U.S. Customs and Border Protection

Slip Op. 14–144

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, and VINH HOAN CORPORATION, VINH QUANG FISHERIES CORPORATION, H&N FOODS INTERNATIONAL, and VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS DEFENDANT-INTERVENORS.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00109

[Sustaining remand results on sixth antidumping duty administrative review of frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: December 18, 2014

Valerie A. Slater, *Jarrod M. Goldfeder*, *Nazakhtar Nikakhtar*, and *Nicole M. D'Avanzo*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

Ryan M. Majerus, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel was *David W. Richardson*, Attorney-International, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Matthew J. McConkey and *Jeffrey C. Lowe*, Mayer Brown LLP, of Washington DC, for defendant-intervenor Vinh Hoan Corporation.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington DC, for defendant-intervenors Vinh Quang Fisheries Corporation and H&N Foods International.

Mark E. Pardo and *Andrew T. Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington DC, for defendant-intervenor Vietnam Association of Seafood Exporters and Producers.

OPINION

Musgrave, Senior Judge:

This opinion considers the results of redetermination ("*Redetermination*" or "RR") of *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15941 (Mar. 22, 2011), PDoc 246 ("*Sixth Review*") from the International Trade Administration, United States Department of Commerce ("Commerce"). *See generally* Slip Op. 1363 (May 23, 2013). The plain-

tiffs, Catfish Farmers of America, *et alia*, petitioners in the administrative proceeding, argue for further remand on several grounds. On different grounds, the defendant-intervenors, Vinh Hoan Corporation, *et alia*, respondents before Commerce, also argue for further remand. For the following reasons, however, the *Redetermination* will be sustained.

I. *Background*

As previously described, the primary dispute is over Commerce's surrogate valuation ("SV") of the respondents' factors of production ("FOPs").[1] *See* 19 U.S.C. §1677b(c)(1). The analysis of the record's information thereon as a whole was remanded for reconsideration and/or clarification. In the *Redetermination*, Commerce's surrogate country selection again resolved to analysis of the information available for Bangladesh versus the Philippines. The dispute here continues to focus upon the extent to which the Bangladesh Department of Agricultural Marketing ("DAM") data and the Philippine Bureau of Aquaculture Statistics ("BAS") data satisfy the "broad market average" and "specificity" SV factors.

Commerce had also requested remand to address an omission regarding an allegation of subsidies for Gemini Sea Food, upon whose Bangladeshi financial data Commerce had relied, as well as reconsideration of the SV for fish waste. For the fish waste, the *Sixth Review* had relied upon import statistics for the Philippines as opposed to specific price quotes from Vitarich Corporation, a Philippine

[1] As previously discussed, Commerce must use "the best available information" from the appropriate market-economy country to value FOPs. 19 U.S.C. §1677b(c)(1). In selecting the appropriate SV, Commerce considers whether it is: (1) publicly available, (2) contemporaneous with the period of review ("POR"), (3) represents a broad market average, (4) chosen from an approved surrogate country, (5) is tax and duty-exclusive, and (6) specific to the input. *See*, *e.g.*, RR at 4, referencing *First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 75 Fed. Reg. 64695 (Oct. 20, 2010), and accompanying issues and decision memorandum ("IDM") at cmt. 3. Commerce explained that these considerations are not hierarchical and that the "best" available SV information for each input is a product- and case-specific determination. *Id*., referencing *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 Fed. Reg. 40477 (July 17, 2006), and accompanying IDM at cmt. 1; *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 19546 (Apr. 22, 2002), and accompanying IDM at cmt. 2. The parties do not dispute the underlying determinations in the *Sixth Review* that Bangladesh and the Philippines are economically comparable and significant producers of comparable merchandise, and it is further undisputed that the Philippine BAS data and the Bangladeshi DAM data satisfy factors (1), (2), (4) and (5). Commerce thus continued to find that both sources are publicly available, contemporaneous with the POR, from an approved surrogate country, and tax and duty exclusive.

fish and seafood processor. In addition, SVs for broken meat and fish skins were also remanded, since the Vitarich quote was bound to those analyses as well.

With respect to specific questions previously posed by the court, on remand Commerce vacated its prior finding that the Philippine BAS data were unsuitable due to alleged data volatility, vacated its prior finding that alleged differences in BAS prices rendered the Philippine source unsuitable, and accounted for changes in inventory in the surrogate financial ratio calculations of data for Fine Foods Ltd., a Bangladeshi integrated processor of seafood. Regarding the SV for the whole fish FOP, Commerce also continued to consider both the Philippines' BAS and Bangladesh's DAM data to represent "official statements" of those governments as to the price of whole live fish relevant to surrogate country selection.

Considering the BAS data in isolation, Commerce again observed that they covered various seafood products of 81 provinces, represented sampling selected from both top-producing provinces and less significant-producing provinces, represented a grand total of 47.14 MTs of *Pangasius* production for two full years, *i.e.*, 0.08 percent of Bangladeshi production for a single year and less than 0.001 percent of total Philippine aquaculture production. RR at 5. Commerce also noted that the Philippines Secretary of Agriculture described the Philippines *Pangasius* industry, in a letter submitted one year and four months after the POR, as being provided extensive support, having high production costs, limited in production and sales, and still in its incipient stage and considered an infant industry. *Id*. at 5–6. Commerce also concluded from the BAS survey forms that the *Pangasius* industry is not well-established, as *Pangasius* is not one of the types of fish listed on the forms and must be written in separately. *Id.* at 6.

In the end, although Commerce "do[es] not question the validity of the BAS sampling methodology as a whole", and the question being whether the data source represents the best information available for SV purposes given the information of record, Commerce identified as an "underlying problem" that there is no explanation on the record on how the BAS filled apparent "gaps" in the data.[2] Commerce thus

[2] Commerce observed that in terms of methodology, the BAS national estimates rely on the previous year's data, of which there are none for *Pangasius* in the majority of the provinces in 2008. For example, the production figure in 2008 for the Isabela province was 3.51 MT, but according to Commerce's interpretation of the BAS methodology, this estimate was based on "inflating" the 2007 Isabela "production estimate." That estimate was zero. None of the provinces reported *Pangasius* production in 2007, so the BAS could not have relied on another province's production as a proxy; therefore, Commerce found it unclear exactly how the BAS inflated the 2007 "zero" production to produce the 2008 estimated production levels

concluded unclear the degree to which the estimated total *Pangasius* production figures provided in the BAS data are a reliable indicator of the country's production in this instance, and therefore determined that the BAS data for *Pangasius* do not represent a broad market average suitable for SV purposes. *Id*.

Considering the DAM data, through juxtaposition against the BAS data, Commerce found them to represent a broad market because they are "a fuller set" than the BAS data and reliable because they were "collected using a scientific method". Specifically, Commerce found the DAM data a "fuller set" than the BAS data because (a) the DAM data were collected using direct weekly price observations, from each district, covering the exact POR, whereas the BAS data are extrapolated estimates of total production, (b) *Pangasius* data were a category specifically collected by DAM whereas the BAS data relied on users to input "*Pangasius*" under a general "Other" category, and (c) the DAM data contained data points for 91.43 percent of Bangladesh's districts (64 out of 67 districts) covering 2,828 weekly price reports during the precise period of the POR, whereas the BAS coverage was more geographically limited. *Id*. at 8.

Addressing the issues raised in the prior opinion, Commerce provided (1) elaboration on past cases in which Commerce faced similar factual circumstances, where, despite its preference for data containing volume and value information, it used data to value major inputs absent such information (such as the DAM data here); (2) clarification of how the data would be representative of commercial quantities of whole fish sales; (3) consideration of the size of the DAM data as a factor as well as its prior statement that the Philippine sampling methodology does not provide statistically equivalent representation in comparison; and (4) consideration of the plaintiffs' contention that there is no record evidence that links the DAM data and the *Fisheries Statistical Yearbook* of Bangladesh (relied upon to demonstrate the size of Bangladesh's *Pangasius* production) or any other basis for assuming that the DAM 2008–09 data cover more sales or quantities than the Philippine national statistics; and (5) consideration of the affidavits submitted by the plaintiffs concerning DAM's price data collection methodology.

On the first three points, above, Commerce found the lack of quantity information associated with the DAM data insignificant after analogizing the situation to the Indian JPC data for steel wire rod

for all the provinces or inflated to produce the 2009 estimated production levels for five of the eight provinces covered by such data. RR at 6–7.

data used in *Nails* and *Hangers*[3] (*i.e.*, price data with no underlying values or volumes) and after finding the DAM price data represent "systematic, national-level price monitoring" that is specific to the same *Pangasius* species at issue and collected by a government agency and maintained on a regular basis. *Id*. at 8–9. Given that whole live *Pangasius* fish are a highly perishable product, and also given the scope, coverage, and frequency of collection of the DAM data, Commerce reasoned that the DAM data do not represent insignificant quantities when considered alongside the fact that the *Pangasius* market totaled 59,474 MTs during this period. *Id*. at 9.

Regarding the argument of a lack of a direct link between the DAM data and the *Fisheries Statistical Yearbook* of Bangladesh, Commerce found that data do not have to be all from the same source to provide useful, reliable government-generated information, and that the lack of direct linkage is unsurprising since the Government of Bangladesh collected them for different purposes --one to report on weekly market prices, and the other to report on overall annual country-wide production. *Id*. at 9. Commerce thus reasoned that the DAM data represent a fuller set of data and thus a broad market average as compared to the BAS data, because the DAM data as a whole represent national-level governmental-price monitoring/reporting and cover numerous commodities for the POR, one of which was specifically the *Pangasius* fish species at issue, and because corresponding national production data from the same government for nearly the exact same period show overall production of 59,474 MTs, which is "more than enough to supply any Respondents' production requirements." *Id*. Moreover, Commerce reasoned, Bangladeshi *Pangasius* production represents 6.52% of total national aquaculture production, the fifth largest overall among all products, and its *Pangasius* industry became "well established" after 1998. *Id*.

Lastly, on the three affidavits submitted by the plaintiffs concerning the DAM data for the *Sixth Review*, Commerce determined that even according them "weight," the statements on the letters from Bangladeshi officials are "more reliable," as they appear on official letterhead and were "given as part of performing in their official capacity". *Id*. at 10. Thus, Commerce determined, from "the totality of the above evidence," that the DAM data satisfy the broad market average requirement "to a significantly greater degree" than the BAS

[3] *Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 33977 (June 16, 2008) (final LTFV determination), and accompanying IDM (June 6, 2008); *Steel Wire Garment Hangers from the People's Republic of China*, 73 Fed. Reg. 47587 (Aug. 14, 2008) (final LTFV determination), and accompanying IDM (Aug. 7, 2008).

data, and after "further evaluating" the record evidence as a whole, Commerce determined, again, that Bangladesh is the best surrogate country option for the SV of the respondents' FOPs. *Id*. *See also id.* at 17.

Commerce also determined to select different SVs for the broken meat, fish skin, and fish waste by-products,[4] RR at 18–19, and it found the presence of a "cash subsidy" in Gemini's financial statements insufficient to render them unsuitable for the purpose of calculating the surrogate financial ratios, *id*. at 19–21.

Commerce claims it thus accounted for all of the changes in the margin calculations and addressed the issues raised on remand with respect to the ministerial error allegations. The resulting antidumping margin for respondent Vinh Hoan Corporation ("Vinh Hoan") was $0.06 per kilogram, which would also be the margin for those companies not individually examined but receiving a separate rate if the results of redetermination are sustained and amended final results are issued. For the voluntary respondent Vinh Quang Fisheries Corporation ("Vinh Quang") and the new shipper review respondent Cuu Long Fish Joint Stock Company ("CL-Fish"), the margins were *de minimis*.

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[4] Regarding the prior opinion's observation with respect to the contribution of different FOPs to the margin calculation, by way of further background for purposes of this opinion Commerce explains in the *Redetermination* that the SV for whole fish dominates the decision of which surrogate country to select, given its overwhelming contribution to the cost of manufacturing and normal value ("NV"). RR at 3. Respondents in this POR overwhelmingly purchased whole live fish as opposed to farming it themselves, and therefore Commerce determined that purchased whole live fish are more important relative to other FOPs, of which Commerce generally considered the surrogate financial ratios to be a more important component of the margin calculation. *Id*. Commerce further explains that it generally prefers to average multiple usable financial statements where available and that Bangladesh has three usable financial statements versus the single one for the Philippines. *Id*. Thus, while the SV data for some secondary FOPs are more contemporaneous in the Philippines than the corresponding Bangladeshi data, Commerce did not place significant weight on that fact when rendering its overall decision on the surrogate country especially since it can inflate these values to make them current with the POR to mitigate against the non-contemporaneity of certain data. *Id*. Given all this, Commerce summarizes, the surrogate financial ratios are a more important component of the margin calculation for this POR than a "handful" of secondary FOPs that contribute minimally to the overall NV. *Id*. In addressing the plaintiffs' comments, Commerce rejected their argument that the value of the by-products should be added to the secondary non-fish FOP values before comparing the latter to NV to determine the percentage of these secondary FOPs of the NV on the ground that this addition would artificially skew the secondary FOP percentage upward because the NV has already been reduced by the amount of the by-product offset, *id*. at 25–26, and the plaintiffs do not contest this determination here.

II. *Discussion*

A. Incorporation By Reference

As an initial matter, the defendant objects to the plaintiffs' attempt to incorporate by reference its 88-page administrative comments on the draft *Redetermination* as an improper attempt to exceed the page limitation for filing comments on remand results.[5] The court agrees to an extent. The court's page limitation on briefs is not an invitation to incorporate by reference, and it is not the function of the court to develop the parties' arguments. Nonetheless, the administrative briefs are still part of "the record," and as such the court has a duty to examine them, for any necessary clarification, or concerning the extent of the fullness of that development. Arguments not specifically raised therein will either be disregarded or limited to the extent of their development.

B. DAM Data Public Availability Determination

The plaintiffs contest Commerce's public availability determination on the DAM data embodied by the worksheets of record. Commerce found the same or similar worksheets not publicly available during the subsequent seventh administrative review[6] because DAM did not respond to Commerce's repeated requests for information regarding how the DAM data is made available to the public and there was evidence of the plaintiffs' failed attempt(s) at collecting the purported public data directly from the relevant Bangladeshi government ministry. *See Seventh Review* at cmt. I.C. The plaintiffs attempted to submit that information for the record at bar, *see* Pets' Subm. dated Nov. 27, 2013, Rem. PDoc 9, which Commerce rejected on the ground that it contained unsolicited new factual information. Commerce Letter Rejecting Pets' Subm. dated Nov. 27, 2013, Rem. PDoc 10.[7] Quot-

[5] Def's Resp. at 2–3, referencing *United States v. Great American Insurance Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("[i]t is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived") (citation omitted); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1579, 1578, 659 F. Supp. 2d 1303, 1308 (2009) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" as "[i]t 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); *JBF RAK LLC v. United States*, 38 CIT ___, ___, 961 F. Supp. 2d 1274, 1283 (2014) ("[t]he court would in essence be litigating the issue for Plaintiff, something the court cannot do").

[6] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 77 Fed. Reg. 15039 (Mar. 14, 2012), and accompanying IDM (Mar. 7, 2012) ("*Seventh Review*").

[7] Commerce retained a copy of the rejected information in the administrative record and provided the plaintiffs the opportunity to resubmit with the identified data redacted,

ing *Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1736–37, 358 F. Supp. 2d 1236, 1243 (2004) for the proposition that "[e]vidence cannot be substantial if Commerce is aware that the conclusion it supports is false", the plaintiffs urge the court to consider that Commerce was undoubtedly aware of the subsequent seventh review determination while it was undertaking the *Redetermination*. Pls' Cmts at 7.

Pertinent to that proposition, however, the plaintiffs' interpretation of the more recent case of *Essar Steel Ltd. v. United States*, 678 F.3d 1268 (Fed. Cir. 2012) is unpersuasive. Referencing *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990), *Essar* affirms the general rule that in the absence of fraud or other such limited exception,[8] the finality attaching to an administrative determination must be respected, including the administrative record upon which the determination rests. In light thereof, the court is not persuaded that Commerce's public-availability determination during remand on the DAM worksheets was incorrect as a matter of substantial evidence or law involved abuse of discretion in the rejection of the plaintiff's attempted submission of information from the *Seventh Review* as "new" factual matter. Although the administrative record consists of "a copy of all information *presented to* or obtained by [Commerce] during the course of the administrative proceeding", 19 U.S.C. §1516a(b)(2)(A)(i) (italics added), Commerce's consideration extended only to pertinent factual information of record in deciding "that the letters from Bangladeshi officials, appearing on official letterhead and given as part of performing in their official capacity, are more reliable than affidavits that the plaintiffs procured for the specific purpose of being used in an antidumping duty proceeding" and that there was nothing on the record to "undermine[ ] their public availability". RR at 27. In other words, notwithstanding what Commerce "knew" or may have learned from its administration of the *Seventh Review*, its decision not to permit supplementation of the record with such information (or, rather, decline to consider such

which the plaintiffs did. *See* Pets' Admin. Cmts on the Draft Rem. dated Dec. 12, 2013, Rem. PDoc11.

[8] In *Borlem*, the court held that the International Trade Commission ("ITC") should reopen the record to reconsider its injury determination because of a Commerce-amended, less-than-fair-value ("LTFV") determination that changed a respondent's margin from affirmative to *de minimis*. 913 F.2d at 937. The LTFV determination, upon which the ITC relied when making its affirmative threat of injury determination, was found to be incorrect, and the ITC issued an amended determination. *Id*. The court identified that this change could have affected the ITC's injury determination, rendering it negative and, as a result, eliminating the possibility of the antidumping duty order. *Id*. at 937. *See also Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1379 (Fed. Cir. 2011) (addressing potential impact of fraud discovered in subsequent review upon prior completed, "final" review).

record-supplementation) was not improper. *See Essar*. Substantial evidence therefore supports Commerce's DAM data public availability redetermination.

C. "Broad Market Average" Finding

1. DAM Data

The plaintiffs contend Commerce's finding that the DAM data provide a broad market average is erroneous. They argue: that Commerce's emphasis on the "individual data points" within the DAM worksheets ignores the prior opinion's concerns on data set "fullness" and results in an unreasonable inference of a broad market average in the absence of any sales quantity information in the worksheets; that Commerce's characterization of the DAM data, as representing "weekly commercial quantities", RR at 32, is without factual support; that their "Hassan" affidavit refutes that the DAM data were "representative of [market] prices" and self-validating prior to publication; that Commerce did not address the other affidavits from Bangladeshi aquafarmers they submitted for the record; that Commerce's distinction of *Laizou Auto Brake Equipment Co. v. United States*, 32 CIT 711 (2008) and *Jinan Yipin Corp. Ltd. v. United States*, 35 CIT ___, 800 F. Supp. 2d 1226 (2011) and its analogy to *Nails* and *Hangers*, *supra*, for the proposition that the worksheets are reliable is inapposite; and that the statement of the DAM official the respondents obtained for the SV record, and upon which the agency relied, is the same statement that Commerce discredited in the *Seventh Review*.

On the last point, *see supra*, part "B". The defendant also contends that Commerce's determination that the DAM data represented a "fuller" data set than the BAS data is based on the fact that the DAM data represented 2,828 weekly price observations from 64 of 67 Bangladeshi districts that covered the period of review under examination, as compared with BAS data consisting of "only" 8 of 81 Philippine provinces at best that were extrapolated into estimates of total production. The defendant contends the fact that data for "*Pangasius*" were specifically included in the DAM data collection sheets but not specifically included in the BAS data, which relied upon a respondent's volunteering of "*Pangasius*" data under the BAS questionnaire's "other" category, bolsters Commerce's conclusion. And regarding the plaintiffs' critique of Commerce's analysis of *Laizou Auto*, *Jinan Yipin*, *Nails*, and *Hangers*, and the *Redetermination*'s factual distinction thereof, the defendant argues that although evidence of industry use of a government data set may provide "additional support" for the reliability of the government data, its absence does not

undermine the general "reliability" of "government statistics," and thus, given such reliability, the absence of quantity data is not a concern. Def's Resp. at 12. The defendant also argues the DAM data's 2,828 price points from 64 of the 67 Bangladeshi districts each represent "at least" 100 kilograms of *Pangasius* and provide an average price that is generally "free of the reliability concerns" that exist where there is a single price from a single sale, such that the quantity could "dramatically" affect the price, and thus quantity "is not as much of a concern as it would be with a single price." *Id*.

Continuing with regard to the argument that the DAM worksheets lack any commercial quantities associated with them, the defendant argues that Vinh Hoan processes at least 244 metric tons of fish a day, and thus it is reasonable to assume that they are buying whole live fish wholesale in greater than 100 kilogram lots. Further, the defendant argues that Commerce on remand implicitly relied on the fact that "there is a minimum quantity associated with the DAM data" because the weekly price points are "per quintal" (*i.e.*, 100 kilograms)[9] in order to calculate the minimum amount the DAM data could represent, namely 282.8 metric tons of *Pangasius* fish for one year (*i.e.*, approximately six times the total of 47 metric tons of *Pangasius* for two years of BAS data), and that "282.8 metric tons is an extraordinarily conservative figure given that other record evidence indicates that annual Bangladeshi production of [*P*]*angasius* is nearly 60,000 metric tons and that the respondents' typical wholesale purchases exceed this 100 kilogram weight by a large margin in metric ton units."[10] *Id*. at 9–10 (italics added), referencing, *inter alia*, RR at 5, 8, 31.

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[9] *See* RR at 31; *see also* Vietnam Association of Seafood Exporters and Producers ("VASEP")'s Subm. at Exs 7A and 7B (dated Nov. 12, 2010), PDoc 195, fr. 530.

[10] The government also points out that at the very least the DAM data represent 282 metric tons of *Pangasius* fish for the relevant, one-year period of review and that Vin Hoan processes at least 244 metric tons of fish per day, while the BAS data represents only 47 metric tons over a two-year period, and that the purchasers of whole live fish are processors who purchase whole live fish in lots larger than 100 kilograms, not in 5 kilogram quantities. *See* Def's Resp. at 10 & n.3, referencing Vinh Hoan's January 6, 2010 Section D Questionnaire Response, at Ex. 10, PDoc 70. Although such record evidence cannot be overlooked, the government's arguments overstates the *Redetermination*, in which Commerce made no minimum quantity finding but rather stated that the DAM data do not represent insignificant quantities, and only stated that Bangladesh produced "more than enough" metric tons of *Pangasisus* "to supply any Respondent's production requirements." *Id.* at 8, 9. The *Redetermination* will not be sustained upon a ground that Commerce itself did not articulate. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983). At a minimum, it is rather the fact that the DAM data represent wholesale datapoints of 100-kilogram lots -- over and above the plaintiffs' hypothetical 5-kilogram sales -- that speaks for itself in "establishing that the price data consist of bulk business-to-business lots/transaction prices." RR at 31.

Lastly, regarding Commerce's consideration of the three affidavits the plaintiffs submitted for the record and the plaintiffs' argument that Commerce did not give enough weight to the Bangladeshi lawyer's affidavit or "address the farmers' affidavits at all", Pls' Cmts at 13, the defendant counters that Commerce specifically addressed each of these affidavits in the *Redetermination*,[11] and that the role of the court here is not to re-weigh the evidence but rather determine if the agency's determination is supported by substantial record evidence and otherwise in accordance with law. *E.g.*, *NSK Ltd. v. United States*, 481 F.3d 1355, 1359 (Fed. Cir. 2007). The defendant contends Commerce simply gave more weight to the representations of an official of the Bangladeshi government, written on official letterhead and given in that person's official capacity, than an affidavit from a non-Bangladeshi official,[12] and in discussing the two Bangladeshi farmer affidavits Commerce simply found the fact that a particular farmer's price is higher than the average price was insufficient to undermine the validity of the purported average.

Considering the foregoing, the court is not persuaded by the plaintiffs' arguments that Commerce's broad market average finding with respect to the DAM data is not supported by substantial evidence or not in accordance with law, for the reasons stated by the defendant.

2. BAS Data

The plaintiffs also contest Commerce's determination that the BAS does not constitute a broad market average. That determination was made after consideration of the letter from the Philippine Secretary of Agriculture, the scope of the BAS survey forms, and the BAS data collection methods. RR at 32–35. The plaintiffs argue that the determination conflicts with the determinations in the preceding and subsequent reviews[13] as well as the original determination, that the "nascency" of the Philippines *Pangasius* industry is a specious reason for not finding the BAS data a broad market average, that the

[11] Def's Resp. at 14, referencing RR at 9–10, 31, 37–38.

[12] The defendant gratuitously adds here: ". . . that was procured solely for the purposes of the antidumping duty proceeding". Def's Resp. at 15 (citation omitted). The same might just as well be said of the "official statements" regarding the DAM worksheets procured on behalf of the defendant-intervenors. However, the defendant adds, "[w]hen government statistics are based on a regularly maintained, updated, and systematic national level data collection system, it is reasonable to presume that they are reliable and representative of the data they represent, in the absence of evidence to the contrary." *Id*. at 12. The court can agree such a presumption is reasonable to the extent of statistics' regular maintenance, but not, emphatically, by virtue of the fact that they are governmental.

[13] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 75 Fed. Reg. 12726 (Mar. 17, 2010) ("*Fifth Review*"), and accompanying IDM (Mar. 10, 2010) at cmt. 1; *Seventh Review* IDM at cmt. I.C.

"broadly established" market criterion expressed in the *Redetermination* is unlawful, that the absence of a specified "*Pangasius*" category in the BAS data survey form does not render actual the BAS data any less reliable, and that Commerce erred in finding that "gaps" exist in the BAS data *See* Pls' Cmts at 14–24.

a. Consistency with Other Determinations

As described more fully in the subsections that follow, there is some merit in the plaintiffs' argument of inconsistency between the agency's BAS redetermination on remand of the *Sixth Review* versus the relevant determination in the *Fifth Review*. The defendant contends each administrative review is subject to judicial review based on the facts on the discrete record underlying the challenged proceeding.[14] While the court does not adjudge the reasonableness of the *Redetermination* on the basis of the agency's determination in a subsequent proceeding, it will, however, consider the reasoning of prior proceedings when considering the reasonableness of a present determination, as the "general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075 (1988) (the rule "is not designed to restrict an agency's consideration of the facts from one case to the next" but "to insure consistency in an agency's administration of a statute"). The defendant contends that without a demonstration that the facts are "identical" in each separate segment, the fact that different decisions were reached in different segments of the proceeding does not indicate that the conclusion reached in the instant case was erroneous, but the defendant's interpretation is too restrictive. *See*, *e.g.*, *I&D Memo* at 12 ("two recent antidumping duty investigations. . . cited to others involving *similar* fact patterns") (italics added); *Jiaxing Brother Fastener Co. v. United States*, 38 CIT ___, ___, 11 F. Supp. 3d 1326, 1330 (2014) ("as Commerce explains, the record and circumstances of this administrative review are not so *similar* to *Wire Hangers* as to require the same result") (italics added in part).

b. Relevance of Age and Size of Philippine *Pangasius* Industry

Commerce speculates that the "nascent" Philippine *Pangasius* industry may have different economies of scale than other, more mature aquaculture industries. In a similar vein, Commerce contends the

[14] *See*, *e.g.*, *Vinh Quang Fisheries Corp. v. United States*, 33 CIT 1277, 1283, 637 F. Supp. 2d 1352, 1358 (2009); *China Processed Food Import & Export Co. v. United States*, 33 CIT 405, 411 n.2, 614 F. Supp. 2d 1337, 1344 n.2 (2009).

newness and the small size of the Philippines' *Pangasius* industry is directly relevant and probative of whether the BAS data are representative of "broadly established" commercial *Pangasius* production.

Proceeding from a proposition of general knowledge of market "nascency" may not be not unreasonable *per se*, but the analysis must take into account whatever in the record fairly detracts therefrom. The defendant admits that Commerce made no finding that there were extraordinary or aberrational start-up costs, but it insinuates that must have been the case. *See* Def's Resp. at 17. Given the contrary evidence of record the plaintiffs submitted, however, such speculation does not provide logical support for concluding that the BAS data do not represent a "broad market average," *i.e.*, do not represent a substantial portion of the market for *Pangasius* in the Philippines, or that these prices are not reflective of the national Philippine market for that product.[15] *See Jacobi Carbons AB v. United States*, 38 CIT ___, ___, 992 F. Supp. 2d 1360, 1369 (2014), *appeals filed*, *inter alia*, No. 14–1753 (Fed. Cir. Aug. 26, 2014). Commerce does not adequately explain in this instance how the relative newness of the Philippine *Pangasius* industry renders the prices published in the BAS unreliable as a surrogate for valuing respondents' whole fish inputs in Vietnam. The defendant argues that when faced with a choice between a well-established and a nascent industry, the well-established industry "better reflects" the "typical" costs of producing the product in Vietnam, and that Bangladesh is in fact one of a small number of countries with an "established" *Pangasius* industry, but that argument puts the cart before the horse on whether the BAS data can be determined representative of a "broad market average" in its own right. Whether the Bangladesh market is broad-*er* is different matter.

Further on this point, the court agrees with the plaintiffs that Commerce's focus on the nascency and size of the Philippine *Pangasius* market introduced criteria not encompassed by the straightforward term "broad market average", *i.e.*, an average that is representative of the particular market under consideration as a whole. *See Jacobi*, *supra.* Apart from being unexplained, "broadly established" appears to be employed in the *Redetermination*, *see* RR at 33, to connote a fundamentally different and more restrictive meaning, concerning which application the parties should have had the opportunity to comment in advance, since new standards may not be

[15] The plaintiffs also object to the implication in the *Redetermination* that they "share" the position that the Philippine *Pangasius* industry is "small". Pls' Cmts at 15 n.8, referencing RR at 33 and Pets' Cmts at 32–33. Duly noted.

applied *ad hoc* without providing an opportunity for parties to provide argument and evidence relating to them.[16] And if "broadly established" equates to "broad market average," the employment thereof does not adequately explain why the BAS data, purportedly representative of *Pangasius* production in the Philippines based on collection methodology intended to cover 81 provinces and cities,[17] are not representative of a substantial portion of "the market" for *Pangasius* in that country or reflective of the national Philippine market for *Pangasius hypophthalmus*. *See Jacobi*, *supra*.

c. Absence of "*Pangasius*" Category on BAS Survey Forms

The defendant states that "the fact that *Pangasius* is one of the less significant species produced in the Philippines[ ] *is the reason* that the BAS's form does not list it separately" and that the absence of a specific field for "*Pangasius*" on the BAS survey form therefore calls into question "the systematic nature of the [BAS's] collection system, as there are no assurances that *Pangasius* production information was specifically requested." RR at 34 (italics added). Whether the first point is true, the court cannot agree that this second "finding" (assuming it to be such) was reasonable.

