Decision Memorandum at 34. In other words, Commerce here determined that it is more problematic when factors of production data are missing for the entire product (as in Activated Carbon from the PRC) than when factors of production data are missing for part of the production process (as in the instant case). *Compare* Activated Carbon Decision Memorandum, 2007 WL 765248 at Comment 20 *with* Issues & Decision Memorandum at 34. Based on these considerations, Commerce reasonably concluded that the result in Activated Carbon from the PRC is not controlling here.

Mid Continent's reliance on two other administrative determinations is similarly misplaced. *See* Mid Continent Brief at 18 (*citing* Issues and Decision Memorandum for the Administrative Review of Certain Cased Pencils from the People's Republic of China; Final Results, 2002 WL 1732817 at Comment 10 (July 25, 2002) ("Cased Pencils Decision Memorandum"); Notice of Final Determination of

[21] Stanley did not provide data for [[ ]] of its subcontractors. *See* nn.18–19, *supra*.

Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China, 64 Fed. Reg. 71,104, 71,109 (Dec. 20, 1999) ("Creatine Monohydrate Final Determination")). In Cased Pencils from the PRC and Creatine Monohydrate from the PRC as in Activated Carbon from the PRC the non-cooperating suppliers were producers of the subject merchandise itself, not producers of components of the subject merchandise. Further, in Creatine Monohydrate from the PRC, there was no indication that the respondents had even tried to obtain data from their suppliers. *See* Creatine Monohydrate Final Determination, 64 Fed. Reg. at 71,108–09. In this case, the two suppliers at issue were producers of components (wiredrawing services) of the subject merchandise, and Stanley made a concerted effort to obtain verifiable factors of production data from them. Thus, neither of the cases supports Mid Continent's claim.

As Commerce noted in its Issues and Decision Memorandum, the agency's analysis here "closely mirrors" that in its previous determination in yet another administrative review, Tapered Roller Bearings from the PRC. *See* Issues & Decision Memorandum at 33–34 (comment 17); Issues and Decision Memorandum for the Final Results of Antidumping Review on Tapered Roller Bearings from the People's Republic of China, 2009 WL 170611 at Comment 4 (Jan. 13, 2009) ("Tapered Roller Bearings Decision Memorandum"). Tapered Roller Bearings from the PRC is analogous to the instant case because the respondent in that case, as in this one, was forthcoming about its inability to obtain factors of production data from subcontractors, and Commerce found that the respondent did not impede the proceeding. *Compare* Issues & Decision Memorandum at 33–34 *with* Tapered Roller Bearings Decision Memorandum, 2009 WL 170611 at Comment 4. Moreover, Tapered Roller Bearings from the PRC is also analogous to the instant case because, in both cases, "the missing [factors of production] were not for complete production of a product, but rather for a stage in the production process that is subcontracted out to unaffiliated parties." Issues & Decision Memorandum at 34; Tapered Roller Bearings Decision Memorandum, 2009 WL 170611 at Comment 4.

Mid Continent's claim that Commerce's choice of data to replace the missing wiredrawing factors of production data was not based on substantial evidence is also unavailing. Mid Continent Brief at 12–13. Mid Continent faults Commerce for the assumption that the subcontractors whose data were missing from the record had production operations identical or comparable to the three subcontractors

whose data were on the record. *Id*. at 13. According to Mid Continent, the subcontractors whose data were on the record had "significantly different" production experiences, resulting in "significantly different production efficiencies among them." *Id*. Specifically, Mid Continent contends that these subcontractors had meaningful differences in their drawn wire yield rates (*i.e.*, the quantity of wire produced from a given quantity of rod) and in their consumption of various inputs. *Id*. Based on these considerations, Mid Continent concludes that Commerce unreasonably assumed that the data on the record for Stanley's wiredrawing subcontractors were appropriate to replace the missing data. *Id*. at 14.

However, since Commerce had already decided not to apply adverse facts available to substitute for the missing data, Commerce was simply looking for neutral data to fill the information gap. The weighted average of the three subcontractors' data on the record constituted a reasonable substitute for the missing data because they were reflective of the majority of Stanley's wiredrawing services data, which was already on the record.

In short, Commerce reasonably declined to apply adverse facts available because Stanley had cooperated with Commerce. Mid Continent's arguments to the contrary notwithstanding, Commerce's determination in this case was consistent with Commerce's decisions in other administrative reviews. And Commerce's selection of neutral facts available to account for the missing data was not unreasonable and was well within the agency's ample discretion.

C. *Surrogate Financial Ratios*

In its Final Results, Commerce concluded that it could no longer use Lakshmi's financial statement as a source for surrogate financial ratios in the underlying review, because the agency had identified evidence of countervailable subsidies in Lakshmi's statement. *See* Issues & Decision Memorandum at 10–11 (comment 3). After reviewing the other potential sources on the record, Commerce ultimately settled on the financial statements of three small Indian companies J&K, Bansidhar, and Nasco. *See* Issues & Decision Memorandum at 9–13.

Mid Continent takes strong exception to Commerce's decision to rely on the financial statements of J&K, Bansidhar, and Nasco, and objects to the agency's rejection of the financial statements of Sundram and Lakshmi. *See generally* Mid Continent Brief at 2, 6–7, 19–27; Mid Continent Reply Brief at 7–9. *But see* Def.'s Response Brief at 9, 18–23; Stanley Response Brief at 15, 30–38. In any event,

the Government now has requested a voluntary remand to allow Commerce to reconsider its position on the selection of financial statements, in light of recent intervening developments. *See generally* Def.'s Remand Motion. As discussed below, that request has merit and must be granted.

When constructing normal value for a foreign producer in a NME country, Commerce bases its determination on "the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). However, as discussed above, valuing the factors of production does not capture certain items, such as manufacturing overhead, selling, general and administrative expenses ("SG&A"), and profit. Commerce calculates those surrogate values using ratios derived from the financial statements of one or more companies that produce identical or at least comparable merchandise in the surrogate market economy country. *See generally* 19 C.F.R. § 351.408(c)(4); 19 U.S.C. § 1677b(c)(1).

In the Final Results, Commerce explained its reasons for rejecting Sundram as a source for surrogate financial ratios:

> [H]aving an integrated wiredrawing process with [steel wire rod, or "SWR"] is key to reflect the production processes of [Stanley]. However, the record does not permit a conclusion that Sundram's production process mirrors Stanley Langfang's. First, nowhere in its financial statement does it indicate that Sundram consumes SWR. Its raw material consumption report lists only "steel" as an input. Thus, even though Sundram produces some comparable merchandise, [Commerce] cannot be certain that it uses the same primary raw material as Stanley Langfang, and thus cannot conclude Sundram's production process reflects that of [Stanley].

Issues & Decision Memorandum at 11 (comment 3). The Issues and Decision Memorandum further explains that Commerce rejected Sundram not only because, according to Commerce, Sundram "only produced comparable rather than identical merchandise," but, in addition, because Sundram "also produced and sold a large array of products not comparable to subject merchandise." *Id*. at 12.

The Final Results outlined as well Commerce's reasons for selecting the financial statements of J&K, Bansidhar, and Nasco as sources for surrogate financial ratios:

> Since the Preliminary Results, additional financial statements have been placed on the record, including those of Nasco, Bansidhar, and J&K. All three companies meet [Commerce's] surrogate value ("SV") selection criteria, and all three produce nails

> from SWR [steel wire rod]. In the case of Nasco, it also appears to produce nails either from drawn wire and/or hot-rolled sheet, but nonetheless consumed SWR during the fiscal year. . . . Second, of the remaining potential surrogate companies, only Nasco, Bansidhar, and J&K produce nails and use SWR in the production process.

Issues & Decision Memorandum at 11–12 (comment 3). Commerce further noted that "Nasco, Bansidhar, and J&K have invested in equipment required to produce nails and use SWR similar to [Stanley], whereas the other potential surrogate companies [have] not." *Id*. at 12. Reasoning that the financial ratios of companies that produce nails "are more appropriate to use than those of companies that do not produce nails" (apparently referring, perhaps mistakenly, to Sundram), Commerce concluded that it would use the financial statements of Nasco, Bansidhar, and J&K to calculate surrogate financial ratios for the Final Results. *Id*. at 12–13.

Noting that, in selecting sources of financial ratios, Commerce's general practice is to attempt to match the production experience of a surrogate company to the production experience of a respondent, Mid Continent argues that Commerce erred in using the financial statements of Bansidhar, J&K, and Nasco, because Mid Continent asserts their production and operational experiences were "fundamentally incomparable" to those of Stanley. Mid Continent Brief at 19–20; *see also id*. at 21–26; Mid Continent Reply Brief at 7–9. Mid Continent characterizes Bansidhar, J&K, and Nasco as "very small scale, private enterprises," while Stanley is a "large, diversified multi-national corporation." Mid Continent Brief at 21–22; *see generally id*. at 2, 6–7, 19–27; Mid Continent Reply Brief at 7–9.

Mid Continent points to the financial statements of Bansidhar, J&K, and Nasco as proof that "their business activities and financial performance have fundamentally little to do with the production of steel nails or comparable [merchandise]." Mid Continent Brief at 22; *see generally id*. at 22–24.[22] Mid Continent also criticizes Commerce as ignoring a laundry list of concerns that, Mid Continent contends, "undermin[e] the use of the Nasco, Bansidhar, and J&K financial

[22] *See also* Mid Continent Brief at 22 (arguing that Bansidhar's sales revenues are largely attributable to resales of traded goods, "leaving virtually nothing to account for 'nail' production and sales"); *id*. at 22–23 (asserting that J&K is "primarily a wire drawer," and that J&K's sales for all produced goods are but a fraction of Stanley's sales of subject goods during the period of review); *id*. at 23 (arguing that Nasco "primarily produces hinges, washers, and 'tawa,'" and that only a small fraction of Nasco's sales revenue was attributable to sales of nails); *id*. at 23–24 (contrasting the fixed assets of the three much smaller companies with those of Stanley and Lakshmi).

statements" in the Final Results. *Id*. at 24–26; *see also* Mid Continent Reply Brief at 8.[23]

Moreover, just as Mid Continent contends that the profiles of Bansidhar, J&K, and Nasco rendered them inappropriate as sources for surrogate financial ratios, Mid Continent argues that Lakshmi and Sundram are "large, multinational fastener producers like Stanley," with similar production experiences. *See* Mid Continent Brief at 26; *see also* Mid Continent Reply Brief at 8–9. Mid Continent asserts, *inter alia*, that the sales revenues and fixed assets of Stanley, Sundram, and Lakshmi confirm that Sundram and Lakshmi "operate at comparable scales of production, and use comparable processes, and thus are more representative of Stanley's production experience" than are Bansidhar, J&K, and Nasco, on which Commerce relied in the Final Results. *See* Mid Continent Brief at 26; *see also* Mid Continent Reply Brief at 8–9. Mid Continent therefore requests that Commerce be directed "to reject the use of Nasco's, Bansidhar's, and J&K's financial statements as surrogate financial ratios and [to] apply the more appropriate financial ratios from Lakshmi and/or Sundram." *See* Mid Continent Brief at 26–27.

The Government and Stanley maintain that the financial statements of Bansidhar, J&K, and Nasco constitute the best available information for surrogate financial ratios and that their use by Commerce should be upheld as supported by substantial evidence and otherwise in accordance with law. *See generally* Def.'s Brief at 9, 18–23; Stanley Response Brief at 15, 30–38.

The Government seeks to deflect Mid Continent's emphasis on the magnitude of the differences in the scale of the production and op-

[23] *See, e.g.*, Mid Continent Brief at 24–25 (concluding that Nasco's financial statements confirm "only minimal nail production," and suggesting that its nail production may be limited to nails for company's own internal consumption; asserting that Nasco is primarily a producer of products manufactured from hot-rolled steel, and that wire rod the main input for steel nails accounted for only a very small percentage of Nasco's consumption of raw materials; arguing that production process for producing goods from hot-rolled steel is "entirely different, uses wholly different equipment, and has a significantly different cost structure" than companies such as Stanley that use wire rod as a main input); *id*. at 25 (stating that Bansidhar's financial statements indicate that company's financial results "are driven by significant *trading*, as opposed to *production* activity"; arguing that Bansidhar's manufacturing operations are operating at a loss, and that company showed profit only due to traded goods; asserting that Bansidhar's fiscal year production of *all nails* (in general) represents but a tiny fraction of Stanley's sales of *subject nails*); *id*. at 25–26 (highlighting fact that less than 5% of J&K's production was devoted to "wire nails," and valuation of those nails was not significant; asserting that J&K's main focus was on drawing wire rod into steel wire, and that most of company's sales were related to sales of steel wire; asserting that J&K's financial statements reflect receipt of subsidies in amount greater than company's "profit," and that had J&K been recognized as operating at a loss company would not have been considered an appropriate source of surrogate values; emphasizing that J&K was operating at less than 30% capacity during period of review).

erations of Stanley on the one hand and Bansidhar, J&K, and Nasco on the other. Specifically, the Government notes that, in the Final Results, Commerce cited several administrative decisions for the proposition that, in essence, "size doesn't matter" (at least not necessarily) in surrogate selection. *See* Def.'s Brief at 21–22 (*citing* Issues & Decision Memorandum at 11–13 (comment 3), and authorities cited there).[24]

In addition, the Government and Stanley particularly highlight Commerce's focus on the production of "identical" or "comparable" merchandise and the importance of the similarity of processes in the use of steel wire rod in the production of nails. *See generally* Def.'s Brief at 9, 18, 20–22; Stanley Response Brief at 32, 34–38. Notably, however, Commerce's conclusion that Sundram's production processes may not mirror those of Stanley and its determination that Sundram does not consume steel wire rod appear to be predicated solely on Sundram's financial statement. *See* Issues & Decision Memorandum at 11 (comment 3) (concluding that "the record does not permit a conclusion that Sundram's production process mirrors [that of] Stanley," because, *inter alia*, "nowhere in its financial statement does it indicate that Sundram consumes [steel wire rod]"). Commerce has not directly addressed Mid Continent's specific arguments on this point; nor does it appear that Commerce has carefully considered all relevant evidence on the record. *See*, *e.g.*, Mid Continent Case Brief at 43, 46 (explaining, *inter alia*, that both nails and screws/fasteners are produced from steel wire and steel wire rod, and that "the production processes for nails and screws/bolts is extremely similar, involving the same input material, which undergoes the same production process"; very favorably comparing "the production process, product range, and physical characteristics of Sundram's screws and bolts and Stanley's nails").

In any event, after briefing the issue on the merits, the Government filed a motion requesting a voluntary remand of this matter to permit Commerce to reconsider its determination in the Final Results. *See generally* Def.'s Remand Motion. In its motion, the Government explains that, since issuing the Final Results in this first administrative review, Commerce now has issued its Final Results in the second administrative review, where Commerce examined whether Bansidhar was a producer of merchandise identical or comparable to that

[24] *But see* Mid Continent Reply Brief at 8 (arguing that "[d]espite the fact that Commerce has in the past indicated that size not render a company unfit as a surrogate, in light of the stark differences in operations between the three surrogate [companies] selected and Stanley, the financial statements chosen by Commerce cannot reasonably be considered the best available information").

produced by Stanley. *See* Def.'s Remand Motion at 2; *see also* Decision Memorandum for Second Nails Review, 2012 WL 699520 at Comment 2. In the second administrative review, Commerce "refined [its] practice with regard to how [it] determine[s] whether a company is a producer of 'identical' or 'comparable' merchandise." Decision Memorandum for Second Nails Review, 2012 WL 699520 at Comment 2.[25] In light of this policy refinement, the Government requests a remand in order to permit Commerce to reconsider the selection of surrogate financial ratios in this first administrative review. *See* Def.'s Remand Motion at 2–3.

Stanley opposes the Government's motion for a voluntary remand, dismissing the issue of whether a company is a producer of "identical" or "comparable" merchandise as a "minor element" of Commerce's antidumping analysis, and asserting that the motion does not establish a "substantial and legitimate" concern within the meaning of *SKF*. *See* Stanley Response to Def.'s Remand Motion at 1–3 (*citing SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citation omitted)).[26] Stanley argues that the Government's request is not made "for any purpose except a vague and open-ended 'evaluation of this issue,'" and observes that the Government's motion "does not state that such a determination would be of any substantive consequence." Stanley Response to Def.'s Remand Motion at 3. Ultimately, Stanley maintains that there is no basis to believe that, even if Bansidhar were to be reclassified as a producer of "comparable" rather than "identical" merchandise, that determination would have any impact on Stanley's dumping margin. *See id*.

Mid Continent, on the other hand, supports the Government's motion and argues that the Government's concerns are both substantial and legitimate. *See* Mid Continent Response to Def.'s Remand Motion at 3–4. According to Mid Continent, "Commerce's recent refinement

[25] Specifically, Commerce determined that, "where . . . detailed evidence is available in the record of the proceeding, [Commerce] will analyze a surrogate company's product mix to make a determination of whether it is more reasonable to consider the company an 'identical' producer as a whole or more reasonable to consider the company a producer of comparable merchandise." Decision Memorandum for Second Nails Review, 2012 WL 699520 at Comment 2 (emphasis added); *see also* Def.'s Remand Motion at 2.

[26] Initially Stanley also opposed the Government's remand motion on the grounds that it would waste the resources of the court. In particular, Stanley argued that, if the Government's remand were granted and the Court of Appeals rendered a decision on zeroing favoring Stanley's zeroing claim in this action, the issue of surrogate financial ratios would be moot because the zeroing ruling would reduce Stanley's dumping margin to zero without regard to Commerce's calculation of financial ratios. Stanley Response to Def.'s Remand Motion at 3–4. However, Stanley's argument has been overtaken by events. As a result of the Court of Appeals' recent decision in *Union Steel*, Stanley has voluntarily dismissed its zeroing claim in this action. *See* [Stanley Plaintiffs] Motion for Voluntary Dismissal of Their First Cause of Action; *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013).

to its practice potentially will result in a change to the financial statements selected and the financial ratios calculated, thereby altering . . . [the] final [dumping] margin." *See id*. at 3. Mid Continent further notes that there is no "evidence that [the Government's] request for partial remand is motivated by bad faith or is frivolous in nature." *Id*. at 3–4 (*citing Clemmons v. West*, 206 F.3d 1401, 1403–04 (Fed. Cir. 2000) (citation omitted)).