The plaintiffs point out that the information of record shows trained data collectors responsible to BAS for working with the surveyed farmers to ensure that the questionnaires covered "all" species of fish farmed. Pets' SV Subm. (July 9, 2010) ("Pets' SV1") at attach. 1, PDoc 132. The record indicates that BAS does not send questionnaires to respondents but rather that these trained data collectors visit aquafarmers or aquafarm operators and work with those que-

[16] *See*, *e.g.*, *British Steel plc v. United States*, 19 CIT 176, 255–56, 879 F. Supp. 1254, 131617 (1995); *Sigma Corp. v. United States*, 17 CIT 1288, 1304–05, 841 F. Supp. 1255, 1267–68 (1993). Similarly, Commerce states in footnote 82 of the *Redetermination* with regard to the Bangladeshi farmer affidavits the plaintiffs submitted that if (italics added)

they were to be relied upon, the production quantities from a mere two Bangladeshi *Pangasius* farmers for one calendar year dwarf the total *Pangasius* production amount for two full years in the BAS data. This point further highlights the fact that the *Pangasius* industry in the Philippines is not *economically significant* enough to produce price data that represent a broad market average, even if such price data were collected by a government agency using a statistically sound methodology.

Commerce here presumes a certain but unspecified level of economic activity in what constitutes a "broad market average", whereas the normal understanding of that term is the *extent* of a market's coverage provided by the average data, for example the indices provided by Dow Jones or Standard and Poor's. "The market" for consideration "is what it is," to use the vernacular, and if in the above observation Commerce intended to impose a different interpretation of "broad market average," then Commerce should have so clarified for the benefit of interested parties and provided opportunity for comment.

[17] *See* Pets' SV Subm. (Nov. 12, 2010) ("Pets' SV2"), at Ex. 1, iii-iv, PDoc 196.

ried to fill out the survey form. *See id*. at attach. 1, Viloria Affidavit, ¶12. Nothing of record indicates to the contrary. The plaintiffs also aver that the entire "*raison d'etre* of the BAS is to compile and publish data for agriculture and fisheries that represent production volumes and values country wide", Pls' Cmts at 23, referencing Pets' SV3 at Ex. 7 (BAS mission statement), PDoc 210, and the record again evinces no contraindication of that not being the case. Hence, it appears erroneous to imply that surveyed farmers are left to fend for themselves in figuring out how to fill out the forms, and without knowing how to report their *Pangasius* price data (as inclusive or exclusive of transportation costs) as the defendant suggests. In other words, when that portion of the record is considered as a whole,[18] the court fails to understand why the fact that the BAS's forms collect *Pangasius* data under an "others" category provides a basis for impugning the quality of the *Pangasius* data collected, *see also infra*, or a basis for concluding the nature of BAS's data collection is not systemic. Furthermore, the defendant has not undertaken a comparable analysis with respect to the DAM data, which the plaintiffs argue would be impossible given the absence of information concerning the DAM's data collection procedures and/or survey forms related to the DAM worksheets. The defendant argues that there is a demonstrable difference in the collection of the *Pangasius* -specific data, but neither it nor Commerce elaborates on that proposition in the context of this issue,[19] and the court will not speculate as to a different basis for concluding that the BAS data do not represent a "broad market average" than as expressed in the *Redetermination*.

d. "Gaps" in the BAS Data

The parties also dispute whether it may reasonably be concluded that there were any statistically relevant "gaps" in the BAS data. On this point, the *Redetermination* begins curiously:

> We do not question the validity of the BAS sampling methodology as a whole. Rather, the question is whether this data source represents the best information available for SV purposes given all of the information on the record. . . .

[18] The plaintiffs also point out that the statement of the Chief of the BAS Fisheries Statistics Division who oversaw the collection and presentation of the fisheries statistics explains that "[d]ata collection is done through personal interviews of respondents using structured questionnaires." Pets' SV1 at attach. 1, PDoc 132. Although that may appear speculative, as it is subject to interpretation, the plaintiffs also point out that the "Explanatory Text" of the BAS data indicates that the BAS conducts surveys regularly, on a "quarterly" basis, to collect data on volume and value for "cultured species by environment, by type of aquafarm, by region and by province," and that this data is routinely checked for errors prior to publication. *See* Pets' SV2 at Ex. 1, p. iii-iv, PDoc 196.

[19] *But see* next subsection, *infra*.

RR at 6. Actually, the question to be answered at *this* stage of the proceeding was simply whether the BAS data represent a broad market average, not whether they represent the "best information available" for SV purposes "given all of the information on the record". Be that as it may, the *Redetermination* claims several reasons, although they appear to reduce to one, as to "why the sampling would not produce a reliable and valid result", to wit:

> In terms of methodology, the BAS national estimates rely on previous year's data,[ ] of which there are none for *Pangasius* in the majority of the provinces in 2008. For example, the production figure in 2008 for the Isabela province was 3.51 MT.[ ] However, according to the BAS methodology, this estimate was based on inflating the 2007 Isabela production estimate, which was zero. Moreover, none of the provinces reported *Pangasius* production in 2007, so the BAS could not have relied on another province's production as a proxy. Therefore, it is unclear exactly how the BAS inflated the 2007 "zero" production to produce 2008 estimated production for all the provinces. This same issue also applies to five of the eight provinces for the 2009 estimated production figures.[ ] The underlying problem is that there is no explanation on the record on how the BAS filled these gaps in the data. In other words, there are too many gaps in the BAS methodology that are not explained by record evidence. Thus, even though the underlying methodology may indeed be valid, using this methodology on an infant/nascent industry is problematic, given that there will be a very small response rate for *Pangasius* within the overall sample size, and there will be a number of respondents within the sample reporting nothing for *Pangasius* at all. Put another way, the methodology relies on sampling to produce its estimated totals, and *if* there are numerous gaps in responses from those who are sampled, it makes the final reported number less dependable. It is, thus, unclear to what degree the estimated total *Pangasius* production figures provided in the BAS data are a reliable indicator of the country's production in this instance. Therefore, a further reading and close examination of the information on the record, as expressed by the above analysis, demonstrates that the BAS data for *Pangasius* do not represent a broad market average suitable for surrogate valuation purposes.

RR at 6–7 (citations omitted; italics added). *See also id*. at 34–35.

The plaintiffs argue that this allegation of "gaps" in the BAS data is premised on an incorrect reading of the statistical survey method

described in the BAS's "Aquaculture Production: Estimation and/or Compilation Procedure", and the erroneous conclusion that the BAS's *Pangasius* data for 2008 and 2009 were "based on the previous year's estimates," as well as on the assumption that due to certain provinces not reporting *Pangasius* production volumes in 2007 the production volumes reported in 2008 for those provinces are necessarily distorted. *See id*. at 6, 34–35. During the *Sixth Review* proceeding the plaintiffs argued to Commerce: (a) that the "Explanatory Text" accompanying the BAS publication states that in 2008 the BAS surveyed aquaculture farms using a "stratified" random sampling technique which is described in the "Aquaculture Production Survey" form;[20] (b) that the survey is intended to cover production of 1,994 aquaculture farms from 81 Philippine provinces and cities; and (c) that the data collected from this survey formed the basis of the BAS's production volume and value figures published in 2008. The plaintiffs contend the defendant has incorrectly assumed that the BAS used its Quarterly Aquaculture Survey ("QAS") method to estimate *Pangasius* production and volumes in 2008, whereas the record shows that the BAS only uses its QAS methods to estimate aquaculture production volume and values in those years in which it does not obtain aquaculture production statistics using the "stratified" sampling technique. They contend 2008 was not one of those years, but a year in which the BAS "used the more expansive stratified sampling methodology to collect production data country wide".[21] Pls' Cmts at 22, referencing Pets' SV2 at Ex. 1, iii-iv (in 2008, "aquafarms were stratified according to area [and s]imple random sampling was employed in the selection of sample aquafarms from each stratum"), PDoc 196.

[20] *See* Pets' SV1 at attach. 1, PDoc 132; Pets' SV2 at Ex. 1, iii-iv, PDoc 196; Pets' SV Subm. (Dec. 13, 2010) ("Pets' SV3") at Ex. 8 (2.2.1.3.C Aquaculture Production: Estimation and/or Compilation Procedure), PDoc 210. The plaintiffs also argue that despite the defendant's apparent conclusion to the contrary, RR at 35, they referenced this form correctly in their comments on the agency's draft *Redetermination* because it was the form used by the BAS to collect *Pangasius* data in 2008 since the form pertains to data collected through stratified random sampling. *See infra*.

[21] *See* Pets' SV2 at Ex. 1, at iii-iv, PDoc 196 (explaining the use of "quarterly surveys" when stratified sampling is not performed). The plaintiffs contend that in the intervening years, the BAS collects quarterly statistics on aquaculture production and values using statistically valid sampling of the aquaculture farming population. *Id*. The BAS then compares its quarterly aquaculture data to the prior year's data to determine whether production volumes and prices have grown or decreased during the survey year as compared to the prior year. *Id*.; Pets' SV3 at Ex. 8 (2.2.1.3.C Aquaculture Production: Estimation and/or Compilation Procedure), PDoc 210, Pl. App. 19. Using this comparison, the BAS adjusts (inflates or deflates) the prior year's production volume and values to estimate the current year's production.

Thus, the plaintiffs aver, the BAS's published figures for 2008 were not derived from 2007 production volumes as Commerce assumed. Similarly, they further aver, the 2009 BAS published aquaculture statistics (including *Pangasius* data) are based on data covering a total of 1994 farms (or "operators") via sampling thereof. *Id*. The year 2008 was a year in which the QAS methodology was used to extrapolate production volume and value data, the plaintiffs contend, and there is no otherwise valid basis to question the reliability of the survey methodology, used by the BAS to estimate *Pangasius* production volumes and values in QAS-methodology years, in order to infer that "gaps" exist in the BAS data, since, as mentioned, the entire "*raison d'etre* of the BAS is to compile and publish data for agriculture and fisheries that represent production volumes and values country wide." *Id.* at 23, referencing Pets' SV3 at Ex. 7 (BAS mission statement), PDoc 210.[22]

Thus, the plaintiffs continue, the record "makes clear" that the BAS takes "great care" to ensure the accuracy of the statistics it publishes, and the defendant has provided no credible explanation as to how the BAS methodology is now unsound especially when that same methodology did not undermine a broad market average finding in the preceding review.[23] Pls' Cmts at 23, referencing *Fifth Review*, IDM at cmt. 1.A. They argue Commerce cannot reasonably conclude that "gaps" exist in the BAS's methodology when it had six months during remand to fill any supposed gaps. *Id*. at 24. And they also note that while Commerce devotes much time and effort to dismissing the BAS methodology, Commerce continues to "sidestep" the fact that the record contains virtually no information about the methodology that the DAM used to compile its wholesale prices. *Id*. The plaintiffs point to Commerce's statement that it "cannot simply draw a negative inference about th[at] fact, given that Bangladeshi officials have

[22] For example, the plaintiffs continue, the Chief of the BAS Fisheries Statistics Division explained that the BAS data collectors gather actual production data each quarter, through the use of QAS forms, to ensure that the data collected are up to date. Pls' Cmts at 23, referencing Pets' SV1 at attach. 1, PDoc 132, and Pets' SV3 at Ex. 7, PDoc 201. Further, the "Explanatory Text" of the BAS underscores the reliability of the survey techniques it uses by noting that the quarterly data is collected methodically and systematically, the data collection procedures account for "changes" in aquaculture production factors (such as "opening or closure of farms and operations of new landing centers"), and the data is routinely reviewed to "ascertain the accuracy of the data gathered." Pets' SV2 at Ex. 1, p. iii-iv, PDoc 196. According to the BAS, after aquaculture data is collected, "analyzed and validated," the "estimates of production [are] generated." *Id*., p. iv.

[23] The plaintiffs also argue that if Commerce harbored concerns about the nature of the BAS's sampling methodology or the manner by which it compiled, reviewed, and published its data, it could have sought clarification from the BAS directly, especially given the fact that the prior opinion gave Commerce "discretion to reopen [the] record" if needed to gather additional information. Slip Op. 13–63 at 34.

attested to its completeness and reliability", *id*., quoting RR at 35, and they argue Commerce is here applying a double standard with respect to the BAS data as its basis for rejecting them when Commerce applied no similar analysis with respect to the DAM data.

The court finds that Commerce could not reasonably conclude the existence of actual "gaps" in the BAS data and it has not sufficiently explained why such gaps should reasonably be presumed and be preclusive of determining the BAS data a "broad market average." To cut to the chase: the parties' dispute appear to center on whether the 2008 BAS data are based on more or less "expansive" data collection methodology, involving stratified random sampling and/or quarterly surveys,[24] with the defendant's papers essentially maintaining that the plaintiffs have not shown that the record demonstrates BAS used "more expansive" methodology during 2008. That point, however, does not demonstrate that even if 2008 was a year in which BAS "reduce[d] the number of sample farms and sample[d] less often", Def's Resp at 21, such methodology would necessarily not have provided a statistically valid presentation of the population of Philippine *Pangasius* production. The argument rather appears concerned with the magnitude of the margins of error that would be encompassed by BAS's sampling technique.

The defendant also criticizes that there is no record evidence "linking" *Pangasius* production to the number (1,994) of Philippine farm

[24] The defendant points to BAS's description of its stratified random sampling methodology on its website as using the aquafarm as the sampling unit, stratifying freshwater fishponds by culture system (mono- or poly-), stratifying brackishwater fishponds by management system (intensity and extensity), stratifying fishpens and fishcages, and using random sampling in the selection of aquafarms from each stratum, involving "at times when there are limited resources" selection of "five/three sample aquafarms . . . from each top five/three producing municipalities identified as sample municipalities in the province" with a maximum of 25 sample aquafarms allocated for each major producing province, nine (9) for minor provinces, and three (3) sample aquafarms for "very minor" provinces. Def's Resp. at 20, referencing VASEP's Subm., at Ex. 1B (Country STAT: Aquaculture Surveys: Sampling Design/Statistical unit/Selection Procedure, dated Dec. 13, 2010), Pub. Doc. 209. The defendant further points out that according to the affidavit of BAS's Chief of Fisheries Statistic Division,

> [t]he volume and value data for *Pangasius* in the attached schedule, entitled "Freshwater Fishpond, 2008," is the complete and final compiled information collected for *Pangasius* produced in the Philippines for the year 2008. This report forms part of the Bureau's working papers and contains the statistical data used to prepare the official *Fisheries Statistics of the Philippines* and the *Fisheries Situationer* publications. Information is collected/gathered on a quarterly basis specifically during the last two weeks of the last month of each quarter, *i.e.* March, June, September and December.

Id. at 21, referencing Pets' SV1, attach. 1, PDoc 132. The defendant further notes that the BAS also advises that "[w]hen operations were constrained by insufficient financial resources, the Bureau undertook every other day data collection with reduced sample sizes and/or quarterly surveys with reduced sample sizes and with key informants as respondents." *Id*., referencing Pets' SV2, Ex. 1, BAS Explanatory Text, at page iv ("C. Sample Sizes"), PDoc 196.

operators, or evidence that BAS "surveyed" *Pangasius* farm operators in all 81 provinces and cities in 2009. The first point appears to involve application of another double standard, *cf.* RR at 9 ("we find that [DAM] data do not have to be all from the exact same source to provide useful, reliable government-generated information"), and the second point disregards the whole point of sampling without impugning the BAS methodology. The defendant further criticizes that "the small volume of the BAS data" and the fact that it "is based on extrapolations from only four Philippine provinces out of 81 in 2008 and eight provinces out of 81 in 2009", but again these points do not adequately discredit or explain why, on that basis, the BAS data may not properly be concluded statistically representative of a substantial portion of the market for *Pangasius* in the Philippines or statistically reflective of prices for the national Philippine market for that product. *See Jacobi*.

In sum, the reasons Commerce offers for finding the BAS data do not constitute a broad market average are insufficiently supported with substantial evidence of record.

D. "Specificity" (*i.e.*, Level of Trade)

In accordance with slip opinion 13–63, on remand Commerce clarified that the "specificity" issue in this matter is concerned with arguments regarding differences in the level of trade of the reported prices, *i.e.*, farm-gate versus wholesale. The *Redetermination* notes that the process of constructing NV for a producer in an NME country using SVs is difficult and necessarily imprecise, and that while Commerce strives to select the best SV possible, it is not necessary for it to duplicate the exact production experience of the NME producers at the expense of choosing an SV that "most accurately" represents the input in question, given all of the evidence on the record. RR at 36, referencing *Nation Ford Chemical Co. v. United States*, 166 F.3d. 1373, 1377 (Fed. Cir. 1999) & *Nation Ford Chemical Co. v. United States*, 21 CIT 1371, 985 F. Supp. 133 (1997).

The plaintiffs maintain that throughout the administrative proceeding and litigation the use of farm-gate prices has been considered of major importance because the record reflects that the respondents obtained their whole-fish input directly from aquaculture farms, and that it was precisely because of the importance placed upon farm-gate pricing in prior reviews that the plaintiffs sought data that would reflect that pricing. *See*, *e.g.*, Pls' 56.2 Mot. Br. at 24–36. In the *Redetermination*, Commerce considered the parties' arguments and focused its examination upon whether the record showed quantifiable

distinctions between the farm-gate BAS pricing data and the wholesale DAM pricing data, and also in light of footnote 8 of slip opinion 13–63.

As an initial matter, Commerce disavows that it expressed a preference for farm-gate prices *per se* in the *Fifth Review*, taking the position here that it seeks prices that are tax- and duty-exclusive, whatever else they may be. *See Redetermination* at 12–13 ("it is the extent to which any price, whether called 'farm-gate' or 'wholesale'[,] includes taxes, duties or other expenses that Commerce considers in comparing sources (if such a comparison is possible)"). This retrenchment appears somewhat at odds with the goal of finding the "best information" that can replicate a respondent's production experience (and in this proceeding it is uncontested that respondents procured whole live fish from fish farms) as well as the inference of Commerce's previous articulation. *See Fifth Review*, IDM at cmt. I.C.: "it is unclear whether the Pangas Thesis' methodology relies on farm-gate prices or market prices, *and if market prices, what movement or other expenses are included in those prices*" (italics added). Nonetheless, Commerce's explanation is not unreasonable, as the *Redetermination* further clarifies that adjustments can equilibrate differences in levels of trade, *see infra*, and for a difference in levels of trade to have any meaning in a dumping calculation, record evidence must establish that there are actual differences in costs associated with the alleged different levels of trade. *Cf.* 19 C.F.R. §351.412(a). For purposes of this proceeding, Commerce therefore performed what it describes as a conservative, hypothetical, and additional freight calculation that overstated the wholesale freight cost.[25] RR at 16, 33–35; *see also* Draft Results BPI Memo., dated Nov. 15, 2013, Remand CDoc. 9. The

[25] As a proxy for the actual Bangladeshi distance between farms and wholesale markets, Commerce used the distance from the fish farms where respondents in the administrative proceeding sourced their fish input to their processing facilities, together with the Bangladeshi freight SV, in order to conclude that the transportation charges associated were "miniscule", by which Commerce apparently means less than $0.01 per kilogram. *See* RR at 38. Commerce noted that since the SV for the *Pangasius* fish input is multiplied by each respondent's FOP usage rate, the $0.01 per kilogram difference is in fact "even greater" than the "miniscule" amount of the transportation costs associated with the whole live fish input, but in relation to another issue discussed in the *Redetermination* (at pages 42–43), the plaintiffs had asserted that a difference of $0.01 per kilogram in the SV for the primary material input would have no meaningful effect on Commerce's margin calculations. Acknowledging that the plaintiffs had averred that transportation charges are not the only difference between farm-gate and wholesale prices, Commerce found that they had failed to define or specify any others, while at the same time positing that farm-gate prices can be either higher or lower, such that any other difference could be positive or negative, with transportation being the only constant difference, and therefore Commerce reasoned that by dismissing a $0.01 per kilogram difference as being immaterial, the plaintiffs had essentially conceded that the potential difference in a price between the wholesale and farm-gate levels that can be approximated using record evidence is even more immaterial,

evidence of record showed an insignificant level-of-trade distinction for purposes of the margin calculation between BAS "farm gate" prices and DAM "wholesale" prices.

Substantial evidence supports finding no *quantifiable* level of trade distinction between BAS and DAM data for purposes of this proceeding, but it would be unreasonable to restrict the analysis of the BAM and DAM data only to such a basis, as the plaintiffs' emphasis is with respect to the inconceivability of the DAM data estimates as consisting of wholesale prices of whole *live* fish, and similar such qualitative factors must also be considered. Commerce apparently found no such qualitative distinctions, however. *See I&D Memo* at 10, referencing VASEP's November 12, 2010, submission at Ex. 7b ("the wholesale price of Pangas in this country-wide government database is with reference to the price of whole *live* unprocessed Pangas, sold into the marketplace") (italics added). *See also id.* at 8 (considering the fact that whole live Pangasius fish are a highly perishable product). Regardless of the treatment the DAM worksheet data (and the official statements or non-responses pertinent thereto) merited in the subsequent seventh review, the court must find that the referenced support amounts to more than a mere scintilla in support of Commerce's *Redetermination*, and the court's function here does not involve re-weighing the evidence of record.

E. Consideration of the Totality of Available Evidence

As mentioned, Commerce determined that the DAM data satisfy the broad market average requirement "to a significantly greater degree" than the BAS data and that the specificity requirement was ambivalent as between the two sets. After "further evaluating" the record evidence as a whole, Commerce again determined that the DAM data were the best for the whole fish SV and that Bangladesh offered the best SV option for the respondents' FOPs. The plaintiffs commented to Commerce that its draft analysis of which of the potential surrogate countries offers the best available whole live fish prices is misleading because the non-fish FOPs and financial ratios are significant. Commerce disagreed, finding that the relative insignificance of the value of non-fish FOPs can be shown by comparing them to the overall NV, which reflects a significant reduction for the by-product offset, and by this method non-fish FOPs "represent a small percentage of NV". RR at 25–26.

The plaintiffs here argue Commerce's approach "significantly skews" the analysis because by-products are non-fish FOPs for which

as the available record evidence showed that it does not lead to any meaningful difference in the SV of the primary input, and by extension, the overall margin calculation.

surrogate values must be selected, so comparing non-fish FOPs to an NV that has already been reduced to reflect the by-product offset results in a significant understatement of the importance of non-fish FOPs. The plaintiffs argued it would be more accurate to aggregate the respondents' costs of secondary materials, energy inputs, labor, and packing inputs plus the value of their by-products, and then compare the value of these elements to the total value of all elements included in the NV, so that the analysis properly accounts for the percentage that all non-fish inputs and financial ratio factors, including by-products, represent of NV, and when this analysis is "correctly performed," the record reveals that all non-fish FOPs and surrogate financial ratios "comprise a substantial portion of the total value of all elements included in the NV calculation." Pls' Cmts at 37, referencing Pets' Cmts at 75. The plaintiffs also call attention to the fact that Commerce relied upon a Philippine source rather than a Bangladeshi source to value by-products in the *Redetermination*. *See* RR at 18–19.

The court is not, however, positioned to conclude that the plaintiffs' preferred analysis would necessarily yield a "more accurate" result as opposed to simply being a different method of analyzing the same data. In calculating NV, Commerce stated that it had already adjusted it for the by-product offset so that "adding the by-product value back into the final comparison would actually result in an inaccurate doubling of the amount of by-product value in relation to the other components of the calculation." RR at 26. Commerce's conclusion that non-fish FOPS are third in importance behind the whole live fish FOP and financial ratios, and its conclusion that the nonfish-FOPS-to-NV ratio is "small", do not appear explicitly or implicitly unreasonable, and the plaintiffs' argument does not otherwise undermine Commerce's consideration.

The plaintiffs also contend Commerce is effectively stating that the Bangladeshi and Philippine financial statements are equivalents, since Commerce now states that they all reflect production of "comparable merchandise." RR at 26–27. The plaintiffs argue substantial record evidence shows that the Philippine companies produce *Pangasius* (RDEX) and finfish (Bluefin), which means that at least one of the Philippine companies produces identical, not comparable, merchandise, whereas the Bangladesh companies are all shrimp producers. *See* Pets' Cmts at 77. At a minimum, they argue, Commerce should have found that the Philippine producers' financial data are "more comparable" to the Vietnamese respondents (which are producers of *Pangasius*, a fin fish) than producers of shrimp products. Regardless, however, Commerce found the production processes for fish fillets versus frozen shrimp "quite similar", RR at 26–27, and the

court is not free to disagree with the substantiality of evidence in support thereof. Further, in considering the contribution of different FOPs to the margin calculation, Commerce posited that "the surrogate financial ratios are generally a more important component", and it reiterated that it "generally prefers to average multiple usable financial statements where available". RR at 3. That is undisputed, and in the final analysis, it appears numerosity simply trumped the points the plaintiff raised above: "Because the DAM data are the best available information on the record to value the whole live fish, and we have three usable financial statements from Bangladesh, we continue to find that Bangladesh is the best choice for the primary surrogate country." RR at 25. The defendant thus reiterates that three provides a better average than one or two, and with that proposition, the court is not yet positioned to disagree, contrary to the plaintiffs' argument thereon.

F. Alleged Subsidy in Gemini's Financial Statements

The plaintiffs' allegation of a potentially countervailable subsidy in the financial statements for "Gemini," a Bangladeshi seafood company upon which Commerce had relied to calculate surrogate financial ratios but purporting a "cash subsidy,"[26] had not been addressed in the *Sixth Review I&D Memo* and was remanded voluntarily. On remand, Commerce found each of the plaintiffs' arguments thereon unsupported by data on the record. In particular, Commerce found that the bank circular mentioned in Gemini's financial statements was not the same as the bank circular that the plaintiffs submitted on the record. Commerce also considered "several other subsidy programs allegedly available" that the plaintiffs had mentioned "in passing" but found " no evidence at all that Gemini received benefits from any of these programs in 2008-[2]009, or any other period, as there is absolutely no reference to any of them anywhere in its financial statements." RR at 20–21.

The plaintiffs dispute that they did not provide a copy of the very bank circular mentioned in the financial statement, but in the end that matters not, because upon examination thereof Commerce found that the terms of the alleged subsidy demonstrated that the bank circular program terminated before the end of the POR. RR at 39. The plaintiffs also argue that the program's termination before the POR is immaterial because a government study demonstrates that the Bang-

[26] Gemini's 2008–09 financial statements report that "[a]s per Bangladesh Bank circular no. FE-23 dated 12–12–2003 total cash subsidy assessed against export for the year is Tk. 9,99,79,199.00", and it also characterizes the subsidy as a "10% Cash Subsidy as per Bangladesh Bank Circular No. FE-23 dated 12/12/03 against export bills." Pets' SV Subm. (Apr. 8, 2010) at Ex. 26-B, PDoc 96.

ladeshi government generally provided export subsidies on frozen shrimp, and that record evidence demonstrates that but for the receipt of this declared cash subsidy Gemini would have reported a "massive" overall loss and Commerce's policy is not to use zero profit companies in its surrogate financial ratio calculation.[27] *See* Pls' Cmts at 40. However, the court finds these arguments are barred on grounds of exhaustion since the plaintiffs did not raise them in commenting on the draft remand results, and none of the doctrine's exceptions appears applicable.[28] Substantial evidence of record otherwise supports Commerce's determinations on this issue.

G. SVs for Fish Waste, Broken Meat, and Fish Skin

In the underlying review, Commerce selected Philippine HTS category 0304.90 (other fish meat of marine fish) to value the fish waste, broken meat, and fish skin by-products after rejecting the Philippine and Indian price quotes submitted by the plaintiffs. Commerce then requested voluntary remand regarding the SV for fish waste. In granting that request, the SV selection for broken meat and fish skin was also remanded as it appeared to be intertwined with that of fish waste, given that the plaintiffs had proffered the same alternative source for both.

Commerce explained that when it endeavors to find appropriate SVs for by-products it attempts to find identical items to those produced by respondents. In this instance, it found that the closest import statistics on the record were from a basket category of Harmonized Tariff Schedule classification that contains many other things besides waste, broken meat, and fish skin. As previously mentioned, the record also contains price quotes from the Philippine Vitarich company for a variety of *Pangasius* fish waste products, including head and belly waste, fat and intestines, bone and tails waste, and skin and trimmings. These encompass the three by-products at issue here.

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[27] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 29473 (June 22, 2009), and accompanying IDM (June 15, 2009) at cmt. 1.A (explaining Commerce's preferred practice is to "use the financial statements of companies that have earned a profit and disregard the financial statements of companies that have zero profit when there are other financial statements that have earned positive profit on the record"); *see also Catfish Farmers of America v. United States*, 33 CIT 1258, 1275, 641 F. Supp. 2d 1362, 1378 (2009).

[28] The court "shall, where appropriate, require the exhaustion of administrative remedies" in civil actions arising from Commerce's antidumping determinations, 28 U.S.C. §2637(d) and it is well-settled that the "reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Gerber Food (Yunnan) Co. Ltd. v. United States*, 33 CIT 186, 195, 601 F. Supp. 2d 1370, 1379 (2009), quoting *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946).

After reviewing the information on the record and considering its approach in recent determinations and other aquaculture cases, Commerce found that seafood by-products are generally not internationally traded commodities that would be reflected in import statistics, and it also found that the HTS description in question is for fish meat rather than by-products. Thus, Commerce reasoned that valuing fish waste using import statistics would result in a fish waste SV that was higher than that of the whole fish and that such an SV would distort the NV calculation. Commerce also found specificity to be an important factor in valuing the by-products at issue. Commerce further found that the Vitarich price quote satisfies the criteria of public availability, terms of payment, and tax and duty exclusivity, and that the Vitarich quote's "far superior specificity" and the fact that it meets the other SV selection criteria including temporality outweighs the broad market average criterion. Commerce found the Vitarich quotes, dated April 2010, "not so far outside the POR as to be unusable" after deflating the relevant SVs to make them contemporaneous with the POR. RR at 19 n.46, referencing *Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT 288, 301, 366 F. Supp. 2d 1264, 1275 (2005) (contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POR). Commerce also rejected an Indian price quote from the record, as it pertained to only one by-product (fish waste), and, although dated closer to the POR, was unclear if the price is tax/duty exclusive.