As Stanley suggests, it may be that Commerce's policy refinement will have no impact on the ultimate dumping margin in this case. But, at this point, no one can be certain. In this review, Commerce has considered the issue of whether a company produced "identical" or "comparable" merchandise to be a relevant factor in its selection of surrogate companies for financial ratios. For instance, Commerce rejected Sundram in part because it was a producer of "comparable," not "identical," merchandise. Issues & Decision Memorandum at 12 (comment 3) (explaining that Commerce found Sundram to "only produce[] comparable rather than identical merchandise"). Similarly, in the Preliminary Results, Commerce noted that it had selected Lakshmi, even though the company "produce[d] comparable rather than identical merchandise." Surrogate Valuation Memorandum for the Preliminary Results at 15–16.

Thus, a change in the way the agency determines whether merchandise is "identical" or "comparable" conceivably could have implications for Commerce's ultimate determination in the underlying administrative review here. The Government's concern is clearly "substantial and legitimate." *See SKF*, 254 F.3d at 1028 (explaining that a "remand is generally required if the intervening event *may* affect the validity of the agency action" (emphasis added)). A remand is therefore appropriate, to permit Commerce to reevaluate its determination in the Final Results concerning the selection of financial statements as sources for surrogate financial ratios, in light of the agency's recent policy refinement. On remand, Commerce shall consider anew all record evidence in light of, *inter alia*, the agency's updated policy and shall fully articulate the rationale for its determination on remand, and identify all relevant evidentiary support, whatever that determination may be.

D. *Surrogate Values for Electricity*

Mid Continent challenges Commerce's determination in the Final Results to value the electricity consumed in producing nails based on data published by India's Central Electricity Authority ("CEA") in March 2008, rather than on data that the CEA published in March

2009 (which Mid Continent placed on the record here). *See generally* Mid Continent Brief at 2, 7, 27–28; Mid Continent Reply Brief at 9–11. *But see* Def.'s Brief at 9–10, 23–25; Stanley Response Brief at 16, 38–39. Mid Continent emphasizes that Commerce's decision not to use the 2009 data was based on the agency's conclusion that the 2008 data are "more contemporaneous" than the data published in 2009. *See* Issues & Decision Memorandum at 15 (comment 5).

Mid Continent contends that Commerce's determination concerning the relative contemporaneity of the two data sets is demonstrably "factually incorrect," and that the Final Results on this point therefore are not supported by substantial evidence. *See* Mid Continent Brief at 27–28; Mid Continent Reply Brief at 9–11. Remand is necessary to allow Commerce to reconsider this issue and to clarify both its determination and the underlying rationale.

In selecting surrogate values, Commerce seeks the "best available information" in accordance with 19 U.S.C. § 1677b(c)(1). Def.'s Brief at 23. In evaluating potential sources, Commerce prefers "investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." Policy Bulletin 04.1; *see also* Issues & Decision Memorandum at 13 (comment 4); Def.'s Brief at 23 (similar). Here, Commerce found that the two potential data sources for surrogate values for electricity *i.e.*, the 2008 data and 2009 data both satisfied the relevant criteria, but that the 2008 data were "more contemporaneous" with the period of review. *See* Issues & Decision Memorandum at 15 (comment 5). In its entirety, Commerce's analysis of the matter in the Issues and Decision Memorandum constitutes but a few brief sentences, with no elaboration:

> We have followed the [surrogate value] selection [criteria] . . . [*i.e.*, public availability, contemporaneity, representativeness, and specificity, as well as whether the data are from an approved surrogate country and are exclusive of taxes and duties]. In the case of electricity, after reviewing both the 2008 and 2009 CEA data, we have determined that both values are publicly available, from an approved surrogate country, specific to the input in question, and . . . broad-market averages. *With respect to contemporaneity, . . . the rates contained in the 2008 CEA data cover more of the* [*period of review*] *than do those of the 2009 data*, *and are thus more contemporaneous*. Therefore, for the final results of this review, we have continued to value electricity using CEA data from 2008 because they best satisfy [Commerce's] [surrogate value] selection criteria.

Issues & Decision Memorandum at 15 (comment 5) (emphasis added).

The bases for Commerce's conclusion that the 2008 data are "more contemporaneous" than the 2009 data quoted above are entirely unclear. The 2008 data reflect effective tariff rates only through March 31, 2008, and the most recent data point for electricity pricing in the 2008 data is from May 2007. *See* Mid Continent Brief at 27; Mid Continent Reply Brief at 10; *see also* Mid Continent Case Brief at 53–54 (*citing* Surrogate Valuation Memorandum for the Preliminary Results at Exh. 46 (data table showing May 2007 as most recent effective date for tariff rates in 2008 data)). In contrast, the 2009 data reflect effective tariff rates through March 31, 2009, and the most recent data point for electricity pricing in the 2009 data is from August 2008. *See* Mid Continent Brief at 28–29; Mid Continent Reply Brief at 10; *see also* Mid Continent Case Brief at Att. 3 (data table showing August 2008 as most recent effective date for tariff rates in 2009 data). Although the 2009 data include many of the same data points as the 2008 data for pre-2008 tariff rates, the 2009 data also include updated energy pricing from 2008 for Madhya Pradesh, Maharashtra, Mumbai (B.E.S.T.), Mumbai (Reliance Energy), and Mumbai (TATA). *Compare* Surrogate Valuation Memorandum for the Preliminary Results at Exh. 46 (2008 data) *with* Mid Continent Case Brief at Att. 3 (2009 data). Thus, on the whole, the 2009 data appear to be more contemporaneous.

The Government attempts to defend Commerce's action in the Final Results by underscoring that the 2008 data "comprise over thirty pages of detailed 'price data for small, medium, and large industries' across an extensive range of geographical locations, whereas the 2009 data appear in summary form on a single page containing only a handful of data points." *See* Def.'s Brief at 24 (*citing* Surrogate Valuation Memorandum for the Preliminary Results at 11). The Government's observation may well have some bearing on the relative merits of the two data sets. However, it says nothing at all about the relative "contemporaneity" of the data, which was the basis for Commerce's selection of the 2008 data over the 2009 data in the Final Results. An agency determination cannot be sustained on the strength of a *post hoc* rationale supplied by litigation counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). As the Supreme Court has explained, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfg. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

The 2008 data may be superior in other respects yet to be detailed by Commerce. But the 2009 data appear to be more contemporaneous

with the period of review at issue (January 23, 2008 to July 31, 2009). The plain meaning of "prices that are contemporaneous with the . . . period of review" in this context is prices that are reflective of those actually in effect during the review period. Thus, a data set reflecting prices that were in effect for more months of the review period is more contemporaneous with the period of review than a data set reflecting prices that were in effect for fewer months of the review period. Based on this understanding, the 2009 data reflect tariff rates in effect for 13 of the 18 months of the period of review (*i.e.*, late January 2008 through late March 2009), while the 2008 data cover less than two months of the period of review (*i.e.*, late January 2008 through late March 2008). *See* Mid Continent Brief at 27.[27]

The Government argues that "issuing a subsequent edition [of data on electricity rates] does not affect the individual rates [in the prior publication] nor does it mean the rates in the prior publication are no longer effective." Def.'s Brief at 25. However, the Government's next statement that the subsequent edition "simply reports any new rates that came into effect after the earlier publication" does not support the Government's assertions that the 2008 data are more contemporaneous than the 2009 data. *See id*. Instead, that statement suggests that the 2009 data are more contemporaneous, because the "new rates that came into effect after the earlier publication" should make the 2009 data more aligned with the period of review.

In light of the discussion above, remand is warranted to permit Commerce to reconsider this issue, and to clarify its determination that the 2008 data are more contemporaneous than the 2009 data and to detail the bases therefor. If, upon review, Commerce concludes that the 2008 data are not more contemporaneous, Commerce shall determine which data constitute the "best available information" based on all relevant factors and shall explain why.

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[27] There is much confusion as to the exact nature, meaning, and significance of the information in the two sets of data. For example, the Government asserts that "the 2008 data show the date of implementation for each rate not the specific dates on which the rate was in effect." *See* Def.'s Brief at 25. But other parties differ. Similarly, Stanley insists that the 2008 data reflect electricity rates that were "in effect for thirteen months of the [period of review]," and that the 2009 data reflect rates that were "only in effect for four months" of that period. *See* Stanley Response Brief at 38–39. And, as discussed above, Mid Continent's figures are quite different. *Compare* Mid Continent Brief at 27–28 (arguing that 2009 data reflect rates in effect for 13 of the 18 months of the period of review, while 2008 data cover less than two months of the period). It appears that there is even disagreement and confusion as to the definition of "contemporaneous." *See generally* Transcript of Oral Argument at 24–27, 35–47, 59–63 (oral argument on surrogate value for electricity). Commerce must clarify and then explain all such matters on remand.

E. *Ministerial Error Allegation*

Stanley's sole remaining issue in this consolidated action is its "ministerial error" claim. The gravamen of this claim is that Commerce declined to correct "an error in [the agency's] computer program," which according to Stanley therefore did not, as a general matter, properly calculate U.S. prices and normal value on the same weight basis. *See generally* Stanley Brief at 2, 3, 4–5, 10, 25–30, 31; Stanley Reply Brief at 14–15. *But see* Def.'s Brief at 10, 31–37; Mid Continent Response Brief at 3–4, 20–24. According to Stanley, the effect of the error was to "overstate[ ] Stanley's normal values and increase[ ] the resulting dumping margin by about one percent *ad valorem*." Stanley Brief at 26.

Specifically, Stanley contends that, due to a "missing instruction," Commerce's computer program did not "adjust normal values to account for the fact that Stanley's per-kilogram normal values were computed using the weight of nails alone while its U.S. selling prices were converted from per-carton prices to per-kilogram prices using the combined weights of nails plus collating materials." Stanley Brief at 2; *see also id.* at 3, 4–5, 25–26; Stanley Reply Brief at 14.[28] Commerce's failure to correct this "error" in "computer programming"

[28] The alleged ministerial error was the product of a process which began when in response to Commerce's questionnaire regarding the company's factors of production Stanley reported the amounts of each factor used to produce one kilogram of nails. *See* Stanley's Response to Section C Questionnaire at 14 (Pub. Doc. No. 159). Using this data, Commerce "added the costs of all the factors, including the plastic, paper or wire collating material used to connect the nails, and obtained a price for the normal value of collated nails stated in terms of dollars per kilogram." Def.'s Brief at 32–33.

Thereafter, Commerce calculated the United States price using the gross unit price charged to the first unaffiliated customer in the United States as reported by Stanley. Def.'s Brief at 33. The gross unit price charged was for a carton of collated nails. *Id*. During further calculations, "[t]o restate the United States price of a carton of collated nails in terms of weight so that it could be compared to normal value (which was calculated in terms of weight), Commerce divided the price of each carton by the weight of its contents (thus restating the price in dollars per kilogram of collated nails)." *Id*.

Commerce then had to select a conversion factor. Def.'s Brief at 33. In its questionnaire response, Stanley provided four different options for conversion factors, including CONGWGT3U (or "C3," the weight of collated nails) and CONGWGT4U (or "C4," the weight of collated nails minus the weight of collating materials). *Id*. & n.5. According to Commerce, the agency decided to divide the price of each carton by the weight of collated nails, or C3, because "collating materials are part of the finished product." *Id*. at 34. Finally, Stanley's dumping margin was calculated by subtracting the United States price from the normal value.

In Stanley's view, the alleged ministerial error was thus "an error in [Commerce's] *computer program*" because it did not account for the fact that Commerce "converted Stanley's . . . U.S. selling prices to prices per kilogram using the combined weight of nails and collating materials contained in the carton," while, in the meantime, Commerce "calculated per-kilogram normal values based on the weight of nails alone." Stanley Brief at 25–26 (emphasis added).

was, Stanley asserts, "a ministerial error." Stanley Brief at 26, 30; *see also id.* at 2, 3, 5, 10, 25, 28, 29.

Stanley further argues that Commerce did not even address the ministerial error that Stanley *actually* alleged. Stanley Brief at 29–30; Stanley Reply Brief at 14; *see generally* Stanley's Request for Correction of Significant Ministerial Errors (Pub. Doc. No. 387). In other words, Stanley maintains, Commerce ended up "focus[ing] . . . on an issue that Stanley did not raise" which was, Stanley contends, "the selection of the cartons-to-kilograms conversion denominator itself." Stanley Brief at 29–30 (*citing* Amended Final Results, 76 Fed. Reg. at 23,280). But it was not Commerce's selection of the cartons-to-kilograms denominator that was the ministerial error, Stanley urges; rather, it was the "computer programming step that occurred *after*" Commerce selected the denominator. Stanley Brief at 30; Stanley Reply Brief at 14. Stanley concludes that, because Commerce focused on the wrong ministerial error allegation, Commerce's "denial of Stanley's correction request [was] therefore unreasonable." Stanley Brief at 29.

Whether Commerce focused on the incorrect ministerial error allegation, or whether Commerce's alleged error was in fact a ministerial error at all (a point that the Government and Mid Continent dispute) is of no moment here, because Stanley failed to exhaust its administrative remedies. *See* Def.'s Brief at 10 (arguing that Stanley is "characterizing," *post hoc*, a substantive issue "as a ministerial error"), 36, 37 (same); Mid Continent Brief at 3–4, 22, 24 (same). For the reasons discussed below, Stanley's claim must fail.

To promote "transparency," Commerce has a long-standing practice of disclosing to parties to an administrative review the details of the agency's antidumping calculations and affording them an opportunity to point out and request correction of any "ministerial errors" identified in the calculations. *See generally* 19 C.F.R. § 351.224 ("Disclosure of calculations and procedures for the correction of ministerial errors.").[29]

Pursuant to the regulations, when Commerce discloses its antidumping calculations to a party, the party has five days thereafter to file comments concerning any ministerial errors. 19 C.F.R. § 351.224(c)(2). The party's comments are to "explain the alleged ministerial error" by pointing to evidence in the record, "and must present what, in the party's view, is the appropriate correction." 19 C.F.R. § 351.224(d). These comments help Commerce correct "if ap-

[29] A ministerial error is defined by the regulations as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which [Commerce] considers ministerial." 19 C.F.R. § 351.224(f); *see also* 19 U.S.C. § 1675(h) (similar).

propriate" any ministerial errors and amend (if necessary) preliminary and/or final results, as well as publish any necessary corrections to the public. 19 C.F.R. § 351.224(e).

To similar ends, the Court of Appeals has instructed that interested parties "*must* point out any ministerial errors [concerning the preliminary results of a review] in their case briefs" filed with Commerce following the issuance of preliminary results. *QVD Food Co. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011) (*quoting* 19 C.F.R. § 351.224(c)(1); 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination or final results . . . .")) (emphasis added). In other words, a party must exhaust its administrative remedies before pressing a ministerial error allegation in this forum.

Here, Stanley failed to exhaust its administrative remedies by not timely and properly objecting to Commerce's choice of conversion factors in the Preliminary Results. *See* Def.'s Brief at 31–32, 35, 36–37. Although Stanley was put on notice of Commerce's choice of conversion factors and programming code in the Preliminary Calculation Memorandum (referenced in the Preliminary Results), Stanley raised no objection within the five-day period for doing so. *See* Def.'s Brief at 32, 34–35; Preliminary Results, 75 Fed. Reg. at 56,075–76; 19 C.F.R. § 351.224(c)(2)(i)-(ii) (providing that party must file comments within "five days" of Commerce disclosing details of its antidumping duty calculations). Nor did Stanley include any comments concerning ministerial errors in its administrative case brief, as the regulations specifically required it to do. *See* 19 C.F.R. § 351.224(c)(1) (requiring party to include "comments concerning ministerial errors made in the preliminary results of a review" in the party's administrative case brief).

Stanley's failure to raise any ministerial allegations at the time Commerce's calculations were disclosed, or even in its administrative case brief, is fatal to the claim that it seeks to press here. As the Court of Appeals has squarely held, "a ministerial error made by Commerce that was reflected in its preliminary antidumping duty determination need not be corrected [by Commerce] when no interested party pointed out the error in a timely manner." *QVD Food*, 658 F.3d at 1328 (*citing Dorbest Ltd. v. United States*, 604 F.3d 1363, 1376–77 (Fed. Cir. 2010)). In *Dorbest*, the court explained that parties are "procedurally required to raise the[ir] issue before Commerce at the time Commerce [is] addressing the issue." *Dorbest*, 604 F.3d at 1375 (*quoting Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)) (internal quotation marks omitted). The

Dorbest court instructed that "[t]his is because '[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.'" *Dorbest*, 604 F.3d at 1375 (*quoting United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).

In the case at bar, Stanley failed to assert its ministerial error allegation "at the time Commerce was addressing the issue" both within the specified five-day period following disclosure, and in its administrative case brief. *Dorbest*, 604 F.3d at 1375; Def.'s Brief at 32, 35, 36–37. Stanley could and should have mounted its challenge within five days of Commerce disclosing its antidumping margin calculations at the time of the Preliminary Results, and pursued the matter in its administrative case brief as well. *See QVD Food*, 658 F.3d at 1328; 19 C.F.R. § 351.224(c)(1)(2). Yet it was not until after publication of the Final Results that Stanley requested that Commerce correct the alleged ministerial error. *See* Def.'s Brief at 36; *see generally* Stanley's Request for Correction of Ministerial Errors at 5–9 (Pub. Doc. No. 387) (dated March 23, 2011). Thus, Stanley did not raise the challenge "until after the proceeding had essentially concluded." Def.'s Brief at 36.

In the Preliminary Calculation Memorandum, Commerce specifically identified its selection of CONWGT3U (the conversion factor) as "the most appropriate conversion weight to use," stating that it "represents the weight of the finished nail plus any collating materials, reflecting the scope of the order and also the fact that collating materials are part of the finished product." Preliminary Calculation Memorandum at 1–2. In addition, Commerce provided "over two hundred pages of detailed calculations" supporting its decision to use what the agency believed to be the most appropriate conversion factor. *See* Def.'s Brief at 35. As such, "Commerce clearly gave Stanley ample opportunity to raise the issue after the Preliminary Results." Def.'s Brief at 36. Because it did not do so, Stanley failed to exhaust its administrative remedies and is thus barred from pursuing its claim of ministerial error in this forum.

IV. *Conclusion*

Stanley's Motion for Judgment on the Agency Record is denied, and Mid Continent's Motion for Judgment on the Agency Record is denied in part and granted in part. Further, the Government's Motion for Partial Voluntary Remand is granted. This matter is remanded to the

Department of Commerce for further proceedings not inconsistent with this opinion. A separate order will enter accordingly.

Dated: September 3, 2013
New York, New York

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

Slip Op. 14–2

JBF RAC LLC, Plaintiff, v. UNITED STATES, Defendant, and MITSUBISHI POLYESTER FILM, INC. and SKC, INC., Defendant-Intervenors.

Before: Judith M. Barzilay, Senior Judge
Court No. 11–00141
Public Version

[Commerce's final results are sustained.]

Dated: January 8, 2014

Jack D. Mlawski, Galvin & Mlawski, for Plaintiff.

Stuart F. Delery, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, (*Stephen C. Tosini*), Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of counsel, *George H. Kivork*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Ronald I. Meltzer, *Patrick J. McLain*, *David M. Horn*, and *Jeffrey I. Kessler*, Wilmer Cutler Pickering Hale and Dorr LLP, for Defendant-Intervenors.

OPINION

BARZILAY, Senior Judge:

Before the court is Plaintiff JBF RAK LLC's ("JBF RAK") motion for judgment on the agency record under USCIT Rule 56.2, challenging Defendant U.S. Department of Commerce's ("Commerce") final results of the first administrative review covering polyethylene terephthalate film ("PET Film") from the United Arab Emirates. *See Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates*, 76 Fed. Reg. 22,867 (Dep't Commerce Apr. 25, 2011) (final results) ("*Final Results*"); *Issues and Decision Memorandum for Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates*, A-520–803 (Apr. 18, 2011) ("*Issues and Decision Memorandum*"), *available at* http://enforcement.trade.gov/frn/summary/UAE/2011–9967–1.pdf (last visited Jan. 2, 2014). Specifically, JBF RAK challenges (1) Commerce's use of zeroing in its antidumping duty

calculation; (2) Commerce's 15-Day Rule for issuing liquidation instructions; and (3) Commerce's home market sales determination. This case was stayed pending resolution of the zeroing issue presented in *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) ("*Union Steel*"). Although the Federal Circuit concluded that Commerce's zeroing practice is lawful, JBF RAK continues to challenge Commerce's use of zeroing. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains Commerce's *Final Results*.

I. STANDARD OF REVIEW

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is "reasonable and supported by the record as a whole." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotations and citation omitted). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

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

II. BACKGROUND

JBF RAK is a manufacturer and exporter of PET Film from the United Arab Emirates. JBF RAK and other interested parties requested that Commerce conduct an administrative review of the antidumping duty order on PET Film. On December 23, 2009, Com-

merce initiated an administrative review of the antidumping duty order on PET Film from the United Arab Emirates for the period of November 6, 2008, through October 31, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 Fed. Reg. 68,229 (Dep't Commerce Dec. 23, 2009). Commerce published its preliminary results and assigned JBF RAK a preliminary weighted average dumping margin of 4.76% *ad valorem*. *See Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates*, 75 Fed. Reg. 78,968 (Dep't Commerce Dec. 17, 2010) (preliminary results). In the *Final Results*, Commerce revised the preliminary rate and assigned JBF RAK a weighted average dumping margin of 4.88% *ad valorem*. *See Final Results*, 76 Fed. Reg. 22,867.

III. DISCUSSION

A. Zeroing

JBF RAK maintains that Commerce's use of zeroing in this case is unlawful. JBF RAK advances the same argument raised in *Union Steel*, *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) ("*JTEKT*"), and *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("*Dongbu*"), which questions whether Commerce may interpret 19 U.S.C. § 1677(35) one way in the context of an administrative review and another way in the context of an antidumping investigation. Pl. Br. 7. Even though *Union Steel* resolved this question, JBF RAK argues for the first time in its reply brief that the Federal Circuit's decision in *Union Steel* is contrary to its prior decisions in *JTEKT* and *Dongbu*. Pl. Reply Br. 4–5. JBF RAK has also indicated that it plans to appeal an adverse decision in this case and request *en banc* review on the issue of zeroing. *See* Pl. Mot. For Test Case Designation, Docket Entry No. 69 (Aug. 14, 2013).

Union Steel has resolved the zeroing issue presented here. In *Union Steel*, the Federal Circuit concluded that Commerce's explanation for interpreting § 1677(35) differently in administrative reviews versus investigations constitutes a reasonable interpretation of the statute under the second step of *Chevron*. *See Union Steel*, 713 F.3d at 1110. This case involves the very same issue. Pl. Br. 7.[1] Given that *Union Steel* is binding authority, the court must sustain Commerce's zeroing methodology in this case as a permissible interpretation of the statute. *See id.* at 1110.

[1] The court will not consider JBF RAK's new argument challenging the Federal Circuit's decision in *Union Steel*.

B. 15-Day Liquidation Policy

JBF RAK also challenges Commerce's 15-day liquidation policy. It makes the following argument:

> In Count five of JBF's Complaint, JBF states that [Commerce's] policy of issuing liquidation instructions fifteen days after the final results of administrative reviews . . . is unlawful and contrary to this court's decision in *SKF USA Inc. v. United States*, Slip Op. 10–57 (CIT May 17, 2010) . . . . *See* JBF Complaint 36–37. Most recently, this court awarded declaratory judgment finding Commerce's statement in the Final Results declaring its intention to issue liquidation instructions 15 days after publication of the final results is unlawful. *SKF USA Inc. v. United States*, Slip Op. 11–121 (CIT Oct. 4, 2011) ("*SKF VI*"). As in *SKF VI*, the Final Results here also stated Commerce's intention to issue assessment instructions 15 days after publication of the Final Results, necessitating Plaintiff's submission of, and the Courts [sic] issuing a Temporary Restraining Order before the expiration of the 15 day period. Thus, Plaintiff requests a declaratory judgment finding Commerce's 15 day rule is unlawful. However, Plaintiff also seeks costs as it has no confidence that Commerce will change its practice notwithstanding the declaratory judgment. Indeed, this court has held that Commerce ignored this court's decisions in analogous circumstances where it found Commerce's 15 day rule is unlawful. . . .

Pl. Br. 18.

Defendant, however, claims that JBF RAK failed to raise this issue in the administrative proceeding before Commerce and therefore failed to exhaust its administrative remedies. Def. Br. 18. Defendant also argues (if the exhaustion requirement is waived) that Commerce's 15-day policy constitutes a reasonable interpretation of the statute. Def. Br. 19 (citing *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 502 F. Supp. 2d 1295 (2007)). JBF RAK, though, contends that it would have been futile to raise the issue below given that Commerce continues to apply its 15-day policy despite the *SKF* decisions declaring it unlawful. Pl. Reply Br. 9–10.

There is no dispute that JBF RAK failed to raise this issue before Commerce. JBF RAK amended its complaint to add this claim challenging Commerce's 15-day liquidation instruction policy. The Federal Circuit has explained that

section 2637(d) "indicates a congressional intent that, absent a strong contrary reason, the [trade] court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed.Cir.2007). The requirement that invocation of exhaustion be "appropriate," however, requires that it serve some practical purpose when applied. Inquiry into the purposes served by requiring exhaustion in the particular case, and any harms caused by requiring such exhaustion, is needed to determine appropriateness.

Requiring exhaustion can protect administrative agency authority and promote judicial efficiency. *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). The requirement can protect an agency's interest in being the initial decisionmaker in implementing the statutes defining its tasks. *Id*. And it can serve judicial efficiency by promoting development of an agency record that is adequate for later court review and by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution. *Id.* at 145–46, 112 S.Ct. 1081. At the same time, "the interest of the individual in retaining prompt access to a federal judicial forum" is taken into account in deciding when exhaustion is demanded in order to protect "institutional interests." *Id*. at 146, 112 S.Ct. 1081.

Courts have recognized several recurring circumstances in which institutional interests are not sufficiently weighty or application of the doctrine would otherwise be unjust. For example, a party often is permitted to bypass an available avenue of administrative challenge if pursuing that route would clearly be futile, *i.e.*, where it is clear that additional filings with the agency would be ineffectual." *Id*. (citing *Corus Staal*, 502 F.3d at 1378–79 (futility applies in situations where plaintiffs "would be 'required to go through obviously useless motions in order to preserve their rights'")). Requiring exhaustion may also be inappropriate where the issue for the court is a "pure question of law" that can be addressed without further factual development or further agency exercise of discretion. *See Agro Dutch*, 508 F.3d at 1029. In such circumstances, among others, requiring exhaustion may serve no agency or judicial interest, may cause harm from delay, and may therefore be inappropriate.

Itochu Bldg. Prods. v. United States, 2013 WL 4405863 at *4 (Fed. Cir. Aug. 19, 2013).

The court is not convinced that the futility exception applies here. Commerce has exercised its gap-filling, policy-making discretion through its practice of issuing liquidation instructions 15-days after publication of the final results. JBF RAK's failure to challenge the 15-day policy before Commerce has left the court with no record to review on the issue. Missing from the administrative record are Commerce's considered views on its policy, the statute, or applicable case law. The court does not have Commerce's response to JBF RAK's arguments (which were never made). Therefore, the court needs Commerce's explanation of its policy to properly review this legal issue. As a general matter, it is preferable (even if not always technically required) to have the agency's views established on the administrative record, a principle equally applicable to legal interpretations as well as factual findings. 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 14.3 (5th ed. 2010).

Requiring exhaustion in this instance will also protect "administrative agency authority" and "promote judicial efficiency." *Itochu Bldg. Prods.*, 2013 WL 4405863 at *4. For example, the court would encroach on administrative agency authority by evaluating Commerce's 15-day policy (a policy that involves a number of competing factors associated with the administration of the dumping statute) without first receiving its views on this issue. The court, therefore, would have to remand this issue to receive Commerce's views on the record before considering JBF RAK's claim. This inefficiency was caused by JBF RAK's failure to raise the issue before Commerce.

Moreover, it appears that JBF RAK is proceeding from a faulty premise that the *SKF* decisions render Commerce's 15-day policy unlawful as a matter of law. Pl. Br. 18. This is incorrect. Although the *SKF* decisions represent persuasive authority (*i.e.*, declaring Commerce's 15-day policy unlawful as applied to that particular plaintiff), there are other decisions by the Court of International Trade that have sustained Commerce's 15-day policy as a reasonable interpretation of the statute. *See Mittal Steel Galati S.A.*, 502 F. Supp. 2d 1295; *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 491 F. Supp. 2d 1273 (2007); *Mukand Int. Ltd. v. United States*, 30 CIT 1309, 452 F. Supp. 2d 1329 (2006). There is no binding decision declaring Commerce's policy unlawful.

JBF RAK, for its part, does not even mention the other decisions as contrary authority. Instead, JBF RAK suggests that Commerce's 15-day policy is unlawful as a matter of law without much discussion of the statutory scheme, contrary authority, or policy considerations associated with this issue. It is only in its reply brief that JBF RAK begins to discuss the legal framework of the 15-day rule. Pl. Reply Br.

10–11. Ultimately, JBF RAK's claim cannot be reviewed in its current form. Requiring exhaustion is appropriate here, not futile, because the court must have Commerce's views on its policy to properly consider the issue.

C. Home Market Sales

1. Ordinary Course of Trade

JBF RAK claims that Commerce miscalculated normal value by using certain home market sales made outside the ordinary course of trade. In its administrative case brief, JBF RAK argued that [[ ]] specific home market sales should be excluded from the calculation of normal value because they involved sales with aberrational prices and quantities. *See* Def. Ex. 6 (JBF RAK's Admin. Case Br. 4–10). More specifically, JBF RAK argued that these specific sales involved: (1) extremely small quantities, (2) abnormally high sales price, (3) an abnormal customer, and (4) abnormally high profit margins. *Id.*

In the *Final Results*, Commerce considered and rejected JBF RAK's arguments:

> The Department finds nothing striking about the sales in question that would justify their exclusion. While the quantities in the four sales are below average, they are part of a smooth distribution of quantities from low to high. These sales are among several sales that involved similarly small amounts. Accordingly, the Department does not find that the quantity involved in these four sales was aberrational compared to other sales made by JBF. The quantities involved in these sales are not extraordinary, but fall within the ordinary course of trade in the home market. Additionally, we find there were too few transactions of the CONNUM actually selected for matching to analyze accurately whether the sales prices were aberrational. Profit for these sales was higher than average and higher than for all other sales; however, as with quantity, profit is smoothly distributed from low to high providing no indication of a standard or normal profit rate or even range of rates. While prices and profit are higher than the other home market sales reported, and quantities lower, the variations in prices, quantities, and profits reflect JBF's normal business practice of sales and are not "extraordinary" under 19 CFR 351.102(b)(35) or "aberrational" (to use the language of *Thermal Paper*). . . . Importantly, JBF has not given the Department any reason to consider that these transactions differ from other sales in any respect, other than quantity, beyond its own pricing decisions and the willingness of the customers for these sales to pay higher prices.

> In other words, it has not demonstrated there is a reason why one would expect, prices and profits for these sales to be higher, such as the unusual product or sales aspects examined in *Mexican Cement* or *Thermal Paper*. JBF has not shown that these sales involve off-quality merchandise, were produced according to unusual product specifications, were sold pursuant to unusual terms of sale, or were sold to an affiliated party at a non-arm's length price. Accordingly, the Department finds that JBF has not established that these sales are outside the OCT and, therefore, we have not excluded these sales from our analysis.

Issues and Decision Memorandum at 3–4.

In this court proceeding, JBF RAK again argues that there are [[ ]] home market sales that should be excluded from Commerce's calculation of normal value because they were made outside the ordinary course of trade. Pl. Br. 14. In fact, JBF RAK has actually submitted the exact same arguments (without any revisions) that it presented to Commerce prior to the *Final Results*. Pl. Br. 14–18.

Under USCIT Rule 56.2, JBF RAK's brief must include "the issues of law presented together with the reasons for contesting or supporting the administrative determination, specifying how the determination may be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law, unsupported by substantial evidence; or, how the determination may be unwarranted by the facts to the extent that the agency may or may not have considered facts which, as a matter of law, should have been properly considered." USCIT Rule 56.2(c)(1).

Unfortunately, JBF RAK has simply recycled its argument from its administrative case brief (almost verbatim) without attempting to analyze Commerce's findings and conclusions against the operative standard of review. *See* Def. Ex. 6 (JBF RAK's Admin. Case Br. 4–10); Pl. Br. 14–18. For a fact-intensive ordinary course of trade issue, Commerce is the finder of fact, weighing the available record information and evaluating each of the relevant factors. *See Cemex, S.A. v. United States*, 133 F.3d 897, 900 (Fed. Cir. 1998) ("*Cemex*"). The court, in turn, does not consider the problem *de novo*, or re-weigh the evidence anew, but instead reviews whether Commerce's determination is supported by substantial evidence, 19 U.S.C. § 1516a(b)(1)(B)(i), or more simply, whether Commerce reasonably concluded that the subject sales were made in the ordinary course of trade. *See Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 616 F.3d 1300, 1307 (Fed. Cir. 2010) ("[T]he only question is whether Com-

merce reasonably concluded that it was appropriate to exclude sales outside the ordinary course of trade, given the available data and circumstances of this investigation.").

JBF RAK never mentions the operative standard of review. Pl. Br. 14–18. It never addresses Commerce's findings and conclusions in the *Issues and Decision Memorandum*. It just repeats the same arguments made prior to the *Final Results* without any consideration of Commerce's response and rejection of those very same arguments in the *Final Results*. Pl. Br. 14–18. For example, Commerce explained that JBF RAK failed to address whether the subject sales "involve off-quality merchandise, were produced according to unusual product specifications, were sold pursuant to unusual terms of sale, or were sold to an affiliated party at a non-arm's length price." *Issues and Decision Memorandum* at 3–4. JBF RAK does not discuss these factors that must also be considered (in addition to price and quantity) in determining whether sales fall outside the ordinary course of trade. *See Cemex*, 133 F.3d at 900 ("Commerce must evaluate not just one factor taken in isolation but rather . . . all the circumstances particular to the sales in question.") (internal quotations and citation omitted).

By failing to frame its arguments against the operative standard of review, *see* USCIT Rule 56.2(c)(1), JBF RAK has created an obvious problem for the court and the other litigants. If it were to review the issue in this context, the court would first have to assume the role of co-plaintiff, reframe Plaintiff's arguments under the substantial evidence standard of review (rather than the *de novo* standard before the agency), and analyze Commerce's ordinary course of trade findings under that framework. In reviewing whether Commerce reasonably concluded that the subject sales were made in the ordinary course of trade, the court would also have to evaluate factors ignored by JBF RAK (*i.e.*, whether sales involve off-quality merchandise, unusual product specifications, unusual terms of sale, and affiliated party transactions). The court would in essence be litigating the issue for Plaintiff, something the court cannot do. *See United States v. Great Am. Ins. Co.*, 2013 WL 6820678, at *6 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F. Supp. 2d 1303, 1308 (2009) ("'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the

argument, and put flesh on its bones.'") (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Accordingly, the court deems the issue waived.

2. Model Matching

JBF RAK also challenges Commerce's model-matching methodology for identifying the foreign like product. Pl. Br. 10. Goods imported into the United States will be subject to antidumping duties if Commerce determines that foreign merchandise is being sold in the United States at less than its fair value. *See* 19 U.S.C. § 1673. The amount of the antidumping duty reflects the amount by which the home-market price of the foreign like product (*i.e*, normal value) exceeds the price charged in the United States. *See* 19 U.S.C. § 1677b(a)(1)(A)-(B). The difference is referred to as the dumping margin. 19 U.S.C. § 1677(35)(A). To "establish the dumping margin, whether in an initial investigation or in an administrative review, Commerce must first identify the 'foreign like product' which will form the basis for comparison to merchandise exported to the United States." *Fagersta Stainless AB v. United States*, 32 CIT 889, 889, 577 F. Supp. 2d 1270, 1275 (2008) ("*Fagersta*") (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1375 (Fed. Cir. 2001) ("*Pesquera*"). The "process by which Commerce identifies the 'foreign like product' in determining dumping margins . . . is called 'model-matching.'" *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1289 (Fed. Cir. 2008). Commerce first attempts to match sales of dumped merchandise with sales of identical merchandise in the comparison market. 19 U.S.C. § 1677(16)(A). Where there is no identical merchandise, as is the case here, Commerce attempts to match sales in the United States with sales of a similar product in the comparison market. § 1677(16)(B)-(C).