Vinh Hoan urges further remand for reconsideration of this decision, arguing that the Vitarich quote is an unsuitable surrogate value source, that price quotes generally must be carefully scrutinized to determine if they represent a reliable market price prior to use,[29] that the circumstances of how this price quote was obtained (through a Philippine attorney) and what the quotes actually represent (*e.g.*, "trimmings", "pickup price", *etc.*) leave "unresolved" issues that should have raised doubts before Commerce regarding the Vitarich quote's reliability, that Commerce rejected the same price quote in the *Seventh Review*,[30] that Commerce's finding "that seafood by-products are generally not internationally traded commodities which would be

[29] Def-Int's Cmts at 6, referencing *Synthetic Indigo from the People's Republic of China*, 68 Fed. Reg. 53711 (Sep. 12, 2003) (final admin. review) and accompanying IDM at 5.

[30] *See Seventh Review*, 77 Fed. Reg. 15039, IDM at 18 (citations omitted). *But see* rejection of similar argument with respect to Commerce's DAM data public availability determination, *supra*.

reflected in import statistics" is simply untrue,[31] that Commerce provides no explanation for how a higher value for a by-product distorts the NV calculation, and "as a general matter, it is quite possible that a by-product which undergoes further processing could have a higher value than the input product". Def-Int's Cmts at 9.

The court cannot conclude Commerce's determination to use the Vitarich quotes unreasonable. Commerce explains that it does not usually prefer to use price quotes as surrogate values, but in this case it found the specificity of the price quote to the three by-products Commerce needed to value to be an important factor in their valuation for the reasons above summarized. *See* RR at 18. Vinh Hoan argues that Commerce has not addressed all of the flaws it found in the Vitarich data in the original determination and that those flaws must result in a finding to the effect that the Vitarich price quotes are not acceptable surrogate values for the three fish by-products at issue. Def-Int's Cmts at 7. But Commerce addressed most of the deficiencies in the Vitarich data in the *Redetermination*, RR at 42–43, *see also* Def-Int's Cmts at 6–7, and it acknowledges that there are still flaws with the price quotes just as there are flaws in the HTS data. It decided, rather, after weighing the evidence and given the fact that the surrogate value originally used resulted in values that made the fish by-products more valuable than the whole live fish, that the best available evidence was the Vitarich quotes because they were much more specific to the by-products being valued than the overly broad HTS basket category originally relied upon. In addressing each of Vinh Hoan's arguments, Commerce provided a detailed, adequate explanation in the *Redetermination* as to why that is the case in this instance. Vinh Hoan does not appear to dispute Commerce's finding that the Vitarich quote is more specific than the alternative HTS category, which includes fish meat of marine fish, or the finding that the HTS data values for "other fish meat of marine fish" was greater than the value for whole live fish, which, since it includes the fillets, should be more valuable than just the by-products. Vinh Hoan argued that further processed by-products can achieve a higher value than the input, but there is no record evidence that the SVs at issue here represented further processed by-products. Vinh Hoan also took issue with Commerce's observation that seafood by-products are not internationally traded and thus not reflected in import statistics, but Commerce stressed that it was "generally" the case that seafood by-products are not a product of international commerce without further-advance processing, while the defendant adds that "[t]he lack

[31] Def-Int's Cmts at 9, referencing Vinh Hoan Section D QR at Ex. 24 (Jan. 6, 2010) (showing sales of by-products to foreign markets), CDoc 17.

of such HTS data is a good indication that the by-products are not generally internationally traded." Def's Resp. at 34, referencing RR at 43. Vinh Hoan's argument does not extend to resolving the absence of specific HTS data on the record from which these by-products could be valued. RR at 43. Substantial evidence therefore supports Commerce's determination.

H. Ministerial Error Allegations and Effect on Margins

Four issues pertaining to calculations involving the categorization of certain items in the financial ratio calculations for Apex, Gemini, and Fine Foods were also remanded. Commerce was requested: (1) to address not accounting for Apex and Gemini's changes in finished goods inventory as no amended final results were issued; (2) to explain the effect Apex's and Gemini's corrections in addition to the specific corrections for Vinh Hoan would have on the margins, as they were close to *de minimis* and it was unclear whether the corrections may have material impact; (3) to address why for Fine Foods Commerce found the nature of the allegation to be methodological, when Commerce put Fine Foods' ratio calculation on the record in the *Sixth Review* and the parties' apparent avenue to raise this claim was through the ministerial error process; and (4) to explain the use of facts available ("FA") and accounting with respect to the classification of apparent changes in Fine Foods' inventories as the record therefor was unclear.

For the *Redetemermination*, Commerce made corrections in its computer program with respect to Apex and Gemini's ratio calculations and corrected ministerial error after considering Vinh Hoan's specific allegation thereon. Neither the margins nor the assessment rates for any company changed and, accordingly, Commerce did not publish amendment of the *Sixth Review*. These corrections are reflected in the programs used in these remand results.

Regarding the appropriate time at which to raise arguments concerning the changes in inventory for Fine Foods, Commerce noted in the *Redetermination* that even though parties intended their submission of the relevant financial statements to be used for valuing whole live fish, they were placed on the record well before the preliminary results, Fine Foods was identified as a fish processor in the financial statements, and the parties were thereby alerted that the financial statements could be used for surrogate ratio valuation purposes. Thus, Commerce's position is that the parties had ample time to comment on the classification of any line items. Further, irrespective of the timing of when to raise arguments, Commerce also noted that it did address the parties' arguments regarding Fine Food's changes

in inventory by stating that "Fine Foods' financial statements lack sufficient detail to determine the proper treatment of the changes in inventory." RR at 23 (citation omitted)

After further review on remand of the financial line items for Fine Foods of "Opening Stock/Inventories" and "Closing Stock/Inventories", Commerce found that the financial statements did in fact contain the detail necessary to account for change in inventory. Specifically, Commerce found the total inventory values (identified in Fine Foods' financial statements as either related to fish or fingerlings in the Inventory section thereof) tie to the inventories in the cost of goods sold.

Commerce found that Fine Foods both farms fish and engages in fish processing, and that along with processed fillets both fish and fingerlings can be sold in their own right as finished products. Commerce, therefore, determined that the inventory changes presented in Fine Foods' financial statement should be considered as changes in the finished goods inventory, and Commerce revised the calculation of financial ratios to reflect this. *Id*. at 45–46.

Vinh Hoan urges further reconsideration of Commerce's decision to include changes in inventory from Fine Foods' financial statement in the financial ratio calculations, arguing that Commerce has not adequately explained its change in position concerning the amount of detail provided in the Fine Food financial statements to account for inventory changes, and that because there is no evidence that Fine Foods sold any fingerlings it would not be considered a "finished good" that would need to be accounted for in the finished goods inventory. Def-Int's Cmts at 11.

The court, however, cannot find the extent of Commerce's explanation inadequate, and substantial evidence supports determining from Fine Foods' financial statements that Fine Foods sold fingerlings. *See* Pets' Aug. 16, 2010 Subm., attach. 1 (Fine Foods financial statement), PDoc 154. It was therefore not unreasonable for Commerce to find upon remand that the inventory figures that include fingerlings were included in the cost of goods sold. *See id.* at 23, 27. Commerce thereby and therefore appropriately accounted for that matter in the inventory figures.

Vinh Hoan also argues that the inventory value data in the Fine Foods financial statement were prepared by Fine Foods' management and not by the company's auditors such that the auditors declined to comment on the valuation of the assets. Def-Int's Cmts at 11. However, that argument does not appear to the court sufficient to under-

mine Fine Foods' financial statement or the auditors' comments thereon with respect to the accuracy of the data in the financial statement.

III. *Conclusion*

In accordance with the court's prior order and based on analysis of the four issues Commerce was instructed to reconsider as well as interested parties' comments thereto, Commerce has maintained its selection of Bangladesh as the primary country, has selected different SVs for the fish waste, broken meat, and fish skin by-products using information from the Vitarich price quote, has continued to use Gemini's financial statements to calculate the surrogate financial ratios, has accounted for all calculation changes as a result of the original ministerial error allegations, and has addressed the issues raised in the prior opinion regarding Fine Foods' financial statements. Margin calculation changes resulted from selecting different by-product SVs and adjusting for the inventory changes in Fine Foods' financial statements. Accounting for all such changes and issues, the *Redetermination*'s resulting antidumping margin for respondent Vinh Hoan is $0.06 per kilogram, while the margins for the voluntary respondent Vinh Quang and the new shipper review respondent CL-Fish are *de minimis*. Vinh Hoan's margin, being above *de minimis*, becomes the margin for those companies not individually examined but receiving a separate rate assuming this decision is rendered final after all appeals.

Based upon the opinion above, the results of remand will be sustained. Judgment to that effect is issued herewith.

So ordered.

Dated: December 18, 2014
New York, New York

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

Slip Op. 14–145

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00110

JUDGMENT

Musgrave, Senior Judge: This court's slip opinion 13–64, 37 CIT (2013), having granted the plaintiffs' motion for judgment on the

agency record compiled *sub nom*. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review*, 76 Fed. Reg. 15941 (Mar. 22, 2011) ("Final Results"), to the extent of remand to the International Trade Administration, U.S. Department of Commerce ("Commerce") to clarify or reconsider its analysis of certain issues addressed in slip opinion 13–63, 37 CIT (2013) that pertain to this case; and the defendant having filed Commerce's *Final Results of Redetermination* pursuant to court remand, upon which the court has received interested parties' written comments; and the court having issued its decision thereon in the context of the opinion on Court No. 11–00109 issued this date; Now therefore, after due deliberation, it is

ORDERED, **ADJUDGED**, and **DECREED** that Commerce's *Final Results of Redetermination* dated Jan. 17, 2014, be, and they hereby are, sustained as to this Court No. 11–00110.

So ordered.

Dated: December 18, 2014
New York, New York

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

Slip Op. 14–146

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, and VINH HOAN CORP., QVD FOOD CO., LTD., VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS, ANVIFISH JOINT STOCK CO., BIEN DONG SEAFOOD CO., LTD., and VINH QUANG FISHERIES CORP., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 12–00087

[Remanding seventh antidumping duty administrative review of frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: December 18, 2014

Valerie A. Slater, *Jarrod M. Goldfeder*, and *Nazak Nikakhtar*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

Ryan M. Majerus, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel was *Elika Eftekhari*, Attorney-International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Matthew J. McConkey, Mayer Brown LLP, of Washington DC, for defendant-intervenors Vinh Hoan Corporation and QVD Food Company, Limited.

Mark E. Pardo, *Andrew B. Schroth* , and *Andrew T. Schultz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington DC, for the defendant-intervenor Vietnam Association of Seafood Exporters and Producers.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington DC, for defendant-intervenors Anvifish Joint Stock Company, Bien Dong Seafood Company Ltd., and Vinh Quang Fisheries Corporation.

OPINION AND ORDER

Musgrave, Senior Judge:

This opinion addresses consolidated lawsuits contesting the administrative review portion of *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Seventh Antidumping Duty Administrative Review and Sixth New Shipper Review*, 77 Fed. Reg. 15039 (Mar. 14, 2012), APDoc[1] 129 ("*Final Results*" or "*Seventh Review*"). Compiled by the defendant, International Trade Administration, United States Department of Commerce ("Commerce" or "Department"), the *Seventh Review* covers the period August 1, 2009 through July 31, 2010, and the administrative reasoning is in the issues and decision memorandum ("IDM") of record, A-PDoc 112 ("*I&D Memo*").

Previously, further proceedings here were stayed pending the results of remand of prior reviews, as those reviews implicated certain issues herein. *See*, *e.g.*, *Catfish Farmers of America v. United States*, 37 CIT ___, Slip Op. 13–63 (May 23, 2013). Redetermination of those reviews having been sustained in a separate slip opinion and judgments issued this date, the stay of this matter is lifted hereby, *sua sponte*, and the merits addressed below.

As in those prior reviews, the plaintiffs'[2] initial claims here concern Commerce's selection of Bangladesh as the primary surrogate country for the calculation of the respondents' margins, which determination also resulted in surrogate valuation ("SV") from Bangladesh of data for the factors of production ("FOPs") of the whole live fish input, farming inputs, labor, additives, diesel fuel, and packing materials, as well as the use of financial statements for certain Bangladesh shrimp

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[1] The antidumping duty order covers *Pangasius hypophthalmus* (also identified as *Pangasius pangasius*), *Pangasius bocourti*, and *Pangasius micronemus*. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47909 (Aug. 12, 2003) ("*Order*"). The designation "A" herein preceding this court's conventional citations to the public or confidential administrative record documents (PDoc or CDoc) are to those documents filed with the Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System ("Access").

[2] The plaintiffs here again are industry petitioners Catfish Farmers of America, America's Catch, Alabama Catfish Inc., d/b/a Harvest Select Catfish, Inc., Heartland Catfish Company, Magnolia Processing, Inc., d/b/a Pride of the Pond, and Simmons Farm Raised Catfish, Inc.

processors to value foreign respondents' overhead, SG&A, and profit. In addition, the plaintiffs complain of the use of Indonesian import statistics rather than price quotes to value four by-products: fish waste, fish oil, fresh broken fish fillets, and frozen broken fish fillets.

For their part, the defendant-intervenors collectively challenge Commerce's use of "zeroing" methodology in this administrative review, and the defendant-intervenor Vinh Hoan Corporation challenges the determination to reject as untimely its request for company-specific revocation as well as the determination to "cap" the SV for its fresh broken fillets at the level of the SV for whole live fish.

Jurisdiction is pursuant to 28 U.S.C. §1581(c) and 19 U.S.C. §1516a(a)(2)(B)(iii). The court is required to examine whether the *Final Results* are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i). Certain claims on this matter persuade that remand of the case is necessary.

Discussion

I. Plaintiffs' Motion for Judgement -- Selection of Primary Surrogate Country

A. Background

19 U.S.C. §1677b(c) mandates that the valuation of the factors of production ("FOPs") of a producer or exporter from a non-market economy("NME") "shall be based on the best available information regarding the values of such factors in a market economy country or countries". Pursuant to its interpretation thereof, Commerce normally selects a "primary" surrogate country based on a four-step sequence. *See* Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004).[3] Only the "Data Considerations" step in that sequence is at issue here:

> [D]ata quality is a critical consideration affecting surrogate country selection. After all, a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable. . . .
>
> In assessing data and data sources, it is the Department's stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net

[3] *See, e.g., Jiaxing Brother Fastener Co., Ltd. v. United States*, 38 CIT ___, ___, 961 F. Supp. 2d 1323, 1328 (2014).

> of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.

Id.

For its preliminary determination, Commerce considered the Philippines, Indonesia, and Bangladesh to be economically comparable to Vietnam and significant producers of comparable merchandise, and it based the selection of the primary surrogate country on the record data for the main input for production of frozen fish fillets: whole live fish.[4] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 76 Fed. Reg. 55872 (Sep. 9, 2011) ("*Preliminary Results*"), APDoc 7, at 55875–77. Commerce determined the Indonesian "FAO-FIGIS" data represented a more reliable broad market average for purposes of valuing whole live fish, having also satisfied the surrogate value criteria (according to its policy) of being publicly available, from an approved surrogate country, sufficiently specific to the input in question, tax and duty exclusive, and contemporaneous with the POR. *Id*. Commerce also determined to reject certain DAM-internal worksheets, of the type used to calculate the whole live fish price in the final results of the prior review, on the ground that questions remained unanswered as to the worksheets' publicly availability. *Id*. (citing DAM's failure to respond to Commerce's inquiries and an affidavit from a Bangladeshi attorney who, as a member of the public, had tried unsuccessfully to obtain a copy of the worksheets). *See* File Memorandum, "Placing Questions to Philippine and Bangladeshi Governments on the Record" (June 27, 2011), APDoc 113. Additionally, Commerce valued the fish waste, fish oil, fresh broken fish fillets, and frozen broken fish fillets by-products using SV import data for Indonesia. *See* Preliminary Surrogate Value Memo, APDoc 5, at 6–7.

After the *Preliminary Results*, the parties placed further data on the record.[5] For the *Final Results*, Commerce changed its preliminary determination, and selected Bangladesh based on the updated data

[4] The three sources of data for these countries' respective prices for whole live *Pangasius* fish were as follows: (1) *Fisheries Statistics of the Philippines 2007–2009*, an official government publication of the Philippine Government's Bureau of Agricultural Statistics ("BAS"), Fisheries Statistics Division, containing 2009 *Pangasius* prices; (2) price and quantity data for 2009 for *Pangasius* pertaining to Indonesia from the U.N. Food and Agriculture Organization's ("FAO") Fisheries Global Information System ("FIGIS"); and (3) internal worksheets from the Department of Agriculture Marketing ("DAM") of the Bangladesh Ministry of Agriculture pertaining to price data for "pangas" at the wholesale level of distribution (the "DAM worksheets").

[5] The additional data were as follows: (1) *Fisheries Statistics of the Philippines 2008–2010* ("*FSP08–10*"), an updated Philippine Bureau of Agricultural Statistics ("BAS") government

for valuing whole live fish. *I&D Memo* at cmt. I.C. *See* Final Surrogate Value Memo, APDoc 113, at 4–5. Commerce again found the data from all three countries for that input to be "approved", tax and duty exclusive, publicly available, specific, and contemporaneous with the POR. But Commerce rejected the Philippine BAS data, after adopting its "observations and concerns" from the previous review regarding them.[6] Commerce also found that while the FAO FIGIS data for Indonesian *Pangasius* are "meant to capture all encompassing whole country data", representative of a broad-market average, and significant in volume in the amount of 109,685MT, they are presented as a single average price for the whole country, include all four species of *Pangasius* (of which *Pangasius hypophthalmus* is the farmed majority) and evince some uncertainty as to total volume.

Such observations apparently persuaded Commerce when it considered the BAS data both as a whole and in comparison with the DAM data for Bangladesh. Considering the DAM data further, Commerce continued to reject the DAM worksheets as lacking public availability. With respect to certain DAM website data submitted after the preliminary results, *see* note 5, Commerce rejected the "grower" prices that consisted of two data points as being too limited to constitute a broad market average. However, as in the prior review, Commerce was not persuaded by the domestic industry's argument that the DAM data should be rejected on the ground that they represent wholesale prices and not "farm gate" prices, reasoning that "it is uncertain the extent to which such a distinction is relevant" in SV analysis, which "seeks to determine the price a respondent would pay for an input if it were to produce subject merchandise in the surrogate country, not necessarily what producers/sellers of the input in the surrogate country receive." *I&D Memo* at 12.

publication, which reported farm-gate volume and value data for whole live *Pangasius* produced and sold in the Philippines during 2009 and 2010; (2) supplementation of the Indonesian FAO data; (3) printouts of weekly price data for whole "pangas" fish, covering a portion of Bangladesh's districts from the DAM website (submitted at Commerce's request, after the deadline for submitting surrogate data had already passed). *See I&D Memo* at 6–8; *see also* VASEP's Surrogate Value Submission (Nov. 15, 2012) at Exhibit 5, APDocs 36–53; File Memorandum, "Phone Call to Counsel for VASEP" (Dec. 20, 2011), APDoc 69.

[6] *I&D Memo* at 9. The plaintiffs' challenges to certain of those findings and concerns were addressed in Slip Op. 13–63, *supra*. On this point, the plaintiffs argue the adoption of prior "observations" would include Commerce's prior finding that the BAS data represented a broad market average. The defendant argues there was no specific broad market average finding on the Philippine BAS data in the instant review, only Commerce's statement that "[a]ll other observations and concerns about the [BAS] data remain the same as in . . . prior segments". The court, however, is inclined to agree with the plaintiffs on the import of that statement, which would include the prior administrative finding of the BAS data as constituting a broad market average.

Commerce then noted that the record indicated that the whole fish processed in Vietnam range from 1–1.5 kilograms and that the DAM website data for "pangash, small" consisted of fish that included that size range, *i.e.*, up to 1.5 kilograms. Commerce also noted that the terms "pangas" and "pangash" are used interchangeably, that "pangas" is the local name for *Pangasius hypophthalmus*, and that *Pangasius hypophthalmus* is the only species listed under "pangas" in the *Fisheries Statistical Yearbook of Bangladesh 2009–2010* published by the Government of Bangladesh. Commerce therefore found that the DAM website data was sufficiently species-and size specific to the whole live fish input utilized by the respondents.

With regard to the broad market average criterion, Commerce noted that the DAM website data represented weekly prices for "only 31 of the 68 districts, [but] this still represents 767 price observations from a considerable portion of the country, a significant number" that included the largest producing district (Mymensing), "thereby indicating that the vast majority of production was captured." Commerce therefore found the source to be a broad market average.

Finally, Commerce compared the prices in the "hard copy" (*i.e.* the DAM worksheets) to those from the DAM website and found the differences between the two "minute." Thus, Commerce found that:

> 1) the data are species-specific (unlike the FIGIS data); 2) this still represents 767 price observations; 3) the largest district, by far, is included; 4) the numbers tie to the hard copy; 5) the data exactly match the POR; and 6) the data are publicly available. In addition, the *Fisheries Statistical Yearbook of Bangladesh 2009–2010*, establishes that cultured species-specific *Pangasius hypophthalmus* [ ] production in Bangladesh was 124,760MT, greater than the volume from the FIGIS data (109,685MT). Although we do not question the reliability of the FIGIS data, we find the DAM data to be a more robust data source, given its breadth and focus, especially with respect to specificity and contemporaneity. We thus find that the DAM data represent the best option for valuing the whole fish input.

I&D Memo at cmt. I.C (footnote omitted). Commerce reinforced this finding by noting that "Bangladesh also has multiple viable surrogate financial companies" for the purpose of calculating SV financial ratios.

B. Analysis

The plaintiffs advance various arguments attempting to convince that Commerce's choice of surrogate for valuing the whole live fish input is unsupported by substantial evidence and contrary to law. One is sufficient for remand.

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First contended is that Commerce has imposed a new and unexplained test of "robustness" without notice and comment or support in the record. The court disagrees. "Robustness" appears inherent in the statutory term "best available information," and is not a new statistical concept. It originally referred to the sensitivity of the *method* of analysis, *i.e.*, to the degree of resistance to errors produced by deviations from the assumptions employed, *see*, *e.g.*, Peter J. Huber, *Robust Statistics*, ch. 1 (Wiley & Sons ed. 1981), but has since been utlized to cover the *quality* of the data being analyzed, *cf. id.*, p. *v* ("[a]musingly, . . . 'robust' has now become a magic word, which is invoked in order to add respectability"). Commerce in this matter simply found the qualities of breadth and focus, as further defined in terms of specificity and contemporaneity, compelling. The plaintiffs chip away at a selective juxtaposition of Commerce's findings of record they deem relevant to those terms,[7] but in the end the arguments are insufficient to render unreasonable the administrative determination of the DAM website data as displaying "more robust" qualities than the

[7] For example, the plaintiffs argue: that Commerce has placed apparent undue emphasis on the sheer number of "data points" embodied by the DAM data; that it is unreasonable to conclude that the "higher-level" yearly average prices aggregated at the provincial levels and published in the Philippine *FSP08–10* data and the yearly total quantity and value aggregated at the national level published in the FAO data for Indonesia are any less "robust" merely because they presented fewer numbers than the lower-level district-aggregated DAM website data; that it is misleading for Commerce to attempt to bolster its case with respect to the DAM website data by referring to the 124,760MT figure for Bangladesh *Pangas* production in 2009–2010 (as reported in the *Fisheries Statistical Yearbook* prepared by the Department of Fisheries, a different government agency than DAM); that the actual DAM website data cannot compare to the data of record for Indonesia -109,685MT total volume of *Pangasius* production for 2009 based on FIGIS data that were specifically associated with the reported FAO data value; and that the Indonesian FAO-FIGIS data were not "overbroad" since Commerce acknowledged that *Pangasius hypophthalmus* is the majority farm-raised species and the antidumping duty order covers three of the four species of *Pangasius.* Further on this latter point, the plaintiffs argue that given the fact that the antidumping duty order covers three of the four *Pangasius* species Commerce fails to explain why a data set that underincludes two of the *Pangasius* species subject to the AD order is more "robust" for purposes of the whole live fish input SV than a data set that overincludes a single *Pangasius* species not subject to the AD order that is not the set's majority species. *E.g.*, Pls' Br. at 13 n.5, referencing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 72 Fed. Reg. 13242 (Mar. 21, 2007) and accompanying IDM (Mar. 12, 2007) at cmt. 8 (using genus-level data to value whole live fish); Pls'

Indonesian or Philippine data sets. *Cf. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974) ("a decision of less than ideal clarity" must be upheld "if the agency's path may reasonably be discerned") *with Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (court may not displace Commerce's choice between two fairly conflicting views). Unstated in the summary paragraph in which Commerce's ultimate finding appears, but stated elsewhere, are Commerce's observations regarding the DAM website data's individuated weekly coverage of the particular size *Pangasius hypophthalmus* utilized in the respondents' production, which "lower level of aggregation" (about which the plaintiffs complain in other context) is what enabled Commerce's deeper consideration of the DAM data's "breadth" and "focus".[8]

Regarding contemporaneity, in light of Commerce's finding that every source was "sufficiently" contemporaneous, the plaintiffs' argument that the DAM website data cannot validly be determined temporally "more robust" overlooks the finding that the FAO-FIGIS data covered only 5 months of the POR. It is not inconsistent for the agency preliminarily to find competing data sets sufficient for the purpose of further consideration, and then, upon such further consideration, to find that the coverage of one is temporally fuller, even exact, and the other less so.

Similarly regarding specificity, the fact that Commerce found the FAO-FIGIS data "sufficiently" specific (to the genus level) for further consideration does not mean, contrary to the plaintiffs' argument thereon, that it was unreasonable for Commerce to further find the DAM website data "more robust" in terms of its specificity or focus upon *Pangasius hypophthalmus*, *i.e.*, the specific whole live fish input utilized by respondents, and in terms of size.

As between the Bangladeshi DAM website data and the BAS data, although Commerce did not directly compare their volumes, the plaintiffs' attempt to refute the defendant's point that the total BAS volume "pales" in comparison with Bangladesh *Pangasius* production overall is insufficient to impugn the reasonableness of Commerce's

Reply at 8, referencing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 75 Fed. Reg. 56062, 56067 (Sep. 15, 2010) (prelim. results) (the record did not show that using genus-level rather than species-level sources "would necessarily generate a difference in price").

[8] Among the various definitions of "breadth", only four are apt here: (1) spaciousness or extent (distance), (2) largeness or liberality, as of views or vision, (3) the quality of having details so massed as to produce an impression of largeness and unity, and (4) in logic, the meaning of extension or denotation. *Webster's New International Dictionary* (Unabridged) (2d ed. 1954), p. 329. "Focus" in the context of this matter obviously means center, concentration or convergence. *See id.* p. 978. The parties' arguments over the terms do not extend beyond such parameters.

"more robust" finding with respect to the DAM website data. And as between the DAM website data and the Indonesian data, the plaintiffs do not adequately explain or persuade why it was unreasonable for Commerce to have preferred a "view" of the data, in the form of weekly snapshots of district markets, as opposed to a single average price summation of them and regardless of the comparative volumes involved.

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Nonetheless, the plaintiffs make the point that it is difficult to understand how Commerce could possibly have found the DAM data more "robust" when DAM did not respond to two separate requests from Commerce for information to clarify aspects of the worksheet data and the nature and soundness of DAM's collection procedures -- in contrast, the plaintiffs maintain, to the Philippine BAS, which they characterize as having provided a prompt and complete response to Commerce's inquiries. *See* Commerce's File Memorandum, "Response to Questions for the Philippine Bureau of Agriculture Statistics Regarding Price Data in the Fisheries Statistics of the Philippines" (July 15, 2011), APDoc 8. Thus returning to methodology, the plaintiffs vigorously contest Commerce's "corroboration" of the DAM website data, arguing that Commerce ignored significant discrepancies between those data and the unpublished internal worksheets that undermined their reliability. VASEP had claimed that the DAM website data may be corroborated by comparing the percentage of matching "pangas, small" data points among the unpublished worksheets data, which Commerce did "by comparing the instances where a field for both sources contained data." *I&D Memo* at 12. Commerce "found that the numbers were identical except for a few observations, and even then the differences between the two were minute." *Id*. According to the defendant, this "enabled the agency to ascertain whether the DAM website data w[ere] indeed sourced from the internal worksheets". Def's Resp. at 24. The plaintiffs contend this is cherry-picking and faulty logic, as their analysis shows that the percentage of DAM website data fields with varying degrees of differences, as compared with the corresponding fields of the DAM worksheets and either containing different numbers or missing data, was over 52 percent.[9]

[9] In greater detail, the plaintiffs contend that the DAM wholesale price data were from "only" 31 of 68 districts in Bangladesh and provided 53 weekly price observations for the 12-month POR of August 1, 2009 through July 31, 2010. *See* VASEP's Surrogate Value Submission (Dec. 22, 2011), at Ex. 2, APDoc 70. Assuming steady production over time, when the plaintiffs performed the same analysis for all 32 districts for which DAM included any data, the data reported by DAM were for only for 45.2% of all weeks, so that even for

Generally speaking, the court is not free to disagree with Commerce's choice of method to confirm reliability, so long as it is based on "more than a mere scintilla" of substantial evidence to that effect. *See Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 217 (1938). And as a general proposition, determining reliability through corroboration is a valid method. *Cf.* 19 U.S.C. §1677e(c); *Watanabe Group v. United States*, Slip Op. 10–139 at 11 (Dec. 22, 2010) (corroboration simply "requires the use of independent sources to confirm the validity of [the] secondary information"). That said, the court agrees with the plaintiffs that by considering only the number of matching data fields among the DAM website data, in comparison with the DAM worksheets and notwithstanding the counter-analysis of a not-insignificant percentage of mismatches, such methodology can hardly be concluded "robust," in contrast with Commerce's expressed concern therewith. Even if it may be concluded to be "more than a mere scintilla", the *I&D Memo* 's "gloss" over the magnitude of the discrepancies between the DAM worksheets and the DAM website data, characterized as "minute," appears specious, because while it may be true that a no-public-availability finding does not, necessarily, correlate to invalidity of the same data for other purposes, the reliability determination with respect to the DAM website data appears here to rest on the thinnest of reeds that also appears considerably bent by the fact that Commerce did not "carry through" on what the plaintiffs purport as Commerce's previously-evinced concerns regarding the DAM collection methodology and the DAM's non-responsiveness thereto in determining the reliability of the DAM website data. Such concerns would seem to go beyond the DAM worksheets' public availability, and the method employed to determine the DAM website data "reliable" does not appear to have resolved the potential "GIGO" principle inherent in such method. *See*, *e.g.*, *Mississippi v. EPA*, 744 F.3d 1334, 1352 (2013). Remand at least for further explanation of the data's reliability in light of the above is therefore necessary, but Commerce also maintains the discretion to reconsider the matter as a whole, should it so choose.

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the 32 of 68 (*i.e.*, 47%) of Bangladesh districts included in the DAM data, the plaintiffs point out that the data are only partial. *See* Pls' Br. at Att. A. In particular, the plaintiffs point out that since the DAM-reported data for Mymensingh (which Commerce claims the DAM data "covered") are for only 17 of 53 weeks of the POR, by their reckoning this means that even if the pricing in each week was representative of all production in that week, which is not known, the DAM data could, at most, account for only 32% of total POR production in Mymensingh. This last point arguably applies with equal force to the method used to produce the BAS data, and even if all the foregoing is true, it is insufficient *on its own* to diminish the "substantiality" of the DAM website data's reliability determination on the reviewing standard before the court. *But see infra*.

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The plaintiffs also argue that there are no quantities associated with the weekly wholesale prices stated on the DAM website, and that in the absence of quantities Commerce had no basis to ascertain whether the DAM data provided values for a commercial level of sales of *Pangasius* in the marketplace. The *Final Results* do not address the plaintiffs' argument that both the Indonesian and Philippine sources provided a stated quantity associated with the average unit price and that no quantities are associated with the DAM website data. Since the court's review function does not entail fact-finding, on remand Commerce is respectfully requested to address the plaintiffs' commercial-quantities contention in determining whether the DAM website data are the best available information.

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On another tack, the plaintiffs also contest the *I&D Memo*'s statement that the distinction between wholesale and farm-gate levels of pricing is "uncertain" because SV "seeks to determine the price a respondent would pay for an input if it were to produce subject merchandise in the surrogate country, not necessarily what producers/sellers of the input in the surrogate country receive." *I&D Memo* at 12. They argue this explanation ignores the fact that the Vietnamese respondents purchased the whole live fish inputs directly from farmers and that farm-gate prices for Indonesia and the Philippines were available on the record. The defendant responds that Commerce's farm-gate-versus-wholesale concern is only with respect to the potential inclusion of taxes or duties and is inapplicable here because Commerce determined that the Bangladeshi wholesale data were tax and duty free. Def's Resp at 25–26, referencing *I&D Memo* at 8 and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 75 Fed. Reg. 12726 (Mar. 17, 2010) and accompanying IDM at cmt. 2 ("one cannot decipher if the prices are derived from farm gate prices, and are therefore tax and duty exclusive, or from market prices").

If the defendant's point is true, it is *post hoc*, and the *I&D Memo*'s explanation is insufficiently responsive to the plaintiffs' concerns. On remand of the prior administrative review, Commerce tested the idea of transportation cost as an aspect of the type of measurable and quantifiable distinction that would impact the wholesale versus farm gate price data of record for that review and found only an insignificant difference. The plaintiffs here are not arguing that quantifiable differences can be concluded from the evidence of record; they are instead essentially arguing that Commerce should proceed from the

assumption that *qualifiable* distinctions should be presumed, *e.g.*, condition of fish at wholesale versus farm-gate, in order to mirror more closely the respondents' *actual* production experience and avoid introducing pricing distortions at the wholesale level, whether or not there is actual record evidence of qualifiable distinctions. The reviewing standard and appellate precedent might preclude imposing that kind of presumption on Commerce's methodology. *See* 19 U.S.C. §1516a(b)(1)(B)(i); *see*, *e.g.*, *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (Commerce need not duplicate the exact production experience at the expense of choosing a surrogate value that most accurately represents the fair market value of the input in a hypothetical market-economy). But it would not be inappropriate to request on remand, since remand is being ordered in any event, further explication from Commerce on the validity of the plaintiffs' concerns, summarized above, in the determination of the best available information for SV of the whole live fish input. Commerce is therefore requested to do so.

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Lastly on this issue, the plaintiffs argue Commerce failed to consider the totality of available data for all FOPs in its surrogate country selection. *See*, *e.g.*, *Folding Metal Tables and Chairs from the People's Republic of China*, 76 Fed. Reg. 2883 (Jan. 18, 2011) and accompanying IDM (Jan. 10, 2011) at cmt. 1C ("consistent with the Department practice, we evaluated data considerations for the purposes of surrogate country selection as a whole, including availability of surrogate financial ratio data and availability of surrogate values for direct material inputs and other FOPS, rather than dissecting the elements").

Whenever the record includes multiple economically comparable countries that are also significant producers of comparable merchandise, "the country with the best factors data is selected as the primary surrogate country." Policy Bulletin 04.1. In this instance, the data sets for Bangladesh, Indonesia, and the Philippines each possess merits and demerits. The plaintiffs do not minimize the importance of the whole live fish factor, but they argue Commerce failed to "move on" to consider the evidence of record that, they contend, demonstrated that the Philippines and Indonesia offered more contemporaneous and specific data for secondary material inputs, labor, energy, by-products, and packing materials than were available from Bangladesh.

It is merely arguable that the *I&D Memo* evinces improper *a priori* selection of Bangladesh as the primary surrogate country before consideration of the non-whole-fish factors and financial data,[10] and the court is not persuaded that the *I&D Memo*, as it stands, does not express therein or thereby a sufficient degree of consideration of the totality of available data in compliance with Policy Bulletin 04.1.[11] For the current *Final Results*, Commerce found the data for Bangladesh to represent the best surrogate for calculating whole live fish, farming inputs, labor, additives, diesel, packing materials, overhead, SGA expenses, and profit, in accordance with its selection of Bangladesh as the primary surrogate country. *See generally I&D Memo* at cmt. II; Final Surrogate Value Memo, APDoc 113, at 4–5. Pursuant to 19 C.F.R. §351.408(c)(2), Commerce normally values factors in a single surrogate country if such useable information exists on the record.

Be that as it may, reconsideration of the totality of available data might be necessary depending upon how Commerce proceeds on remand in further explaining or redetermining the best available information for the whole live fish SV, which would implicate the non-fish FOP SV selections since the ultimate selection of the primary surrogate country has not yet been finally resolved. Certain issues pertinent thereto are more fully addressed in the following section.

II. Plaintiffs' and Vinh Hoan's Motions for Judgment -- Surrogate Valuations of By-products

When calculating normal value, Commerce interprets 19 U.S.C. §1677b(c) to permit offsetting incurred production costs with SVs calculated for by-products generated during the production process,[12]

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[10] *Cf. I&D Memo* at 15 (regarding financial ratios, "[a]s noted above in Comment I, we have selected Bangladesh as the primary surrogate country"), & *id*. at 21 (regarding fish meal, "[a]s we explained in Comment I above, we have selected Bangladesh as the primary surrogate country"), & *id*. at 21 (regarding fingerlings, *etc*., "[w]e have selected Bangladesh as the primary surrogate country"), *with* Slip Op. 13–63 at 34 (remanding for consideration the impact of the secondary factors upon the determination of surrogate country as a whole, along with the court's concerns over Commerce's interpretation of the DAM and Philippine data submitted for that review, since *a priori* determination was not in accordance with Policy Bulletin 04.1).

[11] *See I&D Memo* at 13 ("As described above, the Bangladeshi DAM data offer the best option for valuing the whole fish. Moreover, Bangladesh also has multiple viable surrogate financial companies as discussed below. Therefore, given the totality of the facts, we find that Bangladesh is the most suitable primary surrogate. Both Indonesia and the Philippines are suitable secondary surrogate countries."); *see also id*. at 14–17 (financial ratios).

[12] Selection of the best available information of record for valuing by-products focuses on yielding accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Commerce's stated practice is to evaluate data for reliability,

which interpretation the parties do not dispute. The *I&D Memo* restates: that it is Commerce's preference to value all FOPs with data from the primary surrogate country; that when data are not available from the primary surrogate, Commerce will look to secondary sources; and that Commerce declines to use price quotes when other "more reliable" data are on the record. [13] In the final analysis, Commerce granted SV offsets for respondents' fish waste, fish oil, fresh broken fillets, and frozen broken fillets by-products using import data maintained in the Global Trade Atlas ("GTA") for Indonesia from the Harmonized Tariff Schedule ("HTS"). *See I&D Memo* at cmt II.B.

The plaintiffs contest each by-product SV selection, arguing that the selected SVs are demonstrably aberrant, both in absolute terms and relative to the value for the whole live fish input, because they significantly overstated the by-product offset, thus rendering the margin calculations inaccurate and unreasonably reduced. More precisely, the plaintiffs complain that the Indonesian import data are far less specific to *Pangasius* by-products than the available price quotes, and that Commerce unreasonably cites merely to its preference for import statistics without further explanation, which they claim is legally defective because it presupposes that price quotes will never constitute the "best available information" for valuing a reported factor of production contrary to established judicial precedent. Vinh Hoan contests Commerce's treatment of its fresh broken fillets, and it

public availability, quality, specificity, and contemporaneity. *See Magnesium Metal from the People's Republic of China*, 69 Fed. Reg. 59187, 59195 (Oct. 4, 2004) (preliminary determination); *see also* 19 C.F.R. §351.408(c)(1). Of those considerations, specificity has been held of primary importance for surrogate by-product valuation. *See*, *e.g.*, *Jinan Yipin Corp. v. United States*, 35 CIT ___, ___, 800 F. Supp. 2d 1226, 1304 (2011) ("[i]f a set of data is not sufficiently 'product specific,' it is of no relevance whether or not the data satisfy the other criteria"); *see also Taian Ziyang Food Co. v. United States*, 35 CIT ___, ___, 783 F. Supp. 2d 1292, 1330 (2011) ("'product specificity' logically must be the primary consideration in determining 'best available information'" and "[i]f a set of data is not sufficiently 'product specific,' it is of no relevance whether or not the data satisfy the other criteria set forth in Policy Bulletin 04.1") (citation omitted).

[13] *See*, *e.g.*, *I&D Memo* at 18, referencing *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam,* 74 Fed. Reg. 47191 (Sep. 15, 2009) (final results) ("*Frozen Warmwater Shrimp*") and accompanying IDM at cmt. 7 (Commerce's "general practice is to not use price quote information if other publicly available data is on the record, because [price quotes] do not represent actual prices, broad ranges of data, and [Commerce] does not know the conditions under which these were solicited and whether or not these were self-selected from a broader range of quotes"). The defendant also argues Commerce's reasons for selecting the Indonesian data correlate with the agency's long-standing practice with regard to surrogate price data: Commerce prefers to use surrogate price data that is (1) an average non-export value, (2) representative of a range of prices within, and contemporaneous with, the POR, (3) product-specific, and (4) tax-exclusive. Def's Resp. at 30. *See Taiyuan Heavy Machinery Import & Export Corp. v. United States*, 23 CIT 701, 706 (1999); *accord Hebei Metals & Minerals Import & Export Corp.*, 28 CIT 1185, 1191 (2004).

also raises an imprecise point regarding Commerce's treatment of the fresh broken fillets in their frozen state. With the caveat that Commerce's response to section I, *supra*, might necessitate, in its discretion, a reconsideration of these by-products' SV, the court offers the following observations.

1. Unprocessed Fish Waste

Agreeing with Vinh Hoan that Indonesian GTA data for HTS 0511.91.90.00 appeared to be the more specific evidence of record to value fish waste on the ground that the provision does not include whole fish, Commerce valued respondents' unprocessed fish waste thereby, to wit, "Animal Products Nesoi[14]; Dead Animals (of Ch. 3), Unfit for Human Consumption, Other Products of Fish or Crustaceans, Moluscs or Other Aquatic Invertebrates." *I&D Memo* at cmt. II.B.1. In so doing, Commerce rejected a 2010 commercial price quote for *Pangasius* fish waste from Vitarich, a Philippine *Pangasius* processor,[15] two 2006 price quotes from Indian companies Aditya Udyong and Ram's Cold Storage,[16] and four published Indonesian prices for unprocessed fish waste or other seafood waste products. Commerce rejected the plaintiffs' argument that the import statistics are overly broad, and it did "not find the price quotes to be any more specific" because, among the several general price quotes provided by the plaintiffs for fish waste from India, Indonesia, and the Philippines, only the Vitarich quote was species specific -- and even then, Commerce did not "believe that the species from which the fish waste originated is necessarily important because there is no information on the record indicating there are meaningful distinctions among the species". Commerce also found only two of the price quotes contemporaneous, which the defendant contends were from among the Indian price quotes.

Contending that these findings are at odds with the record, the plaintiffs contest Commerce's finding that the price quotes were not "any more specific" than the import statistics because the Philippine, Indian, and Indonesian price quotes are all specific to unprocessed fish waste, and the Vitarich quote was also species specific (as Commerce itself acknowledges). After considering the plaintiffs' various

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[14] *I.e.*, "not elsewhere specified or included."

[15] Use of this quote in the prior review was sustained on appeal here.

[16] Use of these quotes in a prior new shipper review, covering the period August 1, 2006 through January 31, 2007, was sustained in *Vinh Quang Fisheries Corp. v. United States*, 33 CIT 1277, 637 F. Supp. 2d 1352 (2009).

contentions, the court is persuaded as to the correctness[17] of their argument that HTS 0511.91.90.00 is a "catch-all" provision for aquatic invertebrates that is not facially restricted to species' "waste". Therefore, it was erroneous for Commerce to have articulated that the price quotes were not "any more specific" than the import statistics for valuing fish waste, because that statement proceeds from either *ipse dixit* or circular reasoning that the import data for that provision are "other more reliable data . . . on the record". *See I&D Memo* at 18.

In addition, the plaintiffs argue that continuing to use Indonesian HTS 0511.91.90.00 import-statistics to value the fish waste at $0.59/kg after Commerce switched the primary surrogate country from Indonesia to Bangladesh resulted in a near-doubling of the relative fish-waste-to-whole-live-fish-input ratio, from 33% to 60%. *See* Final Surrogate Value Memo (Mar. 7, 2012) at Exhibit 1, APDoc 113. The plaintiffs' evidence of record indicates that fish waste is a wholly unprocessed by-product that is collected from the factory floor and sold to local buyers for a nominal (and, the plaintiffs argue, more realistic) amount between $0.01/kg to $0.09/kg, according to their recitation of SVs from each of the other potential surrogate countries and the independent research studies on fish waste values in the Asia-Pacific region they submitted for the record. *See* Petitioners' Case Brief at 25–34, APDoc 83; *see also Certain Fresh Cut Flowers from Colombia*, 61 Fed. Reg. 42833 (Aug. 19, 1996) (final results) at cmt. 25 ("the distinguishing feature of a by-product is its relatively minor sales value in comparison to that of the major product or products produced"). No party points to any contradictory evidence of record. The plaintiffs argue such a pricing disparity to the Indonesian import data is obvious indication of inclusion of higher-priced value-added products among those data, and therefore reliance on them is

[17] The court finds the other arguments raised by the plaintiffs on this issue less persuasive. They contend, for example, that Commerce acknowledged from the prior *Sixth Review* that "the import statistics in question" --meaning those pertinent to this review -- include products other than unprocessed fish waste, particularly processed by-products. Pls' Br. at 32, referencing *Sixth Review I&D Memo* at cmt. IV.I.i. The argument fails because those "import statistics in question" were with respect to HTS 0304.90 (other fish meat of marine fish) for the Philippines, not HTS 0511.91.90.00 import statistics for Indonesia. (Commerce rejected Philippine HTS 0304.90 during remand of that issue from the *Sixth Review* because "valuing fish waste using import statistics results in a fish waste SV which is higher than that of the whole fish"; *Sixth Review* Remand Results at 19.) A second argument that fails is that Commerce needs to explain with greater clarity its "divergence" from *Vinh Quang Fisheries* and other cases. Commerce's statement that there was "no information on the record" as to any difference in species' waste provides a reasonably clear explanation for departing from (or the inapplicability of) its general requirement of "prices specific to the input in question" in Policy Bulletin 04.1.

inappropriate because the result is improper assignment of an inflated value to the input in question and an inaccurate antidumping calculation. *See*, *e.g.*, *Globe Metallurgical Inc. v. United States*, 32 CIT 1070, 1079 (Oct. 1, 2008).

The defendant responds that Commerce reasoned that the Indonesian data were "preferable" to the competing price quote data in the record for valuing the fish waste by-product because: (i) only one price quote on the record was species specific; (ii) only two price quotes were contemporaneous; (iii) the Indonesian import statistics reflected broad market averages; and (iv) the Indonesian import statistics were more specific to fish waste because they did not include whole fish. Def's Resp. at 30. With the possible exception of contemporaneity, however, and about which Commerce barely commented, none of these reasons actually impugns the price quotes' reliability, since Commerce itself took the position that the record evinced no distinction among the waste of "species".

Obviously, an administrative preference for a particular kind of data must yield if the relevant facts of record so compel. It would be unreasonable, for example, to continue to "prefer" import data simply on the basis of their breadth if they are in fact overinclusive or overvaluative in relation to the specific circumstances of the input or by-product in question. *See*, *e.g.*, *Jinan Yipin Corp.*, *supra*, 35 CIT at ___, 800 F. Supp. 2d at 1304 ("[i]f a set of data is not sufficiently 'product specific,' it is of no relevance whether or not the data satisfy the other [SV] criteria").[18] And with respect to any substantial evidence of record that calls into question continued reliance on the administrative preference, Commerce needs to reasonably resolve the conflict, because administrative determinations must be explained "with sufficient clarity to permit 'effective judicial review'" as a matter of law. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S. 29, 43; *see*, *e.g.*, *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005). The function of the court, of course, is not to weigh the evidence, but to determine whether the agency has reasonably considered the record. On that basis, this record needs deeper articulation. Whatever the appeal of certain import data in meeting the "broad market" criterion, Commerce needs to explain why they are not overinclusive and more reliable than other information of record

[18] *See also*, *e.g.*, *Vinh Quang Fisheries, supra*, which sustained Commerce's reliance upon the two Indian price quotes on the record pertinent to that review. After throughly detailing the background and proposed alternatives for valuing the fish waste considered in that decision, the court observed that the respondent in that case "never c[ame] to terms with Commerce's finding that [the respondent]'s alternative processed fish waste data were an inappropriate match for the *unprocessed* fish waste factor." 33 CIT at 1282, 637 F. Supp. 2d at 1357 (italics in original).

for the SV valuation of the *Pangasius* by-product in question beyond merely providing a conclusory statement that they are, particularly if the import data's HTS provision is facially overbroad, which appears to be the case here. Otherwise, this aspect of the *Final Results* simply rests on the fallacy of *argumentum ad populum*.

More precisely, Commerce in this instance did not comment on what the Indonesian GTA data for HTS 0511.91.90.00 actually encompasses beyond accepting Vinh Hoan's contention that it does include fish waste. Commerce only indicated its preference is not to use price quotes "when other more reliable data [are] on the record", but that still begs the question, and Commerce provided little else by way of analysis on the reliability of the Philippine, Indian, or Indonesian price quotes, or on the evidence of record on other fish waste prices pertinent to the Indonesian region *vis-à-vis* the import statistics in question, or on the arguments set forth by the plaintiffs regarding satisfaction of the SV selection criteria. *See* Petitioners' Case Brief at 23–34, APDoc 83. Still, approximately eighteen years ago Commerce articulated that "the distinguishing feature of a by-product is its relatively minor sales value in comparison to that of the major product or products produced." *Certain Fresh Cut Flowers from Columbia*, 61 Fed. Reg. 42833 (Aug. 19, 1996) (final admin. results), at cmt. 25. *See also* Charles Horngren, George Foster, *Cost Accounting: A Managerial Emphasis* (7th ed. 1991), p. 527 ("[a] by-product is a product that has a low sales value compared with the sales value of [the principal product]"). Although there may be instances where a process that produces waste to the degree implicated by the SV of the waste by-product calculated for the *Final Results* may not seem unreasonable, an SV for "fish waste" that amounts to 60% of the SV for the primary input of a process rather leaves a difficult bone of contention to swallow, and at least requires Commerce to "explain its action with sufficient clarity to permit 'effective judicial review.'" *Timken*, 421 F.3d at 1355. Further explanation thereof is therefore requested in addition to the foregoing.

2. Fish Oil

Commerce's valuation of the respondents' fish oil by-product suffers from similar defect. In rejecting the *Pangasius* -specific price quote in favor of import statistics, Commerce again stated only that it has "a preference not to use price quotes when other data is available" and that "this HTS category includes fish oil and is therefore[ ] not overly broad." *I&D Memo* at 19. Commerce thus valued the fish oil using Indonesian GTA data for HTS 1504.20: "Fish Fats & Oils & Their

Fractions Exc Liver, *Refined* or Not, Not Chemically Mod., solid fractions, not chemically modified, other" (italics added).

Similar to its fish waste SV, *supra*, Commerce's SV calculation of $1.95/kg for fish oil using Indonesian import data represents nearly double the price of the whole fish input, using the plaintiffs' calculation.[19] *See* Final Surrogate Value Memo (Mar. 7, 2012) at Exhibit 1, APDoc 113. The fact that HTS 1504.20 facially covers refined and further-processed fish oil is at odds with the administrative record of respondents' unprocessed fish-oil by-product and of the respondents' actual production experience, as well as at odds with Commerce's position in *Vinh Quang Fisheries*, albeit as argued in the context of fish waste. As mentioned, specificity has been held of primary importance in determining whether particular import statistics are even appropriate for surrogate valuation. *See*, *e.g.*, *Jinan Yipin Corp.*, *supra*, 35 CIT at ___, 800 F. Supp. 2d at 1304.

The plaintiffs further add that Commerce also failed to respond to their various arguments that the respondents only sold their fish oil in the domestic market, that the record contains a reliable and specific price quote for unprocessed *Pangasius* fish oil from an Indonesian supplier, Yahdi, and that record evidence shows that *Pangasius* fish oil prices in Indonesia and India ranged from $0.13/kg to $0.84. *E.g.*, Pls' Br. at 34 referencing Petitioners' Case Brief at 26–29, APDoc 83. In view of such unresolved questions, Commerce's determination here has also not been explained with sufficient clarity to permit "effective judicial review," thus requiring remand. On remand, also bearing in mind the plaintiffs' averment that the combined effect of Commerce's fish waste and fish oil surrogate valuations adds over 150% of the cost of the whole fish input, if Commerce continues to value the unprocessed fish waste and fish oil by-products using Indonesian import statistics or any other similar such import statistics, it shall clearly explain why any such elevated results, as compared with the whole fish input, are reasonable for fish waste and fish oil by-products, and also briefly explain how, or if, its views have evolved since *Fresh Cut Flowers*.

3. Fresh Broken Fillets

Commerce valued the respondents' fresh broken fillets "by-product" based on Indonesian GTA data for HTS 0304.19.00.00 "Fish Fillets and Other Fish Meat (Whether or Not Minced), Fresh, Chilled or Frozen, Fresh or Chilled, Other". *I&D Memo* at 20. Those data produced a value of $2.89/kg value for the broken fillets. But, because "[b]roken fillets are not value added by-products, they are simply

[19] At such valuation, one wonders whether fish fillet or fish oil is the primary product.

meat from the fish that is broken or torn", Commerce "capped" the fresh broken fillets at the value for whole live fish of $0.98/kg, reasoning that it is illogical to generate a deduction from normal value that is higher than the value of the whole live fish input. *I&D Memo* at 20. *See also* Final Surrogate Value Memo (Mar. 7, 2012) at Exhibit 1, APDoc 113.

The plaintiffs contest this determination on the ground that the record contained, in their opinion, contemporaneous, reliable, *Pangasius*-specific, Philippine price quotes from Vitarich of $0.65/kg for broken *Pangasius* meat. *See* Petitioners' Surrogate Value Submission (May 10, 2011) at Exhibit 16, PDoc 101; *see also* Petitioners' Rebuttal Brief at 95–97 (Jan. 27, 2012), APDoc 93. In the context of Commerce's repeated preference for import statistics over price quotes, the plaintiffs argue that Commerce did not find their Vitarich price quote to be unreliable as a source for valuing fresh broken fillets, and that Commerce failed to address their arguments that the import statistics were "clearly aberrational" because they included values for both by-products and the finished frozen fish fillets, a fact Commerce implicitly recognized insofar as it "capped" the value for broken fillets derived from this HTS category at the $0.98/kg value for whole live fish.

Vinh Hoan contests the determination to "cap". It argues that fresh broken fillets are indeed value-added products that take labor, energy, equipment and other resources to produce and are rendered "more valuable" than the unprocessed whole fish from which they have been produced. Vinh Hoan also contests Commerce's conclusion that Vinh Hoan cannot sell fresh broken fillets as frozen fish fillets because of their appearance on the ground that Commerce failed to cite any evidence in the record to support this factual assertion. The defendant responds that this is contradicted by the record itself, specifically, Vinh Hoan's questionnaire response. Def's Resp. at 35–36, referencing *I&D Memo* at 20 n.62 and Vinh Hoan's Supplemental Section D Response, PDoc 99, Question 23 ("[t]he company confirms that other than fish oil and fish meal, there were no other value added by-products").

The court need not opine on the issue at this point, since Commerce needs to resolve in the first instance whether this issue will need revisiting as a result of the remand of the whole live fish input and selection of primary surrogate country issues.

4. Frozen Broken Fillets

Commerce valued the respondents' frozen broken fillets with Indonesian GTA data for HTS 0304.29.00.00 "Fish Fillets and Other Fish Meat (Whether or Not Minced), Fresh, Chilled or Frozen, Fresh or Chilled, Frozen Fillets, Other." *I&D Memo* at 20. In selecting Indonesian import statistics, Commerce stated that no party other than Vinh Hoan (*et al.*) commented on "this issue." *Id*. The plaintiffs argue they "clearly" addressed the issue of frozen broken fillets in their rebuttal brief in advocating for the use of Vitarich price quotes to value this by-product, *see* Petitioners' Rebuttal Brief at 95–97, PRII-93, and the defendant responds that the *I&D Memo* statement that "[n]o other party commented on this issue" referred to the issue of whether to value frozen broken fillets using HTS category 0304.29.00.00 or another Indonesian HTS category --not whether the Philippine price quote should be used to value the by-product. *I&D Memo* at 20. Vinh Hoan does not appear to contest Commerce's choice of SV for frozen broken fillets, but it does take exception to Commerce's treatment of its fresh broken fillets in their frozen state, as aforesaid.

At any rate, the court again need not opine at this point, since Commerce needs to resolve in the first instance whether this issue will need revisiting as a result of remand of the whole live fish input and selection of primary surrogate country issues.

III. Plaintiffs' Motion for Judgment -- Partial Adverse Facts re Vinh Hoan

Commerce also found that Vinh Hoan had not misrepresented its consumption of whole fish in the production of subject merchandise during the period of review. *I&D Memo* at 35–36. Commerce determined that Vinh Hoan's reporting methodology was reasonable, that Vinh Hoan had provided reasonable explanations as to why its fish consumption ratio might have decreased relative to the last review, and that the record did not support plaintiffs' claim that Vinh Hoan understated its fish consumption. *I&D Memo* at 13.

The plaintiffs argue record evidence demonstrates the contrary, that Vinh Hoan misreported its whole fish consumption factor and failed to substantiate the reasons for the reported decline in its whole fish consumption factor, and therefore Commerce erred in determining not to apply partial adverse facts available to Vinh Hoan pursuant to 19 U.S.C. §1677e. Pls' Br. at 39. According to the defendant, Commerce properly considered Vinh Hoan's explanations for the decline in its whole fish consumption ratio, the lack of record evidence demon-

strating underreporting by Vinh Hoan, and the satisfactory reconciliation of Vinh Hoan's total quantity of fish entered into production with its financial statements. *Id*. Thus, the defendant argues, Commerce properly determined that the record did not demonstrate the need for application of 19 U.S.C. §1677e.

The court agrees with the defendant that the plaintiff's estimations of underreporting are speculative and do not constitute direct record evidence demonstrating that Vinh Hoan misrepresented its whole fish consumption. *See* Pls' Br. at 41–44. The criticism that Commerce did not conduct a verification in the underlying review, *see id*. at 44, is unavailing because by statute Commerce does not have to verify every review. *See* 19 U.S.C. §1677m(i)(3) (noting verification of a final determination in an administrative review is only required when timely requested by an interested party and when no verification was made during two immediately preceding reviews, unless good cause for verification is shown).

In considering Vinh Hoan's explanations for the decline in its reported whole fish consumption factor from the preceding review, Commerce noted that although plaintiffs had challenged each of Vinh Hoan's explanations individually, "Vinh Hoan counters that collectively [the explanations] account for the decline." *I&D Memo* at 35. Commerce further observed that although Vinh Hoan did not submit detailed record evidence tying each explanation to an "exact percentage" of change, nevertheless, "when taken together, these explanations appear reasonable, particularly in light of Vinh Hoan's reconciliation [of its total fish entered into production with its audited financial statements]." *Id*. at 36. Commerce also rejected the speculative nature of plaintiffs' assertion that Vinh Hoan understated its fish consumption, noting that "[t]he record does not contain any evidence of underreporting." *Id*.

Although the plaintiffs allege that Vinh Hoan failed to substantiate with documentation the reasons for the decline in its whole fish consumption ratio, Pls' Br. at 38–39, Commerce did not require Vinh Hoan to submit such documentation in responding to its supplemental questionnaire. *See* Commerce's Supplemental Questionnaire to Vinh Hoan, APDoc 77 ("[p]lease explain what may have caused the total fish consumption ratio to decree . . . between this review and the last"). The plaintiffs' claim that Commerce "accepted [Vinh Hoan's] explanations simply because they 'appeared reasonable'", Pls' Br. at 40, appears to be an oversimplification of the analysis applied by Commerce. That is, the plaintiffs attempt to create the appearance that Commerce simply accepted Vinh Hoan's reported whole fish consumption factor based on Vinh Hoan's individual explanations

rather than consider their collective weight, *see* Pls' Br. at 40–41; however, it appears that Commerce based its decision on the totality of the evidence, and therefore the determination not to apply partial facts adverse facts to Vinh Hoan pursuant to 19 U.S.C. §1677e is supported by substantial evidence and is hereby sustained.

IV. Defendant-Intervenors' Rule 56.2 Motions

Vinh Hoan, QVD Food Company, Ltd., and collectively Anvifish Joint Stock Company, Bien Dong Seafood Company, Ltd., and Vinh Quang Fisheries Corporation, filed separate motions for judgment appealing Commerce's application of zeroing methodology in the *Final Results*. Vinh Hoan's motion also contests Commerce's rejection of its request for revocation of the review as well as Commerce's determination to cap the surrogate value for Vinh Hoan's fresh broken fish fillets at the surrogate value for whole live fish. Anvifish's motion also alleges that Commerce failed to calculate Anvifish's margin as accurately as possible.