Congress has not precisely defined the methodology by which Commerce must identify the foreign like product. It has implicitly delegated that gap-filling authority to Commerce. *Pesquera*, 266 F.3d at 1384. Commerce, in turn, has considerable discretion to construct a methodology for identifying the foreign like product in antidumping proceedings. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008). Commerce has established a model-matching methodology that applies a hierarchy of commercially significant characteristics to identify a suitable foreign like product. Once Commerce has established such a hierarchy, it will not modify that methodology unless presented with "compelling reasons" to change it. *Fagersta*, 577 F. Supp. 2d at 1276. It is "not necessary to ensure that home

market models are technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model." *Koyo Seiko Co., Ltd. v. United States*, 66 F.3d 1204, 1210 (Fed. Cir. 1995).

In the *Final Results*, Commerce rejected JBF RAK's proposed changes to its model-matching methodology:

> We have not made JBF's suggested changes to the matching methodology. The model-matching hierarchy used in the *Preliminary Results* consists of four criteria (in order of importance): specification, thickness in microns, thickness code, and surface treatment. The model matching methodology used for these final results is the same as that used for the *Preliminary Results*, which is the same as that used in the investigation (excepting one minor difference, not relevant to this issue). When the Department has an established model-matching methodology in a proceeding, it may alter its established methodology if there is a reasonable basis for doing so. *See NTN Bearing Corp. of America v. United States*, 295 F.3d 1263, 1269 (CAFC 2002). With respect to changes to its model-matching methodology, the Department has applied a "compelling reasons" standard. *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 FR 5471 1 (September 16, 2005) and accompanying Issues and Decision Memorandum (DM) at Comment 2, and *Antifriction Bearings (Other Than Tailored Roller Bearings) and Parts Thereof From France; et al.: Final Results of Antidumping Duty Administrative Reviews*, 57 FR 28360 (June 24,1992) at General Issues, Comment 1. Compelling reasons that warrant a change to the model-matching methodology may include, for example, greater accuracy in comparing foreign like product to the single most similar U.S. model, in accordance with section 771(16)(B) of the Tariff Act of 1930, as amended (the Act), or a greater number of reasonable price-to-price comparisons in accordance with section 773(a)(1) of the Act. *See ex.*, *Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review*, 72 FR 17834 (April 10, 2007) and accompanying IDM at Comment 2.
>
> JBF has not provided compelling reasons for the Department to consider changing the model-match methodology from the methodology used in the *Preliminary Results* and the investigation. Under the Department's model matching hierarchy, we select a similar model for matching purposes according to: the list of

> characteristics, the order of the characteristics, and the ranking of choices under each characteristic. With respect to PET Film, the Department determined that four physical characteristics are needed to properly define the product: specification, micron, thickness code and surface treatment. Surface treatment, as the last listed characteristic, is the least consequential. Accordingly, only when all other characteristics are equal will U.S. products be matched to home market products with different surface treatments. As Petitioners note, the slate of other suggested matches offered by JBF for other U.S. products are unacceptable matches for a number of reasons outside of physical characteristics, including the contemporaneousness of sales and cost of production. Specifically, all suggested alternatives by JBF were either not sold within the matching window for the U.S. sales or were sold below cost. Also, its case brief is the first instance that JBF suggested a change in methodology, precluding the Department from the opportunity to collect additional necessary information to evaluate JBF's claims. Without such additional information, the Department has no basis to evaluate such arguments, beyond JBF's reference to one sentence in the cost verification report that mentions the apparent lack of materials or process involved in applying a corona surface to film.

Issues and Decision Memorandum at 5–6.

JBF RAK claims that Commerce's "match is materially different than the U.S. article while Plaintiff's match is materially the same and has the identical Cost of Production as the U.S. sales article." Pl. Br. 10. Specifically, JBF RAK claims that Commerce should use a coated film rather than an uncoated film as a match for the U.S. product. Pl. Br. 11. JBF RAK claims that its proposed match (which is acrylic coated on one side and corona[2] treated on the other) is a better match than Commerce's match (which is plain on one side and corona treated on the other). Pl. Br. 11. JBF RAK claims that its suggested match "is the like product match contemplated by the statute and fulfills Commerce's stated goal of '. . . greater accuracy in comparing foreign like product to the single most similar U.S. model.'" Pl. Br. 10.

Contrary to JBF RAK's claim, there is no compelling reason for Commerce to change its methodology. Commerce applied the following hierarchy (consistently from the preliminary through the final

[2] Corona is an electric charge applied to film that makes it more suitable for certain applications. *Issues and Decision Memorandum* at 4.

determination) to identify the foreign like product: (1) specification, (2) thickness in microns, (3) thickness code, and (4) surface treatment. *See Issues and Decision Memorandum* at 5; *Preliminary Analysis Memorandum for JBF RAK LLC*, A-520–803, at 3 (Dec. 7, 2010). Commerce, therefore, ranked "surface treatment" as the least important criterion to determine whether the home market product was similar to the U.S. product for purposes of matching. *See Issues and Decision Memorandum* at 5. The U.S. product (*i.e.*, PET Film) is acrylic coated on one side with no treatment on the other side (acrylic coated, plain). Commerce's model-match from the home market is uncoated on one side with corona treatment on the other side (plain, corona treated). Commerce concluded that the differences in surface treatments were inconsequential under its hierarchy. Although not stated explicitly in the *Final Results*, there is no dispute that the other higher ranked characteristics (*i.e.*, specification, thickness in microns, thickness code) are the same between Commerce's proposed match and the U.S. product. *See Issues and Decision Memorandum* at 5 ("Accordingly, only when all other characteristics are equal will U.S. products be matched to home market products with different surface treatments."); Pl. Br. 11 ("All other characteristics of the U.S. sale product, Plaintiff's match, and [Commerce's] match are the same."). Given that these other characteristics rank higher than "surface treatment," Commerce's selection of the foreign like product in this case is consistent with its hierarchy.

JBF RAK, however, proposes an alternative match with different surface treatments. JBF RAK's proposed match is acrylic coated on one side with corona treatment on the other side (acrylic coated, corona treated). It argues that the corona treatment is insignificant because it does not add any material to the PET Film and merely provides a static electric charge. The other characteristics are also the same between JBF RAK's proposed match and the U.S. product. JBF RAK, therefore, contends that its proposed match is a better choice than Commerce's match because it has surface characteristics that more closely resemble the U.S. product.

Even if JBF RAK's proposed model-match is a better fit based on the differences in surface treatment (which would not render Commerce's choice unreasonable), there are other issues associated with JBF RAK's proposed model-match that make it unsuitable to serve as the foreign like product. Specifically, JBF RAK's proposed matches (sales) were sold either outside the matching window (*i.e.*, not contemporaneous) or below the cost of production. *See Issues and Decision Memorandum* at 6.

Under 19 U.S.C. § 1677f-1(d)(2), "when comparing export prices . . . of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."). Commerce has promulgated a regulation implementing the contemporaneity requirement:

> Normally, [Commerce] will select as the contemporaneous month the first of the following which applies: (1) The month during which the particular U.S. sale under consideration was made; (2) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product; (3) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

19 C.F.R. § 351.414(f). This is known at the "90/60 window." *See, e.g.*, *AIMCOR v. United States*, 23 CIT 1000, 1006, 86 F. Supp. 2d 1248, 1255 n.4 (1999). Alternatively, under 19 U.S.C. § 1677b(b)(1), "[i]f the administering authority determines that sales made at less than the cost of production . . . such sales may be disregarded in the determination of normal value."

As Commerce observed, JBF RAK's proposed model-match involves sales that fall outside the "90/60 window" or sales "made at less than the cost of production." JBF RAK does not discuss this issue in its papers and focuses exclusively on the differing surface treatments. The court, therefore, must assume that JBF RAK does not contest Commerce's findings and conclusions on the question of contemporaneity and sales made below the cost of production. Accordingly, Commerce reasonably rejected JBF RAK's suggested changes to its methodology. Commerce's model-matching methodology for identifying a suitable foreign like product was reasonable in this case.

IV. CONCLUSION

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

Dated: January 8, 2014
New York, New York

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

Slip Op. 14–6

ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–002161[1]

[Plaintiff's motion for judgment on the agency record denied; Department of Commerce's determinations affirmed]

Dated: January 23, 2014

Alan H. Price, *Robert E. DeFrancesco*, *Lori E. Scheetz*, *Tessa Capeloto*, *Laura El-Sabaawi*, and *Derick G. Holt*, Wiley Rein, LLP, of Washington, DC for the Aluminum Extrusions Fair Trade Committee.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Of counsel on the brief was *Rebecca Cantu*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Washington, DC.

Duane W. Layton, *Jeffery C. Lowe*, and *Sydney Mintzer*, Mayer Brown, LLP, of Washington, DC for Aavid Thermalloy.

OPINION

Pogue, Chief Judge:

In this action, the Aluminum Extrusions Fair Trade Committee ("AEFTC") challenges two aspects of the Department of Commerce's ("Commerce" or the "Department") definition of the products excluded from Anti-Dumping ("AD") and Countervailing Duty ("CVD") orders on aluminum extrusions from the People's Republic of China ("China").[2] Plaintiff first argues that the definition of finished heat sinks ("FHS") excluded from the orders does not accurately reflect the definition provided by the International Trade Commission ("ITC" or the "Commission") in its finding of no material injury. Second, Plaintiff challenges the Department's failure to specify in the instructions issued to Customs and Border Protection ("CBP") that importers must certify that their products meet certain testing requirements allegedly required by the ITC's definition of FHS.

The court has jurisdiction over Plaintiff's claims under 28 U.S.C. 1581(c).[3]

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[1] This action was consolidated with Court No. 11–00218.

[2] These orders were issued by the Department acting under Section 702 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671(a)(2006). All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[3] Jurisdiction was addressed in detail in response to Defendant and Defendant-Intervenor's Motions under USCIT R. 12(b)(1) and 12(b)(5). *See Aluminum Extrusions Fair Trade Committee v. United States*, __ CIT __, Slip Op 13–26 (Feb. 27, 2013) (ECF No.45).

Currently before the Court is Plaintiff's motion for judgment on the agency record. ECF No. 49.[4] The motion is denied. The Plaintiff has not demonstrated that the scope of the exclusion in the Department's AD and CVD orders is materially different from the exclusion identified by the ITC. Further, Plaintiff's claim that the corresponding instructions issued by the Department to CBP are flawed in failing to require testing, certification, or proof of buyer in order to establish their eligibility for the FHS exclusion, must be rejected as unripe for decision. Until CBP, acting upon the Department's instructions, misidentifies products eligible for the ITC's FHS exclusion, the Plaintiff's claim remains speculative and their injury hypothetical.

BACKGROUND

In response to the Plaintiff's petitions, Commerce initiated an investigation of aluminum extrusions imported from China in April of 2010.[5] Pl. Mot. for Judgment on the Agency Record, May 15, 2014, ECF No. 49 ("Pl.'s Mot.") at 4. The final determinations in this investigation concluded that Chinese aluminum extrusions were being sold at less than fair value and that countervailable subsidies were being provided by the Chinese government, thus warranting the imposition of AD and CV duties on the subject imports. *Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination); *Aluminum Extrusions From the People's Republic of China*, 76 Fed. Reg. 18,524 (Dep't Commerce Apr. 4, 2011) (final determination of sales less than fair value). The scope of the Department's determination included finished and unfinished aluminum shapes produced by extrusion and identified by their metallurgical content and role in a production process, with clarifying statements

[4] In its motion, Plaintiff asks that the Court void the Department's AD and CVD orders for their alleged failure to properly reflect the scope of the ITC's negative injury and like product findings. *Id.* at 7. In addition, Plaintiff argues that the Department's instructions to CBP must be revised to require that products allegedly falling within the scope of the ITC's negative injury finding, and therefore not requiring cash deposits, be certified as having undergone thermal testing. *Id.* at 15.

[5] Plaintiff has represented the domestic manufacturers of aluminum extrusions in both the administrative investigation of Chinese imports and in this action.

and examples about product types excluded from the investigation.[6] *Aluminum Extrusions*, 76 Fed. Reg. at 18,521–22.

Concurrent with the Department's investigation, and in accordance with 19 U.S.C. 1671(b) and 19 U.S.C. 1673b(a), the ITC conducted its own investigation to determine whether domestic industries were materially injured or threatened with material injury by the importation of dumped or subsidized aluminum extrusions. While the ITC's preliminary affirmative finding of injury matched the product scope definition used by the Department and reflected the original petition, *Certain Aluminum Extrusions From China*, 75 Fed. Reg. 34,482 (ITC June 17, 2010) (preliminary determination), this scope finding was revised in the Commission's final determination to exclude FHS as a separate domestic like product and industry not threatened with material injury. Certain Aluminum Extrusions From China, 76 Fed. Reg. 29,007 (ITC May 19, 2011) (final determination). This exclusion was based on a set of criteria regularly used by the ITC and hinged specifically on

> the customized thermal resistance properties of FHS; the unique aspects of the design, testing and production of FHS; differences between FHS and other aluminum extrusions in the channels of trade through which they are sold; evidence that the thermal management industry is perceived by producers and customers as being different from the general aluminum extrusions industry; and the fact that FHS are sold at much higher prices because of high value-added than most other aluminum extrusions.[7]

Certain Aluminum Extrusions from China, USITC Pub.4229, Inv.

[6] Aluminum extrusions as a broad category (as they were defined in the Commerce investigation and in the ITC's preliminary report) are industrial and consumer objects identifiable by their chemical content and manufacturing process. First, aluminum extrusions consist chemically of one of 160 specified aluminum alloy types that are all "soft alloys" identified by Aluminum Association designations in the 1000, 3000, and 6000 range that mix pure aluminum with magnesium or silicon. Second, these products have been shaped by an extrusion process – heating a billet of the alloy and pushing it through a precision die that produces a raw shape usually called a "blank" that is then further machined, finished, or coated as required for its future manufacturing or consumer use. *See* 76 Fed. Reg. 18521,18524, and 18525 (anti-dumping and countervailing duty Final Determinations) and *Certain Aluminum Extrusions from China*, Investigation Nos. 701-TA-475 and 731-TA-1177 (Final) at 5–10. The exclusion of FHS from this broader category based on their precision machining and customized thermal characteristics is the context of the present dispute.

[7] This exclusion in the final determination is explained in more detail with specific reference to the ITC's six factor test in *Certain Aluminum Extrusions from China*, Inv. Nos. 701-TA-475 and731-TA-1177 (Final), USITC Pub. 4229 (May 2011) ("ITC Report").The ITC's negative injury determination was challenged before the U.S.C.I.T. and upheld in *Aluminum Extrusions Fair Trade Comm. V. United States*, 34 Int'l Trade Rep. (BNA) 2119.

Nos. 701-TA-475 and 731-TA-1177 (Final), at 9 (May 2011) ("*ITC Report*").

In defining the excluded industry and domestic like product, the ITC report described FHS, in the introductory Determinations section, as "fabricated heat sinks, sold to electronics manufacturers, the design and production of which are organized around meeting certain specified thermal performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements." *Id.* at 1 n. 4; *Id.* at 3 n. 1. In response to the exclusion specified in the ITC's final report, the Department revised its own final determination to exclude FHS and issued AD and CVD orders excluding FHS from the scope of the cash deposit requirements on aluminum extrusions. *Pl.'s Mot.* at 5; *Draft Customs Instructions*, AD. PR. Doc. No. 540.

In identifying the excluded products in the AD and CVD orders, the Department modified the exact language used by the ITC in its footnote 4. Specifically, the Department eliminated the four words "sold to electronics manufacturers" from the ITC's product description. *Pl.'s Mot.* at 5. This clause, identifying the buyers of FHS, is alleged by the Plaintiff to represent a critical limitation on the scope of the ITC's exclusion from the injury determination.[8] *Id.* at 5–6. To the Plaintiff, the elimination of these four words expands the scope of the ITC's excluded category and therefore represents both an unlawful violation of the Department's authority relative to the ITC and an inappropriate limit on the remedy to which the law entitles a domestic industry injured by subsidized imports. *Compl.*, ECF No. 7, at 6; *Pl.'s Reply Br.* at 5.

STANDARD OF REVIEW

The Department's determination will be affirmed unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). Accordingly, when reviewing

[8] Plaintiff argues that by eliminating this clause and failing to specify a testing requirement reflective of the clause (retained in the AD and CVD orders) describing thermal testing as part of the definition of FHS, the Department has expanded the definition of FHS to include the broader category of fabricated heat sinks, which may not have been fully tested to insure that they comply with specific thermal requirements. Reply Brief of the Aluminum Extrusions Fair Trade Committee, Sept. 9, 2013, EFC No. 59 ("*Pl.'s Reply Br.*") at 4. To the Plaintiff, FHS are understood as a subcategory of fabricated heat sinks distinguishable from the parent category by thermal testing and identity of the purchaser. *Pl.'s Mot.* at 11.

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). In doing so, the court must consider any fact that "fairly detracts from [the agency conclusion's] weight." *Universal Camera Corp.*, 340 U.S. at 488. As importantly, a reviewing court may not "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.*

DISCUSSION

I. *The Department's Exclusion of "sold to electronics manufacturers" in the AD and CVD Orders*

Plaintiff has not provided sufficient evidence to support the claim that the Department's implementation of the ITC's separate domestic like product and negative injury finding expands the ITC's definition. As explained below, the evidence on the record can reasonably be read to support the Department's view that that the elimination of the clause "sold to electronics manufacturers" from the description of FHS in the AD and CVD orders will not result in any material difference in how CBP classifies imported aluminum extrusions and implements the cash deposit order. Absent evidence that the Department's altered wording will prevent the ITC's negative injury finding from being correctly implemented, we defer to the Department's judgment in implementing its AD and CVD orders.

AEFTC argues that the Department's decision to alter the wording of the ITC's definition of FHS represents an unlawful expansion of the Department's authority relative to the ITC, improperly substituting its judgment for that of the Commission. *Pl.'s Mot.* at 12.[9] Specifically, Plaintiff alleges that the identity of the purchaser is a critical part of the definition of FHS as found by the ITC; eliminating this clause from the definition therefore necessarily broadens the category of the exclusion and violates the intent of the ITC. *Id.* at 11. If this is correct, then the Department has overstepped its statutory authority, because the statute does not give Commerce the discretion to materially modify the findings of the ITC and requires that it impose anti-dumping or countervailing duties on merchandise that has been

[9] The distinct and mutually dependent roles played by the Commission and the Department in implementing AD and CVD duties arise from 19 U.S.C. § 1671a (describing the process for countervailing duties) and 19 U.S.C. §1673(2) (describing the parallel process for anti-dumping duties). The interlocking functions of the Commission and the Department in practice are described in *Mitsubishi Electric Corp. v. United States*, 898 Fed. 2d. 1577, 1579 (Fed. Cir. 1990).

found to be both unfairly subsidized by Commerce and harmful or prospectively harmful to a domestic industry by the ITC. 19 U.S.C. §§ 1671(a) and 1673.