A. VINH HOAN'S MOTION FOR JUDGMENT -- REVOCATION REQUEST

Commerce rejected a request for revocation from Vinh Hoan because the request was filed 232 days after the regulatory deadline established in 19 C.F.R. §351.222(e), stating that revocations "require additional analysis beyond the requirements of an administrative review, including conducting verification, and determining if sales of subject merchandise were made in commercial quantities." *I&D Memo* at 37. *See* Vinh Hoan's Request for Revocation, PDoc 89; *Preliminary Results*, 76 Fed. Reg. at 55873. Commerce noted that interested parties must be allowed an opportunity to comment on the preliminary results of the agency's revocation analysis, *id*., and it distinguished the cases cited by Vinh Hoan, specifically stating that its determination to reject the revocation request was based on considerations of fairness and accuracy. *Id*.

The defendant contends that Commerce acted reasonably and consistently with its regulations and that Vinh Hoan has failed to demonstrate that Commerce's rejection of the revocation request was not supported by substantial evidence or an abuse of discretion and not in accordance with law. *See* Vinh Hoan Br. at 8–24. Although Vinh Hoan claims that Commerce abused its discretion in "fail[ing] to address" Vinh Hoan's fairness and accuracy arguments, Commerce, in rejecting the untimely request, determined that the request was not fair to the other parties and the agency. Vinh Hoan has also failed to demonstrate that its 232-days late submission is factually analogous to the five-day delay in *Carbon Steel Flat Products* and the timely

submission in PET Film from Korea. *See I&D Memo* at 38; Vinh Hoan Br. at 21–23 (citing *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada*, 64 Fed. Reg. 2173 (Jan. 13, 1999); *Polyethylene Terephthalate Film from Korea*, 61 Fed. Reg. 36032 (July 9, 1996)).

Vinh Hoan's brief appears to blur the distinction between the submission of factual information and the submission of a revocation request. With the sole exception of *NSK Corp. v. United States*, 33 CIT 1185, 637 F. Supp. 2d 1311 (2009), which Vinh Hoan cites for the general proposition that Commerce must consider "an important aspect of the problem," none of the cases cited in Vinh Hoan's brief involve revocation requests. *See* Vinh Hoan Br. at 8–24.[20] Rather, the cases upon which Vinh Hoan relies concern the timeliness of factual information submissions under 19 C.F.R. §351.301, not revocation requests made under 19 C.F.R. §351.222, and the court previously recognized the "significant distinction" between Commerce's administration of the two provisions in upholding Commerce's interpretation of the predecessor to 19 C.F.R. §351.222(e) as a "mandatory, bright line rule requiring that a producer submit its revocation request during the anniversary month of an antidumping duty order." *Samsung Electronics Co. v. United States*, 20 CIT 1306, 1310, 946 F. Supp. 5, 9 (1996), *aff'd*, 129 F.3d 135 (Fed. Cir. 1997). *See also Exportaciones Bochica/Floral v. United States*, 16 CIT 670, 671, 802 F. Supp. 447, 448 (1992) (sustaining Commerce's decision not to consider an untimely revocation request), *aff'd*, 996 F.2d 317 (Fed. Cir. 1993).

In addition to the distinction between factual information and revocation requests, the cases Vinh Hoan cites are factually distinguishable from the present proceeding. Vinh Hoan relies heavily on *Grobest I*, *see* Vinh Hoan Br. at 9, 12, 14, 19, however that case involved a separate rate certification that was 95 days late, unlike the 232-day late request for revocation in this case. The decisions in *Maui Pineapple Co.* and *NTN Bearing Corp.*, *see* Vinh Hoan Br. at 12, are also distinguishable because both involved minor clerical errors, not

[20] The other cases cited in Vinh Hoan's brief for its proposition include the following: *Timken U.S. Corp. v. United States*, 434 F.3d 1345 (Fed. Cir. 2006); *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995); *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT ___, 815 F. Supp. 2d 1342 (2012) ("*Grobest I*"); *Fischer S.A. v. United States*, 34 CIT ___, 700 F. Supp. 2d 1364 (2010); *Yantai Timken Co. v. United States*, 31 CIT 1741, 521 F. Supp. 2d 1356 (2007); *Maui Pineapple Co. v. United States*, 27 CIT 580, 601, 264 F. Supp. 2d 1244, 1262 (2003); *Usinor Sacilor v. United States*, 18 CIT 1155, 872 F. Supp. 1000 (1994).

a revocation request. *See Maui Pineapple Co.*, 27 CIT at 599, 264 F. Supp. 2d at 1261 ("the number of cans per case for product code 38900–72475 was mistakenly listed as eight rather than four and the conversion factor . . . was incorrectly indicated as 0.33"); *NTN Bearing Corp*., 74 F.3d at 1207–08 ("[f]or 23 U.S. sales, one digit in a 13-digit code . . . was entered incorrectly into the database . . . [and] NTN . . . had mistakenly included in its U.S. sales database four sales which were actually sales to a Canadian, not a U.S., customer").

Vinh Hoan's discussion of Commerce's consideration of other revocation requests, *see* Vinh Hoan Br. at 10–12, is not relevant, because the circumstance at bar involves Commerce's receipt of what the defendant not unreasonably characterizes as "an extremely untimely request". Def's Resp. at 41. Moreover, in light of the uniqueness of each review, *see*, *e.g.*, *Peer Bearing Co.-Changshan v. United States*, 32 CIT 1307, 1310, 587 F. Supp. 2d 1319, 1325 (2008), Vinh Hoan's references to facts and determinations in the eighth administrative review, Vinh Hoan Br. at 16, 18–19, are not germane to determining the reasonableness of Commerce's findings in the present review. Further, Vinh Hoan's assertion that conducting a verification would not have created any undue burden for Commerce is unconvincing because "[i]t is not the role of the court to second guess Commerce's allocation of its resources. Any assessment of Commerce's operational capabilities or deadline rendering must be made by the agency itself." *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT ___, ___, 853 F. Supp. 2d 1352, 1362–63 (2012) (*Grobest II*) (citation omitted); *see also Samsung Electronics Co. v. United States*, 20 CIT 1306, 1309–10, 946 F. Supp. 5, 9 (1996) ("In response to a request for revocation, Commerce must initiate and conduct an entire investigation . . . . If the plaintiff could command Commerce to conduct such an investigation at its whim rather than only once per year, Commerce's administrative efficiency would be adversely affected.") (citation omitted).

Citing *Grobest I*, 36 CIT at ___ n.36, 815 F. Supp. 2d at 1366 n.36, Vinh Hoan claims that the rejection of its revocation request would work a substantial hardship on the company because of the costs associated with its participation in the proceeding. Vinh Hoan Br. at 12–13. But it is well-settled that ordinary participation in administrative proceedings is not a "substantial hardship" or a "draconian penalty," despite claims to the contrary. *See* Vinh Hoan Br. at 13; *see also Daido Corp. v. United States*, 16 CIT 681, 685, 796 F. Supp. 533, 537 (1992) ("[o]rdinary burdens and expenses associated with antidumping procedures . . . do not constitute irreparable injury") (inter-

nal quotation omitted); *Matsushita Electric Industrial Co. v. United States*, 823 F.2d 505, 509 (Fed. Cir. 1987) (finding of irreparable injury was "clearly erroneous" when based on "having to comply with Commerce's demands for data and verification" because "ordinary consequences of antidumping duty procedures do not constitute irreparable harm") (internal quotation marks omitted); *Nissan Motor Corp. v. United States*, 10 CIT 820, 823, 651 F. Supp. 1450, 1454 (1986) ("[w]hile this Court can appreciate that plaintiffs seek to avoid the expenditure of time and resources which may ultimately prove unnecessary, this cannot be equated with the threat of immediate and irreparable harm"). As such, Vinh Hoan has failed to show that Commerce's rejection of its untimely revocation request was an abuse of discretion or otherwise improper.

B. Defendant-Intervenors' Motions for Judgment -- "Zeroing"

In the *Final Results*, when comparing the respondents' normal value and net United States price for purposes of calculating dumping margins, Commerce used the "AT" (average-to-transaction) comparison method that included the use of zeroing. Under zeroing methodology, for each control number or "CONNUM,"

> Commerce uses the average normal value and on a month-to-month basis compares it to the individual United States transaction prices in that month. If the result is a transaction which is not dumped, *i.e.*, there is no margin, Commerce sets the margin for that transaction at zero. Nonetheless, the sale price for the transaction goes into the denominator in calculating the final weighted-average dumping margin percentage, thereby lowering the percentage margin.

Union Steel v. United States, 36 CIT ___, ___, 823 F. Supp. 2d 1346, 1350 (2012) (internal citations and footnote omitted), *aff'd*, 713 F.3d 1101 (Fed. Cir. 2013). Commerce did not alter these findings in the *Final Results*. *See I&D Memo* at 27–34, 37–38.

Vinh Hoan, QVD, and Anvifish argue that Commerce acted unlawfully when it used its zeroing methodology to calculate the final dumping margin in this case because Commerce employed contradictory interpretations of the same statute (*i.e.*, for the review as compared with Commerce's abandonment of that practice in investigations). *See* Vinh Hoan Br. at 26–31; QVD Br. 6–11; Anvifish Br. 6–19. The court disagrees. Commerce provided the same kind of detailed and reasonable explanation for its interpretation of 19 U.S.C. §1677(35) as permitting the application of its zeroing methodology in the administrative review at issue in this case that was recently

upheld by the appellate court in *Union Steel*, *supra*, and numerous decisions of this court. *E.g.*, *Thai Plastic Bags Industries Co., Ltd. v. United States*, 37 CIT ___, Slip Op. 13–21 (Mar. 19, 2013); *Fischer S.A. v. United States*, 36 CIT ___, 885 F. Supp. 2d 1366 (2012); *Camau Frozen Seafood Processing Import Export Corp. v. United States*, 36 CIT ___, 880 F. Supp. 2d 1348 (2012); *Far Eastern New Century Corp. v. United States*, 36 CIT ___, 867 F. Supp. 2d 1309 (2012); *Grobest II*, *supra*; *Union Steel*, *supra*. These decisions hold that Commerce has reasonably explained why it may use a methodology offsetting positive and negative dumping margins in the context of investigations using average-to-average comparisons, while continuing to employ zeroing in administrative reviews using average-to-transaction comparisons, such as the one in this case. Commerce similarly explained in the *Final Results* that employing offsets when using an average-to-average comparison methodology "allows for a reasonable examination of pricing behavior, on average," whereas employing zeroing when making average-to-transaction comparisons is appropriate because Commerce is examining "the pricing behavior of an exporter or producer with respect to individual export transactions." *I&D Memo* at 33.

Contrary to the contentions raised by Vinh Hoan, QVD, and Anvifish, 19 U.S.C §1677f-1(d) provides for different comparison methods, and Commerce has analyzed the differences between these distinct methodologies to determine that different interpretations of 19 U.S.C. §1677(35) reasonably account for the inherent differences between the distinct methodologies. In addition, the Federal Circuit in *Union Steel* recognized that Commerce's explanation should not be scrutinized in fragments, holding that Commerce's rationale of making a limited change in certain investigations for purposes of implementing a World Trade Organization ("WTO") finding "[c]ertainly . . . is relevant when considered in conjunction with the other explanations offered by Commerce." 713 F.3d at 1109–10; *see also Union Steel*, 36 CIT at ___, 823 F. Supp. 2d at 1357–58 (WTO compliance was valid part of total rationale for Commerce's choice).

In sum, Commerce in the *Final Results* explained the differences between the statutory comparison methodologies and why the differences justified its reasonable interpretation of 19 U.S.C. §1677(35). Commerce's application of zeroing is thus hereby sustained.

D. Anvifish's Arguments re "*Final Modification for Reviews*"

Anvifish avers that Commerce abused its discretion when it

declined to apply its notice of *Final Modification for Reviews*[21] to the subject review. Anvifish Br. at 17–19. In that notice, Commerce announced, pursuant to section 123 of the Uruguay Round Agreements Act, that it would cease to apply zeroing in reviews "pending before [Commerce] for which the preliminary results are issued after April 16, 2012." 77 Fed. Reg. at 8113. In the underlying review, Commerce published the *Preliminary Results* in September 2011, *i.e.*, seven months prior to the deadline established in the *Final Modification for Reviews*. 76 Fed. Reg. 55872. This court has recognized that Commerce has "no legal authority" to apply a section 123 determination "in a manner that ignores the express legal directive set forth therein." *See Advanced Tech. & Materials Co. v. United States*, 35 CIT ___, Slip Op. 11–105 at 16 (Aug. 18, 2011); *see also Corus Staal BV v. United States*, 32 CIT 1480, 1492–93, 593 F. Supp. 2d 1373, 1384–85 (2008) (holding that a section 123 determination is limited to its express terms). Thus, contrary to Anvifish's claim, Commerce properly declined to apply the *Final Modification for Reviews* to the *Final Results*.

Anvifish also alleges that Commerce failed to calculate Anvifish's margin as accurately as possible. As the basis for its claim, Anvifish contends that QVD's weighted average dumping margin, the rate upon which Anvifish's separate rate was calculated, would have been zero in the absence of zeroing. *See* Anvifish Br. at 17. Anvifish also points to the zero margins calculated in the subsequent administrative review of the antidumping order as support for its allegation. *Id*. at 17–18. However, as noted above, the Federal Circuit recently affirmed Commerce's use of zeroing in administrative reviews, and Anvifish's reliance upon events that occurred in the subsequent review is unpersuasive. *See U.S. Steel Corp. v. United States*, 33 CIT 984, 1003, 637 F. Supp. 2d 1199, 1218 (2009) ("each agency determination is *sui generis*, involving a unique combination and interaction of many variables, and therefore a prior administrative determination is not legally binding on other reviews before this court."); *accord Nucor Corp. v. United States*, 414 F.3d 1331, 1340 (Fed. Cir. 2005). Anvifish does not persuade that its preferred methodology necessarily results in a more "accurate" margin, since for decades zeroing has been held to be a proper philosophical interpretation of U.S. law, and it is only recently that a "mathematical" interpretation has been

[21] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Feb. 14, 2012).

imposed from without, due to the accretive process of U.S. abdication of its national sovereignty to the vagaries of unaccountable foreign trade "organizations".

Conclusion

For the above reasons, the matter must be, and hereby is, remanded for reconsideration and further explanation in accordance with the foregoing.

The results of remand shall be filed with the court by April 20, 2015. Within seven days thereafter, the parties shall confer and the plaintiffs shall file a joint proposed scheduling order for comments, if any, thereon.

So ordered.

Dated: December 18, 2014
New York, New York

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

Slip Op. 14–147

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

Before: Leo M. Gordon, Judge
Court No. 14–00104

[Defendant's motion to amend scheduling order out of time denied.]

Dated: December 18, 2014

Daniel B. Volk, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Plaintiff United States. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Claire J. Lemme*, Attorney, Office of Associate Chief Counsel for U.S. Customs and Border Protection.

Peter S. Herrick, Peter S. Herrick PA of St. Petersburg, Florida for Defendant Horizon Products International, Inc.

MEMORANDUM AND ORDER

Gordon, Judge:

Before the court is Defendant Horizon Products International, Inc.'s ("Horizon") motion to amend the Scheduling Order out of time. Horizon also seeks to extend the deadline for Plaintiff United States ("Government") to respond to Horizon's discovery requests and all

subsequent deadlines, including for filing dispositive motions or requesting a trial, by 90 days respectively. The Government opposes Horizon's motion.

On June 27, 2014, the court issued an order providing, *inter alia*, that discovery be completed on or before September 30, 2014, and that any motions regarding discovery be filed on or before October 24, 2014. Scheduling Order, Ct. No. 14–00104, June 27, 2014, ECF No. 10 ("Scheduling Order" or "Order"). From that point in June to the end of July, there was no discovery activity between the parties other than an exchange of initial disclosures. Pl.'s Resp. to Def.'s Mot, Ex. A, Nov. 21, 2014, ECF No. 16. Approximately one month later, on August 28, the Government served Horizon with requests for admissions, interrogatories, and requests for production. *Id.* On September 24, six days prior to the close of the discovery period, Horizon served its responses to the Government's discovery requests. *Id.*, Ex. B. That same day, Horizon served its first set of interrogatories and initial request for production of documents on Plaintiff. *Id.*, Ex. C. On October 27, three days past the deadline for the filing of any discovery-related motions, the Government advised Horizon that it would not respond to Horizon's discovery requests as, in the Government's view, those requests were not timely served. Def.'s Motion to File an Amended Scheduling Order Out-of-Time, Ex. A, Nov. 4, 2014, ECF No. 11 ("Def.'s Mot."). On November 4, Horizon filed its motion to amend the Scheduling Order. Thereafter, on November 21, the Government filed (1) a motion for summary judgment in keeping with the Scheduling Order, and (2) its response to Horizon's motion.

USCIT Rule 16, which is comparable to Federal Rule of Civil Procedure 16, requires the court to issue a scheduling order that governs the scope of discovery and limits the time (including a cutoff date) for parties to complete discovery. *See* 6A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, Federal Practice & Procedure § 1522.1 (3d ed. 2014). Once a schedule is established, Rule 16(b)(4) permits a modification only upon a showing of good cause by the party seeking the modification. *See also* USCIT R. 6(b)(1)(A). If the date for completion of discovery has passed, the movant must also establish, under USCIT Rule 6(b)(1)(B), that its failure to act was due to either excusable neglect or circumstances beyond its control.

In assessing whether Horizon has shown excusable neglect, the court considers: (1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted

in good faith. *See Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 392, 395 (1993). It is not enough for Horizon to assert claims of "inadvertence, ignorance of the rules, or mistakes construing the rules" to satisfy the excusable neglect standard. *See id.* at 392.

Here, Horizon fails to show excusable neglect that would justify the late filing of its motion to amend the Scheduling Order. Defendant's counsel has not offered any cause or excuse for missing the deadline for the completion of discovery. Horizon is silent about why it was unable to file a motion for an extension of time until 35 days after the expiration of the discovery deadline. The motion also does not explain Horizon's inaction from June 27 to September 24 in the discovery process (other than the exchange of initial disclosures). Horizon has not provided the court with evidence of communication that it had with Plaintiff's counsel via phone, email, or letter regarding difficulties in completing discovery prior to September 30 or the need to extend the discovery period. Horizon simply relies on the arguments that the extension request will not "unnecessarily delay these proceedings" and "will avoid a manifest injustice." Def.'s Mot. 1. Without something more, these naked assertions are insufficient to demonstrate excusable neglect.

Even if Horizon could establish excusable neglect based simply on a lack of prejudice to the Government, its request for an extension of time must be denied because Horizon has also failed to demonstrate good cause warranting modification of the Order. Under the good cause standard — the general standard for obtaining an extension of time under USCIT Rules 6(b)(1)(A) and 16(b)(4) — the court's primary consideration is whether the moving party can demonstrate diligence. *See High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013); *Paice, LLC v. Hyundai Motor Co.*, Civ. No. WDQ-12–0499, 2014 WL 3385300, at *1 (D. Md. July 8, 2014); 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1522.2 at 2 (good cause standard not met if movant failed to act diligently).

The Government argues that Horizon's discovery requests were untimely. The court agrees. Once a discovery deadline is established, a party must serve interrogatories and requests for production of documents in sufficient time to permit the opposing party the 30-day response time under Rules 33 and 34 before the close of discovery. *See Thomas v. Pacificorp*, 324 F.3d 1176, 1179 (10th Cir. 2003). The timing of Horizon's service of its discovery requests left the Government with only six days to respond, far less than is permitted under USCIT Rules 33 and 34.

Horizon's motion offers no explanation for its inaction for the large majority of the discovery period, nor does it provide any insight into

counsel's cognizance of the operative times under Rules 33 and 34. A party, like Horizon, may not arrogate to itself additional time for discovery beyond that set forth in a scheduling order by serving the opposing party with untimely discovery requests. Any extension of time, even those stipulated to under Rule 29, requires court approval. *Hernandez v. Mario's Auto Sales, Inc.*, 617 F. Supp. 2d 488, 493 (S.D. Tex. 2009).

The timeline established by a scheduling order is binding and cannot be "cavalierly disregarded by counsel without peril." *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). Horizon's motion fails to set forth how it diligently pursued discovery within the time allotted under the Scheduling Order. Further, Horizon does not identify the factual information it seeks to obtain through discovery, nor does it explain why it needs that discovery in order to defend itself in this action. As noted above, Horizon offers only general statements about the impact of an extension on the Government without any support. Horizon also fails to provide any evidence of communication that it undertook with the Government to address completing discovery in a timely manner or appropriately moving to extend the deadlines in the Scheduling Order. As with excusable neglect, without something more to evidence Horizon's diligent pursuit to comply with the discovery deadline, a modification of the Scheduling Order is not warranted.

Lastly, Horizon's motion lacks any effort to identify standards against which the court can evaluate the implications of permitting Horizon to file its motion out of time and to extend discovery. By submitting a motion without explaining the cause for its failure to file a timely motion to extend the Scheduling Order and its diligence to pursue discovery within the prescribed period, Horizon improperly places the burden on the court to "'do counsel's work, [and] create the ossature for the argument,'" namely to set forth the reasons upon which the requests for relief were based. *Since Hardware (Guanghou) Co. v. United States*, 37 CIT ___, ___, 911 F. Supp. 2d 1362, 1381 (2013) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). This the court will not do.

Accordingly, it is hereby

ORDERED that Horizon's motion to file an amended scheduling order out of time is denied; and it is further

ORDERED that Horizon shall file its response to Plaintiff's motion for summary judgment on or before January 20, 2015.

Dated: December 18, 2014
New York, New York

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

Slip No. 14–148

HUSTEEL CO., LTD., Plaintiff, NEXTEEL CO., LTD. and HYUNDAI HYSCO, Consolidated Plaintiffs, ILJIN STEEL CORPORATION, AJU BESTEEL CO., LTD., and SEAH STEEL CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendant, UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., and MAVERICK TUBE CORPORATION, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00215

[Motions to enjoin liquidation of entries pending challenges to antidumping investigation granted.]

Dated: December 18, 2014

Donald B. Cameron, Julie C. Mendoza, R. Will Planert, Brady W. Mills, Mary S. Hodgins, and *Sarah S. Sprinkle*, Morris, Manning & Martin, LLP, of Washington, DC, for plaintiff.

J. David Park, Nazakhtar Nikakhtar, Henry D. Almond, Yujin K. McNamara, and *Yun H. Lee*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, for consolidated plaintiffs.

Joel D. Kaufman, Richard O. Cunningham, Alice A. Kipel, and *Henry N. Smith*, Steptoe & Johnson LLP, of Washington, DC, for plaintiff-intervenor ILJIN Steel Corporation.

Neil R. Ellis, Dave M. Wharwood, Rajib Pal, and *Shawn M. Higgins*, Sidley Austin, LLP, of Washington, DC, for plaintiff-intervenor AJU Besteel Co., Ltd.

Jeffrey M. Winton, Law Office of Jeffrey M. Winton PLLC, of Washington, DC, for plaintiff-intervenor SeAH Steel Corp.

Melissa M. Devine and *Emma E. Bond*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., and *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC, for defendant.

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

Roger B. Schagrin, John W. Bohn, and *Paul W. Jameson*, Schagrin Associates, of Washington, DC, for defendant-intervenors Boomerang Tube LLC, Energex Tube, Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

Robert E. DeFrancesco, III., Alan H. Price, Adam M. Teslik, and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor Maverick Tube Corporation.

OPINION

Restani, Judge:

Before the court are the motions for injunctions of liquidation and eventual liquidation in accordance with the results of litigation filed

by plaintiff Husteel Co., Ltd., consolidated plaintiffs Nexteel Co., Ltd. and Hyundai HYSCO, and plaintiff-intervenors ILJIN Steel Corporation, AJU Besteel Co., Ltd., and SeAH Steel Corp. (collectively, "movants"). Movants seek to enjoin the defendant, together with the delegates, officers, agents, and employees of the U.S. Department of Commerce ("Commerce") and U.S. Customs and Border Protection ("Customs"), from liquidating at rates applicable at the time of entry, certain unliquidated entries covered by Commerce's final determination in *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less than Fair Value and Negative Final Determination of Critical Circumstances*, 79 Fed. Reg. 41,983 (Dep't Commerce July 18, 2014) ("*Final Determination*"). Defendant consents to the motions. Defendant-intervenors United States Steel Corporation ("U.S. Steel") and Maverick Tube Corporation ("Maverick") oppose the motions. The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). For the following reasons, the motions are granted.

OVERVIEW

Movants are Korean producers and exporters of oil country tubular goods, that challenge various aspects of Commerce's *Final Determination* in the antidumping investigation covering oil country tubular goods from Korea. In their motions, they seek to enjoin liquidation of entries of their merchandise covered by the *Final Determination* during the pendency of this court action in order to ensure that they receive any potential benefits that might result from judicial review of the *Final Determination*. According to movants, the injunctions are necessary because liquidation of their entries will moot their challenges to the *Final Determination*, at least as it pertains to the entries that are liquidated. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) (explaining that once liquidation occurs, a subsequent court decision on the merits can have no effect on the antidumping duties assessed on the liquidated entries, even if the duties ultimately are determined to be erroneous). U.S. Steel and Maverick argue that the injunctions are unwarranted.

DISCUSSION

The court "may enjoin the liquidation of some or all entries of merchandise covered by a determination of . . . [Commerce] . . . , upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). The purpose and effect of granting such an injunction is to preserve the status quo during the pendency of the judicial proceedings in order to ultimately provide parties any relief

the court grants. *See* 19 U.S.C. § 1516a(e)(2) (providing that "entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action"); *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1297 (Fed. Cir. 2006). In deciding whether to enjoin liquidation, the court considers the following factors: 1) whether the movant will suffer irreparable harm if relief is not granted; 2) the movant's likelihood of success on the merits; 3) the balance of equities between the parties; and 4) whether an injunction is in the public interest. *See, e.g., Wind Tower Trade Coalition v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014); *Ugine*, 452 F.3d at 1292. The court has traditionally applied a "sliding scale" approach to this determination, whereby no single factor will be treated as necessarily dispositive, and the weakness of the showing on one factor may be overcome by the strength of the showing on the others. *See Ugine*, 452 F.3d at 1292–93; *Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353–54 (2002). The court will discuss each factor in turn.

1. Irreparable Harm

The first factor that the court considers is the potential irreparable harm to the movants should the injunctions be denied. Although the court is to consider the four factors described above, this factor traditionally has been given the greatest importance. *See Corus Grp.*, 26 CIT at 942, 217 F. Supp. 2d at 1354 (collecting cases). The original legislative history of 19 U.S.C. § 1516a(c)(2) suggests that the court will consider the factors to ensure that liquidation is enjoined only in "extraordinary circumstances." S. Rep. No. 96–249, at 248–49, 253 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 634, 639. Such history no longer accurately reflects the current law, judicial precedent, and agency practice.

Because of the unique nature of antidumping and countervailing duty challenges, the court routinely enjoins liquidation to prevent irreparable harm to a party challenging the antidumping or countervailing duty rate. *See Wind Tower Trade Coalition*, 741 F.3d at 95 ("As observed by the CIT, in antidumping and countervailing duty cases preliminary[1] injunctions against liquidation have become almost automatic due to the retrospective nature of U.S. trade remedies, the length of the judicial review process, and the cruciality of unliquidated entries for judicial review." (internal quotation marks and

[1] "Preliminary" is a proper description of only part of the injunctions sought here, and it is to this aspect of the injunctions that the court's Rule 56.2 refers. The form of injunction sought here, which is commonly utilized, appears to permanently enjoin liquidation not in accordance with the conclusive results of the litigation pursuant to statutory rights. *See* attached injunction and 19 U.S.C. § 1516a(e).

brackets omitted)). As explained in *Zenith*, once entries are liquidated, there is no provision permitting reliquidation if the court later determines that the duty rates assessed on those entries were erroneous. 710 F.2d at 810. A party challenging the duty rate is thus deprived of its right to judicial review if the entries are liquidated. *See id.* Respondents might be subjected to duties that are unwarranted under the trade laws, and petitioners have "a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress." *See id.* These concerns led the court in *Zenith* to conclude "that the consequences of liquidation . . . constitute irreparable injury." *Id.* Suspension of liquidation thus is necessary to ensure effective judicial review of agency action and to guarantee that the rates are consistent with the outcome of the litigation. *See* 19 U.S.C. § 1516a(e)(2) (providing that "entries, the liquidation of which was enjoined [by court order], shall be liquidated in accordance with the final court decision in the action").

U.S. Steel and Maverick do not disagree with the premise that liquidation can constitute irreparable harm. Rather, U.S. Steel and Maverick argue that there is no immediate threat of liquidation, and thus there is no irreparable harm that is imminent to justify an injunction. They note that movants are challenging Commerce's final determination in an antidumping investigation. Under the U.S. trade laws, the duty rates determined in an investigation set the cash deposit rates for the imported merchandise. *See OKI Elec. Indus. Co. v. United States*, 11 CIT 624, 627, 669 F. Supp. 480, 482 (1987). The final rates are not settled until Commerce completes any requested administrative review of the antidumping order covering those entries. *Id.* Parties may request a review twelve months after the order is issued, and the review itself lasts about a year. 19 U.S.C. § 1675(a); *OKI Elec. Indus.*, 11 CIT at 627, 669 F. Supp. at 483. Upon completion of the review, Commerce issues liquidation instructions to Customs. *See* 19 U.S.C. § 1675(a). According to U.S. Steel and Maverick, because Commerce will not issue liquidation instructions until at least a year from the date of the *Final Determination* (i.e., September 2015), movants are not faced with any prospect of irreparable harm at present, and the motions therefore should be denied. The court disagrees.

Movants are required to show a "presently existing, actual threat" of injury. *Zenith*, 710 F.2d at 809. A confluence of considerations leads the court to conclude that the injunctions are proper at this time, even if the threat of injury is not "imminent" in the same sense it is following an administrative review. First, the court notes that under

current law, the rate established in an investigation can be used as the final assessment rate if no party requests a review of the affected entries. 19 C.F.R. §§ 351.212(c), 351.213(b) (2014). U.S. Steel's and Maverick's arguments that the injunctions are premature might have had greater force when the court first was given the power to grant injunctions of liquidation, as the antidumping statute required an administrative review every year. *See* 19 U.S.C. § 1675 (1982). The law was changed in 1984, however, to require administrative reviews only when an interested party requests one. *See Antidumping and Countervailing Duties; Administrative Reviews on Request; Transition Provisions*, 50 Fed. Reg. 32,556, 32,556 (Dep't Commerce Aug. 13, 1985). Today, when no review is requested, entries are liquidated at the cash deposit rate without further notice. 19 C.F.R. § 351.212(c). Ensuring that movants receive the full benefit of their judicial challenge to the investigation, and possibly to the order itself, may obviate the need for future administrative reviews, or may settle issues that are likely to reoccur in future reviews without the need for additional litigation. *See Ipsco, Inc. v. United States*, 12 CIT 676, 680–81, 692 F. Supp. 1368, 1372–73 (1988) (discussing these considerations). Issuing the injunctions at this point also protects movants from any negative ramifications of an erroneous liquidation, which may become final if not protested in a timely manner and would moot the movants' challenges to the antidumping duty rates set in the investigation. *See* 19 U.S.C. § 1514; *AK Steel Corp. v. United States*, 27 CIT 1382, 1387–89, 281 F. Supp. 2d 1318, 1322–23 (2003) (treating erroneous liquidation in violation of court-issued injunction as void); *LG Elecs. U.S.A., Inc. v. United States*, 21 CIT 1421, 1428–29, 991 F. Supp. 668, 675–76 (1997) (same).