But the legal validity of Plaintiff's claim is critically dependent upon the factual question of whether the Department's omission of the words "sold to electronics manufacturers" actually has "effectively removed a subset of heat sinks, which the Commission found to be materially injuring the domestic industry . . . from the scope of the AD/CVD order." *Pl.'s Mot*. at 11. It is in establishing this factual claim that Plaintiff's argument fails.

AEFTC bases its argument on the assertion that the ITC's definition of FHS consists only of the brief description given in footnote 4 of the Final Injury Determination and that every element of the text of this footnote must be faithfully and exactly repeated by the Department.[10] By omitting the clause describing purchasers, the Department is alleged to have produced AD and CVD orders so vague as to "effectively expand the Commission's definition of 'finished heat sink,' thereby unlawfully denying relief to a segment of the U.S. industry that the Commission found to be materially injured." *Id*. at 12–13.

Two aspects of the record indicate that the exclusion of these four words does not alter the definition of FHS. First, the submissions made by the parties do not indicate that any products will be improperly excluded from the AD and CVD orders as a result of the omitted language. Second, the ITC report itself, examined in detail, does not support the proposition that the four words omitted by the Department actually are critical to the product and industry definitions developed by the Commission.

Beyond the assertion cited above that Commerce has improperly expanded the scope of the ITC's exclusion, Plaintiff does not identify anywhere in the record the products that would be improperly admitted without appropriate AD or CVD duties if the purchaser is not specified in the AD and CVD orders. If there exists a category of FHS possessing all of the physical properties described by the ITC and reflected in the Department's AD and CVD instructions that is not sold to electronics manufacturers or to suppliers of such manufacturers, such products are not identified in the Plaintiff's submissions. This failure is critical, since it leaves no reason to believe, based on the record evidence, that the identity of the purchaser is material to the definition.

[10] For the exact text of this footnote, which appears both in Sections entitled "Determinations" and "Views of the Commission," *see above* pp. 6–7.

Rather, replying to the Defendant's denial that the exclusion has been enlarged by the altered wording, the AEFTC merely repeats the claim that "Commerce improperly expanded the Commission's definition of 'finished heat sinks,' thereby inappropriately excluding merchandise . . . and inappropriately limiting the remedy to the materially injured domestic industry." *Pl.'s Reply Br.* at 5. The only allegation of how the product category *might* actually be expanded in the reply brief refers to fabricated heat sinks and heat sink blanks that might be improperly classified as FHS and therefore excluded from the AD and CVD orders based on the omitted language.[11] *Id.* at 7. Implicitly, Plaintiff suggests that these two categories of aluminum extrusions might be distinguishable from FHS only by the identity of their purchasers and therefore would be improperly classified if the final purchaser is not identified in the AD and CVD orders.

Confronting Plaintiff's suggestion, the Department's response is only mildly persuasive. The Department claims that the omission of the words "sold to electronics manufacturers" represents a clarification of the ITC's definition that does not materially alter the scope of the exclusion. Response in Opposition to Motion for Judgment on the Agency Record, Aug. 30, 2013, ECF No. 58 ("Def. Resp.") at 14. The Department also argues that this clarification is reasonable and consistent with the established practice because CBP, in implementing AD and CVD orders, is often unable to identify the domestic purchaser. This has caused the Department to develop a general policy of not making product identification dependent on end use or the identity of purchasers.[12] *Id.* at 13 (citing *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 31,970

[11] Fabricated heat sinks are a broader category of aluminum extrusions that are designed around thermal properties but lack the precise surface tolerances and customized thermal resistance properties of FHS. *See ITC Report* at 7. Heat sink blanks are a precursor product to fabricated or finished heat sinks that require additional machining, forming, and testing. *Id*. at 31 (Dissenting Views of Vice Chairman Irving A. Williamson and Comm'r Charlotte R. Lane).

[12] While the Department's general policy is clear, Defendant's reliance on *King Supply Co. LLC v. United States*, 674 F. 3d 1343 (Fed. Cir. 2012), to support the argument that "sold to electronics manufacturers" should be understood as exemplary rather than limiting language due to the absence of express terms such as "only" or "solely" is misplaced. At issue in *King Supply* was the Department's interpretation of the language of its own AD orders rather than a potential conflict between the ITC's product or industry definitions and those of the Department. It would be unwarranted to take the ruling in *King Supply* as suggesting that the Department may interpret the scope language in an ITC determination as exemplary absent specific limiting terms. Similarly, the citation of *Polites v. United States*, __ CIT __, 780 F. Supp. 2d 1351, 1356 (2011), by the Defendant-Intervenor to support the claim that the Department has broad authority over the language of AD and CVD orders is not relevant, since the present case does not deal with the Department's latitude to formulate the text of such orders, but rather their obligation to faithfully implement the

(Dep't of Commerce June 5, 2008) (final determination) and accompanying I&D Memo at cmt. 1). Commerce argues further that including the omitted language might "reduce the effectiveness of the exclusion by creating ambiguity" by directing CBP to consider factors that it is unable to properly evaluate. *Id.* at 14.

Nevertheless, the Department's claim is supported by a detailed examination of the way in which the ITC Report defines FHS and the actual significance of the purchaser in this definition. The Commission's finding that there exists a category of aluminum extrusions that it calls finished heat sinks and that no domestic industry is threatened by the import of this product is based on a six-part like product analysis.[13] These six factors include the physical characteristics and uses of the product, its interchangeability with related products, the channels of distribution through which the product moves,[14] common manufacturing facilities, processes, or employees, and customer or consumer perceptions of the product. *See ITC Report* at 7–9.[15]

Examining the ITC Report as a whole, four facts emerge that support the Department's characterization of "sold to electronics manufacturers" as "descriptive language that does not limit the exclusion in any way." *Def. Resp*. at 14. First, FHS are repeatedly identified in the ITC Report by two physical properties – (1) their precise design and finish characteristics and (2) their thermal resistance properties that are intended to meet the specific needs of a

findings of the ITC, as Plaintiff correctly points out. Pl.'s Mot. at 11; Response of Aavid Thermalloy, LLC in Opposition to Mot. for Judgment on the Admin. Record, Aug. 30, 2013, ECF No. 57 (Def.-Intervenor's Resp.") at 6.

[13] The ITC's product and industry definitions require the Commission to weigh a range of factors based on technically complex and often ambiguous data. The Commission makes a factual determination in defining domestic like products and establishing the boundaries of domestic industries for the purposes of its injury determinations. In this determination, the Commission uses different tests and does not rely on any single factor or product characteristic to define a product type. *ITC Report* at 3–4. In this case, the ITC employed a six factor test that the report describes as a "traditional" ITC approach to like product definition. *See* id. at 7, n. 16. For a review of the six factor test and a discussion of like product analysis, *see Cleo Inc. v United States*, 501 F. 3d 1291, 1295 (Fed. Cir. 2007).

[14] This factor includes the identity of the purchaser or enduser; in the instant investigation, the Commission observes that FHS are sold to specialized distributors as well as manufacturers of electronic products. *ITC Report* at 8.

[15] In this case, both the ITC's decision to define FHS as a separate product and the methodology by which the Commission distinguished FHS from all other aluminum extrusions were contested by dissenting members of the Commission. *See Id.* at 31–35 (Dissenting Views of Vice Chairman Irving A. Williamson and Comm'r Charlotte R. Lane). The methodology used in the like product analysis was itself challenged in *Aluminum Extrusions Fair Trade Comm. v. United States*, Slip Op. 2012–129, 2012 Ct. Intl. Trade Lexis 134, (CIT Oct. 11, 2012). While this fact makes the Commission's findings no less binding or necessarily more ambiguous, it does highlight the complexity of ITC findings and the difficulty of reducing them to a simple incantation.

given piece of electronic equipment. *See, e.g., ITC Report* at 7. This suggests that the ITC itself relies primarily on physical properties to define FHS, making it reasonable for the Department to interpret the omitted "sold to electronics manufacturers" as redundantly descriptive rather than limiting language.

Second, FHS are sold to both manufacturers and distributors. *Id.* at 8. This fact also suggests that the words omitted by Commerce are intended to clarify the function and specific design parameters of FHS and not to impose a restriction based on the purchaser. Since the ITC acknowledges that manufacturers and distributors purchase FHS, the purpose of specifying "sold to electronics manufacturers" is more likely to be clarification of the actual end use of FHS - cooling electronic equipment - than establishing an exclusion based on the identity of the purchaser that would also create an inconsistency within the ITC Report.

Third, FHS are "precisely or optimally suited to cool the specific electronic devices for which they have been designed." *Id.* at 7. This design specificity supports the point made by the Defendant-Intervenors that FHS, as identified by their physical characteristics, have no significant use or plausible purchaser outside of electronics manufacture.[16] *Def.-Intervenor's Resp. at 5*. The Department's omission of the purchaser from the AD and CVD order will therefore not materially change the scope of the orders because the set of FHS sold to end users aside from electronics manufacturers is empty.[17] This further undermines the Plaintiff's claim that the Department's alteration of the Commission's language will prevent the intent of the ITC's findings from being carried out, unlawfully expand the scope of the exclusion defined by the ITC, or allow any aluminum extrusions to improperly enter the country under the FHS exclusion.

Considered as a whole, the ITC's findings are more nuanced than the summary language that appears in, e.g., the ITC Report at 1 n. 4.[18] The report as a whole provides a sufficiently specific definition of the product itself, regardless of the purchaser's identity. Accordingly,

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[16] The design specificity of FHS and the fact that electronics manufacture makes up the only end use for FHS is also supported by the demand analysis conducted by the ITC. *See ITC Report* at 25. The Commission also notes that the value added from specifically designed thermal resistance accounts for a large gap in prices between FHS and all other aluminum extrusions. *Id.* at 9. The reasons for this difference in price, which affects both the "price" and "customer and producer perceptions" prongs of the Commission's six factor test, further supports the characterization of FHS by the Defendant as a product that can be correctly and faithfully identified without reference to the specific purchaser.

[17] For clarity, note the distinction here between the immediate purchaser, a group that might include distributors or other market intermediaries as well as manufacturers, and end users, which from the record evidence will consist only of electronics manufacturers.

[18] *See above* pp. 6–7 for the pertinent language.

based on the record here, the Department's omission of "sold to electronics manufacturers" from the text of the AD and CVD orders is a reasonable way to implement the scope of the FHS exclusion such that it is both faithful to the ITC's scope definition and possible for CBP to implement.

II. *The Department's Failure to Include a Testing Requirement in their Instructions to CBP*

Plaintiff also challenges the Department's failure to require, in the instructions issued to CBP, certification of thermal testing for FHS excluded from the orders. The language of both the ITC's FHS exclusion and the Department's own AD and CVD orders specifies that FHS are designed around specific thermal properties and that they have been "fully, albeit not individually, tested to comply with such requirements." *ITC Report* at 1 n. 4 and 3 n. 1. Plaintiff argues that the failure to specify a testing or certification of testing requirement will necessarily have the effect of unlawfully allowing untested - and therefore unfinished under the ITC's definition - heat sinks to enter the United States under the FHS exclusion. *Pl.'s Mot.* at 15. Specifically, Plaintiff asserts that since it is impossible for CBP to identify the precise thermal characteristics or tested status of heat sinks by physical examination of the item itself, instructions that do not specify a testing or certification requirement are inherently unreasonable, necessarily fail to properly reflect the narrow scope of the ITC's FHS exclusion, and must therefore be found unlawful and remanded to the Department for reconsideration. *Id.* at 15, 16.[19]

While this argument raises reasonable concerns about the implementation of the Department's AD and CVD orders, it must be dismissed as unripe for adjudication. The ripeness prerequisite springs from the Constitution's requirement that the judiciary address only an actual case or controversy and avoid extending its role to advisory or hypothetical judgments. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003). Within the realm of administrative law, ripeness is intended to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to pro-

[19] Plaintiff draws a plausible parallel between the kind of certification it contends that the Department should require for FHS and the Commission's prior imposition of a requirement that importers produce a statement of the carbon and metallic elements composition of certain iron or steel products. *Pl.'s Mot*. at 15–16, *citing* 19 C.F.R. § 141.89 (entry on iron or steel classifiable in Chapter 72 or headings 7301 to 7307, HTSUS (T.D.53092,55977)). Plaintiff suggests that the requirement that such a statement be in the form of a mill test certificate demonstrates both that the Department is willing to impose testing or certification requirements on certain products when necessary and that such a requirement can be implemented by CBP.

tect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardener*, 387 U.S. 136, 148–9 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Specifically, a claim is not ripe if it is based on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–81 (quoting 13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3532 (1984)).

Adjudicating the claim brought by the AEFTC regarding the failure to impose a testing or certification requirement in the CBP instructions carries precisely this danger.[20] The CBP instructions have not yet been acted upon, and it is not yet possible to evaluate whether the instructions as presently written will result in the unlawful admission of aluminum heat sinks that are not entitled to the Commission's FHS exclusion. The points raised by the Plaintiff, while plausible, remain at this stage hypothetical. Adjudication of the issue would necessarily be speculative and ungrounded in the record evidence that would stem from the agency's consideration.

Courts may, under some circumstances, evaluate and rule on challenges to administrative decisions before their implementation. A claim may be deemed ripe despite its prospective nature if two conditions are met: (1) The plaintiff must demonstrate that they will suffer some serious hardship if judicial review is withheld and the administrative policy is implemented. *Abbott Labs*, 387 U.S. at 149. (2) Both the record and the issues must be fit for judicial review. To evaluate this second condition, we must determine, *inter alia*, whether the court "would benefit from the further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

Neither of these conditions for pre-enforcement judgment are present in the instant case. Plaintiff has not alleged any particular and serious hardship that it would actually suffer as a result of the failure to impose a testing or certification requirement on FHS imports. Plaintiff in this case, unlike the drug manufacturers seeking review in *Abbott Labs*, is neither faced with the prospect of certain and direct harm if the contested determination is enforced, nor an

[20] All Federal Courts, obliged to follow Constitutional restrictions on their actions, properly consider ripeness questions even when not raised or contested by the parties. Reno v. Catholic Soc. Servs., 509 U.S. 43, 56 n. 18 (1993); *Blanchette v. Connecticut Gen. Ins. Corporations*, 419 U.S. 102,138 (1974).

uncertain future path to judicial review.[21] Rather, Plaintiff faces only a speculative harm for which, were it to occur, the path for review is clear under Section 702 of the Administrative Procedure Act and 28 U.S.C. 1581(i)4.[22]

In addition, the further development of the factual record would allow the court to evaluate the effectiveness of CBP and of the Department's instructions in implementing the Commission's scope findings by examining specific failures or problems. After some period of enforcement, any problems CBP might have in properly implementing the scope of the Commissions FHS exclusion will be more concrete and apparent. This will allow for a more informed evaluation based on a more complete factual record, better reflecting both the practical strengths and Constitutional mandate of the judiciary.

CONCLUSION

For the foregoing reasons, the definition contained in the Department's AD and CVD orders is AFFIRMED and the challenge to the Department's CBP instructions is DISMISSED.[23] Judgment will be entered accordingly.

It is so ORDERED.

Dated: January 23, 2014
New York, NY

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

Slip Op. 14–7

UNITED STATES COURT OF INTERNATIONAL TRADE UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN HOME ASSURANCE CO., Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 10–00185

[Plaintiff's motion for summary judgment is granted in part, denied in part. Defendant's cross-motion for summary judgment is granted in part, denied in part.]

[21] The Court in *Abbott Labs* was careful to distinguish the exceptional, multifaceted, and nearly certain prospective harms faced by plaintiff drug manufacturers from the mere "damage or loss of income" that was found inadequate to sustain prospective review for steel producers challenging the Public Contracts Act in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125. *Abbott Labs*, 387 U.S. at 153.

[22] *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1306 (Fed. Cir. 2004) (finding CIT jurisdiction under §1581(i)4 "if Commerce instructions [to CBP] are inaccurate or incorrect").

[23] The Plaintiff's additional claim regarding the failure of the Department to initiate an investigation of currency subsidies, having not been addressed in its opening brief as required by USCIT R. 52.2(c), is also deemed abandoned and is therefore DISMISSED.

Dated: January 23, 2014

Edward F. Kenny, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for plaintiff. With him on the brief were *Stuart F. Delery*, Principal Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge of International Trade Field Office. Of counsel on the brief was *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

Herbert C. Shelley, Steptoe & Johnson LLP, of Washington, DC, argued for defendant. On the brief were *Taylor Pillsbury*, Meeks, Sheppard, Leo & Pillsbury, of Newport Beach, CA, and *Ralph Sheppard*, Meeks, Sheppard, Leo & Pillsbury, of Fairfield, CT.

OPINION

Goldberg, Senior Judge:

This case is before the court on competing cross-motions for summary judgment. In this action on a bond, Plaintiff, the United States ("United States" or "the Government"), seeks recovery of unpaid antidumping duties from surety Defendant American Home Assurance Company ("AHAC"). The parties dispute (1) whether AHAC is liable for the unpaid duties as the surety on a continuous bond, and (2) assuming AHAC is liable, whether AHAC owes the Government both prejudgment interest in the form of equitable interest and interest pursuant to 19 U.S.C. § 580 (2006). For reasons set forth below, the court finds that AHAC is liable under the bond, but that the Government is only entitled to equitable prejudgment interest. Accordingly, summary judgment as to the United States is granted in part and denied in part, and summary judgment as to AHAC is granted in part and denied in part.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

In 2001, AHAC entered into a continuous bond with importer JCOF (USA) International, Inc. ("JCOF"). The Government now seeks recovery on the bond for unpaid antidumping duties. Thus, jurisdiction is proper pursuant to 28 U.S.C. § 1582(2).

Both parties have moved for summary judgment. Summary judgment is available when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To make the requisite showing, the movant must cite "particular parts of materials in the record" and "show[] that the materials cited do not establish the absence or presence of a genuine dispute." USCIT R. 56(c). A fact is material if it could affect the outcome of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute as to a material fact

exists if, based on the evidence, a reasonable factfinder could return a verdict for the nonmoving party. *Id.*

UNDISPUTED FACTS

Importers must generally post security before U.S. Customs and Border Protection ("Customs") will release imported merchandise from its custody. *Hartford Fire Ins. Co. v. United States*, 648 F.3d 1371, 1372 (Fed. Cir. 2011). Importers often use surety companies to post the required security. *Id*. A "surety bond creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee." *Ins. Co. of the W. v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001).

AHAC is a surety company authorized to issue surety bonds. Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 27 ("Pl.'s Facts") ¶ 1; Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 30 ("Def.'s Resp.") ¶ 1. AHAC issued the surety bond at issue in this case pursuant to an arrangement with U.S. importer JCOF. Pl.'s Facts ¶ 2; Def.'s Resp. ¶ 2. The bond, on which JCOF and AHAC were jointly and severally obligated, had a limit of liability of $600,000 per bond period. Pl.'s Facts ¶ 3; Def.'s Resp. ¶ 3.[1]

During the period covered by the continuous bond, JCOF imported two entries of crawfish tail meat from Yangzhou Lakebest Foods Company, Ltd. ("Yangzhou Lakebest")—a Chinese exporter. Pl.'s Mot. & Mem. in Supp. of Mot. for Summ. J., ECF No. 27 ("Pl.'s Br."), at Ex. D, Resp. 4. The entries occurred on November 1, 2001 and November 2, 2001 and were identified as entry numbers M42–1164064–2 and M42–1164065–9, respectively. Pl.'s Facts ¶¶ 4– 5; Def.'s Resp. ¶¶ 4–5. JCOF declared a zero percent *ad valorem* antidumping duty rate for both entries at importation. Pl.'s Br. at Ex. D, Resp. 4.

On February 13, 2004, the U.S. Department of Commerce ("Commerce") published the final results of an administrative review of the order on crawfish tail meat from the People's Republic of China. *Freshwater Crawfish Tail Meat from the People's Republic of China*,69 Fed. Reg. 7193 (Dep't Commerce Feb. 13, 2004) ("*Final Results*"). In those results, Commerce assigned Yangzhou Lakebest an antidumping duty rate of 223.01% *ad valorem*. *Id.* at 7197. The review period spanned from September 1, 2001 to August 31, 2002. *Id.* at 7194.

[1] This bond is called a continuous bond, and it "cover[s] liabilities resulting from multiple import transactions over a period of time, such as one year." *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006).

On May 12, 2004, Commerce directed Customs to liquidate entries of the subject crawfish meat at the rates set forth in its *Final Results*.[2] Pl.'s Facts ¶ 9; Def.'s Resp. ¶ 9. Because Commerce's review period included November 2001, JCOF's two entries were subject to Yangzhou Lakebest's 223.01% *ad valorem* antidumping duty rate plus interest. *See* Pl.'s Facts ¶ 6; Def.'s Resp. ¶ 6. On June 25, 2004, Customs liquidated the entries accordingly ("June 2004 liquidations"). *See* Pl.'s Facts ¶ 11; Def.'s Resp. ¶ 11. When JCOF did not timely pay the duties, Customs made a formal demand on AHAC. Pl.'s Br. at Ex. G. AHAC then filed Protest Number 2704–04–102655. Pl.'s Facts ¶ 12; Def.'s Facts ¶ 12. Customs denied that protest on July 8, 2005, and AHAC did not institute litigation challenging the protest denial. *See* Pl.'s Facts ¶ 15; Def.'s Facts ¶ 15.

Much of the confusion in this case stems from litigation that an exporter other than Yangzhou Lakebest instituted in response to the *Final Results*. Due to the pendency of litigation, the court preliminarily enjoined the Government from liquidating entries exported by Shanghai Taoen International Trading Co., Ltd ("Shanghai Taoen") during the period of review. Pl.'s Facts ¶ 8; Def.'s Facts ¶ 8. The preliminary injunction did not affect JCOF's imports, as the imports came from Yangzhou Lakebest and Yangzhou Lakebest was not a party to the pending litigation. *See* Def.'s Statement of Add'l Material Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 30 ("Def.'s Facts") ¶ 3; Pl.'s Resp. to Def.'s Statement of Add'l Facts as to Which There Are No Genuine Issues to Be Tried, ECF No. 37 ("Pl.'s Resp.") ¶ 3. Nonetheless, when the Shanghai Taoen litigation concluded, Customs reliquidated JCOF's two entries on June 3, 2005 ("June 2005 reliquidations"). *See* Pl.'s Facts ¶ 14; Def.'s Resp. ¶ 14. The June 2005 reliquidations resulted in new bills with a total bill amount $51,997.31 greater than the bills associated with the June 2004 liquidations. *See* Pl.'s Br. at Exs. G, H.[3] After Customs made a second demand on AHAC, AHAC filed protest number

[2] "Liquidation means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2013). In antidumping duty cases, liquidation is suspended "until such time as a party may request an administrative review, and during the pendency of any such review." *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357, 360, 427 F. Supp. 2d 1249, 1252 (2006). Liquidation of the entries at issue here had been suspended pending issuance of the *Final Results*. Def.'s Facts ¶¶ 1–2; Pl.'s Resp. ¶¶ 1–2.

[3] The parties apparently dispute the composition of the enlarged figure. The Government avers that any increase in the amount of the bills is due exclusively to interest accruing between October 2004 and October 2005. *See* Pl.'s Resp. ¶ 7. AHAC asserts that the increased bill amount represents a combination of increased principal and interest. *See* Def.'s Facts ¶ 7. Any dispute on this issue is not material for purposes of this case.

2704–05–102579. *See* Pl.'s Facts ¶ 16; Def.'s Resp. ¶ 16. Again, AHAC did not institute litigation when Customs denied the protest.

Customs sent AHAC a demand letter on February 9, 2007, seeking total payment of $1,157,898.22 for unpaid duties plus interest in connection with JCOF's two entries. Pl.'s Facts ¶ 18; Def.'s Facts ¶ 18. AHAC denied liability on grounds unrelated to those it raises in the instant action. Pl.'s Facts ¶ 19; Def.'s Facts ¶ 19; Pl.'s Br. at Ex. K. The Government then instituted this action on a bond on June 21, 2010. Summons & Compl., ECF Nos. 1–2. In its answer, AHAC asserts multiple affirmative defenses hinging on its belief that JCOF's two entries were deemed liquidated at the rate in effect at the time of entry—i.e., zero percent. *See* Answer to Compl., ECF No. 8. AHAC, thus, believes it is not liable under the surety bond.

DISCUSSION

The parties raise two issues in their summary judgment briefing. First, AHAC argues that the bills underlying the Government's collection action "are legally void" and that AHAC is not obligated to pay under continuous bond number 270114235. *See* Def.'s Cross-Mot. & Mem. in Supp. of Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J., ECF No. 30 ("Def.'s Br."), at 5. Second, the parties dispute whether the Government is entitled to equitable and statutory interest on any recovery. *Id.* at 9. As set forth below, the court finds that the Government is entitled to recovery on the bond and awards equitable interest, but not statutory interest.

I. AHAC is legally obligated to pay under continuous bond number 270114235

The first issue in this case turns on the parties' divergent interpretations of the legal effect of the June 2005 reliquidations. AHAC essentially argues that the untimely June 2005 reliquidations superseded and canceled the timely June 2004 liquidations. Def.'s Br. at 6–7 (citing *Mitsubishi Elecs. Am., Inc. v. United States*, 18 CIT 929, 931, 865 F. Supp. 877, 879 (1994)). Because the reliquidations occurred more than ninety days after the June 2004 liquidations, AHAC further avers that the June 2005 voluntary reliquidations were invalid under 19 U.S.C. § 1501. Def.'s Br. at 7. As a result, AHAC believes there were no valid liquidations.

Without any valid liquidations, AHAC asserts that the entries were deemed liquidated by operation of law at the rate asserted by the importer of record. *Id.* at 8 (citing 19 U.S.C. § 1504(d)). 19 U.S.C. § 1504(d) compels Commerce to liquidate previously suspended entries

"within 6 months after receiving notice of the removal [of the suspension] from the Department of Commerce." For purposes of this case, the six-month clock began running when Commerce published its *Final Results* on February 13, 2004. Def.'s Br. at 8 (citing *Int'l Trading Co. v. United States*, 412 F.3d 1303, 1313 (Fed. Cir. 2005)). The entries, thus, purportedly liquidated by operation of law at zero percent *ad valorem* —the rate JCOF asserted at the time of entry. *Id.*

According to AHAC, it did not need to challenge the June 2005 reliquidations in this Court because they were void at their inception and not merely voidable. Generally, "all liquidations, whether legal or not, are subject to [19 U.S.C. § 1514's] timely protest requirement" and become final and conclusive unless an authorized party files a protest or commences a civil action contesting the denial of a protest. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). However, relying on the Federal Circuit's holding in *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1560 (Fed. Cir. 1997), AHAC argues that the June 2005 reliquidations were legally void because they occurred after a final, deemed liquidation. Def.'s Br. 9. AHAC therefore asserts that it was not subject to the timely protest requirement. *Id.*

AHAC's arguments are unpersuasive. The court agrees that Customs' untimely reliquidations vacated and "substituted for the collector's original liquidation." *Mitsubishi*, 18 CIT at 931, 865 F. Supp. at 879. Nonetheless, the court finds that the timely protest requirement applied because the entries at issue were not deemed liquidated by operation of law and because the reliquidations occurred before the June 2004 liquidations became final. Thus, the June 2005 reliquidations—"whether legal or not"—became final and conclusive against AHAC when AHAC did not institute litigation challenging them. *See Juice Farms*, 68 F.3d at 1346; *accord Philip Morris U.S.A. v. United States*, No. 89–1712, 1990 WL 79000, at *2 (Fed. Cir. June 13, 1990) ("[A]n unlawful reliquidation is not void, but is merely voidable.").

A review of relevant case law is instructive. In *Juice Farms*, Customs erroneously liquidated entries subject to a suspension order. 68 F.3d at 1345. The importer did not recognize the error until the administrative review concluded, at which point the importer attempted to protest the liquidations. *Id.* Customs denied the protest as untimely, and the importer filed suit in this Court. *Id.* In affirming the court's dismissal of the action for lack of jurisdiction, the Federal Circuit found that even inadvertent, unlawful liquidations are subject to the timely protest requirement. *Id.* at 1346.

In *Cherry Hill*, the Federal Circuit concluded that the timely protest requirement applied with equal force in government collection actions. 112 F.3d at 1557. Nonetheless, based on the facts of the case, the court identified an exception to this general rule. *Id.* at 1558. In *Cherry Hill*, Customs delayed more than thirteen months before liquidating certain entries as dutiable that had previously entered duty-free. *Id.* at 1551. In the intervening period between entry and liquidation, though, a liquidation had already taken effect by operation of law under the deemed liquidation statute. *Id.* at 1559 (citing 19 U.S.C. § 1504(a)).

The surety in *Cherry Hill* did not protest the belated liquidation, but raised the deemed liquidation issue in a subsequent government enforcement action. *Id.* at 1558. The Federal Circuit found that the surety was not barred from launching this collateral attack. *Id.* Because a previous, deemed liquidation had already become final, the court found that the new liquidation "ha[d] no legal effect" and could not increase the surety's liability. *Id.* at 1560. In other words, once a final and conclusive liquidation occurs (and the Government's cause of action expires), "Customs cannot breathe new life into it merely by liquidating the entry anew." *Id.*

Unlike in *Cherry Hill*, there were no final and conclusive liquidations in this case when the June 2005 reliquidations occurred. First, the June 2004 liquidations were not yet final under 19 U.S.C. § 1514 because AHAC's protest was still pending on June 3, 2005. *See* 19 U.S.C. § 1514(a) (providing that liquidations become "final and conclusive upon all persons (including the United States and any officer thereof) *unless* a protest is filed in accordance with this section" (emphasis added)). Second, despite AHAC's contrary assertions, the entries were not deemed liquidated by operation of law under 19 U.S.C. § 1504(d).

On its face, 19 U.S.C. § 1504(d) applies when an entry is "not liquidated by [Customs] within 6 months after receiving" notice of the removal of a suspension of liquidation. *See also Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002). Customs' June 2004 liquidations occurred within six months of the February 13, 2004 publication of the *Final Results*, which constituted notice for the purpose of 19 U.S.C. § 1504(d) that the suspension of liquidation had been removed. *See Int'l Trading*, 412 F.3d at 1313. Therefore, no deemed liquidation occurred under 19 U.S.C. § 1504(d).

AHAC has not convinced the court that a contrary conclusion is warranted. Indeed, adopting AHAC's interpretation would set untenable precedent. Logically extended, AHAC's argument would mean that any reliquidation after six months could result in a retroactive

deemed liquidation, as the reliquidation would supersede the original, timely liquidation. AHAC's argument also fails if it hinges on the belief that the June 2005 reliquidations were invalid because they violated 19 U.S.C. § 1501. Though the reliquidations occurred more than ninety days following notice of the original liquidation, such belated reliquidations are still subject to the timely protest requirement. *See Philip Morris*, 1990 WL 79000, at *2; *Mitsubishi*, 18 CIT at 931, 865 F. Supp. at 879. Further, AHAC cannot reasonably argue that the June 2005 reliquidations are simultaneously valid for purposes of creating deemed liquidations by replacing the original liquidations and void *ab initio* such that they need not be challenged under the procedures for protesting reliquidations and contesting protest denials in this Court.

AHAC's interpretation also does little to advance the purposes of the deemed liquidation statute. 19 U.S.C. § 1504 was designed to "'eliminate unanticipated requests for additional duties coming years after the original entry.'" *Cherry Hill*, 112 F.3d at 1559 (quoting *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 and H.R. 8222 Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 95th Cong. 56 (1977) (statement of Robert E. Chasen, Comm'r of Customs)); S. Rep. No. 95–778, at 31–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2243 ("Under the present law, an importer may learn years after goods have been imported and sold that additional duties are due . . . ."). An erroneous reliquidation occurring before a timely liquidation had even become final does not fall within the statute's intended reach.

In sum, the facts of *Cherry Hill* are distinguishable from those in the instant case; accordingly, a different result obtains. AHAC bore the burden of timely challenging the admittedly erroneous reliquidations before this court. Because it did not, and because no exception to the timely protest requirement applies, AHAC has not preserved its challenge and is liable as a surety under the continuous bond. [4]*See Juice Farms*, 68 F.3d at 1346.

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[4] The same logic applies to an alternative argument AHAC first raised at oral argument. Specifically, AHAC asserted that Customs ignored Commerce's June 1, 2004 instructions when it liquidated the entries in question on June 25, 2004 and that Customs' action rendered the June 2004 liquidations void. Transcript of Oral Argument 22–24, ECF No. 49. AHAC's argument centers on instructions Commerce issued to Customs on June 1, 2004 in response to the *Shanghai Taoen* injunction. Those instructions directed Customs not to liquidate entries of subject merchandise exported by Shanghai Taoen or imported by an importer other than JCOF, and further ordered Customs to "[c]ontinue to suspend liquidation of *other entries* until liquidation instructions are provided." Pl.'s Br. at Ex. I (emphasis added). Because AHAC concedes that the injunction itself did not cover JCOF's entries, *see* Def.'s Facts ¶ 3, it was incumbent on AHAC to pursue any concerns regarding the legality

II. The Government is entitled to equitable interest, but not 19 U.S.C. § 580 interest

The court must next determine the amount of money due to the Government. The importer's total liability for the two entries exceeds AHAC's $600,000 bond limit. *See* Pl.'s Facts ¶ 11; Def.'s Resp. ¶ 11. Therefore, if AHAC owes anything over the bond limit, it will come exclusively as damages in the form of interest for its own default. The Government seeks two types of interest in this case—statutory interest under 19 U.S.C. § 580 and equitable interest. As explained below, the court rejects the Government's claim for § 580 interest, but awards equitable interest.

A. Statutory interest under 19 U.S.C. § 580 is not available when the bond secures antidumping duties

19 U.S.C. § 580 provides that "[u]pon all bonds, on which suits are brought for the recovery of *duties*, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." (emphasis added). The Government asserts that the statute's plain language compels an award of interest in this case. Pl.'s Br. 21–22; *see also United States v. Fed. Ins. Co.*, 857 F.2d 1457, 1459 (Fed. Cir. 1988) (finding in a case involving ordinary customs duties that, "[a]s a matter of law, whenever a court awards unpaid import duties in a suit upon a bond, interest must be attached pursuant to section 580"). In other words, because the instant action is a suit for the recovery of antidumping "duties," the Government submits that interest "shall be allowed." *See* 19 U.S.C. § 580.

The historical context of 19 U.S.C. § 580 complicates the matter. Congress enacted § 580 in 1799, and the statute applied at its inception to bonds securing payment of then-existing customs duties. Antidumping duties did not arise until 1921. Antidumping Act of 1921, Pub. L. No. 67–10, 42 Stat. 11. Aside from codifying the statute and moving it from Title 28 of the U.S. Code (pertaining to Judiciary and Judicial Procedure) to Title 19 of the U.S. Code (pertaining to Customs Duties), Congress has not substantively updated § 580 or otherwise signaled whether the statute applies to antidumping duties. [5]

of the June 2004 liquidations through normal protest avenues. By twice abandoning its protests, AHAC may not now attack the legitimacy of the June 2004 liquidations. *See Juice Farms*, 68 F.3d at 1346.

[5] The precursor to 19 U.S.C. § 580 originally provided as follows: "[O]n all bonds upon which suits shall be commenced, an interest shall be allowed at the rate of six per cent. per annum, from the time when said bonds become due, until the payment thereof." *See* Act of Mar. 2, 1799, ch 22, § 65, 1 Stat. 627, 677. The language changed to what it is now when the statute was first codified in the Revised Statutes. *See* 1 Rev. Stat. 181, § 963 (1875). Section 580 was then later reclassified in the U.S. Code as 28 U.S.C. § 787, before being moved to Title 19

Further, no court has ruled on whether § 580's reference to "duties" contemplates antidumping duties.

Against this backdrop, both sides advance divergent interpretations of 19 U.S.C. § 580 and its application in this case. According to the Government, several reasons support extending the statute to bonds securing antidumping duties. Initially, the Government notes that early customs duties—like antidumping duties—were at least partially rooted in protectionist principles. Pl.'s Mem. in Supp. of Summ. J. & Opp'n to Def.'s Cross-Mot. for Summ. J., ECF No. 37 ("Pl.'s Resp. Br."), at 8. Moreover, modern Congress has used the word duties to refer collectively to customs duties and antidumping duties. *See id.* at 9–11. Thus, the Government asserts that Congress has extended § 580's reach by retaining its unqualified language even as new duties emerged. *See* Pl.'s Br. 22.