Of potentially more pressing concern regarding the timing of the motions is U.S. Court of International Trade Rule 56.2, pursuant to which the relevant motions were made. That rule provides that "[a]ny motion for a preliminary injunction to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown." USCIT R. 56.2(a). Rule 56.2 instructs parties that a motion for an injunction should normally be filed early in the proceedings, unless extenuating circumstances are present. The rule makes no exception for investigation cases, rather than administrative review cases, where an early injunction clearly is needed. An injunction likely will be needed at some point in the litigation to prevent liquidation partially or wholly mooting the case or to prevent unnecessary administrative reviews. Thus, a party may not be justified in ignoring the applicable 30-day deadline just because the harm

will occur sometime down the road. What constitutes "good cause" for delay has not been established. By waiting until immediately before the deadline to request an administrative review runs to request an injunction, a party runs the risk that it will be barred from obtaining the injunction by a strict interpretation of the court rule.

Requiring movants to wait until Commerce issues its final results in an administrative review, as U.S. Steel and Maverick propose, also unnecessarily places the movants at risk stemming from Commerce's 15-day policy for issuing liquidation instructions. Commerce's policy is to issue liquidation instructions within 15 days of the final results of an administrative review or, presumably, the expiration of the time to request a review. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT 1635, 1649–50, 353 F. Supp. 2d 1294, 1309 (2004). Commerce does not notify interested parties when the liquidation instructions actually are issued. *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 739 n.7, 491 F. Supp. 2d 1273, 1282 n.7 (2007). The propriety of the 15-day procedure is questionable, as the court has held it to be unlawful in certain cases. *See SFK USA Inc. v. United States*, 800 F. Supp. 2d 1316, 1327–28 (CIT 2011) (issuing a declaratory judgment that Commerce's use of the 15-day procedure was unlawful); *Tianjin*, 28 CIT at 1650–51, 353 F. Supp. 2d at1309–10 (holding that Commerce's 15-day procedure is not in accordance with law). *But see Mittal*, 31 CIT at 737–38, 491 F. Supp. 2d at 1281 (expressing disapproval but holding that the 15-day procedure is a reasonable interpretation of the statute in facial challenge to the procedure). Under Commerce's unwise, and possibly unlawful, 15-day procedure, the movants will have very little time to file and obtain an injunction once the final results are effective. As the court stated in *Mittal*, the 15–day procedure creates "the possibility [that] Commerce and Customs may act so quickly, as to practically foreclose interested parties from obtaining judicial review of the subject entries pursuant to 19 U.S.C. § 1516a." 31 CIT at 738, 491 F. Supp. 2d at 1281 (internal quotation marks and citation omitted).

For the foregoing reasons, the court determines that based on the first factor, movants are faced with a sufficiently imminent and serious harm to warrant issuance of the statutory injunctions sought. The court further emphasizes that delaying the injunctions likely will invite trouble, and neither U.S. Steel nor Maverick has suggested any reason demonstrating that it would be prejudicial or otherwise inequitable to grant the injunctions at this point in the proceedings. Assuming arguendo that harm is not imminent in the sense normally associated with injunctive relief in advance of resolution of the mer-

its, the remaining factors also support granting relief and the court now proceeds to discuss those factors.

2. Likelihood of Success on the Merits

When the irreparable harm factor tilts decidedly in favor of the movant, the burden of showing likelihood of success on the merits is lessened. *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009); *Ugine*, 452 F.3d at 1292–93. In such circumstances, "it will ordinarily be sufficient that the movant has raised serious, substantial, difficult and doubtful questions that are the proper subject of litigation," *Nmb Sing. v. United States*, 24 CIT 1239, 1245, 120 F. Supp. 2d 1135, 1140 (2000) (internal quotation marks omitted), or that the movant "has at least a fair chance of success on the merits," *Wind Tower Trade Coalition*, 741 F.3d at 96. *See also Ugine*, 452 F.3d at 1294–95 (refusing to deny injunction when ultimate outcome on the merits was not "clear-cut"). Movants have raised a number of important issues in their complaints that are of the kind commonly raised, and successfully litigated, before the court. The parties generally have devoted little effort in their respective briefs arguing the relative merits of the claims. The court notes, however, that neither U.S. Steel nor Maverick has cited any legal authority or record evidence suggesting that the claims raised are so dubious that the injunctions should be denied. *Compare Wind Tower Trade Coalition*, 741 F.3d at 94, 100 (upholding denial of injunction when movant's legal position on merits was directly contrary to caselaw on point). The court is satisfied, at this point in the proceedings, that the movants have raised "serious, substantial, difficult and doubtful questions that are the proper subject of litigation," *Nmb Sing.*, 24 CIT at 1245, 120 F. Supp. 2d at 1140, and that the movants have "at least a fair chance of success on the merits," *Wind Tower Trade Coalition*, 741 F.3d at 96.

3. Balance of the Equities

The third factor the court considers is the balance of the equities. As explained, movants are threatened with the possibility of having their entries liquidated with duties that they claim are unlawful, without judicial recourse. Any burden to the government is likely to be minimal, as cash deposits at the rates set in the *Final Determination* will continue, until changed by the ultimate results of litigation.[2]

[2] This litigation, rather than affecting the status of the underlying order, may affect deposit rates. If the final results of an administrative review issue before this litigation is complete, new deposit rates may be set. What effect these injunctions would have on preserving the results of this litigation in such a circumstance need not be decided at this juncture.

Should the injunctions be granted, the only harm to the government appears to be the possible inconvenience occasioned by the delay in liquidation. *See OKI Elec. Indus.*, 11 CIT at 632–33, 669 F. Supp. at 486. Notably, the defendant has consented to the movants' motions. In their oppositions to the motions for injunctions, U.S. Steel and Maverick fail to even suggest that they would be harmed by the injunctions. The court additionally notes that one of the central concerns Congress expressed in the legislative history in allowing injunctions was the detrimental effects of enjoining liquidation on commercial certainty. S. Rep. No. 96–249, at 253, 1979 U.S.C.C.A.N. at 638. These concerns appear to be most naturally associated with respondents and their importers, whose entries are kept in limbo during litigation. These parties are left to wonder whether they will receive refunds on the deposits, or whether additional duties will be owed. Because cash deposits continue to be collected, domestic producers are not nearly as prejudiced by the commercial uncertainty that results from suspending liquidation. In this case, the parties most likely to be prejudiced by suspension of liquidation (i.e., the respondents) are the parties moving for an injunction, and Congress's concerns expressed in the initial legislative history are thus further dampened in this case. Accordingly, the court finds that the balance of equities tips in the favor of movants.

4. Public Interest

Finally, the court considers whether granting the injunctions would be against public policy. Granting the injunctions would ensure that movants are able to obtain meaningful relief in challenging the *Final Determination*. Securing judicial review and ensuring that Commerce properly administers the antidumping laws are in the public interest. *See Nmb Sing.*, 24 CIT at 1245, 120 F. Supp. 2d at 1141 ("It is well settled that the public interest is served by ensuring that [Commerce] complies with the law, and interprets and applies the international trade statutes uniformly and fairly." (internal quotation marks and brackets omitted)); *Timken Co. v. United States*, 6 CIT 76, 82, 569 F. Supp. 65, 71 (1983) ("Short-circuiting [a party's statutory right to a judicial hearing following an averse agency determination] by allowing the subject matter to escape the reach of a reviewing court cannot be in the public interest."). Securing judicial review of the *Final Determination* at this time also promotes judicial efficiency, in that issues that could reoccur in later reviews can be judicially reviewed before any possible errors are repeated. It is also possible that future administrative reviews might be avoided altogether. *See Ipsco*, 12 CIT

at 680–82, 692 F. Supp. at 1372–73; *OKI Elec. Indus.*, 11 CIT at 632–33, 669 F. Supp. at 486 ("The public interest will be better served by issuing rather than denying the injunction since unnecessary time consuming and costly administrative reviews will be avoided by the government."). The court therefore concludes that the injunctions accord with public policy.

CONCLUSION

On balance, the four factors support granting the injunctions. As in most cases before the court, the movants seeking injunctions against liquidation will be protected from their judicial challenges being mooted, while there will be little, if any, harm to the other parties by granting the injunctions. The court accordingly grants the movants' motions. One typical injunction is attached hereto for clarity. Individual orders regarding the other movants' motions will enter separately.

Additionally, the court wishes to commend the defendant for consenting to these motions. As explained, the government will not be harmed in any meaningful way by the granting of the motions, whereas movants have a legitimate interest in the injunctions being granted. The government seems to have concluded, quite wisely, that this is an issue that it has no need to fight over, thereby attempting to save everyone time, expense, and effort. Unfortunately, U.S. Steel and Maverick did not take the same stance, even though the same calculus would seem to apply, as they similarly do not face any harm by the granting of the injunctions. The court presumes that counsel for U.S. Steel and Maverick, as officers of the court, had reason to oppose the motions beyond annoying the movants and increasing litigation expenses, although what those reasons were was not made clear to the court in the opposition papers. Moreover, the court wonders whether U.S. Steel and Maverick's position might be somewhat short-sighted. Although an administrative suspension might be in place, mistakes can happen. For example, Customs could erroneously liquidate entries in contravention of Commerce's instructions. Under this hypothetical, importers presumably could protest under 19 U.S.C. § 1514 and challenge the liquidation. Domestic producers such as U.S. Steel and Maverick, however, do not have the same protest rights under 19 U.S.C. § 1514. *See Cemex, S.A. v. United States*, 384 F.3d 1314, 1323 n.9 (Fed. Cir. 2004) (holding that § 1514 does not provide an avenue for a domestic producer to contest Customs' improper liquidation of entries). Unless voluntarily undone by Customs, liquidation under that scenario would appear to be final, and the domestic producers' ability to obtain relief in their own challenge to

an antidumping determination (whether in this case or in future cases) likely would be lost. On the other hand, actions taken by Customs or Commerce in contravention of a court-ordered injunction have been treated as void and do not deprive the court of jurisdiction over the challenge. *See AK Steel*, 27 CIT at 1387–89, 281 F. Supp. 2d at 1322–23; *LG Elecs. U.S.A.*, 21 CIT at 1428–29, 991 F. Supp. at 675–76. In this hypothetical, it would appear the domestic producers have a stronger interest in having an injunction granted, as they otherwise do not have the same protections as importers from the risks described. Such a case is not before the court at this time, and the foregoing is merely speculation as to the outcome under that hypothetical. The court simply wishes to stress that parties should be thoughtful in deciding which battles to fight and be mindful of the possible ramifications of their positions in future cases. Injunctions will issue.

Dated: December 18, 2014
New York, New York

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

HUSTEEL CO., LTD., Plaintiff, NEXTEEL CO., LTD. and HYUNDAI HYSCO, Consolidated Plaintiffs, ILJIN STEEL CORPORATION, AJU BESTEEL CO., LTD., and SEAH STEEL CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendant, UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., and MAVERICK TUBE CORPORATION, Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00215

ORDER

Upon consideration of Plaintiff Husteel Co., Ltd.'s ("Husteel") Partial Consent Motion for Preliminary Injunction, and all other papers and proceedings herein, it is hereby:

ORDERED that Plaintiff's Motion is GRANTED; and it is further

ORDERED that Defendant, United States, together with its delegates, officers, agents, and servants, including employees of the U.S. Customs and Border Protection and the U.S. Department of Commerce, is enjoined during the pendency of this litigation, including

any appeals, from issuing instructions to liquidate or making or permitting liquidation of any entries of oil country tubular goods from the Republic of Korea:

(i) that were produced and/or exported by Husteel Co., Ltd.;

(ii) that were the subject of the United States Department of Commerce's final determination in *Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 Fed. Reg. 41,983 (Dep't of Commerce July 18, 2014); and

(iii) that were entered, or withdrawn from warehouse, on or after July 18, 2014 up to and including September 30, 2015; and it is further

ORDERED that the entries subject to this injunction shall be liquidated only in accordance with the final court decision in this action, including all appeals and remand proceedings, as provided in 19 U.S.C. § 1516a(e).

SO ORDERED.

Dated: December 18, 2014
New York, New York

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

Slip Op. 14–149

CATFISH FARMERS OF AMERICA, et al., Plaintiffs, v. UNITED STATES, Defendant, and IDI CORPORATION and THIEN MA SEAFOOD COMPANY, LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00252

[Sustaining remand results on seventh new shipper reviews of antidumping duty order on frozen fish fillets from the Socialist Republic of Vietnam.]

Dated: December 19, 2014

Valerie A. Slater, Jarrod M. Goldfeder, Natalya D. Dobrowolsky, and *Nicole M. D'Avanzo*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington DC, for the plaintiffs.

Ryan M. Majerus, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director,

and *Franklin E. White, Jr.*, Assistant Director. Of Counsel was *David W. Richardson*, Attorney-International, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Matthew J. McConkey, Mayer Brown LLP, of Washington DC, for defendant-intervenors IDI Corporation and Thien Ma Seafood Company, Ltd.

OPINION

Musgrave, Senior Judge:

In this Court No. 11–00252, the plaintiffs contested aspects of *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty New Shipper Reviews*, 76 Fed. Reg. 35403 (June 17, 2011) (seventh new shipper reviews) that were virtually identical to certain issues raised in Court No. 11–00109 and that were addressed in the context of Slip Op. 13–63 (May 23, 2013), familiarity with which is here presumed. Consistent therewith, this case was remanded to the International Trade Administration, United States Department of Commerce ("Commerce") for further proceedings. Slip Op. 13–91 (July 22, 2013). The remand results entail Commerce's analysis of the two broad issues remanded with the case for reconsideration, and they explain why Commerce continued on remand to maintain the selection of Bangladesh as the primary surrogate country and also explain the selection of surrogate values ("SVs") for the fish waste and fish skin by-products using information from the "Vitarich" price quote. Accounting for all calculation changes that resulted from addressing the issues of the prior opinion(s), including Commerce's voluntary remand request on the fish waste SV, Commerce determined the margins for all respondents as *de minimis*, including those for defendant-intervenors IDI Corporation and Thien Ma Seafood Company, who submitted comments on the draft remand results to Commerce but submit no further comments here. The plaintiffs argue for further remand with respect to Commerce's "broad market average" analysis and "specificity" (*i.e.*, level of trade) reasoning, but for the reasons explained in Slip Op. 14–144 (Dec. 18, 2014), the results of remand will be sustained and judgment entered to that effect.

Dated: December 19, 2014
New York, New York

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

Slip Op. 14–150

ELKAY MANUFACTURING COMPANY, Plaintiff, v. UNITED STATES, Defendant, and GUANGDONG DONGYUAN KITCHENWARE INDUSTRIAL COMPANY, LTD., Defendant-intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 13–00176

[Remanding a determination by the U.S. Department of Commerce in an antidumping duty investigation for reconsideration of two aspects of the calculation of the normal value of imported merchandise]

Dated: December 22, 2014

Joseph W. Dorn and *P. Lee Smith*, King & Spalding LLP, of Washington D.C., for plaintiff and consolidated defendant-intervenor Elkay Manufacturing Company.

Gregory S. Menegaz, J. Kevin Horgan, and *John J. Kenkel*, DeKieffer & Horgan, PLLC, of Washington D.C., for consolidated plaintiff and defendant-intervenor Guangdong Dongyuan Kitchenware Industrial Company, Ltd.

Patricia M. McCarthy, Assistant Director, and *Richard P. Schroeder*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington D.C., for defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Stanceu, Chief Judge:

In this consolidated action, plaintiffs Elkay Manufacturing Company ("Elkay") and Guangdong Dongyuan Kitchenware Industrial Company, Ltd. ("Dongyuan") contest a determination ("Final Determination") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued upon the affirmative conclusion of an antidumping duty investigation of drawn stainless steel sinks ("subject merchandise") from the People's Republic of China ("China" or the "PRC"). Both plaintiffs challenge aspects of the Department's calculation of the normal value of subject merchandise.[1]

Dongyuan, a Chinese manufacturer and exporter of stainless steel sinks and one of the two producer/exporters that Commerce investigated individually, challenges the Department's use of import data from Thailand to determine a surrogate value for the cold-rolled stainless steel coil that Dongyuan used as the primary material in producing subject merchandise. Compl. ¶ 11–15 (June 12, 2013), ECF

[1] Each plaintiff is also a defendant-intervenor in this consolidated action. Order (June 28, 2013), ECF No. 16 (Ct. No. 13–00199) (granting Elkay's Mot. for Intervention); Order (July 9, 2013), ECF No. 21 (granting Dongyuan's Mot. for Intervention).

No. 9 (Court No. 13–00199) ("Dongyuan Compl."). Elkay, a U.S. producer and the petitioner in the investigation, challenges the Department's method of accounting for selling, general, and administrative ("SG&A") expenses in the normal value determinations for the two individually-investigated producer/exporters.[2] Compl. ¶ 11–14 (June 5, 2013), ECF No. 14 ("Elkay Compl.").

Before the court are Dongyuan's and Elkay's motions for judgment on the agency record pursuant to USCIT Rule 56.2. Elkay's Mot. for J. on the Agency R. (Oct. 21, 2013), ECF No. 26 ("Elkay Mot."); Dongyuan's Rule 56.2 Mot. for J. Upon the Agency R. (Oct. 21, 2013), ECF No. 27 ("Dongyuan Mot."). Also before the court is a request by defendant United States for a partial voluntary remand to allow Commerce to reconsider the use of the Thai import data for determining a surrogate value for cold-rolled stainless steel coil. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 1 (Feb. 28, 2014), ECF No. 40 ("Def. Opp'n"). The court grants the Department's partial voluntary remand request and in addition directs Commerce to reconsider its method of accounting for SG&A expenses in the normal value calculations.

I. BACKGROUND

The decision contested in this case concluded an antidumping duty less-than-fair-value investigation. *See Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019 (Int'l Trade Admin. Feb. 26, 2013) ("*Final Determination*"), *as amended*, 78 Fed. Reg. 21,592 (Int'l Trade Admin. Apr. 11, 2013). In response to a petition by Elkay, Commerce initiated the investigation, which examined imports of subject merchandise made during the period of July 1, 2011 through December 31, 2011 ("period of investigation" or "POI"). *Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 77 Fed. Reg. 18,207 (Int'l Trade Admin. Mar. 27, 2012). On May 14, 2012, Commerce selected for individual investigation as "mandatory respondents" two Chinese producer/exporters—Dongyuan and a combined entity Commerce identified as consisting of Zhongshan Superte Kitchenware Co., Ltd. ("Superte") and a related invoicing company, Foshan Zhaoshun Trade Co., Ltd. ("Zhaoshun") (collectively identified as "Superte/Zhaoshun").

[2] In its complaint, Guangdong Dongyuan Kitchenware Industrial Company, Ltd. ("Dongyuan") also challenged the valuation of Dongyuan's brokerage and handling expenses by the U.S. Department of Commerce ("Commerce" or the "Department"). Compl. ¶ 16–17 (June 12, 2013), ECF No. 9 (Ct. No. 13–00199). Because this claim is omitted from Dongyuan's Rule 56.2 motion, *see* Dongyuan's Rule 56.2 Mot. for J. Upon the Agency R. (Oct. 21, 2013), ECF No. 27, the court considers it abandoned. *See* USCIT R. 56.2(c)(1)(B).

Final Determination, 78 Fed. Reg. at 13,019 n.2.

On October 4, 2012, Commerce issued a preliminary determination ("Preliminary Determination") that imports of subject merchandise from China are being, or are likely to be, sold in the United States at less than fair value. *Drawn Stainless Steel Sinks From the People's Republic of China: Antidumping Duty Investigation*, 77 Fed. Reg. 60,673, 60,673 (Int'l Trade Admin. Oct. 4, 2012) ("*Prelim. Determination*"). Commerce calculated preliminary weighted-average dumping margins of 54.25% for Dongyuan, 63.87% for Superte/Zhaoshun, and a simple average of the two rates, 59.06%, for "separate-rate" respondents, i.e., those producer/exporters not selected for individual examination that had demonstrated independence from the government of China. *Id.* at 60,674.

Commerce published its Final Determination on February 26, 2013 and issued an accompanying Issues and Decision Memorandum ("Decision Memorandum").[3] *See Final Determination*, 78 Fed. Reg. at 13,019; *Issues & Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China*, A-570–983 (Feb. 19, 2013) (Admin.R.Doc. No. 417) ("*Decision Mem.*"), *available at* http://enforcement.trade.gov/frn/summary/PRC/2013–04379–1.pdf (last visited Dec. 16, 2014). In the Final Determination, Commerce determined that imports of subject merchandise from China are being, or are likely to be, sold in the United States at less than fair value. *Final Determination,* 78 Fed. Reg. at 13,019. Making certain changes to the analysis it used for the Preliminary Determination, Commerce assigned weighted-average dumping margins of 27.14% to Dongyuan, 39.87% to Superte/Zhaoshun, and a simple average of the two rates, 33.51%, to the separate-rate respondents. *Final Determination*, 78 Fed. Reg. at 13,020, 13,023.

Elkay initiated an action challenging the Final Determination by filing a summons on May 6, 2013 and a complaint on June 5, 2013. Summons, ECF No. 1; Elkay Compl. ¶ 1. Dongyuan initiated a separate action challenging the Final Determination by filing a summons on May 13, 2013 and a complaint on June 12, 2013. Summons, ECF

[3] Commerce published an amended final determination of the less-than-fair-value investigation and the antidumping duty order, correcting an issue concerning the exporter/producer combinations of one separate-rate exporter, without making any changes to the antidumping margins. *Drawn Stainless Steel Sinks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 Fed. Reg. 21,592, 21,593 (Int'l Trade Admin. Apr. 11, 2013).

No. 1 (Ct. No. 13–00199); Dongyuan Compl. ¶ 1. The court consolidated these cases on August 30, 2013.[4] Order, ECF No. 25.

Elkay and Dongyuan filed their motions for judgment on the agency record and accompanying briefs on October 21, 2013. Elkays Mot.; Rule 56.2 Br. of Elkay Mfg. Co. in Supp. of its Mot. for J. on the Agency R., ECF No. 29 ("Elkay Br."); Dongyuan Mot.; Consol. Pl. Guangdong Dongyuan Kitchenware Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 31 ("Dongyuan Br."). On February 28, 2014, defendant filed a consolidated response in opposition to both motions, Def. Opp'n 1, and Dongyuan filed a response opposing Elkay's 56.2 motion, Def.-Intervenor Guangdong Dongyuan Kitchenware Resp. Br. in Opp'n to Pl.'s Rule 56.2 Mem., ECF No. 39 ("Dongyuan Opp'n."). Elkay and Dongyuan each filed replies on April 4, 2014. Consol. Pl. Guangdong Dongyuan Kitchenware Reply Br. in Supp. of Mot. for J. on the Agency R., ECF No. 44 ("Dongyuan Reply"); Reply Br. of Elkay Mfg. Co. in Supp. of its Mot. for J. on the Agency R., ECF No. 45 ("Elkay Reply").

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, as amended (the "Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping investigation.[5] In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1), provides for the calculation of the normal value of subject merchandise from a nonmarket economy ("NME") country "on the basis of the value of the factors of production utilized in producing the merchandise," plus

[4] The court consolidated Guangdong Dongyuan Kitchenware Industrial Co., Ltd. v. United States, Ct. No. 13–00199, under Elkay Mfg. Co. v. United States, Ct. No. 13–00176. Order of Consolidation and Scheduling 3 (Aug. 30, 2013), ECF No. 25. Although defendant requested consolidation with an additional case, Artisan Mfg. Corp. v. United States, Court No. 13–00169, the court declined to consolidate that case because of the dissimilarity between the issues raised therein and those raised in the other two cases. *Id.* at 2–3.

[5] Unless otherwise specified, all statutory citations herein are to the 2012 edition of the United States Code and all citations to regulations herein are to the 2013 edition of the Code of Federal Regulations.

certain additions.[6] The statute directs that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." *Id.*

A. The Court Grants Defendant's Request for a Voluntary Remand so that Commerce May Reconsider the Use of Thai Import Data to Value Cold-Rolled Stainless Steel Coil

During the antidumping investigation, Commerce identified Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand, and Ukraine as countries comparable to the PRC in terms of economic development and found that all of these countries, excluding the Philippines, were significant producers of merchandise comparable to the merchandise under consideration. *Decision Mem. for Prelim. Determination for the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China* 6 (Sept. 27, 2012) (Admin.R.Doc. No. 337) ("*Prelim. Decision Mem.*"), *available at* http://enforcement.trade.gov/frn/summary/PRC/2012–24549–1.pdf (last visited Dec. 16, 2014). Noting that cold-rolled stainless steel coil is the chief raw material used to produce the subject merchandise, Commerce chose Thailand as the primary surrogate country for the Preliminary Determination, finding that "Thailand provides the most specific information to value each respondent's most significant input (*i.e.*, stainless steel)." *Id.* at 7. Comparing Thai import data published in the Global Trade Atlas ("GTA") to available GTA import data from the Philippines and Indonesia, which Superte/Zhaoshun proposed for use but which Commerce considered less specific to the input to be valued, Commerce chose Thai import data. *Id.* at 7, 16–17. Commerce excluded from the GTA Thai import database the imports from various countries that Commerce found to maintain broadly available subsidies. *Id.* at 17. Commerce also excluded imports from countries on which Thailand imposes antidumping duties. *Id.* In the Final Determination, Commerce continued to select Thailand as the primary surrogate country with which to value the cold-rolled stainless steel coil inputs and continued to make the exclusions from the import database.[7] *See Decision Mem.* 8–10.

[6] A "nonmarket economy country" ("NME") is defined in 19 U.S.C. § 1677(18)(A) as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."

[7] For the Final Determination, Commerce continued to value the cold-rolled stainless steel coil inputs using the Thai import data but expanded the number of Harmonized Tariff Schedule ("HTS") subcategories from which to average the import statistics. In the

In contesting the Department's valuation of the stainless steel coil factor of production ("FOP"), Dongyuan seeks an order directing Commerce "to forego reliance on any Thai import statistics for cold-rolled steel inputs consumed by Dongyuan Kitchenware." Dongyuan Br. 35. Raising various objections to the suitability and reliability of the Thai import data, Dongyuan argues that Commerce should have valued the input using GTA import data for the Philippines and for Indonesia, which both investigated respondents placed on the record. *Id.* at 2–5, 14–34.

In response to Dongyuan's challenge, defendant requests a voluntary remand so that Commerce may consider whether the Thai import data used in the Final Determination were aberrational. Def. Opp'n 7, 15–16. To address that question, defendant would compare the Thai GTA import data with GTA import data from other potential surrogate countries, namely Colombia, Indonesia, Peru, South Africa, Ukraine, and the Philippines. *Id.* at 15–16. Defendant explains that Commerce did not place on the record information pertaining to potential surrogate countries other than Indonesia, the Philippines, and Thailand and that a remand would allow Commerce to "place the missing GTA data on the record." *Id.* at 16. Defendant elaborates that "[g]ranting a remand will enable the parties to make arguments concerning the omitted evidence[] and will enable Commerce to address those arguments in the first instance." *Id.*

Dongyuan opposes defendant's voluntary remand request, arguing that Commerce did not compile the list of surrogate countries based on average unit values ("AUVs") of imports in the surrogate countries and that there is no record basis on which to conclude that the other potential surrogate countries have "usable data."[8] Dongyuan's Reply 6–9. Dongyuan submits that the court should not permit Commerce to undergo the "burdensome and unreasonable task," *id.* at 9, of recreating a record of world import prices of all surrogate countries listed on the surrogate country list or permit Commerce to "cherry-pick off-the-record data that it has concluded would bolster its Final

Preliminary Determination, Commerce valued the stainless steel inputs by averaging the Thai GTA import statistics from three HTS 11-digit subcategories. For the Final Determination, Commerce averaged import statistics from an additional three HTS 11-digit subcategories. *Issues & Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China* 8–10, A-570–983 (Feb. 19, 2013) (Admin.R.Doc. No. 417) ("*Decision Mem.*"), *available at* http://enforcement.trade.gov/frn/summary/PRC/2013–04379–1.pdf (last visited Dec. 16, 2014).

[8] Although Elkay is a defendant-intervenor in Dongyuan's challenge, Elkay did not file an opposition to Dongyuan's Rule 56.2 Motion and did not take a position in its briefings to the court on defendant's request for a voluntary remand.

Determination," *id.* According to Dongyuan, allowing Commerce to reopen the record and examine import data from other surrogate countries would allow Commerce to "defend petitioners' proposed high import AUVs after the close of the factual record and after that factual record is briefed by supplementing the record post-investigation." *Id.* at 10. Dongyuan requests that the court instead rule that the existing "administrative record cannot support a finding that fairly traded Thai import statistics are non-aberrant," *id.* at 22, and instruct Commerce "to disregard Thai import AUVs in selecting the 'best available information' for the surrogate value for Dongyuan Kitchenware's cold-rolled steel," *id.*

The court will grant the Department's voluntary remand request so that Commerce may reconsider its use of the Thai import data to value the steel coil input and reopen the record to admit additional data. The court rejects Dongyuan's position that the court, instead of granting the voluntary remand request, should issue a remand order that prohibits Commerce from using the Thai data to value the steel coil input.[9]

Granting defendant's request for a voluntary remand is appropriate because the Department's concerns regarding the previous decision to use the Thai import data are substantial and legitimate. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001). Because the decision to reopen the record in a remand proceeding ordinarily is a matter for an agency to decide, and because Commerce has advanced a legitimate reason to reopen the record in this case, the court rejects Dongyuan's argument that the court should not permit Commerce to admit additional import data to the record. The voluntary remand that defendant requests will permit Commerce to reconsider its previous valuation of the steel coil FOP on the basis of more complete information. In their comments on the remand redetermination, the parties to this litigation will have the opportunity to

[9] Dongyuan also argues that the use of Thai surrogate data is inconsistent with the Department's policies and practices concerning the threshold at which a nonmarket economy respondent's market economy purchases of a particular factor of production may be considered representative of that factor. Consol. Pl. Guangdong Dongyuan Kitchenware Mem. in Supp. of Mot. for J. on the Agency R. 31–34 (Oct. 21, 2013), ECF No. 31 ("Dongyuan Br."). Defendant argues that the court should reject Donguyan's argument concerning market economy purchases on the ground that "Dongyuan relies on a regulation that was not in effect during the relevant timeframe and, to the extent that Dongyuan's challenge is based upon the prior policy that was then in effect, Dongyuan failed to exhaust its administrative remedies." Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. 7 (Feb. 28, 2014), ECF No. 40 ("Def. Opp'n"). Because the court is granting a voluntary remand, the decision to which Dongyuan directs the market economy purchase argument—that is the Department's decision to use Thai surrogate data—will be reconsidered on remand. Therefore, the court finds it unnecessary to consider at this time Dongyuan's market economy purchase argument and defendant's corresponding responses.

comment on any new evidence submitted to the record and on the decision Commerce reaches upon reconsideration.

B. The Court Orders a Remand on the Department's Treatment of SG&A Labor Expenses

Section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1), provides generally that the normal value of subject merchandise produced in a non-market economy country shall be determined "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be *added* an *amount* for *general expenses* and profit plus the cost of containers, coverings, and *other expenses*." *Id.* (emphasis added). The statute further provides that "the factors of production utilized in producing merchandise include, but are not limited to . . . *hours of labor required* . . . ." *Id.* § 1677b(c)(3)(A) (emphasis added). In this way, the statute provides for the separate valuation of the hours of labor required in producing the subject merchandise and of additional expenses (i.e., "general" and "other" expenses) in the NME normal value calculation. In identifying the "hours of labor required" as a factor of production, the statute does not distinguish between labor expended to produce subject merchandise (i.e., "production" labor) and labor expended in performing non-production activities (i.e., "non-production" labor), such as labor associated with the performance of selling, general, and administrative ("SG&A") functions.

Although Commerce has discretion in determining the best method for constructing normal value (whether or not in the non-market economy context), it must exercise its discretion consistently with the purpose of the antidumping statute, that is, to "determine margins 'as accurately as possible.'" *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (citing *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990)); *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("*Shakeproof*") ("In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible."). This principle applies even though the process of constructing normal value "is difficult and necessarily imprecise." *Shakeproof*, 268 F.3d at 1381 (citing *Nation Ford Chem. Co. v. United States,* 166 F.3d 1373, 1377 (Fed. Cir. 1999)).

Elkay's challenge concerns the method Commerce used to account for certain non-production labor—specifically, the labor that the two investigated respondents expended in performing SG&A

functions—in calculating the normal value of the subject merchandise of those respondents. Elkay claims that Commerce failed to include in the normal value calculation the total cost of the "hours of labor required," as required by 19 U.S.C. § 1677b(c)(3)(A), or to capture satisfactorily "general expenses," as required by 19 U.S.C. § 1677b(c)(1). Elkay Br. 10. Stated simply, Elkay's claim is that Commerce impermissibly understated normal value for the two investigated respondents by failing to capture adequately the labor component of the SG&A expenses of those respondents. *Id.* at 12. Elkay alleges, specifically, that the hours of labor reported by the two investigated respondents, a factor of production to which Commerce applied a surrogate value based on data pertaining to Thailand, included only hours of production labor and, therefore, did not include any hours of labor expended in performing SG&A functions. *Id.* at 8–9. According to Elkay's argument, Commerce failed to capture the SG&A labor costs when valuing the hours of labor reported by the investigated respondents as a factor of production and also excluded the SG&A labor costs when it performed its SG&A expense calculation. *Id.* at 9.

The Department's regulations provide that "[f]or manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(4). Commerce usually calculates separate values for factory overhead, SG&A expenses, and profit by calculating and applying financial ratios derived from financial statements of one or more producers of comparable merchandise in the primary surrogate country. *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010) ("In addition to these methods of valuing the direct inputs to production, Commerce also values selling, general, and administrative expenses ("SG & A"), factory overhead, and profit . . . using financial ratios derived from publicly-available financial statements of producers of comparable merchandise in the surrogate country.") (citing 19 C.F.R. § 351.408(c)(4)). According to the Department's Antidumping Manual, the Department's practice is to calculate a ratio for "general expenses" and to apply this ratio to the sum of the amount calculated for a respondent's "total of materials, labor,

energy, and factory overhead."[10] *Import Admin. Antidumping Manual, Chapter 10: Non-Market Economies* 18 (2009 ed.), *available at* http://enforcement.trade.gov/admanual/2009/Chapter%2010%20NME.pdf (last visited Dec. 16, 2014).

Dated:

In the Preliminary Determination of this investigation, Commerce determined surrogate ratios for SG&A expenses, combined with interest expenses, for each of three companies in the chosen surrogate country, Thailand, using data on those expenses reported in the financial statements of the three companies. *Factor Valuation Mem. for Prelim. Determination* 7–8, Attach. 5 (Sept. 27, 2012) (Admin.R-.Doc. No. 342–343) ("*Prelim. Factor Valuation Mem.*"). The numerators of these SG&A/interest expense ratios calculated for the Preliminary Determination contained the SG&A and interest expenses listed in the surrogate financial statements. *Id.* The denominators of these ratios contained expenses listed in the surrogate financial statements for raw material, labor, energy, manufacturing overhead, and the cost of purchased goods and inventory. *Id.* From the three separate ratios, Commerce calculated an average ratio for use in determining surrogate SG&A/interest expenses for the two investigated respondents, Superte/Zhaoshun and Dongyuan. *Id.*

In the Final Determination, Commerce used the same three financial statements to calculate the three SG&A/interest expense ratios but applied a different method. This method resulted in an average SG&A/interest ratio that was substantially lower than the average ratio calculated in the Preliminary Determination. *Decision Mem.* 15. The financial statements of all three Thai companies reported production labor costs separately from certain other labor costs, which were itemized and categorized among the sales or administrative expenses in the surrogate financial statements. *See Pet'r's Submission of Surrogate Values* Ex. 10 (Aug. 13, 2012) (Admin.R.Doc. No. 262) ("*Elkay's Surrogate Values Submission*") (including financial statements from Stainless Steel Home Equipment Manufacturing Co., Ltd. and Diamond Brand Co., Ltd.); *Dongyuan's Rebuttal Surrogate Values for the Prelim. Results* Exs. 4–6 (Aug. 20, 2012) (Admin-

[10] "Factory overhead" is described in the Department's Antidumping Manual as follows:

> The most important component of factory overhead is depreciation. It can also include supervisory and indirect labor, maintenance, and energy that is not significant enough to be valued separately. Normally, factory overhead is expressed as a percentage of materials, labor, and energy of the surrogate producer, and is applied to the materials, labor, and energy costs of the exporter.

Import Admin. Antidumping Manual, Chapter 10: Non-Market Economies 18 (2009 ed.) (footnote omitted), *available at* http://enforcement.trade.gov/admanual/2009/Chapter%2010%20NME.pdf (last visited Dec. 16, 2014).

.R.Doc. No. 296) (including financial statements from Advance Stainless Steel Co., Ltd.). The record indicates that Commerce excluded a number of the labor costs identified in the financial statements as sales or administrative expenses (and described by Commerce as "SG&A labor costs") from the numerators of the three SG&A/interest expense ratios and included these costs in the denominators of those ratios.[11] *See Factor Valuations for the Final Determination*, Attach. 1 (final surrogate value worksheets) (Feb. 19, 2013) (Admin.R.Doc. No. 422) ("*Final Factor Valuations Mem.*"). As defendant explains in its brief, reclassifying the line items in the surrogate financial statements that Commerce determined to correspond to SG&A labor "reduces the surrogate SG&A ratio by decreasing the total SG&A expenses in the numerator and increasing the labor expense in the denominator."[12] Def. Opp'n 9. Reclassifying these SG&A labor costs reduced the 12.82% average SG&A/interest expense ratio of the Preliminary Determination to a 6.36% average ratio in the Final Determination, a reduction of more than half. *Compare Prelim. Factor Valuation Mem.* 8 *with Final Factor Valuations Mem.* 2.

The rationale Commerce provided in the Decision Memorandum for the decision to change the SG&A/interest expense ratio calculation relied in part on the surrogate labor rate with which Commerce valued the labor hours reported by the two investigated respondents. *Decision Mem.* 15. For the Preliminary Determination, Commerce valued the two respondents' reported labor hours using a surrogate labor rate derived from 2005 data from Chapter 6A of the International Labor Organization ("ILO") Yearbook of Labor Statistics. *Prelim. Factor Valuation Mem.* 5–6. The record indicates that the ILO labor rate Commerce applied in the Preliminary Determination was 141.2162 Thai Bhat ("THB") per hour. *Id.* at Attach. 4.

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[11] The adjustment at issue in this action also reduced the manufacturing overhead ratios by increasing labor expense in the denominators. *Factor Valuations for the Final Determination*, Attach. 1 (Feb. 19, 2013) (Admin.R.Doc. No. 422) ("*Final Factor Valuations Mem.*") (showing method used for determining overhead ratio). The average factory overhead and profit ratios Commerce calculated from the financial statements of the Thai companies are not challenged in this case. Commerce calculated the factory overhead ratios by dividing manufacturing overhead expenses, including, *inter alia*, supplies, repairs/maintenance, and depreciation, by a sum of materials, labor, and energy. *Id.* Commerce calculated the profit ratios by dividing the before tax profit by a total of materials, labor, energy, SG&A expense, overhead, and the cost of purchased goods and inventory. *Id.*

[12] As defendant also explains in its brief, "Commerce calculates the SG&A ratio by dividing total SG&A expenses (designated as 'SGA') by the total cost of material, labor, energy, manufacturing overhead, and finished or traded goods." Def. Opp'n 9 n.7 (citation omitted). Continuing its discussion of the calculation of normal value for a NME respondent, defendant explains that "the surrogate SG&A ratio is multiplied by the respondent's total cost of manufacturing, overhead, and finished and traded goods . . . ." *Id.* at 9.

Following the Preliminary Determination, Dongyuan submitted for admission to the record certain data on the labor cost of "[m]anufacture of other fabricated metal products not enumerated elsewhere" contained in the "Industrial Census 2007" published by Thailand's National Statistics Office ("NSO"). *Dongyuan's Final Surrogate Value Submission—Part I*, Ex. SV-1 (Nov. 26, 2012) (Admin.R.Doc. No. 373) ("*Dongyuan's Final Surrogate Value Submission*"). For the Final Determination, Commerce applied the NSO labor rate as a surrogate labor rate to value the examined respondents' reported labor hours. *Decision Mem.* 11. Commerce concluded that the NSO data were superior to the ILO data, finding "that the 2007 NSO data for labor cost of 'manufacturing of other fabricated metal products' (ISIC Rev.3 Code: 2899) is the best information available on the record to calculate the labor cost of the two respondents in the final determination." *Id.* (citation omitted in original). Commerce explained that "[t]his is because the 2007 NSO data are the most product-specific and contemporaneous[] and provide a broader market average among all the data parties placed on the record." *Id.* According to the Decision Memorandum, the hourly rate obtained from the NSO data was 54.61 THB per hour. *Id.* at 12. It appears from the record that the rate as adjusted for inflation and applied was 63.1158 THB per hour. *See Final Factor Valuations Mem.* 3 ("The SV [surrogate value] for labor is 63.12 THB/hr.") & Attach. 1 (showing an applied rate of 63.1158; *see also Dongyuan's Final Surrogate Value Submission*, Ex. SV-1. The surrogate labor rate applied in the Final Determination, therefore, was less than half of the 141.2162 THB/hour rate applied in the Preliminary Determination.[13]

According to the Decision Memorandum, Dongyuan argued during the investigation that "[t]he Department should treat selling, general and administrative ('SG&A') labor line items (sales, administrative and managerial staff and directors' salaries) in the surrogate financial statements as manufacturing labor, not SG&A labor, in its financial ratio calculations because the underlying ILO Chapter 6A data and the NSO Industrial Census data include these expenses." *Decision Mem.* 14. In the Final Determination, Commerce agreed with Dongyuan's proposed change, stating that "[a]fter examining the record, we agree with Dongyuan that the NSO data include total

[13] During the administrative proceeding, Dongyuan alleged that Commerce had erred in converting the monthly Thai labor rate in the ILO Chapter 6A data into an hourly rate by incorrectly presuming a lower number of hours worked during the month. *Decision Mem.* 10–11. In the Decision Memorandum, Commerce did not address this issue because it had selected the NSO data rather than the ILO Chapter 6A data. *Id.* at 14. Although any recalculation of the hourly rate from the monthly rate might lower the ILO Chapter 6A rate, the resulting rate still would likely be substantially higher than the NSO rate.

labor costs (*i.e.*, manufacturing and SG&A) . . . ." *Id.* at 15.

Commerce explained that it intended to account for SG&A labor by applying to the hours of labor reported by each examined respondent a surrogate labor rate that included both manufacturing and SG&A labor costs. *Id.* Commerce also stated that "[u]sing a surrogate financial ratio that includes SG&A labor costs in addition to the NSO-based surrogate labor rate would double-count those costs in normal value because both include an amount for SG&A labor." *Id*. Commerce concluded its discussion by stating that "to avoid double-counting SG&A labor, we have determined to exclude labor costs from the SG&A surrogate financial ratios for the final determination." *Id.*

Elkay argues that Commerce should be required to calculate the SG&A/interest expense ratios as Commerce did in the Preliminary Determination—by placing in the numerator of the SG&A/interest expense ratios all SG&A expenses reported in the surrogate companies' financial statements, including SG&A labor costs. Elkay Br. 12. Elkay submits that although "the NSO labor rate was an average based on compensation for all types of labor, including both production and non-production labor," *id.* at 8–9, the "labor rate was only applied to production labor hours," *id.* at 9, and not to the non-production labor expended in performing SG&A functions. Elkay asserts that because Commerce "applied the revised surrogate labor rate to a labor FOP that includes only production hours, Commerce failed to capture any SG&A labor costs in the calculation of normal value." *Id.* at 6.

There can be no dispute that Commerce intentionally used an average ratio for SG&A and interest expenses that captured less than the full amount of the SG&A expenses as reported in the surrogate financial statements. It also appears from the record that the labor hours reported as a factor of production by both investigated respondents included only hours of production labor.[14] But it does not nec-

[14] According to defendant, neither Dongyuan's nor Superte/Zhaoshun's reported labor hours included labor for SG&A functions because both parties reported labor that was "directly related to the production of subject merchandise." Def. Opp'n 3. The Decision Memorandum, however, does not mention that Superte/Zhaoshun reported only production labor hours. In the Decision Memorandum, Commerce acknowledged only as to Dongyuan that it applied the NSO labor rate to a quantity of labor hours that did not include SG&A labor. *Decision Mem.* 15 ("Dongyuan's labor FOPs do not include SG&A labor hours . . . ."). The Department's questionnaire asked respondents to "[r]eport the indirect labor hours required to produce a unit of the merchandise under consideration," adding that "[i]ndirect labor includes all workers not previously reported who are indirectly involved in the production of the merchandise under consideration." *Dongyuan's Section D Questionnaire Resp.* D-10 to D-11 (July 3, 2012) (Admin.R.Doc. No. 215); *Superte/Zhaoshun's Sections C & D Questionnaires Resp.* D-12 (July 30, 2012) (Admin.R.Doc. Nos. 244–45). The questionnaire did not specifically request that respondents report non-production labor, including labor associated with SG&A functions.

essarily follow, as Elkay argues, that "Commerce failed to capture any SG&A labor costs in the calculation of normal value." Elkay Br. 6. Elkay's characterization assumes that Commerce omitted SG&A labor costs entirely from the normal value determination considered as a whole. Because the surrogate labor rate Commerce applied to the quantities of labor hours reported by the two investigated respondents bears some relationship to non-production labor costs, Elkay has not demonstrated that the calculation Commerce used to value the examined respondent's labor hours failed to capture any SG&A labor costs. Nevertheless, as discussed below, the court cannot sustain the principal conclusion underlying the Department's decision.

1. The Principal Conclusion Underlying the Department's Decision to Adjust the SG&A/Interest Expense Ratios is Not Supported by Substantial Record Evidence

In recounting the Department's reasons for making the adjustments, the Decision Memorandum states a finding that the NSO data include "total labor costs (*i.e.*, manufacturing and SG&A) . . . ."[15] *Decision Mem.* 15. From this finding, Commerce reached the conclusion that "[u]sing a surrogate financial ratio that includes SG&A labor costs in addition to the NSO-based surrogate labor rate would double-count those costs in normal value because both include an amount for SG&A labor." *Id.* Referring implicitly to the specific adjustment that it made to the surrogate financial ratios, Commerce further concluded that this adjustment was necessary in order "to avoid double-counting SG&A labor." *Id*. As the court discusses below, the record lacks substantial evidence to support the Department's conclusion that "double-counting" of SG&A labor expenses required the specific downward adjustments to the SG&A/interest expense ratios that Commerce found necessary when calculating the normal value for the merchandise of Dongyuan and Superte/Zhaoshun.[16] The

[15] The full statement of this finding in the Decision Memorandum is: "After examining the record, we agree with Dongyuan that the NSO data include total labor costs *(i.e.*, manufacturing and SG&A), including wages, earnings, overtime, bonuses, special payments, cost of living allowances and commissions, as well as, fringe benefits such as, beverages, lodgings, rent, medical care, transportation, recreational and entertainment services, *etc.*" *Decision Mem.* 15.

[16] The basis for the substantial reduction in the ratios (which was by more than half, as explained above) is apparent from an examination of the categories of SG&A costs that Commerce regarded as labor costs and excluded from the numerators, and included in the denominators, of the three SG&A/interest expense ratios. *See Final Factor Valuations Mem.* Attach. 1.

The financial statement of Stainless Steel Home Equipment Manufacturing Co., Ltd. ("Stainless Steel"), one of the three surrogate companies, lists "Salaries and bonuses" under the category of "Cost of Administration" and "Wages of producing" under the category of "cost of production." *See Pet'r's Submission of Surrogate Values* Ex. 10 (Aug. 13, 2012)

court, therefore, must hold invalid the principal conclusion underlying the decision to make the adjustments to the SG&A/interest expense ratios.

Record evidence indicates that the NSO labor rate is derived on "remuneration" paid to "[p]ersons engaged" in the "manufacture of other fabricated metal products." *Dongyuan's Final Surrogate Value Submission*, Ex. SV-2 (containing the NSO's description of its methodology and definitions). The NSO defined "[p]ersons engaged" to include: (1) "[u]npaid workers" who are "owners or business partners who managed or participated in the management of the establishment;" (2) "[o]peratives" that "were directly engaged in the production or other related activities of the establishment and received pay;" and (3) "other employees" referring to "all employees other than operatives," including "administrative, technical and clerical personnel such as salaried managers and directors, laboratory and research workers, clerks, typists, book-keepers, administrative supervisors, salesman and the like." *Id.* The NSO's definitions specify that excluded from the "persons engaged" are: (1) "managers or directors paid solely for their attendance at meeting[s] of the board of director[s];" (2) [p]ersons from other establishment[s] working at this establishment; (3) "[h]ome workers;" (4) "[p]ersons who were on leave for military services or one who had obtained long leave or were on strike"; and (5) "[p]ersons who were employed to work occasionally such as laborer[s] and sale agents who do not receive regular pay." *Id.*

The NSO information supports a finding that the NSO rate was derived from an average remuneration paid for "persons engaged" in

(Admin.R.Doc. No. 262) ("*Elkay's Surrogate Values Submission*"). In the Final Determination, Commerce regarded both of these cost line items as labor costs, not SG&A expenses, for the purpose of calculating the SG&A/interest expense ratio. *Final Factor Valuations Mem.*, Attach. 1. In addition to "Salaries and bonuses," the "Cost of Administration" category reported line items for "Welfare," "Social Security," and "Compensation Fund." *Elkay's Surrogate Values Submission* Ex. 10. In the Final Determination, Commerce also regarded these three cost line items as labor costs. *Final Factor Valuations Mem.*, Attach. 1.

The financial statement of Diamond Brand Co., Ltd., another one of the three surrogate companies, includes line items for salary both under a category labeled "Selling and administrative expenses" and under a category of "Administrative Expenses" as well as a line item for "Labor cost" under the "Cost of production" category. *Elkay's Surrogate Values Submission* Ex. 10. Commerce treated all of these costs as labor costs for the purpose of calculating the SG&A/interest expense ratio. *Final Factor Valuations Mem.*, Attach. 1.

The financial statement of Advance Stainless Steel Co., Ltd., the third of the three surrogate companies, lists expenses for "Labor cost, Overtime, and Welfare" under the category of "Production Expenses" but also lists "Salary, Bonus, and Overtime" and "Social security and providend fund" under the category of "Selling and Administrative Expenses." *Dongyuan's Rebuttal Surrogate Values for the Prelim. Results* Exs. 4–6 (Aug. 20, 2012) (Admin.R.Doc. No. 296). Here also, Commerce treated all of these line items costs as labor cost rather than SG&A expense. *Final Factor Valuations Mem.*, Attach. 1.

various production-related and non-production-related activities. It also supports a finding that the NSO rate is a much broader average than one representing only wages and salaries. The NSO definition of "[r]emuneration" includes: (1) "[w]ages/salaries;" (2) "[o]vertime, bonus, special payment, cost of living allowance and commission;" (3) "fringe benefits;" and (4) "[e]mployer's contribution to social security" (including as examples, payments to a "social security fund, workmen's compensation fund[,] and health insurance, etc."). *Id*. Based on the record evidence, Commerce could conclude that the NSO labor rate is higher than it would have been had it been derived solely from data on wages and salaries.

Less clear is that the NSO labor rate is higher than it would have been had it been derived solely from data on production workers. It may be reasonable to infer that *some* non-production employees, e.g., high-level salaried managerial employees, receive higher remuneration than persons engaged in production. The record data, however, do not support an actual finding that the NSO labor rate was higher—or by what percentage it was higher—than it would have been had it been derived solely from Thai data on production labor rather than from a combination of Thai data on production labor and various types of non-production labor. Apparently, missing from the record are the raw data from which the NSO rate was derived, which possibly could support such conclusions.

The court has considered the record evidence, summarized above, on the derivation of the NSO labor rate and on the derivation, and the magnitude, of the downward adjustments Commerce made to the three SG&A/interest expense ratios (and, accordingly, to the average SG&A/interest expense ratio applied in determining the normal value of the two investigated respondents). On this administrative record, the Department's reliance on the extent of any "double-counting," *Decision Mem.* 15, was too much a matter of speculation. The record lacks substantial evidence to support the Department's conclusion that the rate Commerce applied to the hours of production labor reported by the investigated respondents overstated the value of those labor hours to such an extent as to justify the specific, compensatory adjustments that Commerce made to the SG&A/interest expense ratios.

2. The Department's Reliance on the Labor Methodologies Notice Does Not Justify the Downward Adjustments to the SG&A/Interest Expense Ratios

In both the Preliminary Determination and in the Decision Memorandum, Commerce based its treatment of SG&A labor expenses in

part on a notice ("*Labor Methodologies*") Commerce published in 2011 announcing a new methodology for valuing labor in non-market economy (NME) proceedings.[17] *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production* : *Labor*, 76 Fed. Reg. 36,092 (Int'l Trade Admin. June 21, 2011) ("*Labor Methodologies*"). The Department's reasoning, and its conclusion, changed considerably from the Preliminary to the Final Determination.[18]

The *Labor Methodologies* notice announces that "the Department will value the NME respondent's labor input using industry-specific labor costs prevailing in the primary surrogate country, as reported in Chapter 6A of the ILO Yearbook of Labor Statistics."[19] *Id.* at 36,094. The notice creates "the rebuttable presumption that Chapter 6A data

[17] Commerce issued the *Labor Methodologies* notice to replace an interim methodology it had adopted following the decision of the U.S. Court of Appeals for the Federal Circuit in *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010), which had invalidated the portion of the Department's regulation in 19 C.F.R. § 351.408(c)(3) according to which Commerce determined a labor rate using regression-based wages derived from a number of countries. *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production* : *Labor*, 76 Fed. Reg. 36,092, 36,092 (Int'l Trade Admin. June 21, 2011) ("*Labor Methodologies*"). In the *Labor Methodologies* notice, Commerce states that the method announced therein would apply to nonmarket economy antidumping proceedings initiated after the June 21, 2011 publication of the notice. *Id.* at 36,093. Commerce initiated the investigation at issue in this action on March 27, 2012. *Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 77 Fed. Reg. 18,207, 18,207 (Int'l Trade Admin. Mar. 27, 2012).

[18] In relying on the *Labor Methodologies* notice in the Preliminary Determination, Commerce explained that it had excluded from the calculation of surrogate financial ratios those "items incorporated in the labor wage rate data in Chapter 6A of the ILO data" including "bonuses and other forms of compensation included in the ILO's calculation of wages . . . ." *Decision Mem. for Prelim. Determination for the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China* 18 (Sept. 27, 2012) (Admin.R.Doc. No. 337) ("*Prelim. Decision Mem.*"), *available at* http://enforcement.trade.gov/frn/summary/PRC/2012–24549–1.pdf (last visited Dec. 16, 2014). The record evidence, however, does not indicate that Commerce made adjustments to the preliminary SG&A/interest expense ratios to treat the labor-related SG&A expenses listed in the surrogate financial statements as labor expenses, as Commerce did in the Final Determination. *Compare Factor Valuation Mem. for Prelim. Determination*, Attach. 5 (Sept. 27, 2012) (Admin.R.Doc. No. 342–343) (providing the preliminary surrogate financial ratios calculation worksheets for the three surrogate companies), *with Final Factor Valuations Mem.*, Attach. 1 (providing the final surrogate financial ratios calculation worksheets for the three surrogate companies).

[19] Some language in the notice indicates that Commerce intended to use the ILO Chapter 6A data except in transitional cases; other language suggests that the Department did not intend to limit itself to the ILO Chapter 6A data. *Compare Labor Methodologies*, 76 Fed. Reg. at 36,092 (referring to these data as the "primary" source in the summary of the Announcement), *with id.* at 36,093 ("the Department *will* base labor cost on ILO Chapter 6A data applicable to the primary surrogate country.") (emphasis added).

better accounts for all direct and indirect labor costs." *Id.* at 36,093. The notice further explains that Commerce would discontinue its current use of the data in ILO Chapter 5B: "Unlike Chapter 6A data that reflects all costs related to labor including wages, benefits, housing, training, *etc.*, Chapter 5B data reflects only direct compensation and bonuses." *Id.*

The Decision Memorandum cited the *Labor Methodologies* notice in support of the position that "[i]n deriving surrogate financial ratios, 'it is the Department's longstanding practice to avoid double-counting costs *where the requisite data are available to do so*.'" *Decision Mem.* 15 (citation omitted) (emphasis added to original in quoted source). Commerce noted that "in *Labor Methodologies*, we said that 'the Department will adjust the surrogate financial ratios when the available record information—in the form of itemized indirect labor costs—demonstrates that labor costs are overstated.'" [20] *Id.* (citing *Labor Methodologies*, 76 Fed. Reg. at 36,093–94).

For two reasons, the *Labor Methodologies* notice is not an adequate justification for the decision challenged in this case. First, Commerce departed from the methodology announced in the notice by rejecting the ILO Chapter 6A data in the Final Determination in favor of the NSO data, *Decision Mem.* 13–14, resulting in a rate that was lower by more than half than one derived from ILO Chapter 6A.[21] *Compare Prelim. Factor Valuation Mem.*, Attach. 4 (applying a surrogate rate of 141.2162 THB/hr), *with Final Factor Valuations Mem.* 3 (applying a surrogate rate of 63.12 THB/hr). Second, the *Labor Methodologies* notice explains that "[i]f there is evidence submitted on the record by interested parties demonstrating that the NME respondent's cost of

[20] The *Labor Methodologies* notice contains the following language:

> [T]he Department will determine whether the facts and information available on the record warrant and permit an adjustment to the surrogate financial statements on a case-by-case basis. If there is evidence submitted on the record by interested parties demonstrating that the NME respondent's cost of labor is overstated, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record. Specifically, when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO's definition of Chapter 6A data, the Department will remove these identifiable costs items.

Labor Methodologies, 76 Fed. Reg. at 36,094.

[21] The ILO Chapter 6A rate of 141.2162 Thai Bhat (THB) per hour corresponds to the total manufacturing sector for 2005, inflated to the period of investigation, and not the more specific category of labor to which the NSO data used in the Final Determination corresponds. *Decision Mem.* 11–12. Information on the record, however, indicates that the NSO data corresponding to the total manufacturing sector for 2006, inflated to the POI, was 56.60 THB per hour, demonstrating an even more drastic contrast when comparing the two rates for the broader manufacturing sector. *Dongyuan's Final Surrogate Value Submission*, Ex. SV-10 (Nov. 26, 2012) (Admin.R.Doc. No. 375–77).

labor is overstated, the Department will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record." *Labor Methodologies*, 76 Fed. Reg. at 36,094. As the court discussed previously, the record in this case does not contain substantial evidence to support the Department's conclusion that when calculating the SG&A/interest expense ratios Commerce made appropriate adjustments to the surrogate financial statements to compensate for an overstated labor cost.

3. The Court Rejects Defendant's and Dongyuan's Arguments in Support of the Department's Decision on SG&A Labor Expenses

Before the court, defendant and Dongyuan make several arguments in favor of the Department's decision to adjust the SG&A/interest expense ratios. The court rejects these arguments for the reasons discussed below. Defendant states that "[u]nfortunately, the respondents did not report SG&A labor hours" and that "[b]ased on the limitations of the data on the record, Commerce was faced with two imperfect methodologies for calculating labor." Def. Opp'n 6. Defendant argues that "[i]n such circumstances, Commerce has broad discretion to choose between the competing methodologies," *id.* at 7, and that the court must defer to the Department's reasonable choice for labor and SG&A expense calculations, so long as that choice is accompanied by a reasoned explanation, *id.* at 15. *See also* Dongyuan Opp'n 9 ("Even if there is another way to capture this cost, the Court must uphold this methodology if the Court finds it to be reasonable . . . ."). Regarding the choice Commerce made, defendant explains that "[a]lthough double counting was not a certainty under the record in this case, Commerce's actions recognized the possibility of double-counting," Def. Opp'n 14, and that "[a]s a result, Commerce reasonably excluded 'labor costs from the SG&A surrogate financial ratios for the final determination,'" *id.* (quoting *Decision Mem*. 15).