AHAC counters that revenue generation was the overriding purpose of early customs duties and that antidumping duties are imposed for distinct, remedial reasons. *See* Def.'s Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J., ECF No. 42 ("Def.'s Resp. Br."), at 9. AHAC asserts that the disparate purposes underlying duties implementing trade remedies and customs duties preclude interpreting "duties" in § 580 to cover antidumping duties. Def.'s Br. 12. AHAC also notes that courts have distinguished between duties implementing trade remedies and customs duties, and in some instances have interpreted the word "duties" to exclude antidumping duties. *Id.* (citing *Dynacraft Indus. v. United States*, 24 CIT 987, 992, 118 F. Supp. 2d 1286, 1291 (2000); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007)). For these reasons, Congress' failure to clarify § 580's reach supposedly forecloses its application in this context.

i. *Legal framework*

Supreme Court precedent teaches that the meaning of statutory language can expand over time. *See West v. Gibson*, 527 U.S. 212, 218 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances . . . ."). A "statute is presumed to speak from the time of its enactment" and to "embrace[] all such . . . things as subsequently fall within its scope." *De Lima v. Bidwell*, 182 U.S. 1, 197 (1901). As a result, general, prospective statutes apply to later-created concepts so long as the "language fairly and clearly includes them." *Newman v.*

in 1948. *See* 28 U.S.C. § 787 (1946); 19 U.S.C. § 580 (1952). However, these minor editorial changes neither substantively altered the provision nor resulted from subsequent congressional action. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 625 (1979) (noting the Revised Statutes were not intended to alter existing law).

Arthur, 109 U.S. 132, 138 (1883); *accord Cain v. Bowlby*, 114 F.2d 519, 522 (10th Cir. 1940). The court looks to the meaning and intent of the original statute to determine whether that statute fairly and clearly includes a new concept. *See Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411, 411 (6th Cir. 1925) (cited approvingly in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975)).

For example, in *Cain*, a widow instituted litigation against a truck driver who fatally struck her husband on a highway. 114 F.2d at 521. The statute underlying the widow's action applied to the negligence of "driver[s] of any stage coach or other public conveyance." *Id.* The court addressed whether the words "other public conveyance" fairly included a truck driver operating as a common carrier even though trucks did not exist at the statute's enactment. *Id.* at 522. In its analysis, the court examined the historical purpose of stage coaches—to transport passengers and property—and concluded that truck drivers engaged as common carriers did not differ in any meaningful way. *Id.* at 523. Thus, the court extended the statute to cover truck drivers engaged as common carriers. *Id.*

Other courts have used reasoning similar to that found in *Cain*. For instance, in *Jerome H. Remick & Co.*, another court interpreted a Copyright Act provision to apply to radio broadcasts, even though radios did not exist at the Copyright Act's inception. 5 F.2d at 411–12. In *In re Fox Film Corp.*, 145 A. 514 (Pa. 1929), a Pennsylvania court interpreted a statute requiring pre-approval before publicly presenting "films" to include subsequently-created sound films. Specifically, the court found that sound films were not "so distinctly and intrinsically separate and apart from the" original meaning of the word film (i.e., silent films) as to be a "fundamentally . . . new creation." *Id.* at 516–17.

ii. *19 U.S.C. § 580 does not apply to later-created antidumping duties serving a fundamentally different purpose than historical customs duties*

In light of that background, this court must decide whether "duties" in § 580 (and the meaning assigned to it in 1799) "fairly and clearly includes" modern remedial duties like antidumping duties. *See Newman*, 109 U.S. at 138. Because neither Customs nor any other agency has been charged with administering § 580, the court construes the statute without deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (requiring deference to an agency's reasonable "construction of a statutory scheme *it is entrusted to administer*" (emphasis added)).

In 1799, Congress used the word "duties" to describe the duty assessment scheme that it had established for imported merchandise, similar to the modern customs duty regime. At first glance, it might appear reasonable to read § 580 to cover all subsequently-created import duties. But the court declines to reach that conclusion because in the period since the statute's enactment over 200 years ago, Congress, courts, and the Government itself have counseled that antidumping duties are not comparable to normal customs duties in function, purpose, and character. *See, e.g.*, *Dynacraft*, 24 CIT at 992–93, 118 F. Supp. 2d at 1291–92 (cataloging disparate treatment); *Wheatland*, 495 F.3d at 1361–63 (same).

Initially, the court notes that different entities administer antidumping duty law and customs law. Congress itself sets customs duty rates, while an administrative agency (Commerce) sets antidumping duty rates. Although Customs implements the regime that Congress has established, it does not have discretion regarding the rates of duty or whether to collect customs duties at all. Commerce, however, is authorized to investigate alleged dumping and set antidumping duty rates on its own. *See, e.g.*, 19 U.S.C. §§ 1673, 1675. The two duty regimes are also applied differently. "Regular" customs duties are assessable on all imports of particular merchandise and are permanent unless modified by Congress. *Wheatland*, 495 F.3d at 1362; *Int'l Forwarding Co. v. United States*, 6 Cust. Ct. 881, 882, R.D. 5197 (1941). "Special" antidumping duties are levied against only certain imports, are subject to administrative review annually, and terminate after five years unless Commerce and the U.S. International Trade Commission respectively determine that revocation would lead to continuation or recurrence of dumping and material injury. *See* 19 U.S.C. § 1675(a), (d)(2); *Wheatland*, 495 F.3d at 1362; *Int'l Forwarding*, 6 Cust. Ct. at 882.

Moreover, ordinary customs duties and antidumping duties serve fundamentally different purposes. The court accepts that the nation's first customs duties were rooted in some muted protectionist principles. *See* Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24 (1789) (creating duties "for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures"). Nonetheless, the critical purpose of early duties was to generate revenue for the nascent country—a purpose that is still reflected in modern customs duties. *See, e.g.*, *United States v. Laurenti*, 581 F.2d 37, 41 n.12 (2d Cir. 1978) (noting that customs duties

were a principal source of early federal revenue).[6] Antidumping duties, in contrast, are not intended as revenue-generating devices. *See Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011). Antidumping duties serve the distinct purpose of remedying the effect of unfair trade practices resulting in actual or threatened injury to domestic like-product producers. *See id.* Specifically, antidumping duties are "intended to raise the United States market price for the subject merchandise and thereby increase sales and profits of domestic producers." *Wheatland*, 495 F.3d at 1364.

Due to the well-documented differences between antidumping and customs duties, the court has previously interpreted the word "duties" in an interest statute to encompass only ordinary customs duties. *Dynacraft*, 24 CIT at 993, 118 F. Supp. 2d at 1292. In *Dynacraft*, an importer deposited estimated duties after an affirmative preliminary determination in an antidumping duty investigation. *Id.* at 989–90, 118 F. Supp. 2d at 1288–89. The International Trade Commission ultimately reached a negative injury determination, and an antidumping duty order never went into effect. *Id.* at 989, 118 F. Supp. 2d at 1288. The parties disputed whether interest accrued on the importer's duty overpayment. *Id.* at 990, 118 F. Supp. 2d at 1289.

On this point, two statutes conflicted. 19 U.S.C. § 1677g provided that overpayment interest would not begin accruing until after publication of an antidumping or countervailing duty order. 19 U.S.C. § 1505(c), by contrast, provided that interest would accrue from whenever the importer was required to deposit "estimated *duties*, fees, and interest." (emphasis added). The importer argued that it was entitled to § 1505(c) interest on the overpayment even though § 1677g interest was unavailable. In effect, the importer asserted that "any antidumping duty is a 'duty' within the scope of" 19 U.S.C. § 1505(b) and (c). *Dynacraft*, 24 CIT at 992, 118 F. Supp. 2d at 1291.

The court disagreed, equating the word "duties" in 19 U.S.C. § 1505(c) with customs duties and finding no interest due to the importer. *Id.* at 993, 118 F. Supp. 2d at 1292. In partial support of this finding, the court traced the disparate treatment of antidumping and customs duties both pre- and post-Uruguay Rounds Agreement Act

[6] The Second Circuit has even opined that Congress enacted statutes like § 580 because customs duties were so critical to early revenue. *See Laurenti*, 581 F.2d at 41 n.12. In *Laurenti*, the Second Circuit catalogued instances where early Congress used the words "without delay" in connection with the collection of customs duties. *Id.* The court ultimately concluded that Congress used that language because swift collection of duties was essential to government function. *Id.* Notably, the section of the Act of March 2, 1799 establishing § 580 provided that customs collectors should "*forthwith and without delay*, cause a prosecution to be commenced for the recovery" of unpaid duties. Act of Mar. 2, 1799, ch 22, § 65, 1 Stat. 627, 676 (emphasis added). This suggests that Congress may have passed § 580, at least in part, out of concern for the steady flow of revenue.

("URAA"). For instance, before the URAA, the Customs Court considered "regular" duties to be customs duties and "special" duties to include antidumping duties. *Id.* at 992, 118 F. Supp. 2d at 1291 (citing *Int'l Forwarding*, 6 Cust. Ct. at 882). Congress maintained a similar distinction, referring to antidumping duties as "special duties" and countervailing duties as "additional duties." *Id.*, 118 F. Supp. 2d at 1291 (citing 19 U.S.C. § 1516(a) (Supp. V. 1975)); *see also* S. Rep. No. 67–16, at 1 (1921) (establishing a "special dumping duty" to be imposed "in addition to the duties imposed . . . by law"). The URAA statutory scheme continued to separate the two types of duties, placing antidumping duties in a separate subtitle from other duties and referring to antidumping duties as "additional duties." 24 CIT at 992–93, 118 F. Supp. 2d at 1292 (citing URAA, Pub. L. No. 103465, 108 Stat. 4809 (1994)). Based on its examination, the *Dynacraft* court concluded that "antidumping and countervailing duties were never intended to be regular or general duties." *Id.* at 992, 118 F. Supp. 2d at 1291.

In a different context, the Government itself has advocated an approach similar to that of the *Dynacraft* court. *See Wheatland*, 495 F.3d at 1361–63. In *Wheatland*, the Federal Circuit considered whether safeguard duties were "United States import duties" for purposes of 19 U.S.C.§ 1677a(c)(2)(A) calculations. Because safeguard duties did not exist at § 1677a(c)(2)(A)'s original enactment, there was no congressional guidance on the disposition of those particular duties. *Id.* at 1362. The Government averred that Congress did not intend for all duties to be "United States import duties" and that "special" duties like antidumping duties "should be distinguished from ordinary customs duties." *Id.* at 1361. The Government likened safeguard duties to special antidumping duties in purpose and function and reasoned that those duties were, thus, not "United States import duties" under § 1677a(c)(2)(A). *Id.* at 1361–62. The Federal Circuit upheld the Government's interpretation as "clearly reasonable." *Id.* at 1366.

This court finds the reasoning in *Dynacraft* and *Wheatland* instructive in this case. Here, like in those cases, the court is asked to construe the open-ended word "duties" to include all types of duties. However, the *Dynacraft* and *Wheatland* cases counsel that the meaning of "duties" is not necessarily so expansive and that it may be appropriate to distinguish between duties. Such a distinction is necessary here. Antidumping duties were created over 120 years after § 580's enactment, are meaningfully different from the customs duties existing in 1799, and have long been treated as meaningfully differ-

ent by Congress, courts, and the Government.[7] For these reasons, the court cannot conclude that Congress in 1799 clearly would have intended § 580 to extend to all duties, no matter how distinct. *See Newman*, 109 U.S. at 138. Accordingly, § 580 interest is not available to the Government in this action.

B. The Government is entitled to equitable interest

Although the Government cannot receive interest under § 580, the Government is entitled to equitable prejudgment interest. Prejudgment interest is premised on the idea that it is "inequitable and unfair for the government to make an interest-free loan . . . from the date of final demand to the date of judgment." *United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987); *see also West Virginia v. United States*, 479 U.S. 305, 310–11 n.2 (1987) (affirming award "to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered"). Therefore, the "principle of full compensation" underlies prejudgment interest awards. *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1368 (Fed. Cir. 2005); *accord City of Milwaukee v. Nat'l Gypsum Co.*, 515 U.S. 189, 195 (1995).

An award of equitable interest in this case raises two primary issues: (1) whether interest may accrue against AHAC absent a showing of bad faith or dilatory conduct, and (2) whether the court must balance relative equities before awarding interest. For the following reasons, the court finds that AHAC did not need to exhibit bad faith to be liable for equitable interest beyond its bond limit. The court also finds that equity favors awarding the Government prejudgment interest from the due date of the second demand on AHAC.

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[7] Despite these well-established differences, the Government would have the court read § 580 to apply to antidumping duties by implication. In other words, because Congress has sometimes used the word "duties" to refer to all types of duties, the Government asserts that § 580's language should similarly apply to all duties. *See* Pl.'s Resp. Br. 9–11. In the Government's view, Congress could have repealed § 580 or exempted duties from its coverage had it intended a different result, but it did not. Pl.'s Br. 22.

The court disagrees. Initially, the Government's argument is undercut by its own assertion in *Wheatland* that "duties" does not necessarily mean all duties. Moreover, the Government's argument relies on congressional *inaction* —a particularly weak tool for ascertaining congressional intent. *See Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003). Lastly, the court is not asked to decide whether Congress has ever used the word "duties" to refer to all types of duties. Rather, the court must decide whether to interpret § 580 beyond its initial reach absent persuasive indication that Congress clearly would have intended that result.

i. *AHAC is liable for equitable prejudgment interest in excess of its bond limit*

Regarding the first issue, sureties are normally liable only for duties, fees, and interest up to the bond limit. *See United States v. Wash. Int'l Ins. Co.*, 25 CIT 1239, 1241–42, 177 F. Supp. 2d 1313, 1316 (2001). However, sureties may be answerable for interest beyond that limit for "their own default in *unjustly* withholding payment after being notified of the default of the principal." *United States v. U.S. Fid. & Guar. Co.*, 236 U.S. 512, 530–31 (1915) (emphasis added); *accord Ins. Co. of N. Am. v. United States*, 951 F.2d 1244, 1246 (Fed Cir. 1991).

The parties disagree about when a surety's failure to pay becomes unjust. AHAC argues that equitable interest beyond the bond limit is available only when the surety exhibits bad faith or dilatory conduct. Def.'s Br. 13–14 (citing *Wash. Int'l*, 25 CIT at 1243, 177 F. Supp. 2d at 1318). The Government maintains that misconduct is not a precondition to an award of equitable interest here. *See* Pl.'s Resp. Br. 15–17 (citing *United States v. Canex Int'l Lumber Sales Ltd.*, Slip Op. 11–98, 2011 WL 3438870 (CIT Aug. 5, 2011); *United States v. Millenium Lumber Distrib. Co.*, 37 CIT __, 887 F. Supp. 2d 1369 (2013)).

When addressing the accrual of prejudgment interest in excess of a surety's bond limit, the Federal Circuit has held that "if a surety delays payment beyond proper notification of liability, interest accrues on the debt." *Ins. Co. of N. Am.*, 951 F.2d at 1246 (interpreting the "unjustly withholding" language from *U.S. Fid. & Guar. Co.*). As a result, the court finds that AHAC need not have exhibited bad faith to be liable for interest beyond its bond limit. Rather, the dispositive fact here is that AHAC did not pay following the Government's proper demand on the continuous bond, thereby depriving the Government of the ability to use the withheld funds. That failure exposes AHAC to potential interest liability in excess of its bond limit.

ii. *The court finds that an award of prejudgment interest is warranted here*

However, case law is less clear regarding whether prejudgment interest should be awarded *automatically* after a surety's default or whether the court must first balance equities. *See Princess Cruises, Inc.*, 397 F.3d at 1368 ("The degree to which the trial court is to balance equitable factors to determine whether to award prejudgment interest is not easy to discern from the case law."). Earlier Supreme Court case law suggested that prejudgment interest turned on a balancing of relative equities. For instance, in *Blau v. Lehman*, 368 U.S. 403, 414 (1962), the Supreme Court noted that "'interest is

not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.'" (quoting *Bd. of Comm'rs of Jackson Cty. v. United States*, 308 U.S. 343, 352 (1939)).

However, in the years since *Blau*, the Supreme Court has moved towards a "general rule" that prejudgment interest is available "subject to a limited exception for 'peculiar' or 'exceptional' circumstances." *Nat'l Gypsum Co.*, 515 U.S. at 195 (noting, in a maritime case, that full compensation is the "essential rationale" for awarding prejudgment interest). Indeed, in a case involving a contractual dispute between West Virginia and the Federal Government, the Court explicitly rejected a balancing of the equities approach when awarding prejudgment interest to the Government. *West Virginia*, 479 U.S. at 311 n.3. The Court did note, though, that other equitable considerations like laches might bar a valid claim for interest. *Id.* In *Kansas v. Colorado*, 533 U.S. 1, 13–14 (2001), the Court similarly suggested that prejudgment interest is now "imposed as a matter of course" without balancing the equities.

Although case law diverges on what equitable factors the Court should consider in awarding prejudgment interest, it is clear that full compensation should be the court's overriding concern. It appears that not awarding equitable prejudgment interest would be aberrational and due to exceptional circumstances. In this case, AHAC believes that such exceptional circumstances exist because (1) the Government delayed in bringing suit, (2) AHAC raised good faith defenses to liability, and (3) Customs did not timely liquidate the subject entries. Def.'s Br. 15–17; Def.'s Resp. Br. 5–8. But those reasons do not demonstrate that equitable interest is inappropriate here.

While the Government's delay in bringing suit may justify limiting or declining to award interest, the Government did not excessively delay instituting the instant action. *See United States v. Reul*, 959 F.2d 1572, 1578–79 (Fed. Cir. 1992) (noting that the Government's "laxness" in bringing an action may factor into an equity analysis); *West Virginia*, 479 U.S. at 311 n.3 (citing doctrine of laches). Although the Government waited until close to the expiration of the statute of limitations, AHAC had no reason to believe that the Government had abandoned its claim, nor does it pinpoint any prejudice that it suffered as a result of the delay. AHAC does not argue, for instance, that it was unable to successfully defend itself in the Government's action.

The fact that AHAC raised good-faith defenses to liability also does not constitute "an extraordinary circumstance that can justify deny-

ing prejudgment interest." *See Nat'l Gypsum Co.*, 515 U.S. at 198. As the Supreme Court noted in a maritime case, "the existence of a legitimate difference of opinion on the issue of liability is merely a characteristic of most ordinary lawsuits." *Id.* at 198. Indeed, if the court were to award prejudgment interest only when confronted with bad faith claims, the prevailing party would rarely be fully compensated.