Defendant's argument is unconvincing because it is based on a mischaracterization of the principal conclusion as stated in the Decision Memorandum: Commerce concluded that double-counting *would* occur absent the adjustments it made to the ratios, and this was the basis upon which Commerce determined that those adjustments were appropriate to avoid the double-counting it found to exist. *See Decision Mem.* 15 ("Using a surrogate financial ratio that includes SG&A labor costs in addition to the NSO-based surrogate labor rate *would* double-count those costs in normal value because both include an amount for SG&A labor." (emphasis added)). And even were the Department's decision presumed to rest upon a "reasoned explana-

tion," Def. Opp'n 15, that explanation cannot overcome the Department's basing its decision on a conclusion that, for the reasons discussed, is not supported by substantial record evidence.

Further to its argument that Commerce made a reasonable choice given two imperfect alternatives, defendant argues that "Elkay has not established that its preferred methodology— retaining the SG&A labor costs in the SG&A financial ratio calculation . . . while using NSO data that indisputably includes SG&A labor—would have provided a more accurate surrogate value for labor." Def. Opp'n 14 (citation omitted). Defendant argues further that Elkay "wholly ignores the facial risk of double-counting that would be created by its proposed approach." *Id.*

Defendant's argument fails because the court must evaluate the Department's decision according to the applicable standard of review and cannot sustained a decision not grounded in substantial record evidence. The argument is also misguided in positing that Commerce had only the two choices defendant describes. Commerce had other choices, including choices that did not involve use of the NSO data or choices not involving the particular adjustments it made to the SG&A/interest expense ratios.

In support of the Final Determination, Dongyuan argues that the Department's methodology captured SG&A labor expenses because the NSO rate "applied to the production labor is artificially higher than the labor rate would be because it includes more labor expenses than production labor would normally cover." Dongyuan Opp'n 8–9. As the court discussed previously, the record shows that the NSO rate was derived from an average remuneration paid for "persons engaged" in various production-related and non-production-related activities and that it is a broader representation of labor cost than one limited to wages and salaries. But even if the NSO rate were presumed to be higher than it would be if it had not included non-production labor (a presumption for which the record lacks substantial evidence), the record would not support the Department's conclusion that the adjustments the Department made to the SG&A/interest expense ratios were appropriate adjustments for the double-counting of SG&A labor that the Department found would occur absent those adjustments.

4. On Remand, Commerce Must Reconsider its Decision to Adjust the SG&A/Interest Expense Ratios

On remand, Commerce must reconsider its decision to adjust the SG&A/interest expense ratios and the particular way in which it accomplished those adjustments. Additionally, because Commerce

grounded its decision in part on its choice of a surrogate labor cost, it may consider on remand alternative data sources with which to value the labor hours reported by the two investigated respondents.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands the final determination ("Final Determination") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019 (Int'l Trade Admin. Feb. 26, 2013) ("*Final Determination*"), *as amended*, 78 Fed. Reg. 21,592 (Int'l Trade Admin. Apr. 11, 2013). Therefore, upon consideration of all papers and proceedings in this case, and upon due deliberation, it is hereby

ORDERED that the Final Determination be, and hereby is, set aside as unlawful and remanded for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall issue, within ninety (90) days of the date of this Opinion and Order, a new determination upon remand ("Remand Redetermination") that conforms to this Opinion and Order and reconsiders the use of surrogate information from Thailand to value cold-rolled stainless steel coil when determining the normal value of Dongyuan's subject merchandise; it is further

ORDERED that if Commerce places additional surrogate value data on the record on remand, Commerce must provide parties to this litigation the opportunity to submit comments concerning those data and the Department's decision addressing the valuation of cold-rolled stainless steel coil; it is further

ORDERED that in the Remand Redetermination, Commerce shall reconsider its method of accounting for selling, general, and administrative ("SG&A") labor costs in its calculation of normal value and, as necessary, revise the antidumping duty margins for both the investigated and separate rate respondents; it is further

ORDERED that Elkay Manufacturing Company and Guangdong Dongyuan Kitchenware Industrial Co., Ltd. each may file comments on the Remand Redetermination within thirty (30) days from the date on which the Remand Redetermination is filed with the court; and it is further

ORDERED that defendant may file a response within fifteen (15) days from the date on which the last of any such comments is filed with the court.

Dated: December 22, 2014
New York, New York

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

Slip Op. 14–151

DEACERO S.A.P.I. DE C.V. and DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, GERDAU AMERISTEEL U.S. INC., EVRAZ ROCKY MOUNTAIN STEEL, and NUCOR CORPORATION, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 12–00345

[Sustaining the Department of Commerce's negative circumvention determination on remand.]

Dated: December 22, 2014

David E. Bond and *Jay C. Campbell,* White & Case LLP, of Washington, DC, for plaintiffs.

Melissa M Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery,* Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Reginald T. Blades, Jr.,* Assistant Director. Of counsel on the brief was *David Richardson,* Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal, Kathleen W. Cannon, R. Alan Luberda, and *David C. Smith,* Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors ArcelorMittal USA LLC, Gerdau Ameristeel U.S. Inc., and Evraz Rocky Mountain Steel.

Alan H. Price, Daniel B. Pickard, and *Maureen E. Thorson,* Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

OPINION

Goldberg, Senior Judge:

This case has ricocheted between the court and the Department of Commerce ("Commerce" or "the Department") since 2012. The matter now returns here following a second remand, which asked Commerce whether it would reconsider a finding supporting its negative circumvention decision from the first remand. In the end, the Department chose not to revisit the finding in question. Thus substantial evidence remains on the record to buttress Commerce's decision not to subject plaintiffs' 4.75 millimeter ("mm") wire rod to antidumping duties. The court sustains the negative circumvention determination from the first remand proceeding.

BACKGROUND

The court sketched the background of this case already in its previous opinions. *See Deacero S.A. de C.V. v. United States*, 37 CIT __, __, 942 F. Supp. 2d 1321, 1324–25 (2013) ("*Deacero I*"); *Deacero S.A.P.I. de C.V. v. United States*, Slip Op. 14–99, 2014 WL 4244349,

*1–3 (CIT Aug. 28, 2014) ("*Deacero II*"). Nevertheless, to ensure its holding is not misunderstood, the court repeats some of the history that it outlined before.

In October 2002, the Department issued an antidumping duty order on carbon and alloy steel wire rod from countries including Mexico. *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945 (Dep't Commerce Oct. 29, 2002) (notice of antidumping duty orders) (the "Order"). The Order defined the subject merchandise as follows:

> The merchandise subject to these orders is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Id. at 65,946. The Order also excluded a few types of rod from antidumping duties, including rod made of certain types of steel, and rod containing chemical elements in set quantities. *Id.*

After Commerce issued the Order, plaintiffs Deacero S.A. de C.V. and Deacero USA, Inc. (collectively "Deacero") began selling 4.75 mm wire rod in the United States. In response, domestic producers asked Commerce to decide whether Deacero's rod was subject to the Order. Req. for Scope/Circumvention Ruling 1–2, PD I 1 (Feb. 11, 2011). Commerce said it would not conduct a scope inquiry, however, because rod with an actual diameter of 4.75 mm fell outside the Order's terms. Initiation Mem. 2, 12–13, PD I 24 (May 31, 2011).

But Commerce's work did not end there. After refusing to conduct a scope inquiry, the Department considered whether the rod was "circumventing" the Order under 19 U.S.C. § 1677j (2012). Commerce first explored whether the rod was "later-developed merchandise" similar to the subject goods under § 1677j(d). The Department held it was not, finding that 4.75 mm rod was "commercially available" in Japan before the Order was written. *See* Initiation Mem. 13–14; *see also* 19 C.F.R. § 351.225(j) (2014). Commerce next examined whether the rod represented a "minor alteration" to the subject goods under § 1677j(c). Initiation Mem. at 14–15; *see also* 19 C.F.R. § 351.225(i). This time, Commerce found that the rod was circumventing. Because "wire rod with an actual diameter of 4.75 mm to 5.00 mm" differed from subject merchandise just slightly in "form or appearance," the Department included Deacero's rod "within the scope of the [O]rder." *Carbon and Certain Alloy Steel Wire Rod from Mexico*, 77 Fed. Reg. 59,892, 59,893 (Dep't Commerce Oct. 1, 2012) (final affirm. circum-

vention determination) ("*Final Determination*"); *see also* Issues & Decision Mem. at 18, PD II 47 (Sept. 24, 2012).

On appeal, the court invalidated Commerce's minor alterations decision as unfounded in substantial evidence. Citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365 (Fed. Cir. 1998), the court held that products which Commerce intentionally excluded from an order cannot circumvent that order. *See Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1330–32. Yet here, the record showed, and Commerce found, that 4.75 mm rod was commercially available before the Order was drafted. The Order also omitted 4.75 mm rod from its scope. *Id.* Together, this evidence suggested that Commerce had exempted 4.75 mm rod from antidumping liability with intent. The court remanded so Commerce could revisit its decision in light of these data.

On remand, the Department reversed course and exempted Deacero's rod from the Order. Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 87 ("First Remand Results"). It did so under protest. *See id.* at 1–2. As Commerce understood *Deacero I*, the court had decided on its own that "4.75 mm wire rod . . . existed in Japan at the time the petition was filed." *Id.* at 19. Commerce also lamented a second fact that the court supposedly found, namely, that "Petitioners intentionally sought to exclude 4.75 mm wire rod from the scope of the *Order*." *Id.* In the Commerce's view, these alleged findings forced the conclusion that 4.75 mm rod was not a minor alteration. The Department also suggested, in so many words, that the court had overstepped its authority by making factual judgments reserved for the agency. *Id.* at 12–13, 19 (agreeing with petitioners, who said court "improperly engaged in fact finding").

Yet Commerce's depiction of *Deacero I* missed the mark. In *Deacero II*, the court explained that Commerce "reached a supportable result" on remand by deeming 4.75 mm rod noncircumventing merchandise. *Deacero II*, 2014 WL 4244349, at *6. But the court faulted the logic underpinning the Department's conclusion. Although Commerce hinted during the first remand that the court made *its own* finding respecting commercial availability in *Deacero I*, the court had done nothing of the sort. Instead, following its proper standard of review, the court had held that record evidence regarding commercial availability undermined *Commerce's* finding that Deacero's rod was a minor alteration. *See Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1331–32. So, contrary to its claims, the Department was not bound by *Deacero I* to any particular findings of fact. *See Deacero II*, 2014 WL 4244349, at *6 ("The court never held that Commerce was bound by its prior [commercial availability] finding."). Because Commerce in-

adequately reasoned its first remand decision, *Deacero II* ordered another remand, this time to ask Commerce whether it wished to revisit the commercial availability issue or reopen the record in further proceedings. *Id.* at *7.

The court now has the Department's answer. *See* Final Results of Redetermination Pursuant to Ct. Remand 16, ECF No. 113 ("Second Remand Results"). In the Second Remand Results, Commerce declined to reconsider its commercial availability finding, because in Commerce's view, commercial availability is irrelevant to deciding whether minor aspects of a product were changed to fall outside an order's scope. *Id.* at 16–17. The Department explained that it examines commercial availability only when choosing between the later-developed product and minor alterations inquiries. *Id.* Commerce nevertheless maintained, under protest, that 4.75 mm rod did not circumvent the Order. *See id.* at 1 (restating result of first remand).

DISCUSSION

The court now sustains Commerce's revised decision.[1] In the Second Remand Results, the Department waived the chance to revisit its earlier commercial availability finding. *See id.* at 16. And because this finding remains undisturbed, the record still indicates that Commerce excluded 4.75 mm rod from the Order with intent. Accordingly, the Department's negative circumvention determination was based in substantial evidence and in accordance with law.

But before concluding, the court will clarify and distill its holdings in *Deacero I* and *Deacero II*. In the Second Remand Results, Commerce alleged that the court had modified the minor alterations analysis, *see id.* at 20–22, and barred affirmative circumvention determinations for products that were commercially available before an order issued, *see id.* at 16–17. These arguments betray a deep misunderstanding of the court's opinions. Properly viewed, the court's holdings are narrow and do not blunt Commerce's power to identify circumventing goods under 19 U.S.C. § 1677j(c) and 19 C.F.R. § 351.225(i).

To aid understanding, the court reconstructs its rationale from the ground up. The court begins, as always, with the statute. In 19 U.S.C. § 1673(1), Commerce receives the authority to decide whether certain "class[es] or kind[s] of foreign merchandise" were sold in the United States for less-than-fair value. This provision empowers Commerce, as a natural corollary, to define the goods covered by antidumping

[1] The court has jurisdiction under 28 U.S.C. § 1581(c) and reviews Commerce's conclusions using the standards of review in 19 U.S.C. § 1516a(b)(1)(B)(i).

orders. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) (recognizing Commerce's "inherent power" to define parameters of an investigation); *Wheatland Tube Co. v. United States*, 21 CIT 808, 815, 973 F. Supp. 149, 155 (1997) (same). Moreover, once Commerce has written an order, it enjoys some latitude to interpret the order's application to imported goods. *See Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995). But the Department may not interpret an order "in a way contrary to its terms." *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990). Commerce cannot constructively rewrite an order to cover items outside the order's literal scope.

This general rule can yield unfair results, however. Because Commerce normally limits antidumping orders to their terms, exporters sometimes alter their goods to avoid duties. For example, in response to an order on manual typewriters, an exporter of typewriters might add a memory function to the product to remove it from the order's scope. *See* S. Rep. No. 100–71, at 101 (1987). To prevent situations like this, Congress enacted the circumvention provisions in 19 U.S.C. § 1677j. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 101–41, § 1321, 102 Stat. 1107, 1192 (1988) (codified as amended at 19 U.S.C. § 1677j (2012)). The subsection at issue in this case, 19 U.S.C. § 1677j(c), requires Commerce to include among subject merchandise any "articles altered in form or appearance in minor respects . . . , whether or not included in the same tariff classification [as goods described in the order]." In other words, if a product differs from subject goods in an insignificant way, that product may face antidumping duties even though it lies outside the order's literal bounds.

But this exception has limits. While § 1677j(c) lets Commerce reach items outside an order's plain terms, the exception does not touch products that were placed beyond an order's scope by design. As the Federal Circuit declared in *Wheatland*, "[s]ection 1677j(c) does not [] apply to products unequivocally excluded from the order in the first place." 161 F.3d at 1371.

At first blush, this rule from *Wheatland* seems poised to swallow the minor alterations provision altogether. On one hand, Congress enacted § 1677j(c) to reach goods falling outside of an order's literal scope; on the other hand, *Wheatland* says § 1677j(c) cannot cover items that were unequivocally excluded from an order. So how can one read these rules in concert? If one assumes that any item falling outside of an order's literal scope was unequivocally excluded, then the rules clearly conflict. Although § 1677j(c) empowers Commerce to extend orders beyond their terms to prevent circumvention, the dec-

laration in *Wheatland* would revoke that power by restricting duties to items within an order's four corners. Nevertheless, if one posits that not all items outside an order's scope were unequivocally excluded, then the rules dovetail. A context-sensitive survey of *Wheatland* and other Federal Circuit precedent supports the latter view. *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) (urging counsel to interpret language of opinion in light of its facts); *Can. Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1494 (Fed. Cir. 1987).

In *Wheatland*, the Federal Circuit considered whether to grant Commerce a remand to decide if line and dual-certified pipe circumvented an order on standard pipe. 161 F.3d at 1366–69. The court said remand would be inappropriate for two reasons. First, it found that the order excluded line and dual-certified pipe in absolute terms. *Id.* at 1371. In a freestanding sentence at the end of the order, Commerce wrote, "Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe . . . is . . . not included in this investigation." *Id.* at 1367 (emphasis omitted). Second, the Federal Circuit noted that petitioner had argued to exclude line and dual-certified pipe from the order, even though it knew the pipe was "capable of standard applications." *Id.* at 1371. From this evidence, the court inferred that Commerce intentionally excluded line and dual-certified pipe from the order. And because the Department intentionally excluded that pipe from the order, *Wheatland* denied Commerce's request for remand to conduct a minor alterations inquiry. *Id.*

In sum, despite its broad language about items "unequivocally excluded" from antidumping orders, *Wheatland* stands for this narrow proposition: The minor alterations provision does not apply to goods that Commerce knew existed commercially when writing an order, yet excluded from the order anyway.

By contrast, the provision can cover items that were excluded from an antidumping order without intent—and this remains so even if the items fall outside the order's plain terms. *Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000), illustrates the principle. There, Commerce imposed duties on certain carbon steel products from Japan. After the order issued, Japanese producers added small amounts of boron to their goods so they would no longer be "carbon steel," as defined in the U.S. Harmonized Tariff Schedule. *Id.* at 1350. Commerce launched a minor alterations inquiry to decide whether steel products with trace amounts of boron circumvented the order. *Id.* At first, the Court of International Trade enjoined the inquiry. The court held that Commerce could not apply the minor

alterations provision to products outside the order's literal scope. *Id.* at 1351. But the Federal Circuit reversed and let the inquiry continue. In doing so, *Nippon* distinguished *Wheatland* on procedural grounds, and noted that *Wheatland* "involved two different products, both of which were well known when the order was issued." *Nippon*, by contrast, involved "a product produced by making allegedly insignificant alterations to an existing product." *Id.* at 1356. It seems, then, that *Nippon* allowed the inquiry to proceed because there was no clear evidence that Commerce willfully excluded the boron-laced product from the order.

The court's decisions in *Deacero I* and *II* build upon these precedents. As in *Wheatland*, record evidence in this case suggests that Commerce intentionally exempted 4.75 mm wire rod from the Order. First, as explained in *Deacero I*, the Order plainly excludes from its scope rod under 5.00 mm in diameter. 37 CIT at __, 942 F. Supp. 2d at 1330–31. Of course, the Order does not set the exclusion apart in a separate clause, like in *Wheatland*. *See* 161 F.3d at 1367. But where Commerce placed the exclusion is of little moment. By defining subject rod between 5.00 and 19.00 mm in diameter, Commerce unambiguously omitted rod of lesser width from the Order. And although the exclusion might have been clearer had Commerce set it in a separate clause at the end of the Order, to do so would have been redundant. An order covering rod between 5.00 and 19.00 mm inherently excludes products of any other diameter, including 4.75 mm rod.

Second, the finding that 4.75 mm rod was "commercially available" before the Order was drafted implies that Commerce excluded the rod on purpose. As recounted in *Deacero II*, "[u]ndisputed record evidence demonstrates that small diameter wire rod existed domestically at some point in proximity to the investigation, and Commerce concluded that such wire rod was indeed commercially available prior to the Wire Rod Order's issuance." 2014 WL 4244349, at *4. "Furthermore, [the] petitioners themselves noted in their petition that 5.5 mm wire rod was the 'smallest cross-sectional diameter that is hot-rolled in *significant* commercial quantities,' suggesting that smaller sizes may have been manufactured in limited commercial quantities at the time of the investigation." *Id.* (quoting Initiation Mem. at 4). This evidence signals that Commerce excluded 4.75 mm rod from the Order not by lack of foresight, but with full knowledge of the product's existence. Moreover, though Commerce could have reopened the record and reached a different conclusion regarding commercial availability on a third remand, it declined the invitation to do so. *See* Second Remand Results at 16.

Together, the Order's language—and the undisturbed finding that 4.75 mm rod was commercially available before the Order issued—suggest Commerce intentionally excluded 4.75 mm rod from the Order. Thus, under *Wheatland*, the Department's negative circumvention determination on remand was supported by substantial evidence.

The Department and defendant-intervenors counter with many of the same arguments made in their original briefs and following the first remand. *See id.* at 9–22. The court addressed most of these arguments in *Deacero II* and need not discuss them again here. Even so, to ensure that its holdings are not misunderstood, the court sets a few matters straight.

To begin, Commerce argues that *Deacero I* announced a new test to decide whether an alteration is minor under the statute. The Department calls the alleged test the "fundamental focus" analysis. *See id.* at 20–21. Under the test, a change to subject merchandise would be deemed "minor" only if it affects an insignificant or nonfundamental physical aspect of the good. Conversely, a change would qualify as more than minor if it affected one of the good's central physical attributes. *Id.* Commerce complains that this test lacks a basis in precedent, *id.* (explaining *Wheatland* does not mention fundamental focus test), and implies that the test unjustly supplanted the five-factor inquiry generally used to identify minor alterations, *see id.* at 17–18 (explaining application of five-factor test to Deacero's rod); S. Rep. No. 100–71, at 100 (outlining five factors to consider in minor alterations analysis). Commerce also alleges that the court infringed its fact-finding authority by deeming diameter a "fundamental" characteristic of wire rod. *See* Second Remand Results at 20–22.

These arguments twist the court's holding almost beyond recognition. Although *Deacero I* called diameter "the fundamental focus of the Order," it did not mint a new fundamental focus test to replace Commerce's usual minor alterations analysis. *See* 37 CIT at __, 942 F. Supp. 2d at 1330. Nor did the court find that diameter is more important to wire rod's usefulness than other traits, like grade or carbon content. *See id.*; *see also Deacero II*, 2014 WL 4244349, at *4 n.5 ("[T]he court did not intend to suggest [in *Deacero I*] that diameter is more important than every other physical descriptor in the Wire Rod Order."). Commerce can decide for itself whether consumers buy wire rod for its diameter or other qualities.

Yet diameter was "fundamental" to the minor alterations analysis in another way. When Commerce defined the subject goods, it chose diameter to distinguish subject rod from nonsubject rod. The Order's plain language covered wire rod between 5.00 and 19.00 mm in width,

and omitted rod of any other diameter. *See* Order at 65,946. This omission—together with the finding that 4.75 mm rod was commercially available before the Order issued—implied that Commerce willfully excluded 4.75 mm rod from the Order. So when the court called diameter "fundamental," it meant that the Order's focus on diameter revealed an intent to exempt some rod from duties. The court never said that diameter was the rod's most important physical or commercial attribute.

Furthermore, the court never held that products found to be commercially available when an order was drafted cannot also circumvent that order under § 1677j(c). *See* Second Remand Results at 16–18 (arguing commercial availability does not bar minor alteration finding). In *Deacero I*, the court conducted a *Chevron* analysis and held that the minor alterations provision may reach products that preexisted an order. 37 CIT at __, 942 F. Supp. 2d at 1327–29. The provision might apply, for example, if Commerce found that a product was commercially available, but did not unambiguously exclude that product from an order. *Cf. Target Corp. v. United States*, 609 F.3d 1352, 1362–63 (Fed. Cir. 2010) (holding order on petroleum wax candles could cover mixed-wax candles under later-developed product provision). But here, Commerce clearly omitted 4.75 mm rod and found that the product was available commercially before the Order was written. This evidence indicates that Commerce intended to exempt 4.75 mm rod from antidumping duties.

Finally, the Department argues that commercial availability is irrelevant to the minor alterations analysis. It notes that Commerce examined commercial availability below only to inform its choice between the minor alterations and later-developed product inquiries. *See* Second Remand Results at 16–17. But past agency practice belies the Department's stance. In 1991, Commerce determined that certain manganese brass had not circumvented an order on brass strip from Germany. It based its decision, in part, on the fact that the manganese "brass existed prior to, and at the time of, the original investigation." *Brass Sheet and Strip from Germany*, 56 Fed. Reg. 65,884, 65,886 (Dep't Commerce Dec. 19, 1991) (negative final circumvention determination). Furthermore, as recently as 2009, Commerce held that certain folding tables could not have been excluded from an order because the tables did not exist during the investigation. *Folding Metal Tables and Chairs from the People's Republic of China*, 74 Fed. Reg. 21,332 (Dep't Commerce May 7, 2009) (notice of extension of time), and accompanying Final Analysis Mem. at cmt. 2. So even if Commerce usually ignores commercial availability in its minor alterations inquiry, that does not render the commercial availability find-

ing immaterial here. *See Ceramark Tech., Inc. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1317, 1324–25 (2014) (remanding minor alterations decision where order omitted electrodes of specific diameter and Commerce failed to consider commercial availability). On the contrary, the finding bespeaks Commerce's intent to exclude 4.75 mm wire rod from the antidumping Order, as discussed above.

CONCLUSION

Commerce's negative circumvention determination, as outlined in the First and Second Remand Results, is supported by substantial evidence and in accordance with law. The court now sustains the determination, and judgment will enter accordingly.

Dated: December 22, 2014
New York, New York

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

Slip Op. 14–152

SIGMA-TAU HEALTHSCIENCE, INC. A.K.A. SIGMA-TAU HEALTHSCIENCE, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Senior Judge
Court No. 11–00093

MEMORANDUM AND ORDER

Upon consideration of Plaintiff Sigma-Tau HealthScience, Inc., a.k.a. Sigma-Tau HealthScience, LLC's Motion to Deem Admitted Certain Requests for Admission ("Pl.'s Mot.") (ECF No. 50), Defendant's Response to Plaintiff's Motion for an Order to Deem Admitted Certain Requests for Admission and for Costs ("Def.'s Opp'n") (ECF No. 55), and upon consideration of all other papers and proceedings had herein, and upon due deliberation, Plaintiff's motion will be held in abeyance until January 28, 2015.

Plaintiff moves under USCIT Rule 36(a)(6),[1] challenging the sufficiency of Defendant's objections and requesting that the Court deem

[1] USCIT Rule 36(a)(6) provides:

(6) *Motion Regarding the Sufficiency of an Answer or Objection*. The requesting party may move to determine the sufficiency of an answer or objections. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(4) applies to an award of expenses.

"admitted in full without objection" its requests for admission 44 through 47. Pl.'s Mot. at 14. Plaintiff also requests an award of expenses under USCIT Rule 37(a)(4), [2] which is cross-referenced in USCIT Rule 36(a)(6). Plaintiff quoted another provision, USCIT Rule 37(c)(2), [3] to support its argument that the Court should deem admitted its requests but this provision is a cost provision for failure to admit, which is inapplicable at this juncture. *See* Pl.'s Mot. at 11. USCIT Rule 36(a)(6) is the basis for Plaintiff's motion. The purpose of "Rule 36 is to expedite trial by eliminating the necessity of proving essentially undisputed and peripheral issues." *Beker Indus. Corp. v. United States,* 7 CIT 361, 361 (1984). This motion to deem admitted certain requests for admission is premature since the parties have not made a substantive good faith effort to resolve this dispute, which is a requirement for an award of expenses pursuant to USCIT Rule 37(a)(4)(i). Thus, expenses will not be awarded. During this period of abeyance, the Court provides the parties an opportunity to make a substantive good faith effort to resolve this dispute.

The Court acknowledges that the parties' correspondence appears to be an initial attempt to resolve this dispute. *See*, *e.g.*, Pl.'s Cert. of Good-Faith Efforts to Resolve Disc. Disputes (ECF No. 50–2), Pl.'s Mot. Exs. F, G (ECF Nos. 50–6, 50–7), Def.'s Opp'n Ex. 1 (ECF No. 551). However, the Court requests that the parties ramp up their efforts to a substantive level. Substantive good faith efforts to resolve

[2] USCIT Rule 37(a)(4) provides:

(4) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

[3] USCIT Rule 37(c)(2) provides:

(2) *Failure to Admit*. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

these disputes mean that Plaintiff must address Defendant's objections.[4] For example, if a request for admission deals with a document entirely in a foreign language, then it is reasonable for the opposing party to request a certified translation.

Substantive good faith efforts also mean that parties will not quibble over terminology such as "reliable authority" versus "authoritative source" in requests for admission; the plain meaning of both terms are synonymous and unambiguous. It should be noted that an academic journal article is generally considered both a reliable authority and an authoritative source. It should also be noted that admission of authoritative sources does not require that a proposition for which it supports be offered at this stage of litigation. Parties should make meaningful efforts to address each other's concerns and provide definitive, clear answers to disputed issues.

The Court will hold the motion in abeyance until January 28, 2015, because a review of the briefs and exhibits shows that parties have not yet made a substantive good faith effort to resolve admission requests 44 through 47 prior to seeking court action. By January 28, 2015 parties shall submit a joint status report indicating whether Plaintiff still seeks the relief set out in its motion, whether Plaintiff intends to withdraw the motion, and whether either party wishes for an opportunity for further briefing or whether the motion should be considered briefed as is.

Subsequent to this motion, Plaintiff filed two contested motions which the Court has considered in conjunction with this motion—Plaintiff's Motion for Oral Argument on Its Motion to Deem Admitted Certain Requests for Admission (ECF No. 56) and Plaintiff's Motion for Leave to File Reply Memorandum in Support of Motion to Deem Admitted Certain Requests for Admission (ECF No. 57).

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion to Deem Admitted Certain Requests for Admission is held in abeyance until January 28, 2015; and it is further

ORDERED that parties file a joint status report by January 21, 2015; and it is further

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[4] Plaintiff's Exhibit G, dated September 18, 2014, expresses its "concerns with the inadequacy of [Defendant's] original responses" to "Admissions Numbers 30 and 44–47" but then spends the bulk of the letter discussing the U.S. Pharmacopeia, which is not at issue in this case, as an authoritative source. A passing reference to admission requests without any substantive discussion or explanation does not constitute a good faith attempt. Each disputed admission request should be addressed with particularity.

ORDERED that Plaintiff's Motion for Oral Argument on Its Motion to Deem Admitted Certain Requests for Admission is denied; and it is further

ORDERED that Plaintiff's Motion for Leave to File Reply Memorandum in Support of Motion to Deem Admitted Certain Requests for Admission is denied. If necessary, parties will have the opportunity to request further briefing in their joint status report.

It is so ORDERED.

Dated: December 22, 2014
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN. SENIOR JUDGE

Slip Op. 14–153

MACLEAN-FOGG CO., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Consol. Court No. 11–00209[1]

ORDER FOR REMAND

This remand order follows *MacLean-Fogg Co. v. United States,* 753 F.3d 1237 (Fed. Cir. 2014), *reh'g en banc denied* Ct. No. 13–1187, ECF No. 82 (Dec. 1, 2014) (per curiam). The Court of Appeals for the Federal Circuit reversed and remanded this Court's previous determination in *MacLean-Fogg Co. v. United States,* __ CIT __, 885 F. Supp. 2d 1337 (2012).

Accordingly, *MacLean-Fogg Co. v. United States,* Consol. Ct. No. 11–00209, is hereby remanded to the Department of Commerce for reconsideration consistent with the Court of Appeals' opinion.

Commerce shall have until February 23, 2015, to complete and file its remand redetermination. Plaintiffs, Plaintiff-Intervenors, and Defendant-Intervenor shall have until March 9, 2015, to file comments. Defendant shall have until March 19, 2015, to file any reply.

IT IS SO ORDERED.

Dated: December 22, 2014
New York, NY

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

[1] This action is consolidated with Court Nos. 11–00210, 11–00220, and 11–00221. Order, Aug. 23, 2011, ECF No. 26.