Finally, the court likewise disagrees that Customs' erroneous reliquidations bar equitable interest, even though the court generally should "refrain from action which unnecessarily countenances regulatory breaches." *See United States v. Angelakos*, 12 CIT 515, 518, 688 F. Supp. 636, 639 (1988). The Government only seeks interest from the second Formal Demand on the Surety, which AHAC received after the erroneous June 2005 reliquidations. *See* Transcript of Oral Argument 6, ECF No. 49. This actually benefits AHAC because AHAC's bond limit was already exhausted after the June 2004 reliquidations, and AHAC ultimately could have been liable for prejudgment interest accruing after the first Formal Demand on the Surety pursuant to the June 2004 liquidations. Thus, the court finds that commencing interest after the second Formal Demand on the Surety became due strikes a fair balance between the parties.

In sum, equity favors awarding the Government interest in this action. The court, thus, awards prejudgment interest at a rate set forth in 26 U.S.C. § 6621, commencing from the due date of the second Formal Demand on the Surety. The court also awards postjudgment interest at a rate set forth in 28 U.S.C. § 1961 "based on the same considerations of equity and fairness." *United States v. C.H. Robinson Co.*, 36 CIT __, __, 880 F. Supp. 2d 1335, 1348 (2012); *see also United States v. Great Am. Ins. Co. of New York*, Nos. 2012–1462, 2012–1473, 2013 WL 6820678, at *3 (CAFC Dec. 27, 2013) (extending 28 U.S.C. § 1961 to this Court even though it is expressly applicable to only district courts).

CONCLUSION

For the foregoing reasons, the court grants in part and denies in part the Government's motion for summary judgment. The Government's motion is granted with respect to the issue of AHAC's liability under continuous bond number 270114235. Regarding the Government's interest claims, the court grants the Government's claim for equitable pre- and post-judgment interest, but denies the claim for statutory interest under 19 U.S.C. § 580. Judgment will enter accordingly.

Dated: January 23, 2014
New York, New York

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

Slip Op. 14–8

LG ELECTRONICS, INC. AND LG ELECTRONICS USA, INC., Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant.

Before: Claire R. Kelly, Judge
Consol. Court No. 13–00100

[Order denying Plaintiffs' motion to sever and stay a single count in their complaints.]

Dated: January 23, 2014

Daniel L. Porter, *James P. Durling*, *Christopher Dunn*, *Ross Bidlingmaier*, *Matthew P. McCullough* and *Claudia Hartleben*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for Plaintiffs LG Electronics, Inc. and LG Electronics USA, Inc.

Donald B. Cameron, *Julie C. Mendoza*, and *R. Will Planert*, Morris, Manning & Martin, LLP, of Washington, D.C., for Consolidated-Plaintiffs Electrolux Home Products Corp., N.V. and Electrolux Home Products, Inc.

Karl S. von Schriltz, Attorney-Advisor, U.S. International Trade Commission, of Washington, D.C., for Defendant. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Jack A. Levy, *Myles S. Getlan*, *James R. Cannon Jr.*, *John D. Greenwald*, and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor Whirlpool Corporation.

MEMORANDUM AND ORDER

Kelly, Judge:

Plaintiffs' Joint Motion to Sever a Single Claim and to Stay the Severed Claim ("Joint Motion to Sever and Stay") is denied.

Plaintiffs brought this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2006)[1] and 28 U.S.C. § 1581(c) (2006)[2] for judicial review of the U.S. International Trade Commission's ("ITC") final material injury determination in the antidumping and countervailing duty investigations of *Large Residential Washers From Korea and Mexico*, 78 Fed. Reg. 10,636 (ITC Feb.

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

[2] Further citations to Title 28 of the U.S. Code are to the 2006 edition.

14, 2013) (final determination); [3] Am. Compl. ¶ 1–2, Sept. 3, 2013, ECF No. 34 ("LG's Am. Compl."); Am. Compl. ¶ 1–2, Nov. 14, 2013, ECF No. 50 ("Electrolux's Am. Compl.").

After filing their initial complaints, Plaintiffs separately filed unopposed motions for leave to amend their complaints to include a count challenging the ITC injury determination on grounds that the determination was based on allegedly incorrect factual findings made by the U.S. Department of Commerce ("Commerce"). *See* Pls.' Mot. to Amend Compl., Aug. 30, 2013, ECF No. 31; Electrolux Home Products Corp., N.V. Mot. to Amend Compl., Nov. 13, 2013, ECF No. 45 (collectively "Motions to Amend"). The court granted these unopposed motions. *See* Order, Sept. 3, 2013, ECF No. 33; Order, Nov. 14, 2013, ECF No. 49. On August 30, 2013, Plaintiffs moved to stay these proceedings pending the final resolution of the appeals of the Commerce antidumping and countervailing duty determinations covering the subject merchandise. *See* Pls.' Mot. to Stay 8, Aug. 30, 2013, ECF No. 32; *see also Samsung Elecs. Co. v. United States*, Consol. Court No. 13–00098 (CIT filed Mar. 14, 2013); *Samsung Elecs. Co. v. United States*, Court No. 13–00099 (CIT filed Mar. 14, 2013) (collectively "Commerce Department Cases"). This motion was denied. *See LG Elecs., Inc. v. U.S. Int'l Trade Comm'n*, Slip Op. 13–136, 2013 WL 5943229 (CIT Nov. 6, 2013).

Plaintiffs now move to sever the counts they added through their Motions to Amend and stay those counts pending final resolution of the Commerce Department Cases. *See* Joint Mot. to Sever, Nov. 25, 2013, ECF No. 56. In Plaintiffs' Joint Motion to Sever and Stay, Plaintiffs argue that "it is impossible for these . . . claims to be meaningfully heard *now*." *See Id.* at 6.

The court declines to sever Plaintiffs' amended counts challenging "the Commission's injury conclusions [as] premised upon incorrect factual findings by the Commerce Department," LG's Am. Compl. ¶ 46,[4] which Plaintiffs allege "materially affected the Commission's

[3] The views of the International Trade Commission finding material injury to the domestic industry are published in *Certain Large Residential Washers From Korea and Mexico*, USITC Pub. No. 4378, Inv. Nos. 701-TA-488 and 731-TA-1199–1200 (Feb. 2013) (final).

[4] LG's added count states:

Count 7: The Commission's Determination Is Premised Upon Incorrect Factual Findings by The Commerce Department

43. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 8.

44. There is no question that the Commission's conclusions were premised upon the Commerce Department's factual findings rendered in the Commerce Department antidumping and countervailing duty determinations.

analysis . . . ." Electrolux's Am. Compl. ¶ 19.[5] Granting a motion to sever is committed to the discretion of the court. *Generra Sportswear, Inc. v. United States*, 16 CIT 313, 315 (1992). The court considers the following factors when deciding whether to sever a count: "the totality of the facts and circumstances of the case; whether factual and legal distinctions exist to justify the severance; the potential prejudice to the opposing party; whether severance will promote judicial economy through a savings of time and expense to the parties and the court; and whether severance will promote the interests of justice."[6] *Id.* at 315.

Here, the totality of the facts and circumstances of the case weigh against severing the amended counts. The amended counts ask the court to invalidate the ITC's determination because it was based upon

45. However, the Commerce Department's antidumping and countervailing duty determinations were themselves the product of incorrect analysis and conclusions that have now been challenged in this court.

46. And so, because the Commission's injury conclusions were premised upon incorrect factual findings by the Commerce Department that materially affected the Commission's analysis, the Commission's determination is not supported by substantial evidence on the record and is otherwise contrary to law.

LG's Am. Compl. ¶ 43–46.

[5] Electrolux's added count states:

COUNT 4

18. Plaintiffs herein incorporate by reference paragraphs 1–17 of this complaint.

19. The Commission's conclusions in its *Final Determination* were premised upon Commerce's factual findings rendered in its antidumping and countervailing duty determinations regarding Large Residential Washers from Korea and Mexico. However, Commerce's antidumping and countervailing duty determinations were themselves the product of incorrect analysis and conclusions that have now been challenged in this court. Therefore, because the Commission's cumulated injury finding was premised upon incorrect factual findings by Commerce that materially affected the Commission's analysis, the Commission's determination was not supported by substantial evidence and was otherwise not in accordance with law.

Electrolux's Am. Compl. ¶ 18–19.

[6] All of the parties cite *Generra Sportswear* as supplying factors for the court to consider in determining whether to grant severance. Joint Mot. to Sever 5; Opp. Def. USITC to Pls.' Mot. to Sever 2, Dec. 16, 2013, ECF No. 64; Whirlpool's Opp. to Joint Mot. to Sever 3, Dec. 16, 2013, ECF No. 65. The court notes that *Generra Sportswear* involved a different issue and procedural posture. In *Generra Sportswear*, the plaintiffs brought claims challenging the appraisal of 325 entries of merchandise challenged through 86 protests. *Generra Sportswear*, 16 CIT at 313. The appraisal question at issue involved whether Customs should appraise merchandise based upon the manufacturer's or the middleman's invoice. At the time the case was brought there were over 50 other cases before the court involving the same issue. The parties in *Generra Sportswear* sought to simplify the case to "permit the court to focus on the core question of law" by severing the claim and designating it as a test case under which other cases could be suspended. *Id.* at 316. The instant case is a trade case, will not involve the test case procedure, and is sought for the purposes of obtaining a stay. Nonetheless the court finds the *Generra Sportswear* factors helpful in analyzing whether it should exercise its discretion to sever for the purpose of granting a stay.

"incorrect factual findings by Commerce." *See* Joint Mot. to Sever 3. But the amended counts assume a reality that is still just a wish at this point. The record that the ITC reviewed is the one that Congress directed it to review. *See* 19 U.S.C. § 1677(35)(C)(ii). Congress has mandated that in its impact analysis, the ITC shall evaluate all relevant factors including the magnitude of the margin of dumping. *See* 19 U.S.C. § 1677(7)(C)(iii)(V). Moreover, Congress directed the ITC to use the magnitude of the margin of dumping "most recently published by [Commerce] prior to the closing of the [ITC's] administrative record." 19 U.S.C. § 1677(35)(C)(ii). Further clarifying the meaning of the statute, Congress, in the SAA, stated that absent 19 U.S.C. § 1677(35)(C), the ITC's "determinations could be subject to repeated requests for reconsideration or judicial remands," thereby causing "[t]he finality of injury determinations [to] be seriously compromised." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 851 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4184 ("SAA"). Congress did not want ITC determinations to be held in abeyance to await appeals of Commerce determinations.

Plaintiffs' argument is based upon the notion that there may come a time when Commerce will have to reconsider its determinations and, in doing so, it may render new determinations that could affect the ITC's determination. Those new determinations, if they ever come to pass, would replace the hypothetically-incorrect determinations. *See* Joint Mot. to Sever 3–4. However, the fact that there may come a time when Commerce reconsiders its determinations is a matter that was specifically contemplated by Congress, which required that the ITC conduct its impact analysis based upon the most recent Commerce determination. *See* SAA at 4184 (discussing the impact on the finality of injury determinations if the ITC were required to "amend or revisit its determination each time the administering authority modified its dumping margin[]" and noting the availability of "changed circumstances review" as a possible avenue of relief). Moreover, as explained in this court's prior order, Plaintiffs' claim is still speculative. *LG Elecs., Inc.*, 2013 WL 5943229, at *3 ("The problems for plaintiffs are the speculative nature of their argument and the duration of the proposed stay."). Thus, the totality of the circumstances do not weigh in favor of severing the amended counts.

Moreover, there are no factual or legal distinctions that justify a severance of the amended counts. The Plaintiffs' amended complaints add a claim that the ITC determinations were "premised upon Commerce's factual findings . . . [that] were themselves the product of incorrect analysis and conclusions that have now been challenged in

this court." Electrolux's Am. Compl. ¶ 19.[7] Thus, the Plaintiffs argue that "the ITC's final affirmative determination in the Large Residential Washers case is unlawful because the analysis wrongly included the volumes, prices, and impact on domestic producers of imports . . . ." Joint Mot. to Sever 1–2.[8] The other counts in Plaintiffs' complaints also challenge the ITC's findings regarding volume, price and impact.[9] While the amended counts may be distinct from the initial counts there are no factual or legal distinctions that justify severance. The court's role on review is the same for the initial counts and the amended counts. The court must review whether the ITC's determination is supported by substantial evidence and in accordance with law. This was not the case in *Generra Sportswear* where "[s]everance [] provide[d] the parties and the court with a manageable case having a simple fact pattern and a concise statement of the question of law, and [] promoted a speedy and effective method for the resolution of the issues." *Generra Sportswear*, 16 CIT at 317. Nothing about the factual or legal issues make this case unmanageable now. Plaintiffs would like the court to construe the amended counts as distinct and worthy of severance because in order to pursue the amended counts they first need Commerce's determinations in the Commerce Department Cases to be set aside or at the very least changed significantly. Joint Mot. to Sever 8 ("This claim is based entirely on the outcome of LG's and Samsung's appeals of Commerce's dumping findings and Samsung's appeal of Commerce's countervailing duty findings."). This prerequisite does not make the nature of Plaintiffs' claims different from the other counts in their complaints, it only makes the amended counts more speculative. Thus, there are no factual or legal distinctions between the amended counts and the other counts in the complaint that warrant severance.

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[7] LG similarly challenges "the Commission's injury conclusions [as] premised upon incorrect factual findings by the Commerce Department." LG's Am. Compl. ¶ 46.

[8] Plaintiffs reason that if the appeals in the companion Commerce Department Cases "result in Samsung's exports being determined not to have been dumped or subsidized above *de minimis* levels, then Samsung's exports should properly be excluded from the . . . imports that the ITC examines in determining injury." Joint Mot. to Sever 8. Plaintiffs argue that if this is the case, the ITC's injury finding is "based on a fundamentally flawed analysis that includes volume, price, and impact information pertaining to Samsung and, therefore, remand is appropriate." *Id.* at 4.

[9] *See, e.g.*, Electrolux's Am. Compl. ¶¶ 13, 17 (challenging the "[ITC]'s finding that the volume and the increase in volume of cumulated subject imports were significant" and, the "[ITC]'s finding that subject imports had a significant adverse impact on the domestic industry"); *see also* LG's Am. Compl. ¶¶ 16, 21, 29 ("the [ITC] selectively disregarded data for the first half of 2012, including data demonstrating a reduced volume of imports," "[i]n its analysis of price effects in the *ITC Report*, the [ITC] failed properly to consider relevant evidence," and "[ITC] failed properly to analyze data underlying its impact analysis.").

As to whether severance will cause prejudice, Plaintiffs seek to sever their claims, not to establish a test case as in *Generra Sportswear*, but to obtain a stay. The question of prejudice relates to the ultimate request for a stay. The movant for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay" will prejudice another. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). Defendant argues that staff changes at the agency during the stay will make it more difficult for the agency to defend its determination. *See* Opp. Def. USITC to Pls.' Mot. to Sever 7; *see also* Whirlpool's Opp. to Joint Mot. to Sever 9. Admittedly, agency personnel often change throughout the course of proceedings and "determinations must be made on the basis of the administrative record." Joint Mot. to Sever 11. Nonetheless, there is prejudice in delay. *See Neenah Foundry Co. v. United States*, 24 CIT 202, 205 (2000). The administrative record is complex and staying even this one count for each Plaintiff would prevent a final judgment on the agency determination.

Even if the court were to find the absence of prejudice here the court would not sever and stay these counts as Plaintiffs have failed to show how what they seek "would promote judicial economy and efficiency rather than delay this case." *Giorgio Foods, Inc. v. United States*, Slip Op. 13–14, 2013 WL 363312, at *2 (CIT Jan. 30, 2013). Courts should avoid the inefficient use of resources. *See e.g.*, *Thomas v. Arn*, 474 U.S. 140, 148 (1985). Here, Congress specifically considered judicial efficiency by providing for the "finality of injury determinations." *See* SAA at 4184. Severing and staying the amended counts would directly contravene Congress's efforts to establish finality and conserve judicial resources. Here, Plaintiffs take a very narrow view of judicial economy to argue that they may save time and money if they can wait to *see* how the Commerce Department Cases resolve themselves. Congress took a broader view of judicial economy when it made clear that resources would not be wasted on "repeated requests for reconsideration or judicial remands." SAA at 4184.

For similar reasons severance does not promote the interest of justice. Congress has provided a framework that specifically addresses the possible events for which Plaintiffs hope. The court will assume that Congress's specifically designed framework is meant to promote the interests of justice unless there is some reason to believe it will not. Here, Plaintiffs offer no such reason. Even if Plaintiffs are correct and Commerce alters its determination, the parties will not be left without a remedy. Plaintiffs may have a true *Borlem* claim de-

pending on when the Commerce Department Cases are resolved. *See Consolidated Fibers, Inc. v. United States*, 32 CIT 855, 864–65, 574 F. Supp. 2d 1371 (2008).[10] If the Commerce Department Cases go as they hope, and the timing does not allow for a *Borlem* claim, Plaintiffs can pursue a changed circumstances review. *See* 19 U.S.C. § 1675(b); *see also Consolidated Fibers, Inc.*, 32 CIT at 865, 574 F. Supp. 2d at 1381. The court understands that the remedy provided by a changed circumstances review is not what Plaintiffs prefer. *See* Joint Mot. to Sever 9 n.2 (arguing that a changed circumstances review "is completely different from what Plaintiffs seek in this appeal," and that "[a] court appeal of an original ITC injury determination is not the same, nor even effectively the same, as seeking relief pursuant to a changed circumstances review."). But that is what Congress has given them and it is not unjust.

In light of the foregoing factors the court finds that it would not be appropriate to sever the amended counts and, therefore, there is no need to revisit the Plaintiffs' desire for a stay.

CONCLUSION AND ORDER

Therefore, upon consideration of Plaintiffs' Motion to Sever and Stay, and responses thereto, and all papers and proceedings herein, and upon due deliberation, it is hereby:

ORDERED that Plaintiffs' Motion to Sever and Stay is denied.

Dated: January 23, 2014
New York, New York

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

[10] In *Borlem S.A. Empreedimentos Industriais*, the court determined the record upon which the ITC based its determination contained erroneous facts and, therefore, had discretion to order the ITC to revisit its injury determination in light of the corrected record, which "may lead to a different result." *Borlem S.A. Empreedimentos Industriais v. United States*, 913 F.2d 933, 939 (Fed. Cir. 1990). The ITC argued the statute required the agency to base its determination on the original record promulgated by Commerce because to do otherwise would be to violate the statutory time limits, a line of reasoning the court rejected. *Borlem S.A.*, 913 F.2d at 938.